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SYMPOSIUM: CLINICAL EDUCATION

THEORY AND PRACTICE IN LEGAL EDUCATION: AN ESSAY ON CLINICAL EDUCATION

Mark Spiegel*

Legal education has survived the polemics of the 1960's and the innovations of the 1970's. Clinical programs have been added, but they have not altered the basic structure of legal education.¹ The case method continues as the principal vehicle of legal education. This dominance can be explained by political and economic forces, and perhaps these explanations are sufficient. This Article, however, will not discuss these political and economic reasons; it explores, instead, some of the "idea content" related to this history. What I am interested in is legal education's division of things into the theoretical and the practical: the main tent and the sideshow.²

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¹ I am not arguing that clinical programs have had no impact. When I went to law school from 1965 to 1968, there were virtually no clinical programs. As Robert Condlon has pointed out, clinical education has constituted the most substantial change in legal education in the last two decades. Condlon, The Moral Failure of Clinical Education, in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics 317 (D. Luban ed. 1983). The number of teachers and programs has grown geometrically. Id. at 319. Nevertheless, legal education is still predominantly three years of doctrinal case-method teaching. Clinical teaching is considered another course like International Law that every law school should offer; it has not affected the basic structure of legal education. See Schlegel, Searching for Archimedes—Legal Education, Legal Scholarship and Liberal Ideology, 34 J. LEGAL EDUC. 103 (1984).

² John Cribbet, when he was President of the Association of American Law
Most discussions of legal education do not see the question of what is theoretical and what is practical as a problem. Commentators assume we know which labels are appropriate for which things and what these labels mean. The issue, for them, is how to strike the balance between the theoretical and the practical. Those who favor more practice argue that the balance has been struck too far in favor of theory; those who favor more theory argue that legal education is too professional or practical at the expense of theory.

In this Article, I take a different approach. I argue that the question of where clinical education fits within the law school curriculum does not have to be viewed as simply a question of whether we need more skills training to balance the theory of the regular curriculum. Stating the question that way obscures the choices already made. Most types of legal education have elements of both theory and practice, however those terms are defined. In addition, how we choose to define the terms “theory” and “practice” strongly influences how we perceive various aspects of legal education. Therefore, the way we view clinical education depends as much upon the viewpoint of the observer as it does upon the intrinsic nature of the activity.

In the first Part of this Article I argue that our division into these categories of theoretical and practical is not sim-


5. I am not the first to suggest that it is superficial to frame the issue in terms of “balance.” See Stevens, Preface to Special Issue: Legal Education, 1977 B.Y.U. L. Rev. 689; Twining, Pericles and the Plumber, 83 L.Q. Rev. 396 (1967).
ply a reflection of the natural order of things but is a choice. My argument begins by discussing the development of the case method and the legal realist challenge to the case method. This short history illustrates that each of these “traditional” approaches to legal education can be characterized either as theoretical or as practical. The final Section of the first Part argues that clinical education also can be viewed as either theory or practice.

In the second Part of this Article I explore different views of what we might mean when we use the terms “theory” and “practice” and argue that there is a choice involved in how we define those terms. Our use of these labels is a product of our scientific age and ignores other traditions that might provide different ways of thinking about legal education. Therefore, even if clinical education is labelled as practical, this label can mean something other than skills training.

In the final Part I argue that although clinical education can be viewed in these different ways, we tend to understand it solely as a form of skills training which is predominantly technical. I then explore why we persist in this labelling and what difference it makes for clinical education and other changes to legal education. My argument is that our labelling of clinical courses as skills training influences the content of clinical courses and their place within the curriculum. It also affects how we perceive other additions to our doctrinal core.

The individual parts of my argument do not logically entail each other. One could be inconsistent in applying the terms “theory” and “practice” as discussed in Part I and still not view practice in the technocratic sense described in Part II. Similarly, one could view clinical education as skills training without believing that the case method is theoretical. Although these Parts are not logically related deductions, I believe they are related in a different sense. Together they describe a model of legal education that still dominates despite constant critique. As a result of this dominance, other possibilities are ignored. The goal of this Article is to suggest that there is nothing inevitable about this choice.6

6. Recognizing that this choice exists may not change legal education. It just
I. Theory

The development of legal education in the United States is a story that has been told frequently of late. The tension between theory and practice, academic and practitioner, is a constant theme in those accounts. This section, rather than redescribing this conflict, challenges the way the conflict is characterized. I argue that each of three major educational traditions within legal education—the case method, legal realism, and clinical education—can be viewed as either theoretical or practical depending upon what aspects are emphasized and upon the perspective of the observer.

Before beginning my argument, I wish to preliminarily define the terms "theory" and "practice." By "theory" we commonly mean a set of general propositions used as an explanation. Theory has to be sufficiently abstract to be relevant to more than just particularized situations. By "practice" we commonly mean the doing of something. Practice also is associated with the idea of repetition; therefore, practice sometimes is equated with the gaining of skills because one gains skills by repetition.

In this section these preliminary definitions of theory and practice are used as background for my discussion of the case method, legal realism, and clinical education. It is important to emphasize, however, that I am not attempting to give the one correct definition of theory or practice. Indeed, in Part II, I argue that there are different traditions which make any attempt at definition contingent upon the choices made by the individual choosing the definition.

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means that the political and economic reasons for the dominance of the case method will have to be faced directly.


8. See infra notes 80–82 and accompanying text.

A. The Case Method

American legal education did not begin with Harvard Law School and Christopher Columbus Langdell. As various commentators have emphasized, in addition to the apprenticeship system there were proprietary private law schools and college-based legal education predating Langdell.¹⁰ Langdell, however, established the University-based professional school and the dominance of the case method.

The "theoretical" part of the development of the case method began with Langdell's famous equating of law with "science." According to Langdell, "[l]aw considered as a science . . . consists of certain principles or doctrines."¹¹ Conceived this way, the study of law is theoretical because it involves learning underlying general principles.

But why the case method? Assuming that law has certain underlying principles and that the appropriate way to learn how to become a lawyer is to study these principles, why not study them via lectures or by reading treatises or other learned books?¹² Here a second connection with science becomes critical.¹³ Science involved not only the notion that there were basic principles underlying a discipline but also a methodology. The case method, according to Langdell, was a methodology that emulated the scientific

¹⁰ See, e.g., Stevens, supra note 7; McManis, supra note 7.
¹¹ C.C. Langdell, Preface to A Selection of Cases on the Law of Contracts at vii (1871).
¹² Academic disagreement with Langdell was not over whether law was scientific but over how the scientific principles should be taught. For example, at the annual meeting of the American Bar Association, Edmund Wetmore remarked:

    In teaching any science . . . a certain amount of preliminary work [is necessary] before the student begins to learn the art of applying its principles . . . . A cadet may learn navigation wholly on shipboard by taking his turn at the wheel, and gradually picking up the principles of the science by daily familiarity with their application . . . but he not only would have learned his art more easily, but his practical knowledge would always retain a more scientific basis, if he had had a preliminary course in the theory of navigation.


¹³ What was at stake in establishing the link with science was law's place in the University. Given the growing prestige of science within Universities, identifying with science rather than the humanities or political theory was critical. See Woodard, The Limits of Legal Realism: An Historical Perspective, 54 Va. L. Rev. 689, 715–16 (1968).
method. 14

The methodological link had two aspects. First, Langdell argued that cases were the law's raw empirical data. He explained that:

[A]ll the available materials of that science [law] are contained in printed books . . . [T]he library is to us all that the laboratories of the University are to the chemists and physicists, all that the museum of natural history is to the anthropologist, all that the botanical garden is to the botanist. 15

Second, Langdell maintained that learning principles from cases involved the same kind of inductive reasoning as scientific reasoning. 16

The substantive equation of law and legal education with natural science has not survived, 17 but the methodological link has lasted. It is no longer, however, a methodology that seeks to discover the true principles of the law by looking at "experimental" case data. Instead, the case method teaches students to think like lawyers.

