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Sameer M. Ashar

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Deep Critique and Democratic Lawyering in Clinical Practice

Sameer M. Ashar*

The crisis in legal education has been defined and accentuated by urgent and existential critiques. This body of complaint and suggestion—in the form of books, foundation reports, law review articles, major media entries, and blog posts—has two gaping holes that this Essay seeks to fill. First, the critiques fail to attend to the diminishing of social justice values and commitments in legal education in the period leading up to the 2008 recession, especially as clinical education—often designated as the carrier of justice values in law schools—faced generational shifts and law schools extended “practical” education to more students. Second, with the exception of the work of Robin West, there is little in the way of a forward-looking, progressive, and justice-oriented response to the crisis of legal education. The reform discourse since the 2008 recession is composed almost exclusively of proposals, such as those by William Henderson and Brian Tamanaha, undergirded by neoliberal assumptions and constructs. Leading reformers accept the accelerated disaggregation and commodification of legal practice without attention to aspects of the profession that privilege the public good over market norms and rationales. This Essay draws on clinical practice rooted in pedagogies focused on the development of critical analysis and political engagement to make the case for a progressive

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vision of law school reform—and, more generally, the legal profession—that emphasizes justice, connection, and cogeneration by lawyers and communities of approaches to entrenched social problems.

Introduction	203
I. Resistances and Pressures.....	206
A. Path Dependency	206
B. External Discipline and Austerity	208
C. Neoliberal Reform	209
II. Centering Social Problems.....	212
A. Mandatory Immigration Detention	212
B. Conditions of Work in the Warehouse Industry	214
III. Developing Knowledge Bases.....	216
A. Deep Critique.....	217
B. Democratic Lawyering	219
IV. Institutional Constraints and Opportunities	224
A. Centering Clinical Legal Education.....	224
B. Critical Systems Analysis	227
C. Theories of Lawyering Across Paradigms of Practice.....	229
Conclusion	231

This near-universal and indeed near-militant avoidance of the concept of justice in the very educational institutions that should centralize its study . . . is so indefensible (and so rarely defended) as to be fairly labeled pathological.

—Robin L. West¹

“Skills training,” clinical legal education, “experiential learning”—all these are but the tips of an iceberg representing deeper disputes over the aims of legal education, the roles of lawyers in a changing, transnationalizing society and a destabilization of employment and long-term security. The task of reforming legal education, thus regarded, becomes an exercise in reflection upon the nature of legal knowledge and the scope of ethical and political responsibility of lawyers.

—Peer Zumbansen²

1. ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* 27 (2014).

2. Peer Zumbansen, *What Lies Before, Behind and Beneath a Case? Five Minutes on Transnational Lawyering and the Consequences for Legal Education*, in *STATELESS LAW: EVOLVING BOUNDARIES OF A DISCIPLINE* 215, 221 (Helge Dedek & Shauna Van Praagh eds., 2015) (footnotes omitted).

INTRODUCTION

Calls for change in legal education have evolved in the last decade. Earlier critiques, mainly focused on the disconnection between schooling and practice, were tough and pointed but with limited effect. As the bottom has fallen out of the markets for legal employment and law school admissions, the criticism has become urgent and existential. This body of complaint and suggestion—in the form of books, foundation reports, law review articles, major media entries, and blog posts—has two gaping holes that this Essay seeks to fill. First, the critiques fail to attend to the diminishing of social justice values and commitments in legal education in the period leading up to the 2008 recession, especially as clinical education—often designated as the carrier of justice values in law schools—faced generational shifts and law schools extended “practical” education to more students. Second, with the exception of the work of Robin West, there is little in the way of a forward-looking, progressive, and justice-oriented response to the crisis of legal education. The legal education reform discourse since the 2008 recession is composed almost exclusively of proposals undergirded by neoliberal assumptions and constructs.³ This Essay draws on clinical practice to make the case for law school reforms that emphasize justice, connection, and the cogeneration by lawyers and communities of approaches to entrenched social problems.

The focus of my initial thinking in this area responds to the mainstreaming of experiential legal education around the publication of *Educating Lawyers: Preparation for the Practice of Law* by the Carnegie Foundation for the Advancement of Teaching in 2007.⁴ The challenge has been to defend the social justice imperative embedded in clinical legal education, as deans and faculties have expanded practical skills training in response to the “professionalism crisis.”⁵ The founders and initial funders of modern clinical education possessed an underlying social and political vision alongside a skills agenda,⁶ which created openings for clinicians and students to engage in innovative and important social justice work at law schools across the country. Generational shifts within U.S. clinical education⁷ create uncertainty about how to nurture and preserve this underlying social and political vision.⁸

3. See *infra* Part I.C for a discussion of “neoliberal” precepts.

4. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

5. See WEST, *supra* note 1, at 7–10.

6. See Stephen Wizner, *Beyond Skills Training*, 7 *CLINICAL L. REV.* 327 (2001).

7. See Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 *CLINICAL L. REV.* 205, 213–17 (2010).

8. “The struggle to preserve the social justice origins of legal clinics will be the defining challenge of the twenty-first century for clinical legal education. Faced with pressures to assimilate to the general curriculum, standardize programs, measure learning outcomes, cater to students’ short-term career interests, and palliate government resistance both domestic and foreign, clinicians increasingly will be forced to justify their existence in student-centered terms that can obscure the mission of serving needy clients and communities.” Rachel Moran, *Transformation and Training in*

Leading figures in legal education have sought to flatten American Bar Association (ABA) accreditation standards, alter assumptions regarding faculty employment security, and accentuate skills training.⁹ In such an environment, will relatively low-cost externships and apprenticeships replace clinics with a social justice mission? Legal services and public defender offices will continue to suffer in an era of government austerity.¹⁰ As public interest law shrinks, how will clinics respond? Will clinics have the resources necessary to replace the loss of funded legal representation for the poor? Will there be pressure to forego broader social change advocacy in exchange for individual client services?

As law schools seek to integrate experiential education across the curriculum, it is essential to consider how the transfer of skills and doctrine might take priority over, and thus diminish, the social justice imperative.¹¹ These shifts suggest that those who wish to preserve clinical education as a space for social justice work must excavate the pedagogical value underlying such work. Law students will continue to represent individual poor clients. Individual representation falls within the access to justice norms of the legal profession and comports with the skills agenda advanced by the Carnegie Foundation and other observers reacting in part to the downsizing of the legal market.¹² But the social change component of working with groups of poor clients will be most vulnerable as we endure the resistances and pressures noted above. This is the first gap in the discourse on U.S. legal education that I address in this Essay.

While the disconnection with practice and the economic crisis in legal education has received widespread attention, a longstanding existential crisis (in Robin West's terms)—the consistent sidelining of justice within law schools and the lack of underlying theories of lawyering—is rarely discussed or

the Law: Serving Clinical Education's Two Masters, AALS NEWS, May 2009, at 1, 18, <http://www.aals.org/wp-content/uploads/2014/04/april2009newsletter.pdf> [<http://perma.cc/NE65-FDZZ>].

9. See, e.g., David Yellen, *Loosening the ABA's Grip on Law Schools*, FAC. LOUNGE (Feb. 21, 2013), <http://www.thefacultyounge.org/2013/02/loosening-the-abas-reins-on-law-schools.html> [<http://perma.cc/48XV-JFRQ>].

10. See generally, e.g., Tyler Kasperek Somes, *The Legal Services NYC Strike: Neoliberalism, Austerity and Resistance*, 71 NAT'L LAW. GUILD REV. 8 (2014).

11. See Anthony V. Alfieri, *Against Practice*, 107 MICH. L. REV. 1073, 1074 (2009) ("Paradoxically, by carving pedagogies of practice out of positivist norms of neutrality and scientific technique, and individualist norms of liberal legalism, law schools have fashioned a new formalism severed from difference-based identity, context, and community. Pedagogies of practice common to both clinics and skills courses point to the rise of this new formalism in claims of neutral lawyer judgment, technical 'lawyering' process values, and client-centered representation indifferent to the other-regarding interests of community building."). However, it is important to understand that the social justice imperative and skills transfer are not inherently oppositional. Focus on complex social problems facilitates the transfer of high-level lawyering skills. See *infra* Part IV.C.

12. See, e.g., Mark Yates, *The Carnegie Effect: Elevating Practical Training over Liberal Education in Curricular Reform*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 233, 245–48 (2011).

confronted.¹³ This constitutes the second gap in the discourse since the advent of the economic crisis in U.S. legal education. The most well-known reform proposals, by legal scholars such as William Henderson and Brian Tamanaha, are shaped by neoliberal assumptions and constructs.¹⁴ Indeed, the responses to these proposals largely draw on these same assumptions and constructs.¹⁵ In this Essay I aim to push at the bounds of the discourse on legal education reform, to open space for more “social” responses to the crises facing law schools, and to raise a thread of clinical practice as a model and guidepost for legal education.

In addition to confronting resistances and pressures within clinical education, it is essential—in this period of crisis for legal education—for legal academics to set forth a progressive vision of legal education linking expansive social vision with pedagogical goals. I seek to articulate a new set of aspirations for legal education: a vision of law schools that defend community and solidarity against the effects of concentrated wealth and subordination along multiple dimensions of identity, status, and power; a vision of law schools that confront the structural changes in the market for legal services and originate new modalities of legal practice. The neoliberal reformers of U.S. legal education appear to ignore the dialectical relationship between law schools and the legal profession. The proposals assume a one-way relationship in which disaggregated and commodified legal functions must lead to a restructuring of legal education and the law school curriculum.¹⁶ This partial understanding is dangerous. When the profession has lost its moorings under an onslaught of economic forces, law schools have the opportunity, if not the responsibility, to make interventions that emphasize non-market, justice values.

