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The Moral Failure of
Clinical Legal Education

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This paper discusses some undesirable effects of the "clinical" education movement on the teaching of professional ethics in law school. Specifically, two questions are considered: (1) Why was clinical education expected to be a superior means for teaching professional ethics to law students? and (2) How well has that expectation been met? Section I defines clinical education. Section II synopsizes the currently prevailing arguments for the superiority of clinical instruction in professional ethics. Section III analyzes the theory of education that clinical instruction presupposes, reports on empirical research about teacher-student behavior patterns in clinical instruction, and describes how those behavior patterns could lead to the development in students of ethically questionable or inappropriate habits and beliefs. Section IV looks more closely at the origins of clinical education in speculating about why clinical education has failed. Section V concludes with proposals for reform.

I

Clinical legal education is defined typically as instruction in *interpersonal skills* (e.g., interviewing, counseling, negotiation) and *professional ethics* (the moral principles that regulate the behavior of lawyers in role) in

the context of student *fieldwork* (representation of actual clients with live cases in law offices created by law schools for this purpose) under the *supervision* (systematic, critical analysis of student work) of a lawyer/ law teacher.[1] Each of the emphasized elements is important, and the absence of any one weakens the claim that instruction is clinical. Most clinical programs established during the last two decades follow this model.[2]

It must be added that a wide range of other types of practice-related instructional programs are called "clinical."[3] These programs include: practice court simulations of litigation (particularly trial) problems that students are asked to act out;[4] ad hoc faculty-student research into litigation and law practice skills;[5] extracurricular volunteer work for legal aid offices, "public interest" organizations, and government agencies, often called "internships";[6] equivalent uncompensated (except through course credit) work for private law firms, sometimes described as "downtown seminars";[7] practice-skill exercises grafted onto substantive law courses and usually referred to as "clinical components";[8] and classroom cognitive instruction (sometimes interdisciplinary and with or without parallel simulation exercises) in the interpersonal processes of law practice.[9]

Clinical education differs in two ways from apprenticeship training, the form of lawyer education replaced at the end of the nineteenth century by the university law school.[10] It looks for content more to the interpersonal dimension of law practice—its psychology and ethics—than to its administrative tasks (e.g., finding the courthouse);[11] and it gives critical self-analysis of student work priority over the absolute quality of that work.[12] This emphasis on psychological and ethical subject matter and critical self-analysis has important practical consequences. For example, students in clinical programs work on fewer cases, examine more dimensions of their cases, and have less responsibility for initiating and carrying on discussions about their work than did neophyte lawyers in apprenticeship training.[13]

Clinical education is also commonly described as a new teaching methodology, the components of which are: "1) student assumption and performance of recognized roles within the legal system; 2) teacher reliance on this experience as a focal point for intellectual inquiry and speculation; and 3) motivational tensions which arise out of ordering the teaching-learning process in this way."[14] There is no doubt that clinical instruction proceeds through this methodology. Whether the methodology is new to law teaching is not so clear. The above elements seem equally constitutive of the so-called "Socratic dialogue"—a first-year law-school teaching method in which students take on the law-firm associate role of intellectual apprentice and solve analytical puzzles within a mentor's definition of a problem. The roles assumed in first-year and clinical courses differ greatly, but the two teaching methodologies are conceptually more alike than different.[15]

What seems most innovative about clinical study is its use of the unstructured and multidimensional world of law practice as a setting,[16] and its explicit consideration of interpersonal dynamics as a subject. These attributes add a new set of questions and a rich new source of data to the study of doctrine, policy, and analytical technique that have heretofore made up the study of law.

Measured in volume of course offerings, clinical education has constituted the most substantial change in legal education in the last two decades.[17] Starting from voluntary, unsupervised, extracurricular student practice in the legal aid offices of a few law schools (e. g., Pennsylvania, Denver, Harvard),[18] clinical education reached a high-water mark in 1977 when 139 law schools reported 494 programs of instruction set in 57 substantive fields of law.[19] (The numbers for 1978 and 1979 are roughly the same.)[20] From 1970 to 1976 alone, the number of schools reporting clinical programs grew by 39 percent, the number of programs by 192 percent, and the fields of law in which programs were offered by 307 percent.[21] The number of law professors reporting clinical education among their teaching interests in the Directory of Law Teachers grew from 107 in 1971 to over 700 today.[22] In legal education, the 1970s were the decade of the clinic.

II

The first question I would like to take up is this: Why was it expected that clinical education would be a superior means of teaching professional ethics to law students?[23]

I shall begin with a typology of ethical problems faced by lawyers, taken from Richard Wasserstrom. Wasserstrom identifies two basic ethical problems for lawyers: (1) the problem of manipulation—"that the [obligation of zealous representation triggered by the] lawyer-client relationship renders the lawyer at best systematically amoral and at worst more than occasionally immoral in his or her dealings with the rest of mankind"; and (2) the problem of domination—"that . . . the lawyer-client relationship [itself] . . . is morally objectionable because it is a relationship in which the lawyer dominates and in which the lawyer typically, and perhaps inevitably, treats the client in both an impersonal and a paternalistic fashion."[24] Wasserstrom sees these criticisms, if well founded, as fundamental, and I agree.[25] They suggest, among other things, that law practice involves treating both clients and third parties instrumentally, that is, subordinating their personhood to the lawyer's desires. They raise issues of whether professional expertise will be used to restrict rather than enhance client autonomy[26] and abuse rather than respect legitimate rights of third parties. Ironically, these issues receive virtually no mention in the Code of Professional Responsibility.[27] Yet, as one commentator put it, "These are crucial matters with enormous impact on law practice."[28]

Clinical education, it was believed, would confront these ethical problems in two ways, one substantive and the other methodological. Substantively, clinical education would analyze the interpersonal skills (e.g., interviewing, counseling, negotiation) of law practice. This substantive focus was supposed to make explicit the student's moral stance toward clients and third parties and, in the words of one commentator, "compel the examination of personal ethics, morality and individual conceptions of professional role."[29] In this view, ethical issues were seen as inescapably embedded in issues of interpersonal technique. It was not thought possible to consider questions of what would work, without simultaneously considering questions of what was right.

This expectation was not farfetched. The close link between ethics and technique in clinical study can be seen in accounts of the nature of clinical practice.

> Often because of the time the students spend in the research of their problems, they come face to face with the possibility of using some technical plea to win or delay a case. This gives the staff members an opportunity to discuss with the students the lawyer's responsibilities to the client, the public and the court in the use of technical pleas where delay is the only thing that can be gained. If time is needed for factual investigation or for better preparation of the case, discussion is had as to whether or not a delay is proper through a technical plea. Is it proper to use such where the purpose is to drag out the case to force a settlement?[30]

> Our experience with students in a clinical setting suggests . . . a number of troubling phenomena. . . . [T]hey experienced considerable difficulty with their role as attorneys, and with the interpersonal, emotional dimensions of the problems they encountered. This went deeper than the archetypal questions of professional responsibility courses, e.g., Should I defend a man who admits his guilt? Should I prosecute a man under a statute with which I disagree? Should I allow a witness to testify when I suspect that he is not telling the truth? These questions, of course, were present in abundance, and generated the feeling common among practitioners that the people who wrote the rules never had to function under them. What was also present, however, in far less resolvable form, were questions totally ignored in the Code of Professional Responsibility and in legal education. To what degree can or should I impose my judgments on the client's perceptions? How do I control my fear, anger, and sympathy for the client? To what degree are my judgments influenced by class, race, and caste? In negotiating, when does my manipulation of perception, uncertainty, and attitude become "dishonesty," or go beyond the limits of proper conduct?[31]

The link between technique and ethics also appears in the ostensibly psychological literature in which clinical study is grounded.[32] The principal clinical coursebook devotes one-third of its total pages exclusively to discussions of professional ethics and professional responsibility, and discussions of ethics and technique are intermingled freely throughout the remainder of the book.[33] Similarly, textbooks about lawyer skills

discuss both types of issues interchangeably to a lesser but still significant degree.[34] One commentator even conceptualized the subject of professional responsibility in terms of a psychological taxonomy, suggesting that the study of professional ethics was appropriately the study of the internal psychological and emotional conflicts that ethical dilemmas presented,[35] while another called the "application of ethical canons to specific cases" a practical lawyering skill.[36]

This blending of psychology and ethics in the clinical literature is understandable. The ethicist and the psychologist often deal with the same data and ask similar questions.[37] Each is concerned (in social relationships) with divisions of power and responsibility, the limits and uses of authority, the clarification and expression of values, the issues of domination and manipulation, and the encouragement of autonomy and free choice.

On the other hand, effectiveness, including effectiveness at psychological "technique," and goodness are not always the same, particularly when relationships are multiparty (e.g., client-lawyer-adversary) and obligations vary or even conflict. One person's effectiveness can be another person's oppression. Clinical education's propensity to work with psychological (to the exclusion of political and philosophical) concepts may prevent it from identifying and considering such problems,[38] and prevent it from taking full advantage of factors such as the lawyer's character in directing and restraining lawyer behavior.[39]

Perhaps even more important than this substantive approach to ethics, clinical education confronts ethical issues methodologically as well: clinical students actually practice law.[40] Moral issues are thus raised in ways that differ from those of traditional instruction in three crucial respects: (1) the issues are confronted in the first person, in the lawyer's role, with ready-made motivational tensions—instead of Pi and Delta and their lawyers, the parties are real and their lawyer is *I*; (2) the problems appear in the full richness of a real-life factual situation; and (3) all student work is done as part of a bilateral partnership with a skilled practitioner/teacher, who models appropriate behavior at the same time that he or she criticizes student performance.

The central feature of this process is its conscious use, both in theory and practice, of the dynamics of role adjustment. This process generates a number of epistemological and motivational consequences of enormous importance. For example, "experience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases . . . in a classroom. The way in which ideas are understood after they have been used feels different in a sense that is not fully explained by the fact that they are more readily remembered."[41] This is particularly true of ideas about values, much of whose content is lost when understood in a purely intellectual way.[42]

The process of role adjustment also triggers a need to know and justify. The necessity of performing an unfamiliar task produces a strongly

felt desire for some cognitive framework for coping with the anxiety that unfamiliarity generates and giving consistency and coherence to one's behavior. Since role adjustment is intimately tied to the student's sense of self, the motivational energy generated by this need is very high.[43]

These epistemological and motivational consequences alter the teacher-student relationship. To be sure, traditional law teachers are responsive to student demands to be sources of competency, understanding, and entertainment, yet few students formulate these demands critically, concretely, and coherently. This freedom of faculty pronouncements from critical scrutiny is in part attributable to the absence of any shared teacher-student context or frame of reference within which criticism could be formulated. Clinical teaching provides this context, in the form of a shared law-practice world, in which students gain confidence, knowledge, and critical perspective through performance with their teachers of lawyer role tasks. This, in turn, increases student scrutiny of faculty pronouncements.[44]

In the same vein, clinical work requires choice and judgment to a degree absent in other law-school instruction. Students are responsible for the choices that are the subject of clinical teaching and must live with the consequences in a way that makes the problem of responsibility a meaningful concern.[45] As Meltsner and Schrag note:

> Issues of professional responsibility . . . loom large on the clinical agenda. . . . Should they [the students] drown adversary litigators in a sea of paperwork, lie to adversaries for bargaining advantage, or decide, as a legal aid lawyer, to represent one type of client rather than another when resources are too scarce to represent both? Clinical courses are superior vehicles for sensitizing students to these issues, because the student must actually make a choice among competing options. Unlike the student in the classroom, he cannot stop after pointing out the risks and costs inherent in each available course of action, but must actually select one of them, execute it, and incur the associated costs. His decision may well be irreversible, and he will have to live with its consequences for weeks or months thereafter.[46]

Underlying the foregoing substantive and methodological points are two foundational claims, one psychological and the other philosophical. While infrequently voiced, these claims are in my opinion implicit in any plausible argument for the superiority of clinical education for teaching professional ethics.

