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REPORT FROM A CLEPR COLONY*

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PHILIP G. SCHRAG***

When we were staff attorneys at the NAACP Legal Defense Fund, we discovered two important things about lawyering that we had not learned at the Yale Law School. The first was that what lawyers did was infinitely more complicated than we had been taught to expect. We had learned about finding, distinguishing and, extending legal doctrine, about reading cases and statutes, and about applying them selectively to facts in trials and appeals. But despite Yale’s unusually diverse curriculum for the law school world, we learned little that prepared us to function as lawyers: for meeting our first clients, for confronting many southern states’ perversion of the legal system to an instrument of class and race power, for threading our way through New York’s rococo procedural system, for negotiating elaborate settlements, for planning campaigns of test litigation, or even for the routine but important business of developing working relationships with cooperating or adverse counsel.

Our second discovery was that non-doctrinal aspects of lawyering were much more rewarding to talk about—to ourselves and to others—than were rules of “substantive law.” Indeed, the behavioral demands of the legal system that were most difficult, even frustrating, were precisely the ones that were the most fun to share. And so we began to write about what we and our colleagues did—not so much about what the law was or could be, but about how it felt to be an actor in the legal system, what we did with our time, what our friends and enemies looked like, and what they did to us or for us.

For a long time, it did not dawn on us that communicating with other people about what lawyering was like had anything to do with “teaching;” our law school experience had conditioned us to think of legal education almost exclusively in terms of doctrinal mastery, conveyed through one form or other of Socratic dialogue. Indeed, but for the peculiar surge of

* Portions of this Article were originally written as a memorandum on clinical legal education from Professor Schrag to the Faculty of the Columbia University School of Law. The authors are grateful for the comments of members of their faculty.
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American liberalism in the Johnson administration—that temporary burst, in the midst of war, of middle-class concern for domestic minority and low-income groups—we would surely never have become teachers. But that short flowering sowed many seeds. One of them, known as CLEPR (the Council on Legal Education for Professional Responsibility, Inc.),\(^2\) by funding clinical programs, brought about the first significant innovation in legal curricula since the hegemony of the case method. And in turn, CLEPR also brought into legal education hundreds of new people, ourselves included, who were ill at ease with the teaching goals and methods that they themselves had experienced as students.

Clinical legal education quickly took hold. Very few schools failed to fund these programs after their initial CLEPR grants ran out,\(^3\) and by 1975, 127 law schools administered a total of 346 clinical courses and seminars.\(^4\) In most law schools, members of the faculty preferred to hire new instructors—often from legal aid and legal services ranks—rather than offer the clinical course themselves. The new clinical teachers found little agreement either among themselves or between themselves and their more established colleagues on most of the basic questions arising from the idea of clinical education. To be sure, there was some consensus over the broadest outline of clinical teaching. It would be analogous, in some way, to the last two years of medical education, in which students, supervised by doctors, make rounds of patients, diagnosing and treating their illnesses. It would get students out of the lecture room and involve them with real

\(^2\) CLEPR is a small foundation spun off by the Ford Foundation in 1968; its purpose is to improve legal education by making it more relevant to community needs, and to enable law students to learn better by affording them some contact with the reality of legal practice. Rarely has a foundation produced such a dramatic effect with so little money—Ford’s initial commitment to CLEPR was six million dollars. Marden, CLEPR: Origins and Program, in CLINICAL EDUCATION FOR THE LAW STUDENT 3, 8 (Working papers prepared for the CLEPR National Conference 1973).

CLEPR arrived on the scene at a time when the Socratic method was coming under heavy attack as a pedagogical technique, and when, simultaneously, the law schools were casting about in the foundation world for new sources of funds. The attacks found expression in the early 1970’s in well-known articles: Kennedy, How the Law School Fails: A Polemic, 1 YALE REV. L. & SOC. ACT. 71 (1970); Savoy, Toward a New Politics of Legal Education, 79 YALE L.J. 444 (1970); Stone, Legal Education on the Couch, 85 HARV. L. REV. 392 (1971). For several years before then, many teachers who taught Socratically had been themselves unhappy about the increasing student dissatisfaction; some of them tried to use a “problem” method that has occasionally enjoyed some success. See, e.g., Peck & Fletcher, A Course on the Subject of Negotiation, 21 J. LEGAL ED. 196 (1968).

CLEPR offered to all law schools substantial sums of money and a curricular innovation called clinical education that would appeal to students hungry for a change of pace and greater social involvement. But CLEPR attached a condition to its support. Its grant to any particular school would be decreasing and non-renewable; the school would have to plan to pick up the tab if the program were to continue after its first two or three years. Of course, CLEPR had no formal way to prevent a school from dropping a clinical program. But its officials knew that to do so a school would have to cancel some of its most popular courses and let go instructors who had, after a couple of years, become fixtures. Law schools are used to parting with instructors who have not met institutional standards, but, at least in the early 1970’s, it would have been unusual for them to dismiss instructors solely because the outside money had run out.

4. COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1974-75 III (1975).
clients. And, as a by-product, it would involve the schools in community service. But every teacher and every law school had to make independent judgments about the institutional nature of clinical programs and about their precise pedagogical objectives.

Often, because the institutional arrangements preoccupied both the “old” faculty and the newcomers, these issues were addressed first. Would the clinical instructors and their students see clients in the school, near the school, or at a legal services office elsewhere in the community? Would the instructors have “faculty” status; would they be on a tenure track? If not, would students think of the programs as “second-class” education? How many hours a week would students work in clinical programs? Would they participate in simultaneous traditional seminars related to their clinical work? How much credit would they get? Would the teachers in the clinical programs also be responsible for their administration? Would they have to raise the money to keep themselves employed? Would clinical courses be graded? If so, how? Could or should students take more than one clinical offering? Would the existing faculty accept the new courses as integrated parts of the curriculum? The more subtle pedagogical questions were recognized, but by and large, their resolution was deferred for a couple of years. Only gradually, then, did law teachers explore the possible goals of clinical teaching. Was it applicable to all fields of law, or best adapted to litigation or other “process” studies? Should new pedagogical techniques replace Socratic teaching? Should teachers be less directive? Could ways be found to teach, really teach, the ethical and psychological dimensions of lawyering? How could students best learn, in law school courses, to teach themselves?

We did not come to clinical teaching because we had answers to any of these questions; in fact, we were nearly oblivious to their existence. We came to Columbia because CLEPR’s funding happened at a time when we were ready to do something new, and because the kind of clinical teaching that Columbia wanted seemed to offer us the chance to pursue our legal interests in a new but equally comfortable setting, and at a less frenetic pace. And we imagined (correctly) that even if we knew very little about teaching, we would for two reasons be reasonably well accepted by our students: we knew no less than other law teachers about how to teach; and, from our experience at the Fund, we knew this much more—that there was a lot of lawyering that was not being taught. The clinical concept, whatever it meant, might provide us with some sort of vehicle for teaching it.

Like most of our colleagues in clinical teaching at other schools of law, we approached our task in a less than systematic fashion. In retrospect, logical progression would have required a thorough consideration of the objectives and possible methods of clinical teaching to precede the acceptance of a particular institutional arrangement. But for many reasons, we
just plunged in. As soon as we arrived, we had to prepare for teaching; there was not time for such careful planning. And we suspected that experimentation would help us to figure out where we were going—at least it could not hurt. So we proceeded, for the last five years, to learn clinically from our teaching. As we worked, we learned more about what we could and could not do well; nearly every year, we radically altered both the institutional framework of our offerings and our pedagogical methods. This is the story of our sometimes fumbling attempt to discover how we could best teach clinically—of our search, as it were, for the clinical pinnacle.

Flash-forwards are usually disconcerting, and yet it is too much to ask readers to follow our progression of clinical formulae without some fixed point from which to evaluate the direction of our motion. So we briefly jump far ahead to what we currently see as the principal objectives of our clinical teaching. We dimly saw some of this when we first began; three or four years passed before we could have articulated most of it.

The essence of clinical legal education, we would now conclude, is that for much of the student’s time, he is forced to see the world through the eyes of a practicing lawyer. The student is therefore faced with the full range of complexity that faces the practitioner. Facts may be unavailable, obscure, disputed or distorted. The law may be unclear, or in flux. The goals of other persons—clients, adversaries, and decision-makers, to name a few—may be cloudy or may conflict with those of the lawyer. The lawyer may be caught in a bind between two or more conflicting ethical values, or between an ethical value and a very important practical goal. Choice of the best strategy may require him to estimate and weigh probabilities. The lawyer rarely feels that he has enough time in which to do the most thorough job that he could.

The student taking on this role will, on occasion, step outside of it for analytical purposes. But clinical education differs most dramatically from traditional legal education in that it places the student in role most of the

5. Faculty politics, rather than our own theories, determined many of the institutional issues. For example, the faculty was unwilling to assign a large block of academic credit to clinical work, and it had a strong preference for an in-house program, rather than one which sent students to offices elsewhere. And of course, the literature of clinical education lagged behind its advent; two or three years would pass before Gary Bellow would write a major essay on clinical methodology, see Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (working papers prepared for the CLEPR National Conference 1973), or the Journal of Legal Education would publish an article on clinical teaching in almost every issue. See, e.g., Grossman, Clinical Legal Education: History and Diagnosis, 26 J. LEGAL ED. 162 (1974).

6. The use of the masculine gender includes the feminine; it was chosen by the toss of a coin.

7. Or occasionally, he may view the world through the eyes of another actor in the legal system, such as a judge or client.
time, not on a superficial level by asking him how he would phrase a particular legal argument if he were in court, but by requiring him to respond to all of the challenges and conflicts that simultaneously confront or bombard the lawyer, and then to analyze his response.8

Another difference from standard law school courses involves learning about facts. Like trial practice courses, clinical courses demonstrate that the appellate lawyer's common experience of having the facts fixed in advance is a luxury peculiar to that branch of the craft. Normally, facts are elusive. Clients and witnesses sometimes evade, fail to remember, exaggerate, or lie outright. Stories conflict. Documents conceal. Much time is devoted to painstaking detective work not typically treated in other law school courses. Some of the detective work can be learned from conventional study (e.g., accounting), but much of it requires mastery of interviewing and other methods of investigation.

By putting students into the lawyer's role, the clinical method also gives students the opportunity to observe their own behavior and that of others engaged in the lawyering process. Clinical instructors respond differently to the teaching opportunities provided by interpersonal behavior (our own teaching generally ignored such data until 1973-74); but almost alone among law school courses, clinical offerings provide the option of dealing with directly experienced behavior if the instructors choose to do so.9 Analysis of the interpersonal transactions between students, clients and other actors in the legal process may serve a variety of ends, such as enabling students better to predict and control their actions in a professional context; sensitizing them to social cues and non-verbal communication; helping them to be aware of their own anger, passivity, concern, distrust and other feelings about lawyering and of how those feelings affect what they do.

Issues of professional responsibility also loom large on the clinical agenda. The most important ethical issues are not the ones easily resolved by resort to the Code of Professional Responsibility10 (issues that occur in disciplinary proceedings), but the ones lawyers typically face every day. Should they drown adversary litigators in a sea of paperwork, lie to adversaries for bargaining advantage, or decide, as a legal aid lawyer, to represent one type of client rather than another when resources are too scarce to

8. Our thinking about the objectives of clinical legal education, especially the importance of simultaneity as a constraint on lawyer conduct, was clarified by an exceptional (but unfortunately unpublished) memorandum to the Stanford Law Faculty by Anthony G. Amsterdam (1973).
9. Our colleague, Jack Himmelstein, has described in detail many of the types of human interactions that can advance or interfere with successful, anxiety-free professional relationships; many of the stresses inherent in lawyer-client, lawyer-lawyer, lawyer-adversary, lawyer-court, and lawyer-citizen encounters; and many of the personal feelings that lawyering commonly produces in practitioners. See J. HIMMELSTEIN, REASSESSING THE LAWYERING PROCESS (draft of work in progress, 1975).
represent both? Clinical courses are superior vehicles for sensitizing students to these issues, because the student must actually make a choice among competing options. Unlike the student in a classroom, he cannot stop after pointing out the risks and costs inherent in each available course of action, but must actually select one of them, execute it, and incur the associated costs. His decision may well be irreversible, and he will have to live with its consequences for weeks or months thereafter. Specific examples of ethical issues arising in our clinical teaching will be described in detail below.

Another aspect of clinical legal education is training in strategic decision-making. Every legal problem requires that a lawyer make dozens, and often hundreds, of small decisions that cumulatively comprise its strategic and tactical execution. These decisions typically include whether or not to litigate; what, if anything, to counsel; what parties to involve in the matter, and in what roles; what forum, if any, to invoke; what documents, if any, to use; what communications to direct—and to whom—before, during or after formal proceedings. Traditional legal education excels at enabling students to identify choices; it is less effective in equipping them to choose effectively; and it is still less effective in providing them with confidence in their ability to decide.

In many clinical courses, students must make these decisions themselves and then observe the results of their choices. Some decisions will be reinforced, and some will not. Furthermore, students may obtain supervised experience in two special, very important decision-making skills: choosing under time pressure, and choosing without adequate information. A prominent objective of clinical legal education should be to reveal to students, through their own experiences, that many legal decisions are based on hunch or intuition, and that judgment and good intuition can be observed, analyzed and taught—and later self-taught—like any other legal skill. The phrase "self-taught" is important, because in a single course, it is unlikely that any one student can obtain enough experiences of any type to make safe generalizations. But, as Gary Bellow points out, a student can learn how to learn, and will, hopefully, carry with him from a clinical course a sense of self-awareness that will enable him to continue to educate himself clinically for his entire professional career—just as he continues to learn from books.

To this list of major components of clinical training, we would add two minor goals: teaching about a particular process, and teaching legal "skills." Clinical methods seem peculiarly well suited to instructing students in those types of courses that traditionally are devoted to the analysis of a process rather than a doctrine: civil and criminal procedure, trial

11. See Bellow, supra note 5, at 394-95.
practice, litigation generally, the legislative process, bargaining, and administrative process. Students who have studied these areas previously report that, by participating in the process, they learned far more about it than they did from casebooks, and particularly that some informal aspects could only be learned by personal participation.\footnote{12. For example, students participating in welfare hearings in one of our clinical seminars discovered that the state welfare department's procedural regulations governing hearings were never complied with, and that insisting on compliance by the department would produce endless adjournments (which might help or hurt one's client).}

Students in clinical courses generally discover also that they have an extraordinary need to learn. To put it bluntly, if a student does not catch on quickly to how the process works, he will not only risk the bad feelings associated with losing, but may suffer great public embarrassment in a hearing or other event, and may fail to live up to his own sense of responsibility to his clients. Few students want to experience these feelings: they prepare thoroughly and learn with great efficiency.

The second "minor" goal is skills training. Old myths die hard; the conventional myth about clinical legal education, which we probably accepted when we first began teaching, is that its primary purpose is to teach such skills as interviewing, cross-examination, oral argument and negotiation. We now see skills training as an important by-product of an educational method that has much more ambitious goals, just as teaching the doctrine of contract law is an important by-product of a course whose principal mission is really to teach students about common-law history and method, and about how to read, relate and distinguish judicial decisions.\footnote{13. Some critics of clinical education have argued that the skills can be "picked up" in practice, but as Clay Hiles, one of our students, wrote in a seminar evaluation paper, "real law practice, even when watered down for several months for novice lawyers at big firms, is almost all experience without any systematic effort to look critically or analytically at what the practice of law is or can be about. What is missing is the opportunity for a lawyer-in-training both to experience the real world of lawyering and to enjoy simultaneously the luxury of studying, practicing, learning and improving skills without the limiting constraints of an actual practice: enormous time pressures, don't-ask-questions directions, a general absence of training in or even consideration of human relations skills."}

II

Meltsner came to Columbia directly from the Fund. Schrag had worked with him there but had also spent fifteen months working for New York City government. Between us, we were familiar with the substantive law of consumer protection, criminal procedure, and constitutional litigation, and with the goals, techniques and considerations of large-scale test litigation. We knew that we wanted to base our teaching on student involvement in our work. But we had limits. With an infinitesimal budget that barely covered litigation expenses, we could not design a program that relied on full-time attorneys paid by the law school. In addition, the law school required us to teach large lecture courses during at least one term of the
each year. In unfamiliar territory and with no tradition to guide us, we did what we knew best, and for the first few years we had students work with us on relatively major "test" cases, usually in the federal courts.

