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Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory

by

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The critical theory project, as propounded by the critical legal studies (cls) movement, resembles in certain respects the clinical education project as some clinical educators describe and practice it. Although proponents of other alternative legal theories, most notably critical race theorists and feminist legal theorists, have engaged the critical legal

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1. I use “cls” in this Essay rather than the more common typography “CLS” because I have been persuaded by Mark Tushnet’s assertions about the politics of capitalization. Capitalization indicates something beyond the ordinary, whereas lower-case letters indicate that “critical” and “legal” are ordinary adjectives preceding the word “studies.” See Mark Tushnet, Critical Legal Studies: A Political History, 100 YALE L.J. 1514, 1516 n.4 (1991).


studies movement in a discussion of its ideas, clinical educators have yet to do so. This Essay represents a preliminary attempt to fill that void, highlighting the resemblances between the two movements, and elaborating a clinical educator's perspective on some of the ideas associated with critical legal studies.

An examination of the relationship between clinical legal education and critical legal studies promises to be a profitable one, since each can trace its philosophical roots to the school of legal realism. Critical legal studies' proponents, particularly those who have espoused and elaborated the indeterminacy critique, are the heirs to the version of legal realism generally known as "rule skepticism." Rule skepticism refers to the idea that our legal system, following its own rules, can produce diametrically opposed conclusions on most legal questions, revealing that doctrinal logic rarely compels a particular result.

Clinical legal education is rarely invoked when scholars describe the modern day offspring of legal realism. This is an oversight, as clinical legal education is the heir apparent to the version of legal realism known as "fact skepticism." Fact skepticism refers to the idea that the legal system is incapable of reconstructing the complexity of past events with enough accuracy to afford certainty to decisionmakers or observers about what has occurred and what should occur. The respective historical


5. See Tushnet & Jaff, supra note 4, at 361; see also Jerome Frank, Law and the Modern Mind at viii (1949) (describing the preoccupations of the "rule skeptics").

6. Although they do not link clinical legal education and fact skepticism, Tushnet and Jaff implicitly recognize the link when they describe a broad law-in-action approach as the contemporary version of fact skepticism. Tushnet & Jaff, supra note 4, at 376-77. Their description of the law-in-action approach, however, bears little resemblance to clinical education. See infra notes 90-97 and accompanying text.

7. See Tushnet & Jaff, supra note 4, at 361. Jerome Frank's description of fact skepticism is far more graphic:

[T]he fact skeptics go much further [than the rule skeptics]. Their primary interest is in the trial courts. No matter how precise or definite may be the formal legal rules, say these fact skeptics, no matter what the discoverable uniformities behind these formal rules, nevertheless it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in
links of clinical legal education and critical legal studies to related branches of legal realism suggest that the two movements have overlapping concerns that may recommend greater institutional awareness, communication, and cross-development.

I. The Relationship of Clinical Legal Theory to Critical Legal Theory

A. Clinical Legal Theory

[A]lthough the lawyer may not always be aware of it, in his day-to-day tasks of counselling, planning and contending, he is engaged in activities that philosophy—as well as such related disciplines as psychology and sociology—has long sought to analyze and illuminate. . . . In view of this, it is curious that those concerned with law have not more fully exploited the wealth of available philosophical—and related theoretical—literature.8

A lawyer’s ordinary professional decisions contain political and moral content.9 In their daily practice, “lawyers amend, abrogate, and enforce the law, and in the process, determine much of law’s meaning for persons who come in contact with it.”10 The multitude of assumptions most (not all) lawsuits, not yet begun or not yet tried . . . . [W]hen pivotal testimony at the trial is oral and conflicting, as it is in most lawsuits, the trial court’s “finding” of the facts involves a multitude of elusive factors: First the trial judge in a non-jury trial or the jury in a jury trial must learn about the facts from the witnesses; and witnesses, being humanly fallible, frequently make mistakes in observation of what they saw and heard, or in their recollections of what they observed, or in their courtroom reports of those recollections. Second, the trial judges or juries, also human, may have prejudices—often unconscious, unknown even to themselves—for or against some of the witnesses, or the parties to the suit, or the lawyers.

Those prejudices, when they are racial, religious, political, or economic, may sometimes be surmised by others. But there are some hidden, unconscious biases of trial judges or jurors . . . . Concealed and highly idiosyncratic, such biases—peculiar to each individual judge or juror—cannot be formulated as uniformities or squeezed into regularized “behavior patterns.” In that respect, neither judges nor jurors are standardized.

The chief obstacle to prophesying a trial-court decision is, then, the inability, thanks to these inscrutable factors, to foresee what a particular trial judge or jury will believe to be the facts.

FRANK, supra note 5, at xi-xiii.

8. WILLIAM R. BISHIN & CHRISTOPHER D. STONE, LAW, LANGUAGE AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD at vii (1972).