The psychological claim grows out of the work of Erik Erikson[47] and has to do with the way that adults develop values. The claim responds to the sotto voce criticism of legal ethics courses that "only a fool would suggest that [a] law teacher could recast a twenty year old liar or do much else about the fundamental values which his environment has instilled in him."[48]

To some extent this criticism is valid. By the time a person reaches the age of twenty, her or his personality is well set. Yet, the development of identity[49] in the twentieth century has undergone what Alan Stone calls a "crucial variation."[50] Our society prolongs adolescence by extending education, which in turn delays role commitments (such as occupational choice) attendant on adult status.[51] Thus, major parts of a person's identity are kept open for quite a long time. It is in these open areas—including commitment to and definition of occupational roles—that professional ethics instruction can have a significant impact.

Because law students do not usually think explicitly about their roles as lawyers, the development of their professional identity results largely from emulation of role models—those who are respected, or in some cases feared or hated, for their performance of lawyering roles.[52] The need for appropriate models is intensely felt, so much so that almost all observations of experts acting in roles, both in and out of law school, will affect the professional character-shaping of law students. This is why ideas about professional behavior gathered from practicing lawyers and law faculty are grasped eagerly and imitated quickly, even when such practices border on the unethical.

Of all law-school instruction, clinical programs are designed best to exploit the process of role-model emulation for teaching about professional ethics. In observing ethically scrupulous lawyers acting in recognized lawyer roles, students are required to make the fewest translations or transpositions of instructional messages. They have an exact model of the behavior they are to emulate. And they have an opportunity to try out that new behavior under the observation of a skilled supervisor to make whatever adjustments are necessary. Little could be done to improve upon such a design.

The foundational philosophical claim, which traces its roots to Aristotle,[53] has to do with the way that virtue is known. Following Kelly,[54] I shall call it the "activist view." It holds that only someone who has had the experience of acting in a certain way is capable of knowing the principle embodied in that way of acting. Principles are arrived at by reflection upon activities that have been experienced prereflectively and internalized as dispositions.

A person learns virtues by imitating good people and good actions. Critical reflection on what is learned, to articulate and harmonize habit with principle, is an important but chronologically second step in the process. The neophyte, who is being inculcated in virtue by imitating virtuous acts, need not (and in fact cannot) be aware at first why it is that the acts imitated are virtuous; rather it is enough to do them because "good" people make her or him do them. After a while the habit of acting in a good way becomes one's own. At this point the student of virtue has made part of her or his moral potential a disposition, and when he or she then reflects upon the nature of the good actions he or she can understand their virtuous character. Until disposition is present, the moral character of action cannot be fully understood.

The intellectual activity involved in moral matters is thus a kind of practical wisdom, a capacity for judging particulars on the basis of dispositions informed by deliberation. This faculty is what helps one to decide what to do when different sorts of values that are not necessarily commensurable all bear on the situation.[55] Because the content of moral principles is not fixed independently of activity, however, without the requisite experience even an intellectually gifted person is not capable of knowing such principles.

If one believes in activist moral epistemology, it seems indisputable that the clinic provides the ideal setting for the moral education of lawyers. Only in clinics can students imitate the good actions of good lawyers responding to moral conflicts and then reflect on their response in the company of a good supervisor. And only by experiencing and then reflecting on what it is to act correctly as a lawyer can they come to understand and articulate a principled ethical viewpoint.

It should be apparent that the arguments for clinical instruction in professional responsibility are arguments about potential, not results. The arguments do not claim that existing clinical programs provide superior instruction in professional ethics, just that such programs could, if used properly. There is no hard evidence that students trained in clinical programs behave more virtuously than students who have not taken such courses. Even the first-person reports of student clinical learning turn out to be remarkably unsubstantiated when examined closely. The foregoing arguments taken as a group, however (since none are mutually contradictory), make out a strong prima facie case for the efficacy of clinical instruction in professional ethics.

III

This brings us to the second question: How well has the expectation for clinical instruction in professional responsibility been met? This question may be read in two ways. The first asks whether the ethical content of clinical instruction has effectively taken hold. Do clinical students behave in practice as they are instructed in the clinic? I do not know the answer to this question and shall say nothing about it. The second asks whether the content of clinical instruction ought to be learned. Do clinical teachers model behaviors that are ethically admirable? To this question my answer is, "to a large extent, no." The remainder of this section is an attempt to defend this answer, which may surprise those who find convincing—as I do—the arguments of the preceding section.

To begin, let us look more closely at the theory of education implicit in the preceding section. It views clinical learning as a felicitous combination of two models, which may be described as "learning by doing" and "learning by imitating." In the first model, the student practices law, interacting with clients, adversaries, witnesses, judges, social workers,

etc.—call this group the "cast." The teacher observes these interactions as an objective outsider and gives the student commentary. We may represent this situation as follows (the solid line indicating interaction, the broken line indicating observation):

"Learning by doing"

Teacher

Cast ←————————→ Student
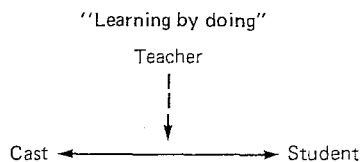
In the second model, the teacher practices law (by intervening in the student's cases, dividing the work with the student, etc.) while the student looks on to see how it is done:

"Learning by imitating"

Student

Cast ←————————→ Teacher
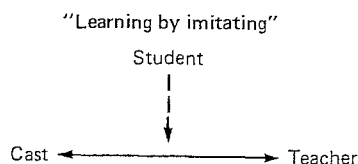
Both of these models of learning are part of the Eriksonian and activist approach in that they are two components of a process that focuses on actual interactions as the vehicle for education. The problem is that these two models stop halfway in applying this approach. They assume that the actual interactions from which the student learns are interactions with the cast. These models restrict their moral psychology and epistemology to the solid arrows in the diagrams. What is omitted, ironically enough, is the vast bulk of interactions between teacher and student. The student engages with the cast only intermittently, but with the teacher constantly. Thus, a better way to draw the diagram is this:

T   S

C ←————————→ S   C ←————————→ T

Like Poe's purloined letter, this fact is so obvious that it can be invisible. But once we turn our attention to teacher-student interactions, it is apparent that moral education in the clinic also derives from students emulating their teachers' behavior *in interactions with the student*. In effect, the student takes the place of the client and regards the teacher's way of treating her or him as the sort of behavior in which a good lawyer engages.[56] In addition to the content the teacher intends to convey by analyzing the student's engagement with the cast, or by engaging with the cast her or himself, the teacher's interactions with the student also help to form the student's moral dispositions toward

the practice of law. And it is in this domain that clinical education fails.[57]

My views on this matter derive from the analysis of scores of hours of taped supervisory sessions between clinical students and their teachers.[58] I was particularly struck by one feature of these interactions, namely, that as pieces of behavior they themselves exemplified the patterns that Wasserstrom identified as morally troubling. It began to look as though clinical teachers and students differ from traditional law teachers and students only in that they are even more zealous at modeling and imitating dominating and manipulative behavior.

To demonstrate this, I must begin by sketching the view of ethics that I presuppose. This view is drawn from the work of Jürgen Habermas, Richard Rorty, and Hannah Arendt.[59] Each of these philosophers emphasizes the close connection between the moral point of view and dialogue. Moral reasoning aims at a certain universality; it attempts to discover and appeal to norms that are binding on all agents, in all situations. To do this, one must develop the ability to "think . . . from the standpoint of somebody else."[60] Even solitary moral reasoning tries to replicate in thought a dialogue among different points of view. Such a dialogue aims at a rational consensus among uncoerced individuals in speech situations minimally distorted by socially or psychologically induced communication barriers. It imposes certain requirements on its participants. They must make explicit to each other the nature of their ends (which include affective reactions to practical situations) and their plans for adapting available means to those ends. They must explore ambiguities in, and articulate evaluative responses to, each other's formulations, responses to those responses, and so on, until consensus is achieved.[61]

The purpose of this recursive communication process must not be to win or to silence others. Its purpose is to understand and to produce uncoerced agreement, if agreement is the appropriate outcome. Moral discourse, in short, attempts to achieve consensus on the legitimacy of ends and the rational relationship of ends to means (evaluating ends and means in each other's lights) through a process of communication that is public, bilateral, critical, and cooperative. In a previous article I have discussed the cluster of behavioral characteristics that make up such discourse under the rubric the "learning mode."[62]

Now, it is noteworthy that observed discourse in clinical practice instruction regularly had few of these characteristics. Clinical teachers and students often competed over the authorship of ideas, concealed their ends and plans for achieving them, attributed (without investigation) meanings to others' ambiguous formulations, argued for preferences subliminally and indirectly, suppressed strong but relevant feelings, "protected" each other from difficult but necessary topics by ignoring such topics altogether, argued for beliefs in needlessly stylized and hyperbolic ways, and feigned agreement to produce illusory consensus

when underlying belief was the opposite.[63] Discourse of this sort is also associated with a set of behavioral traits that I have called the "persuasion mode."[64]

At first glance, the persuasion mode seems to describe competitive law-school styles of discourse previously identified.[65] However, the behaviors I observed are different in some important respects. First, persuasion-mode behaviors are more complex. It is not just that clinical teachers and students act competitively and insensitively.[66] They also tend to make decisions unilaterally, to keep their agendas private, to dissociate themselves from responsibility for failure, to intellectualize all questions, to argue coercively (if subtly so), and to seal themselves off from data about their own ideological constraints and ineffectiveness. These behavioral traits combine to form a self-contained and self-sustaining world in which all parts work in symbiotic relation with one another. The ideology that these behaviors embody allows teachers and students to agree with criticisms of law-school dialogue without realizing that their own dialogue is among the objects of those criticisms.[67]

Second, in themselves persuasion-mode behaviors are not always inappropriate. Each of the behaviors has its place in law-teaching relationships in which it is both effective and proper. The behaviors are double-edged, however: when they are used in inappropriate settings they do great damage. A competitive response to a bright and self-confident student practicing verbal word-play spurs growth. The same competitive response to an inarticulate and nervous student making her or his first public statement has the opposite effect.

