

Fall 1998

Creating True Believers: Putting Macro Theory into Practice

Minna J. Kotkin

Brooklyn Law School, minna.kotkin@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Administrative Law Commons](#), and the [Other Law Commons](#)

Recommended Citation

5 Clinical L. Rev. 95 (1998-1999)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

CREATING TRUE BELIEVERS: PUTTING MACRO THEORY INTO PRACTICE

MINNA J. KOTKIN*

I. INTRODUCTION

In 1986, Robert Condlin published an article, now somewhat notorious in clinical circles, entitled "*Tastes Great, Less Filling*": *The Law School Clinic and Political Critique*.¹ There he attacked in-house clinical programs for failing to provide a political critique of lawyering. Political critique, he suggested, requires a critical theory, defined as "views on the nature of a fair and just legal system and the role of lawyer practices in operating and improving it."² The paramount goal of clinical instruction is such critique, and without it, clinics "will remain relegated to training tasks not considered important enough over the long run by a university law school."³ Condlin argued that the typical clinic cannot appropriately engage in this critical endeavor because of design and resource limitations. He suggested that externship programs supervised by full time faculty provide a better vehicle for students to learn how to think critically about lawyering. "Tastes Great" was viewed as heresy by many clinical educators.⁴

Unfortunately, Condlin's legitimate concerns about the relegation of clinical teaching to trade school-like "skills instruction" were overshadowed by his condemnation of in-house clinics—still a sensitive issue in law school politics.⁵ This article both follows from and challenges Condlin's critique. I argue that the lawyering methodology

* Professor of Law and Director, Federal Litigation Program, Brooklyn Law School. I want to thank Jennifer Sinton for her invaluable research assistance and to acknowledge the support of Brooklyn Law School's summer research stipend program. Thanks also to the participants in the UCLA/IALS Fourth International Clinical Conference, where I presented a draft of this article; to my former colleague in the clinic, Liz Cooper; and to my writing group—Stacy Caplow, Susan Herman, Nan Hunter, and Liz Schneider—for their support and feedback.

¹ 36 J. LEGAL EDUC. 45 (1986).

² *Id.* at 48-49.

³ *Id.* at 45.

⁴ Indeed, Condlin was optimistically understated when he recently noted that the article "might have been read more receptively if it had been given a different title." Robert J. Condlin, *Learning from Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 CLIN. L. REV. 337, 338-39 n.4 (1997).

⁵ It is beyond the scope of this article to enter into the "location" debate. In my view, while an in-house clinic is not the only possible site to explore theory, there is certainly no better place. I say this from my perspective as an in-house clinical teacher and without support or argument.

taught in most clinical programs is premised upon a critical theory. The problem is that we have not developed a methodology for systematically articulating and teaching the theory.

In what I hope is a constructive manner, this article addresses how we can put theory into our teaching and our vision of practice. Part II considers why legal theory makes a difference in clinical teaching, and distinguishes micro theory from macro theory in the teaching of lawyering methodology. In Parts III and IV, I explore the parallel histories of critical legal theory and clinical education, and summarize those components of critical theory that most aptly find their way into our lawyering paradigms. In Part V, using examples of several skill components that cut across most clinical programs—interviewing, counseling, development of case theory, and negotiation—I analyze the underlying micro and macro theories, and make suggestions for how these skills can be taught from a more theoretical foundation. In Part VI, I offer some thoughts for the skeptical reader. I conclude by suggesting that we embrace the idea of “critical lawyering” as an overarching paradigm for our teaching that will serve the purpose of imbuing skills instruction with a solid theoretical foundation.

II. WHY THEORY?

Clinical legal educators have always given lip service to the proposition that experiential learning will change the study of law to integrate theory and practice. I suggest, however, that our efforts in this direction have been stymied by a concentration on the teaching of skills without theoretical context. Our students are provided with little foundation from which to understand what we hope to teach them about law and lawyering. The “theory-practice spiral”⁶ that we envision as the optimal clinical experience may not be turning in the right direction.

In its formative years, clinical legal education was rooted in practice. Students worked with legal services and public interest lawyers to gain “relevant” legal experience in a time of progressive political consciousness.⁷ As these externship experiences were formalized and

⁶ Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1617 (1991)(coining this phrase, and suggesting that perceiving a theory-practice dichotomy erases the dialectical nature of the relationship between theory and practice).

⁷ See Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 189-91 (1989). See also Gary Bellow & Earl Johnson, *Reflections on the University of Southern California Clinical Seminar*, 44 S. CAL. L. REV. 664, 668-69 (1971)(discussing changes in law students' career patterns and interest in “personal and institutional involvement in contemporary social problems”); Robert A. Gorman, *Clinical Legal Education: A Prospectus*, 44 S. CAL. L. REV. 537, 540 (1971)(noting that most clinical programs

funds were made available to institutionalize them within the law schools, it became apparent that clinical practice provided an opportunity to think seriously about what constitutes good lawyering.⁸ From the clinical laboratory, we developed basic lawyering models for interviewing and counseling clients, for planning a representational strategy, for negotiating on behalf of our clients, for representing community groups.

These lawyering models—or paradigms, to use the terminology of this conference—represent what I will call micro theory. For example, when we teach counseling, we present the theory of client centered decisionmaking, usually through the use of texts such as Binder, Bergman, and Price⁹ or Bastress and Harbaugh.¹⁰ In teaching negotiation, we may use *Getting to Yes*¹¹ to convey the notion of principled bargaining. These works suggest the micro theory for the skills that we hope our students will develop. We emphasize in our teaching that the models presented create better lawyering. We patiently explain that if students understand and follow the models, they will provide higher quality legal services to their clients.

Most clinical teachers firmly believe this proposition. In my experience, at least, students are more resistant. For many of them, the lawyering paradigms that we present are counter-intuitive. Students' vision of good lawyering, shaped by popular culture, contemplates the masterful advice-giver and the canny, bluffing, tough negotiator. Thus, students will often question our paradigms, and seem at least initially unconvinced by the micro theory that forms the foundation of the skills being taught. But because they are our students and accustomed to accepting educational hierarchy, they eventually become more compliant, practicing their reflective listening in simulations and, probably with less consistency, with their actual clients. Still, however, how many times do we hear, "But in the real world . . .," when we caution that lawyers cannot make decisions for clients, or insist that a case theory be articulated?