Clinical practice with expansive social vision is one such intervention in the profession and in the market, and can be a core generator of new visions for legal practice. To serve in this role, clinics must be embedded in an ecosystem of legal and non-legal actors, organizations, and networks. Clinics, because they are the primary sites of actual practice in legal education, can make law schools central nodes in these networks. In short, this Essay argues that we need to further the moves from insular, extractive legal education toward connected, cogenerative learning and practice centers. Moving from extraction to cogeneration expands the pedagogical repertoire of new vision law schools and makes them more relevant in the evolving worlds of both private and public sector practice.

13. WEST, *supra* note 1, at 22–30; Heidi Boghosian, *The Amorality of Legal Andragogy*, 3 STAN. AGORA 1 (2002), <http://agora.stanford.edu/agora/volume2/articles/boghosian/boghosian.pdf> [<http://perma.cc/LVZ2-J2UG>].

14. See *infra* Part I.C for discussion of these proposals.

15. See generally, e.g., Michael Simkovic & Frank McIntyre, *The Economic Value of a Law Degree*, 43 J. LEGAL STUD. 249 (2014) (finding that the present value of a law degree typically exceeds its cost for most law school graduates).

16. See *infra* Part I.C for discussion of these proposals.

Part I begins by focusing on the forces—both internal and external—buffeting clinical legal education at this point in its modern history. It then considers major legal education reform proposals in this period of law school crisis and the background ideologies and commitments shaping those proposals. In Part II, I describe two problem areas on which we are currently working in the UC Irvine Immigrant Rights Clinic: mandatory immigration detention and conditions of work for low-wage immigrant workers in the warehouse industry. Part III describes two bases of knowledge that we aim to excavate from our focus on those problem areas: “deep critique” and “democratic lawyering.” Finally, in Part IV, I outline the opportunities and constraints within legal education for a progressive reform vision.

The economic crisis in legal education may compel us to accept the profession as it is now: transitory, disaggregated, outsourced, and commodified. Visionary reform will build on the core public values of the legal profession and recognize that our students need to be flexible and experimentalist problem solvers, working through complex issues in collaboration with clients and communities. Clinical practice that teaches critical systemic thinking and democratic lawyering has the potential to be an engine of renewal and reform.

I.

RESISTANCES AND PRESSURES

Disaggregating legal functions and undervaluing professional judgment threaten broad social vision for law schools in a rare period of ferment and reform. Duncan Kennedy argued that “[s]ocial justice is everywhere [in legal education], but it’s disintegrated and politicized under pluralist rules that require some of everything to be there, so that the school can maintain its reputation as a representative law faculty and avoid being treated as marginal.”¹⁷ It would be wise for law school faculty and administrators to look beyond the established pedagogical canon and individual student training, to refrain from viewing students as passive consumers of legal information, and to work to reform donor interests. However, as I briefly set out below, there are obstacles both within and outside clinical legal education that may foreclose generative reform.

A. *Path Dependency*

An earlier vision of social change lawyering materialized in the 1970s, during the development of a network of federally funded legal services offices with “back-up” centers in particular areas of the law.¹⁸ Legal services attorneys

17. Duncan Kennedy, *The Social Justice Element in Legal Education in the United States*, 1 UNBOUND 93, 103 (2005).

18. See Alan W. Houseman, *Political Lessons: Legal Services for the Poor—A Commentary*, 83 GEO. L.J. 1669, 1682–83 (1995).

aspired to provide excellent representation in select areas in which poor clients faced difficulty, including benefits, housing, and family law,¹⁹ often with the government as an adversary in judicial and administrative forums. There were competing emphases as federally funded legal services expanded, including (1) strategic litigation developed from large caseloads; (2) experiments in the holistic socio-legal provision of services, with lawyers collaborating with social workers and psychologists; and/or (3) development of a paradigm of service provision centered in individual casework and client engagement in neighborhood legal services offices.²⁰ These features were at least partly a consequence of critiques of public interest law as practiced up to that point. The War on Poverty and the Great Society embodied an emphasis on localism distinct from the more centralized New Deal anti-poverty programs.²¹ Within public interest law, Derrick Bell challenged the National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP LDF) on the ground that the much-lauded LDF campaign culminating in *Brown v. Board of Education* was lawyer-led and relatively unaccountable to affected communities.²²

Like any dynamic field in which programs face internal and external political pressures, the localist legal services paradigm itself came under criticism by progressive scholars beginning in the late 1970s and 1980s.²³ The progressive critique had its roots in critical legal studies. Rick Abel argued that emphasizing legalism in local anti-poverty advocacy was at best ineffectual, and at worst a reinforcement of entrenched power relations in society.²⁴ Lucie White illustrated her profound discomfort with the narrowness of legal process and legal remedies in traditional poverty law practice.²⁵ Gerald Lopez proposed a literal rearrangement of the interior of legal services offices, and his work has encouraged many law students to blur the lines between law, organizing, and social work in their practice.²⁶

19. See Rebecca Sharpless, *More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347, 351 (2012).

20. See MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 32–34 (1993).

21. See Thomas J. Sugrue, *All Politics Is Local: The Persistence of Localism in Twentieth-Century America*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 301, 301–26 (Meg Jacobs et al. eds., 2003).

22. See generally Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

23. There was also a sustained conservative attack on legal services that gained strength during the Reagan Administration and continues to this day. See Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 761–71 (2002).

24. See generally Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474 (1985).

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

26. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

The progressive critique significantly altered public interest practice. Those law students most influenced by those works moved into public interest practice in the 1990s and 2000s. They were largely outside the localist legal services infrastructure, portions of which were withering due to defunding and federal restrictions on advocacy. A small group of organizations and law school clinics, as well as a few reinvigorated legal services offices, advanced the latest iterations of social change lawyering. Private entities are now more prominent adversaries of public interest lawyers, and diminished government agencies undertake limited intervention on behalf of indigent clients in private ordering. Public interest lawyers practice in a broader range of areas, from foreclosure to education, to workers' rights, to environmental advocacy. The practice is more global as lawyers face multi-national employers and financial institutions, represent individuals and organizations with cross-border ties, and use human rights law and forums to fight poverty and marginalization within the United States.²⁷ Public interest law finds itself in a very different environment, with new adversaries across a range of subject areas. The open question is whether path-dependent legal education, including law school clinics, has kept up with changes in the field.

B. *External Discipline and Austerity*

When law school clinics have attempted to move away from providing individual legal services or describing a more expansive social mission for themselves, commentators within the field have been critical on pedagogical grounds or have expressed discomfort with the possible incongruity with students' political commitments.²⁸ In addition to the self-generated compunctions regarding the "imposition" of faculty political commitments on students, there are the more obvious external pressures that governments place on clinics to prevent challenges to powerful corporate interests with which they are allied.²⁹ Other commentators have argued that clinicians increasingly evade their responsibility to abide by a "service" model of legal advocacy and lean toward "issue" advocacy because they seek elevated faculty status.³⁰ Finally,

27. See generally Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891 (2008).

28. See, e.g., Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331, 337–38, 342 (2012); April Land, "Lawyering Beyond" Without Leaving Individual Clients Behind, 18 CLINICAL L. REV. 47, 54–59 (2011); Stephen F. Reed, *Clinical Legal Education at a Generational Crossroads: A Self-Focused Self-Study of Self*, 17 CLINICAL L. REV. 243, 249–52 (2010).

29. See generally Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59 (2011).

30. Margaret Drew & Andrew P. Morriss, *Clinical Legal Education & Access to Justice: Conflicts, Interests, & Evolution*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS (Samuel Estreicher & Joy Radice eds., forthcoming 2016) (manuscript at 14) ("Our conclusion from this brief review of the development of clinical legal education is that clinicians' search for equivalent status and/or rents within the academy played an important role in the

commentators have objected to clinics with an expansive social vision of human rights by relying on an inherent and zero-sum dichotomy between politics and pedagogy.³¹

Path dependency and an aversion to educators explicitly invoking political commitments undergird these critical, disciplinary interventions in clinical legal education. In this way, the modern neoliberal critics' views about clinics with an expansive social vision coincide with those of both path-dependent clinicians, focused nearly exclusively on economically triaged individual legal services, and the original conservative critics of the Legal Services Corporation. The possibility suggested in the post-Carnegie era—one of low-cost externships and apprenticeships replacing in-house and live client clinics undertaking complex politicized work—has increased as the economic crisis has unfolded. Further, the austerity regime of a shrinking government sector has hit legal services and public defender offices hard, as those offices grapple with increasing economic and social inequality, and has thus strengthened the call for service clinics.³² Both the economic crisis within U.S. legal education and the austerity regime, stemming from the same macroeconomic forces unleashed by infirmities in the financial sector, have come together to threaten visions of clinical education extending beyond service to individual indigent clients or future private sector employers.

C. Neoliberal Reform

Neoliberal assumptions and constructs operate on the broader field of legal education reform as well. “Neoliberalism” is a contested term used sparingly in the legal academic literature. Like David Singh Grewal and Jedediah Purdy, I believe that the term has strong explanatory power and thus use it in multiple contexts in this Essay. Grewal and Purdy define neoliberalism by referring to the following cluster of features:

Neoliberalism, like classical liberalism before it, is also associated with a kind of ideological expansionism, in which market-modeled concepts of efficiency and autonomy shape policy, doctrine, and other discourses of legitimacy outside of traditionally “economic” areas. . . .
Neoliberalism, then, takes its meaning from this contest between

shift to diversify away from the service clinic model.”). This analysis of clinician motives is strikingly devoid of supporting evidence.