We can best describe some of the work that we did in those first years by summarizing typical cases that we and our students worked on.

1. One major case involved a convict who had pleaded guilty, several years earlier, to a state charge of armed robbery and had been sentenced to forty to sixty years. He had unsuccessfully appealed the sentence on the ground that his plea had been induced by the judge's broken promise— relayed through his attorney—of leniency. Over a three-year period, assisted by successive waves of students, we took the case through the federal courts. Students interviewed the original lawyer, the district attorney, and the prisoner's co-defendants, often under difficult physical and emotional circumstances—for example, in a sleazy South Bronx barroom. Students participated in evaluating the veracity of the witnesses, and they checked facts in locations ranging from courtroom basements to decaying, crime-ridden areas of the city. They also prepared the two incarcerated witnesses for the three-day evidentiary hearing, developed questions for us to ask on direct examination, and suggested cross-examination strategies for state witnesses. The entire class attended the court sessions, and discussed each day's events after court closed. The convict prevailed, and the students worked on the appellate brief, sat as a moot court for a dry run of the instructor's argument in the Court of Appeals, and, after the client prevailed again, worked on the brief successfully opposing a writ of certiorari.

2. In another big case we represented the New York State Democratic Party, and six Democratic Presidential candidates (Muskie, McGovern, Jackson, Lindsay, Chisholm and McCarthy) in a suit to declare unconstitutional the New York practice of refusing to permit the names of presidential candidates—as opposed to convention delegates—to appear on the primary ballot. One student spent a semester putting the case together; she worked out the legal theory, interviewed numerous party officials, worked with a sociologist to design a survey of voter confusion in the 1968 election, arranged for the survey to be taken and analyzed the results, compiled a large number of expert affidavits, drafted pleadings and wrote a brief in support of a motion for summary judgment. In the next semester, the case was argued—and lost—in the Southern District of New York and in the Second Circuit.

3. In 1971, Immigration Service Agents seeking illegal aliens conducted a series of raids on Chinese restaurants in New York's Chinatown district. Agents would enter a restaurant during business hours, flash identification cards, and demand that kitchen personnel prove citizenship or lawful presence in the United States. The raids netted a few aliens but they also disrupted business, and outraged Chinese-American workers. Complaints failed to end the practice. At the request of counsel for a trade association composed of restaurateurs we entered the dispute. In the course of preparing suit to challenge the Immigration Service's
conduct and the rules governing the searches, two students and an instructor negotiated a settlement with the government. The Service agreed to end dragnet searches and to proceed only in the cases where it had probable cause to believe that an illegal alien was on the premises. The agreement was translated into Chinese and widely distributed in the community.

4. With the New York Civil Liberties Union, we represented several persons in a suit to force the Town of Rye to open its "public" beach to all persons, not just Rye residents. Students spent one entire semester studying the geography, history and legal structure of every beach in Westchester, in order to decide on the most appropriate target for a test case; after settling on Rye, they did a thorough historical study of that beach, including searching its title back to the middle of the 17th century, and they wrote an impressive factual report on the beach. The next semester, students wrote a thorough draft of a legal brief. The following semester, students drafted pleadings and we filed the case; the defendant requested a long series of extensions of time in which to answer, and changed lawyers several times, which ran out the clock. The fourth semester, students observed but did not directly participate in depositions of our clients; they then prepared interrogatories.

Despite the fact that these cases were interesting—and that the students enjoyed working on them—we decided to scrap this mode of teaching. However excellent the learning opportunities were for most of the students, every semester our method failed to provide adequate case material for a few. Each time we ran the course, two or three students had cases that simply did not work. Sometimes the adversary put off forever his response to our papers. Sometimes he settled the cases two weeks into the semester. Sometimes the student spent months of frustrating effort trying to track down a single crucial fact. Occasionally we would discover after research that our client was wrong about the facts or did not have a case from a legal standpoint. Sometimes we depended on an outside organization for a client and the organization never delivered.¹⁴

In such cases, we tried, of course, to give the student another project. But balancing projects and students proved to be much more difficult than it would seem at first, for two reasons. We could never be sure when a case really had fallen through.¹⁵ And second, if we were to take on additional cases on the erroneous assumption that the initial set had fallen through, we could not possibly handle the extra load, and we would default on our own obligations to clients. Big cases, unlike small ones, have to be dock-

¹⁴. For instance, the New York City Department of Consumer Affairs asked us to test the constitutionality of the "artisan's lien" law, and told us that many people had complained to the Department of abuses. Although they constantly promised to refer an appropriate litigant, all of their cases turned out to be stale.

¹⁵. The adversary always seemed on the verge of responding; surely he wouldn't switch lawyers a fourth time (but he did). The organizational plaintiff/client was just about to deliver an individual co-plaintiff; surely it wouldn't default on its pledge again (but it did).
eted fairly precisely; an extra three or four cases cannot be slipped in without suffering severe caseload consequences. As a result, a few students spent much of the semester waiting for some external event to occur.

We tried to solve the problem of the aborted case by pairing students: each pair of two students was assigned to two cases, with the hope that both cases would not fall through at once. This partly solved one problem, but created a second: occasionally, both cases would "take off" at once and create more work than the pair could handle. Because the cases were so complex, it was not easy and sometimes not possible to add a third student to the team.

The second problem with the format was that even where individuals had a very good experience, that experience typically consisted of learning about only one or two things very intensively. Few if any students could see a case through from start to finish in a single semester. We minded this aspect of the course least when the student in question was just starting a case: the planning process—including interviewing, strategic analysis, choice of court, choice of parties, manipulation of theory, selection of remedy, and drafting—is so rich, that it did not matter very much if the student participated in nothing else. The real problem came where students inherited cases already begun. In such instances, a student might observe a deposition, or draft or answer some interrogatories; he might observe a negotiation; he might help draft motion papers including a brief; he might help draft an appellate brief. But because the legal process is so slow, he would be lucky to do two of these things, and it would be very unusual for him to do more than two. To the extent (and, as we have said, it is a very large extent) that clinical teaching aims at exposing students to the immense richness and complexity of lawyering, limiting them to one or two aspects of the process was troubling, no matter how well we felt they were taught about those aspects.

Third, we were increasingly concerned by the passive roles in which students were sometimes cast. In the early stages of a case, students were able to do themselves most of the things that we did: drafting all litigation documents, planning strategy, and interviewing clients. But they did not have the ultimate responsibility for the cases—indeed, with major actions such as constitutional test cases, they were not equipped to handle the responsibility—and that fact reduced the degree to which they could really experience the lawyer's role and their personal responses to it. In the later stages of cases, after adversaries became involved, the students were sometimes frozen out. Local federal court rules did not permit them, at that time, to take depositions or argue motions. We did not trust their skill or judgment enough to permit them to negotiate settlements in big cases, and our adversaries sometimes objected to students observing negotiations.
(fearing perhaps, that we would posture for the benefit of the students and thus reduce settlement possibilities).

At all times, the seminar had a classroom component, designed to remedy the twin problems of narrow case focus and limited student responsibility. We met for two hours a week—this became three hours a week after a year or two—to share experiences; the students who learned intensively about what was really happening in a deposition could participate in other students’ consideration of strategic planning and vice versa. The classes, generally speaking, matched a case and a part of a process: using various “live” cases from that semester’s experience, we tried to cover, each semester, as many stages of litigation as possible. Each week’s class had an assignment, usually involving a written exercise that had to be handed in before class, and each week, the central question discussed was: What would you do in this case at this time, and why, and what options are you rejecting, and why? Typical assignments required students to draft pleadings, answer strategic questions (taking into account ethical considerations), draft deposition questions, or explain what they would do at a difficult juncture in an interview with a client or witness.

In the classes themselves, students would discuss their responses, and report their thinking. If the assignment involved drafting, we might distribute one student’s draft for revision by the group. In some classes, a student would conduct the session by narrating the entire story of his case, stopping frequently to ask the group what it would do at each choice point.

These classes were often very satisfying—we usually felt, for example, that they were better, on the whole, than the classes in our lecture courses. Several times a year, we left the class with a sense of exhilaration, a feeling that the students had looked at a problem from an altogether new perspective. And yet, the classes could not remedy the deficiencies in the “big case” format of the course. For one thing, since the students were working on a wide variety of cases, involving many different fields of law, they found it difficult to become more than superficially involved with each other’s problems. Second, the class sessions were essentially passive: students were being asked only to say what they would do, not to do it; and their writing was really academic—it was prepared for a class, not for filing in a court or agency. They could not be sure that under the real stresses of practice they would make the same decisions. But there was one more problem, which, when added to others, eventually made it plain that we could not maintain the original format: the design of the seminar exhausted our energies.

With a little common sense, we might have realized that the NAACP Legal Defense Fund experience could not be transferred to the law school. We should not have expected to be able simultaneously to handle a full
docket of complex cases (that is, an average of one case per student in the seminar, even if two students were paired on two cases), tutor the students on their individual cases, rewrite their work if they defaulted in the final crunch, plan sophisticated clinical classes, evaluate individual weekly assignments for class, teach a separate lecture course, and fulfill the other responsibilities (exams, committees, recommendations, correspondence, and writing) of a law teacher. And the nature of seminar classroom sessions—depending, as they did, on “live” issues in our cases—was such that we could not “cap” classes for re-use in later semesters as is possible in most courses: every week we had to spend a day preparing an entirely new seminar class keyed to the current events of our cases. We found ourselves nightly closing the law school building. In the summer, the only time in which to get a break from the pressure, the problem became worse because the litigation didn’t stop: the only thing that changed was that the students were gone.

III

By 1973, therefore, we were seeking institutional changes in the course. What emerged from this period was our first real understanding of the need to integrate a direct experience of the lawyering process with teaching methods that came to grips with the rush of problems that each case presented. Simulation entered our courses as a semi-conscious response to all of these problems.

The nature of the litigation on which students worked in 1973 did not change dramatically, but we began to add a series of classroom exercises designed primarily to plug the experiential gaps caused by the fact that few students experienced a “total case” in one semester. The idea was to give students a second (or, if students already had two cases, a third) set of clinical experiences as part of the course, in a way that would depend less on chance and yet would not merely involve research and discussion.

Somehow it seems more obvious now than it did then that simulation is the ideal complement to clinical experience. In simulation, the environment—particularly the time variable—could be controlled, and yet the student could to a large extent be made to experience that environment

16. At first we taught eighteen students each. Later, we cut this to fifteen, and then twelve.

17. The critical differences between the Legal Defense Fund and Columbia were these: (1) at the Fund, we had no teaching duties, (2) there we had at most one student assistant, and while we thought that student participation would make a larger caseload easier to carry, we discovered that it took more time, not less, to write a brief with student help (to edit patiently through five or six drafts instead of just batting out the job), and was more frustrating as well when students did not fully meet our expectations or standards, (3) there we had extensive back-up facilities, including other lawyers to help out in a pinch, cooperating attorneys all over the country who pre-screened cases, and a much larger budget for depositions and other litigation costs, and (4) there, we were satisfied to specialize, whereas when we took on the role of “professor”, we wanted to deal with the lawyering process as a whole.
from within rather than from on high. Of course, we knew from the start that simulation was not in fact the same thing as a "field experience." But it seemed to us (as it still does) that it could at least add valuable components to clinical teaching.

Over the course of a year, we designed a series of "mini-simulations." In general, these simulations were limited to one or two weeks in length, and the basic work—the experience—was designed to take place outside of the classroom, with class time used for comparisons of experiences and analysis. Sometimes the simulations would involve a single legal process, such as negotiating a settlement.* But other simulations more nearly approximated the complexity of the lawyer's task: the students would have to engage in several processes, such as interviewing and deposition practice, and decide the order in which to approach these tasks.

The "Bins case" was a relatively sophisticated mini-simulation. (The Appendix contains all of the materials for Bins, a four-person simulation.) Since each of our classes had twelve students, three sets of four (six, if both sections of the course were involved) could experience the simulation simultaneously (taking care not to communicate with members of the parallel sets) and compare notes in class.

The four students involved in each use of the simulation are, respectively, a defendant, a defense attorney, an arresting officer and an assistant district attorney. They receive different and partly contradictory versions of a set of facts. Some of them receive some information about who the other players are, but, reflecting reality, the defendant, for example, does not know who the assistant district attorney is, or even that one is involved. Some of the students are explicitly told their motivations, but even they are given a choice of objectives, as well as a choice of actions. For a week, meeting in empty rooms at school and in their homes, the students work: they must decide whether or not to speak to any other persons involved in the case, and if so, in what order; whether or not to attempt to negotiate a resolution, and if so, what resolution and through what methods. All students must submit a paper analyzing the nature of their contacts with other student/actors, and why each contact was or was not successful.

The Bins exercise is designed to achieve many of the objectives of clinical education. It contains a high degree of simultaneous uncertainty and conflict, as well as factual, ethical and strategic ambiguity. For example, the student playing defense counsel is told that more facts may be available from the client, and the client indeed does have facts that his lawyer lacks. But the client may actually tell his lawyer no more facts, or

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* E.g., students would be paired, with each half of a pair given a confidential set of clients' instructions. They would then be sent off to negotiate a settlement consistent with those instructions.
may tell his lawyer some of the additional facts, or may tell his lawyer all he knows; the lawyer, in turn, may obtain some of the facts and think that he has all, or may get all of them, and think that his client is still withholding information. Much depends on the degree of empathy the lawyer has for his client and on the relationship of trust that the lawyer and client build. (In the papers and in class, the students are asked to report on how they experienced other players during these contacts, and on how their feelings affected the flow of information and therefore the outcome of the legal proceedings.)

A number of ethical problems are built into the simulation. For one thing, the policeman has lied in his affidavit; whether or not he and the assistant district attorney admit this, and how, is an issue. The defense attorney must consider whether it's proper for him to speak to the officer without first obtaining the permission of the assistant district attorney. And the officer must consider whether it is proper for him to refuse to speak to the attorney. Also, the assistant district attorney's environment includes promotional and salary reviews in which conviction and dismissal rates are factors. The assistant district attorney must consider the extent to which this influences the type of bargain he seeks and makes, and whether his decision should be affected by this factor. He must also struggle with the propriety of negotiating a criminal disposition for a release of a civil damages claim.

We usually began classes on the Bins exercise by cataloguing in chart form on the blackboard the various outcomes that have occurred, in the current class and in previous years; this chart takes into account the numerous possible combinations of prosecutions, dismissals, "A.C.D.'s," and guilty pleas, with and without release of the officer from civil liability. Typically, among several groups simultaneously engaging in the simulation there will be several outcomes, and the class can explore why different groups, starting with the same set of facts and the same applicable law, arrived at different outcomes. The motivation to explore this subject is high, because each student was part of a group that reached one particular result, and wants to know how others could possibly have done something different.