The transition from characterizing the case method as a way of learning the scientific principles of the law to viewing it as a teaching of analysis did not take long. By the 1890's, some twenty years after Langdell began at Harvard, his disciples were justifying the case method because it taught analysis. For example, Keener, who introduced the case method to Columbia Law School, 18 wrote: "By this method the student's reasoning powers are constantly developed . . . ". 19 Ames, Langdell's successor at Harvard, stated that the object of the "Harvard method" was not teaching the knowledge of law but the "power of legal reasoning." 20 By 1913,

14. For a description of how Langdell tried to make this connection and the intellectual capital he was drawing upon, see Grey, Langdell's Orthodoxy, 45 U. Pitt. L. REV. 1 (1983).
15. Speech by C.C. Langdell at the Commemoration of the 250th Anniversary of the founding of Harvard College (1887), quoted in A. Sutherland, The Law at Harvard 175 (1967); see also Keener, Methods of Legal Education (II), 1 YALE L.J. 143, 144 (1892) ("the cases being to [the law student] what the specimen is to the mineralogist").
16. Grey argues that the more appropriate analogy was to geometry rather than to natural science. Grey, supra note 14, at 16–20.
20. Proceedings of the 7th Annual Meeting of the Association of American Law Schools,
when Josef Redlich did a study of the case method for the Carnegie Foundation, one of the main findings was that "the real purpose of scientific instruction in law is not to impart the content of the law, not to teach the law, but rather to arouse, to strengthen, to carry to the highest possible pitch of perfection, a specifically legal manner of thinking."\textsuperscript{21}

Although the shift in justification of the case method from discovering principles to learning analysis could have been perceived as a shift from theory to practice, the case method still was viewed as scientific and theoretical. Redlich, who was critical of the case method for its narrowness, still believed that "[i]t emphasizes the scientific character of legal thought . . . and demands that law, just because it is a science, must also be taught scientifically."\textsuperscript{22} Moreover, according to Redlich, Langdell's great advance over the Inns of Court and the apprenticeship system was that he substituted for this earlier training "a genuine theoretical instruction in the common law."\textsuperscript{23}

A further study of legal education was conducted for the Carnegie Foundation in 1921 by A.Z. Reed.\textsuperscript{24} Reed, like Redlich, was critical of the case method for its narrowness. He likewise was concerned about the Harvard model being indiscriminately applied by all schools, based on a myth that the bar was homogenous.\textsuperscript{25} However, he also saw the case method as "theoretical," even while recognizing that it no longer was designed to teach legal principles but rather to "master judgemade laws in the future."\textsuperscript{26}

Is the situation different today? Criticism about the narrowness of the case method continues and it is doubtful whether anyone today considers its methodology "scientific." However, for a large segment of legal educators there is still the tendency to consider the case method theoretical.\textsuperscript{27} Articles about legal education continue to refer to the

\textsuperscript{21} Report of the 31st Annual Meeting of the American Bar Association 1012, 1025 (1907).
\textsuperscript{22} J. Redlich, The Case Method in American University Law Schools 24 (1914).
\textsuperscript{23} Id. at 39.
\textsuperscript{24} Id. at 58.
\textsuperscript{25} See A.Z. Reed, Training for the Public Profession of the Law (1921).
\textsuperscript{26} Id. at 381–82.
\textsuperscript{27} Id. at 379.
\textsuperscript{27} My own anecdotal evidence supports this point. I have been at four differ-
case method as theoretical. While none of the authors expressly define theory and its relation to the case method, their use of the term illustrates that the conception of the case method as theoretical is a background assumption that needs no explication.

An example is provided by a comprehensive study of legal education by Professors Gee and Jackson. In a long historical article, Gee and Jackson discuss how the case method was a response to dissatisfaction with the apprenticeship system. They then go on to state that the case method served the need of providing a consistent education in legal theory and a means of analysis. According to them, what Langdell accomplished was to ensure the dominance of the theoretical over the practical.

A symposium on the competency movement provides another example. Fernand Dutile writing in the introduction asks: "[S]hould university legal education remain . . . largely theoretical or should its thrust be toward preparing the student for his day to day professional life?" Willard Pedrick writing in the same symposium describes legal education in this country as "university education in law, largely of a theoretical nature." Given the continued dominance of the case method in present day legal education, these references to University legal education are, in effect, references to the case method.

Even critics of legal education such as Calvin Woodard and Preble Stolz at times seem to view the case method as theoretical. Woodard in discussing the case method states that "[s]uch purely theoretical education did become . . . ivory towerish." Stolz writes that "it is not necessary to accept fully the faith of Langdell . . . to agree that theory is a more efficient way of learning . . . ." Judges as well as

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29. Id. at 756.
31. Pedrick, The Non-Conventional Third Year—Including Counselling and Interviewing, in LEGAL EDUCATION AND LAWYER COMPETENCY, supra note 30, at 95, 106.
32. Woodard, supra note 13, at 717.
academics perceive the case method as theoretical. For example, Judge McGowan states that law schools should not have to provide practical instruction at the expense of the fundamental instruction only they can provide.\footnote{34} Throughout the article he equates the case method with fundamental instruction; he describes opposition to the case method in Langdell’s time as opposition to theoretical instruction.

There is, however, another way to describe the case method. It is equally plausible to argue that since Langdell was wrong in equating law with natural science, his method based upon that assumption was not scientific. Furthermore, since it was the equation of the case method with science that made the method theoretical, the labelling of the case method as theoretical is erroneous. From this perspective the case method is just a systematic way of teaching one important practice skill.

From the beginning, the “practical nature” of the case method was recognized by both proponents and critics. Keener, who was an exponent of the case method, justified the case method by emphasizing its practical side:

The student is required to analyze each case, discriminating between the relevant and the irrelevant, between the actual and possible grounds of decision. And having thus discussed the case, he is prepared and required to deal with it in its relation to other cases. In other words, the student is practically doing as a student what he will be constantly doing as a lawyer.\footnote{35}

A critic writing at the same time said: “the advocates of instruction by cases have gone to the opposite extreme of placing too high a value upon the study of cases, and of unduly depreciating the value of the study of theoretic law, apart from learning it through the medium of practical law.”\footnote{36} In our time, William Twining summed up the view of the case method as practical by stating succinctly: “The introduction of the case method . . . involved a crucial switch from emphasis on knowledge to emphasis on skill.”\footnote{37}
Recent scholarship by Anthony Chase takes an even stronger view. Chase argues that the development of the case method was the development of a clinical methodology of law. 38 Whether one agrees with Chase’s equation of the case method with clinical instruction, 39 his argument is sound that one’s view of the case method as theoretical or practical may turn on with what one compares it. As compared to the apprenticeship system, the case method is systematic, more abstract, and arguably theoretical. As compared to the lectures of Thomas Jefferson’s day, the case method is narrow, more concerned with methodology rather than principles, and arguably practical. 40

B. Legal Realism

Characterizing the case method as teaching doctrine plus some skills is not a new story. 41 For critics of the case method, the theoretical aspects of legal education, if any, stem from the realists, not from Langdell. While all theory in legal education is not “realist” theory, legal realism opened up the possibility of combining the study of law with other disciplines by arguing that law is not self-contained. From that perspective the law and economics movement is as much a product of legal realism as is critical legal studies. 42 The realists exposed the myth of underlying doctrinal principles and attempted to bring social science theory to the law schools.


