

Uncertainty, Indeterminacy, and the Clinical Curriculum

A Work in Progress

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Traditional law schools, of the late 1960's reflected the inherited tradition of the first three-quarters of the century, that is, more than two years of required courses, all taught using the Socratic case method, all intended to teach doctrine, legal reasoning and even, in a few courses, close textual analysis. The only skills beyond legal analysis were taught at a very instrumental level. Although there were some practical tips sprinkled throughout the curriculum, students were taught the corpus juris and the skill of legal analysis. The normative model for students' careers in all but the elite law schools was small firm practice. But the persistent assumption that students would find mentors after law school who would socialize them and teach them how to lawyer was the excuse for the failure of the law schools to prepare students for the challenges they would face. ³ Clients were a distant abstraction, rarely mentioned, facts were given,⁴ ethics were contained in a few canons that were discussed in a one credit course, if at all and

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³ See Robert Stevens, Two Cheers for 1870: The American Law School in Law in American History 405, 526 (Donald Fleming & Bernard Bailyn eds., 1971) (quoting Judge Paul Brosman, former dean of Tulane Law School, in Lowell S. Nicholson, The Law Schools of the United States 2 (Baltimore 1958), as noting that the average Association of American Law Schools member school (was) geared to the production of lawyers for the local private practice).

⁴ See Cynthia G. Hawkins-Leon, The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues, 1998 BYU EDUC. & L. J. 1 (1998) (criticizing the Socratic method of teaching, noting that this method focuses more on the holding of a case than how the holding was reached). It does not allow students to practice their skills by analyzing a fact pattern. Rather, the Socratic method forces students to discuss what has already been analyzed. Hawkins-Leon compares the Socratic method to the Problem method, in which students are given problems to analyze and solve in preparation for class discussion. Among other advantages, this method allows students to integrate relevant, non-legal materials and knowledge into their analysis, thereby providing for a more enriched curriculum. *Id.*

discussions of injustice were for undergraduate school.⁵ Students asking questions about policy were often given short shrift. That many people who become law professors were really good at doing it the way it was⁶ is bad news because it explains a lot about what's wrong with the system of legal education that persists.

For many young graduates, their faith in that system, though, was severely challenged by what was going on in the world in the late 60's and the 70's. The social change values⁷ that defined that generation, such as end *poverty*, *fight racism*, and "*fuck authority*,"⁸ meant that they saw in becoming lawyers the possibility of being forces for

⁵ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 39 (1992) (stating that though law school curriculums are moving toward pure theory, "the 'practical' scholar" should always integrate theory with doctrine). Edwards goes on to state that "a great professional school never can be antitheoretical. It is undoubtedly valuable for law students to learn economics or moral theory, whether they do so in "pure theory" classes or as part of the more traditional curriculum." *Id* at 39. See also Richard Zitrin and Carol M. Langford, *The Moral Compass of the American Lawyer: Truth, Justice, Power and Greed* 235-237 (1999) (attributing the shift towards including ethics in the law curriculum on the Watergate scandal). Watergate demonstrated the degree of harm caused by unethical behavior by politicians and lawyers, and it forced schools to emphasize ethics and the ABA's Model Code of Professional Responsibility. *Id*. See also generally MODEL CODE OF PROF'L RESPONSIBILITY, (adopted 1969, last amended). See also Arnold Rochvarg, *Enron, Watergate, and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 67-70 (2003) (detailing the immediate change in law schools after the Watergate scandal to begin requiring ethics, and the subsequent six year re-evaluation of the Model Code before significant revisions were made to reflect heightened standards of professional conduct); James P. White, *The American bar Association Law School Approval Process: A Century Plus of Public Service*, 30 Wake Forest L. Rev. 283 (detailing the gradual changes from 1893 to the present that shaped the ABA accreditation standards for law schools).

⁶ See Howard O. Hunter, *Thoughts on Being A Dean, Address at the Leadership in Legal Education Symposium*, 31 U. TOL. L. REV. 641, 642 (2000). (noting that law professors have achieved success in following a particular path, and often seek to replicate their experiences at their own schools with their own students). See also Michael E. Tigar, *Fighting Injustice* (2002) (comparing the extreme activism in the undergraduate sector of Berkeley with the law school faculty's desire to remain neutral in social issues due to political pressures caused by the Cold War).

⁷ See Alan A. Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 392, 396 (1971). (discussing how "law student activists" acknowledge values based on human interaction and the plight of others in society"). As he put it, "... they were committed to social change because generally, in their view, what exists now is wrong."

⁸*Id* at 396-397. Stone identified three core values. "...First there is a deeply humanitarian concern for the plight of others in society...(they) value both collective action for social change and the personal human response of compassion and sympathy.....A second value... is...moral integrity. (They)...insist that their professional activity reflect their own ethical and moral goals....[Third] ..is the quest for self-actualization, fulfillment of the whole person...openness and emotional sensitivity."

good, for justice, and for stopping the arbitrary or oppressive exercise of government power. They thought that if they could force government officials and corporations to obey the law and fulfill the promises of the Constitution, they could make the motto of equal justice under law more than a platitude.⁹ Although they were inspired to use law to achieve justice, it turned out the legal system was not always prepared to follow the law and seemed not to care about justice. The people who had discretion over the lives of poor clients did not do law, at least insofar as that meant following legal rules and using legal reasoning with internal logic to reach decisions. To be successful for these clients in a system that was hugely non-rational sometimes required that lawyers find a way to make it work the way it said it did. Lawyers for the poor and the underrepresented had both a need to manipulate that system, that is, to use it to achieve client goals, and to reform the system, that is, to make it obey its basic precepts. But their legal education did not prepare them for the reality of law practice.

“Reality” seems like the right word because in retrospect it is clear that if the Legal Realism movement had taken hold the curriculum would have been different and the fundamental idea that *law is indeterminate* would have been familiar. In many law schools the curriculum was devoid of legal theory, legal history,¹⁰ or jurisprudence. We read casebooks and were asked to recite “the rule,” read hornbooks that gave the rule, and read commercial outlines in case the other sources were too heavy to lift.

Had clinicians known the history of legal education and the history of the legal profession, the depth and length of the struggle between the case/Socratic method and all

⁹ See Michael E. Tigar and Madeleine R. Levy, *Law and the Rise of Capitalism* (Monthly Review Press 2000) (discussing how, in the past few decades, attorneys of the American Left have devoted considerable time and energy to forcing the institutions which interpret and apply the law to honor basic guarantees of freedom and fairness).

¹⁰ This is not entirely true. Elliott recalls studying the Forms of Action in Civil Procedure, and many an ancient case in Real Property and in Personal Property.

of the other reforms that had been attempted, perhaps we would have been daunted. Had we known of the resilience of the appellate case method against all challengers—apprenticeships, lectures, legal realism, seminars, the problem method, McDougal and Laswell,¹¹ etc.—and the economic circumstances that kept it in place, we probably would never have had the tenacity and temerity to try to change legal education.¹² Perhaps our naiveté and ignorance gave us the courage to believe that we could succeed.

The concrete conditions of our world made it possible for us to think that we could change legal education. There was a generational sense that education needed to be “relevant” and that our actions needed to be related to social justice. The list of historical events that influenced us is familiar and we will not belabor them here. The Civil Rights Movement, the Kennedy legacy, the Vietnam War and anti-war movement, the War on Poverty, the Assassinations and the Riots all influenced how we saw the world. Although The Freedom Riders and The Beatles were of enormous significance to shaping the values and events of the period, the fact was that lawyers and law were implicated in everything that mattered. The timing of the creation of CLEPR¹³ by the Ford Foundation in the midst of this upheaval was surely not a coincidence.