10. Condl, supra note 9, at 48.
and biases, values and norms, embedded in law's workings renders this an inevitable process, though it remains largely unexamined and unarticulated.\textsuperscript{11}

Clinical legal education, with one foot in academia and the other in the practice of law,\textsuperscript{12} represents an ideal vantage point from which to scrutinize conventional lawyers' practices\textsuperscript{13} and bring the theories that prefigure them into conscious awareness.\textsuperscript{14} Only after realizing and confronting these new theories can one endeavor to improve them and, as a consequence, improve the practice of law.\textsuperscript{15} The examination of one's own law practice—a practice that can contribute to the furtherance or frustration of substantive justice—provides a firm experiential ground from which to consider philosophical conceptions of justice, fairness, and equality.\textsuperscript{16}

Exploring these philosophical considerations from the perspective of one's own lawyering is the subject of clinical education. This choice of subject matter pours practical content into otherwise abstract and elusive norms. Through this process, clinical education helps to establish conditions essential for understanding and reforming legal practice and the legal system. This endeavor reveals ethical concerns and has powerful ethical implications.\textsuperscript{17}


\textsuperscript{12} Although clinical legal education can take many forms, I am using that label in this Essay to represent its original and most typical meaning: a law office setting affiliated with a law school course in which students, under supervision, represent indigent clients. Bob Condlin describes this clinical model as \textit{primum inter paria}. See Condlin, supra note 9, at 46.

\textsuperscript{13} See, e.g., Carrie Menkel-Meadow, \textit{The Legacy of Clinical Education: Theories about Lawyering}, 29 CLEV. ST. L. REV. 555, 556 (1980).

\textsuperscript{14} See, e.g., Kenneth R. Kreiling, \textit{Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision}, 40 Md. L. Rev. 284, 290-91 (1981) (contending that lawyers' "theories of action" depend upon: (1) assumptions—relevant stated or unstated suppositions or beliefs, (2) governing variables—the factors within individuals' control such as the level of anxiety and time expended, (3) core values—criteria upon which basic behavioral choices are made, and (4) action strategies—rules for taking action in recurrent situations).

\textsuperscript{15} Id. at 289-95.

\textsuperscript{16} See Condlin, supra note 9, stating:

\textit{One can have normative theories about the proper performance of lawyer practices, and theories about how lawyer practices contribute to the justice of the legal system as a whole.... The ability to judge day-to-day law practice against ... standards of justice and fairness is an essential quality of a good citizen and a good lawyer.}

\textit{Id. at 48, 50-51 (footnote omitted).}

\textsuperscript{17} See, e.g., Phyllis Goldfarb, \textit{A Theory-Practice Spiral: The Ethics of Feminism and
When clinical educators define their subject matter this broadly, clinical education can enhance the relationship between legal theory and legal practice. In the hands of clinical educators, experience can generate theory which can circle back to inform experience, which in turn can alter, refine, and improve the theory. In sum, clinical legal education contains an implicit epistemological theory, and its theory is inseparable from its practice.\(^{18}\)

Clinical education also represents a useful vantage point from which to examine other theories of law. In a previous article I sought to illuminate feminist legal theory from the perspective of clinical education and, conversely, to illuminate clinical education from the perspective of feminist theory.\(^{19}\) I argued that despite differences in focus, clinical education and feminist theory—both alternative viewpoints to traditional legal methods—represent compatible enterprises.\(^{20}\) So too might clinical education illuminate ideas commonly associated with the cls movement, and the simultaneous consideration of each promises to generate new insights into the role of law and legal processes in daily life.

B. Relationship to Critical Legal Theory

The cls literature develops, among other things, a theory of law as legitimation, exposing the manner in which law reflects and creates a social organization built on inequities of power and wealth. Cls theorists have suggested that legitimation works through methods of legal reasoning. By addressing social conflicts through doctrine, the legal system projects an image of disinterested arbiters who fairly resolve conflicts through the inexorable logic of neutral doctrinal principles.\(^{21}\)

In this manner, legal culture induces acquiescence to institutional structures that are built on the values of liberal capitalism while obscuring recognition that these values are preordained choices derived from a particular set of power relations.\(^{22}\) Importing methods of deconstruction

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\(^{18}\) Id.; cf. Stanley Fish, Dennis Martinez and the Uses of Theory, 96 YALE L.J. 1773, 1774 (1987) (arguing that theory is rooted in practice but performs a narrow and limited role in understanding practices). For a critique of Fish's constricted use of the concept of "theory," see Brook Thomas, Stanley Fish and the Uses of Baseball: The Return of the Natural, 2 YALE J.L. & HUMAN. 59 (1990).

\(^{19}\) See, e.g., Goldfarb, A Theory-Practice Spiral, supra note 17.

\(^{20}\) Id. at 1667-74.