After the students observe the spread of results, the discussion can be organized either by relationships (e.g., lawyer-client, lawyer-lawyer, lawyer-state, defense attorney-policeman) or by other factors (e.g., officer's name, strategy planning). A critical issue for the class is how the frustrations of the passive role affect the officer's behavior when he is called.

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19. One feature that we like about the exercise, along the same lines, is that the student who plays the arresting officer is not given the names of any of the other players; he can do nothing until someone contacts him. Law students are not used to forced passivity, and an important issue for the class is how the frustrations of the passive role affect the officer's behavior when he is called.


21. To take full advantage of this motivational fascination, the Bins instructions prohibit discussion of the case in the day between the end of the exercise and the discussion in class.
lawyer-police officer, etc.) or by processes (fact-gathering, planning, interviewing, counselling, negotiating). The issues usually considered in a class on the Bins exercise include what decisions students made, how they made them, and at what cost; what skills they marshalled, and how; and what feelings were generated by their actions.\(^{22}\)

The use of the mini-simulations, particularly in conjunction with videotape,\(^{23}\) marked a step forward but the new formula also presented some serious problems. One was time. The students were spending very large amounts of it on their “outside” litigation, working through a very demanding series of exercises, and writing papers about their experiences. The Columbia faculty increased the credit awarded for the seminar from three to four points, but even four credits did not adequately reflect the time students were spending.

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22. Among the particular questions we typically cover are these:
- How did students (particularly those who acted as defense counsel) decide whom to contact first, how to conduct interviews, and when to negotiate? How did they know when negotiation was premature? When it threatened to be too late? How did they decide that the return on continued fact-gathering had diminished to the point where it was no longer useful?
- How did students maintain a balance between negotiation as competition and negotiation as discovery? How did they negotiate without revealing too many facts that would harm them if negotiations failed?
- What are the successful techniques for gathering facts from a sophisticated, potentially hostile adversary?
- How did students decide ethical questions in the absence of clear commands in the Code of Professional Responsibility?
- How did students feel about maneuvering within a very uncertain environment; e.g., negotiating without knowing what a good outcome was, and arguing about disputed facts? Did feelings of uncertainty affect the outcome?
- Did students sense that they had the power to make choices that would affect the results? How did they feel about realizing that they had such power?
- What was the impact of any racial, sexual or age differences on the bargaining process?
- What interviewing techniques did students use, and how do they evaluate their success? Could they tell when persons whom they were interviewing or being interviewed by were withholding information? Did they feel trust in the communication with a party who supposedly had no adverse interest? How was trust built?
- How did lawyer and client deal with the issue of guilt? What impact, if any, did racial, sexual and age differences make on the interviewing process?
- How did the students deal with the fact that the same person sometimes tells different versions of the same story?
- How did the clients evaluate the lawyer's services? By results or by feelings? Was the lawyer made aware of the client's techniques of evaluation or of the evaluation itself?
- What was the relationship, if any, between successful interviewing and successful negotiation? Did any information gaps or trust blockages help or hinder the lawyer who was negotiating?
- What social pressures affected the result? If the officer agreed to speak to the defense attorney, why did he do so?

This partial list of questions suggests the richness of a class that follows a mini-simulation.

23. While designing and improving mini-simulations such as Bins, we undertook two other further steps to enrich the classroom side of our clinical work. After unsuccessfully searching for a text devoted to the overall advocacy process that was suitable as a text for a clinical course, we published Public Interest Advocacy: Materials for Clinical Legal Education (1974) and assigned chapters from it as background readings for simulation exercises that drew on particular processes and skills. Secondly, we began using videotape equipment to tape student performances in connection with simulated arguments, interviews, negotiations, depositions and other events, and analyzing the tapes in class.
Three other problems were more serious. First, we discovered that second- and third-year students played a variety of "legal" roles with ease, but that non-lawyer roles, including client and witness roles, were very difficult for many of them. To begin with, they had great difficulty empathizing with non-lawyers enough to see the world through their eyes; as clients they kept defining their problems in legal terms, sometimes even lapsing into the lawyer's technical vocabulary, and this unrealistically skewed the problem for the lawyers. In addition, we discovered a certain amount of hostility to playing clients' roles; students were willing, for the most part, to believe that playing lawyers' roles would help them learn about lawyering, but some of them resented being assigned to play clients while their fellow students had the more "valuable learning experience" (and higher status?) of being lawyers. Analysis of this resistance was a rare learning opportunity that we could not take full advantage of because of the time compression involved in a mini-simulation.

Second, mini-simulations almost inevitably suffered from incomplete facts. That was one of the things that made them "mini:" students were not required to master voluminous sheafs of documentary or background material (and we were not required to invent them). But for this we paid a price: situations would inevitably arise (e.g., during a lawyer-client interview) where someone would be asked to supply an answer to a question and no answer had been "canned." In such situations, the students were supposed to improvise, consistent with the other facts and with the personality they were portraying. But many students were not good at improvising, and the situation generated undue stress. Even where students improvised successfully, they did so in different ways, so that the simultaneous simulations, so carefully controlled to keep their facts and law constant, might end up with different facts, and hamper the study of the impact of personality and perception.

Finally, some students simply hated the role-playing. Compared to their simultaneous work on "real" cases, it seemed at first artificial and forced, even childish. Later, we discovered that some of the resistance to role-playing had deep psychological roots and that it often represented resistance to experiencing the tensions and conflicts of the lawyer's role. And we learned that over a long period of time, such as a semester, the resistance could be explored, grappled with, and used creatively, resulting in warmer feelings after a period of time. But to say that is not to deny that among some students the resistance is real and strongly felt, particularly in short simulations.

24. Our own view is that the opportunity to get into the role of client may be the more valuable learning situation in the long run, for it is a chance that the lawyer may never again have available to perceive what it is like to be on the other side of a professional relationship. Cf. D. Rosenthal, Lawyer and Client: Who's in Charge? (1974).

25. Later, we discovered that some of the resistance to role-playing had deep psychological roots and that it often represented resistance to experiencing the tensions and conflicts of the lawyer's role. And we learned that over a long period of time, such as a semester, the resistance could be explored, grappled with, and used creatively, resulting in warmer feelings after a period of time. But to say that is not to deny that among some students the resistance is real and strongly felt, particularly in short simulations.
These problems led to yet another format. Instead of abandoning simulation as a supplement to litigation, we decided to go all the way with it—to try to solve the problems inherent in mini-simulation by taking the device to its full potential. Beginning late in 1973, we designed what could be called a "maxi-simulation"—a full-scale, semester-long, simulated dispute that would immerse students fully in legal roles, but that would enable us to move the dispute through many stages much more quickly than we could in the real world.

In the simulation, twenty four students are divided into two law firms—one a corporate firm, and the other a foundation-supported "public interest" firm. The dispute—the "Myers case,"—involves a bank's refusal to employ an ex-convict. At the beginning of the course, each group of lawyers receives information about its firm, its resources, and its origins, some empirical background information about employment discrimination against ex-offenders, and sets of local rules applicable to several court systems (which supplement rather than replace federal and state rules). They meet their client at the beginning of the next class. Before that class, students must meet to decide (or fail to decide) how they will organize (at least initially) in order efficiently to interview the client and to perform the other tasks of the firm. The instructions suggest, but do not require, that the firm break itself down into four-member work groups to do the various lawyering jobs, and that the work groups devise a method for communicating within the firm.

The students must get all their information about the problem as lawyers would: from their clients, from their outside investigations, through negotiation with adverse parties or their representatives, or through discovery in the context of a lawsuit. The instructors act as the clients, and teach about two-thirds of the course (generally speaking, the first two-thirds) from this perspective. It is Montessori-method law school: we provide the students with a very carefully constructed environment, within which they are free to move in many different ways. At the same time, our teaching (even in the last part of the course where we become instructors rather than clients) is very non-directive. As the weeks go by, the students investigate the ambiguities in their clients' stories; experience

26. With the aid of a grant from CLEPR, we later improved the design of the simulation and wrote up both the aims of our project and the details of how to replicate it. M. MELTSNER & P. SCHRAG, TOWARD SIMULATION IN LEGAL EDUCATION (experimental ed. 1975). The book includes a survey of simulation in legal education. Id. at 9-20. On the theory and uses of simulation in education see generally C. ABT, SERIOUS GAMES (1970); J. RASER, SIMULATION AND SOCIETY (1969).

27. Actually, we begin this course with two "ice breaking" interviewing exercises, so the simulation starts at the end of the second week.
normal tensions in their relationships with their clients, peer groups, and 
adversaries; collect evidence; and research the law. Early in the semes-
ter, they must decide whether to litigate or whether to attempt a non-
litigated settlement. If they elect to litigate, they must select a forum, 
decide on parties, claims, theories, counterclaims, remedies, and timing, 
and apportion litigation tasks efficiently among themselves. Whether or not 
they litigate, they will confront numerous strategic and ethical problems 
without the luxury of full information. Hence, decisions will have to be 
made on the basis of probabilities. If the students litigate, the instructions 
will require them to undertake certain minimum tasks: a deposition, a 
motion, and a negotiation. However, the rules permit the students to 
engage in many other tasks, and like practicing lawyers, the students tend 
to do much more than the minimum required of them: they want to win.29 

In the simulation, the students are genuinely free to make decisions. 
The outcome of the case depends largely on how the students relate to 
their clients, what facts they discover and choose to make part of their 
case, what strategies they adopt, what legal theories they select, and how 
they present the case to each other and/or to a court. The students are free 
to make mistakes without having an instructor bail them out; either a 
colleague, an adversary, or a court will eventually set them straight (and if 
their client or cause is set back as a result, the learning, we think, will be 
that much more effective). If not, the instructor will bring up the issue at 
the very end of the course.

This freedom applies as well to ethical issues; students must make 
choices about the propriety of their actions in the context of a real desire to 
serve their clients (or to disserve them, if that is the nature of their 
relationship). In this milieu students make decisions that they could not 
have predicted that they would make, considering the issue only as an 
abstract intellectual question. Here is an example.

In his role as an officer of a defendant bank, Schrag was served with a 
set of interrogatories that included that question, "How does the bank 
decide whether or not it will hire a job applicant?" This interrogatory was 
very material to the litigation, but it was poorly worded. Both the lawyers 
and the client knew that the plaintiff wanted to ask about the criteria for 
selecting applicants, but the interrogatory could be read in other ways. The

28. The case involves dozens of documents, hundreds of facts (some of them disputed) 
and at last count we identified at least 98 discrete legal issues, about half of them involving 
jurisdiction or procedure.

29. For example, in the fall of 1974, although students were not required to undertake 
any more discovery than one deposition per side, they in fact served 53 discovery documents 
on each other within three weeks, orally argued three discovery motions before judges 
(volunteer faculty members), negotiated (and perhaps breached) discovery agreements, and 
finally mutually agreed on an arbitrator (an associate-in-law of their choosing, who had had no 
contact with us) to examine documents in camera to determine whether or not they were 
privileged under one of their agreements.
dialogue between the client and one of his lawyers went as follows (the student knew that, as usual, he was being recorded):

Lawyer: What is your answer to this question?
Client: Well, we'll hire him if he's qualified under our regular guidelines, unless he's an ex-convict.
Lawyer: That's very damaging. Isn't there some other way you could answer the question?
Client: Well, I'm afraid that's the truth.
Lawyer: Look. This question asks how your bank decides. That could mean the process of decision rather than the criteria. So you could say that your assistant decides, subject to your ultimate approval.
Client: OK. That's true, too.
Lawyer: No, I don't want to put words in your mouth. We have to answer this question with your answers, not mine. How would you answer the question?
Client: My assistant decides, subject to my ultimate approval.
Lawyer: Well, if those are your words, we'll put that down.

His firm did answer the interrogatory in that way, and the adversary firm was bitter about the evasion. In fact, the adversary took some retaliatory action. Later, students discussed the interrogatory in a review class and the student who proposed the answer to the interrogatory justified his response by saying that the client had answered the question in that way. At that point the instructor was able to press a button on a tape recorder and replay the dialogue for the whole class. The student was astonished: he had no recollection of putting the client up to the evasion, and the class recognized that in the heat of legal battle, we tend not even to notice some of the ethically questionable tactics we use.

If this issue had been discussed in a regular lecture class, the student in question probably would have said that of course he would not encourage a client to answer evasively. But by putting a student in the situation, and giving him an opportunity to make a moral decision—in the context of a duty to a client whom he really cares about—the simulation neatly demonstrated that an attorney can act at odds with his expressed conception of proper behavior. Furthermore, students were able to analyze the issue in the context of their real desire to win the case, an element often missing from discussions of ethics in the abstract.

Much of the learning in the simulation takes place outside of the classroom, in small group meetings to plan strategy, or write a firm's documents, or negotiate an agreement. Another substantial segment of the learning takes place in meetings between students and their clients, or in tutorial meetings between individual students and their instructors. But

30. As "instructors," the teachers will not provide facts that have not become part of the
the third major segment does involve classroom sessions of three types. Some classroom sessions are used for the major events of the case itself—e.g., the initial client interview (follow-up meetings with clients take place outside of class), depositions, and argument of non-discovery motions. Generally speaking, if class time is used for an event within the simulation, students use the second half of the three hour period to discuss analytically the event in which they have just participated. If the firms were together for the event, as they would be for a deposition, they separate for the discussion. In the second type of class, students discuss analytically an event that has taken place entirely outside of the classroom (e.g., a negotiation) and which is partially brought into the classroom through student reports (possibly several inconsistent observations) or audio- or video-tape. Finally, some of the classes, particularly at the end of the course, are devoted to a summing-up. For example, students might discuss the dynamics of leadership within the firm, and attempt to discover why some students sought, accepted, avoided, or failed to obtain leadership roles. Or they might discuss the issue of trust between them and their client, or the covert intergroup and the interpersonal processes at work in the simulation universe. Students write every week in the course, but for these particular classes, they do the most difficult writing that is required of them: introspective papers that explore their own feelings about their first lawyering experience. Very strong feelings—pleasure, anger, fear, pride, embarrassment, desire for revenge, anxiety about competence and others—are generated by participation in the simulation. These papers and classroom sessions give students the opportunity to explore those feelings and to share them with fellow students.

Throughout the simulation, intensive use is made of the tape recorder and the videotape recorder. Meetings between lawyer and client are taped, as is every discovery event, every court appearance, and many of the negotiations. The instructors cull from the dozens of hours of recordings short segments for class use. Students are persuaded—not an easy task—that much of the value in the course derives from self-criticism and peer criticism of performances that are broadcast to the class, and after the first few weeks, a lively analysis of performance becomes an integral part of the course routine. (The instructors make an effort to expose the performance of every student to classroom analysis at least once in the semester.)

A major advantage of simulation is that it can be used to expose students to the complex intergroup and interpersonal dynamics of lawyer-
ing. In an article of this kind we can offer only a taste of this side of teaching the simulation. As we refined this phase of the simulation we began to ask students, in effect, what is going on between these people or in this group and how does it affect the work at hand? How is authority vested and responsibility assumed in these encounters? What covert messages are being communicated, and by what means? The aims of such inquiry are to clarify and explore both the definitions which students give the roles they adopt, and the distance they maintain from typical role behavior, to enrich their consciousness of how and what people communicate, and to give the instructors an opportunity to reinforce role behavior which they want to perpetuate.