39. Chase draws on Michel Foucault’s theories about medical education and the development of the medical clinic to argue that the clinical mode of instruction is a systematic control of the practice experience. Id. at 330. He further argues that for Langdell and Charles Eliot (President of Harvard at the time) the case method as taught in the classroom was this systematic method of control. John Schlegel criticizes this comparison and argues that it is based upon a misunderstanding of legal practice. J. Schlegel, The Study of Law and Society: The Law Schools n.22 (speech delivered at the 1980 Annual Meeting of the Law and Society Association). I agree with Schlegel that the case method is at best a fragmented clinical method emphasizing a small slice of practice.

40. Chase, supra note 38, at 334–37; see also McManis, supra note 7, at 608.


42. Legal realism also can be viewed as anti-theory because of its emphasis on facts and particulars rather than broad sweeping statements.
Legal realism cannot be labelled either theory or practice in the same way as the case method. Legal realism was not a unified movement or an educational model. Nevertheless, an important concern of the realists was legal education. And different "realist" ideas for legal education can be viewed as theory or practice depending upon which representatives are selected and what aspects are emphasized.

In discussing the "practical" side of realism's relation to legal education, the obvious starting points are Frank and Llewellyn. Frank wrote a series of articles in which he advocated more "practical" training in law schools. His proposals were derived from his insight that rules do not determine case outcomes; the "fact" level is crucial. Therefore, immersion in facts is critical to understanding the world of the lawyer and to becoming a lawyer. Practical work would illustrate how the world of action was different from the world in books. For Frank, however, this view did not lead to law student as empirical social scientist. Instead, he proposed that law students become participant-observers.

Karl Llewellyn's "practical" side was more interesting and complex. He divided legal theory into three branches: the study of the ends and values involved in law (legal philosophy); the use of empirical description (legal science); and the study of the craft aspects of law, such as the machinery of justice and methods of lawyers and judges (jurisprudence). Like Frank, Llewellyn believed that the study of craft was not limited to empirical social science study—that was the job of the legal science branch of legal theory. Llew-
ellyn also was interested in the transmission of skills.48 His idea of learning skills had both an aesthetic and a theoretical dimension. Learning a craft was learning an art and, as such, had important humanistic value.49 Moreover, as Llewellyn’s tripartite division of legal theory illustrates, skills were an integral part of theory.

The “practical” side of Llewellyn and Frank was not merely a fringe element of their thinking, but derived directly from their critique of formalism and the case method. For these scholars, the narrowness of the case method limited our definitions both of law and of lawyering.

Besides Frank and Llewellyn, is there any support for the claim that realism had a practical side?50 As an academic intellectual enterprise, realism’s most prominent “positive feature”51 was its attempt to integrate other disciplines, particularly the social sciences, into the study of law.52 But, as Professor Schlegel has shown, even the social scientists had their practical agenda. The scholarly tradition of natural science and objective rigorous research was accompanied by a pragmatic reformer tradition. Empirical facts were necessary not merely to understand the underlying principles but

48. Id. at 130, 199, 260; see also The Committee on Curriculum of the Association of American Law Schools, The Place of Skills in Legal Education (K. Llewellyn, Chairman), reprinted in 45 COLUM. L. REV. 945 (1945).


50. Twining divided the realists at Columbia into the prudents—those concerned with professional training—and the scientists—those concerned solely with research. W. Twining, supra note 43, at 54.

51. Realism can be viewed more as a revolt against the formalism of the Langdellian world than as a movement which advanced any programs of its own. See Comment, Legal Theory and Legal Education, 79 YALE L.J. 1153, 1159 (1970).

52. The most ambitious part of this agenda as it relates to legal education was Columbia’s two year study of legal education in 1926–28. The curriculum was to be reorganized along functional lines and law was to be studied as a means of social control. Every available resource of knowledge was to be brought to this study. The notion seemed to be that law was to be taught as part of the social sciences. For some of the proponents of the changes the ultimate goal was that Columbia become a research institute eschewing the training of lawyers. See Faculty of Law, Columbia University, Summary of Studies in Legal Education by the Faculty of Law of Columbia University (1928) (unpublished manuscript) for an outline of the conclusions of this study. For a discussion of the deliberations and results, see Currie, The Materials of Law Study (pts. I–III), 3 J. LEGAL EDUC. 331, 341 (1951), 8 J. LEGAL EDUC. 1 (1955); Stevens, Two Cheers for 1870, supra note 7, at 470–81.
to confirm the need for reform. In this sense, the addition of social science was practical.

Even within the scientific tradition there is an ambiguity. To be scientific is to be rigorous. While the addition of social sciences to the study of law was broadening as compared to the case method, science also has a technical side that, combined with the pragmatic concerns of the scientific realists, can change legal education from a humanistic enterprise to the learning of technique. As Calvin Woodard has stated, this focus on making the law useful transformed legal scholarship and education as an inductive science based on the case method into an applied science based on practical considerations.

None of the above discussion is meant to prove that either the case method or legal realism is either theoretical or practical. What it intends to illustrate is the contingent nature of such labels. From one perspective Langdell brought law schools into the intellectual world of the University; from another perspective Langdell professionalized legal education and centered its methods in the world of practice. From one perspective legal realism brought social science theory to legal education; from another it created the "social engineer—a craftsperson who embodies both scientific rationality and the skills of practical implementation."

C. Clinical Education

Where does clinical education fit within this labelling process? Both by definition and history it starts on the practical side of the spectrum. By definition it is practice because it involves doing. Moreover, it appears to concern itself more with particulars than with the general. Its focus is the world of practical ends rather than abstract knowledge.

Clinical education, at least in the early stages of development during the 1960's, was more akin to the second


54. Woodard, supra note 13, at 718.

coming of the apprenticeship system than to an educational movement. Its initial development was largely a response to two forces: student complaints about the lack of relevance of the second and third year of law school, and CLEPR grants.\textsuperscript{56} Little thought was given to basic questions concerning what clinical education had to offer law students and law schools other than the opportunity for the earlier acquisition of real life experience. If there was an explicit educational rationale, it was related to some connection between providing service and learning.\textsuperscript{57}

In the 1970’s, pressure developed for additional skills training in law school. Chief Justice Burger began giving speeches about the inadequacy of trial advocacy.\textsuperscript{58} The Clare and Devitt Commission proposals and the development of the National Institute of Trial Advocacy lawyer training programs were responses to Chief Justice Burger’s concerns.\textsuperscript{59} There also developed a broader focus on lawyer competency which included skills in addition to trial advocacy. For example, the ABA Task Force on Competency recommended that law schools provide instruction in interviewing, counselling, and negotiation.\textsuperscript{60}

Clinical education was a natural partner of this increased emphasis on skills and competency. One of the original rationales for clinical education was skills training.\textsuperscript{61} For many, skills, by definition, can only be learned by per-

\begin{quotation}
\footnotesize
\textsuperscript{56} For useful discussions of this history, see Condlin, supra note 1, at 332–35; Grossman, Clinical Legal Education: History and Diagnosis, 26 J. Legal Educ. 162, 173–80 (1974).

\textsuperscript{57} Condlin, supra note 1, at 332–33.


\textsuperscript{60} A.B.A. Sec. Legal Educ. Admissions to Bar Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law School (1979) (R. Cramton, Chairman) [hereinafter Cramton Report].