Third, the meaning one gives to persuasion-mode behaviors depends very much on one's vantage point, and multiple vantage points exist. Few teachers intend to aggrandize themselves at the expense of their students; few are unfeeling; few compete over interpretations of work product just to win. Yet many are perceived in these ways. Because of the setting[68] almost anything that teachers and students say or do is ambiguous. Each communication has several plausible meanings, ranging from the most positive to the most negative.[69] The most common scenario begins with a teacher statement intended as helpful but heard as an attack. The student, concerned about being attacked, responds defensively. The teacher does likewise, for the same reason, eventually creating the reality of a joint attack, often from an initial situation of mutual agreement.[70] The process of successive misinterpretation works slowly and subtly, but to the ultimate effect of distorting discourse and producing illusory consensus.

The problem underlying this process, shared in equally by teachers and students, is communicative incompetence.[71] Neither teachers nor students understand the complexity of the messages that they send. Neither side hears its own words from the perspective of the other. The other's inappropriate responses are taken as literally intended, rather than as partly produced by plausible though erroneous constructions

of the first person's remarks. The ultimate breakdown of dialogue is no less real than if pursued intentionally, but perceptions of culpability are different. Each side believes, with some justification, that it joins the attack reluctantly and in self-defense. It is hard to say how these teachers and students would respond if they were aware of their own role in distorting instructional dialogue. But this response must be known in order to evaluate their capacity for and interest in moral discourse.

Fourth, the persuasion mode is not always associated with bad, unpleasant, aggressive behavior. The mode is just as often a low-visibility, indirect, and even cordial method of manipulating others. A person argues for outcomes that are "in the other person's best interest." That they are also identical with the first person's desires is not acknowledged, to either person. Nonverbal information corroborates the genuineness of the first person's concern because, at one level, a persuasion-mode actor convinces even her or himself of her or his identification with the other. The persuasion mode is used among friends as well as enemies, and people feel good about it as often as they feel resentful. Persuasion-mode behavior can be overtly belligerent and aggressive, of course, and in lawyers the mode is usually identified with these characteristics. But the true test of persuasion-mode behavior is in what it seeks to accomplish (e.g., victory rather than understanding or uncoerced agreement) and by what strategies (e.g., private, unilateral, competitive, and self-sealing actions rather than public, bilateral, cooperative, and self-reflective ones). It is substance, not form, that gives the persuasion mode its identity.

It is understandable that clinical teachers would slip tacitly into a persuasion-mode style. Clinical teachers, more even than traditional law teachers, are charged with teaching "adversarial skills"[72] to students.[73] They must train students to control conversation—by getting others either to agree or not to disagree—until the ability becomes a reflex. In other words, students must learn to convince others or silence them on command, and teaching these skills is a necessary undertaking. In the formal, stylized, rule-bound, and arms-length world of law practice, doing justice in particular cases frequently requires the manipulation of persons in whom decision power is reposed.

The most effective way to teach adversarial skills is by drill. Thus, clinical teachers use such skills pervasively in conversations with students in which real student interests are at stake. This encourages students to protect their interests by responding in kind. The repetitiveness and relentlessness of this process is what causes the skills to take hold. It may be that for most clinical teachers this is not a consciously chosen strategy. But its ubiquitousness in clinical instruction suggests that it is a real strategy nonetheless.

In the clinical instruction that I studied, persuasion-mode behaviors were learned unself-consciously, as a set of disembodied means, not as part of a larger moral system that includes constraints on the use of such means. Nor was the development of persuasion-mode habits

tempered by the concurrent development of learning-mode habits. The result of such unbalanced instruction can be morally disastrous.

The internalization of predominantly persuasion-mode habits can cause a person to interpret most social relationships in persuasion-mode terms.[74] This interpretation will produce few moral problems in relationships of strategic interaction[75] (e.g., zero-sum bargaining, courtroom argument, witness examination) where the objective is known by all to be instrumental success, but will produce moral chaos in relationships of friendship, trust, and dependence (e.g., client interviewing and counseling, working with colleagues, witness preparation) where one side expects to share power and responsibility while the other side moves to seize them. The problem is one of teaching habits with limited and specific uses as if they were appropriate responses to all law practice relationships.

The following examples of persuasion-mode behaviors illustrate both their beneficial effects in appropriate settings and harmful effects in inappropriate ones.

1. A persuasion-mode actor assumes that meaning in communication can and should be produced unilaterally, by attributing single meanings to ambiguous statements. This assumption allows her or him to recast adversary arguments into forms that are easier to rebut. But used in nonadversarial relationships, the assumption demeans the importance of colleagues and clients as necessary and unique contributors to the knowing process, and encourages one to see these others as types rather than persons.

2. The habit of taking charge, particularly by indirection and sub rosa strategies, allows one to alter the direction of group action adverse to one's interests while minimizing resistance to that alteration by not letting on that that is being done. Yet, in client and colleague relationships, habitually taking control can lead to paternalism and arrogance. It can cause one to impute rather than explore others' ends, shut off rather than encourage legitimate objection, ignore rather than raise debatable but relevant issues, and accumulate rather than share decision-making authority.

3. Persuasion-mode habits encourage one to see problems brought to lawyers as technical, admitting of single, optimum solutions knowable by experts. This disposition enables lawyers to plunge confidently into complicated intellectual and emotional tangles between clients and adversaries without fear that resolution is not possible. Frequently, this sort of confidence, stemming from a belief that a technical answer exists, would have aided clients and adversaries in their efforts to resolve the problem by themselves. However, another consequence of a technical world view is that the idiosyncratic, subjective value preferences of clients are demeaned in choosing what ends to pursue and by what means.[76] The result is that lawyers, as technical experts, often dominate choice in ways that do not respect the moral autonomy of clients.

4. Persuasion-mode habits cause a person to argue forcefully, hyperbolically, and at length. These are often useful traits in the courtroom or at the bargaining table, but in assessment or planning sessions with colleagues they diminish the importance of good reasoning. Similarly, attributing meaning and forming evaluations quickly and automatically are of value in the rapid-fire dialogue of the courtroom, but in law-office planning sessions where time is not of the essence, they produce simplistic thinking. Complex phenomena are needlessly reduced to some of their parts, and tentativeness and uncertainty are unnecessarily suppressed. Persuasion-mode habits cause one to know where one stands on an issue at the moment it is raised. But many moral questions need not and cannot be so quickly resolved.

5. Persuasion-mode habits enable a person to minimize self-analysis and to reserve it for private moments when it will not weaken instrumental effectiveness. Successful argument in negotiation or trial requires the speaker's own conviction in what is said, manifest in behavior and demeanor as well as in words.[77] Self-analysis introduces doubt, tentativeness, and complexity, all of which weaken conviction and the ability to manifest it in self-serving answers. However, this same disposition can also promote moral irresponsibility, for the persuasion-mode actor avoids self-analysis of her or his own responsibility for the failure of undertakings in relationships where candor is more important than conviction. The self-sealing properties of persuasion-mode habits, however useful in bargaining and argument, reinforce this irresponsibility. A persuasion-mode actor avoids acquiring a critical perspective on the ideological properties of her or his moral stance. Thus, the inevitable biases of class, sex, race, religion, region, and wealth embedded in the actor's world view are more likely to be acted upon uncritically.

6. Persuasion-mode habits predispose lawyers to take evaluative stands automatically, as a first response to others' new ideas. This causes them regularly to make statements that, on reflection, they know to be false. Many of these statements will produce sizeable gains for both client and lawyer (victory, authority, status, wealth), and the habit of taking quick though erroneous stands can be predicted to produce continued gains in the future. But the repeated experience of deriving benefit from less-than-truthful statements may also wear down loyalty to accuracy and fairness. Persuasion-mode habits may weaken one's general disposition to seek and speak the truth.

7. Finally, persuasion-mode habits cause one—understandably in competitive contexts—to hedge bets, cut losses, and pick winnable fights. But such habits may inhibit bold moral action by encouraging one to avoid risks. To be sure, calculated risks are often inherent in good strategy. But to be moral one sometimes must stand on principles unlikely to win competitive success, and sometimes take a stand when competitive success is out of the question. Because a person with persuasion-mode habits tries to be secure in her or his choices, autonomous moral action often may be impossible.

These attributes, taken together, make up a kind of instrumental morality that causes a persuasion-mode actor to define interactions as competitive and, above all else, to value winning and fear losing. Positive legal rules are the only check on such a person's behavior, morality is collapsed into legality, and maximizing to the limits of one's constraints is the operative moral code.[78] These problems, again, arise not with persuasion-mode habits in their own right, but with such habits learned as disembodied means in isolation from some larger moral system. Unfortunately, this was the very pattern that troubled me in my analysis of clinical teacher-student interaction.[79]

A final qualification is in order. Clinical students' reasons for using the persuasion mode differed from those of their teachers, and these differences suggest that teachers are more responsible for the present state of affairs. Students are concerned about performing well in their new role of lawyer. The psychological dynamics of role adjustment make this concern inescapable. Clinical practice is as close as most students get in law school to acting in lawyer role. In this practice, the student's standard for how he or she measures up is the clinical teacher. These factors combine to make the teacher's behavior a powerful influence on students' beliefs about how they should act.

There seems to be a threshold period in which the student, following the teacher's suggestions, defines "performing well" as using effective interpersonal technique. Effective technique, as we have seen, means being reflexively good at manipulating interpersonal exchanges. Students practice manipulation, often enthusiastically, not because they enjoy or believe in it (some no doubt do, but many do not), but because they want to learn to be effective lawyers and manipulation is what their teachers have told them effective lawyering is all about. The students do not know whether the teacher is right and must either take her or his direction on faith (for the moment) or argue against it. The cost to the student of arguing, at this stage of development, is substantial; he or she will probably lose the argument and in the process also forgo the opportunity to learn as much as possible about fundamental processes of law practice, at a time when it is easiest to learn. This learning can give either a more sophisticated and defensible understanding of what is wrong with the teacher's conception of law practice, or a thorough grounding in a conception of a professional role that the student ultimately accepts. There is a logic to taking the teacher's direction and waiting to criticize. I suspect, also, that most students wait because they believe that they will not be sucked in, that is, that they will not lose their critical moral perspective. This judgment is wrong more often than it is right, but it is not usually wrongly motivated.

Two other factors play a role in a differential assessment of student-teacher responsibility. In this threshold learning period students are poor manipulators. They are not yet skilled at the process and their sentiments intrude. The effect often is that clients (or others with whom the students

interact) are not so much oppressed as amused. Moreover, the students do not benefit significantly in a material way from their manipulative labors. They are given little individual authority (all work must still be reviewed, every action cleared in advance) and reap no economic return. They remain as poor, or poorer, at the end of the semester as at the beginning (even in the search for jobs—clinical experience is of questionable value on a resume), irrespective of how well they manipulate others.

I do not suggest that the lack of mean spirit, ability to manipulate effectively, and economic return insulate a clinical student from immoral action; just that these factors make a student's manipulative action morally different from that of a teacher who no longer wonders whether he or she is competent, who manipulates skillfully, who has achieved significant status as a consequence, and who has had adequate opportunity (usually not taken) to discover that manipulation is not always the morally best course. It seems easier to say that the teacher should have known the nature of her or his action, and that he or she has chosen a course of action because he or she values it for itself and for what it produces. This is not to say that the environmental pressure to manipulate is weaker on the teacher than on the student, only that there is a plausible explanation of the student's behavior—it is a decision to learn and grow—that is not present in the case of the teacher.