I worry that much of what we teach only penetrates to a limited

assigned students to work for legal aid and legal services offices).

⁸ See Kotkin, *supra* note 7, at 191-93 (commenting on the development of an attention to "how clinicians were using students' practical experiences to achieve generalized learning about the lawyering process"); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 322 & n.3 (1982)(arguing that clinical programs are justified by the education and experience they provide, and that service is merely a "welcomed by-product").

⁹ DAVID A. BINDER, PAUL BERGMAN & SUSAN C. PRICE, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991).

¹⁰ ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990).

¹¹ ROGER FISHER & WILLIAM URY, *GETTING TO YES* (2d ed. 1991).

degree. I imagine our students, when in "the real world" and confronted by norms of practice that have little resemblance to clinical models, losing the foundations that we worked hard to instill. Why is it that clinical teachers are true believers in the micro theory that we teach, while our students may be only temporary converts?

One possible and obvious explanation for this dichotomy is that clinical teachers have had so many lawyering experiences that demonstrate the efficacy of our micro theories. For example, we learned intuitively and through trial and error that open ended questions elicit more information than cross-examination when interviewing a client, or that a client should not be dissuaded from taking a risk in negotiations even if we would make a different choice.

Thus, while our former students may be temporarily swayed by practice norms contrary to our micro theories, they will return to the fold eventually, as experience demonstrates to them the rightness of our ways. This is the scenario I see on my more optimistic days. On the others, I imagine my former students reverting to those negative lawyering images the moment they walk out of the clinic door and into the infamous "real world." While they may, through experience, come back to our models, their clinical education failed to accomplish a major goal: to avoid the lengthy trial and error process of learning through experience without supervision and directed reflection.

Unfortunately, we cannot convince our students that the clinical models work through the use of objective studies. We have little in the way of empirical data to reinforce our intuitive notions of good lawyering.¹² As others have commented, the clinical community has not created a foundation of study that attempts to provide evidence that our lawyering models produce better results or even happier clients.¹³ Indeed, most of us have no training in the distinct skills necessary for such research, nor the time to invest in such work.

Thus, how do we respond to students' queries about the "whys"

¹² See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1151-52 (1992) (noting that lawyers' intuitions about judge and jury trials are based on perception and not empirical evidence); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 584, 594 (1990) (discussing the theoretical development of a client-centered approach to lawyering despite the "inadequate (though improving) state of empirical research on lawyers and clients" and noting that empirical data would help to test the assumptions of the client-centered approach).

¹³ Vanessa Merton eloquently spoke to this issue at the 1995 AALS Clinical Legal Education Workshop in St. Louis, Missouri. See also Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 UCLA L. REV. 697, 697 (1992) (reviewing the Binder, Bergman, and Price and Bastress and Harbaugh books and noting that some of the lawyering models proposed therein, which the clinical community believes to be effective, are based on assumptions about clients, lawyers, and the client-lawyer relationship rather than on empirical study).

of our lawyering paradigms? I find myself in the position of answering, "because experience has shown that it works better." Sometimes, however, the answer is "because I'm the teacher," which is somehow too reminiscent of the fallback position in my household: "because I'm the parent." We need something more.

Many clinical teachers are true believers for a reason that goes beyond experience. Behind our micro theories are unarticulated macro theories that we do truly believe. These macro theories are political and jurisprudential. They represent our underlying understanding of law and the legal process, of justice and fairness or its absence. For students to understand the "whys," they need to appreciate the macro theory of lawyering skills.

That macro theory, I suggest, rests within critical legal theory scholarship. This is not a novel idea. Any number of clinical writers have dipped into critical scholarship to elucidate lawyering models.¹⁴ I do not mean to imply that our lawyering paradigms are necessarily derived from critical legal theory, however. Rather, I see the process as a symbiotic development along two parallel tracks. Beginning in late 1970s, both critical scholarship and lawyering scholarship began to take root in the legal academy. While neither explicitly relied on the other, the common strands suggest that they find their roots in the same value structure.

Macro theory is necessary because neither anecdotal experience nor empirical data (if we were to develop it) provide a sufficient grounding for our paradigms. And, because the micro theory behind the paradigms does not—and should not—satisfy our students. These foundations actually mask the true underpinning of the skills we teach. I ask students to follow certain models of lawyering because those models reflect my values, and my values reflect my political understanding of law and our legal system. As discussed in Part III, critical legal theory explores those values and political understandings. It

¹⁴ See, e.g., Anthony V. Alfieri, *Theoretics of Practice: The Integration of Progressive Thought and Action: Disabled Clients, Disabling Lawyers*, 43 HASTINGS L.J. 769 (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992); Clark D. Cunningham, *Legal Storytelling: A Tale of Two Clients: Thinking about Law as Language*, 87 MICH. L. REV. 2459 (1989); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Louise G. Trubek, *The Worst of Times . . . And the Best of Times: Lawyering for Poor Clients Today*, 22 FORDHAM URB. L.J. 1123 (1995); Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. MIAMI L. REV. 983 (1984); Lucie E. White, *Seeking " . . . the Faces of Otherness . . .": A Response to Professors Sarat, Felstiner, and Cahn*, 77 CORNELL L. REV. 1499 (1992).

answers the question of "why" with explanations that have substance and content.

III. A CRITICAL HISTORY

At first glance, it would seem that critical legal studies scholarship offers little in the way of guidance for those of us who "teach skills"—a designation that I use here only for purposes of distinguishing between "stand-up" or traditional teachers, who, of course, also teach skills, just different ones. In fact, the major critique of CLS¹⁵ has been its lack of practical application to legal problem solving, either from a doctrinal or a practical perspective.¹⁶ I suggest, however, that a closer look at CLS principles reveals much that resonates with progressive practicing lawyers. Indeed, the response to many CLS insights from this community is that this jurisprudence actually reflects what happens to disempowered clients and groups in the courts today.

