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Association of American Law Schools
Section of Clinical Legal Education Plenary Session
Washington, DC
January 4, 2006

Academic Freedom in Clinical Legal Education

The Supreme Court of the State of Andalusia has just revised the rules that govern clinical programs at the state's three law schools in ways that may substantially affect academic freedom. In the analysis that follows, we assume that the scope of academic freedom in the clinical area is no less than protection for other facets of the law school curriculum. Five elements in the new rules have evoked special concern and alarm. Let me summarize briefly:

First, all clinical legal instructors, whether or not they are members of the Andalusia State Bar, must observe all ethical standards required of Andalusia attorneys. Each clinical instructor must annually complete fifteen hours of continuing legal education ethics, even if he or she is admitted and in good standing in non-CLE states. Initially these appeared to be simply declarative policies. But an explanatory note that followed a few days later made clear that a clinical instructor's authority to supervise law students in litigation might be rescinded for persistent and unexcused failure to meet these standards.

Second, all clinic directors must -- within one week -- inform the clerk of the Andalusia Supreme Court of every case in which any clinic has agreed to provide legal representation. The outcome of each case must also be reported to the clerk.

Third, any student who seeks authorization to represent clients in pending or planned litigation must have taken, or be currently taking, a course on clinical practice in Andalusia – a course which at least one of the schools does not currently offer but must develop in order to comply.

Fourth, no clinical instructor may include in his or her courses any case in which a decision of the Andalusia Supreme Court was eventually reversed by the U.S. Supreme Court. Any published materials like casebooks that contained such a case must be suitably expurgated

Fifth and finally, no legal clinic may take on any case in which the plaintiffs or prospective plaintiffs are represented by or affiliated with any “advocacy group” – a term that is defined elsewhere in the regulations. (Here I should note that Andalusia law relies heavily on the Code Napoleon; though any resemblance between its clinic regulations and those of any actual state is purely coincidentally.)

While some of these rules may seem implausible, they illustrate potential and difficult academic freedom threats. Let me start with the two

related obligations imposed on clinical instructors. In the abstract, it would be hard to object on academic freedom grounds to a uniform ethical-conduct mandate. More problematic is a CLE requirement, since it would uniquely affect clinical faculty among law teachers who are not admitted to practice in the state where they teach – as I will confess I never have been in 43 years. The academic freedom, however, concern arises from the threatened sanction. Removal or disqualification of a university teacher – presumably including a clinical legal instructor -- would require proof that the alleged noncompliance substantially and directly impairs the teacher's continued membership within the academic profession.

That would surely be a daunting task, though not impossible. There is a current analogy in clinical medical education. NIH grants often impose burdens of documentation, reporting and supervision, including mandatory technical training and preparation, that no single clinical professor could spurn or disregard without placing in jeopardy the entire university's eligibility for federal funding. Suppose one such clinician refuses to attend the training program or to certify laboratory research activities as NIH demands. Although I am aware of no such case having yet arisen, persistent recalcitrance of this sort might well be deemed by a committee of faculty peers to be actionable incompetence. By analogy, one must at least consider

whether a clinical legal instructor's refusal to earn mandated CLE credits could pose a comparable threat. While I seriously doubt that a case of anything like comparable urgency could be shown here, that prospect should at least be entertained.

Let me turn now to the easiest of the cases, or at least the most outlandish. For a state supreme court to bar the teaching of any case in which its judgment was overturned seems clearly vulnerable – though I must confess that none other than Thomas Jefferson, whose name my center bears, decreed that the Federalist Papers must be completely excised from the curriculum of the embryonic University of Virginia. Happily, my colleagues who teach Government today feel free to disregard Mr. Jefferson's outrageous ban on what could be taught and studied at his institution.

In the 21st century, however, such a decree could not withstand close scrutiny. Any federal judge, even with proper deference to state colleagues, would presumably strike down on academic freedom and free speech grounds so crude an attempt to bar the curricular choices of clinical faculty. There are just two slightly nagging problems: For one, no precisely apposite precedent comes to mind; state attempts to ban the teaching of evolution, for example, were all decided on Establishment Clause grounds, much as we

would have favored a clear academic freedom rationale for Epperson and its progeny.

My other concern is that judicial interference in law school curricular matters is not wholly hypothetical, as anyone who taught law (as I did) in Indiana when Rule 13 was adopted can readily attest. Here I must confess that I was a beneficiary of this rather extensive curricular mandate imposed as a condition on the admission of our graduates to Indiana practice; my commercial law course suddenly grew from about 25 to over 100 in the semester that Rule 13 decreed that all Indiana practitioners be well versed in UCC Article 2. Thus my otherwise indignant response may have been mitigated by sheer self-interest – though all of us teaching law in Indiana in the ‘70’s recognized that remonstrance to Rule 13 would have been utterly futile. I do posit, however, that the Andalusia reversed-case ban is distinguishable.

