

**Teaching Professional Values  
Through Clinical Legal Education**  
*Address for the Opening Ceremony  
of Ritsumeikan University School of Law*

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President Nagata, Justice Sonobe, Dean Ichikawa, my great friend and colleague the beloved Professor Okubo, honored representatives of the judiciary, the Ministry of Justice, the bar, distinguished members of the faculty and particularly the students, who are the great hope for the future of the Japanese legal system, on behalf your American friends and partners at the Washington College of Law of American University and particularly Dean Claudio Grossman and on behalf of the Association of American Law Schools and its executive director Carl Monk, I am proud to congratulate you on this wonderful occasion and to welcome you into the fellowship of professional legal educators.

Your new direction in legal education, now beginning after these years of careful study, planning, debate, and collaboration with members of the bar and members of the judiciary, is an exciting and hopeful moment for all who believe in the important role that lawyers can play in creating a more just world. I am proud that on my second visit to Reitsumeikan I was able to take part in the major conference you held as part of your deliberation about this venture and your plans for it. And now, what must have once been a distant dream in the minds of a few visionaries is a reality and I am so glad to be here to share in the joy you must feel at this inauguration.

**1. The existence of a strong bar as a precondition of Liberty**

This is my third visit to Reitsumeikan and each time I am here I am inspired by the history of this institution and by the engagement and brilliance of your faculty. The first time I was here, in addition to immersing myself in the messages of your Peace Museum, I met with a group of your faculty to discuss current trends in American legal education and particularly in American legal scholarship. The range of their curiosity, the depth of their

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insights, and the range of their knowledge all tested the limits of my own. Among the multiple lessons I learned from your Peace Museum and from my conversations with your faculty was an understanding for the first time of the ways in which the abrogation of civil liberties, the suppression of a free press, the punishment of dissenters, and the denial of academic freedom contributed to a great tragedy for Japan and for the world. These enduring lessons, about human rights, freedom of thought, and freedom of expression, taught again and again by the course of human history, are too often ignored by those in power. Thus it falls to us, the teachers, to learn these lessons so that they can permeate how we think about educating lawyers.

And, of course, for those of us in the United States, where we face an unprecedented claim of executive power to jail and interrogate people without benefit of legal counsel and without supervision by the judiciary,<sup>1)</sup> these issues have particular currency. We all need to teach our students to embrace the necessity that our countries have just laws administered fairly by impartial tribunals in which the poor, the unpopular, the powerless and the reviled all have competent committed lawyers to ensure their voice is heard. We need for them to understand that the more a government claims to be protecting us from our enemies the more we need to be vigilant that the government itself does not become the enemy. We know and want them to know that a precondition of liberty is the existence of a strong bar, bound by law and rules but independent of the government, with primary allegiance to clients and to protection of the fundamental values of human dignity.

## 2. Law School Curriculum and Clinical Legal Education

We understand that our work as law professors permits us to aspire to improve the legal system in a number of ways, but most importantly through what we teach our students. Each of us does that in our own way, expressing our own understanding of what is important to teach, what values we hope to transmit, what skills we expect our students to master and what perspectives on the law and on practice we want them to appreciate. Our goals as scholars and as teachers lead us to want both to shape the future and to prepare our students for it. And because those students will be among the major players whose decisions, actions, and expectations will determine what the legal system will become, we believe that what they learn in law school will have a direct impact on the ways that law, legal institutions, and the legal profession can operate to produce a better society. Indeed, those of us who believe that struggling for fairness, equality and freedom

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1) See Authorization for Use of Military Forces, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF] (allowing the President to use any force he deems necessary against those suspected to have had a role in the September 11<sup>th</sup> attacks against the United States). *But see* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004) (rejecting the argument that the AUMF can be construed to deny detainees due process protections such as counsel).

is the highest calling of a lawyer should constantly ask ourselves whether our lives would be more meaningfully spent as lawyers rather than as teachers. Choosing to be a teacher is an affirmation that preparing others to do that work extends our mission beyond what we could accomplish alone.