\(^{22}\) Id. at 281-92.
from critical literary theory, cls has sought to reveal the inherent indeterminacy of the categories and values underlying legal thought and, thus, the logical instability of the choices made by our legal culture.\textsuperscript{23} Through these methods, cls proponents hope to engender an intellectual climate conducive to constructing a world of less hierarchy and more substantive justice.\textsuperscript{24}

In this description of critical legal theory, one can hear a resonance with clinical legal theory. Like clinical educators, critical legal scholars seek to illuminate the assumptions, biases, values, and norms embedded in law's workings in order to heighten awareness of the political and moral choices made by lawyers and the legal system.\textsuperscript{25} Although critical legal theorists focus more on legal doctrine and clinical legal theorists on legal practice, both work to make conscious the tacit theories that the legal system embodies and expresses. Each movement conducts this project in the interest of remaking these theories conform more closely with visions of a fairer society.\textsuperscript{26}

In other words, both cls advocates and clinical legal educators are engaged in a project of "theoretical deconstruction."\textsuperscript{27} Each movement hopes that such a project will generate a climate favorable to social change. Although the cls approach to the project is more self-con-
sciously political in content than the clinical approach (a basis on which critical theorists have powerfully critiqued clinical education),\textsuperscript{28} each approach is motivated by ethical sensibilities and sparked by an interest in ameliorating injustice.

II. Critical Legal Studies and Criminal Procedure

A promising start for the development of a clinical perspective on critical legal theory involves examining a text from the perspective of each movement, thereby providing an opportunity to compare and contrast approaches. Mark Tushnet and Jennifer Jaff's \textit{Critical Legal Studies and Criminal Procedure}, published in the \textit{Catholic University Law Review},\textsuperscript{29} facilitates this methodology. The article chooses a text, the Supreme Court's opinion in the case of \textit{Bordenkircher v. Hayes},\textsuperscript{30} and offers some initial possibilities on how critical legal thinkers would analyze the case and the problem of criminal procedure that it confronts: prosecutorial vindictiveness in the plea bargaining context. From the perspective of clinical education, I will assess the approach offered in that article, then describe how a student and a professor involved in a criminal clinical program might encounter and address the same procedural issue.

A. \textit{Bordenkircher v. Hayes}

Tushnet and Jaff use \textit{Bordenkircher v. Hayes} to develop and illustrate the concept of indeterminacy. They recite the facts of the case as follows.\textsuperscript{31} Paul Hayes was charged with passing a bad check in the amount of \$88.30.\textsuperscript{32} His prior record included a sexual assault committed more than ten years earlier, when he was seventeen, for which he had served five years in a reformatory. The record also included a robbery committed several years before the current charge, for which he had served five years on probation. The prosecutor offered Hayes a five year sentence in exchange for a guilty plea on the bad check charge. If Hayes did not plead guilty, the prosecutor indicated that he would have him

\footnotesize{\textsuperscript{28} See, e.g., William H. Simon, \textit{Homo Psychologicus: Notes on a New Legal Formalism}, 32 \textit{Stan. L. Rev.} 487 (1980) (criticizing "psychological vision" for failing to confront the political character of law and legal practice). For a clinician's reply that Simon's critique is unfairly reductive, see Menkel-Meadow, \textit{supra} note 13, at 565 n.61.}

\footnotesize{\textsuperscript{29} Tushnet & Jaff, \textit{supra} note 4.}

\footnotesize{\textsuperscript{30} 434 U.S. 357 (1978).}

\footnotesize{\textsuperscript{31} Tushnet & Jaff, \textit{supra} note 4, at 362.}

\footnotesize{\textsuperscript{32} The actual charge was "uttering a forged instrument," \textit{Bordenkircher}, 434 U.S. at 358, a more serious offense than the words "passing a bad check," with the implication of knowingly writing a check on insufficient funds, might lead the reader to conclude.}
indicted under the state’s habitual criminal statute, which provided for a mandatory life sentence to be imposed on a third-time felon. Hayes did not accept the plea offer. As threatened, the prosecutor indicted Hayes as a habitual criminal. Hayes was convicted and received a life sentence.

On appeal, Hayes claimed that the prosecutor’s bargaining tactics violated due process by penalizing him for exercising his constitutional right to trial. The Supreme Court, split five-four, rejected this argument, finding the prosecutor’s actions to be a legitimate outgrowth of a system largely dependent on plea bargaining. Some of the dissenters were troubled, among other things, by the fact that the habitual offender statute had been repealed by the time the Supreme Court heard the case. The original statute had been replaced by one under which Hayes’ first conviction was disqualified from enhancing his sentence because he was under eighteen at the time of the offense. Therefore, under the prevailing law, his maximum prison exposure was far less than the life sentence he had in fact received.

B. The Critique of Formalism

Having selected these facts from the Supreme Court’s already expurgated facts, Tushnet and Jaff demonstrate that no set of general principles—that is, no version of legal formalism—inexorably leads to the result in Bordenkircher, or, by extension, to the result in any case. They offer several versions of legal formalism to illustrate this contention, explaining how each set of principles could lead to the result in Bordenkircher or to its opposite. Their understanding of formalism is quite broad, encompassing not only the standard target of other cls writing—classical doctrinal formalism—but also formalisms based on principles of moral philosophy, law and economics, and the sociology of the professions. Moreover, the authors are careful to indicate that their list does not exhaust the field of formalisms that one might invoke to address a criminal procedure issue.