IV

If my analysis is correct, it raises another question: How could an instructional program committed to the responsible, bilateral, and critical study of ethics end up proceeding by passive, subliminal, and manipulative technique? To answer this question it is necessary to look more closely at the origins of clinical education.

Clinical education did not start primarily as an educational reform.[80] It was not the product of an insight about law-school instruction, and it did not originate with persons knowledgeable about or particularly concerned with education.[81] It started as a movement for social reform. Legal educators happened to be caught in its net because they seemed at fault for not correcting the serious social harms that the legal system produced and because they and their students were a major untapped resource in the movement for reform.[82] Only later was the inadequacy of legal education in ethics seen as part of the problem.

The clinical revolution started in the 1960s and 1970s with money from the Ford Foundation channeled through a series of grant-making agencies.[83] Between 1963 and 1978, Ford funded programs of every size, shape, and substantive law orientation at almost all law schools that asked for them. The purpose for which these clinics were funded changed subtly over the years, even though the stated purpose remained the same—the support of law-school instruction in "professional re-

sponsibility." "Professional responsibility" would turn out to be a slippery term.

In the early years of its funding of clinics, Ford defined professional responsibility as consisting in "the distribution of . . . legal services to all segments of the public including the poor," and the bringing about of "legal and social reform."[84] Instruction in professional ethics (i.e., the moral norms that regulate the personal relationships of law practice) was recognized as a subsidiary goal, but systemic political reform was emphasized.[85]

The National Council on Legal Clinics, Ford's first grantee, was an administrative creation of the National Legal Aid and Defender Association (NLADA), to whom the grant was in effect made.[86] The money was used to support law students who worked as clerks in legal aid offices; interns in juvenile and family courts; and observers in mental hospitals, social agencies, and police departments.[87] The purpose of this grant seems to have been to help NLADA in its beleaguered efforts to provide free legal representation (mostly criminal defense) to indigents.[88] The right to counsel in criminal cases was being expanded and the demand for representation by indigent criminal defendants outstripped the supply of free defense counsel.[89] Clinical students were seen as a resource in NLADA's efforts to meet this demand through both the students' specific clinical contributions and the predicted increase in volunteer representation by lawyers who would have been "sensitized" to poor people's problems by clinical programs.[90]

In this emphasis Ford was only mirroring popular opinion. The period in which clinics proliferated was the period of the civil rights movement and the "War on Poverty." The political, social, and legal temper of the times was reformist. There was widespread belief, not without cause, in the reformist powers of law and lawyers.[91] Ford believed that law students who worked in the legal system and saw first-hand the difficulties that the system visited upon the poor would, as a result, work for substantive law reforms.[92] Legal clinics were seen primarily as a means to this social end rather than as a vehicle for the reform of instruction in professional ethics.

Law schools proved receptive to this educational innovation. The changing temper of the times challenged traditional conceptions of the role of the lawyer and of the law school.[93] Prominent psychiatrists on law faculties and articulate junior faculty discussed legal education's dehumanizing tendencies at (sometimes great) length in scholarly journals.[94] Legal education, it was charged, had to become more "relevant," personal, humane, and egalitarian. The classroom dialogue process was criticized as excessively theoretical, abstract, intellectualized, and hierarchical, and law professors were attacked for being smug, impersonal, sadistic, and hostile.[95]

Law faculty reaction to these criticisms was varied. Some professors had no immediate response and, after a few belated defenses of the

old order, withdrew from the debate.[96] A few never participated. Many disagreed with the criticisms of law schools, and even more regarded the proposed clinical reform as intellectually shoddy and faddish.[97] But eventually the largest number of law teachers agreed that something needed to be done.[98] They viewed the second and third years of legal instruction as generally unsatisfactory and were willing to experiment with programs that showed promise.[99]

Clinical education came to be viewed as such a program. Work on "real" cases, it was argued, would make "abstract theorizing" relevant[100] and the need for analytical skills obvious, and thus have ripple effects in traditional law courses. Responsibility for client problems and a one-to-one relationship with a teacher would encourage a bilateral expression and investigation of feelings as well as ideas, and thus make law study more egalitarian and personal.[101] "Learning by doing" would reduce the difficulty of motivating students to learn and thus make law study more fun. All of these arguments had obvious appeal.

It also helped that no other proposal for legal educational reform was as suited to the times. The movement for interdisciplinary law study had peaked for law and psychology[102] and had not yet caught on for law and economics.[103] The most substantial interdisciplinary effort, the policy sciences movement, popular at some elite law schools—notably Yale—in the 1940s and 50s, had proved too remote from the day-to-day practice concerns of most law teachers and students to command broad-based support. Besides, these programs were vulnerable to the same epithets—"irrelevant," "theoretical," "impersonal"—leveled at traditional law teaching.[104] And Ford was willing to foot the bill for clinical teaching.

A concern with systemic reform continued to dominate Ford's definition of professional responsibility through the life of the Council on Education in Professional Responsibility (1965-68) and the early years of the Council on Legal Education for Professional Responsibility (CLEPR) (1968-74). Although the term "professional responsibility" was retained, Ford's objective came to be stated more frequently as providing legal "services" to individual poor people, rather than reforming law. This change in meaning of the terminology may have reflected movement in the direction of professional ethics, because in 1974 CLEPR changed its emphasis and announced that it would fund legal clinics primarily for the purpose of providing instruction in professional ethics.[105]

Whether this shift can be attributed to new insight,[106] changing times, or strategic choice is hard to say. Beliefs in the "sensitizing" effects of representing poor people began to look romantic as time passed and agitation by lawyers for social reform diminished. On the other hand, professional ethics was a long-standing and poorly taught course in the standard curriculum, and having a better way to teach it was a firmer foundation than social reform on which to pin one's argument for a place in the academy. It is clear, however, that a subtle but real shift in justification for clinical programs occurred.[107]

One might ask why it matters that Ford did not start and proceed with a clear and consistent plan for reform of ethics instruction. If clinical education is the most effective way to teach professional ethics, isn't that what counts? This would, after all, not be the first time that an agency set out to improve upon the clothesline and invented the telephone. It mattered in this instance, however, because Ford's shifting purposes confused legal educators. In particular, they did not know what standards to use in deciding whom to hire to administer their clinical programs.[108]

It was not clear, for example, whether clinical teachers ought to have academic qualifications and research interests similar to those of traditional teachers, or whether law-practice experience was an appropriate substitute. If practice experience was a substitute, should that experience be of complex law-reform litigation, or would experience with individual clients on small-scale, self-contained problems suffice? Should clinical teachers be expert in professional ethics, or was it enough that they understood strategic, lawyering technique? These and other such questions either were not answered, or were answered simplistically, confusingly, and inconsistently over time by those who spoke for Ford.[109]

One effect of this lack of clear and consistent direction from the funding source was that law schools took the safest short-term but riskiest long-term course. They hired people whose previous work experience was closest in outward form to the day-to-day law-practice obligations of clinical instructors.[110] Since most clinical work was done for poor people, this meant that a high percentage of new clinical teachers came from the ranks of the Neighborhood Legal Services Program for the poor.[111]

This was a safe short-term choice because these lawyers had proven that they could successfully manage the type of lawsuit on which they would work with students. It was a long-term risk because, with some notable exceptions,[112] they had not shown any critical perspective on this representation process. They did not have law-practice research agendas nor articulate theories of law practice. For the most part, these lawyers/teachers had a view (often quite sophisticated) of the proper technique of law practice, a belief that law school had not helped them in learning this technique, and an understandable desire to pass on what they had learned to law students. Critically examining their own first premises, in public, against an ideal, for the purpose of understanding, was a less familiar process. In short, many of the early clinical teachers conceived of themselves as lawyers whose task was to practice law jointly with law students, not as academics whose work also included understanding and elaborating upon the nature of law practice.

Two additional characteristics of many of these early clinical teachers contributed to the problem. The first was that many clinical teachers did not have an articulate theory of instruction. (Some would dispute this because it contradicts clinical teachers' own account of themselves.)

They were committed to the process of "learning by doing," but they were noticeably vague about what the "doing" was supposed to involve. Their individual theories of instruction may have been no more than catalogues of maxims dictating avoidance of those practices they had found unpleasant in their own legal education (e.g., teacher sarcasm, ridicule, criticism, and impersonality). If so, their understanding of the defects in legal education was symptomatic and may have caused them to produce a symptomatic reform.

The second characteristic was that many clinical teachers were more the product of their own legal education than they had realized. Without knowing it, they had internalized the traditional law-school communication habits that they criticized and may have honed those habits in law practice. When they returned to law schools as professors, in their own way, they replicated these objectionable practices, substituting covert for overt manipulative, instructional technique. Being committed to teaching differently but not themselves being fundamentally different, many clinical teachers altered only the outward form of legal education, leaving its underlying substance intact.

The above factors also combined to prevent a high percentage of clinical teachers from seeing and overcoming their initial limitations. Not having a developed, alternative vision of law instruction, but believing that they did possess one, clinical teachers reacted angrily to suspicion and criticism by traditional law teachers of both CLEPR and clinical teachers. This reaction produced what might be called a Kremlinizing effect. Like Soviet bureaucrats, these clinical teachers divided the world into a beleaguered "us" and a menacing "them." On this world view, clinicians do one thing and traditional teachers do something totally different. Neither group likes the other, and each avoids the other altogether when it can. Traditional teachers hold the power in law schools because of historical accident and use that power to perpetuate themselves, largely by denying full faculty status to a sufficient number of clinical teachers. Traditional teachers talk about standards, scholarship, and intellectual content, but that is no more than an elaborate smoke screen for what, at its root, is an unadorned power play to preserve the dominance of the traditional law-teaching role. Some traditional teachers are sympathetic, but they are few in number and unrepresentative of law teachers generally. Most traditional teachers are hostile, not because they want to be, but because they need to protect the only job that they know how to do.

This is the world view of far too many clinical teachers. It produces a profound intellectual and emotional insularity in those who hold it that cuts them off from knowledge of their own limitations and makes serious consideration of those limitations almost impossible. The fact that much of it is overstated does not weaken its hold.[113]

V

Two final questions must be answered. Should law schools continue to use clinical programs to teach professional ethics? And if so, what can be done to reduce the risk of such programs graduating unself-conscious instrumentalists?

The first question is easy. Understanding doctrine is different from understanding virtue. Virtue must become habit and disposition before it can become principle, and this process takes place best in the context of interpreted lawyer role-adjustment experiences. The alternative—analysis of hypothetical ethical dilemmas—is to the learning of ethics what riding in ski-lifts is to the climbing of mountains: all form and no substance.[114]

But how clinical programs can avoid graduating instrumentalists is more difficult to answer. The problems I have described are fundamental. They evince a deep-rooted and basic failure of much of clinical instruction to live up to its potential as a vehicle of moral education. The potential is there, and it would be a mistake to give up on it. But reforms are needed if the self-perpetuating and destructive patterns I have described are to be interrupted. Unfortunately, suggesting programmatic reform is a larger task than I can hope to address here. My recommendations are intended only as a modest first step toward altering two conditions that feed the problem.