I am sure that you, like we, have struggled and will continue to struggle with your curriculum to try to find the right balance among the many things we must teach to our future lawyers. How much doctrine, how much practice, how much theory should there be in each course and in the curriculum taken as a whole. And I know that you will be concerned with how to transmit the values and skills your students will need in order to function as a lawyer.

My understanding is that before now Japan relied exclusively on the Judicial Training Institute to teach the newly admitted how to be lawyers. I come from a country where that job was traditionally done informally and haphazardly, if at all, by senior lawyers. In the past 3 decades, however, we have more and more entrusted that work to an expanding cadre of law professors teaching in clinical programs. Now nearly every law school in the US operates a law office within the academy that exists for the purpose of offering students their first professional experience representing real clients in real cases while being supervised and taught by faculty members and it has been my privilege since 1969 to be one of those professors.

We have spent these 35 years training ourselves and those that have followed to constitute a cadre of lawyer/teacher/scholars, lawyers with enough of a critical distance from the practice of law to be attentive to the ways it can improve, teachers who can equip our students to not accept the existing order as all that is possible, and as scholars who can work for the improvement of our legal system. The scholarship of many of us in this field has concerned itself with theories about lawyering—what are the skills and values that constitute the work of the lawyer and how might we understand them and improve the ways that lawyers operate—theories about pedagogy—how best might we teach students to apply and test our theories and how they might go about extracting their own theories from experience—and theories about law, legal process and legal institutions from the perspective of lawyers, clients and low level tribunals, how law actually operates in the lives of people, what my colleague Prof. Ann Shalleck calls a theory of clinical jurisprudence.<sup>2)</sup> Indeed, I have always liked the metaphor of the clinic as law school laboratory, a place where theory is derived from experience, tested in the real world, and revised in the harsh light of reality.

I urge you to join this effort, to bring into your university clinical teachers who can identify and transmit to students the highest aspirations about what it means to be a lawyer, to prepare them to be ethical, competent advocates for social justice. I am sure

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2) *See generally* Ann Shalleck, *Toward a Jurisprudence of Clinical Thought* (in progress) (unpublished manuscript, on file with the author at the Washington College of Law).

that these teachers will ultimately teach both in content and method something similar to but also quite distinct from what has been and what will continue to be taught in the Judicial Training Institute.

### 3. Teaching Professional Values

I have come to believe that the most important work of clinical teachers is to transmit values to our students. If we win their hearts, their minds will follow. We place our students in positions where they have to take responsibility for another human being, where their words and actions matter and where their hard work or failures have consequences for people other than themselves. Poised on the precipice of the turbulent sea of adulthood, their work in the clinic requires a complete immersion. And, while they struggle to find firm ground, we do our best to keep them from drowning while encouraging them to swim on their own. And this moment, the initial donning of professional role, is particularly important time for the acquisition of professional values. And we try to inculcate in them what Prof. Alan Stone has called "an intellectual interest in justice driven by a moral passion."<sup>3)</sup>

We must teach them the nature of the lawyer client relationship itself. A relationship that requires zealous advocacy, loyalty, candor, confidentiality and avoidance of conflict of interest but which is different each time, constructed through the interaction of lawyer and client and shaped by the pre-conceptions, expectations, needs, goals, differences and similarities of each of the parties to it as well as the context within which the relationship is created. And they must learn that serving a client often means opposing powerful people and institutions and that in order to do that they need to be "competent within the field of law in which they practice and possess a high level of specialized knowledge and skill."

Professor Stephen Wizner and Jane Aiken have identified other imperative values that lawyers should embrace in order fully to serve their clients.<sup>4)</sup> Lawyers should examine the context in which problems arise, and help clients choose realistic goals and the best means to achieve them. A good lawyer recognizes that adversarial litigation may not always be in the client's best interests. He or she strives to dignify her client by taking his or her role as a counselor seriously and helping the client identify the short or long term goals. He or she "establishes a trusting relationship with . . . clients by being reliable, following problems through completion, being a good listener, and being committed to client empowerment."<sup>5)</sup> Clinical teachers need to introduce law students to the "responsibility of lawyers to contribute to efforts to provide access to equal justice for the poor and

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3) See Jane Aiken & Stephen Wizener, 11 Wash. U.J.L. & Pol'y 63, 71 (2003).