31. Eric A. Posner, *The Human-Rights Charade*, CHRON. HIGHER EDUC. (Nov. 17, 2014), <http://chronicle.com/article/Peace-LoveGrandstanding/149961> [<http://perma.cc/2ZAX-AV2H>] (“An argument could be made that political advocacy has pedagogical value. That is possible. But if the goal is political, the pedagogical value is secondary, and likely to be compromised.”). *But see* Sital Kalantry, *Eric Posner Has a Narrow Understanding of Human-Rights Clinics*, CHRON. HIGHER EDUC. (Nov. 24, 2014), <http://chronicle.com/blogs/conversation/2014/11/24/eric-posner-doesnt-understand-human-rights> [<http://perma.cc/TVQ7-5MDM>].

32. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 175 (2012) (“If understaffed legal services offices were offered the full-time assistance of the third-year class of local law schools, that would help fill unmet needs while the students get useful training.”).

market imperatives and democratic demands; it names a suite of arguments, dispositions, presuppositions, ways of framing questions, and even visions of social order that get called on to press against democratic claims in the service of market imperatives.³³

David Harvey emphasizes the expansive, political nature of the neoliberal project.³⁴ In the realm of education specifically, neoliberalism facilitates market dominance as the “privileged domain of measuring and regulating human worth.”³⁵ Wendy Brown speaks to the foundational changes wrought by neoliberal ideas in higher education: “Once about developing intelligent, thoughtful elites and reproducing culture, and more recently, enacting a principle of equal opportunity and cultivating a broadly educated citizenry, higher education now produces human capital, thereby turning classically humanist values on their head.”³⁶

Some have used the current moment of crisis within legal education to advocate a reform program that seeks to meet private employers’ demands.³⁷ Prominent legal academics such as William Henderson and Brian Tamanaha have proposed reforms that share features with the market-based approaches advocated by the American Law Deans Association³⁸ and the Cato Institute.³⁹ Henderson argues for a backwards design of legal education based on collaborations with leading employers in the restructured market for legal

33. David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* 1, 3–4 (2014) (emphasis added).

34. “In so far as neoliberalism values market exchange as ‘an ethic in itself, capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs,’ it emphasizes the significance of contractual relations in the marketplace. It holds that the social good will be maximized by maximizing the reach and frequency of market transactions, and it seeks to bring all human action into the domain of the market.” DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 3 (2005) (endnote omitted).

35. Christopher Breu, *The Post-Political Turn: Theory in the Neoliberal Academy*, in *CAPITAL AT THE BRINK: OVERCOMING THE DESTRUCTIVE LEGACIES OF NEOLIBERALISM* 241, 242 (Jeffrey R. Di Leo & Uppinder Mehan eds., 2014).

36. WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* 24 (2015).

37. See, e.g., William D. Henderson, *A Blueprint for Change*, 40 *PEPP. L. REV.* 461 (2013); James E. Moliterno, *The Future of Legal Education Reform*, 40 *PEPP. L. REV.* 423 (2013); Symposium, *The Future of Law, Business, and Legal Education: How to Prepare Students to Meet Corporate Needs*, 17 *CHAP. L. REV.* 137 (2013); Casey Hall, *How Daniel Katz is Working to Reinvent the Law*, *LEGAL SOLUTIONS BLOG* (Nov. 14, 2013) <http://blog.legalsolutions.thomsonreuters.com/law-and-techology/daniel-katz-working-reinvent-law> [<http://perma.cc/Y9RJ-HX6M>].

38. See, e.g., Pub. Comment on the Application of the Am. Bar Ass’n for Reaffirmation of Recognition by the Sec’y of Educ. as a Nationally Recognized Accrediting Agency in the Field of Legal Educ., *Am. Law Deans Ass’n* (undated), http://www.nacua.org/documents/ALDA_Comment.pdf [<http://perma.cc/AB4K-9VZZ>] (arguing that ABA imposes requirements on accredited law schools that are not only extrinsic to educational quality but also intrusive on institutional autonomy).

39. See WALTER OLSON, *SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA* (2011).

services.⁴⁰ He suggests that both incumbent firms and newly ascendant companies created to disaggregate (and outsource) legal functions would help law schools retool to produce the legal workers needed in the new economy for legal services.⁴¹ Tamanaha's main proposal is to bifurcate legal education, with a first tier of research institutions largely in line with the vision of law schools embedded in current ABA accreditation rules, and a second tier of schools with untenured faculty focusing to a much greater degree on practical skills training.⁴² In place of clinics, which reformers describe as too expensive to scale up to cover all students, Tamanaha argues for a shortened law school program at the second tier schools with a third year of apprenticeship at private and public interest firms.⁴³

The economic crisis in U.S. legal education has skewed the reform discourse toward market-based solutions, with little to no attention paid to the profession's justice imperative, as articulated by West and legal profession scholars such as Susan Carle⁴⁴ and Deborah Rhode.⁴⁵ Professional norms encompass a broader set of values than the market may demand in any given moment. Those values are mutually reinforcing; clients seek out lawyers because they believe lawyers have competencies and a degree of social power in complex systems of governance. That social power relies, at least in part, on the idea that lawyers are part of a justice-seeking profession with some commitment to the greater good.⁴⁶ The neoliberal reforms further marginalize

40. Henderson, *supra* note 37, at 462–63 (“On the most basic level, it is clear that law schools must become more attuned to legal employers—we need professional employment for our graduates to keep the doors open. . . . [W]e are making business decisions designed to get our institutions to places of safety; we are *not* making pronouncements of our social, political, or aesthetic values.”).

41. *Id.* To be clear, it is essential that legal educators understand (and interpret) foundational changes in the market for legal services, both for the sake of accurate scholarly approaches to the field and to adjust pedagogical methods for the employment market that our graduates face. *See infra* Part IV.C. What is troubling is Henderson's single-minded and over-determined focus on the disaggregation and technological change in a portion of the market; his arguments are too narrow to apply to U.S. legal education as a whole.

42. TAMANAHA, *supra* note 32, at 174 (“The law school parallel—in program and pricing—of vocational colleges and community colleges will come into existence, many of two-year duration. Research-oriented law schools will remain as they are.”).

43. *Id.* at 175; *see also* Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J.L. & PUB. POL'Y 599 (2012) (arguing for apprenticeships in place of a third year of law school).

44. *See* Susan D. Carle, *Introduction to LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 1–11 (Susan D. Carle ed., 2005).

45. Deborah L. Rhode, *Lawyers as Citizens*, 50 WM. & MARY L. REV. 1323 (2009).

46. *See* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 3 (Austin Sarat & Stuart Scheingold eds., 1998) (“Cause lawyers thus reconnect law and morality and make tangible the idea that lawyering is a ‘public profession,’ one whose contribution to society goes beyond the aggregation, assembling, and deployment of technical skills. In this way lawyers committed to using their professional work as a vehicle to build the good society help legitim[ize] the legal profession as a whole.” (footnotes omitted)).

the public-oriented, justice-seeking elements of legal professional identity and undermine the profession as a whole.

II.

CENTERING SOCIAL PROBLEMS

Rather than design backwards from the perspective of economic actors in a portion of the shifting market for legal services, law schools must put large, complex social problems at the center of their curricula. This preserves essential aspects of the legal profession's commitment to seek justice, and teaches transferable approaches to lawyering in a time of foundational change. This Part sets forth two problem areas on which we are focused in the UC Irvine Immigrant Rights Clinic.⁴⁷ Although the work is challenging to undertake and to contextualize in the clinical setting, it contains a set of generative aspirations for legal education. These two projects contain many of the features of the new forms, contexts, and challenges of public interest law as described in Part I.A. They both involve powerful private entities (in one case due to government outsourcing). The state has a limited and contingent protective role in one project and is the prosecutor of our clients in the other. Both projects involve multiple areas of law and are driven by global economic shifts and migration. Through our intake, we consciously move toward projects that evoke the political,⁴⁸ and this puts our students in varied and multi-faceted modes of public interest practice.

A. *Mandatory Immigration Detention*

After running a small pilot project, we assigned nearly every student in the clinic to provide limited representation to mandatorily detained immigrants in bond hearings at the Adelanto Detention Center, ninety miles northeast of Irvine. Students worked on these cases in addition to their primary litigation and non-litigation projects largely focused on civil rights and workers' rights.

47. Although sometimes denigrated by non-clinical colleagues, clinicians often develop and deconstruct written case studies from their practice with students to derive pedagogical insight and, less frequently, to make interventions in policy, doctrinal, and legal profession debates. Although there are strengths and weaknesses to this scholarly approach, reflective analysis of one's practice has the possibility of generating theories of pedagogy and praxis. See Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLINICAL L. REV. 157, 170 (1994) ("Reflection must be central to such a clinic's work because the fundamental goal of the clinic itself is to build theory—to increase our practical knowledge about the settings in which we work and the methods of lawyering and teaching that we might use. Because building grounded theory is the clinic's fundamental goal, scholarship—descriptive, critical, and prescriptive writing—must be an integral part of its work.").

48. See Sameer M. Ashar, *Fieldwork and the Political*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 288, 288 (Susan Bryant et al. eds., 2014) ("The challenge then lies in figuring out how to keep 'the political'—alternative conceptions of society as articulated by those excluded from the established social structure—at the surface in clinical legal education.").

