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ESSAY

MY SUMMER VACATION: REFLECTIONS ON BECOMING A CRITICAL LAWYER AND TEACHER

MINNA J. KOTKIN*

I've spent my summer "vacation"¹ reading wonderful articles by clinicians, critical legal theorists, and fellow travellers about lawyering and teaching for an anthology I'm editing, entitled *Critical Lawyering*.² Having dumped my caseload on my long suffering colleague,³ I've had a bit of time to do what I'm always asking of my students, but do so little of myself: reflect upon how to be a better lawyer.⁴ Given all of this theory that I supposedly have mastered, have I actually changed the way I do things? What do I do differently?

I've concluded that my teaching and lawyering have changed over the fourteen years I've been in this business, but probably not enough.

* Professor of Law and Director, Federal Litigation Program, Brooklyn Law School. I want to thank Jennifer Sinton for her excellent research assistance; my writing "buddies" — Stacy Caplow, Susan Herman, Nan Hunter and Liz Schneider; Sara Kay (see *infra* note 3 and accompanying text); Liz Cooper; and my dog Boz. I also want to acknowledge the support of Brooklyn Law School's summer research stipend program.

¹ As I'm often told, we are so lucky to have the summers "off."

² The anthology, *CRITICAL LAWYERING: A READER* (forthcoming, New York University Press 1998), is being brought out by the publishing arm of the same fine university that sponsors this journal. This is not a paid advertisement, but simply "shameless self-promotion." For more specific references, see *Lawclinic Bulletin Board*.

As is true of the above, this essay contains a number of references that may make sense only to clinical teachers. If, by some odd chance, you happen to be a traditional teacher reading this piece, please consult your local clinician. You might even think about visiting the clinic.

I know you're asking, "So, what is critical lawyering, anyway?" Keep reading, or as they say, see *infra* notes 9, 13-16, 22, 24 and accompanying text.

³ Why is it that tenured clinicians get to use summers to write, while short term contract teachers, trying to break into the permanent job market, often have 11 month commitments?

⁴ For an elucidation of the importance of reflection in clinical theory, see Robert Dinerstein's opus. Dinerstein has written and performed several unpublished songs about reflection or reflective vision. They are: "Clin-ic" (to the tune of "Downtown"), performed at the January 1985 AALS annual meeting ("Things will be great in the clinic/you'll be reflective in the clinic/Everything's waiting for you."); "All My Teaching" (to the tune of "All My Loving"), which Bob thinks was performed at the 1990 AALS Clinical Conference in Ann Arbor ("We'll reflect all the way/'bout the issues of the day."); and "Supervision" (to the tune of "Satisfaction"), also performed in Ann Arbor ("You will get some supervision/We'll review your reflective vision.").

Some changes relate to concerns that might be characterized as mundane; some go to paradigmatic issues⁵ of lawyer-client-teacher relationships.⁶ For what it's worth, this essay discusses the changes that may be of general applicability. In a sense, they fall into the category of "things I wish someone had talked with me about when I started teaching." But more importantly, I think they demonstrate the struggle, in which all clinicians engage, to integrate theory into practice. I hope that this essay will spark readers to submit their own reflections, since this law review is intended to be, in clinical tradition, as interactive as a law review can be.

THE BACKGROUND

Some background about the clinic that I direct, and the cases we handle, will be useful in understanding my efforts to train critical lawyers and, for that matter, to become one myself. As I have described elsewhere,⁷ the Federal Litigation Program was designed to assist the local federal courts in providing representation to *pro se* litigants, and to provide students with training in pre-trial litigations skills, primarily discovery and motion practice at the federal level. The clinic's caseload is composed largely of individual discrimination actions: the typical action involves an employee asserting that his or her termination was motivated by consideration of race, national origin, gender, age, or more recently, disability. These cases comprise a substantial percentage of *pro se* filings; few private lawyers, even in New York, are willing to undertake such actions without a substantial retainer, and then only when the facts suggest a high probability of success, thus allowing for the possibility of recovering attorney's fees from the defendant employer.

In some respects, these cases make excellent teaching vehicles. The students' caseload is limited to two or three matters over the course of the academic year. They have the benefit of close supervision through a student-faculty ratio of eight to one. This teaching environment enables students to fully assume the lawyer's role: they interview and counsel our clients, negotiate with our adversaries, take

⁵ For a definition of paradigmatic issues, see the UCLA/Institute for Advanced Legal Studies Fourth International Clinical Conference, "Conceptual Paradigms in Clinical Legal Education," October 23-26, 1997. More "shameless self-promotion."

