

“Tastes Great, Less Filling”: The Law School Clinic and Political Critique

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This article¹ takes up the question of whether the law school clinic is a necessary or even preferred vehicle for clinical practice instruction,² and its corollary of whether there are more interesting formats, closer in spirit to the purposes of a university law school, which would serve clinical instruction's objectives as well. Its answers are, respectively, “no, most of the time” and “yes, most of the time.” In response to the first question, it argues that design and resource limitations prevent the typical clinic from performing important critical functions of legal education, and that for this reason the clinic will remain relegated to training tasks not considered important enough over the long run by a university law school. In response to the second, it recommends an alternative format for practice instruction which avoids these problems, describes its advantages over the conventional clinic, and discusses whether the objections typically made to this alternative are warranted. While principally about format, the article also articulates a conception of clinical study which is more compatible with university education than the conception now in place. Many will view this as a hopeless plan and perhaps they are right. But if we could get our thinking about clinical education straight, that sense of hopelessness would disappear.

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1. The law school clinic has been a subject of discussion in the journals for some time, but I have not made an effort to incorporate that discussion or locate my position within it. (For references to and evaluations of some of that literature see Robert J. Condlin, *The Moral Failure of Clinical Legal Education*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*, ed. David Luban, 339-41 notes 1-22 (Totowa, N.J., 1984) (hereinafter cited as *Moral Failure*); and Robert J. Condlin, *Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction*, 40 *Md. L. Rev.* 223, 223-26 notes 2, 3, 5, 6, 279 note 118 (1980) (hereinafter cited as *Socrates' New Clothes*).
2. Practice instruction is based on materials and experiences generated by student work for live clients in pending cases. It is to be distinguished, on the one hand, from clinical instruction generally, which is the study of lawyer skill practices in all of its forms, many of which take place outside of clinical practice, see note 6 *infra*, and on the other, from the law school clinic, which is only one format in which practice instruction occurs. Unless otherwise indicated or required by context, when I speak of clinical education, clinical study, clinical instruction, fieldwork or the like, I mean clinical practice instruction.

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Two additional preliminary points should be made. First, few law teachers, once engaged, are unemotional or uncertain of their views about clinical instruction, and evaluative commentary, however tentative or limited, can provoke strong reaction from supporters and detractors alike. A discussion, therefore, should be perfectly clear about just how controversial it proposes to be. This article does not plan to question the legitimacy of clinical instruction *per se*. Such instruction, properly conceived, has substantial value and is an essential part of an overall program of law school education.³ That view is now widely accepted. While debate about “ultimate existence” is over, however, difficult questions remain about the form and content clinical instruction ought to have, and it is those questions that are taken up here.

Second, discussion is limited to what may be called the conventional clinic, a law office established and operated by a law school for the purpose of student clinical practice. Excluded will be discussion of classroom and simulation-based approaches to clinical study, and fieldwork-based approaches, such as the clinical internship, or so-called farm-out program, in which the person responsible for student instruction is not a full-time member of the law school faculty. The conventional clinic is not the only format for practice instruction but by clinical teacher consensus it is the most effective, and it is preferred by most law schools. Schools that choose not to establish a conventional clinic usually have economic rather than pedagogic reasons for their decisions. Even in a post-CLEPR age, with the laudable demise of the “in-house” litmus test,⁴ the conventional clinic is *primum inter paria*, and a discussion of its strengths and weaknesses is generally thought to be a discussion of the best that clinical education has to offer.

The Purpose of Clinical Practice Instruction

Our starting point must be an understanding of what clinical practice instruction tries to accomplish. Over the years the most popular objectives have been training in the motor dimensions of lawyer practice skills (skills training); teaching ethics, both the development of character and informing about relevant codes and rules (ethics); internalizing the tacit norms and lore of law practice (socialization); inspecting particular types of lawyer work prior to job selection (placement); increasing self-awareness of dispositions and values likely to affect performances as lawyers (self-awareness); teaching doctrine and analysis in an engaging fashion (pedagogy); and understanding and criticizing standard ways of performing lawyer practice skills for their contributions, both in specific instances and

3. The author supports this claim in Condlin, *Moral Failure*, *supra* note 1, at 319-24; and Condlin, *Socrates' New Clothes*, *supra* note 1, at 227 note 10.

4. See Condlin, *Moral Failure*, *supra* note 1, at 332-36; and Condlin, *Socrates' New Clothes*, *supra* note 1, at 223-24 note 2, for a description of CLEPR, (The Council on Legal Education for Professional Responsibility), its role in the development of clinical education, and the ways in which it conditioned both recognition of a clinical program and eligibility for financial support on whether the program had conventional properties.

in the aggregate, to the legal system and the outcomes it produces (critique).⁵ Usually, clinical teachers have favorites among these objectives and shape their programs to emphasize one or two in a sustained and systematic way. But this narrowing of focus can create problems if the teachers choose unwisely, for the objectives exist in a hierarchy, and critique is at the top. This fact has consequences for all the decisions involved in constructing a clinical program and in teaching a clinical course.⁶

Clinical critique takes as its subject the skill practices (and the theories on which they are based) lawyers use to give effect to legal rules and is

5. On the objectives of clinical education see generally Anthony Amsterdam, *Clinical Legal Education: A 21st Century Perspective*, 34 *J. Legal Educ.* 612 (1984); Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 *Geo. Wash. L. Rev.* 273 (1984); Condlin, *Moral Failure*, *supra* note 1, at 318-24; Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *Vand. L. Rev.* 321, 322-25 (1982) and articles cited therein; Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision*, 40 *Md. L. Rev.* 284 (1981); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories about Lawyering*, 29 *Clev. St. L. Rev.* 555 (1980); David R. Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 *J. Legal Educ.* 67 (1979); John M. Ferren, *Goals, Models, and Prospects for Clinical Legal Education*, in *Clinical Education and the Law School of the Future*, ed. Edmund W. Kitch, 94 (University of Chicago Law School Conference Series No. 20, 1969).

6. The conventional clinic is only a small part of the clinical curriculum. An ideal curriculum would begin with classroom survey courses in lawyer practices based on social science research data and scholarship about the profession and videotapes of lawyers acting in role. In analyzing this material students would develop intellectual categories that put practice experiences into larger context, and develop the vocabulary necessary to discuss lawyer behavior with others. See Gary Bellow & Bea Moulton, *The Lawyering Process: Materials for the Clinical Instruction in Advocacy* (Mineola, N.Y., 1978), for an illustration of the concepts with which such courses would work. Much of the cognitive instruction now done in clinics could be removed to this type of course.

Survey courses would be followed by seminars examining selected subparts of the clinical subject matter in greater depth, in major part through the use of role playing, gaming, and simulation methodologies. (Interviewing and Counseling, Investigation and Discovery, and Bargaining and Negotiation are the more common titles and subject matter subdivisions of these courses.) Survey and simulation courses would precede clinical practice and be prerequisites to it, and the conceptual apparatus and beginning motor-skills developed in these courses would help students exploit more of the potential of the real life setting. A sequence of prerequisites also would help minimize the problem of overgeneralization. Left on their own, students understandably view their first practice experiences as everyman's and miss the richness of variation that a truly big picture provides. But if the variation is described in advance the limits of individual experiences can be noticed or pointed out.

Notwithstanding that it comes last, and that most students will not do it, clinical practice is an important part of this overall program. Critique presupposes understanding of lawyer practices, and understanding in turn presupposes some experience with the practices' operation. This is not a radical view. In fact, a version of it underlies the socratic paradigm of first year law teaching. First year teachers do not believe that students understand case analysis after being told, among other things, that it consists of assessing changing fact patterns to identify legally relevant considerations that matter and distinguish them from those that do not. It also is thought necessary that students try their hands at assessment and subject their efforts to a law professor's evaluation. The discussions that ensue are expected not just to increase skill proficiency at comparing cases (though that is a goal), but to enhance understanding of relevant legal similarities and differences. Understanding, as much as skill, is the object of this process. Understanding is not the same as critique, however, and traditional instruction is often as deficient as clinical in failing to take this next step.

concerned with understanding and evaluating the manner in which such practices contribute to the justice of the legal system.⁷ These practices are important because they make up the low-visibility ways in which lawyers amend, abrogate, and enforce the law, and in the process, determine much of law's meaning for persons who come in contact with it.⁸ The practices are amenable to theoretical elaboration, support multiple research agendas, and can be divided, categorized, and sequenced conceptually for purposes of instruction.⁹ In addition, they provide a distinct and relatively unexplored vantage point on the operation of the legal system from which new critical insights about law about law may be produced, and these insights in turn will have implications for the ways in which statutes are drafted and doctrines elaborated.¹⁰ One can have normative theories about the proper performance of lawyer practices, and theories about how lawyer practices contribute to the justice of the legal system as a whole. While clinical thinking in each of these areas is far from developed, the work to be done is familiar and manageable.¹¹ In studying lawyer-skill practices, teachers and students come to see how the individual actions of lawyers constitute and reconstitute legal rules, and how the legal system's kantian (rule/policy) and aristotelian (lawyer dispositional) halves fit together.

Critique consists of analyzing and evaluating the patterns and theories immanent in the methods lawyers use to perform and think about skill practices against conceptions of what would be better, for the purpose of resolving perceived contradictions between theory and practice.¹² This analysis presupposes a critical theory, which in turn presupposes worked-out views on the nature of a fair and just legal system and the role of lawyer

7. These practices can be thought of generically as inquiry, bargaining, persuasion, planning and so on, or in task specific terms such as interviewing, counseling, negotiation, witness examination, oral argument and the like. See Condlin, *Socrates' New Clothes*, *supra* note 1, at 224-25 note 3, for a description of the benefits to be gained from looking at these practices from each perspective.
8. See e.g., Robert J. Condlin, *Cases on Both Sides: Patterns of Argument in Legal Dispute-Negotiation*, 44 Md. L. Rev. 65 (1985) (illustrating the ways in which lawyer argument practices give varying content to the same substantive norms in different legal disputes). See also Gerald R. Williams, *Legal Negotiation and Settlement 6-7* (St. Paul, Minn., 1983) (variable results reached by differing teams of lawyer negotiators settling the same case); Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge 202-205* (New York, 1974) (variable assessments of the legal strength of the same case made by different experts).
9. See Bellow & Moulton, *supra* note 6, for one such conceptualization.
10. See Condlin, *Socrates' New Clothes*, *supra* note 1, at 227-28 note 10, for a description of the contributions of the clinical perspective to the study of traditional substantive law questions. See also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 977-980 (1979) (description of substantive law insights suggested by the perspective of lawyer bargaining).
11. For examples of the best clinical work of this type to date see *infra* note 43. For interesting traditional law teacher contributions to this literature see Walter Probert & Louis M. Brown, *Theories and Practices in the Legal Profession*, 19 U. Fla. L. Rev. 447 (1966); Irvin C. Rutter, *A Jurisprudence of Lawyer's Operations*, 13 J. Legal Educ. 301 (1961).
12. On critique see Raymond Guess, *The Idea of a Critical Theory: Habermas & The Frankfurt School 55-95* (New Rochelle, 1981). See also Richard J. Bernstein, *The Restructuring of Social and Political Thought 173-225* (Philadelphia, 1976).