The use of immigration detention by the U.S. government has risen at an alarming rate in the last decade. In fiscal year 2014 (FY2014), U.S. Immigration and Customs Enforcement (ICE) took 425,728 individuals into custody.⁴⁹ The government requested approximately \$5 million *per day* in FY2014 to house immigration detainees.⁵⁰ Although immigration detention is civil in nature, detainees experience it as punitive, and conditions can be as harsh as those in the criminal system.⁵¹ One major contributor to the rise in immigration detention was the 1996 enactment of a statute requiring the mandatory detention of noncitizens convicted of a wide range of criminal offenses, including minor drug offenses.⁵² Individuals who already have a removal order and those considered “[a]rriving aliens” are also subject to mandatory detention.⁵³ The U.S. Supreme Court upheld mandatory detention by a 5-to-4 vote in *Demore v. Kim*.⁵⁴ However, recent U.S. circuit court decisions have limited *Demore*’s holding and the application of mandatory detention statutes, finding that due process requires detainees to receive an individualized bond hearing.⁵⁵ Our students represent clients in bond proceedings at the six-month mark in their period of detention, in accordance with the Ninth Circuit’s decision in *Rodriguez v. Robbins*.⁵⁶

The Adelanto facility is operated by the GEO Group, a publicly traded corporation.⁵⁷ The facility is located in a remote part of San Bernardino County, east of Los Angeles, in an area called the high desert. Imagine a plateau in the middle of mountain ranges, sparsely marked by Joshua trees and tall metal towers carrying electrical lines. Subdivisions of suburban homes and strip malls sprout up in the high desert along Route 395 with great speed. In this area, the detention center is an economic development project. But it is

49. U.S. IMMIGRATION & CUSTOMS ENF’T, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 (2014), <https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf> [<https://perma.cc/YG4Y-FGA6>].

50. NAT’L IMMIGRATION FORUM, THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES (2013), <http://immigrationforum.org/wp-content/uploads/2014/10/Math-of-Immigration-Detention-August-2013-FINAL.pdf> [<http://perma.cc/R5CL-H6XA>].

51. See César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLAL REV. 1346 (2014).

52. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 303, 110 Stat. 3009-546, 585-87 (codified at 8 U.S.C. § 1226 (2012)) (amending section 236 of the Immigration and Nationality Act).

53. See 8 C.F.R. § 1003.19 (2014).

54. 538 U.S. 510 (2002).

55. *E.g.*, *Rodriguez v. Robbins*, 715 F.3d 1127 (9th Cir. 2013); *Preap v. Johnson*, 303 F.R.D. 566 (N.D. Cal. 2014).

56. See 715 F.3d at 1127.

57. *Adelanto Detention Facility*, GEO GROUP, INC., <http://www.geogroup.com/maps/locationdetails/35> [<http://perma.cc/G64X-58DN>] (last visited Oct. 26, 2015).

short-term development.⁵⁸ Buses with the jolly green GEO logo transport young men from jails and prisons in Los Angeles County and Orange County to Adelanto each day. That same logo flies on a flag outside of the facility, alongside the California State and United States flags.

Because of Adelanto's distance from downtown Los Angeles, the lack of local development in the proximate area, and the general paucity of legal resources for indigent immigrants, few detainees have legal representation or the capability to find an attorney through familial and community networks. The facility currently holds up to 1,300 men, and plans are underway to add another 650 beds, including a women's housing unit.⁵⁹ Men in orange jumpsuits are made idle by their confinement, behind high metal fences topped with barbed wire, far from their families. The facility houses the courtrooms for three immigration judges, which seem out of place, except that this appears to be an improvement over the use of videoconferencing to beam detainees into courtrooms far away in downtown Los Angeles.⁶⁰

B. *Conditions of Work in the Warehouse Industry*

A second clinic project is both distinct from and significantly related to the first. We have been working with the Warehouse Workers Resource Center (WWRC) for several years, providing legal information to workers through periodic one-day clinics in the Inland Empire region. The foreclosure crisis hit the area hard, and it has experienced double-digit unemployment rates since the 2008 recession. However, 40 percent of imports into the United States flow through the Long Beach and Los Angeles ports, and land is cheap in the region.⁶¹ Real estate developers have built four hundred million square feet of warehouse space, fueled partly by the growth of e-commerce.⁶² One who drives through the region on Interstate 15 sees acres and acres of beige boxes stretching out in the midst of vast fields, in addition to the requisite subdivisions and strip malls.⁶³ (Perhaps not accidentally, the warehouses look much like the Adelanto detention facility.) An economist estimated that the average wage for non-professional workers in the industry is \$22,000 per year,

58. Economists Arjun Jayadev and Samuel Bowles argue that the growth of the "guard labor" sector globally is based on expenditures borne of mistrust and not an especially generative use of capital. Arjun Jayadev & Samuel Bowles, *Guard Labor*, 79 J. DEV. ECON. 328 (2006).

59. Kate Linthicum, *Expansion of Adelanto Immigrant Detention Center Underway*, L.A. TIMES (July 8, 2014), <http://www.latimes.com/local/la-me-ff-adelanto-immigration-20140709-story.html> [<http://perma.cc/T9DC-35F7>].

60. See Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. (forthcoming 2015).

61. See Gabriel Thompson, *The Workers Who Bring You Black Friday*, NATION (Dec. 16, 2013), <http://www.thenation.com/article/177377/holiday-crush> [<http://perma.cc/4CU6-BQ6R>].

62. *Id.*

63. *Id.*

and even less for those who are not direct employees but work for temporary agencies.⁶⁴ The warehouse industry is largely unorganized.

A clinic team has been investigating work conditions at a mid-sized warehouse operation holding merchandise for major retailers, including Macy's and Costco. Current and former workers approached WWRC seeking assistance. The workers alleged the following work conditions:

- unsanitary and nonfunctioning bathrooms;
- lack of safe drinking water;
- unsafe operation of forklifts, including their use as ladders to retrieve heavy boxes from the tops of high shelves;
- employees working seven days per week and as much as twelve hours per day, yet not receiving the premium pay allowed to them under state and federal law;
- unreimbursed work time after workers have clocked out and use of their own vehicles to bring goods to shippers;
- up to thirty minutes unpaid wait time each morning to clock in for work;
- termination for refusing to comply with forced overtime, with women workers told that they should not have had children for which they were obligated to care;
- lack of promotional opportunities for women, who were told that they were not qualified for higher paying jobs.⁶⁵

Like the clinic's prior work with hotel industry workers in a series of cases,⁶⁶ it appears that the bodies of low-wage immigrant workers are exploited for as much labor as managers can derive at the least cost.⁶⁷ Sophisticated human resources programs that measure the productivity of individual workers in real-time are called "electronic whips" because of their use by managers to drive workers and to discipline and terminate them.⁶⁸ Brands with hundreds of millions in revenue are undergirded by the nickel and diming of those lowest in the supply chain, not just in the United States but perhaps more brutally in the Asian countries where the warehoused goods are manufactured.⁶⁹

64. *Id.*

65. Memorandum from the UC Irvine IRC student team to file (Nov. 14, 2014) (on file with author).

66. See Sameer M. Ashar et al., *Advancing Low-Wage Worker Organizing Through Legal Representation*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 313 (2013).

67. See Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, in LEFT LEGALISM/LEFT CRITIQUE 105 (Wendy Brown & Janet Halley eds., 2002).

68. See G. Stoney Alder, *Ethical Issues in Electronic Performance Monitoring: A Consideration of Deontological and Teleological Perspectives*, 17 J. BUS. ETHICS 729, 735 (1998); Karen Levy, *The Future of Work: What Isn't Counted Counts*, PAC. STANDARD (Aug. 3, 2015), <http://www.psmag.com/business-economics/the-future-of-work-what-isnt-counted-counts> [<http://perma.cc/P494-AAT6>].

69. See, e.g., Jason Burke, *Bangladesh Factory Collapse Leaves Trail of Shattered Lives*, GUARDIAN (June 6, 2013), <http://www.theguardian.com/world/2013/jun/06/bangladesh-factory->

III.

DEVELOPING KNOWLEDGE BASES

What do we make of these areas of work in the context of clinical legal education? Clinical practice generally corrects for deficiencies in legal education simply by putting students in the role as advocates for clients. First, there are the established and significant benefits of learning traditional legal techniques in a low-volume, highly supervised context.⁷⁰ This occurs in any well-taught clinic in which students represent clients—civil or criminal, group or individual, big or small cases. Second, through clinic cases and projects, students come to understand—in the words of Elizabeth Mertz—the content of “conflict stories,” instead of focusing solely on the holdings of cases and corresponding legal authority.⁷¹ They develop facts and case theories rather than receiving them as given.

Both the mandatory detention and warehouse labor projects offer the foundational benefits of in-house, live client clinical education. In the Adelanto project, students have a closely supervised in-court experience representing clients before immigration judges. They engage in fact investigation and development, legal research and writing, and client examination in court; defend against government cross-examination; and make closing arguments. Students also negotiate directly with ICE attorneys regarding the terms of bond releases. If the clinic secures the release of any detainees, such detainees’ chances of obtaining representation to fight the merits of their removal cases improve significantly. In the warehouse project, the clinic team has met with groups of workers at the office of our partner organization over multiple weekends. Law students have provided the workers with legal information while gathering facts to undergird potential legal action. They move from facts in casebooks to facts in life.⁷²

These projects have the potential to do even more pedagogical work in law schools. If we understand the work as cogenerative rather than extractive, we may develop student capacity in a few less developed and articulated areas of professional development, as set forth in the following Sections. These knowledge bases run contrary to both entrenched forms of doctrinal legal education, as well as the neoliberal reform approaches, in that they move away

building-collapse-community [<http://perma.cc/A59P-44KB>]; Charles Duhigg & David Barboza, *In China, Human Costs Are Built Into an iPad*, N.Y. TIMES (Jan. 25, 2012), <http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html> [<http://perma.cc/MVA2-6TME>].