To encourage group members to consider their interaction with peers, clients, and adversaries, the instructors must create an atmosphere of psychological security. Students must be reminded both that they selected the seminar knowing that one of its important objectives was the examination of their feelings generated by professional activity and by interpersonal contact of various kinds, and that a rule of confidentiality applies to all seminar discussions. Much in the manner of a group dynamics trainer or consultant, the instructor by his own demeanor exhibits the non-defensive, inquiring posture toward group behavior that he believes will foster learning. For example, rather than offering psychological interpretations from on high, he reports his feelings (as his feelings, not as truth) openly and honestly. He encourages students to express openly their feelings about him. He provides feedback only after students signal that they want it. He is strongly supportive of the expression of feelings in others, but, when he comments on role performance by individuals, he must recognize that such interventions will often lead to defensiveness and hostility. This is an inevitable by-product of a process in which the participants are “able to inform each other how their behavior is being seen and interpreted and to describe the kinds of feelings generated.”

To make open discussion less threatening, we adopted as best we could a teaching approach that permitted the group to define for itself what was happening. We intervened only to facilitate group communication, to


32. Campbell & Durette, supra note 31, at 76.

33. A few words about team teaching seem appropriate here. Mechanically, the maximization requires the cooperative effort of two instructors, but we believe that the objectives of the course, and not only its game design, virtually compel the instructors to become a genuine “team.” Teaching this course is psychologically taxing for the instructor as well as the student, and two instructors can afford each other much needed support; furthermore, one’s team colleague can often provide valuable insight into one’s own behavior in relation to the student group. It goes without saying that to work effectively together, the instructor
remind the group of its task, or to point out occasions when the group acted, as if in collusion, to deny the importance of certain experiences. This approach is common in T- (training) groups of various sorts, but its use in the context of law school simulation is both unusual and risky. Participants in group dynamics work conventionally select for themselves this mode of experience; law students, in contrast, may feel it is something they have to put up with to obtain professional skills. T-groups usually focus on the "here and now"—excluding from consideration the status or outside relationships of the members. But members of the seminar are peers within the same institution. They have prior, and will have future, relations with each other and with the instructors which may affect both their lawyering in the simulation, and their willingness to discuss this behavior within the group.  

The net effect is to make communication more difficult than in the usual group dynamics setting and to exaggerate the already high level of anxiety students feel in their first experience acting as lawyers. On the other side of the ledger, the application of group dynamics to learning professional skills is directly demonstrable in the simulation, while in much group dynamics work the relationship between the group experience and group (whether two, as in the Myers case, or more) must demonstrate a high degree of collegiality—courtesy, respect, and sharing—but collective responsibility for clinical teaching requires more than civility and sensitivity to others. Because the teaching team is experienced by students as a single entity—i.e., management—lack of coordination in the teaching team is "understood" as a role and task confusion promoted by authority and is likely to make work more difficult. In short, the instructors must pay attention to the structure and dynamics present within their own instruction group and the environment in which it works—factors such as status, competition, authority and responsibility. We found a need to review, on virtually a daily basis, the ways in which our work was being influenced by (1) how clinical teaching in general and our program in particular was perceived by students, faculty and the world outside the school, (2) our other roles—as teachers, scholars, lawyers in the community, members of the law school hierarchy, (3) our different experiences, styles, tastes, and personalities, and (4) our evolving relationship with each other, including particularly the occasional feelings of anxiety or competition that we experienced toward one another. Of course, our continuous analysis of our own feelings and behavior is enormously time-consuming—it often involves ten or twenty conversations a day—but we believe that it has enhanced our ability to teach as no other form of preparation could have. The most important step we took to enable us to communicate with each other was to attend group relations conferences sponsored by the regional affiliates of the A.K. Rice Institute, which employ what is known as the Tavistock method. See A.K. RICE, LEARNING FOR LEADERSHIP (1965). Instructors with a small budget available to them might also consider entering into a consulting relationship with a group relations trainer. Organizations capable of providing such consultation include the Institute for Applied Study of Social Systems (New York), the Center for Education in Groups and Organizations (New Haven); the Study Center for Organizational Leadership and Authority (Los Angeles); North Central Group Relations Center (Minneapolis); GREX (San Francisco); the Washington-Baltimore Center of the A.K. Rice Institute (Washington, D.C.); the Texas Center of the A.K. Rice Institute (Houston); Williamstown Psychological Consultants (Williamstown, Mass.); University Associates (La Jolla, Calif.); and the National Training Laboratories (Washington, D.C.).
the members’ work is difficult to concretize. The simulation also involves small groups in a cooperative venture; students are less likely to feel isolated than in many other classes. Also, if we failed to communicate to students that distorted perceptions of themselves or others, unrealistic role expectations, and other irrational forces could be critical to their performance as lawyers, students would have to confront the hard truth later on—when they are, perhaps, less susceptible to change, more vulnerable to criticism, and without available guidance.35

Some illustrations of processes typically examined in this phase of the simulation may be helpful. The students, as lawyers in the simulation, frequently feel, for example, a need to appear more knowledgeable than they are or believe they are. The practitioner, students have learned, is expected to bring to the lawyer-client relationship skills that will assist the “ignorant” layman. When a question or a challenge arises, students (and all too many practitioners) may believe they must maintain the front of the expert professional. The student perceives his role as involving the maintenance of distance from the client, merely “solving” problems—rather than helping clients see problems differently.36 The simulation provides a forum in which to experience and to learn about the consequences of this need to seem knowledgeable or powerful when knowledge and power are not felt (or are felt to be illegitimate). For example, for a couple of weeks after interviewing their client Joseph Myers, his lawyers often ignore him. His “problem” has become theirs to solve and they overlook opportunities where his experience and perspective may assist them. Myers may grow anxious because of his attorneys’ indifference, particularly if they are condescending when he questions them. Similarly, if there are divisions within the firm representing him (e.g., over a negotiating stance), the lawyers often fail to realize that Myers might resolve their policy conflict; their perceived need to maintain professional distance robs them of useful data.

One of the greatest virtues of a semester-long simulation is the freedom given to students to expose the problems of managing stresses that inevitably arise in a legal system fraught with uncertainty. Lawyers continually must act in an unpredictable environment. Students litigating in the

35. While we have borrowed freely from several systems of human relations, inter-group and inter-personal relations training, our classes are neither therapy sessions nor T-groups. Our approach is eclectic, its overriding objective is to permit students to become aware of how interpersonal and intergroup relationships affect the lawyering process, often in a covert manner, and to enable them to experience, in a professional setting, some techniques for analyzing these factors. Students are forwarned that they will have opportunities to learn about how feelings affect their professional behavior but that therapy is not on the agenda.

36. The point is not that the professional is merely dominant within the relationship. Rather, it is that from the professional’s point of view the client is seen and responded to more like an object than a human being, and more like a child than an adult.

simulation are not exceptions. They have little confidence that they know the full factual or legal story and are forced to rely on the word of clients and witnesses—notwithstanding incomplete corroboration or proof of reliability. By taking responsibility for the fate of a client’s legal claims where the facts are but partially known and the law muddled, they are extremely vulnerable. Active litigators continually face loss of self-esteem and feelings of incompetence, but personal capacity to risk these losses may very well be the mark of superior lawyering.

Another behavior that the simulation allows students to examine is aggression. Initially many students express an almost academic neutrality toward their client’s problem; others find themselves unsympathetic to their client—the bank seems socially regressive and Joseph Myers, the ex-offender, a dubious character. But once they, as lawyers, enter into adversary relationships such attitudes are partially suppressed: conflict between the two sides typically separates them into warring camps; efforts to negotiate may break down; ethical precepts are commonly forgotten. Lawyers identify, or over-identify, with their client’s perspective. Strong feelings constantly surface which cloud judgment and spill over into personal relationships between the advocates. Similar processes are observed in the relations among the law firm members and in their dealings with their clients, in competition for control of the firm’s decision-making process, in gripes concerning who is working too much or too little, and in jealousy over leadership roles. These issues almost always produce tension and often generate hostility that breaks out into the open.

Whether or not the Myers simulation achieved the many lofty goals we set for it is difficult to evaluate. But it is plain that Myers does remedy three problems with the mini-simulations. By playing them ourselves, we eliminated the adverse consequences (along with the advantages) of trying to get law students convincingly to take on the clients’ roles. By creating

37. As in real life, professional conflict may affect pre-existing social relationships, and we have observed student friendships (both within the same law firm and between students in opposing firms) collapse temporarily under the stresses which the students, as lawyers, experience. But in each of the instances that we have observed, those friendships became much stronger at the end of the semester when the students involved understood more about the ways in which role behavior contributed to the pressures on their relationships. The same phenomena, of course, affect student-instructor relationships.

38. As we wrote in Toward Simulation in Legal Education, supra note 26, at 41:

The simulation also offers an opportunity to confront the frequency and utility of lawyers’ combative instincts. In one of our experiences with Myers case, for example, we observed seemingly unreconcilable conflict over whether documentary evidence was properly available to the plaintiffs at the deposition and through interrogatories. Both sides signaled that they would fight to the bitter end until one student dramatically pointed out the stakes of such conduct—extra brief writing, long waits cooling heels before a judge would see them, oral argument, vacation work. Negotiation considerably narrowed the scope of the dispute and the work required of the lawyers. Concerns approximating those encountered by practitioners caused a decision to engage in conciliatory conduct.

39. Whatever our worth as teachers, we believe that we do a reasonably good job as actors; one of us has studied acting professionally, and we both take our acting in the
a total environment—a bank with 200 employees, an ex-offender organization called the New Leaf Society, an extensive file of documents (printed on various seemingly actual letterheads), background histories on the major characters from date of birth onward, elaborate court rules, and even a videotaped newscast that may become evidence—we have largely avoided the problem of incomplete facts. And by lengthening the simulation to a full semester, we have solved the problem of the uninvolved student. By the end of the sixth week of working on the same case, every student believes in its reality; some, in fact, find it too real for comfort.

Needless to say, the new format also generated its own pedagogical problems. A very serious—and unsolved—one is that confusion is generated when instructor and client are the same person. The only feasible alternative would be to employ professional actors or acting students—a device used in some educational simulations at other institutions. But there were considerable advantages to playing the clients ourselves: we saved a substantial amount of money, we knew everything that happened at all lawyer-client meetings, and we could create new interstitial facts on the spot, if necessary, without worrying that they would be inconsistent or would make the situation too simple, too complex, or too amorphous.

Among the costs of acting as clients was the enormous burden on our time. Whether or not we served as clients, we had to accept the unusual commitments of this form of teaching: reviewing hours of tape and editing it for classroom use; meeting with individual students regularly for tutorial sessions; discussing among ourselves our relationship with each other, our students, and our institution; keeping track of the many simultaneous student activities; creating weekly assignments; and reviewing student group work done for assignments and for student-generated litigation. By acting as clients as well, we also committed ourselves to be available for supplemental interviews and counseling. During the negotiation exercise at the end of the course, this commitment is especially great; for that exercise only, each student works on his own to negotiate a settlement with one student on the other side. Therefore, each of the students must meet one, or, more likely, several, times with his client to discuss the proposed terms. During one ten-day period in 1974, the two of us logged 64 personal lawyer-client interviews, each of which had to be committed to written notes immediately afterwards, and many of which resulted in tapes which had to be reviewed and edited for class.

A second burden was psychological: role-playing was as emotionally intense an experience for us as it was for our students, particularly when simulation very seriously—we rehearse, we analyze our roles together, we develop script when necessary, and when in role we never, never make a joke or parody about the dramatization. The touchstone of our presentation is to behave consistent with the roles we have adopted. Cf. U. HAGEN, RESPECT FOR ACTING (1973).
the roles played involved conflict with our lawyers. For parts of a semester, our students may dislike us intensely, viewing their clients as narrow-minded, stubborn or greedy. Study of these feelings can be educationally rewarding (although it can be difficult for students to tell their teachers about their hostility toward them), but it is not fun to be disliked, even as an actor in a role.

There are other difficulties with large-scale simulation. Because it has many overlapping objectives, from which different students will get different things, it is also very difficult to reach an appropriate balance of emphases. For example, some students may have very little interest in exploring the interpersonal aspects of the simulation but want the opportunity to examine strategic decision-making in a highly complex environment. For such students, a very complicated set of facts would be appropriate. Conversely, for students who wish to emphasize the psychological aspects of the course, a simpler legal problem would be better to reduce the time and energy of researching intricate legal issues or discovering obscure facts. Our present simulation tends toward complexity, but it is far from plain that we have struck the balance in the correct place. 40

The large-scale simulation also poses the difficult problem of when to provide feedback. In a one-week simulated event, it was easy to infuse all of the formal analysis after the activity itself had run its course. But when the simulation is semester-long, there are high costs to adopting the strategy of non-interference. First, who can remember after fourteen weeks what happened so long ago? Even with videotape as a device for refreshing recollection, it is difficult to recreate attitudes and feelings, so that the analysis may lack the vitality of immediacy. Second, students may become extremely anxious when feedback is withheld for so long. At the present time, we have a two-week introduction to the simulation, involving short exercises and substantial feedback from instructors and fellow-students. Then the simulation begins, and for the first several weeks, the instructors serve only as clients, providing no feedback as teachers (this helps the students to believe in their reality as clients). However, we tape and preserve everything, and take notes on all lawyer-client encounters, as well as everything else that we find out about. 41 Right in the middle of this period, we have a one-week break, during which the students do an

40 For a more thorough discussion of this issue, see our teacher's manual, TOWARD SIMULATION IN LEGAL EDUCATION, supra note 26, at 66-85. In one sense, complexity enhances the study of psychological factors. A very difficult case compels the emergence of leadership and the delegation of tasks for effective representation; this in turn catalyzes the interpersonal conflicts that are more easily avoided when each student relies on individual effort.

41 The simulation generates an enormous volume of records. In a typical semester our file of student writings and our notes of our observations comprises several hundred pages, and in one two-month period of the simulation we found that the 24 students had xeroxed, and exchanged among themselves, thirteen thousand pages of memoranda and legal documentation.
exercise related to a simulation skill (test-case planning), but not to the
simulation; for that class, the instructors behave like instructors and pro-
vide plenty of feedback (it is most directive class of the term). Then, about
half-way through the simulation, increasingly larger parts of the classes are
turned over to analysis. The final three classes are exclusively analytical.
This schedule worked out reasonably well the last time we tried it, but
some other adjustment of the tension between freedom and feedback may
still be preferable.

Full-scale simulation, as described here, is plainly a novel form of legal
education. Like clinical education itself, it should have a rather thorough
evaluation, but we have not found satisfactory ways to approach this. It
would probably be necessary to follow a number of graduates for several
years after they left the law school with questionnaires designed to illum-
nate the impact of certain facets of their education on what they were
currently doing, and how they were doing it. Such a survey would be
expensive to administer, and meaningful results could not be obtained—if
at all—for years.

Meanwhile, on a more modest level, we have sought a student evalua-
tion of our method by devoting the final three-hour class of each semester
to a discussion of simulation (in relation to other teaching techniques) as a
pedagogical method, and by requiring each student to write an evaluative
paper and to complete an anonymous questionnaire. Several aspects of the
latest questionnaire results are striking. Twenty-one out of twenty four
students claimed that the course had influenced their short-term career
goals; fourteen said their long-range goals were also altered by it. Also, the
students perceived that, while they learned no more legal doctrine than
they did in other courses, the simulation had been markedly more effective
than standard law classes in teaching about ethics, decision-making, group
dynamics and other crucial aspects of actual lawyering.