practices in operating and improving it.¹³ This theory can be a psychology of law practice, in which individual lawyer behavior is viewed as relatively discrete and self-contained action and the principles that explain its operation are identified and categorized,¹⁴ or a kind of legal sociology (or economics), in which principles of individual action are replaced by equivalent principles about legal institutions and systems, and lawyer behavior is explained by the incentives and constraints of the social matrix in which it occurs.¹⁵ A psychology or sociology is not critical, however, until it challenges prevailing conceptions of good behavior and identifies (even if only implicitly) better ways of thinking about and performing in lawyer role. To make judgments about what would be better, principles of individual action and social organization must be linked to a theory of society or theory of justice, a theory of the way in which lawyers and legal institutions ought to operate in order that fair and just states of affairs be produced.¹⁶ These theories can be incomplete, tentative, or not wholly (or

13. If critical theory is understood in its strictest sense, as encompassing the critique of ideology (*Ideologiekritik*), this may require too much. In *Ideologiekritik* the theorizing agent becomes object as well as subject by including his own behavior, including his own theorizing, within the ambit of his criticism. *Id.* The goal is to produce "emancipatory insight," that which transcends ideological constraints, even those of which the agent is unaware, in part through dialogic interaction with self-reflective and communicatively competent subjects. See e.g., Jurgen Habermas, *Knowledge and Human Interests* 310 (Boston, 1971). For the Hegelian, this activity also may be seen as part of an innate dialectical drive to absolute knowledge grounded in the idealist presupposition of the identity of thought and being. See Alan Montefiore & Charles Taylor, *From an Analytical Perspective*, in Garbis Kortian, *Metacritique* 10 (New York, 1980). At this level, a critical theory is a theory of criticism as well as a theory of society. Few political philosophers (let alone law teachers) claim to have worked out critique of ideology, however, (even more deny its possibility), and more cannot be expected from persons whose interest in the field is, of necessity, secondary. So while I do not rule out efforts by clinical teachers at *Ideologiekritik*, and some will struggle with this difficult task, see e.g., Dean H. Rivkin, *Law Reform and the Faces of Power*, (unpublished paper) (copy on file with author), for most a psychology of law practice or a legal sociology, combined with a "practical" theory of justice, will be sufficient. See Jurgen Habermas, *Theory and Practice* 255 (Boston, 1973), on the nature of "practical" theories; and Sir David Ross, *The Nichomachean Ethics of Aristotle* 28-39 (New York, 1975), on "practical" wisdom. See also Bernstein, *supra* note 12, at 187-88 (discussion of the difference between practical and technical theories).
14. There are many such psychologies now in clinical use. See e.g., David A. Binder & Susan C. Price, *Legal Interviewing and Counseling* (St. Paul, Minn., 1977); Thomas Shaffer, *Legal Interviewing and Counseling in a Nutshell* (St. Paul, Minn., 1976); Andrew Watson, *Legal Interviewing and Counseling* (Indianapolis, 1976). But see William H. Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *Stan. L. Rev.* 487 (1980) (criticizing the psychological vision underlying clinical study as a new legal formalism).
15. There are only a few clinical sociologies, see e.g., Carrie Menkel-Meadow, *Toward Another View of Negotiation: The Structure of Legal Problem Solving*, 31 *U.C.L.A. L. Rev.* 754 (1984), and, to my knowledge, no economics.
16. An illustration will help. Simon's claim that lawyers cannot investigate client ends without imputing them, and that to impute ends is to impose a structure of professional domination, is critique. See William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 *Wis. L. Rev.* 30, 52-59 (1978). It is a social-psychological claim grounded in a political theory which can say why domination is bad. (I do not suggest that Simon's claim is correct, just that, if correct, it is an illustration of critique.) Binder and Price's observation, on the other hand, that characteristics of lawyer questioning shape and restrict client responses is not (yet) critique, because it is only a

even in major part) original, as long as they are also coherent, intelligent, and genuinely open to further development. Clinical teachers do not have to be original political thinkers, but they should have a political dimension to their conception of the clinical subject.¹⁷

Political critique is the most important clinical objective for several reasons. To begin with, it is the objective most adapted to the university setting in which legal instruction occurs. Critique is a university's reason for being, its identifying characteristic, and the only one of its multiple functions it fails to perform at the price of being a university. Stripped of its critical role, the university is a mere socializing agent, an instrument of prevailing orthodoxy, engaged only in legitimation and control. One might be skeptical about the modern university's commitment to critique and this would be fair. Day-to-day university activity is often mundane; critique is rare, and socialization and control are commonplace. But critique is the university's highest function, its aspiration, the source of its greatest potential and its occasional achievement and it remains the strongest basis of the argument for the university's existence.¹⁸

The critical task is particularly important to the university law school. The ability to judge day-to-day law practice against objective standards of

social-psychological claim and cannot, on its own terms, say whether influencing client responses is good or bad. See Binder & Price, *supra* note 14, at 40-47. Binder and Price's analysis has an inchoate political dimension, but until that dimension is developed their analysis cannot be said to be critical. For some, identifying contradictions between another's theory (about which one has no position) and practice also counts as critique, and avoiding inconsistency or self-contradiction is the only necessary substantive norm. Guess has called this type of criticism "genetic" and found it wanting, in major part because of its ambivalence about substance. See Guess, *supra* note 12, at 26-44.

17. Clinicians have traditionally been more interested in social psychology than politics. See e.g., Menkel-Meadow's analysis of negotiation behavior, in which she makes claims that seem necessarily grounded in political theory but which are defended almost exclusively in social-psychological terms. Menkel-Meadow, *supra* note 15. For a beginning analysis of the political dimensions of negotiation and bargaining, see Gerald J. Postema, Coordination and Convention at the Foundations of Law, 11 J. Legal Studies 165 (1982); David Luban, Bargaining and Compromise: Recent Work on Negotiation and Informal Justice, 14 Phil. & Pub. Affairs 397 (1985). Nonclinical teachers are often no better than clinicians at incorporating political theory, but that is not to say that traditional and clinical teachers, as groups, are equally undeveloped. There is a large body of traditional legal scholarship drawing on critical social theory (see e.g., relevant excerpts from the following symposia or symposia facsimile: Critical Legal Studies Symposium, 36 Stan. L. Rev. 1 (1984); The Fiss-Brest Debate on Interpretation, 34 Stan. L. Rev. 739 (1982); Symposium: Law and Literature, 60 Tex. L. Rev. 373 (1982); A Symposium: The Public/Private Distinction, 130 U. Pa. L. Rev. 1289 (1982); Symposium on Legal Scholarship, 90 Yale L.J. 955 (1981), and individual articles, see e.g., Drucilla Cornell, Toward a Modern/Postmodern Reconstruction of Ethics, 133 U. Pa. L. Rev. 291 (1985); Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1 (1984), and this thinking increasingly is entering mainstream law teaching. In addition, because traditional law teaching materials (including casebooks) frequently embody critical perspectives, law teachers using such materials present such views even without trying to. While it would be better if these efforts were conscious, coherent tacit political analysis is better than none.
18. On the nature of the university, see Charles Wegener, *Liberal Education and the Modern University* (Chicago, 1978); Joseph J. Schwab, *College Curriculum and Student Protest* (Chicago, 1969); Laurence R. Veysey, *The Emergence of the American University* (Chicago, 1965).

justice and fairness is an essential quality of a good citizen and a good lawyer.¹⁹ Yet legal work settings make this kind of deliberation difficult. Lawyer tasks have predefined instrumental ends and lawyer roles come with a full complement of powerfully felt self-interests, and the combination of the two often distorts critical thinking and sometimes corrupts it. For most, law school provides the last unrestricted opportunity to take a larger view, where "work" itself obliges one to develop a conception of lawyer behavior that serves more than selfish ends. In an important sense, the obligation to pursue critique is heightened not diminished by the fact that law school is the last step on a journey into a profession.

In addition, in the legal system's educational division of labor critique of lawyer practices is the special domain of the clinical law teacher. Students learn about law practice from many directions and sources. Expert practitioners develop skills, law firms socialize, psychologists increase self-awareness, placement officers find jobs, traditional law professors teach about doctrine and analysis, and philosophers develop ethical sophistication. These processes occur in clinics, but good instruction depends upon both format and expertise, and in most of these subjects clinical teachers are not expert, at least not in comparison with persons who work with the subjects full time. For some of these subjects, skills training is the best example, clinicians are additionally disabled because unlike practitioners, they do not work with students for a long enough period of time for the instruction to take hold. (Skills are based on habit and habit takes longer than a semester to develop.) Clinicians have time and opportunity to analyze lawyer skill practices, however, they can develop the necessary expertise and they are likely to be the only persons in the students' educational process concerned principally with this topic. Not to pursue the subject is to fail to deliver on the clinical teacher's implied promise to teach about lawyer practices as a critical perspective on law.

Moreover, critique is the foundation on which the other clinical objectives rest. Even skills training presupposes critical judgments about what skills ought to be learned, in what order, and in what form, and these judgments in turn presuppose a conception of a fair and just legal system

19. Most conceptions of lawyer role require that a lawyer be a political and moral agent. Even in Fish's view, where there seems to be the widest latitude (see *Interpretation in Law: The Dworkin-Fish Debate* [Or, Soccer amongst the Gahuku-Gama], 73 *Calif. L. Rev.* 158, 168 [1985]), a lawyer must be capable of moral judgments and make them. See Stanley Fish, *Interpretation and the Pluralist Vision*, 60 *Tex. L. Rev.* 495, 501 (1982). For other conceptions of lawyer role representing radically different viewpoints, but all requiring a lawyer capacity for moral and political judgment, see Monroe H. Freedman, *Lawyers and Ethics in an Adversary System* (Indianapolis, 1975); Simon, *supra* note 16, at 130-44; Edward A. Dauer & Arthur Leff, *Correspondence: The Lawyer as Friend*, 86 *Yale L.J.* 573, 580-84 (1975); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *Yale L.J.* 1060 (1975). Perhaps Roy Cohn would not require such judgments but few have accused Cohn of being a political or moral philosopher. See e.g., Roy Cohn, *A Fool for a Client* (New York, 1971).

and the role of lawyer practices in operating and improving it.²⁰ One cannot say, for example, what kind of rhetorical and strategic maneuvering is proper in influencing an adversary to settle until one has worked out a moral and political view about how dispute negotiation ought to proceed.²¹ For example, we do not call a person who fabricates evidence and obtains a favorable settlement as a result, skillful; we call him dishonest. And a person who curses an adverse negotiator because he knows the adversary will be upset and bargain badly is often thought of as abusive not skillful, even when the tactic succeeds. The concept of skill has no meaning outside an ever-changing and controversial normative context and it must be studied in that context to be understood. Political critique is a necessary not just interesting part of the study of skill, therefore, and those who fail to engage in it are forever at the mercy of the prevailing "wisdom" of their environments and the tacit biases imbedded in their personal beliefs. The subordination of skills training to critique does not preclude clinical courses emphasizing skills. But such training ought not to come first, it ought not to be pervasive, and even when pursued for its own sake it ought not to ignore altogether the critical background questions temporarily bracketed.

In suggesting that clinical study ought to engage in critique of lawyer practices I make no judgments about the outcome of that critique. Many standard conceptions of and methods for performing lawyer practices could be improved,²² but I do not assume at the outset that these conceptions or methods are corrupt, or that they systematically deny justice to a substantial part of the legal client population. In fact, I would not be surprised to learn that, as the end products of a complicated set of necessary trade-offs and accommodations to practical realities, such practices reflect a kind of Burkean equilibrium that makes radical reform inadvisable.²³ The opposite also probably will sometimes be true. My present argument is only that clinicians ought to determine for themselves the extent to which each such situation exists.