(I) Doctrine

Tushnet and Jaff develop most fully the familiar cls critique of classical doctrinal formalism, demonstrating how following the logic of prin-
ciples established in prior precedents leads to contradictory results. The result one achieves depends entirely on which set of relevant precedents one chooses. The precedents disapproving of prosecutorial vindictiveness in retaliation for a defendant's exercise of constitutional rights are motivated by a concern for fairness in individual cases and lead to the conclusion that Hayes' argument should prevail. On the other hand, the precedents generally approving of plea bargaining focus on protecting an important aspect of a larger systemic design and lead to the conclusion that a prosecutor's insistence on the exchange of constitutional rights for sentencing benefits represents legitimate bargaining. According to the latter set of precedents, the Supreme Court decided correctly. In pursuing our doctrinal analyses, nothing directs us to prefer individual protection over systemic protection, or vice versa. Nor would such direction cleanly resolve the indeterminacy dilemma, since one can construct individual and systemic arguments in support of each result.

(2) Moral Philosophy

Tushnet and Jaff use a similar style of analysis to demonstrate the indeterminacy of each of the other brands of formalism. A moral philosopher might argue that deduction from fundamental philosophical principles leads to a particular result in Bordenkircher. By contrast, the authors demonstrate how a theory of free will in plea bargaining can lead equally to one conclusion or to its opposite, depending on how free will is constructed, how one evaluates the constraints under which plea bargaining occurs, and whether one views bargaining as occurring inside or outside the adversary system. Similarly, using a theory of retribution, one can argue either against habitual offender statutes that permit disproportionate punishment for a subsequent offense or in support of habitual offender statutes when appropriate retribution appears not to have been exacted for the underlying offenses.

(3) Law and Economics

Likewise, using law and economics principles, one would treat plea bargaining as a market system that reaches "socially optimal" results through the self-interested negotiations of each party. Regulations

37. Id. at 363-67.
38. For example, one might construct a defendant's choice to accept or reject a plea offer as an exercise of free will. However, due to the sentencing discount typically foregone by rejection of a plea offer, one might consider the encumbrances imposed on a defendant's choice to be so considerable as to undermine the possibility of free will. See id. at 368-69.
39. Id. at 368-69.
40. Id. at 370.
would interfere with the effective functioning of the plea market, and argue against Hayes' position that the court should prohibit certain negotiation strategies of one party. On the other hand, Tushnet and Jaff identify flaws in the plea market, supporting the notion that the prohibition of certain negotiation strategies will improve market performance. Among them, for example, is the recognition that a prosecutor's preferences are not coterminous with the preferences of society's law-abiding citizens, and that those working and residing in correctional institutions, not prosecutors, feel the direct effects of a prosecutor's insistence on unduly harsh pleas. Consequently, a prosecutor may seek suboptimally high pleas with excessive social costs.

(4) Organization Theory

Finally, Tushnet and Jaff examine the principles of organization theory—or, in their words, the sociology of the professions—which lead to results that "make life easiest for the repeat players in the system." The unrestricted plea bargaining that Bordenkircher permits promotes the interests of criminal justice professionals, such as prosecutors, defenders, and judges, by generating a higher number of pleas. On the other hand, the authors observe that if the criminal justice participants view their professional interests as aided by defendants' beliefs that they have been treated fairly—certainly, correctional officials are likely to view their own interests in this way—then Bordenkircher should have come out the other way.

The formalism of the sociology of the professions, like all other formalisms, cannot locate general principles that lead us down the path of logical necessity to a particular destination. No metaframework is available to help us choose the right principles from which to begin the analysis. Therefore, according to the authors, all forms of formalism leave us afloat. This argument represents the contemporary version of legal realism's rule skepticism.

41. Id. at 370-71. In this section Tushnet and Jaff draw on Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. LEGAL STUD. 289 (1983).
42. Tushnet & Jaff, supra note 4, at 373.
43. Id. at 374.
44. Id. at 375.
45. "If we shift the frame—from the individual to the systemic level, from abstract moral philosophy to specific institutions, and so on—we can produce alternative results. Yet neither the formalisms nor any metatheory specifies what frame we should use." Id. at 376.
III. Clinical Response to the Article

How might a participant in a criminal clinic view Tushnet and Jaff's article? From the standpoint of a clinician in the midst of daily practice, their arguments, though skillfully presented, border on the inconsequential. Only from the standpoint of the academy, where traditional legal views can hold great sway, and where the predominant teaching methods often implicitly endorse the norms of formalism, are such arguments likely to gain influence.46

A. Informalism

Formalism has a weak grasp in clinical settings because clinics function in the midst of "informalism."47 Clinical participants regularly confront the phenomena, played out by a variety of criminal justice actors, that combine with or override doctrine in determining the outcomes of cases. Far too often, clinical students have had the experience of entering court secure in the knowledge that the law is squarely on their client's side, only to face a judge who rules against the client. Occasionally, they have experienced feeling that the law leans against them but that powerful equities lie on their side, offering hope of a favorable resolution. In some cases clinical students can voice their own arguments as well as their opponent's arguments, finding each set independently persuasive. In a vivid, immediate, and sometimes intuitive way, clinical students hear the message of doctrine's indeterminacy.