70. See SULLIVAN ET AL., *supra* note 4, at 120–22.

71. Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 494–95 (2007). Mertz, in her linguistic study of the typical first year curriculum, concludes “[t]he move to focus on form, authority, and legal-linguistic contexts is thus accompanied by a shift away from precision or depth in discussions of content, morality, and social context.” *Id.* at 496.

72. See *id.* at 495.

from an individualistic, formal understanding of law to a more social, contextualized understanding.⁷³

A. Deep Critique

Students have the opportunity to gain knowledge about social and economic structures from these projects. To fight to change the systems through which our clients are subordinated is an aspiration that runs across generations.⁷⁴ This aspiration is one that we demonstrate in our approach to client representation and in the content of seminars and case discussions. It is perhaps demonstrated most emphatically in the intake rationale of clinicians,⁷⁵ which is often largely invisible to students. Gary Blasi said in 1994, “[s]tructuralist theories may not capture all that exists, but ignoring structure risks missing nearly everything.”⁷⁶

Clinics may attempt to develop structural analysis and methods of resistance to hegemonic oppression, but against a backdrop of disaggregation and relative disorganization. The historian Daniel Rogers argues:

[I]n the last quarter of the century, through more and more domains of social thought and argument, the terms that had dominated post-World War II intellectual life began to fracture. One heard less about society, history, and power and more about individuals, contingency, and choice. The importance of economic institutions gave way to notions of flexible and instantly acting markets. History was said to accelerate into a multitude of almost instantaneously accessible possibilities. Identities became fluid and elective. Ideas of power thinned out and receded.⁷⁷

Disaggregation and neoliberalism are perfect and complementary bedfellows. If we cannot escape the box of our pervasive reality and of goods manufactured and assembled by workers in buildings surrounded by suicide nets,⁷⁸ then even the location of such efforts within our particular social structure will undermine our efforts to resist it. The philosopher David Hoy brings this to the surface in *Critical Resistance*: “The general point is that utopian imaginings of freedom

73. Thanks to Rachel Moran for this insight.

74. See, e.g., Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997 (2004).

75. See Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLINICAL L. REV. 357 (2010); Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451 (2010).

76. Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1091 (1994); see Edward Rubin, *Why Law Schools Do Not Teach Contracts and What Socioeconomics Can Do About It*, 41 SAN DIEGO L. REV. 55 (2004).

77. DANIEL T. RODGERS, *AGE OF FRACTURE* 5 (2011); see Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

78. Duhigg & Barboza, *supra* note 69.

may not be aware of the extent to which they presuppose the patterns of oppression that they are resisting.”⁷⁹

This is the field in which we operate, which requires us to develop in ourselves and in our students the capacity of deep critique, of thinking beneath and beyond liberal legalist approaches to social problems. We can develop this capacity only through collaborative work with people, communities, and thinkers at the margins of our social structure. The clinical standpoint, alongside our bond clients in immigration court, is significant. Our students gather “local knowledge,” in the words of Clifford Geertz,⁸⁰ about the home communities from which our clients come, as well as how legal regimes bear down on them, even confining them in prisons or prison-like workplaces. We discover that power has reconfigured the land,⁸¹ so that people are dispossessed by law⁸² and made vulnerable to fractured systems of neoliberal production.⁸³ As we trace the expansion of the immigration enforcement system from the border to the interior, and the withdrawal of government from a mediating role in the employer-employee relationship, we unearth why things are the way they are. Both the mandatory detention and warehouse labor projects cause us to question the efficacy of quasi-adversarial systems in which power is decidedly tilted toward the state or powerful private interests.⁸⁴

However, the clinical standpoint is necessary but not sufficient. History and critical theory denaturalize the worlds our students confront through the practice of poverty law.⁸⁵ History and theory give us the tools to engage in

79. DAVID COUZENS HOY, *CRITICAL RESISTANCE: FROM POST-STRUCTURALISM TO POST-CRITIQUE* 3 (2004). Thanks to Nisha Agarwal and Jocelyn Simonson for introducing me to the work of David Hoy. See Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE 455 (2010).

80. Mertz, *supra* note 71, at 486 n.6 (citing CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 234 (3d ed. 2000)).

81. See Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, 1 *DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y* 1 (2012).

82. See Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 11 *FLA. A&M U. L. REV.* (forthcoming 2015); Andrea Smith, *The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement*, 2 *SETTLER COLONIAL STUD.* 69 (2012).

83. See HARVEY, *supra* note 34, at 159 (“The main substantive achievement of neoliberalization, however, has been to redistribute, rather than to generate, wealth and income. I have elsewhere provided an account of the main mechanisms whereby this was achieved under the rubric of ‘accumulation by dispossession’ The state, with its monopoly of violence and definitions of legality, plays a crucial role in both backing and promoting these processes.”); DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014).

84. See Wendy Brown & Janet Halley, *Introduction to LEFT LEGALISM/LEFT CRITIQUE*, *supra* note 67, at 1, 19–20 (on the reflexive and undermining turn to legalism by left movements).

85. Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 *AM. U. J. GENDER SOC. POL’Y & L.* 161 (2005); see Helge Dedek, *Stating Boundaries: The Law, Disciplined*, in *STATELESS LAW*, *supra* note 2, at 9, 21 (“Yet the challenge levelled by ‘stateless law’ increases the pressure on the ‘discipline’ to leave the trodden paths and become aware of the historically contingent factors that have come to define what we do.”).

campaigns, alongside community organizations and political activists, to change institutions of law. It is immensely difficult to maintain critical consciousness in the trenches of daily warfare with hostile or indifferent interests and with isolated clients. Organizers and other community actors bring consciousness almost necessarily lacking in the circumscribed relationship between lawyers and clients.⁸⁶ Representing workers through WWRC causes us to ask whether we are changing conditions for workers across the industry through legal action. Organizers challenge us to acknowledge the limits of adjudication and provide a broader understanding of the possible scope of a grievance and the necessary social response. Racial subordination is both everywhere and nowhere in our work in immigration detention and in the warehouses of the Inland Empire.⁸⁷ Collaboration with organizers encourages our students to develop both justiciable and non-justiciable narratives in the course of our representation of detainees and workers.⁸⁸ While critical and interdisciplinary perspectives can be explored in law school classes and seminars, they cannot replicate the experience of an immersive confrontation with an intractable social problem and close work with clients and organizers on that problem.

B. Democratic Lawyering

Legal academics have originated theories of lawyering rooted in clinical practice in waves of scholarship and program development. Gary Bellow co-authored the *Lawyering Process* with Bea Moulton and developed the Legal Services Center with Jeanne Charn at Harvard.⁸⁹ Tony Amsterdam developed a systemized method of teaching litigation skills from which came the Lawyering

86. See Robert W. Gordon, *Foreword to LAWYERS' ETHICS AND THE PURSUIT OF JUSTICE*, *supra* note 44, at xiii.

87. It is striking how little participants in the clinical enterprise discuss the dynamics of racial subordination in our legal practice. This may reflect the pull of color-blind ideologies within legal education. It remains difficult to discuss subordination in clinical conversations, perhaps in the absence of what Margaret Montoya calls the scaffolding of applied critical race theory in our pedagogy. Margaret E. Montoya, Univ. of N.M. Sch. of Law, Remarks at the 2010 Conference on Clinical Legal Education (May 6, 2010). Jean Koh Peters and Sue Bryant have done essential work in building a tool set for teaching cultural competence. Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, in *TRANSFORMING THE EDUCATION OF LAWYERS*, *supra* note 48, at 349. We need to think together about how to carry this consciousness to clinical discussions about strategies and tactics that can be used against systems of social control and racial subordination. See Jean Koh Peters & Susan Bryant, *Talking about Race*, in *TRANSFORMING THE EDUCATION OF LAWYERS*, *supra* note 48, at 375. More than anything else, we need to exercise vigilance and courage as we construct a more relevant and meaningful anti-subordination pedagogy.

88. See Carrie Menkel-Meadow, *Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse, and Injustice*, 64 U. TORONTO L.J. 620, 637 (2014) (“Conventionally trained lawyers and judges may be limited in how they conceive of legal claims and harms and be unable to enter into the subjective experience of those who experience harms and claims not yet recognized by formal legal systems.”).

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

program at New York University School of Law.⁹⁰ David Binder promoted an intense focus on discrete skill development and shaped the clinical program at UCLA School of Law to reflect this focus.⁹¹ Carrie Menkel-Meadow has argued that a principal strength of clinical legal education is its potential for theory generation, both about the substantive issues on which clinicians work with their students, as well as about lawyering.⁹²

Scholars in the first generation of clinical scholarship sought to elevate the work of their colleagues in clinics and to inspire the development of ideas and written work that might transform legal education and the profession. They demonstrated that access to experience outside of law school could lead to scholarship and teaching methodologies essential at both the micro-lawyering and macro-system levels. Although these scholars continue to maintain an unparalleled professional focus and record of social justice commitments and achievements, they made a concerted effort to demonstrate the usefulness of clinical teaching and scholarship across practice settings. They believed in the transfer value of clinical education for students entering areas of practice that might be quite different from the pro bono public interest practice of most clinics. Perhaps this is the reason why, in some of the key writings on lawyering theory, especially the work of Binder at UCLA, justice is sidelined to the periphery rather than centered, in contrast to the approach advocated by Robin West in her focus on doctrinal teaching.⁹³ Clinical scholars demonstrated the value of their theories of lawyering and took great care to defend the enterprise against charges that it was insufficiently attentive to legal practice outside of public interest law.⁹⁴ To be overly concerned with justice in clinical teaching and scholarship would be to relegate the new theories of

90. See Anthony G. Amsterdam, *The Lawyering Revolution and Legal Education*, in THE CAMBRIDGE LECTURES 1985, at 11 (Frank E. McArdle ed., 1987).