20. It may be objected that critique also presupposes skill, and that a circle is the appropriate metaphor to describe the logical relationship between skills training and critique. Further, if this is true a claim that one process presupposes the other is nothing more than a claim about where one has broken in on a circle. This objection may be granted without conceding that critique is still the appropriate place to break in. A sufficiently clever mind can produce ground breaking analysis of processes not yet mastered, but masterful performance is rarely possible without a critical if in part inarticulate overview. Critique also lends itself more easily to self-contained study. A rich critical theory helps answer many of the questions it raises, but determining what is skillful in even a rudimentary way is not possible without resort to critical analysis. And, more damage is done in clinical work, both to clients and self, by students long on natural skill and short on understanding than by their opposites. Each of these reasons suggests that critique is the place to begin.

21. For a preliminary discussion of this issue see Condlin, *supra* note 8, at 133-35. See also William H. Simon, *Visions of Practice in Legal Thought*, 36 *Stan. L. Rev.* 469, 504 (1984) (even common sense practical judgments and compromises presuppose theories about the way the society is structured and what it permits).

22. I describe one such set of improvements in Condlin, *supra* note 8, 126-35.

23. See David Luban, *The Adversary System Excuse*, in *The Good Lawyer*, *supra* note 1, at 110-11 (description of a "Burkean" argument).

In the end, critique of lawyer practices is pursued for its contribution to the development of the individual—not to be unknowingly captive to received wisdom is to be more fully autonomous—because it is an essential element of a law trained person's completed world view, and as a foundation for reform of the incentive structures within which lawyer behavior operates. When it is present and done well, clinical instruction is successful and the simultaneous pursuit of other objectives makes the instruction that much better, but when it is absent, no amount of training in motor skill, socialization, or self-awareness can wag the dog. It is the only element of clinical study that is both a necessary and sufficient condition of good instruction.²⁴

II. Two Problems with the Conventional Clinic

Two features of the conventional clinic inhibit effective critique. I shall discuss the first as a problem of design, and the second as a problem of resources.

A. Design

The conventional clinic purports to be both law school and law office, and its supervising attorneys both law teachers and lawyers, who both produce data and evaluate it. These dimensions cross-pollinate, clinicians claim, to create in the clinic the best of both worlds, a critical practice and an informed and relevant critique. Perhaps this is correct and certainly it is worth exploring, but there are reasons for dividing the labor of lawyering from the labor of critique that arguments for the conventional clinic do not take into account.

To begin with, to conceive of a clinical teacher as both lawyer and professor, or as both data and critic, is to build into the role a conflict of interest.²⁵ There is an emotional stake in a personal work product that makes it difficult to see weaknesses let alone criticize them with others, particularly when one is viewed as an "expert" and not expected to make mistakes. In evaluating his own efforts a clinical teacher will pull analytical

24. Making critique the preeminent objective has several practical implications for the manner in which practice courses are typically thought about and taught. It is not important for critique, for example, that students perform lawyer skill practices with great frequency. It is enough that they see particular practices performed and do them themselves a few times until the elements and the steps necessary to their mastery are evident. At that point, time is usually better spent dissecting the practices for their essential properties, comparing them with alternatives, and evaluating their role in producing just outcomes. The critical clinical student is more of (though not completely) an anthropologist than a native. He becomes part of the lawyer-society, but also maintains enough emotional and intellectual distance to allow him to analyze that society's practices for their political and moral biases, presuppositions, and effects. He tries to understand why things are done as they are and enlarge his sense of what could be done, rather than internalize as habit what is commonly accepted.

25. It is also to define the role as encompassing two full-time jobs, and virtually to guarantee that neither will be performed at the level of excellence. Such a conception programs clinicians to fail, and ought to be rejected (especially by clinical teachers) for this if for no other reason.

punches, no matter how large his reservoir of earnestness and good will, and be oblivious to this fact.²⁶ If I am paternalistic in my relations with clients, for example, and evidence this by shielding them from unpleasant information, either by withholding it or presenting it in its "best" (i.e., inaccurate) light, but paternalism is not consistent with my image of myself or my conception of good lawyering, the insight that I am paternalistic is one I typically would screen out. Either I would not notice the behavior manifesting this pattern, or I would interpret it as showing concern for the client. Yet to teach from the behavior I would have to recognize and acknowledge the paternalism. Otherwise, I would teach about the wrong issue, and perhaps fail to understand the issue at all.

The negative effect of this screening process on student learning is often extreme. Not only will clinical teachers miss problematic patterns in their practice behavior, but they will miss patterns likely to be the most educationally interesting because they are also likely to be the most threatening. In an ideal world this would not happen. There, a clinician would be as critical of his own work as that of others, and most accounts of clinical study assume this ideal. But experience teaches that this is an optimistic assumption most of the time because it does not take into account the finely developed mechanisms all of us possess to shield ourselves from information about how far we have fallen short. We may listen to such information under the right conditions, but it is the rare one among us who is willing or able to be the messenger at the same time.²⁷ This is not pathological. Defenses are adaptive mechanisms that perform necessary functions in life. But one thing they do not do is allow one to know oneself by oneself.

To this it might be argued that in the conventional clinic the student's work is criticized and not the professor's. As a description of what typically occurs this is no doubt true, but as a claim about what ought to occur it is not. Practice instruction is the study of lawyer behavior and in this study student behavior is a small and often not very interesting part. Behavior of experienced and skilled lawyers, even if only a little more experience and skilled, must be added to the hopper if the study is to prove comprehensive and rich, and the supervising attorney's behavior is the logical candidate.²⁸ Clinical teachers can suppress discussion of their own efforts, of course, and many do, but at the cost of greatly restricting the scope and sophistication of their study.

It also is difficult in a clinical setting to separate student from supervisor work. Student decisions typically are reviewed in advance and students believe teachers have ratified important strategic choices before actions

26. Ferren, *supra* note 5, at 118-20.

27. Clinical participants who engage successfully in the critique of ideology (see note 13 *supra*) are a limited exception to this claim. This is a small group (if it exists at all), however, and even it should participate in the conventional clinic only after having completed all other parts of the full clinical sequence.

28. See Condlin, *Moral Failure*, *supra* note 1, at 322-25, for a discussion of the importance of teacher behavior to practice instruction.

affecting client interests are taken. Students say as much in after-the-fact discussions if the teacher is critical (“you told me it was all right,” or “why didn’t you tell me not to do it”). These are legitimate protests. Protecting client interests is more important than allowing students to learn from mistakes and when student choices jeopardize such interests it is irresponsible for teachers not to intervene. When teachers are implicated in even this secondary sense, as all conventional clinicians are, their defenses are likely to be mobilized and their analytical punches are likely to be pulled. At a minimum, valuable time will be wasted resolving the not very important question of whether the teacher said that the choice was all right. Clinical students should review work in advance—I do not suggest the opposite—but postperformance analysis is likely to be more probing if the professor is not already on record (even arguably) as having approved of the work.²⁹

Clinical students are not good critics of their professors’ work because students and professors are not true colleagues within the social and political structure of law school. The two groups have different levels of experience, status, perspective, and formal authority, and in each of these categories teachers have the upper hand, and often use it to suppress nonconforming views.³⁰ Clinicians sometimes pretend that they are no different from their students, but this usually appears patronizing or silly, and is the opposite of what the students bargained for in paying tuition. When clinicians report that students are effective critics, it is usually because they (the clinicians) have a unduly narrow sense of what can be said about their work, or because the student has learned what the professor would like to hear.³¹

29. These problems could possibly be reduced by assigning students to two clinical teachers, one to supervise skill performance and the other critique, but it is nearly as difficult to analyze the work of a close colleague as that of one’s self. Multiple supervisors are also expensive, particularly in comparison with the outside attorney option described in section III, and should be avoided when possible for this reason alone. It is not just that two salaries cost more than one, but that money spent for the extra salary will be used to duplicate something that already exists. In instances where the conventional clinic is the pedagogical format of choice, dual supervision is preferred. See *infra* 24-25.

30. See Condlin, *Socrates’ New Clothes*, *supra* note 1, at 248-74 (dominant pattern in clinical supervision is one of teacher manipulation and control, even when ostensibly the opposite). In part, this is because practice instruction typically comes at the beginning rather than end of a student’s clinical study, before he has had an opportunity to develop coherent views about lawyer practices or a vocabulary within which to discuss those views with another. A sequence of prerequisites would lessen this problem. See note 6 *supra*. I once claimed that the shared law-practice world of the clinic gave students confidence, knowledge, and critical perspective, and that these in turn increased student scrutiny of teacher pronouncement. See Condlin, *Moral Failure*, *supra* note 1, at 322. I now believe that claim to be overstated. See also Alan A. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 412 (1971), for a description of student conversational styles when speaking with faculty. While many of the insights of Stone’s important article are dated, its analysis of the student deferential style remains accurate.

31. To establish a truly nonhierarchical relationship, Simon has suggested that it is the responsibility of a teacher to “create [a student] capable of holding [the teacher] accountable.” See Simon, *supra* note 21, at 489. (Simon discusses lawyer-client relations, but the extrapolation to teacher-student seems fair and is one I suspect he would be willing

Additionally, when the attorney and professor are one and the same there is increased pressure to avoid critique. For example, an attorney/professor often will want to use clients for instructional ends when the needs of the client conflict, usually in the interest of student education rather than out of a disrespect for client autonomy. (The opposite problem can occur as well. A clinician who sees himself more as an attorney than professor may want to use students to perform routine representational tasks with little or no instructional benefit.) Thus, he might schedule extra discovery, hearings on motions, bargaining sessions, or the like so that students can try their hands at prized but infrequent tasks. Sometimes such procedures benefit clients, and other times they do not, but they are always costly, even to those who do not pay their lawyers (e.g., delay, extended uncertainty, unpleasantness), and the decision of whether the game is worth the candle is for the client to make based on client considerations. Since the student and attorney/professor describe the choices that must be made, and provide much of the information on which such decisions are based, the potential for loading the deck in the direction of educational ends is high.³² And because the same persons are also responsible for detecting self-interested action after the fact, the likelihood of discovery is low.

Lawyer-client conflicts occur in all practice settings, of course, but they are particularly pronounced in the monopoly conditions experienced by most clinics. Poor persons will not want to jeopardize their chance for legal redress by seeming "uncooperative" or "ungrateful," and will be susceptible to "suggestions" or "hints" that additional work needs to be done. A

to make.) This is either the student-and-teacher-are-equivalent view slightly dressed up, or a conception of expert-layperson relationships that makes conventional hierarchical thinking look like leveling. On this second and more interesting reading, teachers (or lawyers) not only are more powerful than students (or clients), they are so much more powerful that, godlike, they are able, even obliged, to "create" students in their own image and likeness. Yet, from the students' perspective, if it is difficult to deal with the conventional authoritarian bureaucrat, think of how much more difficult it would be to deal with God, or for that matter anyone unilaterally responsible for creating the possibility of my bilateral participation. This may read too much into Simon's view, but I doubt it. Few people are as facile with words as Simon, or choose them as carefully, and the religious perspective is consistent with his overall orientation. (See Simon, *supra* note 21, at 506.) Surprisingly Simon seems to think of his approach as egalitarian, and one in which law teachers (or lawyers) will not dominate. Like other Critical Legal Theorists (see e.g., Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* [Cambridge, Mass., 1983]), Simon seems phobic about hierarchies, and acts as if the overriding goal in life was to stamp them out. Since hierarchies have a nasty habit of not going away, this causes him to produce fanciful mystifications about the absence of hierarchy as a prelude to its reintroduction under the guise of nonhierarchy. (How is it possible, for example, even to describe a nonhierarchical relationship from the perspective of only one person, as Simon tries to do, particularly the person already dominant.) There are oppressive hierarchies in life and they should be destroyed, but to acknowledge this is not to say that hierarchy itself must go. Some hierarchies, both natural and artificially constructed, produce more benefits than costs and ought to be retained. In the end, the abuse of hierarchy, not its existence, is the problem in life, and practical suggestions about keeping hierarchy in check are needed from thinkers as thoughtful as Simon.