William Pincus was a program officer with the Ford Foundation and his mandate with the Ford Foundation in the 1950’s was to fund projects in law schools. He became

¹¹ See Robert Stevens, Two Cheers for 1870: The American Law School in Law, in American History 405, 530 (Donald Fleming & Bernard Bailyn eds., 1971). (discussing a 1943 Laswell and McDougal article entitled "Legal Education and Public Policy," which offered a curriculum built around skills and values, which were found wanting from the existing curriculum's value system. The article was a turning point, the beginning of the "post-Realist period," however, it was almost completely unsuccessful in terms of producing a real change in legal education).

¹² (See Harno and Stephens). Develop footnote.

¹³ The Council on Legal Education for Professional Responsibility. See Orison S. Marden, CLEPR: Origins and Program, in Clinical Education for the Law Student: Legal Education in a Service Setting 3, 5 (1973) (explaining the founding of The Council on Legal Education for Professional Responsibility in 1968 through funding by the Ford Foundation). CLEPR's purpose was to "expose young men and women during their law school years to the public responsibilities of the legal profession. *Id.* at 3.

very skeptical about law schools because he decided that law schools were part of what was wrong with the American legal system. He was outraged by the fact that our complex legal system, upon which everyone is dependent, failed to ensure the universal availability of lawyers. How could the adversary system presuppose equality before the law and ignore the fact that it just wasn't true?¹⁴ Pincus said, "It was obvious that while the law school was not responsible for the total situation it did reflect the spirit of the entire apparatus. If you could change the curriculum to take in the needs of the larger part of the population it could influence decisively the entire judicial system."¹⁵

One of the interesting things about Pincus was that he was able to act as a major catalyst for change from outside the academy. Of course, he was peddling excellent goods, selling the world on an idea that we all take for granted today, that it would be great for a law student's education and great for the justice system to involve law students in the actual representation of poor people. He had a great strategy for selling that idea and it worked very well. Among the parts of the strategy, aside from the critical fact that he had a bag of money, was to recruit a cadre of lawyers, mostly from legal services and public defender programs, to become the foot-soldiers who would invent clinical legal education.¹⁶

The first impulse of clinical legal education was that involving students and lawyer-teachers with real cases was inherently an improvement on the three years of sameness that pervaded legal education.¹⁷ It was relevant, an essential virtue for us, and

¹⁴ cite to CLEPR report

¹⁵ cite to CLEPR First Biennial Report

¹⁶ Elliott is currently working on writing a personal history of this period. He calls those who began during the CLEPR years "The Founding Generation of Clinical Teachers," even though they were not the first ones. John Bradway, who started clinical programs at Duke and USC law schools in [years], must be acknowledged in any mention of founders even if the clinics he started did not survive into this period.

¹⁷ See Robert D. Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J.

we felt we were on a similar moral plane as others engaged in social justice activism. Clinical pedagogy¹⁸ and theories about lawyering,¹⁹ law, legal process and legal institutions²⁰ came later, all built around this basic idea that students doing real legal work, representing actual clients, was a good thing and that there was much that they could learn while they were doing it. Although a competing legal services vision for what clinical education was existed and has persisted,²¹ this idea, that we would develop new pedagogy and new models of lawyering, quickly became central to the work of clinical teachers.

Bill Pincus left many legacies for us, but the most important one was constituting us as a movement, bringing us together, introducing us to each other, having us work in conferences together and getting us organized.²² Our agenda included reform of the

LEGAL EDUC. 511, 517 (1992). (stating that the Committee's belief that "the in-house clinic provides the optimal means of integrating the theoretical, analytical, skills, and ethical goals [this article has] identified . . . No other learning experience in law school combines the extraordinarily varied and dramatic context of real cases and problems with the opportunity for intensive teaching, supervision, growth and reflection"). See generally Jerome Frank, *Why Not A Clinical Lawyer-School?*, 81 U. Pa. L. Rev. 907 (1933) (blaming the legal system for not portraying the actual ambiguity and elasticity in the law, and instead teaching the rules derived from case study, not the reasoning).

¹⁹ See also Stevens, *supra* note 11, at 490-1 (citing an observation from Reed, "Training for the Law" in which it was noted that "the failure of the modern American law school to make any adequate provision in its curriculum for practical training constitutes a remarkable educational anomaly").

¹⁸ See Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109 (1994) (describing how as clinical legal education matured, new methodologies for supervision of students developed, which included many more components than just overseeing case work). These included simulations, case rounds, lectures and discussions. *Id.*

¹⁹ See Gary Bellow & Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (1978). This book (along with its criminal and civil simulation supplements) has, perhaps more than any other, influenced the agenda and methodology of clinical seminars. It remains the only comprehensive attempt to define a theory for the field of lawyering and to provide the materials necessary to teach it. See also David A. Binder, Paul Bergman and Susan Price, *Lawyers as Counselors: A Client-Centered Approach* (West Publishing Co. 1991). Expand

²⁰ sources

²¹ Expand in footnote

²² See Stevens, *supra* note 11, at 9-10 (discussing CLEPR's role as a "clearing house of information concerning clinical legal education," holding workshops and meetings designed to bring together clinical law teachers, law school deans, practitioners and CLEPR board members and staff).

curriculum as well as reform of the legal system. As it has turned out, we have had more success with the former than the latter. At the same time, although most clinical teachers situate themselves within the legal aid/law reform/social justice agenda, many of us have shared a vision that we could contribute to creating a more just society through reforming legal education.²³ Our intention has been to shape both the abilities and the values of our students in order to produce competent lawyers, at least some of whom would be committed to high-quality legal work on behalf of poor or disenfranchised clients.

Because their decisions, actions, and expectations will determine what the legal system will become, what they learn from us will have a direct impact on the ways that law, legal institutions, and the legal profession will function. Our belief that struggling for fairness, equality and freedom is the highest calling of a lawyer means that preparing others to do that work extends our mission beyond what we could accomplish alone.²⁴

One of the purposes to Pincus's organizing was to ensure that clinicians could be an effective political force both within the academy and without.²⁵ Although the telling of the political story of clinical education will have to wait for another day, it was clear early on that for our movement to find a permanent and secure place within the legal

²³ See Susan Bryant and Elliott Milstein, *Reflection Upon the 15th Anniversary of the Lawyering Process*, 10 NYU CLINICAL LAW REVIEW 1, 18 (2003) (discussing the struggle of law professors to incorporate ethics and values into the clinical teaching revolution).

²⁴ See Elliott S. Milstein, "Academic Freedom, Law School Governance and Clinical Teachers," President's Message, AALS Newsletter November 2000.