Perhaps long-suffering formalists will not hear the message in the clear tones that Tushnet and Jaff would have them hear it. Anyone sufficiently invested in a particular point of view can resist the call of an-

46. Duncan Kennedy has elaborated a biting critique of traditional legal education. See Duncan Kennedy, Legal Education as Training for Hierarchy, in THE POLITICS OF LAW, supra note 21, at 40. I mean to suggest only that the convention of traditional doctrinal teaching, when it provides no social or historical context for understanding black letter law, conveys a tacit endorsement of formalist explanations of law's meaning. Although not all academic law is taught according to this convention, my point is simply that where it is so taught, Tushnet and Jaff's critique has most force. In other contexts, like a clinical context, their critique is less useful.

47. Jerome Frank describes the "unserenity" that characterizes trial court practice: "[A trial] courtroom is, as Wigmore notes, 'a place of . . . distracting episodes, and sensational surprises.' The drama there, full of interruptions, is turbulently conducted, punctuated by constant clashes between counsel and witnesses or between counsel." FRANK, supra note 5, at xxix. This description, vivid though it is, omits all of the even less stylized and therefore more unpredictable, informal, and varied interactions that are involved in handling a case prior to trial. Frank has referred to the interactions that construct the "atmosphere" of a case as "the rough-and-tumble activities of the average lawyer's life." See Jerome Frank, Why Not a Clinical Lawyer-School?, 81 U. PA. L. REV. 907, 908 (1933).
other. But participants in a clinic all too quickly realize that people, not the doctrines they invoke, make legal judgments. These clinical experiences may lead to insights about how a decisionmaker’s world view informs legal outcomes. Nevertheless, in the first example cited above the student could view the judge as simply refusing to apply the “correct” formal doctrine. The student might believe that formalism is right, but that the judge is a maverick who, due to his or her own aberrant values or psychological profile, has failed to abide by it, and thereby made the wrong decision. In the second example the student may see the sympathetic nature of the client’s case as a factor that can unduly influence a judge to reach an individually desirable, but formally incorrect result. In the last example the student’s interpretation of the ease with which she articulates opposing arguments may be that the case is very close. She may feel that her lack of experience renders her unable to determine the better formal result.

Some shades of truth may inhere in these students’ positions, in spite of their superficial appearance. But little turns on that possibility, be-


49. Richard Boldt has reminded me that clinical students may explain the nonformalist outcomes that they observe by marginalizing their own experiences of representing poor people: “this is just poor people’s law.” The use of classroom materials, especially empirical or ethnographic materials about lawyering for nonindigent clients, can help enlarge the students’ set of experiences and challenge this otherwise easily reached conclusion. See Richard Boldt & Marc Feldman, The Faces of Law in Theory and Practice: Doctrine, Rhetoric, and Social Context, 43 HASTINGS L.J. 1111 (1992).

50. See, e.g., Lesnick, supra note 48, at 440 (Although “legal principles are [not] wholly indeterminate,” and “a judge's perception of the world through a particular perspective is [not] wholly determinative of outcomes . . . a significant channeling goes on,” and “a judge's response to one legal issue may parallel his or her response to another, doctrinally unrelated one.”). Lesnick views this observation as “moderate,” “measured,” and “supported by the experience of nearly all practitioners.” Id. at 440 n.52. Clinical students who observe the influence of decisionmakers’ world views on legal outcomes would do well to consider how particular lawyering choices might challenge the pre-existing views that could work to their clients’ detriment. See Goldfarb, A Theory-Practice Spiral, supra note 17, at 1684-86. The detrimental pre-existing views might even belong to the students themselves. Id. at 1677-83.
cause these are precisely the sorts of issues that clinical students and clinical teachers can discuss. In these discussions doctrine’s indeterminacy—or the guidance of moral philosophy, cost-benefit analyses, organizational theory, or some other framework—is the question rather than the answer. Clinical students and clinical teachers arrive at their tentative answers only after an extended period of empiricism and dialogue. As a result, their answers will look right, feel right, and conform to their experiences, reducing the likelihood that they will be persuaded by arguments working solely on an analytic level.