On the whole, we believe that, despite some bugs, simulation should
and will be a regular, but not exclusive, basis for our clinical teaching. But
putting aside the fact that the Myers simulation—and we suspect any really
good simulation related to an adversary process—depends on a highly
interdependent team teaching relationship that is not easy to create or
sustain, we would be reluctant to offer the simulation every semester.
First, it is a draining experience, very tough to take in two consecutive

42. If an instructor must change roles from client to teacher during a two-part class he
physically leaves the room, makes a slight change of costume to symbolize the alteration of
role, and re-enters the class.
43. One related problem that may be insoluble is that simulation raises so many issues to
talk about that it is hard to call any sort of halt to the analysis. One of our "analytical" classes
ran eight hours: the scheduled three-hour session ran an hour overtime, and then every one of
the students returned to the law school for four hours the following Saturday morning for a
voluntary continuation of the analysis.
44. Cf. Bellow, supra note 5, at 374-75.
semesters. Also, to use one case again and again would be dull for the
instructors, who would turn stale. And, despite our efforts to keep them
confidential, too much knowledge of the facts becomes dispersed in the
student body. Ideally, a new simulation should be created every two or
three years (perhaps using a new process, such as legislation), but the
process is extraordinarily time-consuming.45

Also, we have believed from the outset that simulation alone was not
an adequate substitute for clinical field work, and our experience with the
Myers case confirmed our view. Students are highly skeptical that role play
reflects reality, that the models of conduct extrapolated from role play are
valid outside of a law school or that the simulations created by the instruc-
tors abstract the appropriate elements from reality. They may be right—
there is no way that students or instructors can evaluate the concepts that
evolve from simulation unless simulation and theory are constantly tested
against experience. Thus, actual lawyering must be the counterpart of
simulated lawyering. In addition, the need to attend to, and to think hard
about, both simulation and traditional classroom courses is founded upon
the probability that the information or skills offered by the course will
eventually prove useful. To the student practitioner in a clinic, legal train-
ing is immediately useful. He must learn or he will be embarrassed before
real clients, lawyers and judges.46 So, for all its intriguing uses and bright
future, for all we had learned from it, simulation alone could not be the
mainstay of our clinical teaching.

V

Both of the clinical techniques we had used (the “major case” model
and simulation) deviated substantially from the mainstream of clinical legal
education as it has developed over the last seven years in the United
States. The great majority of clinical programs (74.3% out of 346) involve
either a school-operated and -supervised law office (the “in-house clinical
program”) or placements in a legal institution like a legal aid office, law
firm or prosecutor’s office.47

When Meltsner took a research leave in the spring of 1975, Schrag
decided to experiment with a more conventional form of clinical education.
The purpose of this venture was not to develop yet another form of clinical
teaching, but to apply the teaching techniques that we had developed in the

45. Indeed, if intensive simulation is to have a future in legal education, funds will have
to be found to teach would-be simulators and support them (e.g., by reducing course load or
providing summer stipends) during the design period.
46. Student practice also makes the abstract concrete and for many students “turns them
back into the academic exercise in a very, very, effective way.” Abraham S. Goldstein,
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simulation to a field work setting. Field work, we thought, might be superior to simulation in that students would not have to accept on faith the correspondence between their experience as students and their later professional lives. But even if clinical field work had no advantages over simulation, it was realistic to postulate that the field setting would remain, at least for a decade, the much more popular environment for clinical teaching in the country as a whole. It seemed valuable to see whether the classroom component of field work clinics could be enriched by the type of teaching that, as in the Myers simulation, encouraged students to share with each other the agony and joy of responsibility and decision-making in a professional context.

Schrag's experimental offering, the Advanced Clinical Seminar in Civil Legal Representation, was only open to six students, all of whom had taken a prior clinical offering. In addition to a daily class, it required students to spend about two-thirds of their time working on the representation of clients, and to write two seminar papers. For the work, the students received eight credits. The Uptown (Harlem) Office of the Legal Aid Society of New York provided a room for the student to work in, a library conference table for classes, a routine source of intake, and the ability to absorb pending cases at the end of the semester.48

Before the semester began, Schrag imagined that Legal Aid would require him to act as the attorney on the cases, making the final decisions (after consultation with the students), signing papers, and appearing for what oral advocacy would be necessary. He imagined a relationship to the students somewhat analogous to that of senior partner.

But on the very first day he decided that another sort of relationship, offering far greater opportunity for learning, was possible. Legal Aid was authorized to conduct student practice programs, and, indeed, students from other law schools in the New York area were practicing law in that office with very little supervision. Tentatively at first, but then with mounting confidence and enthusiasm, Schrag turned the seminar into a semester of closely supervised student practice.49 Schrag told the students at the

48. The experimental course was made possible only through the cooperation and steady encouragement of Jeffrey E. Glen, who directs Legal Aid's Harlem office. Mr. Glen fully appreciated the pedagogical objectives of the seminar, so that it was integrated into his office as a working unit which, nevertheless, maintained its separate identity.

49. A word about student practice: Ever since 1909, Colorado has permitted its law students to practice in its courts and agencies; over the years, other states have also encouraged supervised practice by some or all law students. See Council on Legal Education for Professional Responsibility, State Rules Permitting the Student Practice of Law (issued periodically) for a compilation of statutes and rules. Today, forty-four of the forty-eight states that have law schools authorize student practice. Id. at xi, 117. New York State's student practice rule permits third year students to practice law if they are "acting under the supervision of a legal aid organization whose existence, organization or incorporation is approved by the appellate division of the supreme court of the department to which the principal office of such organization is located, when such students... are acting under a program approved by that appellate division and specifying the extent to which such students may engage in [legal] activities ...." N.Y. Jud. L. §§ 478, 484 (McKinney
outset that, although he might argue with their decisions when he disagreed, they were handling the cases, and the decisions were theirs to make. Similarly, he attended the hearings in which they took part, but sat in the back of the room, observing and taking notes; they and the clients, adversaries and adjudicators had to know that it was the students who were on the line. He took no cases of his own, and actively conducted only one interview all semester. He maintained his work space, not at the law school, but in the seminar's room at the Legal Aid office, so students knew that he was there to be used to the extent that they wished. He could be asked specific legal, procedural or strategic questions (although often he did not know the answer, and said so). Students could—and did—come to him to discuss their relationships with their clients, with their adversaries, and with Schrag himself; they discussed planning and ethical issues arising in their work; they discussed the Legal Aid environment that they could observe on a daily basis. Some students spent virtually all their time in that room, taking advantage of five or six hours a day of tutorial contact. Others worked elsewhere and came to Schrag for comment only when they had reached a tentative decision or had drafted a paper.

The students in the Advanced Clinical Seminar handled approximately forty “cases,” about two-thirds of which eventually required some formal proceedings (either the exchange of formal legal papers, or an oral appearance, or both) and the rest of which were settled informally. Schrag had thought it would be educationally useful for the students to participate in a true sample of legal aid cases, but he eventually discovered overriding pedagogical reasons for a limited amount of specialization. Since Legal Aid generously permitted him to control both the quantity and nature of the seminar's intake, he was able to move toward partial specialization. The resulting case mix was: five public housing evictions, eight welfare hearings, plus a very broad scattering including credit card disputes, a school suspension case, a custody dispute, consumer contract or loan disputes, unemployment insurance claims, a disability hearing, landlord-tenant disputes, a conversion claim, and an occasional tort. 1968). Apparently the drafters of this provision were primarily concerned with the service aspects of student practice rather than its pedagogical value; the provision requires that the approved organization be a legal aid organization rather than a law school. Nevertheless, the rule is broadly drafted (if mechanically cumbersome), and it provides adequate authorization for court approval of student practice programs whose principal purposes are educational. For practical purposes, such programs must choose between operating under the auspices of an approved legal aid program or of establishing a school-operated limited-purposes legal aid organization.

Sometimes when a student and Schrag had an interesting disagreement one of them would bring the issue to the full seminar for discussion. On these occasions, the seminar might end its discussion with a straw poll, in which Schrag would participate along with the students, but the student who had the case was always at liberty to make his own decision in the end, subject to one qualification. If Schrag thought their action was so wrong as to constitute a clear disservice to their client, he would in fact overrule. This situation, however, never arose.
Students were usually able to see the cases through from beginning to end. They interviewed the clients initially, \(^{51}\) planned the action to be taken, performed all necessary investigation, drafted appropriate papers, made all decisions, maintained the client relationships, negotiated settlements, took depositions, and appeared before courts and administrative agencies. \(^{52}\) At the end of the course, the students decided to continue with three particularly interesting cases, under Schrag's continued tutelage, for the summer; the rest were turned back to Legal Aid. Because of the way the seminar had accepted cases, most were turned back at a reasonable stage (e.g., cases argued and awaiting decision) so that the students did not feel they were dropping hot potatoes. \(^{53}\)

The seminar involved two interrelated modes of instruction: student work on the cases, including discussions with the instructor and with other students, and the daily classes. The daily class sessions were the glue that made the seminar a unity. Although the group was expected to convene for an hour, very often the discussion continued for an hour and a half, two hours, and even three hours. Schrag had not planned to have set agendas for the classes, but it soon became clear that with forty cases in the air at once, too much was happening to concentrate attention without one. So, very early in the seminar, he began consulting seminar members in the mid-afternoon about a topic for the day's class, and limited each day's discussion to a single event, process, or decision.

The discussion that follows, indicating the nature of what was treated in the classes, is organized by topic, for the sake of clarity. However, since topical organization promotes clarity at the expense of conveying how the classes built on each other sequentially, we will briefly show how one type of case was handled over time.

One area in which the seminar specialized was public housing evictions. Under Escalera v. New York City Housing Authority, \(^{54}\) the New York City Housing Authority may, after a due process administrative hearing, evict a tenant for being "undesirable." Tenants are usually classified "undesirable" when they or a member of their family has been arrested for some alleged offense. Often the arrested person is acquitted, or

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51. As part of his supervisory duties and in order to teach interviewing, Schrag personally sat in on every interview during the first two weeks. Later in the course he sampled the interviews but did not attend most of them.

52. The students made a substantial number of administrative appearances, but only two cases involved student appearances in a court. In part this reflects the high cost of litigation in New York; petty cases these days are either disposed of "on the papers" or settled, because neither side can afford the time and money costs even of oral motion argument, much less trial.

53. Nevertheless, it would have been disastrous for the clients if Legal Aid as an institution had not been there to accept transfer of these cases; even where the students had "finished" a case, it was essential that someone be available to police a settlement or to take or defend any appeal.

54. 425 F.2d 853 (2d Cir. 1970).
the charges are dropped, but the Authority proceeds with the eviction nevertheless, arguing that since the eviction is "civil," it need not prove guilt beyond a reasonable doubt, and further arguing that exclusionary rules do not apply, so illegally seized evidence is admissible. The hearings are conducted before a tape recorder, and the tenant's representative is entitled to make his own recording (making Escalera hearings extremely useful for teaching purposes); each side generally puts on witnesses and documents, cross-examines adverse witnesses, makes various objections and arguments in connection with the testimony, makes various motions at the hearing, and makes a closing summation. Adverse rulings can be appealed to three levels of the State court system.

Early in the semester, the seminar volunteered to accept every Escalera client who came into the Legal Aid office during the semester. Schrag hoped for twelve cases and got five. To prepare for these cases, the students read Escalera itself and some related cases, as well as the documents from an Escalera case that had been handled by the Legal Aid office the previous semester. Next, the entire class went to the Housing Authority to observe a Brooklyn Law School student (a Legal Aid worker) handle two cases. The hearing was tape-recorded and immediately afterwards a class session was held in which the seminar discussed the cases with the student. Two days later, the Brooklyn Law School student was again present; the tape recording was played, and a member of the Columbia Law faculty, present as an observer, commented on the proceedings from the point of view of the evidentiary arguments and rulings that had been made. Shortly after that, the students began taking in their own clients. Because they had seen the procedure, they had a bit of a head start in interviewing their clients and preparing their evidence. And, as they obtained information, they brought to the daily classes their strategic and ethical problems.

Jon, for example, had a client whose son had been arrested for possession of heroin and had been adjudicated a youthful offender. He asked the class to help him devise the best way to make the argument that since his client had been held to be a youthful offender, the Housing Authority could not present evidence of the facts leading to that adjudication. His options included moving to dismiss when the charge was read (but that would come so early in the proceedings that the hearing officer might be inclined to regard it as premature and Jon as overly zealous),

55. In New York City alone, twelve hundred Escalera hearings are docketed annually.
56. The Housing Authority rules say that "technical rules of evidence do not apply," but do not define "technical" nor state what rules do apply. Therefore, every hearing involves not only argument about whether various rules (e.g., the hearsay rule) have been complied with, but also about whether those rules are applicable. Rulings on these issues vary according to the hearing officer, the dynamics of the hearing, and other factors, most of which are susceptible to classroom analysis.
57. All names, including those of the students, have been changed.
objecting to the reading of the charge (but that might be construed as a
direct attack on the hearing officer, who would be doing the reading),
objecting to the first question asked of the arresting officer (but that might
make Jon the villain for interrupting at a suspenseful moment), etc. In the
class, Ray suggested (and Jon agreed) that Jon request that the officer be
instructed not to discuss the events leading to the adjudication (thereby
objecting only to aspects of the testimony, not all of it). Then if that were
denied, he would ask the hearing officer to warn the officer that a state law
prohibited revealing facts underlying a youthful offender adjudication. Jon
also faced the problem of how to prove that the facts had led to a youthful
offender adjudication (in order to preclude testimony) without himself
introducing evidence, possibly in violation of the state law, that the adjudi-
cation had taken place. A second issue was whether, if Jon were overruled,
he should ask for an adjournment during which he could attempt to obtain an
injunction against the officer's testimony, or whether that would be a poor
stratagem, because if he lost, he might make the hearing officer angry,
prejudicing other strong aspects of his case.

After discussing strategy and any ethical issues with the class, the
students conducted their Escalera hearings and brought back to the class
the tape recordings of the hearings themselves. Typically, it would take an
hour of classroom time to unravel each twenty minutes or so of hearing
time. Schrag's technique was to play twenty or thirty seconds of tape. At
any time, a student could yell, "Objection!", in which case he would stop
the tape, and the student would explain why he would object at that time,
and we would discuss his view. In any event, the tape would not be
allowed to run for more than about thirty seconds without stopping it to
discuss what the student handling the case did, did not do, should have
done or should not have done at that moment. After each segment of
discussion, the student who had the case would talk about why he did what
he did, and also how he felt at the time toward each other person in the
hearing room.

In the review of the tape in Jon's case, the group was pleasantly
surprised to discover that all of the things anticipated at the strategy class
had come to pass. Jon used each tactic, in the order planned, to object to
the evidence that had resulted in the youthful offender adjudication. The
Housing Authority lawyer argued that the statute only prohibited revealing
"records" of a youthful offender adjudication, not duplicating the evidence
that comprised the records or led to the adjudication. The hearing officer
overruled Jon each time. The class analyzed in detail the manner of Jon's
motions and objections, looking closely at the words used (at one point he
"requested" rather than "moved" for an adjournment to seek an injunc-
tion, and his tone of voice suggested that he didn't really want what he said
he did), his options (in asking for the adjournment, he didn't suggest a
specific, short period of time), his inflection, etc. The class also considered briefly the propriety, in view of DR 7-105,\(^\text{58}\) of warning the policeman in the hearing that he could be prosecuted for testifying about the facts leading to the adjudication, where the hearing officer had specifically authorized Jon to deliver the warning.

After Jon lost all attempts to raise that issue, he objected to any testimony by the officer that the "white powder" he had found in the boy's glassine envelopes was heroin, since the officer had not been shown to be qualified to render that opinion. Jon won that point, and the officer then tried to testify that he'd read in a laboratory report that the powder was heroin. Job objected on hearsay grounds, and the hearing officer ruled that while the policeman's testimony was admissible, it "had no weight."