The first condition is the woefully underdeveloped and one-sided intellectual content of much clinical teaching about ethics. Too many clinicians rely on a small stock of shopworn, persuasion-mode ideas, and seem to be unfamiliar with learning-mode alternatives. For example, it is inconceivable that clinical teachers with sophisticated views about ethics could be unaware of the problems of manipulation and domination that Wasserstrom has identified. These are watershed issues. Yet the clinical literature,[115] and the behavior of clinical teachers I have studied, all too often evidence only simplistic understandings of these issues generally and no awareness of their manifestations in clinical teaching.

This lack of sophisticated understanding is a clinical Achilles' heel. The only teaching "method" that succeeds over time is the triumph of content. The ethical content of clinical instruction needs to be criticized, tested, and reformulated, and multiple intellectual perspectives on this content need to emerge.[116] It cannot any longer be thought sufficient to teach a clinical course as a series of ad hoc reactions to the ethical issues that arise in a set of randomly (or even carefully) selected cases. Clinical teachers drawing upon their distinctive vantage point, must identify that core set of behaviors, concepts, theories, analytical frameworks, and insights about ethics that is the essence of their instruction, and these elements must always be part of clinical course offerings.

The development of this content is the responsibility of all clinical teachers. It cannot be left, as it has in the past, to a handful of productive and innovative thinkers. This means, most significantly, that more individual teachers must communicate and defend their ideas in the journals. There must be the unfettered debate from many perspectives, some to prove mistaken, that is characteristic of the healthiest subjects of study. If this does not occur, clinical instruction in ethics is living on borrowed time, and the fact that the gallows is not yet built does not change that.[117]

The second and related condition is the inadequacy of clinical research methods. Most clinical scholarship is "empirical," in that it is based on observed clinical experiences. Yet most of those experiences are reported in the form of authors' summaries of what students did and paraphrases of what students said. The difficulty with this data is that a reader cannot tell what actually happened or whether he or she would have summarized the clinical experiences in the same way. And the well-known distorting effects of perception, memory, expectation, and intention are rarely considered.[118] That this writing is usually self-laudatory—every clinical program is described as an unmitigated success,[119] and there are no "carefully documented failures"[120]—adds to the reader's suspicion.

Clinical teachers should reject the temptation to reminisce about a semester. The random recalling of anecdotes is not empirical research. More clinical teachers must begin to generate data that has a substantial claim to objectivity. To do this, at least in the immediate future, it will probably help to work with others trained in empirical research, forming cross-disciplinary alliances within the university.[121] This practice should have the added effect of breaking down the insularity, described earlier, that is too frequently the hallmark of contemporary clinical study.

Better scholarship and research methods by themselves, however, are only part of the answer. It is possible to understand and agree with Wasserstrom's critique, and yet still use persuasion-mode behaviors inappropriately in one's communications with students. Even teachers sensitive to the problem need to monitor and evaluate their communication practices on a regular basis (and many do), if those practices are not to add a layer of distortion to their instruction about ethics. Making teacher-student communication a conscious subject of clinical study is the easiest way to do this.

This means that more than just a handful of clinical teachers must study both ethics and their own teaching of ethics. On this second level, they must identify the persuasion- and learning-mode properties of their communication practices with one another and evaluate the appropriateness of those practices to the situations in which they arise. Ideally, teachers and students would correct inappropriate behavior. But if that is not possible (e.g., because underlying dispositions are too strong), they must still identify the behavior for what it is, acknowledge its

inappropriateness, and do as much as they can to meliorate or nullify its undesirable effects.

In studying oneself teaching there is the risk, of course, that the parasite will swallow the host. The analysis of teacher-student communication cannot be continuous or predominant. The majority of the time in the clinic must be spent in the study of lawyering. Trying to be actor and observer simultaneously is similar to what Bernard Williams has described as trying to find a "mid-air position," that is, a framework outside all frameworks.[122] It will not work. There is no such position. But if the analysis of teacher-student communication is kept within bounds, it blends naturally with the analysis of student-cast interaction. The two complement and build upon one another.

In studying themselves, clinical teachers need models. This process, like learning virtue, depends upon the development of habit as well as the articulation of principle. This is perhaps the most difficult need to satisfy. Self-reflective learners do not abound in law teaching,[123] and clinicians may have to look elsewhere to find them. Fortuities excepted, this is likely to be a slow and frustrating search. In the interim, clinicians might find models in the critical literature. Some of this scholarship is written from the perspective of the individual actor and describes critical self-learning in graphic detail.

In the end, rational dialogue is a major part of the "good" that is modeled in clinical instruction. And such dialogue has as necessary preconditions the articulation of principles and the critical analysis of the process by which those principles are articulated. I emphasize these preconditions because I believe their neglect has done the most to produce the persuasion-mode universe that is clinical instruction today.

Notes

1. See, e.g., David R. Barnhizer, "The Clinical Method of Instruction: Its Theory and Implementation," *Journal of Legal Education* 30 (1979): 67, 71–75; Lester Brickman, "CLEPR and Clinical Education: A Review and Analysis," in *Clinical Education for the Law Student* (New York: Meilen Press, 1973), pp. 61, 63; William Pincus, "Legal Education in a Service Setting," in *Clinical Education for the Law Student*, pp. 27–28, 34; William Pincus, "Clinical Training in the Law School: A Challenge and a Primer for the Bar and Bar Admission Authorities," in *Clinical Education for Law Students*, edited by William Pincus (New York: Meilen Press, 1980), p. 365.

Some subjects of clinical instruction (e.g., pleading and drafting, strategic decisionmaking) do not fit obviously into the interpersonal skills category. I include them nonetheless. While these processes are usually carried out in private, they are intended to have their effect within an interpersonal relationship. Each represents the planning and preparation stage of a personal interaction and is important, not for its own sake, but for what it can do to help one interact effectively with others.

2. For a description of a wide variety of such programs, see the articles collected in *Clinical Education for the Law Student*, pp. 181–248; and Edmund W. Kitch, ed., *Clinical Education and the Law School of the Future* (Chicago: University of Chicago Conference Series No. 20, 1970), pp. 138–213.

3. As Gary Bellow puts it: "The clinical label itself has provided little guidance in delineating its boundaries. It has been variously applied to any law related activities in

which students engage outside the classroom as well as to a number of traditional law school activities, . . ." Gary Bellow, "On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methology," in *Clinical Education for the Law Student*, p. 375; see also E. Gordon Gee and Donald W. Jackson, "Bridging the Gap: Legal Education and Lawyer Competency," *Brigham Young University Law Review* 1977 (1977): 882. Some describe nonfieldwork programs as "quasi-clinical." Barnhizer, "The Clinical Method," p. 73.

4. Edward F. Barrett, "Simulated Litigation at the Notre Dame Law School," in Kitch, *Clinical Education,* pp. 217–222; Robert A. Gorman, "Clinical Legal Education: A Prospectus," *Southern California Law Review* 44 (1971): 528–40.

5. Gorman, "Clinical Legal Education," p. 540.

6. Ibid., pp. 545–48; John M. Ferren, "Goals, Models and Prospects for Clinical-Legal Education," in Kitch, *Clinical Education,* pp. 102–4.

7. Gorman, "Clinical Legal Education," pp. 543–44.

8. The best example of such grafting is in James A. Henderson, Jr. and Richard N. Pearson, *The Torts Process* (Boston: Little, Brown, 1975), where practice-skill exercises are woven into a substantive course in torts. See p. xi for a description of the purposes of this effort.

9. The introduction to Gary Bellow and Bea Moulton, *The Lawyering Process: Materials for Clinical Instruction in Advocacy* (Mineola, N.Y.: The Foundation Press, 1978), pp. xix-xxv, describes two variations on such a course.

10. For a description of apprenticeship training, see Gee and Jackson, "Bridging the Gap," pp. 722–27, 731–43. For the history of the takeover by university legal instruction, see Robert Stevens, "Two Cheers for 1870: The American Law School," in *Law and American History,* edited by Bernard Bailyn and Donald Fleming (Boston: Little, Brown, 1971), pp. 410–35.

11. Several people have pointed out the preoccupation of clinical study with psychological subject matter. See Geoffrey C. Hazard, Jr., "Report," in *Proceedings of the Asheville Conference of Law School Deans on Education for Professional Responsibility,* edited by Howard R. Sacks (Chicago: Council on Education in Professional Responsibility, American Bar Center, 1965), p. 117; Robert J. Levy, "The Family Law Project at University of Minnesota Law School," in Sacks, *Proceedings of the Asheville Conference,* pp. 36–40; Howard R. Sacks and Henry W. Kenoe, "The Counseling Training Project at Northwestern University School of Law," in Sacks, *Proceedings of the Asheville Conference,* pp. 42–46; Gee and Jackson, "Bridging the Gap," pp. 755–61. William Simon has called this preoccupation a new legal formalism. William H. Simon, "Homo Psychologicus: Notes on a New Legal Formalism," *Stanford Law Review* 32 (February 1980): 487.

12. The priority of reflective analysis over lawyering performance is often expressed as teaching the process of "learning to learn." Kenneth R. Kreiling, "Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision," *Maryland Law Review* 40 (Spring 1981): 284.

13. This is not to say that students have no responsibility for initiating and carrying on discussion. Unlike apprenticeship, however, where neophyte lawyers were left to sink or swim, there is a teacher in clinical settings whose primary responsibility is to ensure that student work product is continually reviewed and discussed. For a discussion of the supervisory process, see Barnhizer, "The Clinical Method," pp. 80–81, 86–88, 95; Brickman, "CLEPR and Clinical Education," p. 70; Gee and Jackson, "Bridging the Gap," p. 755; Kreiling, "Clinical Education and Lawyer Competency," *passim.* Clinical teaching involves more that just instructor analysis. While the instructor plays the major analytical role, another facet of clinical instruction that is distinctive is the emphasis it gives to students taking responsibility for their own learning. Barnhizer, "The Clinical Method," pp. 73–75.

14. Bellow, "On Teaching the Teachers," p. 381.

15. Robert J. Condlin, "The Myth of the Clinical Methodology," *Clinical Legal Education Perspective* 2 (1978): 9. There are some differences between first-year case analysis and law-firm research and memo-writing. Unlike a first-year teacher, a law-firm supervisor does not tell an associate the relevant statutory and case law. The associate must find that on her or his own. But then there is a special course in the first year to teach law

students how to do research. Second, the law-firm supervisor does not ask an associate to analyze law on a clean slate. The firm has a client and knows where it wants the analysis to come out. But the supervisor doesn't want frivolous arguments either, or those that will not hold up under critical scrutiny. So an associate must do objective analysis of relevant law before he or she determines how far the law may be stretched in the client's direction. In addition, the associate must be able to see similarities and differences among fact patterns, make analogies, synthesize principles out of specific decisions, tease out underlying reasons for decisions, and test analysis by carrying it to its logical conclusion and reconciling it with other relevant data. All of these are intellectual skills taught in the first year. Thus, skill at the first-year law-school thinking process is a necessary but not sufficient condition for effective law-firm research and writing.

On the relationship of law school to law firms, see Dan C. Lortie, "Laymen to Lawmen: Law School Careers and Professional Socialization," *Harvard Educational Review* 29 (1959): 352–69; David N. Rockwell, "The Education of the Capitalist Lawyer: The Law School," in *Law Against the People*, edited by Robert Lefcourt (New York: Random House, 1971), p. 91.