32. For an illustration of the low visibility and indirect manner in which a clinical student, with the best of intentions, can load the deck in favor of student ends, see Condlin, *Socrates' New Clothes*, *supra* note 1, at 276-77 note 12.

genuine desire to avoid controlling the choice on the part of the clinician does not make this risk any less real. In fact, because his motives are noble he may be less likely to be on special guard to detect self-interested action, though no less likely to engage in it, or to have interests different from those of his client.³³ And a clinic, because it is large and relatively undisciplined, may be less able to monitor closely all the interactions in which such problems are likely to arise. This is a variation on a familiar point, discussed in the early clinical literature as the conflict between service and education, and dismissed there by the assertion that work generated for educational purposes invariably improved the quality of the client's representation.³⁴ The argument was powerful at the time because the way in which clinical practitioner interests could differ from those of their clients or clients could wish to avoid procedures that provided instrumental benefits was not widely apparent. Now it is evident that the argument is too simple.

This conflict between service and education is exacerbated by limitations of time. In even a moderately busy clinic, preparation of client cases must receive the highest priority, looked at from the perspective of both lawyer and teacher (because giving client interests the highest priority is itself an important teaching message), and preparing cases thoroughly, as a law school clinic should, will expand to fill the available time. This priority is reflected in all aspects of the clinic's operation, but is perhaps most apparent in the patterns that appear in conversations between teachers and students. Most of these conversations consist of requests by students for information to fill gaps in their experience, or to help them make strategic judgments in their cases (what do I do next? where do I find a form for that?), and clinical teacher responses that answer these requests. The underlying assumptions are that there are set ways, known to experts, of performing lawyer tasks, and that a novice's best course is to ask an expert about them. Since few clinical teachers espouse these assumptions, it is ironic that in answering student questions they convey the opposite message.³⁵ Other discussion, often sophisticated, is about the manipulation of rules, procedures, and institutions for the purpose of gaining an instrumental advantage against an adversary. This "ends-means" thinking, as Anthony Amsterdam calls it,³⁶ like any puzzle-solving,³⁷ can be complicated and challenging, but it need not be critical political thinking, and usually it is not. The assumption in "puzzle solving" is that the

33. *Id.*

34. See e.g., Earl Johnson, Education versus Service: Three Variations on the Theme. *in* Clinical Education for the Law Student 414, 417-20 (Council on Legal Education for Professional Responsibility, New York, 1973).

35. See Condlin, Socrates' New Clothes, *supra* note 1, at 248-74, for a description of the manner in which patterns in teacher behavior convey instructional messages often at odds with the teacher's espoused theory.

36. See Amsterdam, *supra* note 5, at 614.

37. See Thomas S. Kuhn, The Structure of Scientific Revolutions 35-42 (Chicago, 1970), for a discussion of "puzzle solving."

structure of the puzzle is legitimate, so much so that awareness of the underlying question of legitimacy recedes into unconsciousness.

The foregoing is what one would expect of law office conversation. It is reasonable for students, as novices, to be preoccupied with impending instrumental tasks, particularly if client interests are at stake, the tasks are unfamiliar, and the students' role is defined as performing them successfully. The first objective in any environment is survival (though students do not always appreciate that this represents relative rather than absolute success). And it is only slightly less understandable that clinicians, as supervising lawyers, would answer student questions to prevent client interests from being sacrificed, office resources from being wasted, and student effort from coming to a standstill. This illustrates not so much the failure of individual clinical teachers and students as the inadequacy of the metaphor of the teaching law office. Law offices represent rather than teach, and when they try to do both it is the teaching that suffers, as it should.

Clinical participants will usually be satisfied with using legal rules and institutions cleverly on behalf of disadvantaged groups (a good thing in itself), and accept rather than criticize the premises of the system they so skillfully manipulate.³⁸ In a world where real client interests are in jeopardy, obligations are numerous and pressing, and time is limited, understanding for understanding's sake will not be given a high priority, and reasonably so.³⁹ In such a world questions about the justice of individual outcomes will sometimes be examined, though often only implicitly, but questions about the justice of systemic or institutional arrangements or standard practice methodologies will usually go begging. Ends-means thinking makes it difficult to see the forest for the trees and undercuts a lawyer's capacity for utopian thinking, an attribute one ordinarily would think desirable in a social engineer.⁴⁰

The conflict-of-interest problem is built deeply into the structure of the conventional clinic. It is not a cosmetic defect or a failure of execution, and it is not going to go away on its own as clinics and clinicians mature. If anything, it will become more serious as clinical practice slips into the routinized patterns of day-to-day law practice generally, as it has in many

38. See Walter Gellhorn, *Preaching That Old Time Religion*, 63 *Va. L. Rev.* 175, 187 (1977) (clinical teachers devoted to sharpening the adversary fang and claw); Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law*, 59 *Geo. L.J.* 1095, 1109 (1971) (public interest lawyers, while they otherwise test the law's bounds, profess a basic commitment "to the adversary system itself.")

39. The problem may be more serious than lack of time. Lawyer thinking differs radically from critical reflection. It starts from a narrower focus, looks at evidence from a more instrumental perspective, and is more manipulative in the manner it thinks of and expresses its conclusions. In a sense, legal and critical thinking are the work of different people, and a shift from one perspective to the other is a shift in personas. Most of us do not embody two such equally developed personas, and as a result, would find such a shift difficult to make.

40. See Robert Gordon, *Of Law and the River, and Of Nihilism and Academic Freedom*, 35 *J. Legal Educ.* 1, 8 (1985), where he faults minimalist stoic morality (professionalism) for not dealing with the "real world" of law practice because it gives no guidance on what lawyers ought to do; it cannot imagine alternatives to the status quo and does not think it should.

places. Even exceptionally able teachers, who are genuinely interested in critique, will find it difficult to pursue that process in such an environment and this brings us to the second problem. A disproportionate number of clinical teachers seem uninterested in critique, so much so that even if the problem of design were corrected, critique would not necessarily become the central objective of the conventional clinic. This is the problem of resources.

B. Resources

Clinical teachers seem to view prevailing methods for performing lawyer practices as received wisdom rather than data, and measure success more by how students imitate these methods than by how they analyze them. This is evident, not just in the design of the clinic, where clinicians have created a world in which critique is almost impossible, but in the absence of critical interests manifest in the scholarly clinical literature. Most clinical articles describe how students learn that practicing law requires skills beyond being able to read a case closely, and different examples are given.⁴¹ This is not a startling discovery, however, and it is made with equal facility by students who have not had the benefit of a clinical course. A second category of articles, often interesting and clever, catalogues and refines lawyer tactical tricks.⁴² But these articles consist of "puzzle solving," and do not so much establish the critical dimension as presume it. There are a few critical clinical articles,⁴³ but they comprise a regrettably small group that seems more an aberration than a harbinger of things to come.

41. See e.g., William Pincus, *The Clinical Component in University Professional Education*, in *Clinical Education for the Law Student*, ed. William Pincus, 139-51 (New York, 1980).

42. See e.g., Michael Meltsner & Philip G. Schrag, *Public Interest Advocacy: Materials for Clinical Legal Education* ch. 13 (Boston, 1974); Mark K. Schoenfeld, *Strategies and Techniques for Successful Negotiation*, 69 A.B.A. J. 1226 (1983).

43. Such articles include Carrie Menkel-Meadow's *Problem Solving Negotiation*, challenging prevailing adversarial conceptions of lawyer bargaining (see Menkel-Meadow, *supra* note 15); Simon's *Homo Psychologicus*, detailing the lack of a politics in the psychological vision of lawyering underlying clinical education (see Simon, *supra* note 14); Bellow's discussion of paternalism, lack of imagination, and lawyer self-interest imbedded in legal services offices' standardized methods of representing the poor (see Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA Briefcase 106 (1977); and Schrag's, *Bleak House*, describing abusive uses of the civil discovery process by the collection industry (see Philip G. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. Rev. 115 (1969). (See also Tushnet, *supra* note 5, at 278, and articles cited therein at notes 12-15.) This group of articles has produced surprisingly little discussion by clinical teachers. A few nonclinical teachers have joined issue (see e.g., James R. Elkins, *All My Friends are Becoming Strangers: The Psychological Perspective in Legal Education*, 84 W. Va. L. Rev. 161 (1981) replying to Simon); but these are clinical subjects and one would expect clinical teachers to have important contributions to make. Simon's strong accusations, at a minimum, should have provoked a reply and a debate clarifying whether clinical instruction has a politics, but this has not happened. (But see Menkel-Meadow, *supra* note 5, at 565 note 61, clinical teacher response to Simon in a footnote.) Some will see this assessment as overly pessimistic. They believe that clinical scholarship has begun to mature, or more accurately, has "passed beyond infancy into adolescence." See, *Call for Papers, Brochure of International Conference on Exploring and Expanding the Content of Clinical Legal Education and Scholarship*, Fall 1985 (U.C.L.A. and University of Warwick Schools of Law). If this was intended as a compliment (twenty years is a long infancy), and there is every reason to believe that it was, the written record as yet does not support it.

Some might argue that the criticisms of substantive law implicit in clinical education's decision to represent poor people, and explicit in legal arguments made in briefs and memoranda filed in particular cases, fulfill the obligation of critique. But beyond the fact that most brief writing is not critique,⁴⁴ this claim fails because clinical teachers were not hired as commentators on substantive social welfare law schemes. Their subject was thought to be lawyer practices (if one thought about it), and ultimately, they were expected to ask whether existing methods for performing such practices produce more or less justice. The substance/procedure distinction ultimately collapses, and some substantive law criticism is an inevitable outgrowth of clinical study. But using lawyer practices for under-represented groups is not the same as analyzing those practices for their contribution to a just legal system, or conceiving of better ways to structure that system, and only the latter are the *sine qua non* of clinical study.

There is a second, contingent dimension to the resource problem, one grounded ironically in clinical teachers' own mistaken premises. If skills training (rather than critique) is viewed as the preeminent clinical objective, most existing programs would still fail, this time because clinical teachers are not typically the best exemplars of law practice skills.⁴⁵ Medical

One hesitates to raise the problem of the lack of critical clinical scholarship. It is not a cordial point, some even think it is an impolite one, and such points have a way of being ignored irrespective of their merits. But there is not much critical clinical literature and this is a serious cause for concern. One looks in vain at the history of legal education for a successful reform not grounded principally in a revisionist theory about law, legal systems, or institutions. Reform of education is first and foremost reform of ways of thinking about subject matter, manifest in scholarship. Changes in methods of instruction are cosmetic not substantive, based more on aesthetic than political concerns, and usually only as viable as the power of the group instituting them is strong. Such changes rarely survive their sponsors, or their sponsors' current interests. Like reformers before them, from the law-as-science advocates of the late nineteenth century, to the critical legal studies theorists of the late twentieth, clinical teachers must say something new, in print, about the fairness, legitimacy, and nature of law and the legal system. The special vantage point of lawyer practices makes this possible, but does not guarantee that it will happen.