²⁵ The creation of student practice rules in states throughout the country was partially a product of Pincus's vision and so was the government funding. See David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1515 (citing 94 Rep. of the A.B.A. 118 (1969), which records the adoption of the A.B.A.'s Model Student Practice Rule in 1969. The rule was intended to allow students to take responsibility for every stage of a case, while ensuring that they be carefully supervised. Every state now has a student practice rule). See Margaret Martin Barry, Jon C. Dubin, and Peter A. Joy, *Clinical Education for This Millennium: The Third Wave* 7 Clinical L. Rev. 1, 19-20 (2000) (outlining the history of outside grant support for clinical legal education). When the Ford Foundation's support of CLEPR came to an end in 1978, the Department of Education became the major funder of clinical legal education programs through its Title XI (later renamed Title IX) Law School Clinical Experience Program. By the time it ended in 1997, the Title IX program had been the source of over \$87 million.

academy, it would have to overcome the claims of its detractors that it was only a politically popular fad that did not belong in a university. Much of the resistance to clinical education stemmed from the implicit belief that what lawyers do, what has come to be called *lawyering*, was not of intellectual interest. If this is so, then the likelihood that clinicians would make contributions to knowledge was considered slim. We would, went the argument, be so occupied with the mundane details of the practice of law that we would not be able to or interested in transcending the day-to-day to develop more profound understandings of lawyering or law

The project of determining how to teach lawyering has required an inquiry into the nature of the lawyering process, including analyzing the day-to-day work of lawyers, and that on-going work has been more complex than most of us originally imagined. We believe that the reason the project has been as complex as it has been stems from what we have come to call the six indeterminacies: that law is indeterminate, facts are indeterminate, the lawyer-client relationship is indeterminate, problem-solving itself is indeterminate, and, skills too are indeterminate. To be effective as teachers in an indeterminate universe, we have created teaching methods and a pedagogical style that are intended to be responsive to this indeterminacy, thereby constituting the sixth indeterminacy.

Our teaching must help our students learn to make decisions and take actions through the thicket of uncertainty²⁶ that defines the work of lawyers. Although their

²⁶ We have debated whether the terms “indeterminacy” and “uncertainty” are synonymous and therefore interchangeable. On one interpretation, uncertainty is the reaction that indeterminacy generates (and thus is the state produced by it); that is, the above indeterminacies lead to uncertainty, which in turn is a background consideration for decisions that follow. On another reading, the two are simply two words for the same phenomenon. Note, too, that when we use the term “indeterminacy” we mean not that there are

search for the “givens,” their attempts to find unquestionably binding precedent and their beliefs that there are experts out there (including their clinical teachers) who know the answers to all of their questions are usually fruitless and often frustrating, we help them to recognize decision-moments they had not seen and to propose a course of action even though information is imperfect and the complexity of the variables sometimes difficult to grasp.²⁷

no elements of determinacy within the particular area but that the enterprise is “insufficiently determinate” or, as one dictionary states, “incapable of being definitely decided,” [Source]

²⁷ See Shalleck, *supra* n.[] at 158-163.

The Indeterminacy of Law

The notion that law is indeterminate is not terribly controversial.²⁸ Although it was a core concept of the Legal Realist movement of the 1920's and 30's, it seems to have been a casualty of the Second World War. Structured as it was as a search for doctrine using those tools of analysis called legal reasoning, law school education in the 1960s only narrowly prepared its students for the disconnections they observed in the trial courts between what judges there did and what they had been taught to expect. In the criminal courts the enormous discretion either ceded to or assumed by police officers, prosecutors and judges usually mattered more to the lives of law students' clients than did the pronouncements of appellate courts or arguments based upon them²⁹. Law is what the trial court says and does and the reality was that a judge's decisions were affected by his or her values, prejudices and biases. Thus, if a lawyer could steer a case before a particular judge the likelihood of favorable treatment increased. The necessity of tailoring arguments and planning strategy directed at what you could learn about the particular judge were as important as reading the latest decisions of the Supreme Court. It is not that law did not matter; it is only that it mattered less than students had been led to believe.

²⁸ For a helpful discussion of how lawyers think about the law and communicate their understandings to clients, *see* Ellmann, Dinerstein, Gunning, Kruse & Shalleck, *Lawyers and Clients; Critical Issues in Interviewing and Counseling* (Thomson Reuters 2009), Ch. 8, *Talking to Clients About the Law*, 337 et seq.; *see also* Condlin, *Cases on Both Sides* [re use of law in negotiation contexts].

²⁹ *See* John Mortimer, *Rumpole* [find story with reference to how irrelevant Harvard Law Review arguments were to British criminal juries].

Of course, none of the above is today's revelation and the non-clinical curriculum in most law schools intends to teach students that law is indeterminate, although many students resist this observation and some faculty do as well. In the early days of clinical education, clinicians debated whether there should be a component of the clinical course to teach the substantive law practiced in the clinic.³⁰ However, the task of helping students learn *and use* the law to help their clients is too complex to be satisfied by crash courses in legal doctrine.³¹ It is simply not possible to teach how all of the law that affects the lives of our students' clients operates within the context of the institutions they will encounter. Our students need to learn how to develop a contextualized understanding of law in order to develop solutions to client dilemmas.³² To try to do otherwise not only misleads them but also increases the danger that they will treat client problems as determinate, to be solved exclusively within the subject matter of the particular clinic. Good clinical pedagogy engages students in a contextualized search for law and precedent to develop alternative theories to solve client problems.³³

³⁰ Sometimes erroneously referred to as "the academic component," in denigration of everything else taught in clinical courses.

³¹ To be sure, there are a range of views regarding how much substantive law should be taught in a particular clinic and when it should be taught. The critique here is more about the front-loading of substantive law in the clinical curriculum before the students are assigned their actual cases when they will learn the law they will need to know. Presumably, all clinicians do some "teaching" of substantive law in this latter context. Also, one's views about the need for front-loaded substantive law instruction may be informed by the context of the particular clinic. Thus, a general practice clinic may be one in which the very variety of cases the clinic handles may preclude meaningful substantive law front-loading, while a clinic in a more specialized area of law in which students may have little prior legal background (e.g., special education) may be one in which at least some introduction to the substantive law is necessary for students to hit the ground running when they receive their cases.

³² [Cite to Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, [35 Vand. L. Rev. 321 \(1982\)](#)]

³³ This section will be expanded to include a discussion of the ways that clinicians' observations of the interplay between the politics and values of decision-makers in trial courts prefigured and supported the fundamentally similar arguments advanced within the Critical Legal Studies Movement debunking the myth of neutral and detached decision-making. One major difference between the two movements is that clinicians' understanding was informed by their experience with trial courts, administrative agencies, (and other entry-level adjudication fora) and clients whereas CLS was primarily based upon analysis of texts, e.g. appellate decisions and historical

Moreover, notwithstanding contemporary law students' arguably more sophisticated understanding of the role of law in actual adjudication, many students arrive in upper-level clinical programs with an over-determined view, for example, of the role of tools of statutory construction such as "plain language interpretation" in actual adjudication. They tend to see these kinds of rules as determining results (frequently to the detriment of their client's case) rather than as simply one way in which to interpret a legislative or regulatory enactment. They may under-appreciate the role that the lawyer's advocacy can and should play in proffering a plausible interpretation of the law that relies on alternative interpretive tools to generate a result that achieves the client's goals. Clinical education's focus on advocacy for situated clients can help students see that in some cases the indeterminacy of the law can be their friend and not their enemy.

The Indeterminacy of Facts

records. Secondly, because clinicians were dealing with real cases for real clients with real stakes, they could not simply throw up their hands regarding the politicization of law but had to craft arguments that perhaps over-recognized perceived determinacy so as to persuade decisionmakers to decide cases in their clients' favor.

“What are the facts of *Sherwood v. Walker*?”³⁴ This question, so familiar to first-year law students called upon to recite the facts of a case in Contracts or another class, disguises the fundamental difficulty that lawyers face in determining the answer to the same question when the “facts” do not arrive pre-digested in an appellate opinion. Because appellate courts treat facts as determined, even when in reality their decisions pick and choose among those in a record, the traditional curriculum insufficiently communicated the importance of determining where the facts come from and how they get into a case. 35

Clinical legal education introduced to the curriculum the idea of the centrality of facts as important for their own sake.³⁶ Students often expect that they will interview a

³⁴ One of us (Elliott) picked this case because of his fond memory of a tee shirt that he used to have with a rendering of Rose the Second of Aberlone, the barren cow featured in the facts of this case. 66 Mich. 568; 33 N.W. 919 (1897).