B. Nihilism

Learning about the indeterminacy of legal formalism through analytic routes alone poses particular dangers. Although not a necessary conclusion of the indeterminacy claim, the charge of nihilism can be leveled easily, especially by those who feel threatened by the loss of analytic landmarks.\(^{51}\) Moreover, the trap of nihilism can ensnare a vulnerable young law student. If all first principles lead us anywhere and nowhere, why have any?

If they wish, Tushnet and Jaff, with some difficulty, can defend themselves against the nihilism charge. More importantly, they can help the vulnerable young law student resist nihilism’s pull. The authors can argue that when we are unconstrained by the false determinism of formalism, we are free to choose and defend our first principles and to argue for the good to which they may lead. While trying to remain aware of our own position’s imperfections, we can strive for values we deem worthy and seek to persuade others of their merit.\(^ {52}\)

The difficulties of constructing this position analytically can be more demanding than constructing it experientially. The awareness of law’s indeterminacy does not block a clinical student’s view of the harm that people suffer and the help that legal decisionmakers can provide. It cannot prevent clinical participants from standing for something, as they must, because they are standing with someone who needs their legal assistance.


At least sometimes, the position that we take in these clinical circumstances will appear socially desirable in a broad sense. Articulating why that seems true and how it differs from instances in which the opposite seems to hold is an important analytic exercise. Furthermore, the exercise has an especially acute lesson when it coincides with the recognition of law's indeterminacy. The lesson is this: the fact that we cannot prove the truth of what we know does not preclude us from asserting truth or truly knowing it. Nor does it mean that we cannot act to allay the human suffering that we observe. The difference between the clinical participant and the critical legal studies proponent, each aware of law's indeterminacy and faced with the problem of prosecutorial vindictiveness in plea bargaining, is that the clinical student is obliged to do something in the situation in which that problem arises.

C. Inductive and Deductive Reasoning

Clinical legal theory as practiced in law school clinics combines inductive and deductive reasoning, whereas critical legal theory of the variety offered by Tushnet and Jaff exhibits greater dependence on deductive approaches. In this sense, critical legal theory has often been structurally similar to, though substantively divergent from, the mainstream legal theory that it attacks. Each has often relied on abstract analyses of doctrines that emerge from appellate case law to construct different conclusions. Although critical legal theorists use the methods of traditional case analysis to demonstrate their inadequacy, these theorists can become mired in the demonstration, never moving beyond that well-traveled terrain.

Clinical educators would challenge the cls preoccupation with analysis of appellate cases as a vehicle for developing an understanding of the

53. See Condlin, supra note 9, at 48-51.

54. This seemingly paradoxical conclusion is similar to that drawn by authors writing from other alternative perspectives—e.g., feminist, humanist, communitarian—outside of clinical settings. See, e.g., Bartlett, supra note 48, at 880-84 (A "positional" stance on truth "conceives of truth as situated and partial," acknowledging "the existence of empirical truths, values and knowledge, and also their contingency."); Mark Edmundson, The Ethics of Deconstruction, 27 Mich Q. Rev. 622, 635 (1988) (Belief is "provisional," "open to revision" but "for the time being, committed."); Jerry Frug, Argument as Character, 40 Stan. L. Rev. 869, 876 (1988) (The awareness that answers to important questions are "tentative and contestable," does not make them "meaningless or arbitrary."); Lesnick, supra note 48, at 445-46 (The realization that one's world view is always "up for grabs," helps us "hold on more securely, yet less tightly, to our most basic beliefs.").

55. Cf FRANK, supra note 5, at xii (arguing that because the rule skeptics focus solely on "upper-court decisions," they are "but the left-wing adherents of a tradition. It is from the tradition itself that the fact skeptics revolted.").
legal system. Rather, they would examine how shifting the focus to the multidimensional world of law-in-operation might affect one's insights and explanations of legal phenomena. Choosing analysis of appellate cases as a primary method of understanding law ties critical scholars too closely to a particular set of power relations and thereby limits the scope, and perhaps the accuracy, of their social theory. This method

56. Jerone Frank’s critique of legal education poses an equally apt challenge to those who focus primarily on appellate cases:

[T]hey do not study cases. They do not even study the printed records of cases (although that would be little enough), let alone cases as living processes. Their attention is restricted to judicial opinions. But an opinion is not a decision. A decision is a specific judgment, or order or decree entered after a trial of a specific lawsuit between specific litigants.

. . . . It is absurd that we should continue to call an upper court opinion a case. It is at most an adjunct to the final step in a case (i.e., an essay published by an upper court in justification of its decision).

Frank, supra note 47, at 910-16 (emphasis in original).

57. This was Frank’s prescription for legal education generally. Id. at 916 (“Law students should be given the opportunity to see legal operations. Their study of cases should be supplemented by frequent visits, accompanied by law teachers, to both trial and appellate courts.”) (emphasis in original).

58. Cf. Frank, supra note 5:

[Most of the rule skeptics, restricting themselves to the upper-court level, live in an artificial two-dimensional legal world, while the legal world of the fact skeptics is three-dimensional. Obviously, many events occurring in the fact skeptics’ three-dimensional cosmos are out of sight, and therefore out of mind, in the rule skeptics’ cosmos.