Jon then made a quick decision that he had a perfect record, and rested his case without cross-examining the officer or putting on his client or any other witnesses. In class, the seminar considered that decision, as well as what the students would have done had they been representing the Housing Authority in this proceeding.

The thing to note is that the class did not spend a week on interviewing, and then a week on strategy, and then a week on evidence; the structure of the course built on an interesting series of events where each type of learning led to another—for example, reading, legal analysis, demonstration, discussion, expert analysis (by the faculty guest), individual work with clients, tutorial instruction, class discussion, individual work on stage (the hearing), and finally review by the class and the instructor.

Having described the dynamic movement of the seminar from class to class over time, here then are descriptions of some of the topics that the seminar considered:

**Interviewing:** Since students did the "intake" for most of their cases, interviewing occupied much of their time, and a substantial amount of class time, during the first three weeks of the course. In one of these classes, the seminar was converted into an experience similar to "medical rounds." One student interviewed a client (with the client's permission) in front of the class. The interview was tape recorded, and after it was finished the other students explored a few areas they thought had not been fully covered. During the discussion of litigation strategy that followed the client's departure, every member of the seminar agreed that she had told a consistent, full and truthful story, and that she would make a strong witness. The story, in brief, was that Ms. Ward, our client, had known her neighbor, Ms. Prince, for twenty-four years, and had gone to Ms. Prince's apartment just before Christmas to borrow a ladder. She found Ms. Price quite drunk,

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\(^{58}\) "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."
and near her was an envelope from which quite a lot of money had fallen. When Ms. Ward offered to hold the money for a couple of days, Ms. Prince gave her $1500 (the receipt of a retroactive social security payment). Over the next week, she took back $800 of it. Then, during a Christmas week party where everyone had been drinking, Ms. Ward had returned the rest of the money. Ms. Prince denied the return, and sued Ms. Ward, pro se, for $700.

Ms. Prince was then interviewed, and the class was somewhat shaken to discover that not a single fact tallied with Ms. Ward’s version of the story. The class discussed the new development, and quickly became aware of its total willingness—and desire—to believe its client before hearing any other view. Students considered how much they, as lawyers who wanted to “win,” had invested in the assumption that their client was leveling with them.

The following weekend, Ms. Ward told one of the students that her son had advised her to “tell her lawyers everything,” as opposed to the advice of her cousin, which she had followed earlier. Now she said that the morning after she supposedly had returned the money, she woke up so hung over that she couldn’t remember anything, including whether or not she’d paid back Ms. Prince. She even called the police, who unsuccessfully searched her apartment for the money. The class, forced to re-evaluate the tendency to assume an identity of interests between lawyers and clients, was never again quite so unskeptical.

Interpersonal dynamics. Judy handled a consumer credit case in which the lawyers for a finance company agreed to suspend the garnishment of her client’s wages and to refund the garnisheed wages pending litigation or settlement of the action. Their failure to comply with the suspension agreement became a source of intense frustration to Judy, who had expected from law school that attorneys behaved honorably toward each other (honorable behavior, as students discovered, was frequently not forthcoming from attorneys who manage mass volume litigation against the poor). After two weeks of talking to the collection lawyer handling the Davis case, Judy obtained an assurance from him that he had in fact

59. Of course the “informational” aspects of an initial interview may be least important. Later in the course, the class studied other facets of an interview. Judy had an Escalera case in which the McDonald family was threatened with eviction because the tenant’s adolescent son had been arrested for possession of marijuana (although the criminal charge was later dismissed). In the course of the interview, the boy pressed on Judy admissions that he had committed a substantial number of crimes, more serious than possession of marijuana, for which he had not been caught. He also asked her what color her eyes were. The class tried to understand why the boy was making the admissions, which were quite unrelated to the present charge. Was he testing her to see if she’d be shocked, and as a result betray his confidence? Was he testing whether she would refuse to remain an ally if he were “bad”? Was he asking for help in connection with a problem much larger than this case? Was he bragging, and perhaps exaggerating, in order to obtain sexual advantage? Was he measuring Judy’s loyalty to him against her loyalty to his mother, who was technically her client?
suspended the income execution. The next week, when Ms. Davis' pay check was again garnisheed, Judy called the lawyer. Now he not only refused to tell her when he had supposedly sent the suspension notice to the city marshal, but he also claimed that he would not send one, because, he claimed, the city (Ms. Davis' employer) did not honor temporary suspensions of garnishments.

As her telephone conversation with the lawyer continued, Judy could not get him to admit that his office had in fact signed an agreement, or even to look at the file. He kept telling Judy that he was older than she and that when she was older she would understand how things were done. He told her that she was wasting her time and his, that his time was more valuable than hers, that he didn't have all day to spend looking at files, and that her client would get justice in the long run. His constant insults made it barely possible for her to control her temper.

In class that day, the group discussed the feelings of anger and frustration that can arise in legal practice, and how they can affect choices that lawyers make in handling problems. To dramatize the event for the class, Judy and Schrag role-played her 20-minute conversation with the lawyer (she portraying the lawyer because only she had heard his side of it), and then Judy talked frankly with the seminar about her feelings as she participated in the original conversation. The class ended with a discussion of strategy for dealing with the still-unenforced stipulation.

Counseling: Judy represented the Webster family. Sixteen-year old Richard Webster was notified that he was being suspended from high school as the result of a long series of disciplinary infractions, including participation in a cafeteria fight. The Board of Education had asked him to transfer to the "auxiliary service," a kind of school specializing in preparing students to take the high school equivalency test. He had the right to refuse the transfer, and instead to submit to a formal suspension hearing, but that choice could result in far more serious consequences to him, including outright expulsion from the school system. Judy had one long meeting with Richard to discuss his alternatives with him. In the seminar (which went for three hours that day), Schrag played the tape of the session, stopping it about every twenty seconds so that the class could discuss the interaction of lawyer and client in detail.

For example, Judy told Richard at the outset that he had virtually no chance of going back to his old high school. The group talked about whether this was an appropriate insertion of reality, or whether Judy took too great a risk of alienating Richard, so that he wouldn't listen for the rest of the session. At another point, she asked him if the auxiliary service would be acceptable since he would be able to exchange his equivalency certificate for a regular high school diploma. Richard's response was to ask if he would have to wait for the regular diploma to come through before he
could get a scholarship to attend the Air Force Academy. The class
discussed how they would have responded to that query—whether the
counselor should tell Richard immediately that he could never get into the
Air Force Academy, or whether it would be better to let that fantasy pass
unexamined. At the end of the counseling session, Richard agreed to go
with Judy to the auxiliary service to look at it.

Ultimately, Richard elected to go to the auxiliary service, and when he
did, a fellow student asked Judy how she felt. “I feel awful,” she said.
“I’ve been depressed all day. For three years I’ve gone to law school, and
I’ve done very well, learning how to make the fine distinctions that can win
cases in the Supreme Court. I’ve learned all about how to fight a case
forever. But here from the very start all I’ve done is take a boy who
wanted nothing more than to fight it out all the way with the Board of
Education, and instead I’ve persuaded him to abandon his fight and to
accept what they wanted him to do all along.” The seminar then discussed
the ameliorative, and often conservative aspects of the lawyer’s role.

_**Strategic planning:**_ Leah’s Escalera client, Mr. Ramirez, was being
evicted as a result of his arrest (charges had been dismissed) for possession
of a gun. One of the first class sessions on the case, immediately after the
initial interview, concerned not only the numerous strategic questions that
would have to be considered, but those which had to be omitted because
resources (including time) might be too scarce. In this particular class,
Schrag decided to be as non-directive as he could: he took notes, but he
permitted the class to do all of the work of identifying the necessary
decisions. Among the questions they listed were these: (1) To what extent
should the lawyer for this case, and for every Escalera case, raise the
“big” questions that were being litigated in a federal test case? For in­
stance, should Leah argue that the criterion for eviction—that Mr. Ramirez
was an “undesirable” tenant—was unconstitutionally vague? Should she
complain that the Housing Authority should be prohibited from making a
decision based on facts not in the record? Should she complain that Mr.
Ramirez never had notice that possession of a gun was a ground for
eviction? (2) Mr. Ramirez’ arrest apparently occurred in a car on a street in
front of a housing project. The street was not itself part of the project, but
the charge against him was possession of a gun on project grounds. If this
was significant, was it best raised before, during or after the hearing? With
what words or papers? (3) Should other project tenants be brought into the
hearing to testify that, in their view, Mr. Ramirez was a “desirable”
neighbor? (4) Should Mr. Ramirez testify? (5) Mr. Ramirez claimed that
the gun had belonged to a friend, whose name and current whereabouts he
did not know. Should Leah press him for the name, in spite of his reluc­
tance to speak about this subject? If he gave her the name, should she
spend much of her time trying to locate him? What if that might result in
criminal charges being lodged against the friend? (6) Should Leah try to discuss the case with the arresting officer, who would probably be a witness against Mr. Ramirez at the hearing? (7) What use, if any, should Leah make of the fact that the charges were dismissed, and how, technically speaking, should she bring that fact to the attention of the hearing officer?

**Drafting:** In one of his cases, Ray had to move to amend a complaint. In class, he distributed his original motion papers, his adversary's response, and a draft of his proposed five-page reply. Members of the seminar took issue with both the subjects addressed and the style of the reply. They considered the overall impression that such a relatively long reply would make and outlined a different, much shorter one. As an exercise, Schrag conducted two one-minute contests in which the task was to take the paragraphs from the draft reply and boil them down as far as possible without losing content. (In each instance, the winning entry consisted of a single word, inserted elsewhere.)

**Ethics, Example I:** Since issues of professional responsibility were such an important priority of the seminar, it is worth noting several of the ethical issues that confronted it during the semester. A constant theme was the problem of the lawyer's obligation toward an adverse pro se litigant. Ms. Prince had sued our client, Ms. Ward, and we concluded that since Ms. Prince's story kept shifting, it would be desirable to take her deposition. During the deposition itself, the plaintiff (who was still not represented by counsel) told Mary that she was not certain that the defendant hadn't repaid the money to her husband, and that she had actually received $800 of the $1500 from the defendant during the course of one week, and had spent it on food and liquor. Of course, one of the conventional purposes of depositions is to obtain admissions, but the students were quite uncomfortable obtaining from the plaintiff concessions that would never have been made had the witness been represented by counsel.

**Ethics, Example II:** The Stone case raised a far more difficult question of professional responsibility—the general issue of an attorney's role in a custody proceeding. Mary represented a father, recently released from jail, who was seeking to obtain physical custody of his twin sons from friends of his estranged wife, with whom she had informally placed them during his incarceration. When the case first arose, Schrag intended, in the

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60. It seems to us that because the ethical problems that lawyers face can only be understood if considered experientially, in the context of real incentives to behave in various ways, clinical methods, whether those of simulation or of field work, are particularly well suited for student learning in this complex area. Cf. M. Freedman, Lawyers' Ethics in an Adversary System (1975).

61. Mary was so ambivalent about the deposition that although the plaintiff told a totally different story at the trial from the one that she'd testified to at the deposition, Mary never used the deposition at the trial.
first seminar session on the matter, to have the class consider the litigation strategy.  

But in the class, Jon pointed out that the problem had ethical dimensions more difficult than its strategic problems. Should Mary, he asked, approach a custody case the same way she approached landlord-tenant or consumer credit cases—or, since the children were unrepresented, did she have a duty to them to investigate whether our client's home was suitable, or whether the client had a plan for the children's upbringing? Indeed, should she go further and make her own judgment about where the best interests of the children lay before litigating on behalf of the father? Further, he asked, if she decided that the children were better off in their present home, should she advise the father not to try to recover them? And if he refused to accept such advice, should Mary not represent him, or represent him with less than full vigor? Ray suggested that Mary, as Mr. Stone's attorney, had no business trying to make an independent judgment; if she visited his home, our client would inevitably sense that she was not there to win his case but to look him over and judge whether his lawyers thought that he was competent to take care of his own children. This dilemma—in the context of a real case where the lives of two families would inevitably be affected by our basic decisions—produced one of the most exciting and animated law school classes that Schrag had ever participated in. The class ended with the decision to conduct a straw poll—advisory for Mary—the next day.

At the following class, the group more or less decided that it did not favor making an independent judgment about the client, unless some further evidence of his unsuitability surfaced, beyond his criminal record. But that returned the group to the ethical dimension of the original strategic problem. The best legal strategy for Mr. Stone might well be the one that least afforded the children an opportunity to have their interests considered. That is, he seemed to have the best chance of getting his children back if he filed in Supreme rather than Family Court (thereby avoiding the ambiguous "best interests" standard), and if he moved quickly. Indeed, the group was told by the director of the Legal Aid office, that habeas respondents, given a very short return date, often defaulted. In that case, the

62. For example, Mary could choose to file a habeas corpus suit in the Family Court, where the case would take eight months, would involve a probation office report, and would be determined, finally, according to the "best interests of the children." Or, she could elect to file in the state Supreme Court, where the procedure might be faster and where the issue would be only whether the father was "neglectful" of the children, not where they would be better off. Also, if she filed in Supreme Court, Mary would have to decide whether to give the "friends" of the mother (who had the children) a relatively long time (such as ten days) in which to respond or whether she should try to catch them off guard by giving them only a day or two.

63. A senior Legal Aid lawyer advised the group to request an affidavit from the children's mother, but to insert in it a recital that she had been advised of her right to counsel. Mary told her of this right, and she enthusiastically waived it. The class worried: was this a meaningful waiver?
judge would send the sheriff to arrest them, and the petitioner would begin his action in a position of extreme psychological superiority. Did the group owe it to the client to use the legal machinery most likely to enable him to get what he wanted? Did the group owe it to his children to select exactly the opposite strategy? This class was really a rough one: one student’s voice cracked repeatedly, Schrag snapped a paper clip across the room, and Mary, whose case it was, promptly lost the file.64

Ethics, Example III: On April 8, 1975, Edward outlined for the class his Escalera case. His client was a woman, separated from her husband. She was being evicted from public housing because her son, who had never lived with her, allegedly had sexually assaulted his girl friend of many years at a housing project more than a mile from the one in which his mother lived. Edward had talked to his client’s son (who was then in jail on a different charge), and had learned that the alleged victim refused to testify before the grand jury until subpoenaed. Chances were good, therefore, that if she were not subpoenaed by the Housing Authority, she would not come to our client’s hearing, and the case against her would be weak. Edward asked the class whether it would be unethical for him to attempt to discourage the woman from testifying. If he could not or did not discourage her, his best tactic to counter her testimony might be a traditional “rape defense” in which defense counsel brings out the victim’s sexual history and reputation. Edward was extremely uncomfortable about the prospect of doing this, and wanted guidance from the class about whether he had a duty to his client to do so if he believed such a strategy would help achieve a victory.

The discussion that day was desultory, so the class decided to pick it up again the next day. The following morning, Edward called the woman to ask if he could talk to her to find out what happened, and the first thing she said to him on the telephone was, “Tell me, do I have to come to the hearing?” Edward arranged to meet with her and discuss the question that evening. That afternoon, three hours before Edward was to meet her, the class considered his problem further. This time there could be no procrastination: Edward had to come to some conclusion.