4) See *id.* at 74-76 (characterizing ideal lawyer values as a general awareness of the lawyer about the client's status and concerns, as well as building a relationship with her client).

5) See *id.* at 76.

powerless."<sup>6)</sup>

Implicit in all of this is the value that we call "client-centered lawyering." This includes the necessity that the lawyer try to understand the client's problem from the client's frame of reference. It includes the belief that clients should make all of the important decisions in the life of a case and that lawyers must know how to counsel them in a way that enables them to understand the legal and non-legal implications of a decision and helps them weigh these factors in order to actually decide.

#### **4. Communicating across Language and cultural Barriers**

In order to perform competently as client-centered lawyers, students must learn to communicate across language and cultural barriers. Particularly in clinical programs in U.S. law schools, clients nearly always come from different cultures than law students and are very often immigrants without English language proficiency. Figuring out how to understand the client's story and the client's problem requires an understanding of the milieu within which it arose. I think that the ability to see the world from the perspectives of others is a fundamental one for a lawyer to work transnationally, an ability that I know will be of particular interest for Japanese lawyers.

I teach in a clinical program, the International Human Rights Clinic, which is a particularly advantageous setting for students to have to grapple with situations that arose in another country.<sup>7)</sup> Our students handle the cases of refugees seeking asylum in the United States. Therefore they have to prove, at a trial in Immigration Court, that their client meets the definition of refugee within the meaning of U.S. law, which is largely consistent with international law. In doing so they have to learn not only the details of their client's story but also the larger story about the political, legal, economic and cultural conditions of the country from which the client has fled. In order to prevail, they have to be able to convince the judge that their client's story is likely true and it is often only possible to do that by explaining how it is consistent with the context within which it occurred.

The law that the students have to master in order to help these clients includes domestic, foreign, and international law. The domestic law includes statutes, regulations, case law, and court rules and the inter-relationship among them and between them and national obligations under international treaties. These are the sources for understanding

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6) *See id.* at 79 (noting that these ethics can not be taught in an academic course on Ethics).

7) *See* Rick Wilson, et. al, *The Work of the International Human Rights Law Clinic at American University: Twelve Years of Operation*, (May 2002) available at <http://www.wcl.american.edu/clinical/annual.2002.pdf> (last visited Nov. 12, 2004) (describing the framework and setting that the clinic provides to student attorneys, as well as the types of cases and scope of work that student attorneys perform). Cases include asylum claims, petitions with the Inter-American Commission on Human Rights, and criminal and civil proceedings in foreign jurisdictions.

both the law and the procedure that applies to the case and also for developing the arguments that they have met their evidentiary burden of proving each element of the asylum law. Sometimes it is necessary to turn to international law or the law of other countries. For example, to argue that the treaty obligation of *non-refoulement* protects the client from being returned home,<sup>8)</sup> it can be helpful to use as authority interpretations of that obligation from international tribunals as well as from the courts of other nations. Other examples in the cases from our clinic have required students to figure out whether a non-Russian expatriate of the Soviet Union would be considered a citizen of Russia if deported there, whether a Somali whom the United States incorrectly believed was Kenyan would be sent to Somalia under Kenyan law if deported there, and whether a cohabitating couple from Angola was married for purposes of conveying standing for the survivor to bring a lawsuit. In each of these examples, students learned that through a combination of legal research and consultation with native lawyers, they could understand foreign law.