\end{quotation}
formance. Clinical education provided opportunities for performance, and hence clinical education was the place to center skills training. This equating of clinical education with skills training further reinforced the idea that clinical education is inherently practical.

But neither the definitional approach nor this history captures the whole picture. Just as the case method and legal realism embody elements of both theory and practice, so does clinical education. Gary Bellow, in an influential article published in 1973, described clinical education as a methodology.\textsuperscript{62} For Bellow, clinical education’s underlying method was student performance of a role within the legal system and the use of this experience as the focal point for intellectual inquiry.\textsuperscript{63} By focusing attention on methodology, Bellow tried to bring to the forefront the learning issues that were submerged beneath issues such as funding and credit allocations. In so doing he was able to get beyond the notion that since doing is practice, clinical education’s inherent nature is practical.

If clinical education is a methodology, it conceivably can be used to teach any of the substantive subjects in the curriculum. If these substantive courses are “theoretical” the use of a different methodology should not change the theoretical status of the courses. Under Bellow’s definition of clinical education there is nothing inherently limiting about clinical education other than using the student’s performance as a starting point for inquiry. Some may see the student’s practice experience in legal services as limiting, but clinical education does not require placement in only legal services offices. This placement is not inherent in the nature of the methodology.\textsuperscript{64} Moreover, Bellow’s conceptualization of clinical education as methodology directly linked it to the tradition of case method teaching as methodology. If the case method could be theoretical, why not this newer method?


\textsuperscript{63} \textit{Id.} at 379.

\textsuperscript{64} \textit{But see} Klare, \textit{The Law-School Curriculum in the 1980s: What’s Left?}, 32 J. Legal Educ. 336, 342 (1982) (Clinical education has drifted away from its political moorings.).
Another important rationale for clinical education that emerged at this time was the teaching of professional responsibility. The primary funding source for clinical education, the Council on Legal Education for Professional Responsibility, had the term “professional responsibility” in its title during the 1960’s, but it was not until the mid-1970’s that a significant shift occurred toward using clinical education to teach professional responsibility.65 This link with professional responsibility could be characterized simply as a widening of the practical domain of clinical instruction. The teaching of ethics or professional responsibility has comparable intellectual status within legal education as has clinical education.66 Moreover, ethical issues frequently are considered the domain of the practitioner. On the other hand, professional responsibility can be approached as an exploration of philosophy which would be as theoretical as any other part of law school.67 Starting the inquiry into these issues from performance does not change this and, indeed, arguably strengthens the possibility of meaningful theoretical discussion.68

Related to the view of using clinical education to teach professional responsibility is using clinical education to emphasize the interpersonal elements of lawyering.69 There are two aspects to this approach. First, because lawyers constantly do their work with or through others, lawyering may be conceptualized according to the psychological aspects of these transactions. Clinical work having this focus uses existing theories developed in psychology and social psychology to understand, explain, and develop ways of doing

65. Condlon, supra note 1, at 334–35.
68. Robert Condlon recently has described the relationship between clinical education and professional responsibility as involving both a substantive and methodological focus. Substantively, ethical issues are intertwined with performance. In Condlon’s words: “it was not thought possible to consider questions of what would work without simultaneously considering questions of what was right.” Condlon, supra note 1, at 320. Condlon then goes on to question whether clinical education has fulfilled the promise of actually teaching professional responsibility and expresses strong doubts that it has. Id.
particular lawyering tasks such as interviewing or advocacy.\textsuperscript{70}

A second aspect of the "psychological school" is to question and explore issues of professional identity that students experience while acting in the role of lawyers.\textsuperscript{71} In this respect the psychological approach is related to both the professional responsibility perspective discussed above and the sociological notion of role discussed below. It is different from both of these in that it draws its insights from psychological theory rather than from philosophy or sociology.\textsuperscript{72}

Rather than borrowing from the psychologists, another approach to clinical education looks to sociology. In the book \textit{The Lawyering Process}, Gary Bellow and Beatrice Moulton use the sociological notion of role to analyze lawyering tasks.\textsuperscript{73} At one level such analysis is a sophisticated way of training lawyers to perform various lawyering tasks. By focusing on the socially generated expectations of the lawyer's various roles one can decide how and whether to fulfill those expectations. For example, in landlord-tenant court the expectations are that the lawyer will help "work out something for his client" by agreeing to pay back rent or bargaining for time for his client to move. Aggressively using procedural or substantive defenses where rent has not been paid violates these expectations.\textsuperscript{74} Consciously focusing on these role demands as socially determined but not

\textsuperscript{70} See, e.g., T. Shaffer, \textit{Legal Interviewing and Counselling in a Nutshell} (1976); A. Watson, \textit{The Lawyer in the Interviewing and Counselling Process} (1976); Goodpaster, \textit{The Human Arts of Lawyering}, 27 J. Legal Educ. 5 (1975).


\textsuperscript{72} Here, as with most visions of legal education, there is a two-sidedness to the enterprise. On the one hand, as William Simon has emphasized, there is a technocratic formalistic dimension to the psychological vision which ends up celebrating practical technique at the expense of critical theory. Simon, \textit{Homo Psychologicus: Notes on a New Legal Formalism}, 32 Stan. L. Rev. 487 (1980). On the other hand, at its best this school of clinical education encourages critical self-reflection. See sources cited supra note 71.

\textsuperscript{73} G. Bellow & B. Moulton, \textit{The Lawyering Process: Materials for Clinical Instruction in Advocacy} (1978). See generally Menkel-Meadow, supra note 69, at 558-60.

inevitable teaches lawyers what is expected of them. As importantly, it opens the possibilities of exacting a price for conformance or of consciously deviating while being aware of the costs.

As Carrie Menkel-Meadow has pointed out, this approach to lawyering can be "simultaneously procedural, instrumental and evaluative."75 Therefore, at another level, Bellow's and Moulton's analysis can be used as a way to assess critically the validity of these roles and to open up the possibility of seeing them differently. Bellow's article on legal services lawyers, Turning Solutions Into Problems: The Legal Aid Experience,76 is an example of this kind of analysis.

Thus, despite its history, clinical education is not one thing and does not have one essential nature. Clinical education can be a methodology similar to the case method, or it can be an exploration of theory borrowed from other disciplines similar to legal realism. Clinical education can be considered either theory or practice in the same way that the case method and legal realism can be either. That is, the characterization can be determined more by what features are emphasized and by the perspective of the person answering the question than by the object of the question.

This is not really surprising. Much of the question of categorization as theory or practice reflects a false dichotomy that demands that things be seen in either/or terms. Either you are contemplative or you are not; either you are dealing with general propositions or you are not. Reality is, obviously, much more complex. Any activity or educational method involves a mixture of contemplation and action, truth seeking and practical ends, general statements and specifics. Clinical education is no exception; therefore, there is a choice involved in how we view clinical education.

In Part III of this Article I argue that the way we have exercised this choice is to define clinical education as skills training. But the choice we have made is not only in our application of the labels "theory" and "practice"; how we choose to define the terms "theory" and "practice" also involves a choice that affects our views of clinical education.

75. Menkel-Meadow, supra note 69, at 559.
and the structure of legal education. That choice is the subject of Part II.

II. Practice

Given the many words written about the "basic dichotomy" in legal education between theory and practice, it is surprising that little attention has been devoted to attempting to specify what an author means when he or she uses these terms. If these terms had one unique meaning, this failure to "define" would be of little significance. However, these terms do not have singular definitions. Indeed, there are at least two different ways of looking at these terms, each of which signifies very different world views. For lack of better labels I will call one "scientific" and the other "normative."