³⁵ Appellate courts’ selectivity is not limited to the facts, of course (or the law, as discussed in the prior section). Sometimes, courts choose to interpret the procedural posture of a case in a manner that will set up the doctrinal posture they wish to adopt. E.g., in the ADA case of *Sutton v. United Air Lines*, 527 U.S. 471 (1999), the Supreme Court observed that “Petitioners do not make the obvious argument that they are regarded due to their impairments as substantially limited in the major life activity of seeing.” The Court goes on to decide that petitioners did not demonstrate that the respondents regarded them as substantially limited in the major life activity of working, leading to a doctrinal development that clearly frustrated the original purpose of the ADA (and was part of the inspiration for the 2008 amendments to the statute), which may have been the Court majority’s intent. Had the “regarded as substantially limited in the major life activity of seeing” argument remained in the case, the Court arguably would have had a more difficult time rejecting the “regarded as disabled” theory of ADA coverage. The above-cited statement by the Court implies that the petitioners had either missed this argument or, at best, made a strategic decision to forgo it. Only upon reviewing the district court and court of appeals decisions does one discover that the petitioners indeed made this argument in the lower courts, only to have the district court render an almost certainly incorrect legal judgment about it and have the court of appeals refuse to consider the argument because, while acknowledging that the petitioners had raised this argument in their brief, petitioners had not done so in their amended complaint, so that the appellate court would not consider it. From the record, one does not know whether the elision of the argument in the amended complaint was intentional or inadvertent (at the least, the inconsistency between the appellate brief and the amended complaint suggests less than stellar lawyering) and the role of the lower courts is completely effaced. [See also *Youngberg v Romeo* oral argument and Powell’s interpretation of Edmund Tiryak’s statement that Nicholas Romeo was not challenging his initial commitment as tantamount to an admission that he could never live in the community, though, within a few years of the Supreme Court’s decision, he did just that.]

³⁶ We do not mean to suggest that non-clinical faculty members do not discuss the facts of the cases they consider, nor that they do not manipulate and question those facts in the course of considering hypotheticals and other variations on the cases. Rather, we see such use of facts as more likely to inform the goals of inculcating critical thinking, doctrinal precision and policy analysis (hence, instrumental) rather than focusing on the importance of facts in and of themselves in adjudication or transactions. Nor, of course, do most non-clinical teachers see

client who will tell them *the facts*. They quickly learn that, for a multitude of reasons, the reconstruction of an historical event is problematic. Memories are flawed, subjectivity introduces distortions, facts are constructed to be consistent with preconceptions, filling³⁷ occurs, and biases and self-interest (and perhaps a desire to please the lawyer) produce wishful thinking. Even if the event had been recorded by a spy satellite or a passing videographer, the image would be subject to interpretation. Coupled with their growing skepticism about facts, students are surprised to discover how much of the work of case preparation involves decisions and actions about facts. Which facts are relevant and which irrelevant depends upon choices regarding case theories built upon predictions about what admissible evidence might be gathered to support the factual propositions that will prove the elements of a legal theory.³⁸ Students must learn to construct case theories³⁹ that will enable them to conduct investigation and discovery to find evidence that will let them tell the stories that will persuade a particular fact finder or type of fact finder to accept that an event in the past occurred as the client claims, or that an event in the future will occur in the ways predicted.

“fact investigation” or “fact development” as among their teaching goals, understandable choices in light of the larger class sizes with which they deal.

³⁷ Cite to material on “filling” [interviewing and counseling texts; Elizabeth Loftus work on limits of eyewitness testimony?]

³⁸ This discussion presupposes that the student has been able to discern the client’s needs and to propose non-legal and legal solutions that most nearly meet those needs. David Chavkin calls this activity that precedes development of a theory of the case developing a Theory of the Client. See Chavkin, *Clinical Legal Education: A Textbook for Law School Clinical Programs*, Anderson Publishing (2002). Another, somewhat more limited, formulation of this activity of the lawyer is to say that the lawyer needs to develop a “theory of the representation of the client,” a concept that would incorporate elements of legal/factual case theory and a sense of how the case or matters fits within the context of a client’s life. Under the “theory of the representation” in a criminal case, for example, the key focus in the case might be on developing an argument why a sentencing alternative to incarceration might be appropriate, or why an adult convicted of a first drug offense as an adult in her mid-50s does not fit the profile of someone whose drug use may lead to further criminality.

³⁹ Our colleague Binny Miller has written insightfully about the importance of case theory and how we teach it [Binny Miller, Give them back their lives, U Mich; CLR article on Teaching Case Theory].

There are three sets of templates that must be overlapped to develop and use facts in the life of a legal matter. There are sets of formal rules (e.g. Federal Rules of Civil Procedure) that govern discovery and some that regulate investigation (e.g. Model Rules of Professional Conduct), rules that govern admissibility of evidence (Rules of Evidence), rules about what information need not be revealed and what can be concealed, rules about what constitutes a particular cause of action that define the elements that must be proven or disproven, and rules of procedure that determine the quantity required and contexts for the proof of facts. Although teaching these rules is the subject matter of other courses, figuring out how those rules apply in practice and in tandem often reveals the ways the language contained in them is subject to interpretation and disagreement. The second template involves a set of decisions about the nature of the information sought, the sources of that information, the methods of inquiry (and the resources to be expended) that are likely to produce the information, the translation of that information into evidence and inferences⁴⁰ that address the narrative (or portion of the narrative) that relate to the element(s) of the cause of action to be proven or disproven, Can information you want to keep secret be protected? The third template involves a set of predictions about how people and institutions will behave in the roles in which we find them. How will a potential witness react when approached by which person to ask what questions in what place at what time? What information will opposing counsel provide in answer to questions during negotiation and how will he/she react to information you reveal during that process. How will the judge, jury or other decisionmaker perceive reality when

⁴⁰ The Binder-Bergman book *Fact Investigation* provides an especially helpful way of thinking about such inferences using the “especially when/except when” typology. [expand].

presented with particular factual claims, legal claims, witnesses and arguments? To what extent can additional knowledge about those people inform how to proceed?

There is no handy cookbook to teach students about methods for becoming actively involved in understanding and developing the “facts” that define a client’s matter. ⁴¹Clinicians teach subparts of it in separate classes, usually using one or more simulations, including (at least in a civil litigation context) segments on client interviewing, case theory, fact investigation, and even sometimes information bargaining as part of teaching negotiation. Like all of the theories developed in the clinic, because of the unique ways that factual problems present in different cases, lessons learned in class become the backdrop for the deeper understanding that comes from application. The contextualized application of theory to practice leads to real learning. Reflection in light of experience tests theory in the real world, and permits adjustment or adoption in light of experience. ⁴²

⁴¹ Though some clinical texts do attempt to address the need to conceptualize and plan for factual investigation—see, e.g., Binder & Bergman, *supra*, and Krieger & Neumann, *Essential Lawyering Skills*, Part III, Persuasive Fact Analysis. We think it significant that Krieger & Neumann entitle this section of their text “persuasive” fact analysis because it reinforces the idea that lawyers need to learn how to present facts in advocacy posture.