16. For descriptions of that setting, see Barnhizer, "The Clinical Method," pp. 73–75; Michael Meltsner and Philip Schrag, "Report from a CLEPR Colony," *Columbia Law Review* 76 (1976): 584.

17. William Pincus, "Preface," in Pincus, *Clinical Education for Law Students*, p. xi; Robert McKay, "Legal Education," in *American Law: The Third Century*, p. 273, quoted in Gee and Jackson, "Bridging the Gap," p. 881.

18. Brickman, "CLEPR and Clinical Education," pp. 71–74; Maynard J. Toll, "CLEPR From the Viewpoint of Legal Aid and Legal Services," in *Clinical Education for the Law Student*, p. 19; Stevens, "Two Cheers," pp. 491, 522.

19. Gee and Jackson, "Bridging the Gap," p. 881.

20. Ibid.

21. Ibid.

22. Author's count.

23. At first, only a few law teachers had this expectation. Those in charge of funding clinical programs (see note 80) and many of the new clinical teachers saw clinics more as a vehicle for broad social reform or as a program of instruction in lawyer interpersonal technique. Over the years the minority view became more popular, and by the mid-1970s even the "money people" agreed that teaching ethics was what clinics did best. Views on this matter vary widely to this day, however. Many clinical teachers still view teaching ethics as a small part of their instructional objectives. See Section IV, below.

24. Richard Wasserstrom, "Lawyers as Professionals: Some Moral Issues," *Human Rights* 5 (1975): 1. Writing five years after the proliferation of clinical programs, Wasserstrom was the first to give precise formulation to the issues of manipulation and domination. Yet these issues had always been the concern of clinical educators. In the early years this concern was expressed in psychological terms, and self-awareness was thought to be the appropriate antidote. See, e.g., Sacks and Kenoe, "The Counseling Training Project," pp. 42–46.

25. See also William H. Simon, "The Ideology of Advocacy: Procedural Justice and Professional Ethics," *Wisconsin Law Review* 1978 (1978): 52–59.

26. Michael J. Kelly, *Legal Ethics and Legal Education* (Hastings-on-Hudson, N.Y.: The Institute of Society, Ethics and the Life Sciences, 1980), p. 41.

27. Ibid. Kelly discusses the limited number of code sections that deal with the manipulation and domination problems.

28. Ibid. Several other commentators, coming from a wide variety of perspectives, have also emphasized the importance of these matters. See Warren Lehman, "The Pursuit of a Client's Interest," *Michigan Law Review* 77 (1979): 1080–81; Mark Spiegel, "Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession," *University of Pennsylvania Law Review* 128 (1979): 73–112; David Luban, "Paternalism and the Legal Profession," *Wisconsin Law Review* (1981): 1; Mark Spiegel, "The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring Lawyer-Client Dialogue," *American Bar Foundation Research Journal* 1980 (Fall 1980):

1010–15; Douglas Rosenthal, *Lawyer and Client: Who's in Charge* (New York: Russell Sage Foundation, 1974), pp. 7–61.

29. Barnhizer, "The Clinical Method," pp. 74–75.

30. Charles H. Miller, "Living Professional Responsibility—Clinical Approach," in *Clinical Education for the Law Student*, pp. 105–7.

31. Gary Bellow and Earl Johnson, "Reflections on the University of Southern California Clinical Semester," *Southern California Law Review* 44 (1971): 686–87.

32. Psychologists would no doubt object to their work being characterized as dealing with interpersonal technique. I mean to say only that that is how most clinical teachers used the work.

33. See Bellow and Moulton, *The Lawyering Process*, pp. 1–121, 240–72, 407–29, 586–606, 798–825, 957–65, 1083–121. For a description of the difference between professional ethics and professional responsibility, see David Luban, "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics," *Maryland Law Review* 40 (1981).

34. See, e.g., David A. Binder and Susan C. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (St. Paul: West Publishing Co., 1977), p. 230; Thomas L. Shaffer, *Legal Interviewing and Counseling* (St. Paul: West Publishing Co., 1976), pp. 349–50; Andrew S. Watson, *The Lawyer in the Interview and Counseling Process* (Indianapolis: Bobbs-Merrill, 1976), pp. 93–113.

35. Andrew S. Watson, "Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education," *University of Michigan Journal of Law Reform* 8 (Winter 1975): 248–85.

36. Ferren, "Goals, Models and Prospects," pp. 94–95. Later in his article Ferren seems to qualify this statement, suggesting that a kind of politics (i.e., understanding "offical behavior") is also involved (p. 105).

37. As Geoffrey Hazard has put it: "The quality of [law] practice . . . relationships affects what the law is in a realistic sense and ultimately affects its moral character in the eyes of society." Geoffrey C. Hazard, Jr., "Rethinking Legal Ethics," *Stanford Law Review* 26 (1974): 1231.

38. William Simon develops this point at great length and with considerable insight. See Simon, "Homo Psychologicus," pp. 517, 520–24, 539–50, 558–59.

39. That most clinical teachers came from the milieu of the activist 1960s, and from a highly politicized type of law practice (i.e., legal services—see Section IV, below), might lead one to expect that they would have well-developed moral and political views and use those views to inform their teaching. This did not seem to happen. See Simon, "Homo Psychologicus," pp. 555–56.

40. Bellow, "On Teaching the Teachers," pp. 380–82. The development of the methodological point that follows is taken, in large measure, from Professor Bellow's excellent article. See also Kelly, *Legal Ethics*, pp. 19–20.

41. Bellow, "On Teaching the Teachers," p. 382.

42. See the discussion of Aristotle's theory of moral education, below.

43. Bellow, "On Teaching the Teachers," p. 383. Howard Sacks, an early proponent of clinical education, has also commented on these features of clinical work: "If an experience seems real, the beneficial effects on students are likely to be several. Students have more interest in the subject matter, and are better motivated to learn. They work harder, and pay closer attention to what is happening. They tend to learn things at a deeper level, and thus to remember them longer. Prejudices and stereotypes are subject to more intensive attack; and feelings of concern about perceived injustice and misery are more easily aroused." Howard Sacks, "Student Fieldwork as a Technique in Educating Law Students in Professional Responsibility," *Journal of Legal Education* 20 (1968): 294.

44. Bellow, "On Teaching the Teachers," pp. 384–85, 391.

45. Ibid., pp. 396–97.

46. Meltsner and Schrag, "Report from a CLEPR Colony," pp. 585–86. Dean Gerard Nash of the Monash University in Melbourne has put the point succinctly: "Responsibility cannot be simulated." Quoted in William Pincus, "Text of Remarks at the Annual Luncheon of the Association of American Law Schools—January 4, 1980," in Pincus, *Clinical Education for Law Students*, p. 425.

47. The two principal law school spokesmen for the psychological claim each draw heavily and exclusively on Erickson's work. See Alan A. Stone, "Legal Education on the Couch," *Harvard Law Review* 85 (1971): 398–404; Watson, "Lawyers and Professionalism," pp. 250–52; and works of Erickson cited there.

48. James J. White, "The Anatomy of a Clinical Law Course," in Kitch, *Clinical Education*, p. 171. See also Brainard Currie, "Reflections on the Course in Legal Profession," *Journal of Legal Education* 22 (1969): 50; James E. Starrs, "Crossing a Pedagogical Hellespont via the Pervasive System," *Journal of Legal Education* 17 (1965): 365. Some law professors claim that they can affect professional behavior but not personal behavior of students. The nature of this distinction is not self-evident. See Kelly, *Legal Ethics*, p. 38.

49. Identity is "the sense of self, formed from emotionally significant relationships with others which shape one's being and one's image of self. . . ." Watson, "Lawyers and Professionalism," p. 250.

50. Stone, "Legal Education on the Couch," p. 399.

51. Ibid. This prolongation, in Stone's view, is an "entirely new phenomenon in the history of civilization."

52. Watson, "Lawyers and Professionalism," p. 250. See also Bellow, "On Teaching the Teachers," p. 381.

53. See. e.g., Sir David Ross, *The Nichomachean Ethics of Aristotle* (New York: Oxford University Press, 1975), pp. 28–39. See also Luban, "Calming the Hearse Horse"; M. F. Burnyeat, "Aristotle on Learning to be Good," in *Essays on Aristotle's Ethics*, edited by Amélie Oksenberg Rorty (Berkeley, Calif.: University of California Press, 1980), p. 69.

54. Kelly, *Legal Ethics*, p. 39.

55. Thomas Nagel, "The Fragmentation of Value," in Nagel, *Mortal Questions* (New York: Cambridge University Press, 1979), pp. 128–35.

56. There is a logic to the student's action. The teacher-student and lawyer-client relationships have many characteristics in common. Both are based upon contracts (that differ in insignificant ways) with money passing from one being helped to one doing the helping; both involve an imbalance between the parties in relevant expertise, knowledge, skill, and perspective; both contain an uneven distribution of formal authority, with a client being a little better off than a student in that regard; and both involve expert/ nonexpert collaboration on the solving of technical tasks. A student could understandably conclude that an "expert" in a relationship possessing the above characteristics should behave as her or his teacher does in relationships with students. Looking to behavior rather than language to determine what a person believes is both common sense and academic wisdom. See Condlin, "Socrates's New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction," *Maryland Law Review* 40 (1981): 248 n. 65.

57. My analysis of clinical education is restricted to its effectiveness at teaching ethics. I make no claims about its effectiveness at teaching strategic interpersonal technique or in producing social reform. There are obvious connections among these various objectives, but I do not develop them in this paper. If clinical education fails in the teaching of ethics, it does not follow that it fails in its other objectives.

58. The analysis of these tapes is reported in Condlin, "Socrates's New Clothes." The clinical teachers represented in this data ranged in experience from one year to six years. They taught at elite as well as nonelite law schools. For a further description of their characteristics, see "Socrates's New Clothes," p. 249 n. 66.

59. The relevant works are Jürgen Habermas, *Theory and Practice* (Boston: Beacon Press, 1973); Jürgen Habermas, *Communication and the Evolution of Society* (Boston: Beacon Press, 1979); Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton, N.J.: Princeton University Press, 1979); and Hannah Arendt, *The Life of the Mind* (New York: Harcourt Brace Jovanovich, 1971), Vol. 1 (*Thinking*).

60. Hannah Arendt, *Eichmann in Jerusalem* (New York: The Viking Press, 1963), p. 49.

61. Habermas, *Theory and Practice*, pp. 17–19; Jürgen Habermas, "Towards a Theory of Communicative Competence," *Inquiry* 13 (1970): 360; Jürgen Habermas, "On Systematically Distorted Communication," *Inquiry* 13 (1970): 205.

62. Condlin, "Socrates's New Clothes," pp. 235–38.

63. Ibid., pp. 238–48.

64. Ibid., pp. 233–35.

65. See, e.g., Duncan M. Kennedy, "How the Law School Fails: A Polemic," *Yale Review of Law & Social Action* 1 (1970): 71; Paul N. Savoy, "Toward a New Politics of Legal Education," *Yale Law Journal* 79 (1970); Stone, "Legal Education on the Couch"; Murray Schwartz, "How Can Legal Education Respond to Changes in the Legal Profession?" *New York University Law Review* 53 (1978): 444; Andrew S. Watson, "The Quest for Professional Competence: Psychological Aspects of Legal Education," *University of Cincinnati Law Review* 37 (1968).