At the beginning of this essay, theory was defined as a set of general propositions used as explanation. This definition embodies two ideas: generality and explanation. Theory has to be sufficiently general to be relevant to more than just particularized situations. A theory that applied to only

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77. See Macdonald, Curricular Development in the 1980's: A Perspective, 32 J. LEGAL EDUC. 569, 586 (1982); cf. Michelman Report, supra note 41, ch. 1, at 11 (listing a variety of things such as the nature and functions of law and legal institutions and the moral and political outlooks imminent in legal doctrine and professional role and stating "all of that is what we mean by 'theory'").

78. See C. LARSEN, MAJOR THEMES IN SOCIOLOGICAL THEORY 4 (1975) ("Theory is one of the most amorphous terms in science.").


80. See supra note 8 and accompanying text.

81. One of the most frequent reasons given for concern with theory is that theory explains at a level of generality that makes it more useful over the long run. See D. EASTON, THE Political System: An Inquiry Into the State of Political Science 4 (1967). The common way of expressing this view is to say that the best practical education is a theoretical one. Particulars change but general explanations have a more lasting value. See I. KANT, ON THE OLD SAW: That May Be Right in Theory but It Won't Work in Practice 41 (E.B. Ashion trans. 1974) ("A set of rules, even practical rules, is called a theory if the rules are conceived as principles of a certain generality and are abstracted from a multitude of conditions which necessarily influence their application.").
one instance would not be a theory at all, but would be simply a description of that one instance.\textsuperscript{82}

It is not sufficient, however, for theory to be simply general; it must also explain.\textsuperscript{83} This understanding of theory as explanation connects theory with truth. Under the classical version the relationship of theory to truth is an exclusion of activities having a practical end from the domain of theory.\textsuperscript{84} Theoretic truth was truth recognized as having value in itself, free from the distortion allegedly caused by the need to achieve practical ends.\textsuperscript{85} Related to the classical view of theory as truth is the notion that theory involves contemplation. By retreating into the world of the mind we are able to perceive in a more detached manner.

Under the scientific view, theory has come to have a highly structured definition derived from assumptions about what counts as truth.\textsuperscript{86} Contemplation, by itself, is no longer considered sufficient to produce theory. Instead,

\textsuperscript{82} Perhaps an example from law will be helpful. When we speak of the theory of the case or the holding, if the holding is stated with such particularity that it only covers the particular case and no others then it is not an explanation or theory of the case. On the other hand, if the holding or theory is stated too generally, it has little or no explanatory power for the next fact situation. The problem, of course, is to find the point at which something is sufficiently general to count as a theory but still detailed enough to explain.

\textsuperscript{83} See Ball, Plato and Aristotle: The Unity Versus the Autonomy of Theory and Practice, in \textit{Political Theory and Praxis: New Perspectives} 57, 58 (T. Ball ed. 1977) (describing evolution of idea of theorist as spectator to include the capacity to explain what was viewed and distinguish what was essential); Euben, \textit{Creatures of a Day: Thought and Action in Thucydides}, in \textit{Political Theory and Praxis: New Perspectives} 28, 34 (T. Ball ed. 1977). The idea of theory as explanation is more controversial because it is unclear what counts as explanation. My sense is that all views of theory that I will discuss include the notion of theory as explanation but differ radically in what counts as explanation and why we care about explanation.

\textsuperscript{84} Ball, supra note 83.

\textsuperscript{85} Compare Kronman, Foreword: Legal Scholarship and Moral Education, 90 \textit{Yale L.J.} 955 (1981) (defining characteristic of scholarship is concern for truth) with Kitch, The Intellectual Foundations of \textit{"Law and Economics,"} 33 \textit{J. Legal Educ.} 184, 186 (1983) ("Scientific [as] used here . . . is meant to encompass all work of description, categorization, and analysis that is carried on with an open-minded spirit of inquiry . . . . [Its] driving focus is not utility for practice. . . .").

\textsuperscript{86} Richard Bernstein has described this transformation. See R. Bernstein, \textit{supra} note 79. As the title of his book illustrates, Bernstein is discussing social and political theory, not theory in the natural sciences. His conclusions are relevant to this discussion because law seems more analogous to social theory than to natural science, Langdell to the contrary notwithstanding. Furthermore, in more recent work Bernstein has argued that his conclusions about social theory can be applied to the natural sciences. See R. Bernstein, \textit{Beyond Objectivism and Relativism} 32–33 (1983).
propositions must be set forth in a logical order which explains how they are deduced from the theory.

One may define properties and categories, and one still has no theory. One may state that there are relations between properties, and still one has no theory. One may state that a change in one property will produce a definite change in another property, and one still has no theory. Not until one has properties and propositions stating relations between them, and the propositions form a deductive system—not until one has all three does one have a theory.87

Furthermore, the propositions must be stated with sufficient precision so that they are testable and capable of verification by empirical experiment.88 Since only factual statements can be proved or disproved, normative statements are excluded from scientific theory.89 Normative statements may be interesting, even illuminating, but they do not count as theory because they cannot lead to discovery of truth. They are merely an expression of a subjective position.90

This scientific definition of theory has been challenged in a number of ways. The assumptions that there can be separation between objective and subjective, fact and value, particular and general, that allows for the discovery of “irrefutable truth”91 have been questioned not only in the social sciences but also within the natural sciences and mathematics.92 In addition, under the classical tradition, theory not only distinguished “appearance from reality, the false from the true,” but also provided an “orientation for practical activity.”93 We have lost this vision of theory and it is argued that we need to reclaim it.94

This particularized definition of theory also affects prac-

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88. See R. Bernstein, supra note 79.
89. See Black, The Boundaries of Legal Sociology, 81 YALE L.J. 1086, 1091 (1972).
90. Bernstein argues that this view of theory reflects a total intellectual orientation. R. Bernstein, supra note 79, at 51, 226.
93. See R. Bernstein, supra note 79, at 53.
94. Id.; see also Wolin, Political Theory as a Vocation, 63 AM. POL. SCI. REV. 1062 (1969).
tice. Under the scientific view practice is a specific kind of doing.\textsuperscript{95} It is the technical application of theoretical knowledge.\textsuperscript{96} Many of the same writers who challenge the scientific understanding of theory also challenge this conception of practice. They argue that we have lost a critical distinction between the technical and the practical. Practice at one time was not simply the application of technique, but it was the domain in which judgment was exercised.\textsuperscript{97} Moreover, practice was different from technical expertise because it expressly asked "the question of the good too . . . about the best way of life or about the best constitution of the state."\textsuperscript{98}

The separation between the scientific and the normative views of theory and practice is part of our tradition of legal education. Langdell’s system not only attempted to emulate scientific methodology, but also mimicked science’s aspirations to be seen as value-free.\textsuperscript{99} The realists, in turning to social science, also were interested in making law a value-free social science.\textsuperscript{100} The legal process school was still another attempt to insulate law and the legal education from choices about substantive values.\textsuperscript{101} And today the law and economics school sees itself as working within a scientific paradigm which allows it to avoid normative statements.

\textsuperscript{95} Cf. Ball, Editor’s Introduction, in POLITICAL THEORY & PRAXIS: NEW PERSPECTIVES 4 (T. Ball ed. 1977) (distinction between doing and making).

\textsuperscript{96} Id.; see also R. Bernstein, supra note 79, at 173.

\textsuperscript{97} See R. Bernstein, supra note 79, at 187; R. Beiner, POLITICAL JUDGMENT (1983); J. Habermas, THEORY AND PRACTICE (1973); A. MacIntyre, AFTER VIRTUE (1984).