⁴² This process of reflection-in-action draws from Donald Schon’s path-breaking work . [See also Neumann CLR article on Schon].

The Indeterminacy of the Lawyer-Client Relationship

Too often in the traditional law school class, clients are but stick-figures whose characteristics and behaviors are assumed or ignored altogether. Beyond acknowledging the fact that the plaintiff and the defendant in the written decisions are the clients of some lawyer, the nature of that relationship and its role in creating the posture of the case being studied is unexamined. There is, of course, a body of law, typically taught in Professional Responsibility courses, relating to the lawyer-client relationship that includes obligations of confidentiality, zealousness, loyalty, candor, and limits to each of those. There is also law on fees, retainers, malpractice and more, which are sometimes the subject matter of various classes. However, except when something goes awry, most of the characteristics of the lawyer-client relationship develop behind closed doors in response to the expectations, needs, values and behaviors of both the lawyer and the client. The relationship is constructed in unique ways that change over time and deserve examination within the legal education setting.⁴³

⁴³ See Ann Shalleck, "Construction of the Client Within Legal Education," 45 *Stan. L. Rev.* 1731 (1993).

A story in the Washington Post a few years ago concerned a woman charged with conspiracy to murder her former husband.⁴⁴ Her best friend was unmasked in the husband's home after shooting and wounding the husband and the wife was charged with sending the shooter in to kill him in order to regain custody of her children. She lost custody when her lawyer informed the court that the client had threatened to kill her husband if he obtained custody. What led the lawyer to believe that he needed to blow the whistle in what was ultimately a failed attempt to prevent violence? What did the client believe about their relationship that would lead her to make such a damaging statement to him?⁴⁵

Or consider the newspaper stories dealing with the collapse of Enron several years ago.⁴⁶ Some of the corporation's misdeeds were carried out by creating separate entities to absorb financial losses to avoid having them appear on the corporation's books. There surely were lawyers involved in setting up those entities; how did they interpret their obligations. Did they have a "justice dialogue" with their client?⁴⁷ Were they tempted to blow whistles? How helpful were legal rules in answering the questions these lawyers faced? ⁴⁸

Within the International Human Rights Clinic in which one of us (Elliott) taught for a decade, students grapple with the ways their expectations about who their clients will be diverge from reality. They expect their clients to be pure, victims of human rights

⁴⁴ [Cite needed]

⁴⁵ Moreover, to the extent the lawyer's revelation caused the mother to lose custody, it actually increased the likelihood of violence.

⁴⁶ [Need to have more recent examples, perhaps from current economic crisis, Madoff, etc.]

⁴⁷ See Ellmann, et al., Chapter 7, Engaging in Moral Dialogue.

⁴⁸ The role of lawyers in an earlier scandal, the Watergate scandal of the 1970s, led to a number of reactions, including efforts to re-emphasize their importance of teaching legal ethics. See, Richard Wasserstrom.

abuses, anxious to stay in the United States, and eager to help their lawyers with straightforward stories, prompt attendance at appointments, and compliant attention to lawyer requests. It would also be nice if they limited their needs for help to legal matters within the purview of the clinic's expertise and certainly they ought to express their gratitude for the hard work the students perform for them. Instead, clients are sometimes complicit in their own oppression, occasionally tell what they think is a better story than their own, repeatedly miss appointments and more.

To the extent students expect to locate their zeal for representing clients within their belief in the justice of the client's cause,⁴⁹ they sometimes are disappointed. If having affection for a client based upon his or her behavior in the relationship is a precondition for effective lawyering, then a number of our students are candidates for committing malpractice. Because the essentialized determinate client the students both expect and want only rarely seeks our services, much of the work of clinical teachers has been to help students unpack and understand their client's behaviors and to see it in the context of their own.

The indeterminacy of the relationship begins with the fact that clients have preconceptions about what a lawyer is, as well as perceptions that develop in the context of the particular relationship.⁵⁰ They are sometimes unsure whether the lawyer wants a good story or a true one and in any event are unlikely to trust a lawyer at the beginning of

49 Of course, law students, and lawyers in general, are motivated to represent clients for a number of reasons. Charles Ogletree has been particularly thoughtful in his consideration of the motivation of public defenders. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, [106 HARV. L. REV. 1239 \(1993\)](#).

50 See Robert Dinerstein, *A Meditation on the Theoretic of Practice*, *43Hastings L.J.* 971, 978(1992)(recounting story of client who told student lawyers that in her country of origin lawyers would do whatever their clients wanted.).

the relationship, if ever. Clients in many of our clinics come from cultures in which lawyers are sometimes complicit with oppressors and there is no inherent reason why a student lawyer would be seen as trustworthy.⁵¹ Others come from cultures where certain topics cannot be discussed across gender, age or other barriers. Trauma can cause repression, memory loss, and other distortions. Clients can also have a mix of goals, some of which will be revealed and some not, that are in conflict and can change over time.⁵² The attempt to fit the client's problem into a preconceived legal category can block the lawyer from hearing about how it fits into overall issues in the client's life such as need for a job, a place to live, saving the lives of family members still in the country of danger, fear of the persecution continuing while in the United States, and more. This incomplete list is only one example of the kinds of issues the client may bring to the relationship that will affect how it develops.

⁵¹ Furthermore, the inexperience of the student lawyers may make them even less trustworthy in the eyes of the client,

⁵² Moreover, because life is dynamic, client goals can change over time because of changes in life circumstances.

Students also may have preconceptions about the nature of the lawyer-client relationship.⁵³ These preconceptions can come from a multitude of sources external to the law school. Very strong messages appear in popular culture and literature. Others come from family members who are lawyers or who have been clients and very powerful ones are learned in part-time jobs students have in law firms. Since an important goal of the lawyer-client relationship is to understand the range of the client's legal and non-legal problems and to assess the client's needs,⁵⁴ students must understand the ways that some of their conscious or unconscious preconceptions can interfere with that assessment.

⁵³For a discussion of the complexity of determining the extent to which the lawyer should pursue truth in the lawyer-client relationship, *see* Ellmann, et al., *supra* note [], Ch.6 (Truth and Consequences).

⁵⁴ *See* n. [], *supra* [discussing theory of the client and theory of the representation].

Clinicians have done excellent work in thinking, writing, and teaching about the lawyer-client relationship and its indeterminacy.⁵⁵ Most if not all clinical programs explicitly teach legal interviewing and counseling and most present students with a nuanced view of the relationship and try to equip them to deal with it. Through the models we present in class and in developing simulations that expose them to the complexity of choices with which they will deal in practice, we force our students to rethink their preconceptions and to adjust their behavior to overcome at least some of the barriers to effectiveness. We want them to understand the multitude of elements that influence and shape legal actions taken on behalf of clients so that they can develop a vision of clients that will enable them to practice client-centered lawyering.⁵⁶ Then, through guiding students in our supervision sessions in their real cases with the difficulties inherent in these relationships we help them see that sometimes struggling with clients requires more of them than their struggle with the legal claims.

As with the other indeterminacies, it is not possible to eliminate all indeterminacy within the lawyer-client relationship. Rather, the goal is and must be to understand that indeterminacy and be aware of its dynamic effect on the choices available to the lawyer and client.