The origin of the CLS movement dates from the same period that spawned the beginnings of clinical legal education, with much of the same impetus at its roots. In the 1970s, clinical education sought to bring a political consciousness to the legal academy. CLS first drew national attention in 1976 when a group of scholars gathered for a conference at the University of Wisconsin.¹⁷ Interestingly, the report of that conference comments upon CLS's roots in practical lawyering. The intention of the group was to "[speak] to lawyers and academics in a way that connected theoretical speculation to their daily experience [of] the law, rather than merely their abstract curiosity."¹⁸ CLS

¹⁵ I use "CLS" broadly to encompass the "traditional" CLS scholarship, as well as other postmodern theoretical movements. For much of the following summary, I have relied on an excellent book by my colleague, Gary Minda, which provides a cogent and accessible summary of postmodern theory. GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END* 123-24 (1995).

¹⁶ See *id.* at 123-24 (discussing the criticisms of Paul Carrington, Owen Fiss, Joel Handler, John Stick, and Harry Edwards); *infra* notes 34-39 and accompanying text (discussing the criticisms of CLS scholarship). Despite the criticism that CLS lacks practical grounding and application, Minda notes that "intellectual projects of CLS were also based on the view that practice informed theory. Progressive legal theory was said to emerge from progressive political practice. CLS focused on the 'doing' rather than just the 'theorizing.'" MINDA, *supra* note 15, at 112; see also DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983) (offering proposals for challenging hegemony at law schools); Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013 (1985) (discussing CLS activism in law schools and proposing a greater role for clinical programs).

¹⁷ See MINDA, *supra* note 15, at 106. For a general history of CLS scholarship, see CRITICAL LEGAL STUDIES (James Boyle ed., 1992); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982); Duncan Kennedy & Karl Klare, *Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

¹⁸ James Boyle, *Introduction*, in CRITICAL LEGAL STUDIES, *supra* note 17, at xliv.

scholars conceived their role as offering not merely a theory of law, but a “politically active, socially responsible” view of being a lawyer.¹⁹

The theory in fact espoused by CLS is notoriously difficult to define, and as Mark Tushnet has noted, critical theory is less an intellectual movement than it is a political location.²⁰ Some principles can be discerned, however. First is the indeterminacy of legal doctrine, so that any legal principle can yield contradictory results. Given that law is indeterminate, predictors of results can be traced to identifying what entrenched economic and social institutions benefit from a decision. Legal analysis and culture are designed to disguise the political content of decision-making and legitimate political results. The culture of law works to mystify and disempower outsiders through the use of abstract professional legal discourse. Traditional liberal legal thought, with its rights-based focus, privileges the values of individual autonomy and self-interest over community and connection, so that liberal law reform efforts result only in the perpetuation of the *status quo*.²¹

Critical scholars also look at how legal education worked to support the hegemony of traditional legal theory. Law school is part of the mystification process, in that it de-emphasizes the moral and political content of law, and seeks to explain judicial decision-making as an objective rational exercise, rather than a smokescreen for disguising rule indeterminacy. Law students are trained to function as legal technicians, with the expertise necessary to make “right” decisions for their clients. CLS trained lawyers, on the other hand, see their role as empowering clients to challenge the alleged objectivity of the legal system.²²

Critical jurisprudence also finds expression in feminist legal theory, critical race theory, and queer theory. These movements are alternatively viewed as off-shoots of CLS or independent schools of legal thought that changed the focus of CLS. In either case, by the late 1980s, critical scholarship had shifted to some degree from exclusively economic analysis to the exploration of how issues of race, gen-

Boyle notes that the very ability of CLS to speak to practitioners may account for the rise of CLS. *See id.*

¹⁹ *Id.* at xliv.

²⁰ Tushnet, *supra* note 17, at 1515. For Tushnet, a “political location” is “a place where people with a wide but not unlimited range of political views come together for political education, sustenance, and activity.” *Id.* at 1515 n.2.

²¹ *See* MINDA, *supra* note 15, at 113; Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 374 (1982-83).

²² *See* MINDA, *supra* note 15, at 110-14; Gabel & Harris, *supra* note 21; William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

der, and sexuality determine legal outcomes.²³ Feminist jurisprudence looks primarily at women's experience to expose how the law has systematically privileged masculine normative visions. Thus, a basic tenet of feminist legal theory is the importance of personal narrative in challenging the dominant discourse. Telling the stories of women's lives exposes the patriarchal assumptions inherent in doctrine.²⁴ Among the most significant perspectives to emerge from this methodology is cultural feminism, which emphasizes the value that women attach to the morality of relationship and connection, as compared to autonomy and individuality. Cultural feminists suggest that these values have long been disregarded by liberal legal theory, resulting in a body of doctrine that disempowers women and fails to protect their interests.²⁵ Radical feminist theory takes a different analysis, viewing gender inequality in law as the result of a systematic attempt to maintain the subordination of women, and a reflection of a social construction of sexuality designed to perpetuate male dominance.²⁶ Both schools rec-

²³ See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education, or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988). See also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (developing a "Black feminist criticism" by exploring the "tendency to treat race and gender as mutually exclusive categories of experience and analysis" and marking this tendency in antidiscrimination law, feminist theory and antiracist politics); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (discussing the need for "counterstorytelling" by "outgroups" to challenge dominant narratives and ideology); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992) (suggesting that gay rights advocates should seek to counter myths about gay lifestyles and identities and should employ a gender-based legal theory to further gay rights).

²⁴ See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 87 (1989) (arguing that feminist narratives "moved the reference point for truth and thereby the definition of reality as such"); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 975 (1991) ("The ostensible 'neutrality' of the law disguises the extent to which it is premised on the perspectives of the powerful; the narratives of those who occupy a comparatively powerless position are not only evidence of what has been excluded, but testimony to the law's relentless perspectivity."); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 63 (1988) (arguing that "the narrative and phenomenological task for the critique of patriarchal jurisprudence is to tell the story and phenomenology of the human community's commitment to the Rule of Law from women's point of view").

²⁵ Robin West summarizes cultural feminist thought as follows:

Because women are connected with the rest of human life, intimacy with the "other" comes naturally. Caring, nurturance, and an ethic of love and responsibility for life is second nature. Autonomy, or freedom from the other, constitutes a value for men because it reflects an existential state of being: separate. Intimacy is a value for women because it reflects an existentially connected state of being.