64. A few ethical conflicts raised institutional rather than personal issues. Ray represented a woman who had lived with a man for many years, and was the mother of their ten-year old child. They had never married, but the woman had had an order of paternity entered when the child was six. The man died intestate, leaving a taxi medallion worth $30,000, and the woman came to the Legal Aid seeking, for both herself and her child, part or all of the estate. Ray learned that the woman could not share in the estate, because New York does not recognize common-law marriage, but that there was some chance (hinging on the outcome of a pending test case) that the child could participate. Should he urge the client who had come to him (the mother) to step aside and release him as counsel to her, so that he could represent the child without conflict? Furthermore, did the prospect of a substantial recovery make this a “fee-generating” case that Legal Aid should refuse to take for any client, even though any private lawyer who handled it would charge perhaps half or more of any recovery as his fee? If Legal Aid were to take the case, would that be unfair to the estate’s other claimant—the decedent’s legitimate child who was claiming the entire estate—who was not indigent and therefore would have to retain a private attorney to fight Legal Aid?
He knew that it was Housing Authority practice to mail documents entitled "subpoena" to the witnesses that it wanted to testify, but it did not serve those "subpoenas" personally on the witnesses as required by law, nor did it tender witness fees. Edward wanted to know whether he would be violating a Disciplinary Rule against giving "legal advice" to potentially adverse, unrepresented persons, if he told the woman, truthfully, that the papers were not valid subpoenas. Some members of the class thought that he would, but others argued that the woman actually had no "adverse" interest to Edward's client, who, after all, was the boy's mother. Others thought the action improper even if it did not contravene a specific provision of the Code of Professional Responsibility, and some thought that the action was, at the least, tactically unwise, since it could come out at the hearing that he'd advised the Authority's witness that she need not appear. By the time Edward had to leave, the class had reached an uneasy consensus that he should simply explain to her the difference between a mere request to appear and a subpoena and then give her the number of an independent Legal Services Office that she could call for advice.

Ethics, Example IV: In the last week of the course, Edward represented a welfare client in a hearing on her claim for benefits. After a month's delay in a court-ordered hearing, the Department of Social Services failed, through negligence, to produce its file on the case. But the Department was ready to go ahead with the hearing anyway, its representative conceding that because he had no file, he had no case.

At the opening, the hearing officer, a lawyer, asked to see the court order, and misinterpreted it as an order granting benefits rather than as an order for a hearing. He thought, therefore, that the merits of the case had already been determined, and that he need go no further. Neither Edward nor Schrag corrected him—Edward because he was confused by this strange turn of events, and Schrag because he thought, at the time, that it was unnecessary to correct him since he was right for the wrong reasons. That is, he had to rule for the applicant in any event because the Department could not meet its burden of going forward.

When Edward and Schrag recreated the hearing from their notes (using Legal Aid lawyers as volunteer actors) in the next day's class, the students raised serious questions about their failure to correct the hearing officer's error. They asked whether Edward had a duty to the system of justice, overriding that to his client, to correct errors that interfered with a reasoned adjudication of controversies.

Since a consensus emerged that he should have corrected the error, consideration was given to whether something should still be done, before the hearing officer decided the case. When one student suggested that Edward send the hearing officer (and the Department's representative) a note...
copy of the order, with a letter explaining the nature of the confusion, another student suggested that the client could be done an unnecessary injury, as a result of having an overly prissy lawyer. The debate ranged over two days, and, because the class was on the line, because a member of the group had acted and had to continue to act, and because inaction was a form of action, the level of student involvement in a question of professional responsibility was extremely high. The final result was a very professional, well-drafted letter explaining both the nature of the confusion and why it should be immaterial to the outcome.

**Overall complexity:** One of the objectives of clinical legal education is to examine the overall complexity of the legal process; that is, to look at many aspects of a legal problem simultaneously to see how the strategic, economic, ethical, and other aspects of a “case” interact. One of the cases which gave us the opportunity to do this was Richard Webster’s school suspension. In a single class, the seminar would discuss a case’s many angles, from the grandiose philosophical issues to the minutiae of tactics.

—**Resources.** Richard Webster’s record involved charges of more than two dozen incidents over a two-year period. Many of these incidents were reported by different witnesses, often teachers or staff members of his school. In many instances, Richard denied that the incidents occurred; in many others, he challenged the school’s version of the events. To plan rationally whether or not to go through with the suspension hearing, and how to conduct it if Judy were going ahead with the hearing, it would be desirable to interview each of those witnesses at length, to test how well cross-examination could shake the testimony they would give against him. Clearly, lawyers being paid $120/hour to represent a major corporate client for whom expenses were no object would do just that. A recurring problem was whether the students, as Legal Aid lawyers, owed their client the same kind of service performed by paid corporate lawyers. Or did they also owe a conflicting duty to the many clients who would be turned away if they poured all their resources into one case?

—**Task definition.** Was the lawyer’s job merely to keep Richard in school, or was it also to advise him about how to stay there if he prevailed? If the attorney thought he would be better off leaving school and going to some other facility, should he be told that? If he was told and initially rejected Judy’s advice, should she continue to press, or do only as he asked? Since none of the group were psychology or education experts, were they competent to make even an initial judgment about where his interests lay? Then again, suppose the students suspected he would benefit by seeking psychiatric help. Were they qualified to make that judgment? Did they owe it to him not to suggest it because even making the suggestion was an unwarranted intrusion? Did an attorney’s role demand more than trying to get the relief that the client wanted? Where did that
role stop? Did his lawyer have a right—or duty—to explore with him the direction of his life, his hopes and his ambitions?

—Client definition. The boy and his mother may have had different goals. The boy, for example, might have thought he had far less concern with being suspended from school than his mother did. The mother had brought Richard to Legal Aid, and the receptionist had registered her as the client. Who was the client really? Did Richard and his mother have such conflicting interests that Judy couldn’t represent both of them? If she thought they had conflicting goals, could she decide to represent only one of them? Could she choose the one? What did she have to tell the other?

—Ethics. Was it ethically proper for Judy to talk to his teachers, who were employees of an adverse party that was represented by counsel? Could she take their statements?

—Strategy. Was it desirable for Judy to try to negotiate a settlement without going through the hearing? If so, what should she ask for? What did she have to offer? Was the situation like plea bargaining, in which the lawyer could offer the state the option of saving the cost of a hearing? In that event, was it desirable, and was it proper, to suggest that the hearing, if one were held, would be long and expensive, involving most of the teachers in Richard’s school?

—Evidence. How should Judy deal with the teachers’ evidence against Richard that had been placed in his file, much of it very flimsy, and that might be brought into the hearing as a business record?

—Disposition. If the Board of Education didn’t recommend to the hearing officer any particular disposition at the close of its case, should Judy? On what basis? Should she argue for a particular disposition, or did she need an expert to interview the client and recommend what should happen to Richard? Should such an expert not only advise Judy but testify? Should she urge Richard’s financially strapped mother to pay for this service when its value was so unclear? How much?

—Time. The tyranny of time is probably studied too little in law schools; but for the seminar, it was always a major factor to consider. The questions outlined above would take days, perhaps weeks, to answer, and yet all the while Richard’s hearing was postponed, he had to remain out of school. Therefore, while his lawyers fumbled around for answers, they felt they were responsible for interrupting his education. Furthermore, they believed that the longer he was on the street, the greater the chance that he would get into serious trouble. How was the seminar to balance off this pressure of time against its desire to do the best job for him?

Schrag was very pleased with the results of the Advanced Clinical Seminar. Direct student responsibility for cases and clients, a low student/
faculty ratio, the large block of time that students could devote to the program, and the analytical interaction in the daily class combined in a format which could achieve most of the goals of clinical training.

Of course, this type of clinical instruction also had its problems. Foremost among them was the relatively high financial costs imposed by the student/faculty ratio. Six-student seminars are not unprecedented at Columbia or other law schools, but few schools will institutionalize such high-cost offerings. They are usually an incidental result of low student interest, whereas here, the class size was a result of deliberate pedagogical design, and students had to be turned away. We believe that the educational value of the offering to the students who took the course justified the resources allocated, but obviously others will fairly differ with that judgment.

A second problem was created by the diversity of substantive issues presented by the seminar's cases. The original plan to take on a broad cross-section of a typical Legal Aid case load turned out to be too unwieldy: Schrag's value as a resource was greatest if he could become somewhat familiar with an area. This was impossible if too many subjects were in the air. More significantly, the students were much better able to learn from each other if they were working on problems that had some common threads.

Of course, concentration presents problems of its own. If student practice becomes too specialized, it might eventually become rather boring, especially for the instructor who might then teach less effectively. On the other hand, specialization adds a fascinating set of teaching possibilities to the clinical teaching agenda—those which emerge from regular exposure to a particular institutional setting. For example, students can be sensitized to discern the overriding policies which affect the behavior of individual decision makers. They can observe how these policies are communicated to insiders and to outsiders; how they are undercut or enhanced by resource allocation, personnel constraints, and bureaucratic controls; and how an outsider can affect institutional behavior. They can analyze the conflicts which characterize institutional behavior and which characteristics of the institution insiders wish to keep secret. They can ask how such an agenda of secrecy affects the way insiders deal with outsiders; how the institution copes with expansion and change; how it plans and what forces affect its planners. Do insiders have a realistic picture of their power? Their lack of it? We have concluded that the solution to the specialization/diversity conflict lies in temporary specialization, changing the type of case handled or the processes studied every year or two.

VI

After teaching in four different kinds of clinical programs over a five-year period, we think that we have at last settled upon a pedagogical
method and an institutional setting that will be relatively stable: we are in
the process of opening an on-campus teaching clinic, in which we will
pursue the objectives that we have described and employ the teaching
approach that has emerged from our series of experiments. The test litigation clinic taught us the importance of direct student
responsibility for clients and cases, the difficulties of teaching clinically
when students were exposed to but a slice of a legal process, and the
indispensability of a carefully-planned and rigorously-taught classroom
component. From our work with simulation, we concluded that non­
directive teaching has a value that law schools have barely begun to
explore; that in a proper environment, students will teach lessons to each
other they would not learn as well from on high; that team teaching has
enormous potential in a clinical setting; and that a simulated professional
milieu is an excellent one for law students exploring both the styles and
consequences of various methods of decision-making, and the effects of
interpersonal and intergroup relations on the outcomes of the legal proces­
ses. We learned, too, the value of offering in law school an educational
program that permits and encourages students to deal with their own
feelings about leadership, responsibility, competence, authority, aggression
and cooperation; that requires them to work, in relative safety, within a
complex system of organizational dynamics, the conflicting values of the
Code of Professional Responsibility, and the terrifying pressures of uncer­
tainty and limited time. Our pilot project in student practice taught us that
what we can teach well through simulation can be taught even better—with
essentially similar methodology—in a setting where students are “on the
line,” and responsible to real clients. We expect that the problems that
gave students the most trouble as they worked in the simulation and the
Harlem setting will surface again in our new clinic. These concern less the
analysis of doctrine or the assimilation of skills than the group and institu­
tional dynamics of lawyering, and issues of individual growth and de­
velopment.

The tacit message of much of legal education is that lawyers usually
work individually; but in the simulation, and to some extent in Harlem, our
students found themselves engaged in collective decision-making. Our
teaching role had to be redefined to facilitate student investigation of the
derivation, delegation and exercise of authority within and between groups.
Though we set the rules and laid out the boundaries of the environment, we

66. It is worth noting, for those concerned with educational policy, that our series of
experiments with different teaching formats was conducted under the umbrella of tenurial
appointments. Though tenure is usually thought of as a means of ensuring academic freedom
to take unpopular positions in scholarly pursuits, it sheltered us from the inevitable con­
troversy surrounding innovative pedagogy. We doubt that we would have felt so free, in the
absence of tenure, to alter the way we were teaching virtually every year. We wonder whether
law schools that shunt “clinicians” off the tenure track are not inviting the perpetuation of
programs that are popular with students and with the client community but which are less
valuable, educationally, than their instructors might make them.
would not tell students what to do. When hit with the full force of responsibility for the outcome of the cases, as well as for the quality of their own experience, students complained that they were ill-prepared by their previous education. Students and faculty had to come to terms with the passivity of the student role, and the implicit assumption of much legal education that the faculty is solely responsible for whether learning takes place. Initially, students expected that we would step in, subtly lead them where we wanted them to go, influence their decision, manipulate resolution of the dispute. When we continued to play our roles as they had been outlined, students occasionally resented it. Our pedagogy had to take account of the fact that, as figures of authority, all sorts of power we did not have or would not seize was attributed to us. Students became aware that an attitude of "they will do it" interfered with their ability to affect the outcome. As a result they asked questions not usually raised in law school classrooms: To what extent do I feel comfortable with myself as a lawyer? Am I self-sustaining or do I make unreasonable demands on others for support and satisfaction? To what extent do I feel free to satisfy my own goals and needs with appropriate aggressiveness? Do I too often (or not often enough) depend on others? How do feelings about clients affect my conduct as a professional? My non-professional life? To what extent can I engage in self-criticism or peer criticism without exaggerated loss of self-esteem or undue defensiveness?

The pedagogical implications of these aspects of the simulation helped Schrag formulate his role in Harlem. He was responsible for the structure and operations of the seminar; his general experience as a lawyer was at the service of the students. But he would not determine the sorts of lawyer roles the students adopted, or select the forums, parties, procedures or legal theories to learn. Since group meetings were designed to encourage students to make their own decisions in their cases, they could not be dominated by an all-knowing faculty member who would make those decisions. Students had to learn how to use faculty expertise as a resource rather than as a crutch. To the extent this definition of his role caused students grief, Schrag explored with them why he believed a major part of their learning concerned how to take responsibility for learning.

Our new student-practice clinic will, we hope, preserve the most successful elements from all of our other approaches. The students will have direct client contact and personal responsibility for decision-making. We will function principally as a resource, raising issues but not resolving them—unless a student’s chosen course will seriously endanger a client. Like most teaching clinics, we will maintain a low student/faculty ratio and a relatively low case load per student; unlike most, we expect to specialize that case load, so that we can better study particular legal processes and involve students deeply in each other’s work. At least five hours a week of
classroom sessions, like Schrag's in Harlem, will be devoted to the issues—particularly to the daily ethical conundrums and ubiquitous interpersonal problems rarely incorporated into the formal study of law—that simulation has taught us to identify and present.

But as we begin to apply our teaching techniques in a new setting we confront, again, a question that has troubled us for all the years that we have been working in this field. What is the proper relationship between our teaching and the social system in which our students will soon find themselves? With a few notable exceptions, such as some jurisprudence courses, the law school curriculum prepares students to be expert promoters of the interests of others, and, generally speaking, teaches that personal neutrality in a professional role is a highly desirable goal—even in a society in which the most talented lawyers most often represent those with the greatest ability to pay. Also, most students are quite content with the view that social issues—particularly questions of income and wealth distribution—are personal concerns, unrelated to their career decisions within the profession.

Clinical legal education, to an even greater extent than most legal education, changes the students who experience it. Most clinical education occurs in the setting of law offices for the poor, and the mere contact between law students and the clients they serve educates students about poverty in a way that is unsettling for many of them. Ethical issues, including questions of lawyers' responsibility to the public generally, are explicitly a high priority in a majority of clinical programs. The informality and low student/faculty ratio of the clinic enable instructors to talk with many of their students intimately and at length. But we are unsure whether, in that setting, we should (and if we should, how we should) consciously attempt to convey to our students our social as well as our professional values (that is, whether that is a proper aspect of our role as law teachers). Even if we attempt to do so, the institutional settings into which most of our students will necessarily go (because of the incredibly few opportunities for practice in the "public" sector, the lower wage scales, and the supposedly inferior training) may well undo our efforts in that direction.

We are deeply troubled, for we often believe that we ought to be changing the values of our students, but are instead using our teaching setting and techniques to perpetuate the existing social and economic order. Our clinics have already produced first-rate private practitioners who then work for firms that litigate against our clinics' clients and others like them—with the insights, skills and methods that we do our best to help them learn. In an adversary system, of course, all lawyers cannot be on the

67. Even as we write, legal aid, government, and other public interest placements are contracting, and Wall Street firms are again raising starting salaries, increasing the compensation gap.
same side (or even agree which is the right side) but the system’s theoretical neutrality does not excuse moral amnesia or blindness to legitimate claims for social justice.68 Our students must choose, and no matter how much we respect what they do as their choice, we must decide whether to try to influence them by our teaching.