⁶ See you can put six fatuous footnotes in two paragraphs. Tenure-track clinicians take note. I'll try to control myself now.

⁷ See Minna J. Kotkin, *The Violence Against Women Act Project: Teaching a New Generation of Public Interest Lawyers*, 2 J.L. & POL'Y 435 (1996). In fact, the following several paragraphs are taken verbatim from this article, with permission, of course. It's always important to cite yourself, to demonstrate the requisite amount of chutzpah, and it's not plagiarism if it's your own article, is it?

and defend depositions, draft and argue motions, and most importantly, develop case theory and plan case strategy. In rare circumstances, they may even try an action in federal court, although, as with the federal court docket in general, the great majority of our cases end in negotiated settlements.

Given its goals, the program has been a success. Students do indeed learn about pre-trial litigation skills, and the program does provide limited but not insignificant assistance to the courts. The program is popular, even though it is notorious for its time requirements. It attracts many, but not exclusively, students with a strong interest in pursuing public interest careers.

I have concerns, however, about the underlying messages that our students learn about civil rights practice. Our clients file their claims *pro se* with the firmly held belief that they have suffered discriminatory treatment, that they will have their day in court, and that their rights will be publicly vindicated. What they, and the students who represent them, experience instead is the endlessly protracted and often highly adversarial and difficult course of employment litigation in federal court. Both the process and the substantive law works against clients achieving their goals. Their cases go on for years, delayed by discovery disputes and motion practice in which clients rarely have a role. The law of employment discrimination, moreover, does not lend itself to remedying subtle forms of discrimination.⁸ Most employers today are well versed in keeping the paper record needed to support termination decisions. They document "good" reasons for their actions, often making it difficult if not impossible to ferret out the subjective judgments that suggest differences in treatment on the basis of race or gender. Witnesses typically are still employed by the defendant, and objective testimony is hard to come by.

Nevertheless, tenacious advocacy often produces not insignificant monetary offers. Between the pressure exerted by the judiciary to avoid these types of trials, the delays in obtaining a trial date, and the uncertainty of a successful result, our clients almost uniformly "choose" to settle. We both preach and try to practice client-centered decisionmaking, but I often wonder how much we manipulate our clients into making this choice.

Indeed, the entire process of federal litigation seems to work

⁸ Among the compelling pieces on subtle or unconscious forms of discrimination and the law are Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1989); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987); and David Benjamin Oppenheimer, *Negligent Discrimination*, 141 *U. PA. L. REV.* 899 (1993). (This is the first "real" footnote, suggested by the editors of this august journal.)

against the goals of critical lawyering, which I define as lawyering methodology that attempts to empower clients traditionally subordinated by our legal system.⁹ Other than as criminal defendants, clients are rarely seen or heard in the federal courts. They almost never get to “tell their story,” and their stories are often difficult to shoehorn into the statutory requirements.¹⁰

In addition, teaching in this context does not immediately lend itself to developing students’ critical consciousness. Even the most public interest oriented students often become caught up in the “professionalism” and elitism of the federal courts. They concentrate much more on developing their deposition skills, for example, than on their relationships with clients. They may be impressed by the experience, confidence and resources of the big firm lawyers who represent the corporate defendants.

On reflection, I have realized that some of the changes in the way I teach are attempts to provide an antidote to this less than ideal context for teaching students to be critical lawyers. Despite the program’s limitations in this respect, the changes I’ve made in how I teach and how I litigate at least suggest an effort to apply theory to practice. What is most striking to me, however, is that the changes were not as result of a conscious attempt to apply theory. Rather, they represent the process of learning by osmosis: the unconscious application of my reading and listening to critical and clinical theory.¹¹ If there were ever a question about the value of this scholarship, the following vignettes of things I do differently are a testament to its practical utility.

THE CHANGES

A. *Feminist Legal Theory, or Wearing Pants to Court*

Each year since I began teaching, a female student has approached me about whether she could wear pants to appear at a status conference or a motion argument in federal court. Despite my feminist convictions and substantial credentials,¹² I puzzled about how to integrate feminist legal theory into this query. We know that feminist jurisprudence seeks to expose how the law systematically privileges

⁹ The concept of critical lawyering shares conceptions of client empowerment with various postmodernist schools of thought —critical legal studies, feminist legal theory, critical race theory, queer theory and clinical legal theory. For a more serious discussion of this subject, see Minna J. Kotkin, *Creating True Believers: Putting Macro Theory into Practice* (1997) (unpublished manuscript, on file with the author and looking for a home).