44. A few clinical teachers argue that briefs should count as critical scholarly output, but this claim is based on a misunderstanding of critical scholarship. But see Tushnet, *supra* note 5, at 277 note 11 ("Legal briefs are not, *by definition*, inadequate evidence of scholarly insight"; (emphasis added). Critical scholarship does not start from the perspective of a client's instrumental ends, articulate only arguments supporting those ends (and rebuttals to counterarguments necessary to establish credibility), or try to camouflage its biases, weaknesses and strategic omissions rhetorically by the use of argumentative technique. Some scholars work in this way, but their work is thought to be suspect for those reasons. By the time a scholar writes he usually knows how he will conclude, but he did not start with this knowledge in hand, and his views will have changed many times over before reaching reflective equilibrium. The key difference between the two processes is that in critical scholarship the author decides for himself the outcome of the analysis; in brief writing he does not. Brief writing often contributes new insights to the understanding of a problem, such is the force of self-interested and narrowly focused thought, but rarely if ever does it alter basic conceptions of the way in which the problem should be understood.
45. While it is difficult to establish the best skill exemplars, it is fair to say that as a group clinical teachers (1) were not the best performers in law school, (2) are young and inexperienced in comparison with the bar as a whole, (3) do not work in elite law firms or with anything approximating such firms' facilities or resources, and (4) because they work

clinicians are a good analogy. They are elite practitioners, at the top of their fields, and their appointments as clinicians acknowledge this stature rather than attempt to confer it. Although clinical work does not always have the highest status, in medicine only the best practitioners become clinicians. If clinical skills are to be learned by imitation, the medical view seems to hold, those being imitated should exemplify the best skill performance the profession has to offer. One would expect law schools to use equivalent exemplars, experienced lawyers who have established themselves as foremost among their peers at the performance of lawyer skills. Yet, few legal clinicians are elite practitioners or in any other way the equivalent in stature, competence, or sophistication of their medical counterparts.

Clinical teachers counter that while not always the best at using lawyer skills they are the best at teaching about (i.e., transmitting) them; that they make up in pedagogical effectiveness what they lack in experience and proficiency.⁴⁶ This argument has initial appeal, but in the end it concedes too much. If a clinician has not performed the skills under study at or near the highest levels, he cannot transmit any interesting understanding of those skills. This is the premise of clinical education, that experience is a necessary component of understanding. He may transmit what he understands well, but this will provide only a misleadingly simple conception of the skill, and may unwittingly convince students that there is no more to be learned. A similar lack of experience does not disable a clinician interested in critique because he does not seek to transmit skills and thus need not have mastered them. In fact, his critical bite is often sharper when he is "inexperienced" with the skills and thus not fully socialized into prevailing practices and modes of thought.

Neither variation of the problem of resources is likely to go away. Elite practitioners will not become clinical teachers because it would cost them

with novices on relatively simple cases (usually by pedagogical choice) are not likely to be on the frontiers of new skill developments. There are exceptions to each of these generalizations, and good arguments that the criteria implicit in them do not measure skill proficiency accurately. But for most law trained people who do not start out determined to believe the opposite, I suspect that the above factors establish a fairly powerful circumstantial case against the claim that clinical teachers are the best skill exemplars. For attempts at the difficult task of rank ordering ("stratifying" would be their word) the bar, see John Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (New York, 1982); Francis Kahn Zemans & Victor Rosenblum, *The Making of a Public Profession* (Chicago, 1978).

46. If clinicians are willing to suspend the "experience" requirement for themselves in this one instance, why not for other people in other instances? Why not agree that a person with no experience, either with the skills in question or law practice in general, who is sufficiently smart and asks interesting questions, can be as good a clinical teacher as one who has mastered the skills in their most sophisticated variations? For example, why not Roberto Unger in the clinic? On this article's view such an idea makes sense, but to accept it, even in part, is to reject conventional clinical thinking. One would think that clinical teachers would be eager to give up the no-win claim to skill expertise. Most students understand from summer and part-time work that clinicians are not the best practitioners, and traditional faculty do not believe that law teachers who ground their intellectual authority on skill expertise are thoughtful. Even as a strategic matter, it is hard to imagine why clinicians would cling to such a position.

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too much. They will not view the opportunity to do research and produce scholarship as a form of compensation. Nor will they, as do their medical counterparts, be able to generate large fees on the basis of their clinical work. They will want to be compensated within the salary structure of the bar, however, and this means larger salaries than law schools are capable of paying. Moreover, existing clinical teachers are not likely to shift their emphasis from training to critique because they do not want to, and might find it difficult to do so if they did. If critique was their highest value clinicians would have behaved differently from the start. They would have developed the intellectual content of the clinical subject in the journals, provided additional room in the structure of the conventional clinic for reflection on policy questions only tangentially related to skills or the instrumental tasks of particular cases, and would not have used fieldwork to carry the brunt of clinical instruction. In addition, having established the clinic as a practicing law office, clinicians have now created legitimate expectations in client groups (or at least sincerely and reasonably believe that they have), that cannot be repudiated unilaterally or easily, either in the short run to redesign programs or permanently to devote more attention to questions of critique.

The conventional clinic is often described by students as a haven from the harsh world of law practice, where one gets a last chance to live according to ideals. This view (i.e., that ideals play no part in traditional law practice) is arrogant, coming from persons with little or no experience with practice in the conventional sense, and dangerous (because it reflects a resignation to the mundane yet changeable features of regular law practice which must eventually be confronted). But most important, even if correct, it is a questionable premise on which to base an educational program. The safe-haven concept was tested in the T-group—an experiment of organizational psychology to help managers learn to produce more open organizations—with mixed and short-lived results. Laboratory training, as it was also known, developed skill at behaving competently in laboratories, but was not so successful at transferring learning “back home” to work.⁴⁷ Law schools should think carefully before they replicate this result by resuscitating the T-group and making it a permanent part of the law school curriculum.

Students should learn about lawyer practices, to be sure, but in a setting that represents the one in which those practices are typically carried on.

47. See Fritz Steele, *Consulting for Organizational Change* 60-82 (Amherst, Mass., 1975) (characteristics and limitations of laboratory training); Donald N. Michael, *On Learning to Plan—And Planning to Learn* 225-64 (San Francisco, 1973) (description of structural features of conventional social organizations, not present in T-groups that resist learning); William R. Torbert, *Learning from Experience toward Consciousness* 45, 166 (New York, 1972) (limitations of T-group learning); Chris Argyris, *Intervention Theory and Method: A Behavioral Science View* 52-55 (Reading, Mass., 1970) (individuals learn to be competent in T-groups but not to create more open and trusting worlds “back home” in work); Leland P. Bradford, Jack R. Gibb & Kenneth D. Benne, *T-group Theory and Laboratory Method: Innovation in Re-education* (New York, 1964) (enthusiastic description of the potential of the T-group learning).

This means existing law offices and not hybrid variations specially created for the occasion. Protection against being overwhelmed by the vocationalism of the law office milieu or its concomitant pressure to turn intellectual analysis platitudinous or instrumental should come from a law professor who intervenes when these dangers threaten. Trustworthy data about student performance⁴⁸ and access to mentors with critical agendas are the only essential features of good practice instruction, and most of the time these will be easier to produce in a format other than the conventional clinic.⁴⁹

III. The Cooperating Outside Office Alternative

Practice instruction could be based in cooperating local law offices of all types both public and private,⁵⁰ without any loss and potentially some gain in intellectual sophistication and critical perspective. A student would work on cases or projects pending in an outside office and in every respect fit into the office's customary ways of doing things. He would take his primary skill direction from an outside attorney, whose principal concern would be with the technical quality of the student's work. The attorney would assign tasks, edit written work, enforce deadlines, evaluate skill performances, and otherwise be the final supervisory authority with respect to all efforts on behalf of the client. In addition to his supervision by the outside attorney, the student also would meet with a clinical professor in a regularly scheduled tutorial to discuss the policy questions implicit in the student's practice. Tutorials make it easier than seminar meetings to preserve client

48. The most common example is a transcript of the relevant portions of an audio-tape recording of the performance under study. A text is important. Analyzing performance on the basis of shared memory or oral reconstructions is roughly akin to analyzing doctrine on the basis of eyewitness accounts of a reading of a judicial opinion. It may be possible, but no one would ever try to do it.

49. Some students inevitably will work for law firms in which skills training is poor or nonexistent, and law schools are right to be worried about this. But it does not follow that a clinical course is the place to remedy this problem. More informed placement counseling and better continuing legal education programs are more logical responses. A school should define a clinical course's purposes positively in terms of what it can add to a student's critical understanding of the legal system, rather than reactively in response to worst-case scenarios about new-lawyer work experiences. A course must have educational integrity, and for clinical courses that integrity is found in a critical appraisal of lawyer practices and the relationship of those practices to justice.

Additionally, some argue that law schools ought to run clinics as state-of-the-art law firms where students work with the latest technology and are introduced to up to date theories of law office management. Most schools could not afford to do this, and if they could they should not want to. Concern with technology and management is a concern with form over substance. The interesting things about law practice are legal not technological, and a law professor's most important contribution to a student's learning is in the realm of ideas about law. Technology and management can be interesting adjuncts to that study, but they cannot replace it.

50. These could include private law firms, legal services offices, public interest organizations, legislative and municipal law departments, attorneys-general offices, administrative agencies, courts, or any other type of office engaged in legal work about which a clinical program could want to teach. I have used the outside office format, as described here, for several years in my own clinical teaching, and the following discussion is based on that experience.

confidences,⁵¹ and can be held at fixed times because the professor and students are not tied to the schedule of the clients' cases.

An example will help illustrate the differences between the attorney and professor supervisory agendas.⁵² Assume that a student encounters the following problem:⁵³ A landlord has started eviction proceedings against a client of the student's firm for damaging a rental premises. One of the items of damage is a broken front door window. The client tells the student that he knows a passerby threw a snowball through the window because he found a puddle of water in the front hall next to the broken glass. The student is suspicious because it has not snowed in the vicinity yet that year (it is November and the interview takes place in southern New England). Assume also that the client is unfriendly, equivocating, and generally reluctant to talk. The student believes, not implausibly, that the client broke the window himself and is lying about the snowball to cover this up. Possibly being lied to makes the student angry because he believes that it shows him little respect, and fearful because he thinks it will make him look like a novice when he presents the story to a supervisor. He brings these and other issues to his meetings with both the outside attorney and the clinical professor.

The attorney would be interested principally in obtaining information necessary to put the client's story in its best light as a defense, or, if the evidence did not warrant a defense, to persuade the client to concede on the issue of the broken window. As a first step, he would probably identify maneuvers that could be used to test the client's story. These might include obtaining factual information from sources independent of the client that would make the story more or less plausible (e.g., local weather bureau snowfall and temperature records); informing the client of the attorney-client privilege and assuring him that incriminating information would not be revealed without consent; restating the story, pointing out problematic areas, and asking the client for further explanation or proof; cross-examining the client to demonstrate how the story might be shown in court to be implausible; accusing the client of lying and demanding that he deal honestly; or whatever else came to mind. Testing the story without rupturing the attorney-client relationship would be a difficult task, calling for intellectual inventiveness and practical expertise, but a task the student must learn to perform.