West, *supra* note 24, at 18. Carol Gilligan's book *IN A DIFFERENT VOICE* (1982) is considered a "seminal" work of cultural feminism.

²⁶ While cultural feminism celebrates women's connectedness to the other as evidenced by women's morality of care, nurturing, and intimacy, radical feminism views this same

ognize the importance of listening to women's voices, however, and both diverge somewhat from the CLS mainstream in that they maintain a connection to liberal reformist idea of transforming doctrine to actually reflect women's voices.²⁷ The emerging postmodern feminist theorists believe, on the other hand, that gender equality must begin from the destabilization of gender identity, and a recognition of the falseness and essentialism of binary thinking.²⁸

Critical race theory seeks to expose the fact that racism is deeply ingrained in our legal culture. The formal equality supposedly dictated by our current laws does little to confront everyday manifestation of discrimination, and, in fact, is constructed to preclude any rapid destabilizing change in racial hierarchy. In exploring new visions of racial justice, critical race theorists rely on narrative and storytelling to demonstrate the false promise of our civil rights laws. In addition, they seek to demonstrate that normative discourse of civil rights is highly fact sensitive, and, therefore, neutral principles like formal equality can work as a hindrance in the search for racial justice. A color-blind meritocracy favors the interests of the white majority because it fails to recognize the racial hierarchy of our society.²⁹

connectedness as "the source of women's debasement, powerlessness, subjugation, and misery." West, *supra* note 24, at 83. "Invasion and intrusion, rather than intimacy, nurturance and care, is the 'unofficial' story of women's subjective experience of connection." *Id.* See also Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 427 (D. Kelly Weisberg ed., 1993)(proposing a trajectory for radical feminist theory).

²⁷ See MINDA, *supra* note 15, at 141-48 (noting that both cultural and radical feminism "tend to focus on a single understanding of women's experience" which needs to be articulated in order to insert woman's voice into the dominant ideology). While cultural feminism proposes that feminists must "expand the understanding of human development by using the group left out in the construction of theory to call attention what is missing in its account," GILLIGAN, *supra* note 25, at 4, MacKinnon writes: "Take your foot off our necks, then we will hear in what tongue women speak." Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *FEMINIST LEGAL THEORY: FOUNDATIONS*, *supra* note 26, at 277.

²⁸ See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990)(exploring the performativity of gender identity and politics). Some have questioned whether gender identity can be destabilized without historicizing the category of "experience," which is itself grounded in empiricism and liberal theory. See Joan W. Scott, "Experience," in *FEMINISTS THEORIZE THE POLITICAL* 33 (Judith Butler & Joan W. Scott eds., 1992)("It ought to be possible for historians to, in Gayatri Spivak's terms, 'make visible the assignment of subject-positions,' not in the sense of capturing the reality of the objects seen, but of trying to understand the operations of the complex and changing discursive processes by which identities are ascribed, resisted, or embraced and which processes themselves are unremarked, indeed achieve their effect because they aren't noticed." (citing GAYATRI SPIVAK, *IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS* 241 (1987))).

²⁹ See generally *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado ed., 1995)(collecting various works of Critical Race Theory).

As Critical Race Theorists have exposed the problems of color-blind ideology, policy

Queer theory questions how sexual identity should be conceptualized.³⁰ While the range of "queer theories" is diverse,³¹ two strains of thought, often in conflict, seem to predominate. One approach posits fixed and stable gay and lesbian categories of identity. Within this approach, the goals are to "make visible" the lives of gays and lesbians, and, within the legal context, to analyze the effect of law on lesbians and gay men and combat discriminatory legal doctrine.³² Alternatively, constructivists show how sexual identities are constructed rather than revealed, and suggest that there are not homosexual or heterosexual categories of identity apart from language and culture.³³ Queer theory also deconstructs the categorical opposition between homosexuality and heterosexuality, thus destabilizing cultural gender and sexuality norms.

The reaction of the legal world to critical legal theory is instructive in understanding the relationship between theory and practice. Indeed, examining the gulf between the response of progressive practitioners and traditional legal academics forms a starting point in considering how clinical education finds its theoretical roots in critical

and discourse around affirmative action have also been critiqued because affirmative action has functioned to maintain racial hierarchy. Richard Delgado writes:

[A]ffirmative action serves as a homeostatic device, assuring that only a small number of women and people of color are hired or promoted. Not too many, for that would be terrifying, nor too few, for that would be destabilizing. Just the right small number, generally those of us who need it least, are moved ahead. . . . By labeling problematic, troublesome, ethically agonizing a paltry system that helps a few of us get ahead, critics neatly take our eyes off the system of arrangements that brought and maintained them in power, and enabled them to develop the rules and standards of quality and merit that now exclude us, make us appear unworthy, dependent (naturally) on affirmative action.

Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, in *CRITICAL RACE THEORY: THE CUTTING EDGE*, *supra*, at 356.

³⁰ See Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993) (examining the conflicts between essentialist and constructivist movements within queer theory).

³¹ For a general background in queer theory, see *THE LESBIAN AND GAY STUDIES READER* (Henry Abelove et al. eds., 1993); *INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* (Diana Fuss ed., 1991).

³² William Rubenstein has compiled a thorough casebook on the contemporary status of gays and lesbians in the law. See WILLIAM B. RUBENSTINE, *SEXUAL ORIENTATION AND THE LAW: CASES AND MATERIALS* (2d ed. 1997).