91. See David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 213–18 (2003) (encapsulating a skill-centered approach to clinical legal education).

92. Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980).

93. WEST, *supra* note 1, at 43–61. *But see* Michael Meltsner, *Celebrating The Lawyering Process*, 10 CLINICAL L. REV. 327 (2003). On Bellow and Moulton's effort to bridge generic skills acquisition with the moral commitments and responsibilities of a lawyer, Meltsner wrote:

The Lawyering Process straddled this fence also. It includes "skill dimensions," that encouraged clinicians to work on interviewing, counseling and negotiation as well as readings that raise painful questions of both personal and professional morality. You cannot work through its 1,121 pages without learning how to be a more effective practitioner regardless of who your client is; on the other hand, it would also take a pronounced sense of moral denial, one bordering on the morally inert, to avoid confronting in these pages the question of the proper use of the powers they impart.

Id. at 347.

94. See Binder & Bergman, *supra* note 91, at 302–03 ("Clinicians routinely lament the tendency of non-clinical law school faculty and administrators to perceive clinicians as 'second class citizens.' Yet the survey-type coverage to which the case-centered approach relegates lawyering skills may contribute to this unwelcome attitude.").

lawyering to the concerns of the few at law schools and in professional settings across the United States.⁹⁵ In this way, some of these works were responsive to the neoliberal consensus in the legal profession in the 1980s and 1990s,⁹⁶ or interpreted as such to consolidate the neoliberal approach.⁹⁷

Scholars also generated writings on multiple variations of progressive lawyering with a more central justice focus. The works of Lucie White, Gerald Lopez, and others critiqued the ways in which poor people received legal services, as explored above in Part I of this Essay. Their affirmative visions of legal practice have yet to find widespread purchase in standard law school curricula. Ascanio Piomelli helpfully summarizes the collective aspirations that scholars developed in reaction to these critiques in his description of democratic lawyering. Democratic lawyering, according to Piomelli, is when we “regularly work with people and groups involved in struggles for dignity, survival, self-determination, and other basic human needs” and “seek to foster and join collective efforts of low-income and working-class people and people of color to reshape their own lives and communities,” “in short, to form and support active *publics*—groups that come together to understand, confront, and attempt to gain some control over the forces and actors shaping their lives.”⁹⁸ The idea of “active publics” is essential.⁹⁹ Daniel Fischlin, Ajay Heble, and George Lipsitz argue, “[w]ithout concrete, self-active constituencies deciding democratically the contours of acceptable human conduct, human rights can become a . . . discourse that regulates human suffering rather than prevents it.”¹⁰⁰

Practitioners who seek to resist participating in the regulation of human suffering approach the work of lawyering by elevating methodological commitments over substantive or tactical ones. Collaborators ask them to

95. See Kennedy, *supra* note 17.

96. See Margaret Thornton, *Legal Education in the Corporate University*, 10 ANN. REV. L. & SOC. SCI. 19 (2014).

97. Carrie Menkel-Meadow suggests that the effort to classify and mainstream clinical methods through the “MacCrate Report,” AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), may have unintentionally undermined the social justice foundation of clinical legal education. Carrie Menkel-Meadow, Comments at the Contemporary Perspectives on Professional Education Session at the Law and Society Association Annual Meeting (May 30, 2015); see Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What’s Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 622 (1994) (arguing for the teaching of “ethical consequentialism” in law schools, so as to incorporate conceptions of the public good); see also Phoebe A. Haddon, *Education for a Public Calling in the 21st Century*, 69 WASH. L. REV. 573 (1994) (arguing for greater attention in legal education to curtailment of legal services for the poor and accelerating economic inequality).

98. Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 FORDHAM L. REV. 1383, 1394 (2009).

99. See *id.*

100. DANIEL FISCHLIN ET AL., *THE FIERCE URGENCY OF NOW: IMPROVISATION, RIGHTS, AND THE ETHICS OF COCREATION* xviii (2013).

employ a range of legal and political advocacy tactics with a range of social justice ends defined in conjunction with them.¹⁰¹ Lawyers are not mere conduits for clients' justice aspirations with no politics of their own. Lawyers always bring politics to their relationships with clients, even if the approach is ostensibly apolitical.¹⁰² Practitioners aspire to co-construct legal projects and social justice goals with activated groups of clients. Piomelli concisely describes the work: "Democratic lawyers collaborate with and nurture grassroots groups in which everyday people participate in multiple realms of self-rule or self-government, including tactical and strategic deliberation, public and behind-the-scenes leadership, joint public action, and joint assessment of that action."¹⁰³ Sophisticated public interest lawyers consider competing structures of collaboration with active publics.¹⁰⁴ In contrast, Mertz describes a curriculum that teaches law students to pick up any situation and efficiently translate it into set legal categories.¹⁰⁵

"Constrained legalism"¹⁰⁶ and "tactical pluralism,"¹⁰⁷ both terms defined by Scott Cummings to describe the significant strategic features of the collaborative relationships between lawyers and community groups, require that legal teams assess the efficacy of legal action to accomplish goals set by client groups. The slide into legalism is stayed, as students learn to understand client goals and assess legal action as a means toward those goals, alongside a range of other advocacy methods. We feel this acutely in the warehouse case, in which we are poised to begin litigation, even without a larger understanding of how such legal action might fit into the broader goal of industry transformation. The ultimate aim is usually not the winning of a case or passage of a bill, but instead something headier and less clear, such as the development of collective power. The open-ended nature of the search for legal mechanisms by which to repair harms identified by communities speaks to the larger pedagogical goal of preparing students to engage, in the words of Carrie Menkel-Meadow, in "process pluralism," particularly in response to difficult historically and macro-politically entrenched problems.¹⁰⁸ The tension between

101. See, e.g., Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879 (2007) (describing collaborative legal and organizing campaign on behalf of restaurant workers).

102. See Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 297 (1996).

103. Piomelli, *supra* note 98, at 1391.

104. See Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103 (1992); Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J.L. & SOC. CHANGE 25 (2011).

105. Mertz, *supra* note 71, at 508.

106. Scott L. Cummings, *Critical Legal Consciousness in Action*, 120 HARV. L. REV. FORUM 62, 67-71 (2007).

107. Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927, 1932 (2007).

108. Menkel-Meadow, *supra* note 88.

social justice goals and legal means is not inherent. It is a product of the path development of legal practice in which every dispute is characterized and defined as one between individuals or between individuals and the state. The law and organizing¹⁰⁹ and cause lawyering¹¹⁰ literatures contest the shape of current legal practice, and the actors in those narratives push at the boundaries of legal practice as defined by the rules of ethical conduct and the less formal conventions of local practice.

To be sure, the development of tactical and strategic analysis is possible in individual client clinics with no relation to a broader social vision. However, faculty will often add cases and projects to the docket because of the certainty of the need for legal action, as determined by the supervisor or the client, rather than the desire to solve a social problem, as defined collaboratively by lawyers and clients.

In addition to the ability to assess the need for legal action, democratic lawyers learn to collaborate with and nurture partners from the community, mediate complex decision making within organizations and communities,¹¹¹ frame social problems, and think carefully about power—how it is created, distributed, used, and lost. Students move out of legal systems with predetermined assignments of authority, in which poor people must plaintively submit to judges and prosecutors possessing enormous power over their lives. They are forced to think creatively and irreverently about reallocating power in specific circumstances. They engage with clients who are collaborating with others and, in some cases, with sophisticated political organizers. “Affective *solidarity*” with groups of clients keeps lawyers involved in community, no matter what type of practice they enter upon graduation.¹¹² Appreciating the plasticity of legal roles preserves motivation and works against individualistic and formalistic assumptions in mainstream professional socialization.¹¹³

109. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

110. See STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* (2004).

111. See Susan D. Bennett, *Little Engines that Could: Community Clients, Their Lawyers, and Training in the Arts of Democracy*, 2002 WIS. L. REV. 469, 473 (discussing what lawyers can do to make sure democratic “community-building” is real, not ritualized).

112. Piomelli, *supra* note 98, at 1393.

113. See *id.* at 1397–1408; Alfieri, *supra* note 11, at 1084–85 (“Although the depth of lawyer bias and the force of color-blind neutrality hinder such identification and explanation, collaboratively enlarging the scope of client participation in the ‘lawyering’ process through individual decision-making and collective action transforms practical judgment.”); Bennett, *supra* note 111, at 495–96 (“There is nothing static about any of the on-going, long-term relationships between actors engaged in creating strong institutions for their communities; the lawyer-client bond is just one of those many relationships. The community-based lawyer should anticipate reciprocating her client’s evolution.”).

Democratic lawyering deepens critique, both of formalistic lawyering roles and of entrenched arrangements of power and resources in society.¹¹⁴

IV.