¹⁰ See, of course, Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

¹¹ See *supra* note 9 and *infra* notes 13-16, 22, 24 and accompanying text (referring to works of critical and clinical theory).

¹² I actually was in a consciousness raising group in 1969.

masculine¹³ normative visions.¹³ Cultural feminists suggest that women's values have been long disregarded by liberal legal theory, resulting in a body of doctrine that disempowers women and fails to protect their interests.¹⁴ Radical feminists view gender inequality as the result of a systematic attempt to maintain the subordination of women.¹⁵ Postmodern feminists posit that only the destabilization and subversion of gender identity can lead to greater gender equality.¹⁶ But how does all this translate into actual lawyering and supervision?

In my pre-critical stage, the student dialogue used to go something like this:

- STUDENT: Can I wear pants to court tomorrow?
 ME: What do you think [or how do you feel]¹⁷ about wearing pants to court?¹⁸
 STUDENT: [Not a star in the clinic, this student has yet to pick up on our subtle and sophisticated teaching techniques. She responds in a puzzled tone.] Well, it's supposed to be eight degrees out. I'd be a lot more comfortable.
 ME: Do you think it would have any impact on how the judge perceives you or your client, particularly given that you're a student?
 STUDENT: Well, I'm not sure.
 ME: Have you spent much time observing proceedings in federal court?
 STUDENT: I've noticed that there aren't too many women lawyers, and I guess they mostly wear suits with skirts, but —
 ME: Do you think being "comfortable" is worth the possibility of prejudicing your client's interests?

By the time I finished with my non-directive supervision, the student was ready to send her pants suit to the Salvation Army.

One day a few years ago, I said to myself after one of these conversations: "This is ridiculous." It is true that there are not a lot of

¹³ For a collection of essays on feminist jurisprudence, see *FEMINIST LEGAL THEORY: FOUNDATIONS* (D. Kelly Weisberg ed., 1993).

¹⁴ See, e.g., CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

¹⁵ See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: FOUNDATIONS*, *supra* note 13, at 427 (proposing a trajectory for feminist legal theory).

¹⁶ See, e.g., JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

¹⁷ This is for the "touchy/feely" school of clinical methodology. See Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985). Just kidding, friends.

¹⁸ While this technique is sometimes known as non-directive supervision, I prefer to think of it as getting my money's worth from years of therapy.

women practicing regularly in the New York federal courts,¹⁹ and by and large, those that do “dress for success” in a traditional way, which means no pants. But if we continue to feed into this pattern, things will never change. Would a judge actually take offense by a woman in a pants suit in 1997?²⁰ We’ll never know until we try, and to the extent there is any adverse reaction, it’s time to confront the issue and educate the judiciary about gender discrimination in the almost 21st century.

So, my response to the question is now more directive and proactive: “Yes, if it’s a pants suit that’s roughly equivalent to what men, unfortunately, still have to wear to court. The tie is optional. But, be aware that there are probably still some judges who will have a negative reaction. You’ll have to be completely prepared, very professional and articulate to overcome his²¹ perceptions. To the extent there is a risk to the client, you may want to discuss it with him/her, but my philosophy is that this is a risk worth taking. We need to abolish this vestige of discrimination in the courts.”

So, I’ve become a more critical lawyer and teacher. Someday, I may even progress to wearing pants to court myself.

B. Critical Legal Theory, or Bringing Clients to Court

Among the basic principles of critical legal theory are that the procedural regularity of the litigation process disguises the political content of decision-making and legitimatizes political results, and that the culture of law works to mystify and disempower outsiders through the dominance of professional legal discourse.²² Anyone who has done plaintiff’s Title VII litigation, as we do in the clinic, knows these principles to be self-evident. Nothing is more disempowering for a client than waiting a year for a judge to decide a summary judgment motion, which if defendant wins, means that the client never gets to “tell her story” in person. Or trying to understand her lawyer’s explanation of a six month long discovery dispute about whether the defendant will turn over documents relating to other employees’ claims of

¹⁹ Judith Resnick has commented on this phenomenon. See Judith Resnick, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991).

²⁰ I have not as yet confronted the converse situation, but when it comes, we’ll see how well I can stick to my new found critical (i.e. postmodern) sensibility.

²¹ This is a purposeful use of the male pronoun.

²² An excellent book by my colleague, Gary Minda, provides a cogent and accessible summary of postmodern theory, including critical legal theory. See GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY’S END (1995). See also CRITICAL LEGAL STUDIES (James Boyle ed., 1992); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982).

discrimination.