The other curricular mandate is more problematic. Government does not often require universities to create courses or degree programs, though such action is not wholly unprecedented. In the mid 1970s, the Ohio General Assembly decreed that each of the publicly supported medical schools must create a department of family medicine – and must do so within ninety days! The deans and other officials were so stunned by this mandate that speedy

compliance seemed the wiser course – though academic freedom concerns were raised after the fact. Andalusia’s requirement that all students seeking authority to appear in court must study clinical practice would probably be greeted with comparable perplexity. Whether a serious academic freedom claim could be mounted here is an issue I shall defer; clearly telling universities to add a new course is quite different from telling them what should be taught in that course or who should teach it.

Let me move now to the notification requirement. Could not the Andalusia Supreme Court claim that its management of litigation across the state entitled it to know when and in what types of cases law school clinics were providing representation? And if so, would the duty to report final outcomes of such cases make the burden constitutionally vulnerable? One has the uneasy feeling that the court is not simply seeking better information in the abstract, but that some ulterior motive underlies the seemingly innocent reporting requirement. Perhaps the strongest challenge would be the obvious point that such information could be garnered through annual reports from each clinic, and need not be provided case-by-case at the moment of engagement. Yet I doubt that the availability of an obviously less intrusive means would invalidate the reporting requirement without something more sinister.

Finally, and most critically, what of a state supreme court's attempt to condition approval of student representation on severe contraction of a clinic's caseload? A short but not very satisfying answer would be to say that the U.S. Supreme Court's ruling in the Solomon Amendment case next summer will give us ample guidance. Clearly the Justices will offer some help in balancing the eternally warring principles of *Rust*, *Rosenberger* and *Velazquez*, but we should not postpone our analysis until that happens. It is true that we are dealing here with conditions imposed on a benefit that government is under no constitutional duty to grant at all, as some states do not. And there is at least a superficial similarity between judicial rules that narrow the permissible clinic caseload and the Title X abortion clinic conditions that the *Rust* Court sustained. Moreover, some use might be made in defending such a curb of Supreme Court decisions that have sustained access limits with regard to expressive activities on government property – most notably the *Cornelius* case which upheld the ban on solicitation by “advocacy groups” within the Federal Employee's Combined Campaign.

There are, however, several persuasive factors that cut the other way. One is the obvious proximity between the subject matter of the *Velazquez* case – the Federal Legal Services program – and the core mission and

activity of a law school clinic. Most of the factors that persuaded the Velazquez majority to invalidate the broad ban on indigent representation would seem to apply equally to curbing the capacity of a law school clinic to represent clients and interests in need of legal guidance, while providing a valuable learning experience for the clinic's students.

The other distinguishing factor, happily, brings us back to academic freedom, the focus of this program. Often overlooked in the Rust opinion is a crucial and welcome paragraph, reminding us that universities are different from other places where speech occurs and may be restricted or suppressed. Curiously, the Rust case had nothing to do with universities or with academic freedom, since none of the clinics that challenged the abortion ban were campus-based. Yet for some reason – perhaps in response to Justice Blackmun's stress on the physician-patient relationship – the late Chief Justice saw this as an occasion to stress the distinctive character of the academic setting as a limit upon government's power to regulate expression. That paragraph has been often and widely used in defense of academic freedom; I will confess that as one who has never been enamored of Rust's holding I have invoked shamelessly the “universities are different” paragraph for what have invariably been good causes.

Let me offer a slightly deeper analysis of the caseload restrictions. Academic freedom concerns would be centrally implicated, even without any adverse personnel consequences or other sanctions. The mere threat to withdraw or cancel clinic authorization over a breach of such standards seems to me quite sufficient to cross the threshold. While clinical legal education may seem to some of our colleagues somehow different from, and less deserving of protection than, teaching, learning and research in the more traditional classroom setting, that distinction finds no support in relevant Supreme Court cases or in AAUP policies.

The target of such curbs is no less “academic” than any other facet of what may and may not be taught in university classrooms, clearly recognized by the Supreme Court in a host of cases since 1957 as the core of constitutionally protected academic freedom. If we would refuse on academic freedom grounds to countenance a bald attempt by state government to control the content of a university curriculum in other areas, we should be no less hesitant to protest a comparably pernicious attack on the clinic’s caseload policies. Thus, to bring us back to the core focus of this session, at least one of the proposed policies raises very serious and substantial academic freedom concerns. My reaction to the others varies,

though I anticipate during the discussion and the concurrent sessions we will have ample opportunity to test our respective assumptions.