INSTITUTIONAL CONSTRAINTS AND OPPORTUNITIES

Rather than inviting disruption and displacement,¹¹⁵ law schools presently have the capacity to rediscover their purpose, reinvent their programs of study, and activate students in joint learning and engagement with active publics. Vexing “ill-structured” social problems¹¹⁶ ought to serve as the core vehicles through which students learn about law and lawyering.¹¹⁷ Clinics are the institutional mechanism through which this work comes into the four walls of the law school. Clinics also carefully facilitate the presence of students and faculty in law offices, basements, restaurant meeting rooms, church halls, and other spaces outside of the university. Clinical practice with an expansive social vision is central to thick legal education reform proposals that do not hew to the current needs of private employers or austerity-era public entities. Legal education, through clinics, has an essential role in generating new visions of practice and undergirding the moral and ethical responsibilities of the profession.¹¹⁸

A. *Centering Clinical Legal Education*

The marginalization of clinics in discussions about legal education reform is surprising until one understands the underlying assumptions and constructs. To justify significant deregulation, differentiated legal education, shortened programs, a return to an apprentice or externship model, and deputization of students to provide individual legal services, one must do so in the name of practice-readiness. Clinical legal education complicates that simple story. Rather than think critically about how to more effectively integrate clinical education into the overall law school curriculum or how to have students work

114. Amna Akbar, *Law's Exposure: The Movement and the Legal Academy*, 65 J.L. EDUC. 352 (2015) (describing the ways in which the Black Lives Matter movement should be understood within legal education).

115. Jill Lepore, *The Disruption Machine: What the Gospel of Innovation Gets Wrong*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/the-disruption-machine> [<http://perma.cc/Y3YG-X9Y3>].

116. Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45 (2002).

117. See Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in THE COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, INC., CLINICAL EDUCATION FOR THE LAW STUDENT 374 (1973); Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577, 591 (1987) (“Under Bellow’s definition of clinical education there is nothing inherently limiting about clinical education other than using the student’s performance as a starting point for inquiry.”).

118. See Moran, *supra* note 8, at 17 (“Imagine a clinical program that recognized society’s need for lawyers with social justice perspectives as well as the importance of preparing students for their role as citizen-lawyers.”).

on more complex matters in clinical settings, neoliberal reformers write off clinical education as “expensive”¹¹⁹ and “artificial,”¹²⁰ with second-class clinicians cast as rent-seekers.¹²¹ These critics need to sideline clinical education because it interferes with what is fundamentally a neoliberal approach to legal education: market differentiation, commodification, and students understood first as consumers and then as laboring cogs in law offices. That students might learn about lawyering and the profession in non-market spaces within the university setting appears intolerable. This is shortsighted and revealing, as it exposes the background ideology that shapes the reform discussion.

Robert Kuehn has deftly picked apart the assumption that increased opportunities for student participation in clinics would increase law school tuition.¹²² Kuehn reports the many causes of increased tuition: prioritizing scholarship production of non-clinical faculty through lower teaching loads and higher salaries; merit-based grants and aid in the ranking-driven competition for students with high numerical entrance indicators; new construction of law school buildings; higher administrative and support service costs; and required payments by law schools to their universities.¹²³ When schools need to make cuts, as has been the case at most law schools since the 2008 economic crisis, many fixate on the costs of clinical education.¹²⁴ In fact, according to Kuehn’s analysis of available data, 84 percent of law schools have the opportunity to offer a clinical experience to every student without an increase in tuition.¹²⁵ This dissonance appears to reflect a set of values about what is institutionally necessary, as well as a reflexive attempt to protect the accumulated privilege (and rent-seeking) embedded in the entrenched system of legal education. This understanding may not quickly enable deans at the 82 percent of law schools that do not guarantee clinical education¹²⁶ to expand experiential offerings. But it is essential that there be a degree of honesty about the range of costs borne by students through their tuition. Many law schools have (again, reflexively) prioritized faculty salaries, new buildings, and higher position in the rankings over experiential education and community engagement.

119. TAMANAHA, *supra* note 32, at 172–73 (pointing out that clinical education is uneconomical, not a solution to legal education’s long-term woes); Drew & Morriss, *supra* note 30, manuscript at 4 (clinics are “more expensive on a per student-credit-hour basis than doctrinal courses”); Henderson, *supra* note 37, at 502.

120. TAMANAHA, *supra* note 32, at 173 (“Law schools, at great expense, create artificial practice settings within an academic institution although actual settings exist in the world of legal practice. The economic inefficiency of this arrangement places an upper limit on the expansion of clinics . . .”).

121. Drew & Morriss, *supra* note 30, manuscript at 11.

122. Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENV. U. L. REV. 1 (2014).

123. *Id.* at 7–10.

124. *Id.* at 12.

125. *Id.* at 32–39.

126. *Id.* at 32–33 (“[O]nly 18% of law schools (36 of 202) presently require or guarantee a clinical experience.”).

More surprising than the cost fixation of neoliberal reformers, however, is the apparent disregard of clinical practice by progressive reformers.¹²⁷ Robin West devotes a chapter of her otherwise deeply insightful book on the existential crisis facing legal education to a discussion of how bifurcated faculties of interdisciplinary scholars and clinicians prevent law students from engaging in normative analysis of the law, critical theory, legalism, and legal policy formulation for entrenched social problems.¹²⁸ These misimpressions on the part of a critical doctrinal scholar at a prominent law school with a rich, varied, and expansive clinical program¹²⁹ indicate that the (at times) externally imposed and (at other times) internally sought isolation (or insulation) of clinical law teachers must end. Here again we see evidence of accumulated privilege and institutional inertia at work. To draw out the greatest synergies with other coursework and the overall intellectual activity at a law school, clinical teachers must be fully integrated in faculties and in governance. And yet, particularly at higher-ranked schools, there is either a cognitive disconnect or some degree of existential angst associated with creating parity across faculties, including clinicians, legal writing teachers, and academic support specialists. Colleagues in those sectors of the faculty are deemed marginal because they lack scholarly productivity while they are often discouraged by institutions from allocating time for intellectual pursuits over the direct instruction of students. It is also sometimes true that individuals in those categories embrace their marginality in exchange for autonomy and more intense focus on direct student instruction (and, in the case of clinicians, client services). Faculties must either develop more complex and inclusive criteria in crediting institutional contributions (perhaps leading to a reconfigured understanding of institutional worth) or provide colleagues in those marginal sectors with time, resources, and perhaps the affirmative expectation that they will engage in scholarly exchange, adjusted for the obligations owed by clinicians to their clients.

While clinical legal education ought not to be the sole carrier of justice concerns in U.S. law schools, it is essential that a progressive reform agenda be centered on the sites of actual legal practice with marginalized people. This also renews the commitment to social justice within clinical legal education, even as it is tested by institutional and generational shifts.

127. *But see* Stephanie Dangel & Michael J. Madison, *Innovators, Esq.: Training the Next Generation of Lawyer Social Entrepreneurs*, 83 UMKC L. REV. 967 (2015); Martha F. Davis, *Institutionalizing Legal Innovation: The (Re)Emergence of the Law Lab*, 65 J. LEGAL EDUC. 190 (2015). These authors use the modern language of innovation and entrepreneurship rather than collectivist conceptions of social justice, but do so to advocate for law school focus on wide-ranging social problems. *See also* Deborah J. Merritt, *Student Choice*, L. SCH. CAFE (Aug. 13, 2015, 6:02 PM), <http://www.lawschoolcafe.org/thread/student-choice> [<http://perma.cc/7C6X-Q9YZ>] (supporting California State Bar proposal to require fifteen experiential credits).

128. WEST, *supra* note 1, at 131–73.

129. As outlined in Part I of this Essay, *supra*, clinical legal education is complex—as complex as the public interest legal ecosystem of which it is a part.

B. Critical Systems Analysis

Lawyers do not possess the narratives that communities generate. Lawyers are taught at an early point in their education to exercise detachment and to assess factual stories without the benefit of preexisting moral or communitarian commitments.¹³⁰ Many law students experience this feature of the curriculum as both energizing, because of the obvious disjuncture with their previous lives, and depressing and disaggregating, for precisely the same reason. Many law students are still in the midst of identity formation and commitment definition when they arrive at law school. As law skeletonizes facts to facilitate adjudication,¹³¹ it categorizes and reduces complex and contradictory human experience.¹³² By bringing groups of clients into clinical practice and giving students critical frames generated across disciplines, we encourage them to put their newfound skills of categorization and reduction into a broader, structural context. The goal is to give them the experience necessary to interpret community narratives and to co-construct social problems and potential legal responses, alongside clients.¹³³ For some, this kind of clinical practice may be the way “back in,” as Christine Zuni Cruz has termed it,¹³⁴ to reconnect students with communities,¹³⁵ strengthened by adding legal skills to their professional repertoire.

Are we truly able to get outside of the social structure in which we are located to develop new means to resist the forces grinding down the minds and bodies of our clients? Is our critique deep enough? Not yet, for sure. But this is a knowledge base—a struggle of thought and imagination, really—that merits our full attention. Our students are learning about intersecting systems of legal power, such as the immigration and criminal justice systems. So many are mandatorily confined at the Adelanto facility due to over-policing in communities of color and vague and expansive gang injunctions borne of a race-based war on drugs. Our students become keenly aware of the flaws in the

130. See Mertz, *supra* note 71.

131. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 170 (3d ed. 2000).

132. It is important to acknowledge that this, too, is “experiential education.” JOHN DEWEY, *EDUCATION AND EXPERIENCE* 26 (1938) (“It is a great mistake to suppose, even tacitly, that the traditional schoolroom was not a place in which pupils had experiences.”).

133. See Bellow, *supra* note 102; Bennett, *supra* note 111, at 495 (“Made explicit, the happenstance interchanges between client and lawyer can be transformed into a ‘learning loop’ that resembles the function performed by the ‘learning community.’”). One outstanding question is whether the limited contacts that may occur between lawyers and poor clients are characterized by honest and critical evaluation of legal and life options and with the values of each party at the surface of the communication. See STEPHEN ELLMANN ET AL., *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* (2009).

134. Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 *CLINICAL L. REV.* 557 (1999).

135. Alfieri, *supra* note 11, at 1083 (“A transformative commitment to difference-based identity and antisubordination practice norms commands the abandonment of neutrality claims in rendering lawyer judgments about the means and ends of representation.”).

criminal justice system through immigration bond representation. Our students are also deeply conscious of the fact that a profit-seeking, publicly traded corporation operates the detention facility in close collusion with the state. Are we engaged in critical resistance? Again, not yet. But in this work are the seeds of pedagogical goals and methods that have the potential to transform the relationship between the profession and the social problems that directly implicate law, as taught in U.S. law schools.¹³⁶

The projects described in this Essay, the types of critiques referenced—against exploitative employers and an over-criminalizing state—as well as the terminology used (“progressive” versus “neoliberal”) appear to indicate strong political bias, which in turn may be used to argue against a clinic-centered program of legal education reform. Opponents such as Eric Posner use the left-leaning projects of human rights clinics to argue against the existence of those clinics.¹³⁷ Drew and Morriss indicate a preference for individual service provision over larger advocacy projects in clinics. This posture is reminiscent of the attacks on the Legal Services Corporation waged by conservative opponents over many years, which succeeded in eliminating the capacity of those lawyers to engage in class action litigation and to represent undocumented immigrants.¹³⁸ These strategies of delegitimization are well-worn and themselves evidence of entrenched political bias. By trimming the sails of law school clinics, opponents (and path-dependent proponents) avoid even minor disturbances in the distribution of power and resources in the United States through law or legal action. Rather than taking out the adversary by grounding critiques in unsupported arguments about pedagogy or relative expense, opponents should speak directly as to why they believe these issues and problems ought not to be a part of the law school curriculum. Why shouldn’t we study the failure of state regulation in the market for globalized low-wage labor? Or the inefficiency of immigrant detention and the rent seeking of private prison companies? Unfortunately, the charge of political bias in educational contexts is often an attempt to hide opposing political bias and to preserve the status quo.

The less contentious response to the charge of political bias is simply that clinics with social vision may be guided by a diverse set of values and methods. There is no single kind of clinic that would generate deep critique and an understanding of democratic lawyering among students. Criminal defender clinics provide individual services and often provoke deep thinking among

136. *But see* Fred Moten & Stefano Harney, *The University and the Undercommons: Seven Theses*, 22 SOC. TEXT 101 (2004) (arguing that critical academic projects reinforce the university as a pillar of state power over subjugated peoples).

137. *See* Posner, *supra* note 31.

138. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 220–26 (2003).

students about the criminal justice system and mass incarceration.¹³⁹ Clinics focused on a geographic community or neighborhood may deploy a range of lawyering methods, including individual case representation, to challenge unjust conditions of life in those areas.¹⁴⁰ A clinic focused on religious liberty may be cast as politically conservative,¹⁴¹ but in fact represents poor and working class clients and engages in the kind of multi-modal advocacy and engagement with social movements and ideas described in Part II of this Essay.¹⁴² It is true that the struggles of people who cannot afford to pay for legal services are often against a bureaucratic state or exploitative private actors. Lawyers need to be free to use all possible means to challenge the difficult conditions of their clients' lives. Many clinics do promote a vision of the public good. To say that this is out of bounds within legal education is to deny one of the foundational precepts of the legal profession.¹⁴³

C. *Theories of Lawyering Across Paradigms of Practice*

The work described above requires adaptability, improvisation, and invention.¹⁴⁴ In their critique of the architecture profession in *Spatial Agency*, Nishat Awan, Tatjana Schneider, and Jeremy Till resonate deeply:

Professions rely on this assertion of stable knowledge in order to give themselves authority over others, and so to accept acting otherwise is to recognise the limits of one's authority, and to relinquish the sole hold of fixed and certain knowledge. If agents are indeed to allow themselves to act otherwise, then the knowledge that they bring to the table must be negotiable, flexible and, above all, shared with others.¹⁴⁵

These attributes—adaptability, improvisation, and invention—mirror the skillset identified by the legal academic analysts of a changing private sector market for legal services, such as William Henderson and David Wilkins.¹⁴⁶ In the case of producing goods and providing services across borders, Henderson discusses “process engineering” and the need for law graduates to understand

139. See, e.g., M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351 (2012); Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense Is Not So Sexy and Other Grievances*, 1 CLINICAL L. REV. 723 (1995).

140. See, e.g., Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333 (2009).

141. Ethan Bronner, *At Stanford, Clinical Training for Defense of Religious Liberty*, N.Y. TIMES (Jan. 21, 2013), <http://www.nytimes.com/2013/01/22/us/at-stanford-clinical-training-for-the-defense-of-religious-liberty.html> [<http://perma.cc/63J8-38LM>].

142. See James A. Sonne, *Religious Liberty, Clinical Education, and the Art of Building Bridges*, 22 CLINICAL L. REV. (forthcoming 2015).

143. See *supra* notes 44–46 and accompanying text.

144. FISCHLIN ET AL., *supra* note 100, at xvi.

145. NISHAT AWAN ET AL., *SPATIAL AGENCY: OTHER WAYS OF DOING ARCHITECTURE* 32 (2011).

146. See Henderson, *supra* note 37; David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067 (2010).

how to generate competent legal work product from disaggregated systems and supply chains.¹⁴⁷ In the case of redress for systematic elimination of indigenous culture and community in Canada, Menkel-Meadow discusses “process pluralism” and the need for lawyers to be able to formulate differing kinds of dispute resolution mechanisms for variable and dynamic problems.¹⁴⁸ In either case, society (and future employers) demand that legal education provide law students with ill-structured problems and give them the space and guidance to wrestle with those problems. While ill-structured problems with high degrees of uncertainty can be found in all sectors, local manifestations of massive and intractable problems, such as poverty, racism, and exploitation offer a great deal of space for law students to gain experience in process design, particularly when they represent groups of activated community members.¹⁴⁹ As work is outsourced to different kinds of legal service providers, leading lawyers must develop strategic and tactical sophistication. As work moves across borders, leading lawyers must build relationships and collaborate effectively. These attributes are significantly present in clinical work advanced on the tenets of democratic lawyering.

Another favorite theme of the market-based legal education reformers is technological change and the likely displacement of humans in providing certain kinds of legal services. However, it is important to refrain from overdetermining outcomes of expanded technological capacity, as Frank Pasquale and Glyn Cashwell argue: “[L]egal and cultural change can render once contestable disputes essentially automatable, and can also render once automatically resolved disputes open to new levels of contestation.”¹⁵⁰ Law schools, through scholarship and clinical practice, have an essential role to play in helping society draw lines between automation and discretion in legal decision making. Clinics, especially, have a key role in bringing active publics to the table as elected officials, judges, and administrators make these decisions.

147. Henderson, *supra* note 37, at 486.

148. Menkel-Meadow, *supra* note 88, at 638:

Those who engage in the legal work affecting large groups of people with great injury will require training and skills which may be quite different from or additional to conventional legal training. . . . Complex, historically based, and group claims may require processes that are more susceptible to change and modification (“contingent” solutions) than conventional legal processes provide for. This is part of the development of the newer legal processes of deliberative democracy and consensus building as methods of managing and handling modern complex legal (and human) disputes that do not lend themselves so easily to final resolutions.

149. Lawyers must also grapple with ill-structured problems and radical uncertainty in governance. See, e.g., Justin R. Pidot, *Governance and Uncertainty*, CARDOZO L. REV. (forthcoming 2015).

150. Frank Pasquale & Glyn Cashwell, *Four Futures of Legal Automation*, 63 UCLA L. REV. DISCOURSE 26, 48 (2015).

We seek above all to cultivate in students and in ourselves the capacity for action. Difficult social problems and unjust conditions of life invite analysis and action. These problems and conditions need a place to land within legal education. This, in turn, makes legal education essential in society and motivates young people to become lawyers.¹⁵¹

CONCLUSION

Instability creates space for experimentation and the possibility of desubjectification or desubjugation. In David Hoy's words, "[c]ritique does not tell people who they really are and what they ought to do. Instead, . . . critique challenges their understanding of who they are, and it leads them to resist their attachment to their social identities and ideals."¹⁵² It may not feel apparent, but law schools possess a degree of institutional flexibility relative to nongovernmental organizations and legal services entities. Further, legal educators have the capacity to break down subject matter silos within our institutions and across the university. Because of the educational mission of law schools, there is a degree of tolerance for the inefficiency of critique and democratic resistance, essential in this course of experimentation. Institutionally, law schools have the potential to flourish by resisting extractive, neoliberal approaches and centering social problems as the core content of learning agendas and active publics as collaborative partners. Through this cogenerative work with those at the margins, we can gain the capacity to envision new forms of legal practice, grounded in the profession's justice-seeking, public-good-advancing norms and values.

151. At a recent conference, Professor Catherine Smith of Denver University Sturm College of Law reported on a talk she gave to high school students as part of the school's pipeline efforts. Student enthusiasm for law school grew when she discussed the complicated legal and political challenges that Ferguson and the Movement for Black Lives presented. When the students began to talk about *why* they would attend law school in the current social context, they grew more animated and passionate about the possibility. Catherine Smith, Univ. of Denver Coll. of Law, Remarks at the Annual Meeting of the Law and Society Association (May 29, 2015); see Catherine Smith, *Seven Principles: Increasing Access to Law School Among Students of Color*, 96 IOWA L. REV. 1677 (2011).

152. HOY, *supra* note 79, at 14.