For many years, I did nothing to attempt to counteract the deadening effect of the litigation process for clients, and the disconnection with clients that the process fosters in lawyers. In fact, I contributed to it, as demonstrated by the following supervisory dialogue:

STUDENT: For the status conference that's scheduled for next week, should we ask our client, Mr. Jones, to come?

ME: [After the endless attempt to elicit from the student the pros and cons of bringing the client to court,] Well, you can but as we've discussed, there are risks. The judge may want some information from the client, and we won't really be able to analyze the situation before we get a response from the client. For example, what if the judge says: "Mr. Jones, are you available to have your deposition taken this week?" and we needed more time to prepare him. While we would never, of course, say that a client was unavailable when he actually was, we might want to explain to the client that "available" can mean different things. We can't do that if he's in court. Also, our adversary hasn't met Mr. Jones yet. He'll be able to get a sense of him if Mr. Jones is there, which will help him prepare for his deposition. Finally, if the judge gives us a hard time, or makes cracks about students, Mr. Jones may lose confidence in us. So, what do you think?

I'm embarrassed to admit that this is not a parody. I actually had this kind of dialogue with students for a number of years. All of the "cons" outlined above are real, but what about the "pros"? I did not ask whether the client wanted to come to court, and whether the student had fully explained what was going to happen. Nor did I suggest ways that the "cons" could be minimized by preparing Mr. Jones for the experience.

But most importantly, I did not seriously consider how alienating the federal litigation experience is for clients who arrive at our doorstep with a sense that they have been grievously wronged, put their case and their trust in our hands, and then lose any ownership in the process of asserting their rights. We keep them informed, consult them about significant strategic decisions, send them copies of papers filed, and do all of the things that good lawyers should do. I've come to realize, however, that attending court, even for the most trivial conference, enables clients to experience, if not fully participate in, the process. Sitting at counsel table with your team of lawyers (in the clinical context, that usually means two students and a supervisor) has meaning for most clients. And if the judge demeans the client's case, as so often happens in Title VII litigation, the client gets a true picture

of how our system of justice works. If the students are on their game, the client also will see how we attempt to resist this system. It is an opportunity to bring to clients a "critical" understanding of the law.

There is another reason for bringing clients to court. Judges and adversaries see that the client truly cares about the case and is watching, with a layperson's perspective, how justice is done. It is easy and not atypical for a judge, even a well-meaning one, to say, "Oh, not another race discrimination case" in a courtroom full of lawyers. It is unlikely that the same comment will be made when the "alleged" victim of the discrimination is sitting at counsel table. Clients being present puts a human face on the racism and sexism that still exists in the workplace.

My supervision is more efficient now. In response to the student's question, I say "yes." The problem is that I may not take the time to explain why: to integrate theory and practice. I have become a more critical lawyer; I'm still working on becoming a more critical teacher. And I'm thinking about the issues that relate to bringing clients to negotiations.²³

C. Critical Race Scholarship, or Telling Counter-Narratives as Case Theory

One of the significant insights of critical race theory is that we need to tell "counter-narratives" in court to provide outsider perspectives.²⁴ Here is an example of how I have resisted putting this theory into practice.

STUDENT: We had a great interview with Mr. Jones. He was working as a temporary doorman, and he was the only African-American on the building staff. When a permanent position opened up, they gave it to the white handyman instead of him. His evaluations weren't great, but he thinks there was a conspiracy against him. The other workers didn't want him there, so he says that they got a couple of tenants to write letters complaining about his attitude. We're doing the fact memo now. You should have it in a few days.²⁵

²³ This is to suggest that there's another article on the way—another important scholarly technique, right up there with citing yourself.

²⁴ See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed. 1995) (collecting various works of critical race theorists).

²⁵ Right.

ME: Oh, no — not another conspiracy. You have to tell Mr. Jones — I mean, counsel him — about the problem of talking about conspiracies. As soon as our adversaries hear that word in a deposition, they go for the jugular. “Oh, there was a conspiracy, was there? And, who was involved? Was it all of the other workers? And all of the other tenants? They were all out to get you, weren’t they?” By the time [big firm name deleted] is done with him, he’ll look like a complete paranoid. So, you need to talk to Mr. Jones about not using the word “conspiracy.”

Again, embarrassing but true. From the viewpoint of critical race theory, there exist, of course, conspiracies of the sort that Mr. Jones describes. They are not paranoid fantasies. It’s just that insiders — including white plaintiff’s counsel, as well as judges and adversaries — have trouble perceiving them. Critical race theory has helped me realize this, and I’m trying to analyze my responses to conspiracy claims from a more critical perspective.