³³ See Ortiz, *supra* note 30, at 1836-37 ("To constructivists, the gay identity category reflects not only late nineteenth-century Euro-American attitudes toward family, gender, and sexuality, but also attitudes towards economic organization and medical science."). Constructivists derive much of their scholarship from Michel Foucault's "History of Sexuality" and from Eve Sedgwick. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans. 1978); EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (1990). Nan Hunter and William Eskridge have recently written a casebook which tends toward the constructivist approach. See WILLIAM N. ESKRIDGE, JR., & NAN D. HUNTER, *SEXUALITY, GENDER AND THE LAW* (1997).

theory. Beginning in the 1980s and continuing to the present, CLS scholarship has been heatedly attacked, with a force that appears out of proportion to the content of the actual critique. In numerous articles, leaders of the legal academy have accused the Critics of "nihilism" and suggested that those who teach from a critical perspective are violating their ethical duties as law teachers to support the "rule of law."³⁴ Another branch of criticism has labeled critical scholarship as useless to practitioners and judges.³⁵ The narrative focus common to the various critical schools has been attacked as lacking analysis and failing to shed light on "objective truths."³⁶ Finally, the Critics have been generally denounced as unintelligible, incomprehensible, unprofessional, immoral, and just plain uncivil.³⁷ At some institutions, these critiques have resulted in serious tenure wars.³⁸

It has been suggested that the discourse over critical scholarship is simply an example of a traditional academic interchange: the older generation fighting off the "Young Turks" to preserve its territory in the academy.³⁹ Indeed, there is little question that the Oedipal drama

³⁴ See MINDA, *supra* note 15, at 123-24; Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (arguing that law teachers who "embrace nihilism . . . [have] an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy"); Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 L. & SOC'Y REV. 697 (1992) (arguing that CLS scholars do not offer a positive or constructive critique of legal doctrine); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332 (1986) (arguing that CLS scholars are legal nihilists).

³⁵ See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). Judge Edwards of the D.C. Circuit states: many "elite" law faculties . . . have significant contingents of "impractical" scholars, who are "disdainful of the practice of law." The "impractical" scholar . . . produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.

Id. at 35.

³⁶ See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 854 (1993) ("A legal story without analysis is much like a judicial opinion with 'Findings of Fact' but no 'Conclusion of Law.'").

³⁷ See Carrington, *supra* note 34 (questioning the CLS commitment to the legal profession); Owen M. Fiss, *The Death of Law?*, 72 CORNELL L. REV. 110 (1986) (stating that CLS critiques are "unappealing and politically irresponsible" because they fail to suggest an alternative vision of law).

³⁸ See Boyle, *supra* note 18, at xl ("Recent years have seen well-publicized denials of tenure to academics who espoused feminist and CLS ideas, together with an apparent relaxation of scholarly standards for anyone who wishes to suggest that critical legal scholars are nihilists, fascists, Marxists or (more mysteriously) all three.").

³⁹ Gary Minda aptly describes this scenario as follows:

History indicates that when a new theory or paradigm appears to challenge the view and methods of an established theory or paradigm, a crisis in confidence emerges, provoking a response from the mainstream. The reason is clear. Professional reputations and careers are at stake; the old guard must hold off the challenge posed by the "Young Turks" in order to maintain their status and privilege.

partially accounts for the degree of rancor in the debate, but its vehemence is particularly startling when compared to the reaction of practitioners exposed to critical theory. Since practitioners rarely grace the academic journals with theoretical critique, I rely here on subjective and anecdotal evidence. It is my sense, however, that many litigators, and certainly most progressive lawyers, find the basic tenets of critical legal thought, when stripped of its jargon, self-evident and rather obvious. Yes, law is indeterminate; otherwise why would so many disputes end in litigation? Yes, the law favors entrenched economic interests; any lawyer involved in products liability or securities class action litigation experiences this on an everyday basis. Yes, the legal system has difficulty understanding "outsider narratives"; ask any legal services or civil rights lawyer.⁴⁰ This is, of course, a vastly over-simplified version of CLS, but for the practicing legal community, it might be said that the academic debate over the place of this scholarship is much ado about nothing.

III. A CLINICAL HISTORY

Clinical teachers represent either the most introspective segment of the practicing bar, or the most practically oriented of the academy, or both. From the beginning of clinical education to the present, our ranks are largely populated by those who share a progressive political outlook. We have largely chosen to devote our professional careers not only to teaching but to representing clients who cannot afford private counsel. It is hardly surprising, therefore, that clinicians have either independently come to the same conclusions as CLS scholars, or consciously or unconsciously absorbed the basic tenets of CLS, and incorporated them into their teaching and lawyering theory. What we have not done is be explicit about the theory behind our teaching.

The history of modern clinical legal education has been explored

MINDA, *supra* note 15, at 208. I use the term "Young Turks" with some hesitation, given that it most probably has some unfortunate essentialist genesis.

⁴⁰ See generally Abrams, *supra* note 24, at 971 (exploring the challenges that feminist narratives present to the legal system and modern legal theory). Abrams argues that the lack of public debate on feminist narrative has contributed to misunderstandings about its purpose and integrity. Abrams writes:

many mainstream scholars continue to voice doubts about feminist narratives. What is particularly troubling about such doubts is that they have rarely been voiced in public—either in spoken or published form—but have surfaced in coffeepot discussions, and in the deliberations of appointments committees. . . . The public silence that has met feminist narrative scholarship may be sufficient to persuade those with limited exposure to the form that it is sufficiently flawed, or sufficiently marginal, as to require little or no response.

Id. at 976-77.

at length in clinical scholarship.⁴¹ To summarize briefly, law students' demands for a more relevant education in the late 1960s led to informal externship relationships with legal services and public interest organizations. At the same time, the Ford Foundation began to funnel money into the law schools for clinical programs in order to increase the availability of and consciousness about legal services for the poor.⁴² Staff lawyers hired by the law schools to run the programs began their long and continuing fight to achieve academic status and parity.⁴³ Not coincidentally, clinical teachers moved away from their original service focus, and started to use the clinic as a laboratory for thinking about lawyering skills, and in turn to produce scholarship about it, in part to legitimize their place in the law schools. Meltsner and Schrag appeared in 1974;⁴⁴ Binder and Price in 1977;⁴⁵ Bellow and Moulton in 1978;⁴⁶ Shaffer and Redmount in 1980;⁴⁷ Fisher and Ury in

⁴¹ See, e.g., Kotkin, *supra* note 7; William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463 (1995); Richard A. Rosen, *Clinical Legal Education*, 73 N.C. L. REV. 749 (1995); Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31 (1993); Panel Discussion, *Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U.L. REV. 337 (1987). See also Bellow & Johnson, *supra* note 7; Gorman, *supra* note 7; George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974); Allen Redlich, *Perceptions of a Clinical Program*, 44 S. CAL. L. REV. 574 (1971); Arthur B. LaFrance, *Clinical Education: "To Turn Ideals into Effective Vision,"* 44 S. CAL. L. REV. 624 (1971).