\textsuperscript{98} H. Gadamer, Hermeneutics as Practical Philosophy, in REASON IN THE AGE OF SCIENCE 88, 93 (G. Lawrence trans. 1981). Within the group of philosophers who espouse this return to Aristotelian notions of practice there are different perspectives on the "good" that practice embodies. For some it is the good of the political domain; for others it is the good in performing ethically; for still others the good is in performing one’s role. For my purpose I do not believe these differences matter. In all cases they point to a conception of practice that is different from practice as technique or skills.


\textsuperscript{101} See Ackerman, Law and the Modern Mind (Book Review), Daedalus, Winter 1974, at 119, 123–24; see also White, supra note 100, at 661–62 (central presuppositions of process jurisprudence: process leads to justice, advocacy leads to truth, and expertise leads to wisdom).
Roger Cramton has argued that there are a whole set of linked attitudes that constitute "the ordinary religion of the law school classroom." Under the intellectual framework that comprises this ordinary religion:

Any true knowledge requires agreement on a mode of proof or verification. In the absence of such verification, an assertion cannot be taken as true. Since it is apparent that people differ in the values they hold and that there is no rational way to resolve these differences, a practical person will not waste time worrying about unanswerable questions.

The parallel between these observations and the arguments regarding the scientific and the normative views of theory is striking. The result of this orientation is that law school is viewed as a "training ground for technicians . . . ."

In a recent article, James White has expressed a vision similar to Cramton's. White discusses three linked ideas that describe our current view of law and lawyering. First, despite the realists, law is still "spoken of (by academics at least) as if it were a body of more or less determinate rules, or rules and principles." Second, "[t]his idea of law and legal science fits with . . . the contemporary conception of our public political world as a set of bureaucratic entities . . . functioning according to ends-means rationality." Third, "[l]aw then becomes reducible to two features: policy choices and techniques of their implementation." Finally, although White never says this explicitly, the practice of lawyering is relegated to technique.

Some of the proposals to reform legal education further

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103. Id. at 249-50.
104. Id. at 262; see also Woodard, supra note 13; Himmelstein, Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U. L. REV. 514 (1978).
105. White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. REV. 684 (1985). I could also cite numerous articles by "Critical Legal Theorists." My objective in using Cramton and White is to illustrate that this view of the dominant conception of law and legal education is held by mainstream academics.
106. Id. at 685; see also Schlegel, supra note 1.
108. Id.
109. The whole point of White's article is to recapture a vision of law and lawyering as rhetoric. Therefore his conception of law described in the text must imply a parallel conception of lawyering.
illustrate the influence of the scientific view. The suggestion that we should divide our students into two streams after the first or second year of law school—those who are seeking truth and those who are seeking the financial rewards of private practice—is based upon the idea that the pragmatic orientation of the students going into practice is inconsistent with the pursuit of truth. This assumes both a conception of truth that is in accord with the scientific vision and a view of practice that is technocratic.

The scientific vision of theory and practice also influences our perception of clinical education. In Part III, I argue that clinical education usually is equated with skills training. However, if one accepted the possibility that practice was something other than acquisition of technical skills—that it included the study of judgment and a critical assessment of values and institutions—clinical education might be viewed differently.

First, clinical education can be used to explore and to think about lawyer decisionmaking. Theory as applied to the real world is partial. The dilemma of practice is how to decide when there is no universal rule that provides the an-

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111. The suggestion that we limit law school to two years is another variation of this idea. See AALS, Carrington Report, supra; H. Packer & T. Ehrlich, *New Directions in Legal Education* (1972); Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. Legal Educ. 37 (1973). By limiting law school to two years, we can limit it to teaching theory, leaving any training that is necessary to the real world of practice. Implicit in these suggestions is the assumption that practice means teaching the acquisition of skills that can be better accomplished by practitioners. For others, the fact that most law school graduates are going to practice law means that law schools have some responsibility for the competence of their graduates. See, e.g., Cramton Report, supra note 60. Therefore, we should add to the curriculum a variety of skills training courses in the third year of law school. I agree with the latter view. However, this view still seems to accept the conflict between the theoretical and the practical. It adds a layer of practical courses on top of the theoretical core. Compare Eric Ashby's comments:

> Gestures of adaptation by universities to defend themselves against overspecialization vis-a-vis sciences are praiseworthy but suffer from the assumption that specialization and liberal education are antithetic. What is needed is a challenge to the assumption itself.


112. See the discussion of decisionmaking in Menkel-Meadow, supra note 69, at 562–64.
swer. Studying decisionmaking is one way to explore this gap.

Second, clinical education can be used to apply a critical perspective to a student's own lawyering experiences and to connect those experiences to the political, social, and psychological dimensions of lawyering. Studying decisionmaking requires an understanding of the assumptions about ourselves and the world of lawyering which govern our decisions. It is the exploration of these assumptions and the connection between them and our behavior that can lead to the critical insight that comes from trying to figure out what is this activity and what does it mean to me.\textsuperscript{113} It also can lead to the exploration of the major ethical dilemmas of the lawyer's role. Finally, it can lead to the exploration of the meaning of these activities for society—is this an appropriate and just way to organize our institutions.

An example of this process can be found in the book \textit{The Lawyering Process} by Gary Bellow and Beatrice Moulton. In a section on case preparation, Bellow and Moulton set out the "transcript" of a conversation in a bar between an attorney representing a defendant in a narcotics case and the undercover agent who made the arrest. The lawyer obtains information from the agent that results in the dismissal of the charges against his client. In the paragraphs preceding the dialogue the objectives, strategy, and assumptions of the lawyer are described. In addition, the transcript includes a column describing the lawyer's thoughts during the conversation.\textsuperscript{114}

At one level this entire exchange can be analyzed simply as an example of the technique of obtaining information from a potentially hostile witness. At another level it illustrates decisionmaking and judgment: although the lawyer

\textsuperscript{113} It also can lead to the development of learning how to learn from one's own experiences. \textit{See} Amsterdam, Opening Remarks to Professional Skills Instruction Workshop, ABA Section of Legal Education and Admissions to the Bar (Jan. 29, 1982).

\textsuperscript{114} An excerpt from the transcript is the best illustration:

\begin{center}
(\textbf{WHAT WAS SAID}) \hspace{2cm} (\textbf{WHAT I WAS THINKING})
\end{center}

\begin{center}
\textbf{ME:} How are you feeling? I heard you were in a Rockville, Maryland hospital in August but I gather you're okay now.
\end{center}

\begin{center}
\textbf{B:} Who said that? \hspace{2cm} I probably guessed right.
\end{center}
had a set of "rules" about how to conduct such interviews, the transcript combined with the annotations describing the lawyer's thoughts illustrate how the skillful lawyer adapts or changes those rules to meet the needs of the particular situation. Bellow and Moulton, however, do not stop here. At the end of the transcript, they add this postscript:

I used . . . the statement that he [the undercover agent] had been in a hospital for observation concerning narcotics. . . . It was also used in argument in the Court of Appeals. It might have cost him his job—I'm not sure—he was not given a permanent position on the force.115

This statement and the description of the lawyer's thought process allow the analysis to turn to the personal and ethical. Bellow and Moulton ask what is the effect on the lawyer to seem to treat somebody with respect and consideration when that posture is used solely to gain cooperation and when it harms the other person?116 What are the ethics of such behavior?

These questions also can turn to the political and the social. Is this behavior justified by the social institution of lawyering? The adversary system? The power of the state vis-a-vis the individual? The discriminatory use of narcotics laws? The lawyer's relationship with his client? Although this final set of questions is not explored fully in this part of

(WHAT WAS SAID)

ME: A friend of mine on the force. Hell, don't look so surprised. Anybody who does this work knows that if you don't shoot once in a while out there, you'll get yourself killed.