⁵⁵ See, e.g., Gary Bellow and Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy (1978); David A. Binder, Paul Bergman and Susan Price, Lawyers as Counselors: A Client-Centered Approach (1st ed, 1991) and (with Paul R. Tremblay) 2d ed. 2004); Robert M. Bastress and Joseph D. Harbaugh, Interviewing, Counseling, and Negotiation: Skills for Effective Representation (1990); Stefan H. Krieger & Richard K. Neumann, Jr., Essential Lawyering Skills. (3d ed. 2007);; Robert F. Cochran, Jr., John M.A. DiPippa & Martha M, Peters, The Counselor-at-Law: A Collaborative Approach to Client Interviewing and Counseling (2d ed. 2006); Ellmann, et al.

⁵⁶ Clinicians have embraced client-centered lawyering as mainstay of their clinical teaching. [Numerous cites—see B&P, Dinerstein, Client-Centered Counseling, Kruse, Fortress in the Sand, CLR]. See Ellmann, et al., Chapter 3 (“Engaged Client-Centered Counseling About Client Choices”).

The Indeterminacy of Problem Solving

There is not general agreement about what we mean when we refer to “problem-solving” by lawyers.⁵⁷ One of us (Milstein) attended two conferences on the topic. One was a number of years ago at the U.S. Department of Justice, called in response to a speech by then Attorney General Janet Reno; the other was the [] International Conference on Clinical Education [need title] in December 2001 at Lake Arrowhead, California, sponsored by UCLA School of Law and University of London. There is both a substantive and a process meaning to problem-solving and they overlap in important ways.

At the Justice Department conference,⁵⁸ the agenda appeared to be to encourage lawyers to do more for clients than solve the particular legal problem that led the client to a lawyer. The message here was that lawyers should think about the root causes of the client’s problem and seek to find ways to address them. This theme implicates the substantive meaning of problem-solving. Essentially what Reno was proposing was that lawyers look beyond the representation of individual clients and take on the structural problems of communities. Client addicted to drugs? Why not more drug treatment programs? Client being evicted for not paying rent? Why not work on economic development?

⁵⁷ The increasing importance of the topic may be suggested by the recent publication of Brest and Krieger’s book on Problem Solving.

⁵⁸ footnotes to be developed

Another meaning of problem-solving discussed at the DOJ conference but much more so at the Lake Arrowhead conference, looks to a process of thinking through potential solutions to client problems and engaging in a risk analysis to predict the likelihood that something good, or bad, would come from an action. This process is akin to strategic planning and decision-making and there are a number of disciplines outside of law that are concerned with this process, including, for example, cognitive psychology,⁵⁹ game theory, military strategy and educational psychology. This process meaning is what one of us (Elliott) used when trying to define “good judgment,” as a most important attribute of a good lawyer.⁶⁰ It is what Anthony Amsterdam has called “ends-means thinking.”⁶¹ Lawyers with good judgment are those who recognize the maximum number of decision points in the life of a matter, are able to identify multiple options for taking or withholding action, can predict what people or institutions will do in response to the action and the likelihood they will do it, evaluate the relationship of the response to the desired outcome, and either explain this complex situation to clients to enable choice making or, when appropriate, make the choice and carry out the action.

⁵⁹See, e.g., Kahneman, Slovic & Tversky (eds.) Judgment under Uncertainty: Heuristics and Biases, Cambridge University Press (1982), Wallsten (ed) Cognitive Processes in Choice and Decision Behavior, (1980).

⁶⁰See, Milstein, "What is Good Judgment" – Unpublished Paper delivered to the 1984 Clinical Teachers Conference, Duke University, May 1984. See also Mark Aaronson, CLR article; Alex Scherr article; Ian Weinstein CLR article.. Non-clinical scholars also have focused on the importance of the lawyer’s judgment. See Anthony Kronman, *THE LOST LAWYER* (199).

⁶¹ See Anthony G. Amsterdam, *Clinical Legal Education - A 21st Century Perspective*, 34 J. Legal Educ. 612 (1984) (describing “ends-means thinking” and distinguishing it as a neglected area within the traditional law school curriculum); and Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109 (1993-4) (citing Anthony G. Amsterdam, *The Lawyering Revolution and Legal Education* 8 (1985) (unpublished paper presented at Cambridge Lectures, July 15, 1985, on file with the New York University Review of Law & Social Change).

Another meaning of problem-solving combines the process and substantive aspects by looking at the process by which a lawyer chooses which of the multiple substantive problems presented by a client or a situation the lawyer will attempt to solve. This meaning is particularly useful in situations where actually defining the problem is one of the core activities of the lawyer. In doing so the lawyer would want to work on a problem that would likely have a positive effect on an important need or goal of the client and, of course, one that the client chooses for the lawyer's involvement.⁶² It is in the process of client-centered counseling that a lawyer presents to a client proposed actions that would most nearly approximate achieving the client's goals, as the lawyer understands them.

Some of the time the work the lawyer does for a client is quite determinate in nature. Preparing the papers for and handling a real estate closing, filling out an application for permanent residence on an Immigration Service form, and issuing a Certificate of Title all seem determinate in nature, although one could imagine that a lawyer asked to perform any of those tasks might discover other problems of the client that might need to be addressed in counseling. Most of the time, however, clients' understanding of the possible actions available to address their problems is limited. The client might start by asking for the lawyer's help in getting political asylum, not recognizing that there are other ways to achieve the underlying goal of not returning to the oppressing country that might have a higher likelihood of success.

⁶² See Susan Bennett, PROBLEM SOLVING IN CLINICAL EDUCATION: EMBRACING THE ILL-STRUCTURED PROBLEM IN A COMMUNITY ECONOMIC DEVELOPMENT CLINIC, 9 *Clinical L. Rev.* 45 (2002) Footnote needs more description

Clinical programs teach problem-solving in all of the senses in which it is defined in this section.⁶³ In simulations students are asked to brainstorm about potential legal and non-legal solutions to client problems and then to think about how to make predictions as to the consequences of available choices. In our International Human Rights Clinic, for example, we use an asylum simulation and first ask the students what possible legal and non-legal actions would help the client with the underlying need to not be returned to Rwanda. Then we ask a broader question, common in clinics, about whether there is a broader remedy available to address the circumstance that led to the client's persecution. In our clinic those actions are international human rights remedies, such as an action against a former Rwandan official in federal court under the Alien Tort Claims Act. In real cases we, like many clinics, eschew manuals, form pleadings and brief banks, all to encourage students to engage in fresh thinking about the process of solving client problems rather than to follow familiar paths. We work with them in supervision as they try to divide the client's problems into legal and non-legal ones in order to make decisions about which ones they will tackle. In further illustration of the indeterminacy of problem-solving, what they usually discover is that client needs do not easily divide into legal and non-legal categories and even when they do, the students' concepts of what lawyers do for their clients is challenged by the decisions they ultimately make.

⁶³ See, e.g., Linda Morton, Teaching Creative Problem Solving: A Paradigmatic Approach, [34 Cal. W. L. Rev. 375 \(1998\)](#); Brest & Krieger.

The Indeterminacy of the Student-Teacher Relationship

We tell our students that they are the lead lawyers in their cases, and will have primary if not sole contact with their clients and yet we supervise their legal work.⁶⁴ We ask them to be reflective and confess their mistakes and weaknesses to us and yet we grade them.⁶⁵ We appear in the role of Professor in the formality of class, in the role of facilitator in the informality of rounds, and in this unique role of clinical supervisor during case supervision.⁶⁶ We are not their mentors nor are they our apprentices.

Clinical teachers have the privilege to guide their students through their first experiences in the role of lawyer. Because of the importance of this moment in shaping their attitudes about practice and their expectations for themselves, we have been very attentive to our pedagogy and self-conscious about our behavior to ensure that we do it well.