⁴² See Kotkin, *supra* note 7, at 190-91. The Ford Foundation created the Council on Legal Education and Professional Responsibility (CLEPR) in the late 1960s. CLEPR funds enabled the development of programs that would provide legal services to the poor through the academic community. Although CLEPR initially envisioned that law school professors and students would contribute to the work-force of legal services offices, CLEPR quickly evolved into a funder of the first in-house clinical programs.

⁴³ See Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 HOW. L.J. 135, 161 n.53 (1994) ("Clinicians have had to struggle for every step forward, as the mainstream of legal education had trouble appreciating the value of clinics."); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 319 (1989) (outlining the typical complaints law schools make about clinical programs). For many years, clinical teachers were not viewed as law school faculty and often received lower pay, status, and title. See Kotkin, *supra* note 7, at 191. Clinicians tend to improve their status at the law school by teaching traditional courses in addition to clinical programs. See Barry, *supra* at 161 n.54.

⁴⁴ MICHAEL MELTSNER & PHILIP G. SCHRAG, *PUBLIC INTEREST ADVOCACY, MATERIALS FOR CLINICAL LEGAL EDUCATION* (1974). See also MICHAEL MELTSNER & PHILIP G. SCHRAG, *TOWARD SIMULATION IN LEGAL EDUCATION: AN EXPERIMENTAL COURSE IN PRETRIAL LITIGATION* (1979); Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976); Michael Meltsner & Philip G. Schrag, *Scenes from a Clinic*, 127 U. PA. L. REV. 1 (1978).

⁴⁵ DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH* (1977).

⁴⁶ GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* (1978).

⁴⁷ THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LEGAL INTERVIEWING AND COUN-*

1981.⁴⁸ The first law review symposium on clinical education was published in 1980;⁴⁹ the first official AALS Clinical Teacher's Conference occurred in 1979.⁵⁰ In 1983, clinical teachers' demands for academic status were recognized in part when the ABA enacted a law school accreditation standard requiring some form of job security for "skills teachers."⁵¹ Despite this official recognition, clinical scholarship was, and to some extent continues to be, so devalued by traditional teachers that, unlike critical scholarship, it has been largely ignored, rather than challenged, in academic discourse.⁵² Many clinical teachers felt

SELING (1980).

⁴⁸ ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

⁴⁹ *Symposium: Clinical Legal Education and the Legal Profession*, 29 CLEV. ST. L. REV. 1 (1980).

⁵⁰ For the following information, I was indebted to Sandy Ogilvy, the historian for the AALS Section on Clinical Legal Education. After the Snowmass, Colorado program in June 1979, the AALS Clinical Section was created in 1980 by vote of the AALS Executive Committee. Prior to the Snowmass program, CLEPR and its predecessor organizations sponsored a series of conferences and workshops between 1959 and 1973. In June 1973, CLEPR held a seminar event at Buck Hill Falls, Pennsylvania. This conference produced a book of essays and a book of proceedings. See CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING (1973) (Working Papers for CLEPR National Conference); CLINICAL EDUCATION FOR THE LAW STUDENT: CLEPR CONFERENCE PROCEEDINGS (1973).

⁵¹ When enacted, ABA Standard 405(c) (then 405(e)) stated: "A law school should afford to full-time faculty members whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members" AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(c) (1995). In 1996, the ABA revised the standard:

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members. However, this Standard does not preclude a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members, or in an experimental program of limited duration.

AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(c)(1996). The new standard is mandatory and specifically allows schools to hire short-term, non-tenure track staff.

The entire history of the 405(e) fight is contained in Roy Stuckey's file cabinet. See E-mail from Roy Stuckey to the author, Sept. 9, 1997 (on file with author).

⁵² See John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989) (arguing that the focus on the production of legal scholarship from law school faculty has led law schools to neglect their duty to provide students with practical training in lawyering). Clinical scholarship is so devalued that the in the late 1980s the chair of the AALS Professional Development Committee warned new law teachers that their careers will be at risk if they write clinical articles on lawyering skills because such writing is not considered to be good scholarship. See *id.* at 350 n.21; Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 J. LEGAL EDUC. 14, 17-18 (1987).

compelled to write doctrinal scholarship if they hoped to get tenure, and for those who pursued their true interests, tenure battles rivaled those faced by the Critics.

V. FROM SKILLS TO MICRO THEORY TO MACRO THEORY

The parallel developments in clinical thought and critical thought are not coincidental. They grew out of the same zeitgeist, and were spearheaded by young lawyers—some more academically inclined than others—who came of age in the 1960s and approached law from considerations of its potential for social change. With some notable exceptions,⁵³ and most probably for reasons of academic hierarchy, however, clinical teachers and critical theorists have never quite found common cause or joined forces, either with regard to academic politics, or to integrating their theoretical perspectives.⁵⁴

In this section, I look at several skills and attempt to analyze them using micro and macro theory. As I suggested earlier, this approach may help to enrich clinical teaching. But I view this exercise as a two-way street. Critical scholarship would be similarly enriched by translating the theory into thoughts about new ways of lawyering.

Almost every clinical teacher devotes some attention to interviewing skills. The basic approach that most use starts from the proposition that the client needs to provide her lawyer with a full factual picture and to articulate the result she seeks. To accomplish these goals, we teach students interviewing skills: “structure the interview to begin with an identification of the problem; ask open-ended questions to obtain a chronological narrative; then work on theory development to gather legally critical and detailed information.”⁵⁵ To supplement these structuring skills, we teach ways of “encouraging clients to be active participants in the description and resolution of their problems:”⁵⁶ identifying facilitators and inhibitors to direct communication; promoting empathic communication and non-judgmental approaches; engaging in “active listening”; and formulating effective questions.