B: Yeah, it's rough.

ME: I hear the doctors up there can give you a worse time than the junkies. I know a guy that got hooked worse after they began than before. Never really got off it.

B: Well, they were pretty good with me. I was only in for observation.

(WHAT I WAS THINKING)

If I can reassure him that it is talked about, he may feel free to admit it. I think it sounded certain and casual to him. A friend of mine on the force had said that most undercover officers who got addicted did go to that hospital.

If I hinted he might have become addicted, he might admit he was in the hospital but not addicted.

I felt he was lying but I got what I wanted.

G. BELLOW & B. MOULTON, supra note 73, at 405.

115. Id. at 406.

116. Id.
the text, the material to do so is set out in other parts of the book.117

I am not claiming that every clinical course does the kind of analysis sketched above. Nor is it feasible to do so in every instance. My argument is that the potential is there if we choose to acknowledge it and to use it. Similarly, I am not arguing the superiority of either the normative or the scientific view.118 What is critical to my argument is recognizing that the choice involved has much to say about how we perceive clinical education. Acknowledging the scientific model as only one point of view rather than the only correct view opens up the possibility that what we mean when we say clinical education is “practical” is contingent. If the scientific view is selected, clinical education is likely to be equated with the learning of technocratic skills; if the normative view of theory is selected then clinical education can be viewed as something other than technical skills application.

III. Clinical Education as Skills Training

In Part I of this Article, I argued that clinical education could be viewed as theory. In Part II, I argued that clinical education could be viewed as practical in a much broader sense than simply skills training. However, this does not mean it has been either viewed or used in these ways. We tend to equate clinical education and skills training, and that tendency influences what we do with clinical education.

The proposition that clinical education is equated with skills training cannot be proved in a rigorous sense, just as one cannot prove that the case method is considered theoretical. Nevertheless, the ordinary discourse I have observed around law schools is evidence that it is true. For example, if a committee is formed to consider skills training, the first thing it will consider is whether the school needs more clinical education. If a curriculum committee considers clinical education, a primary part of its agenda will be assessing the need for more skills training.

Additional evidence is the instructions given to ABA accreditation teams. The instructions for review of clinical

117. Id. at 35–117
programs state that clinical education “is defined broadly to include the teaching of skills by means other than those used in the traditional classroom.”119 On page two of the memorandum giving these instructions, the heading is “Professional Skills Training.” Reference is then made to Standard 302(a)(iii) of the ABA Standards for Approval of Law Schools, which states that law schools shall offer instruction in professional skills.120

Why is clinical education equated with skills training? One reason would be that they are synonymous. Parts I and II of this Article tried to show that this is not necessarily the case.121 If I am correct that the equation of clinical education with skills training cannot be explained by something inherent either in clinical education or in legal education, what accounts for the tendency to treat clinical education


120. White Memo, supra note 119, at 2. It is conceivable that Standard 302(a)(iii) provides legitimacy to scrutinizing clinical programs, and therefore “skills training” must assume a dominant place in such scrutiny. But why would the ABA accreditation process need such a rationale? Are not all courses open to examination by the accreditation team? Moreover, if the concern is compliance with accreditation Standard 302(a)(iii), a memorandum on skills training rather than on clinical education would encourage examination of the total law school curriculum to see if that standard is being met by the whole curriculum rather than by just one aspect.

121. See also Amsterdam, Opening Remarks to Professional Skills Instruction Workshop, ABA Section of Legal Education and Admissions to the Bar (Jan. 23, 1982). Professor Amsterdam, in his presentation to the Dean’s Workshop at the ABA convention, stated:

I hope it will be agreeable to define the subject of this workshop as the clinical method of legal education, rather than adhering literally to its title “Professional Skills Instruction.” “Professional Skills Instruction” is both overinclusive and underinclusive of the topic I would like to discuss. It is overinclusive because much of what has always been taught in the law school classroom is “professional skills instruction,” how to read cases. It is underinclusive because “professional skills instruction” is not the only or even the most important objective of the new techniques of legal education . . . .

Id. at 1.
and skills training as synonymous? One place to look is to the history of the return of clinical education to the law schools during the late 1960's and the early 1970's. Here, as stated earlier, two forces coalesced—money from CLEPR and growing student demands for relevance.\textsuperscript{122} The request for relevance included both service and training aspects. Law school was viewed as irrelevant because it slighted the needs of the poor, who desperately needed legal services, and because it failed to equip students for practice. Clinical education was thought capable of fulfilling both demands.\textsuperscript{123} It would provide service by having students practice on behalf of the poor, and it would train students by having them practice. Since skills training was perceived to be what was necessary for practice, for many, clinical education became skills training.

Related to this identification of clinical education with skills training was the identification of clinical education with the apprenticeship system. Clinical education involved working under the supervision of a more experienced lawyer just as apprenticeship did.\textsuperscript{124} If apprenticeship had value, it was to provide skills training; hence, if clinical education had value, it would be to provide skills training.

During the 1970's, judges and the practicing bar helped continue the focus on clinical education as skills training. Politically, clinical education needed allies. It had received its impetus from an alliance with outsiders—CLEPR and students—and in order to sustain itself it understandably looked to support from the bar. Judges and the practicing bar during the 1970's had renewed complaints about the competence of lawyers.\textsuperscript{125} They could look to clinical education as a way of translating these complaints into demands.

\begin{footnotes}
\textsuperscript{122} See supra note 56.
\textsuperscript{123} It became apparent that although clinical education might satisfy students' desires to be of service, it could not meet the needs of the poor for service. Even if supervised properly, students could not effect a net increase in available legal services. Amsterdam, Memorandum to Stanford Law School Faculty (July 17, 1973).
\textsuperscript{124} See Kitch, Forward: Clinical Education and the Law School of the Future, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 5, 6 (E. Kitch ed. 1969). As Chase has pointed out, the analogy is flawed. What is important about clinical education is its differences from the apprenticeship system, not its apparent resemblance. Chase, supra note 38.
\textsuperscript{125} See supra notes 58–60.
\end{footnotes}
for change in legal education.\textsuperscript{126} This "natural alliance" tended to merge clinical education and competence training. Moreover, as with the focus on relevance, the focus on competence tended to emphasize the skills aspects of clinical education to the exclusion of its other possibilities.

This history, however, only partially explains why clinical education has tended to be viewed as skills training. If there are other ways to view clinical education, why has not a change occurred over time? I have no easy explanation; however, it does appear that traditional academics, students, and clinical teachers all have a stake in continuing this view of clinical education as skills training, albeit for different reasons.

One reason has been offered by those critics who emphasize what Langdell accomplished for law professors rather than for law students.\textsuperscript{127} In order to create a profession one needed a standardized unit of knowledge that was distinct from its competition. Doctrine and the case method were that unit. They were distinct from a large part of the profession because they solely involved reasoning from appellate cases and they were distinct from other disciplines by being self-contained. Therefore, under this view, to allow clinical education into the "main tent" would threaten the self-identity of law teachers because it would threaten the centrality of doctrine.

The way to ensure that clinical education has minimal impact within the law school world is to equate it with skills training. Skills training, by definition, is a marginal activity within academic circles.\textsuperscript{128} Moreover, viewing clinical education as skills training makes simulation, the least expensive form of clinical education, a more viable competitor to

\textsuperscript{126} Id.