The clinical professor would have a different yet complementary set of objectives. These might include exploring out-of-the-ordinary instrumental

51. See Confidential Communications in Student Legal Clinics, 1972 Law & Social Order 668 (1972) (description of the difficulties in preserving client confidences in law school clinics).

52. For an illustration of the differences between thinking like a lawyer and thinking like a critic, see Jon O. Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 Yale L.J. 1643 (1985). Judge Newman's suggestions are the type of ideas which critically inclined clinicals could be expected to generate and test. Yet a reading of his proposals will show just how sharply they contrast with the typical clinician's substantive agenda.

53. This example is real and comes from my own clinical supervision, but its generic features are so commonplace that any clinical teacher could offer an equivalent substitute. Several have told me that they have supervised the same case.

resolutions to the problem which had not occurred to the attorney or had occurred and seemed unpromising;⁵⁴ or what is more likely, using the client's behavior as a vehicle for examining the epistemological and moral difficulties inherent in the process of reconstructing historical fact in adversarial adjudication. For example, the professor might probe the concept of "lying" to determine whether it explains all of the client's actions or the student's worries; question whether structural features of the attorney-client relationship encourage or provoke such behavior; ask what obligations a lawyer owes to one who has not communicated events accurately; try to define the nature of truth telling in a system of stylized discourse or lying games; consider whether tactics for "testing" the story raise new problems, such as invasion of client privacy or lack of respect for client autonomy; examine the role a harsh law, sympathetic client, or hostile adversary plays in determining what to do; ask how else facts could be investigated and presented in dispute settlement so as to reduce the pressure for creating a "best light" story; or take up related questions.⁵⁵ The professor's inquiries might produce benefits for the client, but the decision to undertake them would not depend upon the guarantee of such a return nor would it ordinarily be expected. Both attorney and professor would take an agent-centered approach, in that each would attempt to develop understanding useful to the student while acting in lawyer role. The attorney would be interested in immediate returns, however, while the professor would take the longer view.

It is easy to give other illustrations. Assume, for example, that a student participates in a negotiation in which an adverse attorney exploits his (the student's) low level of tolerance for conflict. The adversary makes *ad hominem* arguments, shouts, threatens, and otherwise abuses the student because he judges that the student will seek to end the confrontation more quickly and pay client money to do so (i.e., the student will flee rather than fight). Assume also, that with all of its costs both immediate and long-range, on balance this is still the attorney's instrumentally best approach. It will achieve the highest dollar settlement, in the shortest period of time, with the smallest amount of expense, and with few if any long-range repercussions because the attorney will not negotiate with the student again. A supervising attorney would be interested in what the student could have done to prevent himself from being abused, while a professor might take up such questions as whether a settlement based on nonsubstantive considerations is politically legitimate or whether there are moral limits on the uses of leverage.

54. See e.g., Saul W. Baerstein, Functional Relations between Law and Psychiatry—A Study of Characteristics Inherent in Professional Interaction, 23 J. Legal Educ. 399 (1971) (description of a psychiatric remedy to an ostensibly legal problem).

55. These questions are eclectic in their intellectual perspectives and are meant only to suggest the range of critical avenues open to the clinician, not identify the precise questions that should be asked. For an illustration of a set of multiple questions, generated from a single analytical framework, that would be interesting to pursue in this context, see James B. White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. Rev. 684, 701-702 (1985).

Issues raised by the professor also will come up in attorney-student discussions, but because they are not closely connected with preparing the client's case they are likely to be kept in the background.⁵⁶ The attorney and student might refer to the issues in passing, but the professor and student would examine them in depth. The professor would suggest readings⁵⁷ and the student would prepare texts (e.g., in the "snowball" case a transcript of the interview segment in which the student elicited the questionable parts of the story)⁵⁸ on which analysis could be based, and these materials would be distributed sufficiently in advance of a tutorial meeting to allow time for reflection and judgment. Since it would not be possible to investigate all important issues in such detail, representative examples embodying recurring themes would be chosen. In the outside office format the attorney and professor complement one another in their approaches to the student's supervision, and together help the student discover how instrumental and critical perspectives intertwine to make a complete frame of reference.

One might ask why fieldwork is essential to the student-professor discussions. Could not the same analysis be done in the classroom, perhaps in a more sophisticated fashion, based on social science research data and scholarship about the profession? If one is interested in lawyer behavior in the aggregate, a sociology of the profession, then perhaps the answer is yes. Though even here there is benefit in discovering how patterns that are problematic in statistical aggregates or verbal descriptions do not always appear so when confronted in experience. But if one is interested in a moral philosophy of lawyering it is necessary to deal with these questions in the first person. Moral understanding is arrived at by critical reflection on

56. This could be for personal as well as work concerns. The professor's questions may challenge the attorney's conception of role or his standard methods of performing lawyer tasks. The attorney is likely to filter out such interpretations because they are distracting under the best of conditions and threatening under the worst. The professor's emotional distance from the representation, and his critical rather than instrumental approach to the interview, on the other hand, should increase the likelihood that these possibilities are considered.

57. In the "snowball" case these might include excerpts from Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York, 1978) (discussion of difficulties in defining lying, particularly in stylized and role regulated relationships); Stuart Hampshire, ed., *Public and Private Morality* (New York, 1978) (suggestion of argument for lawyer control of clients, based on analogy to ends-focused morality of public officials); John H. Langbein, *Comparative Criminal Procedure* (St. Paul, Minn., 1977) (description of alternative systems for reconstructing historical fact in dispute adjudication); Robert Traver, *Anatomy of a Murder* (New York, 1958) (illustration of the force of lawyer behavior in influencing client communication); Luban, *supra* note 23 (criticism of fact reconstruction process in adversary adjudication); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 *N.Y.U. L. Rev.* 63 (1980) (discussion of psychological difficulties created by behaving differently in professional and ordinary relationships); Simon, *supra* note 16 (proposed nonhierarchical conception of lawyer-client relationship); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 *U. Pa. L. Rev.* 1031 (1975) (discussion of proposed ethical rule requiring lawyers to pursue truth in adversary adjudication); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Problems*, 5 *Hum. Rts.* 1 (1975) (description of dominating and manipulative patterns in lawyer behavior with clients and analysis of moral propriety of such patterns), and the like.

58. A text is important. See note 48 *supra*.

activities that have been experienced pre-reflectively and begun to be internalized as dispositions. Until disposition is present, at least in some minimal or beginning form, the moral character of action cannot be fully understood. Without the experience of acting in lawyer role moral philosophizing will be just so many words.⁵⁹

In addition, just as an anthropologist discovers aspects of a culture lost on a demographer, a clinical participant discovers aspects of lawyer behavior lost on a classroom observer. In participating in an event one discovers what drives it, and this is different from learning how to describe the event, even with a great deal of particularity. The professor's questions would have been asked in other law school courses, but for most students direct experience will add nuance and sophistication; and for some it will make the questions real for the first time. A lie is a more complicated phenomenon in person than in a hypothetical case, and the experience of perhaps being lied to stimulates additional insight into the nature and causes of such activity. It is often inconceivable to students that a misrepresentation could not be a lie, for example, or that someone they were trying to help could misrepresent to them, that they could unknowingly and with the best of intentions lead a client to misrepresent, that strong personal feelings could affect their level of effort, or that they would not probe deeply to discover truth if it would jeopardize other strategic objectives. Until they are involved in such events, students do not take seriously the possibility that the events could happen, or become aware of all the factors involved in understanding and dealing with them.

Direct experience with lawyer role also causes practice instruction to take a firmer hold. This is not only because the richness of real life data makes the experience more memorable, but because students approach real problems with a heightened seriousness of purpose. Research on simulation gaming shows that students play at academic exercises in ways that circumscribe their learning.⁶⁰ Law school counteracts this phenomenon in the first year by making class activity lifelike (case analysis is performed in roughly the same manner as in law practice),⁶¹ and important (first year grades and the effects they produce place a ceiling on future work options), but once case analysis is mastered in at least a rudimentary sense, and class standing is established, there is no equivalent pressure in second- and third-year courses, even though there are many subjects still to be understood. A teacher can be charismatic, or restrict enrollment to mature students, but putting students in real situations has similar effects and is more easily attained. As long as such programs are no more costly than their traditional counterparts, and the outside office program is not, there is no overriding objection to their use. This is not an argument for the pervasive use of

59. See Condlin, *Moral Failure*, *supra* note 1, at 323-24, for a discussion of this point.

60. See e.g., Jeffrey Z. Rubin & Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* 297-300 (New York, 1975), and discussions cited therein.

61. See Condlin, *Moral Failure*, *supra* note 1, at 340n. 15.

clinical fieldwork, only a few clinical subjects are taught best out of real cases, but for advanced seminars of the type described earlier.⁶²

Organizing a practice program dispersed throughout many offices might appear difficult logistically, but this is true only if one is concerned with using the offices to train students to master skills. If the goals are understanding and critique, a professor need not monitor student experience closely. A working familiarity with each student's law firm, an understanding of the customs of local practice, and the student's experience captured in some relatively accurate form (such as a text) would be enough. This data need only be evocative enough to recreate the relevant experience in the student's mind when it comes time for analysis. There would be no such thing as a "teachable moment," lost to posterity if its meaning was not analyzed the instant it occurred. Critical reflection would occur whenever the student and professor could meet, and for several reasons it might be better if this happened well after the student's performance had taken place. This is an instance in which different instructional goals make for different logistical concerns.

Periodically, compromises may have to be made in this format to accommodate structural features of law practice. Clients do not make themselves available for limited purposes, for example, quietly bowing out once a student has accumulated enough experience to sustain a period of critical reflection, and this is true whether one works in an outside office or a conventional clinic. But these compromises are kept to a minimum when the clinical professor and student are not solely or even principally responsible for the representation of the client. With a separate attorney protecting the client's interests no problem is created when instructional objectives require the clinical participants' attention elsewhere. This is a major advantage of the outside office format.⁶³

Lawyers will cooperate with an outside office program for several reasons. The largest number will help out of a desire to contribute to law student education. Lawyers are law students once removed, and most can remember when they too were novices and helped along by members of the profession. Others will value the opportunity to talk with someone who understands their problems and can give them a second (and third) opinion on their work. Graduates or friends of a school will help out of a sense of loyalty, while others will like the prestige that comes with being affiliated with a

62. See note 6 *supra*.

63. Not wanting to be embarrassed before one's peers and students causes (and should cause) conventional clinicians to prepare cases compulsively. In doing so, however, they leave little time or energy for critical reflection. A sigh of relief is the typical postperformance reaction, and searching discussion about the improvement of performance is of little interest at that moment to all but a few genuine saints (with high metabolism rates). (Many assert that they engage in searching postperformance critique, but close examination usually shows their definitions of "searching" to be controversial.) Energy returns, of course, but time does not, so that when interest in critique reemerges there is more pressing work on other cases. If clinicians are to do worthwhile critique, at a minimum, they must be freed from the all-consuming burdens of public performance which go hand in hand with client representation.

university law school, or see students as free (or nearly free) resources with which to augment their client services. Having to make few adjustments in their day-to-day ways of doing things will make it easier for lawyers to accept such a program. Because the lawyers provide data more than instruction any of these motives is acceptable.