The critical anti-skeptics also live in the artificial upper-court world.

Id. at xi-xii.

59. [Rule] skeptics cold-shoulder the trial courts. Yet in most instances, these skeptics do not inform their readers that they are writing chiefly of upper courts . . .

When a trial court, relying on inaccurate testimony, misapprehends the real facts, it decides an unreal, hypothetical case. An upper court is still more likely to do so; for, further removed from the real facts, it usually uses, perforce, the trial court’s version of the facts as something “given.” As the trial courts in most cases have an uncontrollable power (“discretion”) to choose the facts—that is, to choose to believe one witness rather than another—those courts, not the upper courts, play the chief role in court-house government. All of which goes to expose the fallacy of the Upper-Court Myth . . .

What does it mean to say that the facts of a case are substantially similar to those of an earlier case? It means, at most, merely that the trial court regards the facts of the two cases as about the same. Since, however, no one knows what the trial court will find as the facts, no one can guess what precedent ought to be or will be followed either by the trial court or, if an appeal occurs, by the upper court. This weakness of the precedent doctrine becomes more obvious when one takes into account the “composite” factor, the intertwining of rules and facts in the trial court’s decision.

This weakness will also infect any substitute precedent system, based on “real rules” which the rule skeptics may discover, by way of anthropology—i.e., the mores, customs, folkways—or psychology, or statistics, or studies of the political, economic, and social backgrounds of judges, or otherwise. For no rule can be
renders critical legal theorists, like traditional legal theorists, vulnerable to Jerome Frank's concern that the law school's predominant focus on appellate cases is analogous to teaching horticulture by using only cut flowers.60

In contrast, clinical legal theorists seek to study flowers as they grow, a demanding method that brings them into contact with the myriad, intricate phenomena that nurture or impede floral growth. Yet no other method offers promise of a fuller understanding of the dynamics of flowering. No matter how many species of cut flowers one scrutinizes or the number and variety of patterns such scrutiny uncovers, one can only come to know flowers broadly and deeply by coming to know them in the complex habitats in which they have taken root. Understanding flowers, then, requires understanding flowers-in-relation to sun, rain, wind, pests, weeds, humans, and all other forces of interaction. One cannot forego an inductive method of analysis—close observation and broad information gathering before drawing conclusions about the dynamics of law and lawyering—when, like flowering, one's subject matter interacts with so many other phenomena.

D. Challenging Assumptions

Another advantage of studying law in the practice environments in which one experiences its workings, when contrasted with an abstract appellate case approach, is that one's pre-existing assumptions, some of them erroneous, are more likely to become visible.61 Tushnet and Jalfs's article contains several examples of assumptions that are likely to face challenges when confronting the everyday realities of criminal practice. For example, the authors, while recognizing the existence of innocent

hermetically sealed against the intrusion of false or inaccurate oral testimony which the trial judge or jury may believe. . . . Anyone who has ever watched a jury trial knows the rules often become a mere subsidiary detail, part of a meaningless but dignified liturgy recited by the judge in the physical presence of the jury and to which the jury pays scant heed.

*Id.* at xi-viii (citation omitted).

60. Frank, *supra* note 47, at 912.

61. See, e.g., Goldfarb, *A Theory-Practice Spiral*, *supra* note 17, at 1648-51; Kreiling, *supra* note 14, at 289-95. Although he is speaking of interdisciplinary education generally rather than clinical education specifically, James Boyd White makes a similar observation:

An important consequence of this kind of study is that it would bring to the center of consciousness, where it could be studied and criticized, the assumptions underlying the culture of law and of our larger culture; this in turn might enable us better to perform our lawyers' functions of cultural criticism and transformation.

defendants, endorse the assumption that "almost all defendants are factually guilty" or have "committed the crimes with which they are charged."  

Most clinic students enter criminal clinical programs with this assumption as well. Yet many leave these programs with a far more complicated view. The number of apparently innocent clients is often higher than they supposed, the number who present facts about which they are genuinely uncertain is far greater, and even when they feel as if they can largely reconstruct the pertinent events that underlie the charges, the degree of factual and philosophical complexity often makes the issue of guilt or innocence fundamentally ambiguous.  

It is more difficult to imagine this ambiguity than to face it. But facing it requires opening oneself to the experience of criminal casework. While making this choice need not be a prerequisite to speaking about these matters, at least some vicarious experience, perhaps through literary or ethnographic accounts or through factually rich empirical research, may be necessary to inform one's opinions on criminal justice issues.

In another passage of their article Tushnet and Jaff again reveal a tendency to construct defendants stereotypically. In describing the institutional bias in favor of plea bargaining, the authors assert that "[d]efendants, especially recidivists like Hayes, ... know this[.]