Here, I’m still struggling, however. As a teacher today, I might have a more sophisticated dialogue with the student. But I still don’t know how to create case theories that reflect the subtle nature of racist, but perhaps unconscious, conspiracies in the workplace and to present them to adversaries and courts in a convincing way. I’m in need of more theory-practice scholarship by critical race writers.

D. Clinical Theory, or Trying to Stop Driving My Students Crazy

Clinical theory is premised on the view that experiential learning is an excellent methodology for teaching students about law and lawyering, and it occurs most effectively through role assumption: students learn by acting in the role of the lawyer. In my naïve youth as a clinical teacher, I wrote an article that examines at length²⁶ the genesis of role assumption, and questions whether it is necessarily the best methodology for every student.²⁷ I suggest that a certain amount of modeling for law students goes a long way.

Despite what I wrote in that piece, I largely follow the role assumption premise in my clinic. The problem is that role assumption is a difficult matter in federal Title VII actions. Two students doing their first trial in federal court (which may well be their first ever court appearance) over several days is not a pretty sight. A student’s first deposition — of a fully prepared corporate executive represented by a big firm partner — also can be a daunting event for all concerned. As

²⁶ It was pre-tenure, so there are lots of real footnotes.

²⁷ See Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185 (1989).

my former colleague, Kathleen Sullivan,²⁸ has written about,²⁹ preparing a student for her first argument, which happens to be in the Second Circuit, is a somewhat harrowing experience.

My view has been, however, that we can compensate for what students lack in experience with lots of preparation and practice beforehand. So, for many years, I would rehearse the entire deposition with a student, role-playing the critical parts again and again, in an effort to teach T-funnel questioning and probing, follow-up and locking-in techniques. These role plays were preceded by the student's preparation and revision, after my review, of a question and answer script, often of twenty or thirty pages, with all exhibits attached.

By the time I was finished with the student, he was a basket case. The technical aspects of deposition taking had been blown all out of proportion, and the most important skills — thinking and being curious — had gotten lost in the details. In addition, the student's confidence was destroyed, and she was completely intimidated by the prospect of the task ahead. I had some really ugly experiences using this teaching methodology, including the time when a student slept through his alarm on the morning of his first deposition and couldn't be awakened by telephone. I think he was trying to tell me something.

I've changed my teaching methodology for depositions and other public appearances, as well as my general philosophy about preparing students. First, as a general matter, I've found that the most important thing that I can do is to help students be confident and to convince them that they cannot do any real harm to their client or her case, because I won't let that happen. Second, I now recommend the following principles of lawyering, which I myself hold, and I try to convey to students:

1. There's usually nothing wrong with saying "I don't know, but I'll find out," to an adversary or a judge. For students particularly, who are so easily bluffed and are ill-equipped to bluff back, it's better to be yourself and be honest.

2. There's nothing wrong with seeking assistance from your supervisor in a deposition or in court. In depositions, I now have frequent, although whispered, conferences with the student to ensure good follow-up. It's not reflected in the transcript, and if our adversary doesn't like it, it's just too bad, and I'll tell her so (in a civil way,

²⁸ This is Kathleen A. Sullivan, who can now say: she is not *the* Kathleen Sullivan of Stanford, she is *the* Kathleen Sullivan of Yale, which sounds better than *the* Kathleen Sullivan of Brooklyn.

²⁹ See Kathleen A. Sullivan, *Self-Disclosure, Separation and Students: Intimacy in the Clinical Relationship*, 27 *IND. L. REV.* 115, 148-49 (1993).

of course).

3. The most important thing in learning to be a lawyer is not technique, but thinking through and acting upon a well-developed case theory. This usually means that while the traditional lawyering tasks, such as discovery practice, are important, it is at least as valuable to use your common sense and your pre-law school life skills, to investigate and independently find proof that supports your client's claim. How all of the public facets look is less important than the content of what you're doing.

These principles are at the heart of clinical theory, although they rarely find their way into clinical scholarship. They fall into the category of "things I wish someone had told me when I started teaching," and are put forward here in the hope that some new teacher's students may be spared.

CONCLUSION

At its best, clinical legal education provides much needed legal services, teaches students lawyering skills and helps them to develop self-reflective habits that will enable them to continue to grow as experiential learners. But clinical programs also provide a rare laboratory-like practice setting.³⁰ Students and teachers together can explore new ways of representing clients, particularly those without easy access to our legal system, and new strategies for forwarding their legal and political interests. This essay is a first step on my part to self-consciously address that process through the prism of critical scholarship. I look forward to more summer vacations and more things done differently.

³⁰ See Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945, 950-51 (1991).