The behavior of cooperating lawyers must be reasonably competent and the issues raised by their practice moderately complex if outside office work is to generate interesting critical insights. These requirements may cause difficulty for schools located in communities where the quality of practice is not high or the type of work not sophisticated, and in these circumstances operating a conventional clinic may be the wiser course. Sophisticated practice does not inevitably mean antitrust or First Amendment work, however, or cases not likely to be found in small- to medium-sized cities. Cases can be interpersonally rich even when doctrinally simple, particularly when examined through the prism of a well-developed conceptual framework, and interpersonal skill is found in small communities as well as large. In fact, increased access to skill exemplars and a less-pressured pace in which to discuss issues can make the small community preferable much of the time.⁶⁴ Clinicians argue that practitioners cannot be trusted to illustrate skill expertise, and give a dozen or so local examples to support their claim. When I make the opposite assertion, I also have only a dozen local examples in mind, but for my claim a dozen examples is proof.

Some may fear that lawyers will resent being thought of as data and refuse to cooperate with a program that looks at them in that way. If true, this would be an important concern for the outside office format because of its heavy reliance on lawyer cooperation. But the concern need not materialize if the clinical professor understands and appreciates both his and the attorney's role. A skilled lawyer has internalized a sophisticated repertoire of habits, beliefs, motor skills, tacit theories, and practical wisdom that are indispensable to good law practice and almost impossible to duplicate. A clinical course must provide access to such expertise or it shortchanges instrumental concerns and has nothing on which to ground its critical analysis. Clinicians cannot provide this expertise because typically they do not possess it and if they do, they cannot be both data and critic. The outside attorney is the professor's necessary and coequal collaborator, and he must be viewed in that light.

64. I have taught in clinical practice programs in two small cities (Charlottesville, Virginia, and Bloomington, Indiana) and one large one (Boston, Massachusetts), and found the small city preferable on almost every count. In small cities judges and lawyers have more time to spend with students and take it, cases proceed in a more timely fashion, procedural mechanisms are applied as written rather than short-circuited because of time and caseload pressures, and clients and witnesses are more accessible and thus available for more extensive consultation. There are problems with small city practice, of course, but if casework is over the sophistication threshold (which is not high—small cases are now thought the best teaching vehicles even in big cities), they are more manageable problems. The small communities I have had experience with have had at least 50,000 citizens. Small town and rural practice seems different, see Donald D. Landon, *Clients, Colleagues, and Community: The Shaping of Zealous Advocacy in Country Law Practice*, 1985 Amer. Bar. Found. Res. J. 81 (1985), and may not be as adapted to clinical practice instruction.

The clinician must also recognize that his task is not to pass judgment on attorney work. He asks why issues are defined, options limited, and choices made as they are, but these are questions about the profession as much as any particular attorney, and more important, they are questions, not competing conceptions of appropriate skill performance advanced indirectly under the guise of inquiry. The professor is engaged in studying the profession, not grading it. In fact, patterns that appear problematic to the professor might well turn out to have more to be said for them than the professor has surmised. Because he often will lack the attorney's more extensive knowledge of the situation, the professor will be wrong or at least incomplete in his analysis a fair amount of the time. In those instances when specific attorney decisions are properly called into question, the professor's comments should interest the attorney as much as the student. Insightful evaluation, if presented badly, can provoke resentment, but this is a failure of execution, not design. Thinking of the outside attorney as data is a respectful view and enough lawyers will understand it in that way. Those who do not usually do not make good clinical supervisors.⁶⁵

The outside office program has several further advantages over the conventional clinic. To begin with, it does not make a disproportionate claim on the limited law school resources of money, credit hours, and student time, and until it can be shown that there is something special about the conventional clinic that claim is greedy. I have taught clinical courses in every credit hour format, from full semester for fifteen credits to three-hour seminar, and in both conventional and outside office settings, and have found no knockdown arguments for the benefits of the conventional clinic. Thus, I do not think that such a special factor can be shown to exist. More important, an outside office program is likely to generate more critical insight than the conventional clinic because it separates critique and those who do it (professors) from producing data for critique and those who do it (lawyers). It is not a problem that a professor sympathizes with a lawyer's position, in fact this is often helpful, but when the first reaction to a work product is to defend rather than analyze it (even if unself-consciously) the professor is not performing effectively as a law teacher. Professors are less likely to identify emotionally with the decisions being evaluated, their defenses are less likely to be triggered, and the full range of their critical insights is more likely to be available for discussion with students when the work being reviewed is not their own or that of a close colleague.

The outside office structure parallels that of the traditional law classroom, in which the teacher feels little emotional identification with the opinion being analyzed. Because clinical teachers and students work with persons whose decisions they sometimes question, the analogy to the classroom is not perfect. But these differences can be seen as presenting an opportunity to teach about learning from colleagues, not a self-evident or

65. See Condlin, *Socrates' New Clothes*, *supra* note 1, at 248-74; and Kreiling, *supra* note 5, at 300-306, for discussions of the difficulties in this process.

easy process when done well.⁶⁶ Students can record conversations with supervising attorneys in which they are both giving and receiving evaluative comments (the students' own, it is important that the students not become mere messengers for professor commentary) and analyze those transcripts for their "learning-mode"⁶⁷ properties. Learning to learn can become part of the clinical practice instructional agenda. Even here, emotional distance from the particulars of the conversations under study, even if not complete, is a valuable quality in the professor's direction of the analysis.

The outside office is also more representative of the so-called real world of law practice.⁶⁸ The caseload and client population are usually more diverse, presenting a wider choice of analytical problems and personality profiles. The absence of a captive client market in many of these offices makes the attorney-client relationship, in Douglas Rosenthal's phrase, more participatory, though as Rosenthal also shows the freedom to hire someone else does not always act as a check on lawyer domination.⁶⁹ Decisions about quantity and nature of the work to be done are in the hands of lawyers not professors, who are likely to give their contracts with clients and the limits of their resources priority over their agreements to help students learn. Client goals and limitations on resources are powerful constraints on lawyer learning in all but the conventional clinic and are boundaries within which students must learn to operate. The differences between an actual law office and a clinic can be overstated, but they are real differences nonetheless. If it is possible to live a full, critical life of the mind in the practice of law, it must be possible and it is certainly necessary to show how this is done in an actual law office. Students ought to be skeptical of anything less.⁷⁰

Ironically, a variation of the outside office format also may be equally suited for training in practical skills. Two things are necessary to train in skills: (1) a set of images of excellent performance which can become standards for evaluating one's own efforts, and (2) the opportunity to rehearse a skill and review that rehearsal until the motor dimension of the skill is under control. Access to elite and senior practitioners allows the outside office to offer a larger catalogue of excellent skill images and thus helps students develop more sophisticated standards of practice. Opportunity

66. Having practitioners and professors work in teams, in which one member takes principal responsibility for skill judgments and the other for critique, is at least as likely to produce the type of reflective practice proponents of clinical education say they want as the present strategy of trying to make single individuals (whether lawyer or professor) equally adept at both processes. In this respect, the outside office format contains the seeds of an alternative conception of law practice that makes it as much a program of structural reform for the legal profession as a pedagogical innovation. It also provides a beginning vehicle to help law schools exploit the educational potential of part-time work by students.

67. See Condlin, *Socrates' New Clothes*, *supra* note 1, at 235-42, for a description of "learning mode" properties.

68. No single office is representative of practice as a whole, and this increases the risk of overgeneralization, see note 6 *supra*, but this is a problem principally for clinical programs that rely on fieldwork for all of their data.

69. See Rosenthal, *supra* note 8, at 29-63.

70. Cf. Gordon, *supra* note 39, at 8 (to impart "professionalism" law school courses need the example of successful real world lawyers).

for drill is more difficult to provide, but if the professor is willing to supplement casework with simulation exercises in the skills under study, little is lost in the way of improved performance. Because simulation exercises can be designed, manipulated, and repeated, they are more likely than casework to develop desired habits, and habit is the foundation of skill. In fact, it is an illusion to believe that skill proficiency can be acquired in the semester or year available for the conventional clinic, where drill is and cannot be continuous. Preparing simulation exercises places more of a burden on the clinical professor, but that is not an objection to the format.

Because cooperating attorneys will delegate less work than conventional clinicians the outside office will present fewer opportunities for students to perform certain types of lawyer tasks (e.g., argument to court, examination of witnesses, deposition taking, and other publicly performed skills). Decreased opportunity to perform is traded off for increased opportunity for critique, however, on the belief that over time critical analysis of early practice experience pays greater dividends than the experience itself. In an ideal world an outside office would provide the same practice opportunities as the conventional clinic, and on occasion it will be possible to find such offices. But most of the time in establishing a practice program a choice must be made between creating opportunities for experience and opportunities for critique, and I suggest that critique be chosen.

Adoption of the outside office format is likely to have effects over both the long and short term. Over the long term it will encourage more critically inclined persons to enter clinical teaching. New law teachers will not be discouraged from choosing clinical subjects by the prospect of running a law firm or being the attorney of record on a large number of cases. They will know from the outset that practice responsibilities will not be mandatory, and to the extent that such responsibilities are chosen, they will not be so all-encompassing as to prevent teaching in nonpractice formats, doing research, or writing. In the short term, the model will free existing clinicians from the impossible burden of being equally adept at both practice and critique. Some will discover that they prefer practice and redesign their teaching toward that end, while others will decide the opposite. Either decision, as long as it is freely made, works to the benefit of clinical teachers and law schools alike.

The outside office model also provides a framework within which the clinical efforts of traditional law faculty can be conceptualized and coordinated. With varying but sometimes great frequency, traditional teachers offer clinical courses in areas of their substantive expertise. Arrangements for fieldwork are made on an *ad hoc* basis, and typically do not continue beyond the end of the course. Such efforts ought to be encouraged because they help flesh out a school's clinical curriculum and involve all of the faculty in the important task of studying lawyer practice behavior.⁷¹ Many traditional teachers have a good deal to say about lawyer

71. See W. Burlette Carter, Robert Gordon Gives Twenty-Fifth Holmes Lectures: Traces the Tradition of American Lawyers to Present, 80 Harv. L. Rec. 4-5, 16 (March 1, 1985), on the importance of studying lawyer behavior.

practices but need a format that does not swallow them up. The requirements of coverage and coordination suggests that someone ought to work in the clinical field full-time, but clinical study property conceived is too important to be left only to clinicians.

Finally, it should be made clear that the outside office format is not a move backward toward the "apprenticeship" model of the late nineteenth and early twentieth centuries.⁷² Apprenticeship trivialized practice instruction by emphasizing mundane information (e.g., where to find the proper form) and mechanical skills (e.g., arrangement for service of process). Students were used as mere resources, or often forgotten altogether for large parts of the time spent in their mentors' offices. Clinical teachers, as heirs to the apprenticeship tradition, devised the conventional clinic as a means of avoiding these abuses. The key to intellectual quality control, it was thought, was to place instruction under the exclusive direction of a full-time law teacher, and the easiest, in fact, only sure way to do this was to create a law office within the law school itself. This was a reasonable view two decades ago, when the content of clinical study was largely undefined and format was the only thing about which one could be certain. But as that content has begun to emerge, rigidity about format looks increasingly like a "compulsory chapel" view.⁷³ As identity develops, fewer environments are threatening.