66. Compare Schwartz, "How Can Legal Education Respond," which seems to say that competitiveness is all there is to the law-school style.

67. The self-sealing property of the persuasion mode produces this effect. By "self-sealing," I mean that people acting in the persuasion mode do not reflect critically on how they understand. They do not try to discover the ways in which their particular ideologies distort communication and understanding.

68. I include within "setting" the status, experience, power, and other such attributes of the actors, conferred by the social systems of law school, law practice, and the society at large, that influence each party's perception of the other.

69. Condlin, "Socrates's New Clothes," pp. 228–30.

70. For an example of the scenario, see ibid., pp. 248–60.

71. Communicative incompetence involves more than technical weaknesses in speech and language skills. It includes the inability to identify and escape (if only partially) ideological constraints that prevent one from achieving uncoerced consensus with another. Richard Abel has asked if it is possible to "restructure communication without changing the world." I do not know the answer to that question. I approach the problem from the perspective of communicative competence because it is a formulation I find helpful. It allows us to think of worldly problems in ways that suggest specific courses of conduct for day-to-day behavior. It has always been hard to know how to measure success at changing the world, but one can tell when there has been an improvement in communicative competence.

72. "Adversarial skills" may be a misleading term. The communication practices I am talking about are not stylized and formal techniques of courtroom argument. They are low-visibility methods for closing the universe of discourse in one's favor without letting on that that is being done. They manipulate and dominate within a cordial and conversational style and are effective because they keep another from discovering that personal autonomy and free choice are at stake. Examples of their law-practice analogues are argument techniques in negotiation or methods for convincing recalcitrant witnesses to cooperate in discovery.

73. Put another way, there are worlds in which persuasion-mode behaviors are the norm and operating effectively requires the use of these behaviors. It might be better if these worlds could operate more in the learning mode, but they do not. See Gary Bellow and Jeanne Kettleson, "From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice," *Boston University Law Review* 58 (1978): 384–86.

74. This is because a person understands in terms of what he or she has internalized as habit. See Section II, above.

75. Ironically, one of the problems produced is that of not knowing when one is morally justified in acting strategically. This is because moral justification for strategic action is a product of learning-mode communication. On the nature of strategic interaction, see Erving Goffman, *Strategic Interaction* (Philadelphia: University of Pennsylvania Press, 1969).

76. Douglas Rosenthal has described the economic costs to the client when this happens. Rosenthal, *Lawyer and Client*, pp. 13–27.

77. Elizabeth Loftus has discussed the importance of conviction in argument. See Elizabeth F. Loftus, *Eyewitness Testimony* (Cambridge, Mass.: Harvard University Press, 1979), p. 19.

78. Persuasion-mode habits can also ripen into ideology and become valued for their own sake as much as for what they produce. The development of values through role

model emulation is the most obvious way in which this ripening could occur. Students could come (and some do) to their clinical experience habitually and intellectually indifferent to the persuasion mode, and become what they do. (Robert Coles, *Erik Erikson and the Growth of His Work* [Boston: Little, Brown, 1970], p. 339.) But this is rarely the case. Almost all students have strong feelings about the substance of the persuasion mode before they enroll in clinical programs. Most reject the mode as inappropriate in social interaction, notwithstanding that they use it to varying degrees.

How persuasion-mode habits ripen into beliefs that drive out preexisting beliefs is a slightly more complicated question. At least three social psychological theories have been advanced to describe this process. The dissonance theory of Leon Festinger (see Leon Festinger, *A Theory of Cognitive Dissonance* [Evanston, Ill.: Row, Peterson, 1957]) suggests that in attempting to reduce dissonance caused by believing one thing and doing another, a person changes his beliefs so that they "become consistent with his public behavior." See Gerald R. Miller and Michael Burgoon, *New Techniques of Persuasion* (New York: Harper & Row, 1975), p. 61. The incentive theory of Irving Janis suggests that "improvising arguments in favor of a point of view at variance with one's own . . . increases the salience of the positive arguments and therefore increases the chances of acceptance of the new attitude position." Irving Janis, "The Influence of Incentive Conditions on the Success of Role Playing in Modifying Attitudes," *Journal of Personality & Social Psychology* 1 (1965): 17. And the self-perception theory of Daryl Bem argues that "Individuals come to 'know' their attitudes and other internal states partially by inferring them from observations of their own overt behavior. . . ." Daryl J. Bem, "Testing the Self Perception Explanation of Dissonance Phenomenon," *Journal of Personality and Social Psychology* 74 (1970): 23. See also Bem, "An Experimental Analysis of Self-Persuasion," *Journal of Experimental Social Psychology* 1 (1965): 199; Richard E. Nisbett and Timothy De Camp Wilson, "Telling More Than We Can Know: Verbal Reports on Mental Processes," *Psychological Review* 84 (May 1977): 231; Erwin Chemerinsky, "Protecting Lawyers From Their Profession: Redefining the Lawyer's Role," *The Journal of the Legal Profession* 5 (1980): 31.

79. William Simon has made the same criticism of clinical instruction from the data base of clinical scholarship. See Simon, "Homo Psychologicus," pp. 520–24, 539–50.

80. "Clinical education" here refers particularly to that spate of programs started in the 1960s and 1970s with money from the Ford Foundation channeled, for the most part, through the Council on Legal Education for Professional Responsibility (CLEPR). Early in his tenure as President of CLEPR, William Pincus (the principal spokesman for clinical education; see Pincus, *Clinical Education for Law Students*, p. xv) stated that CLEPR was not interested in changing the law school curriculum. See William Pincus, "Council on Legal Education for Professional Responsibility: Past, Present and Potential Contributions," in *Education in the Professional Responsibilities of the Lawyer*, edited by Donald T. Weckstein (Charlottesville, Va.: University Press of Virginia, 1970), p. 330. At some point Pincus changed his mind.

81. This is not to say that no educators were involved in the first clinical programs. Obviously some were. But educators had been able to start and sustain clinical programs on only a limited and sporadic basis. See Stevens, "Two Cheers," pp. 522–24. It took the money of the Ford Foundation and the proselytizing of William Pincus to make clinical education a systemwide phenomenon. It was Pincus and his allies who had objectives other than educational reform. They were not hostile to educational reform and often listed it in their statement of objectives. But the tenor of their public discussions would lead one to conclude that they were more interested in other things, at least at the outset.

82. Pincus, *Clinical Education for Law Students*, pp. 71–72.

83. The National Council on Legal Clinics, funded from 1958 to 1965 at $800,000; the Council on Education in Professional Responsibility, funded from 1965 to 1968 at $900,000; and the Council on Legal Education for Professional Responsibility, funded from 1968 to 1978 at approximately $10,000,000 total. Lester Brickman describes the phoenix-like succession pattern of Ford's agencies. Brickman, "CLEPR and Clinical Education," pp. 56–60. See also Gee and Jackson, "Bridging the Gap," pp. 755–61; Orison S. Marden, "CLEPR: Origins and Programs," in *Clinical Education for the Law Student,*

pp. 5–8. Ford rarely, if ever, paid all of the costs of a clinical program. Typically, it would pay two-thirds of the program's expenses in the first year of a grant, one-third in the second, and none after that. The formula varied greatly, but Ford's approach was always to provide "seed money," hoping that the law schools would take over total responsibility for the programs in short order.

84. Pincus, *Clinical Education for Law Students*, pp. 1–3. See also Brickman, "CLEPR and Clinical Education," p. 65; Gee and Jackson, "Bridging the Gap," pp. 884–85; Marden, "CLEPR," pp. 4–5; Whitney North Seymour, "CLEPR From the Viewpoint of the Practicing Bar," in *Clinical Education for the Law Student*, pp. 13–15.

85. I do not intend to make the line between ethics and politics too sharp. There is obviously a good deal of overlap. But instruction, for example, in how to make access to the legal system available is not the same as instruction in how to avoid manipulation and domination. Ford was more interested in the former at this time.

86. Marden, "CLEPR," p. 5.

87. Ibid., p. 6.

88. See Pincus, *Clinical Education for Law Students*, pp. 5–9; 24–25; 208–9. See also Mr. Justice Brennan's concurring opinion in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

"I join the opinion of the court and add only an observation upon its discussion of legal resources, *ante,* at 12 n.7. Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. The Council on Legal Education for Professional Responsibility (CLEPR) informs us that more than 125 of the country's 147 accredited law schools have established clinical programs in which faculty-supervised students aid clients in a variety of civil and criminal matters. [citation omitted]. These programs supplement practice rules enacted in 38 states authorizing students to practice law under prescribed conditions. [citation omitted]. Like the American Bar Association's Model Student Practice Rule (1969), most of these regulations permit students to make supervised court appearances as defense counsel in criminal cases. [citation omitted]. Given the huge increase in law school enrollments over the past years, [citation omitted], I think it plain that law students can be looked to to make a significant contribution, quantitatively, and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision." Ibid., p. 540 (L. Ed.).

89. Ibid. Ford's first appropriation for clinical programs was made three months before *Gideon v. Wainwright*, 372 U.S. 335 (1963) established the constitutional right to counsel in felony cases. See Pincus, *Clinical Education for Law Students*, p. 8.

90. Toll, "CLEPR From the Viewpoint of Legal Aid," pp. 21–22.

91. This was also the time of the establishment of the Neighborhood Legal Services Program for the poor. See Edgar S. Cahn and Jean Camper Cahn, "The War on Poverty: A Civilian Perspective," *Yale Law Journal* 73 (1964): 1316; Edgar S. Cahn and Jean Camper Cahn, "What Price Justice: The Civilian Perspective Revisited," *Notre Dame Lawyer* 41 (1966): 927; "Legal Services—Past and Present," *Cornell Law Review* 59 (1974): 960; Roger C. Cramton, "Promise and Reality in Legal Services," *Cornell Law Review* 61 (1976): 674–80; Warren E. George, "Development of the Legal Services Corporation," *Cornell Law Review* 61 (1976): 687–90. Note, "Neighborhood Law Offices: The New Wave in Legal Services for the Poor," *Harvard Law Review* 80 (1967): 805.

92. Pincus, *Clinical Education for Law Students*, pp. 63, 82, 160–61; Gee and Jackson, "Bridging the Gap," pp. 884–85.

93. Stevens, "Two Cheers", pp. 539–41.

94. Stone, "Legal Education on the Couch"; Watson, "The Quest for Professional Competence," p. 91; Charles A. Reich, "Toward the Humanistic Study of Law," *Yale Law Journal* 74 (1965): 1402; Savoy, "Toward a New Politics," p. 444; Kennedy, "How the Law School Fails."