The explanations that we offer for both our interviewing goals and the techniques we teach are largely founded upon principles of

⁵³ See *supra* note 14 (referring to clinical writers who have employed critical scholarship to elucidate lawyering models).

⁵⁴ See Goldfarb, *supra* note 6, at 1600-05 (stating that although the methodologies of clinical legal education and feminist jurisprudence are compatible, “the movements have worked independently, not collaboratively”). Goldfarb argues that feminism and clinical education should draw from each other because “such cross-fertilization would enhance the quality and contribution of each.” *Id.* at 1605.

⁵⁵ BINDER, BERGMAN & PRICE, *supra* note 9.

⁵⁶ *Id.* at 32.

legal ethics and instrumental lessons from psychological theory.⁵⁷ Thus, because the Code of Professional Responsibility and the Rules of Professional Conduct require that clients make the decisions about their legal matters, we must make sure to elicit their preferred resolution. Because psychologists have demonstrated the importance of empathy and active listening, we use those techniques to motivate our clients to provide a full factual picture. The two major texts on interviewing—Binder, Bergman and Price,⁵⁸ and Bastress and Harbaugh⁵⁹—explore psychology and ethics, to somewhat varying degrees, as the foundation for the skills presented.

Nowhere in either text, however, is there any mention of the political underpinnings of our interviewing goals and skills, which I sense most clinical teachers share, or their relationship to legal theory and critical jurisprudence. And even if we see and understand these connections, I, at least, rarely make them explicit in the classroom or in student supervision. The connections need to be articulated, both to ourselves and to our students.

For example, we should not encourage empathic listening simply because psychologists have shown that it motivates clients to speak freely. Rather, to the extent that we are representing those traditionally disempowered in the legal system, our clients deserve and require our true—not our instrumental—empathy. It is not untypical for our client interactions to be preceded by a long history of non-empathy: bureaucratic nightmares in the social service system; visits to lawyers who dismiss their claims and concerns; negative rulings at lower administrative levels. I often wonder at the strength of our clients to pursue their claims at all. If we are to be the most effective advocates for these clients, we need to have true empathy for their situations, and to understand how the law works to dissuade them from pursuing and asserting their rights.

Similarly, using open ended questions is an effective way of eliciting a full narrative, which is useful in gaining a broad factual picture and not missing critical chronology or details. But narrative serves other functions as well. Critical feminist and race theorists teach us that some narratives hold out the promise of changing the law.⁶⁰

⁵⁷ Indeed, Bastress and Harbaugh devote several chapters to psychological theory, as do Binder, Bergman and Price (who is a clinical professor of psychology), although less explicitly denominated as such. See BASTRESS & HARBAUGH, *supra* note 10.

⁵⁸ BINDER, BERGMAN & PRICE, *supra* note 9.

⁵⁹ BASTRESS & HARBAUGH, *supra* note 10.

⁶⁰ Perhaps the most obvious example is the development of the law of sexual harassment, which grew directly out of Catharine MacKinnon's stories of workplace behavior. See CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

Thus, we need to obtain the broadest possible narrative and to explore it the context of our clients' lives if we are to utilize narrative's potential to make the legal system more responsive to our clients' goals, as well as to the overarching goal of creating a legal system that better serves other than economic interests. Critical scholarship can provide the foundation for communicating to our students these macro theories.

Many of the same goals and techniques come into play when we teach counseling, but here the emphasis is less on fact development and more on "client centered decisionmaking" and considerations of importance of non-legal consequences in reaching decisions. This is the skill that I have the least faith in my ability to effectively teach in a way that makes a lasting difference in how students will practice law. To me, it is the most counter-intuitive skill and the one that most clearly departs from popular culture norms. It is here that we most often hear, "but, in the real world"

What do we offer as the theory underlying our counseling model, arguably the most significant contribution of clinical teaching to changing the way law is practiced? The most obvious micro theory relates to ethical considerations: according to the Code and Rules, decisionmaking is the client's province. Surprisingly, however, neither commonly used counseling text devotes more than a passing reference to this rationale for the models they advocate. Indeed, hardly any rationale—let alone theory—is offered at all. Bastress and Harbaugh address counseling largely from a psychological perspective, and rather than provide theory to support their model, they focus upon the barriers that interfere with lawyers' ability to respect their clients' wishes.⁶¹ Binder, Bergman, and Price are more eclectic, but provide only a passing reference to anything resembling theory. In a one-page section entitled, "The Advantages of a Client-Centered Approach," the authors first offer the instrumental rational: "Active client participation enhances the likelihood of producing satisfactory resolutions." They then add:

Moreover, active client participation respects the autonomy of the person who "owns" the problem. A client does not lose the right to make decisions which are likely to have a substantial impact on his or her life for having sought legal assistance.⁶²

End of theory. No wonder our students resist our counseling models.

In fact, counseling is the skill that most lends itself to exploration through macro theory. The first foundation for the client-centered model is alluded to above. Critical scholarship has explored in depth

⁶¹ BASTRESS & HARBAUGH, *supra* note 10 (chapters 1, 2, 8, 12 and 13).

⁶² BINDER, BERGMAN & PRICE, *supra* note 9, at 22-23.

issues of client autonomy, and narratives demonstrating its significance are a common feature of these pieces: "Mrs. G." is the classic example.⁶³

Another aspect of counseling, however, has not been frequently connected to theory, but should be. Why do we emphasize the importance of considering non-legal consequences? We tell our students, "Because they are important to people—sometimes more important than the legal result." What we are really putting forward is a basic tenet of critical theory: people are different from one other. Specifically, issues of economics, race, class, religion, gender, and sexual orientation may well affect how our clients perceive the law and its ability to achieve the results they seek.

To use a simplistic example, in a sexual harassment case, a single mother on public assistance may be anxious to accept a quick settlement, when our students believe that she could obtain much more at trial. On the other hand, an African-American office worker in an action charging discriminatory promotion policies may not wish to accept a generous settlement, when it means that he will not have his day in court. Clinical teachers can describe endless variations on this theme, as well as their difficulties in teaching students to put client-centered decisionmaking into practice. The macro theory of "difference" would give students a richer foundation from which to appreciate why clients may come to different decisions than they would in similar circumstances, and help them to respect those decisions.