An outside office program is likely to avoid the abuses of apprenticeship and the so-called farm-out clinics because it locates the teaching function in a law school professor rather than an attorney, and places emphasis on critical understanding rather than on acquisition of skill, information, or lore. The student is judged on his analysis, not performance of lawyer practices, and experience is important as data, not for its own sake. In the end, an outside office program embodies the best features of apprenticeship and the conventional clinic, access to mainstream law practice and practitioners from one, and full-time law professor instruction from the other, and combines these features with the critical perspective of the university at large to form the next logical step in the development of formats for clinical practice.⁷⁴

72. For discussions of apprenticeship see Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* 3, 10-11 notes 5, 6 (Chapel Hill, N.C., 1983); and E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. Rev. 695, 722-27, 731-43.

73. See Robert Stevens, *Preface*, 1977 B.Y.U. L. Rev. 689, 692-94.

74. An argument for the outside office format is not an endorsement of existing clinical externship, internship, or farm-out practice programs. Most such programs have skills training as their goal and use the outside office only to help keep costs down. Since skills training is the wrong objective for a practice program these programs are misguided from the start. The key to a successful practice program is a clinical teacher interested in critical not instrumental questions, of the sort illustrated earlier in the discussion of the "snowball" case. See notes 54-56 *supra*. The outside office format is important, not in itself, but as the structure most likely to attract clinicians with critical interests and to provide adequate opportunity for those interests to be explored.

IV. Qualifications, Variations, and Problems of Implementation

The foregoing remarks should not be read as an unqualified dismissal of the conventional clinic. I mean to suggest only that the clinic is not an indispensable feature of clinical instruction, not that it should never be used. Schools that have not yet invested in a clinic may want to think twice before doing so, but those that have made the investment need not abandon it. The conventional clinic performs several functions better than the outside office, and these will remain important functions to perform. To begin with, a law school, as part of its obligation of good citizenship, could establish a clinic to provide legal representation to persons or interests that would otherwise go unrepresented.⁷⁵ Instructional benefits from such an office would be considered desirable but not essential to its continued support. Several schools whose clinics predate the clinical education movement seem to have acted on this motive, and others may have.⁷⁶ This reason is compelling to many though not all, and a school said to have established a clinic for such purposes ought to have debated the issue in those terms.

The remaining functions are connected more directly with instruction. One involves the situation mentioned earlier in which the quality of local practice is not high, or the nature of local casework not sophisticated, and a law school clinic is the best means for providing students with individual and organizational models of excellent practice. Here, the clinic is chosen because it is the lesser of all evils. The conventional clinic is also better suited for those students who need to take their first law practice steps in smaller increments than outside law firms can economically accommodate. Such students require smaller than average assignments, regular and frequent access to supervisors, and supplementary counseling and support. When ready, however, even these students ought to work in outside office programs where they can try out newly developed skills and understanding under conditions more representative of future work settings.⁷⁷

A conventional clinic established for the above (or other) reasons, still should be structured as much as possible along the lines set out in this discussion. Supervision of lawyering should be separated from critical analysis (e.g., students should have two supervisors), critique should be given priority over skills training, and supervision should be approached as the elaboration of a body of ideas rather than the production of a set of experiences. Some of these tasks will be difficult to accomplish in the

75. See Bloch, *supra* note 5, at 322 note 3, and articles cited therein for a discussion of clinical education's citizenship obligation.

76. Possibilities with which I am familiar are Harvard, Tennessee, Chicago, Denver, Pennsylvania, Maryland, Boston College, and Georgetown law schools.

77. The conventional clinic is also better suited to the critique of ideology. See note 13 *supra*. To transcend ideological constraints professors and students must be both lawyers and professors and generate data about their simultaneous participation in each role. The conventional clinic guarantees such data, but the outside office does not. Critique of ideology is the most advanced form of clinical study, however, and ought to be undertaken only after a student has completed the full clinical sequence, including the outside office program.

conventional format but it is better that they be realized partly than not at all. None detracts from what the conventional clinic would otherwise contribute to student learning.⁷⁸

The ideas proposed here may encounter some resistance. Students, for example, may presume that the conventional clinic is superior to the outside office for two principal reasons. First, for many students working on live cases is new and exciting, much like being in the first semester of law school all over again, only better because this time the study is obviously relevant to law practice. Often, it does not matter that the training is unsophisticated and uncritical in some larger sense, as it did not matter in first year that case analysis was often simplistic. What is important is that it is "real." Critique of lawyer practices may look overly academic by comparison and come at a time when student tolerance for academic approaches is low. Second, students may prefer the increased responsibility for client interests the outside office delegates because they think it is a sign that they are being treated as adults.⁷⁹ Not respecting student maturity is a serious law school problem, and students are right to want more adult treatment than law schools typically provide, but the problem is not solved by the temporary and limited measure of placing students in clinics. This uses the clinic as a placebo and leaves the law school social structure relatively intact. Development of genuine respect for student maturity requires different measures.

Clinical teachers also make a variation of the "responsibility" argument. The clinic is the best place to teach responsibility, they say, because being in charge of a client's case develops character, speeds up maturation, and reduces the risk of undependable lawyers being loosed on an unsuspecting public. To an extent this is true. Taking responsibility is an important part of learning to be responsible, and work on a client's case is as good a vehicle for taking responsibility as any. But instruction depends upon format and expertise, and there is no evidence to indicate that clinical teachers are expert at understanding or teaching about the process of becoming responsible.⁸⁰ Lawyer skill practice, not maturation, is the clinical subject

78. Law schools also ought to experiment with other clinical practice formats. One with promise has schools with office space to spare renting it—along with rights to the library, special access to students, and the like, to existing law firms at below market rates in return for the firms' agreements to provide clinical practice opportunities and to allow themselves to be studied. Participating firms could be chosen on the quality of their work, organizational characteristics, subject matter concentrations, or whatever other features a school wished to draw on in its practice courses. In this model, a firm would maintain its structure and identity, but operate out of a law school so to speak. This approach has several advantages, not the least of which is that it gives law schools access to more experienced and elite clinical mentors. Terms of the contract between a school and a firm would take careful thought, but it is conceivable that the obligations on each side would not be so onerous as to prevent affiliation. Such a project is now under way at the University of Maryland Law School.

79. But see Condlin, *Socrates' New Clothes*, *supra* note 1, at 248-74 (illustration of how ostensibly respectful supervisory behavior can in fact be manipulative).

80. For example, in the scholarly literature few if any clinicians draw on or show an awareness of the considerable body of psychological and philosophical literature on moral development.

matter, and most clinicians go beyond the limits of their competence when they leave the realm of skill practice behind. Interestingly enough, this argument, like so many others for clinical instruction, focuses on a peripheral feature that is part of all law study, traditional and clinical alike. Such arguments make it seem as if clinical study has no distinct contribution to make to the study of law, that there is no discrete body of ideas which is central to understanding law and specific to the clinical vantage point.

In addition, students are likely to be more interested in social and political critique of lawyer practices than they initially realize. Their impressions of working in law firms often are uninspiring because they have not had the opportunity to interpret or criticize those impressions in all the dimensions they associate with good thinking. It is the instrumental, simplistic, or noncritical nature of their observations which is troublesome, more often than the subject of law practice itself. Students are surprised to discover the critical side to clinical study but find such analysis satisfying and important once it is understood. When these impressions seep into the collective consciousness of a student body at large, agitation for conventional (as opposed to more) clinical instruction usually abates. Those who are troubled by all forms of authority will continue to see the conventional clinic as the only work in which they can be their own bosses, but this concern is not one that law schools will be able or should try to relieve.⁸¹

It might be more difficult to persuade clinical teachers of the merits of the outside office format. Part of the reason, I suspect, is that clinicians are more often practitioners than scholars or critics of law practice, and are more interested in training than critique. They have a conception of lawyer skills to transmit, a tacit belief in the staying power of the present system for adjudicating disputes, and a desire to inculcate the best-known ways of manipulating that system.⁸² But they are less interested in conceiving of alternative institutional arrangements or new practice methodologies. This is more than a concern with preserving a conception of clinical teaching one knows how to do best. Even the non-self-interested clinician will give critique a low priority if he believes he can practice successfully without it; and it is easy for him to believe this. Critique's contributions to practice are subtle, indirect, and incremental over time, so as not to be easily perceived by a person preoccupied with other important and pressing tasks.⁸³ Unless he values critical understanding for its own sake and is willing to suspend judgment on its practical value, a clinician will view almost any specific instance of it as unimportant, and the issue will come up only in specific instances. Reasoning from this mistaken premise, he will have no cause to doubt his conclusion and no experience on which to base the opposite conclusion. He will not discuss this belief publicly because it is not highly

81. A more critical approach to clinical study might also attract top-ranking students, who now often avoid clinical courses as too vocational.

82. See note 38 *supra*.

83. See Simon, *supra* note 21, at 503 (contribution of critical theory to practice is indirect).

regarded in the law school environment, but he will believe in and act on it nonetheless.

Some clinical teachers once espoused critical objectives but at different points gave them up to represent clients and run law offices. The prospect of changing the world for the better through the power of law and law students was the principal motive. An army of law students marching forth from clinics, uncorrupted by money or the desire to make it, was seriously considered to be one of the poor's best hopes. The romantic nature of this vision may have enhanced its appeal to the former legal services lawyers who made up most of the cadre of early clinical teachers. For others, running a law office was a familiar and enjoyable task, and one that was easier to perform successfully under the often hostile scrutiny of traditional law faculty. Those who followed this route soon found themselves managing bureaucracies, but by the time they realized this they had invested too heavily in their choices to back away (those who wanted to). With this background, clinical teachers might understandably resist the suggestion that the conventional clinic is limited in basic ways.

A few clinical programs are structured along the lines described in this article. They divide lawyering from critique and give critique the higher priority, conceive of the clinical subject as a body of ideas rather than a set of experiences, and evaluate students not on their performance of lawyer practices but on their understanding and criticism of them. These programs are not often defended in these terms, but I suggest that such a defense would be more coherent and would explain better the aims of the programs. Persons in charge of such programs will find the arguments to this article easy to adopt because they have been speaking prose all along.

V. Conclusion

From even this limited discussion it should be apparent that prevailing conceptions of clinical practice instruction are no longer adequate. Practicing law is not the same as critically understanding law practice, and by conflating the two the conventional clinic is likely to produce the worst of both worlds, routinized practice and self-interested critique. Practice is a precondition to critique, to be sure, but in an educational setting it must also be subservient to it, and this is difficult to attain in the conventional clinic. Some will see this appraisal as unduly negative, and believe that it stems from a lack of sympathy for clinical instruction in general. This would be wrong. The development of the practice clinic is a milestone in the history of American legal education. Beyond its rejuvenation of law school pedagogy, the clinic called much needed attention to lawyer skill practice as an independent variable affecting the justice of the legal system, and created many of the conditions necessary to integrating the study of that practice with more traditional parts of the study of law. For its contributions, both realized and inchoate, the clinic is now an enduring part of the story of legal education, and rightfully so. But as is often the case with potentially radical reform, momentum weakened before potential was realized and clinical education as implemented became an instrumental shadow of clinical education as conceived. The clinical vantage point, a modified "bad

man" view that looks at legal norms from the perspective of how they will be manipulated by lawyers, still has the potential to inform our understanding of legal theory and law practice at the most sophisticated levels. But for this potential to be exploited new clinical formats must be created, ones that provide time for detached critical reflection, and are concerned with expanding our understanding of what is possible more than with passing on what is presently known. If this restructuring is not undertaken, the clinical education becomes trapped in static, instrumental, and mechanical conceptions of law practice, no matter how clever, it will and should remain at the curricular margin. Clinical study must evolve—not to survive, clinical positions are secure for the foreseeable future—but because there is still work to be done.