### 5. Case Theory and fact-finding

Although this will seem counter-intuitive to some, we do not provide classroom instruction in “the law” that the students need to utilize in their cases. We assume that the students, all of whom have completed at least one and usually two years of law school, will have learned enough in other parts of the curriculum to enable them to conduct the research necessary to find, comprehend, and utilize applicable law and procedure. Because their casework is closely supervised by faculty who endeavor to both ensure the adequacy of their preparation and to teach them a process for preparation while they are doing it, there are safeguards in place to ascertain that our assumption is correct. We believe that by forcing them to find the answers themselves they will learn the skills necessary to explore unfamiliar areas throughout their careers. By learning a process for a contextualized understanding of both law and procedure they can become comfortable as well in applying that process in the transnational setting.

In order to win a client’s case it is necessary for lawyers to learn how to develop a case theory, a way of telling the client’s story that is persuasive, provable and consistent with the requirements of applicable law. A case theory combines a factual theory with a legal theory, each of which is malleable but both of which are interdependent. For example, in asylum law an applicant must prove that persecution occurred *on account of* one of six protected categories, including religion and political opinion.<sup>9)</sup> Proving the

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8) See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex, art. 3, Supp. No. 51, at 198, U.N. Doc. A/39/51 (1984) (codifying the basic principle that bars the return of any individual to a country where he or she is likely to face persecution or torture).

9) See 8 U.S.C.A. Section 1158 (2002) (listing the procedures for gaining asylum, and the categories for which the US government will grant asylum).

motive of a persecutor, whose testimony is universally unavailable, is sometimes difficult and motives are often mixed. When the refugee advocated for religious freedom for a minority religion and joined a political party to advance that goal, was the suffering inflicted upon him on account of religion or political opinion? Lawyers have to decide how to tell the story, based upon what facts, provable with what evidence, consistent with which evidentiary rules, to persuade the fact-finder that the legal basis that the lawyer claims to apply is satisfied. The case theory then becomes the reference point for the set of choices the lawyer faces about which facts to search for in the investigation and which law to research in depth. In a clinical program students engage in developing and utilizing case theories in the complex environment of the real world. This provides the teacher with an opportunity to raise questions they hadn't previously considered and point them in directions that transcend their individual experiences. I believe that this better enables them to think about law and culture beyond the boundaries of their own legal systems.

Once a case theory points in particular directions for the development of factual inquiry, a lawyer must know how to conduct an investigation to find evidence to support the story to be told. In the International Human Rights Clinic the investigation typically must include a search for witnesses and documents from a foreign country as well as witnesses, documents and reports that are available locally but that are informative about events that took place in that country. Learning how to conduct this search, to decide what evidence to seek and where and how to find it, is an important component of the clinical program and it is difficult to imagine practicing transnationally without an understanding of how to do this.

In the end, the best lawyers are those who can make the best strategic judgments in order to help clients solve their legal problems. These lawyers know how to define a problem and then engage in a systematic process leading to its resolution. They recognize all of the moments when choices are presented, are able to identify the widest array of choices that might be made, can predict most accurately the possible consequences if a particular action is taken or withheld, can assess the likelihood that each predicted consequence will occur, and can evaluate the relationship between predicted outcomes and achievement of the client's goals. This imperfect process requires an understanding of how humans and institutions will behave in response to particular stimuli and thus can only reduce uncertainty, not eliminate it completely. It is, of course, most difficult when the humans and institutions whose behavior is the subject of prediction are distant or unfamiliar. Students handling real cases in a clinical program are exposed to this explicit model of decision-making but learning how to apply it is a life-long endeavor.

## **Conclusion**

Let me conclude with this. In the United States, even though legal education has

changed much for the better during my lifetime and even though we do a better job now than before at educating our students about justice, civil rights, human rights and the relationship between racism, sexism, homophobia, and the like, and injustice, even though our teaching blends theory and practice, and even though we are more attentive than ever to how we transmit values, somehow we have failed to ensure that victims and potential victims of injustice and arbitrary action will always have access to legal advice or representation. I am told that in Japan lawyers throughout the country do a better job at this than their American counterparts. I implore you that as you go forward with this grand plan to expand the Japanese bar that you ensure that you do better at this than have we. Thank you.