Clinical teachers have trained themselves as lawyer/scholar/teachers of the legal profession but with the critical distance from practice that our roles inside the academy permit, indeed require. There has been a huge national effort to create this cadre of teachers who can define and pass on the best of what it means to be a lawyer, how to lawyer in ways that are consistent with our highest aspirations for a just legal system and a just society. There has been at least one national conference in each of the last 32 years

⁶⁴ See, Chavkin, *Am I My Client's Lawyer*, supra n.[] for the view that the clinical supervisor does not have a lawyer-client relationship with the client.

⁶⁵ See Stacy Bruskin and David Chavkin, "Making the Grade in Clinical Legal Education: The Catholic University Grading Experiment," 3 *Clinical Law Review* 299 (Spring 1997)

⁶⁶ See, Shalleck, supra n. []

intended for clinical teachers to teach each other what they know about teaching and lawyering.

Among the things that we have learned about our teaching is that while some of it can be controlled like other forms of teaching with a syllabus, readings and a fairly predictable classroom dialogue, parts of it are new each time, carried out in tandem with the unpredictable events and chaotic pace of the clinic's legal work.⁶⁷ Furthermore, because the student-faculty ratio permits it and the work and context demand it, we are able to tailor our instruction to the individual needs of our students. Although our task is to help them see the connection between their lawyering experiences in clinic and those they will encounter throughout their careers, to treat each insight they have as a lesson potentially generalizable to other lawyering situations, the beginning point is always their individual frame of reference and their own perceptions of the world.⁶⁸ What things about this interview with a client are like other interviews, what theory can we apply to this experience, what theory can we extract from this experience, and how do we apply this knowledge in the future? What and how do you learn from the fact that you won this case? What things that you did made a difference? How did the predictions work that you made about how people and institutions would behave? If your predictions were incorrect, what was wrong about them? What empirical information did you gather from this event you have witnessed that will inform the way you make the decisions in the next case?

⁶⁷ This indeterminacy in the clinic classroom requires the clinical teacher to achieve a high level of comfort with uncertainty and unpredictability. In some ways, the clinical teacher operates as a kind of jazz musician, responding to the rhythms and riffs the students express within an overall structure the teacher has identified in advance. Several commentators have used the jazz metaphor to describe law if not law teaching. [See Peter Margulies, other articles].

⁶⁸ One of us (Elliott) has long described this task as conveying to students that their lawyering experiences need to be treated as a metaphor for all of lawyering.

The indeterminacy of the clinical teacher-student relationship is most apparent in supervision when the teacher meets with the student individually or in teams.⁶⁹ The teacher usually starts with the agenda for the meeting set by the students and listens carefully to their concerns. These meetings may be thought of as involving a multiple track tape, only some tracks of which get heard during any one meeting, but all of which require the teacher's ultimate attention. As we tell our students, we expect them to come into the supervision meeting with a listing of tasks they have undertaken and questions they have for how to proceed, but even if the supervision session yields answers to all or most of these questions (or at least some guidance about how the students need to think about those questions more fully), the session undoubtedly will generate an entirely new, and perhaps longer, list of questions that the students (and possibly the clinical teacher) had not anticipated. Such a process can be invigorating but also threatening to the students' self-esteem ("why didn't I see that?"), and the intimacy of the clinical teacher-student relationship complicates the learning tasks to be achieved.⁷⁰ [To be expanded].

⁶⁹ See, David Chavkin, "Matchmaker, Matchmaker: Student Collaboration in Clinical Programs," 1 *Clinical Law Review* 101 (Fall 1994). Although many clinical programs have students work on their cases individually or in teams of two, some clinics have made greater use of larger group supervision either in all of their clinic cases or in some portion of them. [Examples?]

⁷⁰ See Kathleen Sullivan, Jennifer Lyman re the intimacy of the clinician-student relationship; also Rader-Dinerstein-Smith colloquy in CLR.

The Indeterminacy of Skills

Some of the most important scholarly work done by clinical teachers has been the project that began first in conferences and then gravitated into books and articles to map out the lawyering process into its component parts and then to propose ideas and theories about what constituted high-quality performance of that component. The first effort to do this analysis comprehensively was the joint project of Gary Bellow and Beatrice Moulton, *The Lawyering Process*.⁷¹ That book was a tour de force in that it defined the content of the clinical curriculum at a time when what that would be was not yet clear. (The book circulated in draft form for a number of years before it was finally published in 1978.) However, as it turned out, students found the book dauntingly complex and too theoretical and it was ultimately unsuccessful as a textbook. Instead, many clinicians adopted texts and methods that students considered more readable because they were practical or prescriptive in their outlooks.

The temptation to use teaching materials in clinic that are determinate is enormous because in many clinics students resist the seminar component and the readings in favor of spending more time on cases and fieldwork. To the extent they see the readings as providing instruction in how to do the work of representing clients, there is a greater likelihood they will do it.

At the same time, there is an on-going movement within clinical education away from skills teaching that treats a skill as detached from values or that is written at an

⁷¹ See *supra* n. [37]. On the occasion of the twenty-fifth anniversary of the publication of Bellow & Moulton's *The Lawyering Process*, the Washington College of Law and Clinical Law Review hosted a symposium, the papers for which were published in [CLR issue].

overly prescriptive level. Clinicians do not want to fall into the trap of creating a new formalism as the standard discourse regarding lawyering skills. In addition, although the Bellow & Moulton book pointed the way with separate sections in each chapter on skills and on the ethical dimension of that particular part of the lawyering process, a number of other books treat the skills as if they exist separate from purposes for which they are employed.

After the MacCrate Report the phrase skills and values has entered the discourse of discussions of lawyer learning.⁷² “Skills/values” is preferable to the phrase “skills and values” because there is no action that a lawyer takes that is the exercise of a skill that does not have values implications Every action that we take carries with it some notion of our beliefs about the lawyer-client relationship,⁷³ who the client is,⁷⁴ the forces that bring the client into the situation, or whether the action we take is in pursuit of appropriate goals.

⁷² See LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION (A.B.A. Section on Legal Education and Admissions to the Bar, 1992). (also known as the MacCrate Report, this study stresses the importance of clinical education in teaching students the skills and values of the legal profession. The report also emphasizes that skills and values cannot be thought of as separate and distinct from one another, since both impact every professional decision a lawyer makes).

⁷³ See Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, *Clinical Law Review*, fall 1999. (stating the importance of confronting emotions in lawyering, since emotional responses are generated in every human encounter).

⁷⁴ See Binny Miller, *Give them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485 (1994). (stating the author’s belief that the traditional view of case theory which put the law first and shaped the facts around it, is no longer sufficient. Miller advocates for a greater role for clients in determining case theory, both in terms of the attorney’s development of it, and the client’s actively choosing it).

[In the rest of this section we will try to show how dissatisfaction with the prescriptive tone of Binder and Price's first interviewing book led to a second edition and then new books that are "fuzzier" in their analysis of interviewing and counseling, how the movement from Younger's Ten Commandments of Cross Examination to the more conceptual approach of Bergman's Trial Practice Nutshell and the movement from the NITA method of critique-based trial teaching to theory based trial teaching, all constitute a recognition of and a response to the indeterminacy of lawyering skills. In addition, we will explore the extent to which the political agenda of clinicians and efforts to link their concerns with those of practicing lawyers and judges may have led to a reductionist view of clinical education as "skills training," marginalizing the clinical enterprise within the eyes of non-clinical legal academics and deans. Finally, we will note that clinical teachers do not unanimously agree with our views; Binder and Bergman's focus on teaching deposition skills, e.g., is based on the view that rigorous focus on a narrower set of skills is superior to the more broad-based skills-values education that we advocate.]