95. See, e.g., Thomas L. Shaffer and Robert S. Redmount, *Lawyers, Law Students and People* (Colorado Springs, Co.: Shepard's Inc., 1977), pp. 1–13, 48–53, 93–102, 153–192; Carolyn S. Bratt, "Beyond the Law School Classroom and Clinic—A Multidisciplinary Approach to Legal Education," *New England Law Review* 13 (1977): 200–205; Arthur Kinoy, "The Present Crisis in American Legal Education," *Rutgers Law Review* 24 (1969):

1; Rockwell, "The Education of the Capitalist Lawyer," p. 94; Jon Richardson, "Does Anyone Care for More Hemlock?" *Journal of Legal Education* 25 (1973): 427; Anthony J. Mohr and Kathryn J. Rodgers, "Legal Education: Some Student Reflections," *Journal of Legal Education* 25 (1973): 403; Simon, "Homo Psychologicus," p. 553; Kennedy, "How the Law School Fails," pp. 1–4. These complaints were directed at all university education, not just law school. See Joseph J. Schwab, *College Curriculum and Student Protest* (Chicago: University of Chicago Press, 1969).

96. See, e.g., Charles C. Black, Jr., "Some Notes on Law Schools in the Present Day," *Yale Law Journal* 79 (1970): 505–11.

97. Paul D. Carrington, "The University Law School and Legal Services," *New York University Law Review* 53 (May–June 1978): 421–28; Preble Stolz, "Clinical Experience in American Legal Education: Why Has It Failed?" in Kitch, *Clinical Education*, p. 68; Herbert L. Packer and Thomas Ehrlich, *New Directions in Legal Education* (abridged ed.) (New York: McGraw-Hill, 1973), pp. 37–46; Spencer Kimball, "Floor Discussion," *Proceedings of Association of American Law Schools Conference Funding of Clinical Legal Education* (March 3 & 4, 1978).

98. See, e.g., Francis A. Allen, "The New Anti-Intellectualism in American Legal Education," *Mercer Law Review* 28 (Winter 1977): 447; Kimball, "Floor Discussion," p. 91; Gorman, "Clinical Legal Education," pp. 551–61; Gee and Jackson, "Bridging the Gap," p. 883; David F. Cavers, "Report on Evaluation of Selected NCLC Projects by Ford Foundation Evaluation Group," in Sacks, *Proceedings of the Asheville Conference*, pp. 97–105.

99. I do not mean that most faculty were willing personally to experiment with new programs. They were willing to support an institutional experiment—i.e., they would vote to hire a clinical teacher—but few traditional faculty actually taught clinical courses. For an exception, see Alfred F. Conard, "Letter from the Law Clinic," *Law Quadrangle Notes* 18 (Fall 1973): 18.

100. Barnhizer, "The Clinical Method," pp. 73–75.

101. For a twist on this argument, contending that it is the student-client relationship that introduces the democratizing and personalizing element, see the statement of William Pincus quoted in Packer and Ehrlich, *New Directions in Legal Education*, p. 44.

102. See Stevens, "Two Cheers," p. 528.

103. For a history of the law and economics movement, see Morton J. Horwitz, "Law and Economics: Science or Politics?" *Hofstra Law Review* 8 (Summer 1980): 905–12. See also Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique," *Stanford Law Review* 33 (February 1981): 387 n. 1, 393–98.

104. See Stevens, "Two Cheers," pp. 476–77, 531–37.

105. Pincus, *Clinical Education for Law Students*, pp. 228–40, 271–74, 293, 296. In spite of CLEPR's emphasis on first, law reform, and then, ethics, most clinical programs today emphasize the teaching of interpersonal technique. CLEPR's goals weren't ignored, just subordinated. Perhaps this is because law practice, by its nature, raises more technique issues than it does ethical and political ones. Since technique predominates and is more manageable emotionally and intellectually, it is understandable that it would become the focal point of clinical work. Moreover, only with respect to interpersonal technique can clinical cases be counted on, by themselves, to raise a comprehensive and representative set of issues. It is easy to give a complete course in interpersonal technique from practice cases. Problems of coverage, sequence, and structure are manageable in a way that they are not when practice work is used to teach a comprehensive course in professional ethics.

106. This shift occurred immediately after the publication (in a CLEPR-sponsored anthology) of Gary Bellow's very influential article "On Teaching the Teachers." Bellow argued that clinical instruction was mostly a pedagogical innovation and downplayed its social reform potential. CLEPR may have been convinced by Bellow's reasoning and thus decided to justify clinical instruction in terms of its pedagogical potential. The shift to a "professional ethics" justification was partly a shift in the direction of pedagogy.

107. For a slightly different version of the development of legal clinics, see Kelly, *Legal Ethics*, pp. 17–20. Kelly suggests that CLEPR's and clinical teachers' shift from an interest in social reform to an interest in pedagogy and professional ethics was a reaction to "the politics of tenure."

108. Perhaps law faculties should not have looked to CLEPR for guidance in hiring clinical teachers. After all, who should know better than a law teacher what qualities a law teacher ought to have? That logic did not operate, perhaps because CLEPR was paying most of the bills and had strong feelings about what type of person should be hired (i.e., not a traditional law teacher); law faculties had been convinced that clinical teaching was different in some unspecified way that made traditional academic standards inappropriate; and law faculties thought that CLEPR's views were based on documented experience. When no one knows what is right, the first person to speak authoritatively is often deferred to, especially in the short term, and particularly if he's paying.

109. For the most part, the "answers" were provided by William Pincus. See note 80. For representative examples, see Pincus, *Clinical Education for Law Students*, pp. 140–51, 244–56, 351–57, 370–72, 376–78. I have cited only to excerpts from articles that first appeared in academic law journals. Pincus's speeches and panel presentations provide richer evidence of the simplicity and confusion of CLEPR's position, but few people put their best thoughts in speeches.

110. In all fairness to law faculties, it is not clear that the pool of prospective clinical teachers was ever rich in candidates with academic interests. Law faculties may have had little choice.

111. The Neighborhood Legal Services Program (the federal government program charged with providing legal services to the poor) had begun to produce a large class of "burned out" lawyers, looking for new and less frustrating work. (For a discussion of the "burn out" phenomenon, see Jack Katz, "Lawyers for the Poor in Transition: Involvement, Reform, and the Turnover Problem in the Legal Services Program," *Law & Society Review* 12 [Winter 1978]: 286–97.) Since most clinical practice was done for poor people, but under less pressured and more reflective conditions, these lawyers had a natural interest in the mass of new clinical faculty positions being created.

112. See, e.g., Meltsner and Schrag, "Report from a CLEPR Colony"; Michael Meltsner and Philip Schrag, "Scenes from a Clinic," *University of Pennsylvania Law Review* 127 (1978): 1; Jack Himmelstein, "Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law," *New York University Law Review* 53 (1978): 514; Spiegel, "The New Model Rules"; Spiegel, "Lawyering and Client Decisionmaking"; Gary Bellow, "Turning Solutions Into Problems: The Legal Aid Experience," *NLADA Briefcase* (August 1977): 106.

113. Sometimes, of course, this clinical world view is accurate. Some traditional law faculty are narrow-minded, biased, and intellectually dishonest in their dealings with clinical programs. They try to hold clinical teachers to standards that they cannot meet themselves and oppose clinical programs with a fanaticism and pettiness of sometimes epic proportions. Clinical teachers sometimes have reason to be paranoid.

On the other hand, it is easy to mistake the devil for everyman. Because the fanatics are the most voluble, it is easy to think that they are the most representative. When this is done, there is the tendency to write off all law faculty reaction as unfair, ideological, or sick. Understandable as this reaction is, it is self-defeating.

When law faculties are examined in the aggregate, the charge that they are unsympathetic is hard to establish on the evidence. There is resistance to clinical instruction, to be sure. But serious reforms produce resistance as a matter of course. Reformers always have to go more than halfway. When an organization is asked to change accustomed ways of doing things, even if outmoded, it resists. This is even more the case when the reform introduces subjects (i.e., the study of the self and social relationships) that have a proven capacity for mobilizing defenses, particularly in law-trained people. The resistance of law faculties must be measured by the extent to which it goes beyond expected resistance. Against this standard, traditional teachers look moderately sympathetic.

114. This statement admits of a limited qualification. If a person has developed moral habits while growing up and has reflected on those habits so as to understand them in principled terms, he or she may be able, through an act of the imagination, to place herself or himself in the position of a lawyer confronted with an ethical choice and create in her or his mind the intellectual and emotional conditions constitutive of that situation. For such a person, a hypothetical ethical scenario could serve as a trigger for this

imaginative act, and the analytical resolution of such a scenario could serve as a realistic rehearsal for a response to the dilemma in real life. Some people are sufficiently imaginative, and their ethical character sufficiently mature, that they can find learning in the tiniest shards of an instructional experience and use that learning to direct their behavior in life. Legal education ought not to mistake this person for the paradigm case.

115. The problems with the clinical literature are discussed in Simon, "Homo Psychologicus."

116. One commentator has suggested that multiple intellectual perspectives on the technique dimension of clinical instruction have already taken shape. See Carrie Menkel-Meadow, "The Legacy of Clinical Education: Theories About Lawyering," *Cleveland State Law Review* 29 (1980): 555.

117. Eventually, students do not enroll in courses in which the intellectual content does not evolve. As each generation of clinical students passes on more of the stock ideas with which a clinical program deals, there will come a time when there will be few, if any, new ideas to teach. At that time, clinical programs will lose out in the competition for student (particularly good student) enrollment. Ronald Pipkin has described the process through which students abandon a course without new intellectual content, using as an example, ironically, the traditional course in professional responsibility. See Ronald Pipkin, "Law School Instruction in Professional Responsibility: A Curricular Paradox," *American Bar Foundation Research Journal* 1979 (1979): 257–65.

118. For a further discussion of these issues, see Condlin, "Socrates's New Clothes," p. 237 n. 35 and 251 n. 69.

119. For representative examples of such scholarship, see George S. Grossman, *Clinical Legal Education: An Annotated Bibliography* (New York: Council on Legal Education for Professional Responsibility, 1974), pp. 40–55. See also any of the descriptions of particular clinical programs reported in *Clinical Education for the Law Student*, pp. 181–248; Kitch, *Clinical Education*, pp. 138–213; Sacks, *Proceedings of the Asheville Conference*, pp. 17–91.

120. Hubert L. Dreyfus, *What Computers Can't Do: The Limits of Artificial Intelligence*, rev. ed. (New York: Harper & Row, 1979), p. 21.

121. For previous examples of clinical teacher collaboration with scholars from other disciplines, see Harrop A. Freeman and Henry Weihofen, *Clinical Law Training: Interviewing and Counseling* (St. Paul: West Publishing Co., 1972); Murray Teigh Bloom, *Lawyers, Clients and Ethics: Using the Law School Clinic for Teaching Professional Responsibility* (New York: Council on Legal Education for Professional Responsibility, 1974). For an example of the type of empirical research that is desirable, see Carrie Menkel-Meadow, "Allocating Legal Resources Among Legal Services Attorneys," *Proposal to the National Science Foundation*, May 28, 1980.

122. Bernard Williams, *Morality: An Introduction to Ethics* (New York: Harper & Row, 1972), p. 29.

123. Ironically, clinical teachers are among the most prominent of the limited number of law teacher models. Critical self-reflection characterizes the writing of Michael Meltsner, Phil Schrag, Jack Himmelstein, Mark Spiegel, and Gary Bellow, among others. See note 112. Traditional law teachers also provide such models. See, e.g., Paul Brest, "On My Teaching," *Stanford Lawyer* (Spring/Summer 1979): 23.