\textsuperscript{128} "Theory" or "perspective" courses have similar status problems. They appear peripheral to law students when compared to doctrinal subjects. Ronald Pipkin’s article on Professional Responsibility courses suggests that one powerful reason for this is that the "latent message" of the law school curriculum is that Socratic teaching and doctrinal learning are more intellectually demanding and central to forming professional identity. Pipkin, Law School Instruction in Professional Responsibility: A Curricular Paradox, 1979 Am. B. Found. Res. J. 247.
clinical programs with real world practice components. The easiest goal of clinical education to fulfill through simulation is skills training.\textsuperscript{129} Indeed, one might argue that the encouragement of simulation at the expense of real practice programs is a way to ensure that clinical education is kept in the "skills box."\textsuperscript{130}

Students have an interest in viewing clinical education as skills training because they want law school to prepare them for practice. To them, skills training is necessary to fulfill that goal, and clinical education courses are the only courses that provide such training. Skills training in clinical courses is the analogue of learning doctrine in traditional courses. Without this base, students are uncomfortable about progressing to other forms of learning.\textsuperscript{131}

Last, but not least, clinical teachers have their own interests in seeing clinical education as skills training. As with most teachers, they want to satisfy students. Therefore, to the extent students want clinical courses to be skills training courses, teachers will respond, at least to some extent, to these demands. Moreover, most clinical teachers, including me, see these student demands as legitimate. Students do need skills training beyond the parsing of appellate cases.

Beyond these reasons, clinical teachers are part of the same cultural traditions that have produced the rest of legal education. Breaking down skills into their component parts and analyzing them has a quasi-scientific appeal similar to analyzing doctrine. It is concrete and can be objectified. To the extent the other goals of clinical education seem more abstract, softer, and less analytical, they may assume less status within clinical education's own hierarchy of goals. Fur-

\textsuperscript{129} Simulations fail to replicate the uncertainty of the real world and the sense that what the participant does matters not only to him or her but also to others. See, e.g., M. MELTSNER & P. SCHRAZ, supra note 71, at 42–43. On the other hand, it is easy to design simulation exercises that separate skills into their component parts. The major virtue of a simulation, its controllability as compared to real life, allows the isolation of the various components. For an excellent example of this breaking down of a skill into its component parts and the design of simulated exercises to test the performance of each part, see D. BINDER, TEACHERS MANUAL TO BINDER & PRICE, LEGAL INTERVIEWING & COUNSELING: A CLIENT-CENTERED APPROACH (1977). For a discussion of this issue that has a slightly different emphasis, see Hegland, Moral Dilemmas in Teaching Trial Advocacy, 32 J. LEGAL EDUC. 69 (1982).

\textsuperscript{130} Cf. AALS, CARRINGTON REPORT, supra note 110.

\textsuperscript{131} See Bellow, supra note 62, at 990–91.
thermore, although good skills training is difficult, these other goals are even harder to accomplish. Skills training is easier to achieve than the "softer" goals of clinical teaching. It can be objectified and assimilated to teaching doctrine: there are rule structures and exceptions.\textsuperscript{132} Therefore, just as in the regular classroom, where there can be a tendency to fall back on teaching doctrine, there can be a tendency to fall back on teaching skills in clinical courses.

If traditional academics, students, and clinical educators all have reasons for continuing to identify clinical education with skills training, why, if at all, does this identification matter? My answer is that I think the issue of labelling is important to face directly both because of its impact on how clinicians structure their teaching and how it affects legal education generally.

Regarding clinicians and their work, the image of clinical education as skills training can lead to a narrower vision of their courses than necessary. One significant harm is the lost opportunity to accomplish some of the other goals of clinical education discussed in Parts I and II of this Article. It also means missing the opportunity to confront seriously the split between theory and practice.

Second, as Kenney Hegland pointed out with regard to the National Institute of Trial Advocacy program, the whole-hearted commitment to teaching skills can lead to the reinforcement of "certain negative lessons about lawyers' obligation to the truth and how they should treat their clients and adversaries."\textsuperscript{133} If students' only academic encounter with lawyering skills is limited to technocratic concerns, the message is obvious—in the real world nothing else is important. Furthermore, with regard to clinicians themselves, the labelling of what they do as solely skills training, and hence not as intellectual or theoretical, reinforces the isolation of them from the rest of the faculty and leads to the notion that the only way to be accepted is to abandon

\textsuperscript{132} This, I think, is a partial explanation of why most clinical teachers I know (including me) find it easier to teach from Binder and Price's book on interviewing, \textit{supra} note 129, than from Bellow and Moulton's more ambitious book, \textit{supra} note 73.

\textsuperscript{133} Hegland, \textit{supra} note 129, at 71.
clinical work.\textsuperscript{134}

It is not, however, only the effect on clinicians and clinical courses that is important. An equally important consequence of this "false labelling" is to limit the potential gains legal education could achieve from clinical education. As long as clinical education is perceived as merely skills training of the kind that used to be done in a lawyer's office, it will be simply an additional second- or third-year course added on to the curriculum. But as Tony Amsterdam has stated:

A law school cannot realize most of the benefits of the clinical method by having a Clinic, or even a number of clinics sufficient to give every student one clinical course. To design a clinical program with that goal makes as much sense as designing a law school curriculum with the goal of giving each student one traditional course concerned with doctrinal analysis.\textsuperscript{135}

Given one course, a clinical program is forced either to attempt to achieve a multiplicity of goals (probably impossible to achieve within one course) or to abandon many of its goals. Furthermore, the latent message of just one clinical course is a powerful one—this activity and what it purports to teach may be fun and even potentially interesting, but it is not central to the education of a lawyer.

This latent message not only affects clinical education and its place in the law school but it also reinforces legal education's image of a solid doctrinal core that is theoretical and intellectual. Just as Langdell could define the case method as theoretical as compared to the apprenticeship system, it is easier to maintain our view of the case method as theoretical and intellectual if we can compare it to something that is not theoretical and intellectual, namely clinical education as skills training.

Other additions to traditional legal education, such as the social sciences or social theory, also suffer from the centrality of doctrine. Therefore, the reinforcement of doctrine's primary position by its juxtaposition with clinical education also contributes to keeping these other additions marginal. Recognizing that much of legal education can be

\textsuperscript{134} Cf. Schlegel, supra note 53, at 20 (discussing "problem" of bringing social science to the law school).

\textsuperscript{135} Amsterdam, supra note 123, at 1.
called either theory or practice depending upon the circumstances does not necessarily guarantee change in this status, but it would certainly be a step forward.

CONCLUSION

In this Article I have argued that the way we label aspects of legal education as “theory” or “practice” and what we mean by those labels involves choices on our part and that those choices have affected how we view and use clinical education. My reason for this exploration is not to “elevate” clinical education to the status of being theoretical.136 Nor is my argument that clinical education should substitute for the addition of social science or social theory to the curriculum.137 But as long as the dialogue in legal education is characterized as how much theory (traditional courses) vs. how much practice (skills training), the framing of the issue determines the answer. Traditional courses are at the core with some practice at the periphery. We might argue about the relative size of the core and the periphery, but that would be the extent of the dialogue. By definition we know what is central. On the other hand, perhaps, if the issue were perceived so that we agreed that little of what we do within legal education has a unitary nature of theory or practice and that our conceptions of theory and practice can be broadened, then we might just ask how the total package of legal education should be structured without allowing a priori labelling to determine the answers we reach.

136. See Clouser, Clinical Medicine as Science: An Editorial, 2 J. Med. Phil. 1 (1977) (question of whether clinical medicine was scientific is not merely a semantic or status issue but a question that is important because its exploration leads to greater understanding and critical self-assessment).