**Conclusion: The Indeterminacy of Clinical Pedagogy and Teaching Methods
and the Curious Persistence of the Non-clinical Curriculum**

Clinical education is not the only thing that has changed in legal education in this period. Clinical programs have contributed to some of the other changes in legal education because they have been a laboratory for the law schools to see the profession and to see the practice of law. Clinicians have brought back information about what is missing from the law school curriculum and our work has informed the other ways in which the curriculum has changed. All types of pedagogy struggle with the

theory/practice/doctrine trichotomy.⁷⁵ All thoughtful teachers try to figure out the appropriate level of abstraction for their classes. How much practice, how much theory and how much rules and doctrine? The addition of various kinds of legal theory certainly improves the product. Also, some of the curricular reform has tried to break down the doctrinal barriers between subjects, ways in which people who teach first year curriculum have tried to look at the overlap between and among the subjects. Even though the names of many courses have stayed the same, new pedagogical approaches within these courses constitute reform.⁷⁶ We have seen great improvements in the teaching of legal writing, and the creation, which is still in its infancy, of the professional legal writing faculty, with their own discipline and their own theories about writing, has been a major development. It is also possible that the problem method, called by Dean John Sexton “situation-based” learning, will spread. This method begins with a lawyer in a simulated client situation trying to solve the client’s problems. This context-based teaching, the kind of the case method used in business school, has students do broad-based problem-solving that cuts across doctrinal areas has the potential to substantially improve the classroom experiences of our students.⁷⁷

⁷⁵ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992). (discusses the difficulty and importance of balancing these three goals of the curriculum. Edwards writes that many law schools have begun to emphasize abstract theory at the expense of practical doctrine and pedagogy).

⁷⁶ See Robert Stevens, *Two Cheers for 1870: The American Law School* in *LAW IN AMERICAN HISTORY* 405, 525 (DONALD FLEMING & BERNARD BAILYN eds., 1971) (discussing changes in many law school courses, despite the fact that their titles have not changed). At the Washington College of Law, our colleague Andy Popper has spearheaded a project called the “Integrated First-Year Curriculum,” in which faculty in first-year sections come together in various activities from time to time in the semester to emphasize for students the connections between first-year courses and other developments in the law (international law, law and economics, feminist jurisprudence) that might not otherwise be obvious.

⁷⁷ Need sources for use of case method in business school and further elaboration of problem method in law schools beyond PR.

Despite these changes, however, many things in legal education have remained the same.⁷⁸ The Socratic Case Method, even in its 21st century iteration, is still the predominant form of teaching, used in classes well beyond the time when it is useful as a way for students to learn. The Socratic Case Method was a reform of the apprenticeship model that previously existed but really built on the implicit belief that apprenticeship still exists.⁷⁹ That is, the Socratic method is built on the belief that it prepares students *to learn* how to be a lawyer, and that the actual learning is going to go on somewhere else, led by mentors.⁸⁰ The rejection of the apprenticeship model as formal education was based on the belief that people who were doing it were not doing it well, there was no theoretical justification for it, there was no pedagogy, it was haphazard, it was exploitative.⁸¹ And now there is this belief, I think, that is implicit in most legal education, and particularly for the students that are going to go to the big law firms, that

78 The recent Carnegie Foundation for the Advancement of Teaching and CLEA Best Practices reports (both published in 2007) reflect this tension. For example, the former praises law schools for their inculcation of cognitive concepts through the Socratic method, while criticizing them for failure to develop sufficiently the “apprenticeships” of professional skills (practical) and formation of professional identity (formative).

⁷⁹ See Robert Stevens, *Two Cheers for 1870: The American Law School* in *LAW IN AMERICAN HISTORY* 405, 442 (DONALD FLEMING & BERNARD BAILYN eds., 1971). (referring to the 1914 Redlich Report, “Common Law and the Case Method,” in which Redlich commented that the Socratic Method would not have been nearly as successful if it had not been complemented by such experiences as individual advice from professors, mooted experiences, and law reviews).

⁸⁰ See Robert Stevens, *Two Cheers for 1870: The American Law School* in *LAW IN AMERICAN HISTORY* 405, 410 (DONALD FLEMING & BERNARD BAILYN eds., 1971). (noting that the origin of professional development was almost entirely by apprenticeship, what he calls exclusively clinical training, by today’s standards).

⁸¹ See Talbot “Sandy” D’Alemberte, Remarks at a conference, ‘The MacCrate Report: Building the Educational Continuum,’ held at the University of Minnesota School of Law from September 30 through October 2, 1993. *The MacCrate Report: Building the Educational Continuum, Syllabus*, Winter, 1994, at 5-6. (stating that the earliest American system of legal education was one of apprenticeship. He quoted Professor Calvin Woodard’s negative characterization of such training as “overwhelmingly practical, non-theoretical, and non-philosophical in character, being largely concerned with the technicalities of procedure and pleading.” D’Alemberte criticized this “disconnection between the bar and the academy”).

there is going to be great training there and they will learn to be lawyers. And indeed some of them do.⁸²

Most young lawyers are victimized by the “Myth of Mentoring.” Mentoring occurs in life under rare circumstances. We are available to mentor some of the time, we are available to mentor for some people, but for most of us we are closed to receiving a mentor for good portions of our lives because we are tied up with other things. It is only some young people who are good at “seducing” us to be mentors. “Seducing” seems to be the right word because there is an intimacy in a relationship between mentor and mentee and the fact that it requires seduction, disadvantages women and some minorities in big firms where there are other barriers that prevent that relationship from forming. So to count on mentoring is to leave some people out. What clinical education has tried to do is to create educational models to substitute for mentoring. That is, we systematize models of teaching to substitute for the fact that we do not have the time or the energy to develop those relationships with so many students, or certainly not all the time.

⁸² The effect of the financial and economic crisis of 2008 on future law practice is still evolving. It may well be that the structure of large law firms will change sufficiently so that past claims of training of entry-level lawyers in their first years as associates will be ever more difficult to maintain.

The real teaching that goes on in the profession is actually teaching we ought to resist. It is done in the form of the socialization of young lawyers into the mores and habits that prevail in the local bar.⁸³ (EXPAND) So if we are not teaching our students to recognize other choices, we have failed.

In the final analysis, clinicians attempt to de-stabilize the law school curriculum and legal practice by inculcating a set of skills and values that will permit their graduates to appreciate the benefits of the legal system and law practice while remaining critical of their shortcomings. This agenda is inevitably reformist and ongoing. Some interventions will stand the test of time, and others will be rejected (for reasons that are sound or not). The destination is uncertain and, dare we say, indeterminate. But the indeterminacies one experiences along the way can either be debilitating or transformative. By describing these indeterminacies, we hope more of them will be the latter and not the former.

⁸³ See Carla Messikomer, *Ambivalence, Contradiction, and Ambiguity: The Everyday Ethics of Defense Litigators*, 67 Fordham. L. Rev. 739, 759 (1998). (noting that one of the consequences of the ambivalence pervading today's legal system is a deficiency in the training and socialization of young lawyers. Because most firms have no regular process for training and socializing new associates, those new to the profession are left to pick up the "intellectual, technical, attitudinal and ethical" aspects of it from partners who exhibit ambivalence about their own role in the legal profession).