This same micro-macro analysis can be applied to our teaching of case theory, in which we attempt to convince our students that they need to develop a consistent and integrated factual and legal story that both makes sense and makes out a claim. Why? The micro theory we offer is that a well-developed case theory makes for effective planning, fact investigation, and oral advocacy. I see the macro theory as two-fold. First, case theory that effectively conveys the stories of disempowered clients is probably the most important factor in changing the law to better recognize those clients' interests. Witness how sexual harassment came to be recognized as a form of gender discrimination.⁶⁴ Second, on a even more macro level, we should ask ourselves why case theory is so important if the legal decisionmaking is controlled by precedent: the facts either make out a claim or they don't. Indeed, the critical importance of case theory in litigation demonstrates the basic tenet of classic CLS theory: the law is not fixed and its indeterminacy generally works to support entrenched interests.

⁶³ See Lucie White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

⁶⁴ See note 60 *supra*.

As to negotiation, many clinical teachers advocate the problem solving and principled bargaining approaches that Fisher and Ury popularized. Here, *Getting to Yes* is brief, but explicit about the micro theory: "Principled negotiation shows you how to obtain what you are entitled to and still be decent. It enables you to be fair while protecting you against those who would take advantage of your fairness."⁶⁵ The authors also emphasize the importance of communication, of maintaining relationships, and of actually being fair.⁶⁶ Here, in fact, the micro theory come close to the macro theory: feminist jurisprudence suggests that the law would profit from these same lessons.

V. A NOTE TO THE SKEPTICS

I imagine that, by now, many readers are thinking something along the following lines. "That's all we need—trying to cram critical legal theory down our students' throats. They don't even read the assigned skills material half of the time. And I can't read that stuff myself. Besides, why should we try to impose our political values on our students? That's not what clinical teaching is about. The students will resent it terribly and we'll get another round of 'political correctness' complaints. They are here to learn skills and that's what we should be teaching. Besides, they're all going off to be corporate lawyers, anyway. What relevance does a theory of lawyering for poor people have for them?" Here are my responses.

If you can't read it, don't assign it. There is no question that much of early critical scholarship suffered from extreme unintelligibility, and some postmodern theory still is inaccessible to me without devoting more time than I'm willing to invest. On the other hand, there is a wealth of scholarship that is truly entertaining, inspiring, and eminently readable. What could be more engaging than Lucie White's *Mrs. G/Sunday Shoes*,⁶⁷ Gerry López's *Seven Weeks* article,⁶⁸ or Herb Eastman's *Speaking Truth to Power*?⁶⁹ Just as in choosing our skills reading, we need to select carefully our legal theory materials.

As to "political correctness" and teaching values, this issue has been the subject of some debate in the clinical community and there

⁶⁵ FISHER & URY, *supra* note 11, at xviii.

⁶⁶ For example, Fisher and Ury suggest that negotiators should create options for mutual gain and distinguish individuals from conflicts, and that negotiators should be "hard on the merits, soft on the people." *Id.* at xviii, 56.

⁶⁷ White, *supra* note 63.

⁶⁸ Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989).

⁶⁹ Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995).

are legitimate arguments on both sides.⁷⁰ I offer my viewpoint, however, that whether or not we try to, we teach values and politics, almost by definition. Teaching must, to a greater or lesser degree, encompass the communication of values, which in turn implicate politics. In clinical teaching, values and politics are perhaps as close to the surface as in any place in the legal academy, since we confront real life situations that cannot help but raise these issues. The risk that we face is not being explicit about what we teach. In my experience, students do not object to—and in fact appreciate—learning about a clinical teacher's political understanding of the law, as long as it is made clear that there is room for other views and no one will be silenced in the classroom. What students do have trouble with—and rightfully so—is an implicit and unarticulated political “agenda” in the classroom. When it is unspoken, students may become resentful and reticent to voice opposing ideas. This is the risk when we do not articulate legal theory in our clinical teaching.

And if our students disagree with critical theory? As discussed earlier,⁷¹ they will not be alone. But isn't that what academic dialogue is supposed to be about? I, for one, would rather discuss in class whether the law consciously supports entrenched economic interests and how case theory can be used creatively to help decisionmakers take cognizance of other interests, than whether open-ended questions really produce more information than the check-list approach to interviewing. Students will remember more about, and take more seriously, our skills training if it is put in a theoretical context, even one with which they disagree.

Finally, what is the relevance of critical theory to the corporate lawyers of tomorrow? The skills we teach make for better lawyering for all clients, whether they are corporate CEO's or evicted tenants. The CEO will respond better to empathy than to judgment. An anti-trust action needs a case theory as much as a discrimination claim. If, as I posit, macro theory helps students to understand micro theory, we will have succeeded in becoming better teachers for all of our students. But a true Crit, and some clinical teachers, might well respond that we should not be providing ammunition in the form of skills to the corporate bar. Indeed, we should not be empathizing with the CEO, as he explains why he was justified in laying off older workers or dumping sludge in the river. Nor should we blithely apply client centered decisionmaking without reference to moral content. Unfortunately, I have no completely satisfactory answer to this concern. It

⁷⁰ Teaching values was the subject of the 1998 AALS Conference on Clinical Legal Education.

⁷¹ See *supra* notes 34-39 and accompanying text.

is a conundrum with which all progressive law teachers—traditional and clinical—must come to terms. Moreover, it is probably the one area that has produced a dialogue between and among critical and clinical scholars. William Simon,⁷² Steve Ellmann,⁷³ and others have challenged the legitimacy of strict adherence to client centeredness. At the very least, then, these issues should provide fruitful grounds for class discussion.

V. CONCLUSION: CREATING TRUE BELIEVERS

My aim in this article is to help clinical teachers to create “true believers” in both the skills we teach and in the values that underlie them. We need true believers if we are to begin to accomplish what I view as the major goal of clinical legal education: ultimately to change the way that law is practiced, and the way the legal system relates to our clients, as well as the way our clients relate to the law. Adding macro theory to our teaching may be one way to make progress toward that goal, and to give some content to the idea of critical lawyering.

⁷² See William Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991).

⁷³ See Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987).