When, in our first years at Columbia, we litigated cases of our choosing, with the assistance of our students, we felt that we were demonstrating by our lives and conduct that lawyers of stature and ability could choose to practice public law in a way that had a favorable impact on the community and profession. When we ceased to be the litigators, we may have lost much of the power of example and may have been left trying to make up by what we say for what we no longer do. The comparative neutrality of our present role tends to convey an approval of good lawyering divorced from its social impact, when we in fact prefer, for ourselves and our students, a use of the legal process to enhance the rights and privileges of the disadvantaged. We fear that the heavy bias of our teaching toward means (when combined with signals received from other sectors of the law school) will make questions of ends seem less important, or allow such questions to be swept under the rug.

While exposure to a legal services setting inevitably provides some emphasis on ends, the legal aid experience cuts different ways. It can teach frustration as well as empathy; it may even convey disrespect for the poor, for the students know that the rich do not receive their legal services from student practitioners, or from lawyers handling 50 or 60 cases at a time. The message conveyed by the temporary work setting is ambiguous and, compared to all the other signals the student receives, is muted. We think we get better and better at teaching lawyers to serve their clients effectively, but to what social end? For all our pride in our improvement as teachers, we remain saddled with the guilt that, to the small extent we influence our students, we are helping to produce a greater concentration of wealth and power in a nation that needs less.

APPENDIX: The Bins Mini-Simulation Assignment

*General Instructions (for everyone)*

Please submit a paper by 11:00 A.M. of the day of class next week, describing the events or conversations in which you participated (if any) (and in what order) with respect to the problem enclosed, and discussing

1. Whether or not the outcome of each such event or conversation was satisfactory from the point of view of the character you played.
2. If it was satisfactory, what did you do and what did the other party or parties do, that

68. For an exacting critique of attempts to use the adversary process as justification for lawyers regarding "as morally irrelevant any number of factors which nonprofessional citizens might take to be important, if not decisive, in their everyday lives", see Wasserstrom, supra note 36, at 8.
caused it to be satisfactory, and if it was not satisfactory, how you and they could have caused it to be more satisfactory; and

3. If it was your job to obtain information, whether you obtained all the information that you think the person you were talking to had, and if it was your job to answer questions, whether you gave all the information you had (and, in all events, if not, why not).

4. Any other observations you care to report.

Note: The purpose of this paper, and of next week's class, is to encourage you to analyze introspectively the events that occur, your own performance and reactions, and those of the other student with whom you will interact. In writing the papers, think critically about the details of the personal dealings you have had in this exercise.

No conversations concerning this case should take place until noon tomorrow, at the earliest, so that everyone has had a chance to read and think about the instructions, and to get into his assigned role.

Other than conversations in the role of the character you are playing, you should not discuss this case before next week's class with any other student in school, including any other member of this seminar. For example, someone else may also be playing your role, but you should not exchange notes. This instruction applies even after your paper has been submitted.

You may supplement the facts that are given with other plausible, consistent facts if necessary, but you should try very hard to understand the role assigned and to say and do what you think your character would do.

The papers should be placed in your instructor's mail box by the assigned deadline.

Supplemental Instructions for Crane only:

Your name is Sandy Crane. You are white, 30, a Columbia Law School graduate. You work for a small firm that does legal work for New York University. You are very overburdened with work and have no time for pro bono litigation. But sometimes you have to do some minor work for students referred to you by the school without a fee; you and others in your firm regard this work as a necessary evil performed to keep a major client happy.

Harold Bins, a second-year, pre-engineering scholarship student at N.Y.U. is referred to you by his faculty advisor. He appears to be a gentle, soft-spoken young man. Medium height and build. Age 20. Black. Reserved but nervous.

In an interview at your office he related the following story. Two nights ago he and a friend went to Greenwich Village "to look around." On St. Mark's Place near Second Avenue the two sat on a stoop and drank beer from cans they had bought at a local food store.

After a while, around 10:00 P.M., Bins decided to take a walk and he strolled around the corner by himself. After walking three blocks he saw someone in a group of four young men who looked familiar and smiled in recognition, but as he approached the group, he realized he did not in fact know them.

Nevertheless he chatted with the group of four for a minute and as he was about to leave one of the young men (not the one who smiled) suddenly pulled a lever setting off the fire alarm from a box located about three feet from where they were talking, and the group immediately fled. Bins was frightened and began to walk away. He had walked one block from the box and around one corner when he was grabbed from behind by a white man who threw him against a wall, searched and cuffed him, and called him a "goddam nigger." Another man joined him. Later they identified themselves as plainclothesmen. He was taken to the nearby precinct where he was cursed out, pushed around and asked repeatedly why he pulled the alarm. Bins denied the charge and finally said, "Look, I'm a student at N.Y.U. and have better things to do than pull fire alarms." At that point the cops cooled down, and gave him a summons, returnable in criminal court at 9:00 A.M. on the morning of our next class. The arresting officer was named Dan Bowles.

If you think there are some vague points in the story, you may want to question Bins again to find out whether he is telling the truth.

At some point, you might want to talk to Bowles, and/or to the Assistant District Attorney in the arraignment part, Pat Mates. You know that Mates will have to make a decision, before court convenes,

a) to prosecute
b) to refuse to prosecute (i.e., dismiss the case), or
c) to recommend to the court that the case be ACD'd (Adjourned in Contemplation of Dismissal); if the court accepts the recommendation, charges are dismissed if the person is not arrested in the next six months.
d) to accept a negotiated plea of guilty and recommend a negotiated sentence.

The maximum penalty is a year in jail, but on conviction, most persons who turn in false alarms get probation. A conviction, however, will severely damage your client's employment prospects, so a prosecution is to be avoided.

You and Mates have the power to negotiate a plea of guilty, if you both desire to do so, either to the misdemeanor of sounding a false alarm or to the "violation" of disorderly conduct. (A "violation," like a traffic ticket, is not considered a "misdemeanor" offense.) If you negotiate a plea of guilty to turning in an alarm, you also have the power to agree on a
sentencing recommendation—either a specific jail term of up to one year and/or three years (a fixed, statutory period) of probation. The maximum penalty for disorderly conduct is 15 days' imprisonment; probation is not permitted for this offense. For either offense, the D.A. may recommend "unconditional discharge"—in essence, a suspended sentence, with the offense noted on the offender's record.

Since the court appearance is next week, if you are going to do anything you should start to do it within the next 52 hours.

Student playing Bins:
Student playing Bowles: __________
Student playing Mates: __________

[If the case is to be ACD'd or dismissed, you must attach to your paper a written statement to that effect, signed by Mates before 5:00 P.M. the day before our next class (because the court appearance is first thing the following morning). If you do not obtain an ACD, dismissal, or disposition by plea of guilty, your client will be arraigned, and Mates will turn the case over for prosecution to an attorney in another section of the D.A.'s office, with which it will be much harder to make a deal.]

**Supplemental Instructions for Bins only:**

Your name is Harold Bins. You are black, age 20. You are a second year pre-engineering scholarship student at New York University. Your manner is reserved, and while you usually disagree with your friends who characterize you as habitually nervous, you are very jumpy about some recent events.

This morning you consulted an attorney, Sandy Crane, whom you were referred to by your faculty advisor. At the attorney's office you related the following story:

Your story as told to Sandy Crane:

Two nights ago you and a friend went to Greenwich Village to "look around." On St. Mark's Place near Second Avenue the two of you sat on a stoop and drank beer from cans you had bought at a local food store. After a while, around 10:00 P.M., you decided to take a walk and you strolled around the corner by yourself. After walking three blocks, you saw someone in a group of four young men who looked familiar and smiled in recognition, but as you approached the group you realized you did not in fact know him.

Nevertheless you chatted with the group of four for a minute and as you were about to leave one of the young men (not the one who smiled) suddenly pulled a lever setting off the fire alarm from a box located about three feet from where you were talking, and the group immediately fled. You were frightened and began to walk away. You had walked one block from the box and around one corner when you were grabbed from behind by a white man who threw you against a wall, searched and cuffed you, and called you a "goddam nigger." Then another man joined him. Later they identified themselves as plainclothesmen. You were taken to the nearby precinct where you were cursed out, pushed around and asked repeatedly why you pulled the alarm. You denied the charge and finally said, "Look, I'm a student at New York University and have better things to do than pull fire alarms." At that point the cops cooled down, and gave you a summons, returnable in criminal court at 9:00 A.M. on the day of next week's class. The arresting officer was named Bowles.

You told the lawyer only part of the whole story on the first go round because you couldn't bring yourself to tell him that you were talking to the group because you did recognize the fellow in the group; although you don't know his name, he is your cocaine supplier, and you were discussing with him the terms of a prospective purchase. Your family has sacrificed a great deal to send you to college and you are afraid of what your father will do when he hears that you have gotten in trouble. There is the question of scholarship aid. You need it to finish school and wonder whether the University will cut you off if you are convicted of a crime. Worse, the group was walking about pulling the alarm at the time you joined it and you jokingly said to the fellow who eventually did it, "You wouldn't really do a thing like that," and you raised your hand and pointed to the fire box, half hoping that he would, in a tone of voice that egged him on. You aren't sure that you would recognize him if you saw him again, but he is white, red-haired, about 6'2" tall, and wore a Billy Jean King sweatshirt.

You are also worried about your friend. He was once convicted of a juvenile offense and you know he doesn't want to become involved.

This is your first arrest, but you have friends who have been falsely accused by the New York police in the past. You would like to penalize the cops for what they did to you, if possible.

Crane seems helpful but you don't know how far to trust this lawyer with the real story. You anticipate that Crane may call you again; you aren't about to call Crane. You will have to play it by ear. The student playing Crane is. . . .

[You should include in your paper what disposition was made of your case and whether you are satisfied with the legal representation you got. If you are not, why not?]

**Supplemental Instructions for Bowles only:**

Your name is Dan Bowles. You have been a policeman on the New York force for 9 years. Two nights ago at around 10:00 P.M. you and your partner were sitting in plain clothes in an unmarked police car fifty yards from the corner of Second Avenue and St. Mark's Place.
You chanced to look up and you saw a group of teenagers near a fire alarm box, the handle of which was down. Among them was a black of medium height and build with his hand up near the box. The two of you jumped out of the car, raced after one member of the group of kids (dumb kids) that was standing near the box, but lost him. While your partner continued the search for that kid, you ran around a corner and saw another kid, the one that had his hand up. You grabbed him and pushed him around to teach him a lesson. You took him to the station and questioned him. Kid claims that he didn’t do it and that he goes to college. You are sure that he’s lying about not pulling the lever, though neither you nor your partner actually saw him pull down the lever. You guess that no one would know you were not telling the truth if you said that you did see him pull the lever. But you don’t want to be caught in a lie.

After the kid said he didn’t pull the lever, you and the others in the stationhouse stopped roughing him up, and you gave him a summons, returnable in criminal court at 9:00 A.M. the day of next week’s class, for turning in a false alarm. A copy of the summons then went to the D.A.’s office for pre-prosecution processing.

College kids mean trouble. A damage suit would go on your record, and college kids make complaints to the review board. Even if you haven’t done anything wrong, the Department transfers cops who have too many complaints against them and you don’t like the idea of working in Staten Island. You are worried because there is a remote possibility that the kid could have been trying to stop the alarm with his hand up. But you aren’t going to tell that to anyone unless you are asked probing, precise questions.

Your affidavit, attached to the summons that went to the D.A.’s office, says:

On [two nights ago] at 10:05 P.M., my partner and I were sitting in our patrol car near the corner of St. Mark’s Place and Second Avenue, and I observed Harold Bins pull the lever of a fire alarm, there being no fire in the vicinity.

Setting off a false alarm is punishable by a maximum penalty of a year in jail but defendants convicted of the offense rarely are sent to jail. Unless a defendant makes it a habit to pull alarms, he will get probation. Some judges will refuse to convict (and give a defendant a conviction record). Instead they ACD (Adjourned in Contemplation of Dismissal) the case, which means that charges will be dismissed unless the defendant is arrested in the next six months. The judge sitting next week, however, is difficult to predict.

You know from experience the following things:

1. The court is filled with junk cases that take up time you’d rather spend on violent crimes, but false alarms are a real problem. Sometimes firemen get killed answering them or can’t deal with real fires. The rate of false alarms has been increasing rapidly in recent years.
2. When you don’t prosecute a case, you run the risk of angering the police, who feel they are working hard, risking their necks, and getting no support from the young lawyers in the D.A.’s office.
3. Even if cases are minor, convictions (after trial or by plea of guilty) help your win-loss record which is periodically reviewed by your supervisors when raises and promotions are considered. But acquittals count against you.
4. You have the power to dismiss the charge without obtaining specific permission from your superiors, but occasionally the newspapers and the politicians get mad about the low rate of convictions compared to arrests, so no Assistant D.A. likes to have an above average rate of dismissals. Your current rate is slightly above average, and last week your superior made a joking comment about it, which you have been worrying about.
5. An occasional problem you have to deal with (besides prosecution) is that policemen are threatened with damage suits. When a case is dismissed by an Assistant District Attorney, many of them force the accused to sign a release for any false arrest or assault claims against the city and the cops. You have done it, too, though you regard the practice as unethical. But you do it because you have to deal with the cops every day, and you can’t afford to be thought of as the only Assistant D.A. who isn’t protecting the men on the force. Of course, if you simply offer to dismiss a case outright, you have no leverage to extract such a release; releases generally come about after a request for dismissal from the suspect and a decision by an Assistant D.A. not to proceed.
6. Lawyers in your office sometimes negotiate pleas of guilty with defense counsel, and stipulate as to a sentencing recommendation.
To summarize, it is in your power
   a) to dismiss a case outright;
   b) to prosecute a case and seek a conviction;
   c) to dismiss and attempt to obtain a release at the same time;
   d) to recommend that the court ACD the case;
   e) to recommend ACD, and attempt to obtain a release from the suspect as the price of
      such a recommendation (slightly harder to achieve than to dismiss altogether in
      exchange for a release);
   f) to negotiate with Bins' defense counsel a plea of guilty, if the lawyer contacts you. If
      you negotiate such a plea, it can be to either the misdemeanor of turning in a false
      alarm or to the "violation" (which, like a traffic ticket, is not a "criminal" offense) of
      disorderly conduct, which carries a maximum penalty of 15 days. In either case, you
      and Bins' lawyer have the power to agree on a recommended sentence—either a
      specified jail term (up to the maximum), or an "unconditional discharge" (a suspended
      sentence with the offense noted on the offender's record). In the case of turning in a
      false alarm (but not for disorderly conduct) you could also agree on probation for a
      fixed, statutory period of three years, instead of or in addition to a term or a condi-
      tional discharge;
   g) to negotiate a plea of guilty and obtain a release.

Any release or agreement to plead guilty you obtain must be in writing, signed by the
suspect himself. Don't worry about technical drafting; ordinary English will do.
You must include at the outset of the paper you turn in
   a) whether you decided to dismiss, prosecute, or recommend ACD, or whether you
      arranged a negotiated plea of guilty (and if so, what offense Bins will plead to, and what
      sentence you will recommend to the court);

AND
   b) whether you obtained a release. If you did, it must be appended to the paper, and must
      be signed before 9:00 A.M. on the date of the next class.

The student playing Patrolman Bowles is _______.