62. Tushnet & Jaff, supra note 4, at 371 n.47, 376.
63. Id. at 366 n.20.
64. Id. at 371.
65. See, e.g., John B. Mitchell, The Ethics of the Criminal Defense Attorney—New Answers to Old Questions, 32 Stan. L. Rev. 293, 293 (1980) (expressing the view that a surprising number of the more than 600 defendants whom the author represented had not committed the crimes for which they were charged). Perhaps one of the reasons for widespread acceptance of a contrary view is the media's simplistic depiction of law enforcers versus criminals as good versus bad. For a discussion of the ideological influence of media portrayals, see John B. Thompson, Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication (1990).
66. See Frank, supra note 47, at 919 ("The student should become aware of the slippery character of 'the facts' of a case.").
67. For a discussion indicating that individual guilt or innocence is not a descriptive dichotomy, but an ideological choice that does not enhance understanding of moral character, see generally Michael Bayles, Character, Purpose and Criminal Responsibility, in 1 Law & Phil. 5 (1982); Richard C. Boldt, Restitution, Criminal Law, and the Ideology of Individuality, 77 J. Crim. L. & Criminology 969 (1986); John O. Cole, Thoughts From the Land of And, 39 Mercer L. Rev. 907, 914-19 (1988).
knowledge constrains their freedom of choice about pleading guilty.\textsuperscript{70} On what basis, other than popular (mis)conceptions, do they rely? Not only is every defendant—including first offenders, the retarded, and the mentally ill—deemed knowledgeable about this aspect of the system, but Hayes, a person whose traits are completely unknown to us, is deemed to be an especially knowledgeable recidivist.

Hayes has been convicted of three different offenses spanning more than a decade. By criminal justice standards, he is not a frequent offender, for he spends years at a time without running into criminal trouble. Moreover, the fact that three offenses appear on his record tells us little about the merits of those charges, given the systemic bias toward convictions\textsuperscript{71} and the documented inadequacies of the criminal defense bar, particularly of overburdened public defenders and undertrained and underfunded appointed counsel.\textsuperscript{72}

Nevertheless, three convictions in more than a decade lead Tushnet and Jaff to assume that Hayes' experiences, about which we know nothing, made him a particularly knowledgeable defendant. In our culture this stereotype is easily learned and sometimes accurate, such that it is

\textsuperscript{70} Tushnet & Jaff, \textit{supra} note 4, at 368. Tushnet and Jaff overlook the fact that a recidivist statute, such as that passed since Hayes' last contact with the criminal justice system, dramatically skews the incentive structure surrounding plea bargaining.

\textsuperscript{71} See, e.g., Abraham S. Goldstein, \textit{The State and the Accused: Balance of Advantage in Criminal Procedure}, 69 \textsc{Yale L.J.} 1149 (1960) (providing considerable support, through procedural examples, for the claim that institutional arrangements in the criminal process aggravate the prosecutions' disproportionate advantage).


The problem has become more visible as it has become more severe. See, e.g., Trisha Renaud, \textit{Man Plead Guilty to Namesake's Case}, \textsc{Fulton County Daily Rep.}, Dec. 18, 1990, at 2. The overburdening and underfunding of indigent public defense systems has become so profound that in some jurisdictions public defenders are risking their careers by refusing further case assignments from the courts. See, e.g., Ann Woolner & Trisha Renaud, \textit{Public Defenders at the Breaking Point}, \textsc{Fulton County Daily Rep.}, Sept. 18, 1990, at 2. The front page announcement of the latter story captures its essence:

Overwhelmed by staggering caseloads, forced to interview clients who are chained to other prisoners, and now pressured to work even faster, many Fulton County public defenders have had enough. They say they're going to slow down, making sure each client gets proper representation. But will the overburdened system break down if they slow down?

\textit{Id.} at 1.
often regarded as a fact rather than a stereotype. Coming into contact with a naive third-time offender—not, in my experience, an extraordinarily unlikely possibility—would teach the beholder that, in the absence of additional information, a defendant’s level of sophistication ought not be presumed.

A more subtle and typical version of the same phenomenon is the authors’ use of the word “criminal” for people who have been convicted of crimes. Like “recidivist,” the word implies a status, almost a claim about character, despite all the imperfections of which we claim to be aware in the conviction-generating process. In Tushnet and Jaff’s article people convicted of crimes are referred to not just as criminals, but as people “who have chosen unlawful activity.”

To the contrary, criminal clinical participants, after extended interactions with a variety of defendants, may come to see the misleading reductionism in summing up their clients—people with a range of personalities, abilities, and identities who are often living in challenging circumstances—as “criminals.” In addition, the students’ experiences with the people who are living in these circumstances frequently lead them to be less than sanguine about using the word “choice” to describe the conduct of each of their clients, even those whom they believe to be factually guilty. Although these insights can be derived in other ways, they are often vividly transmitted in the context of criminal practice or a criminal clinic.

Tushnet and Jaff make several other assertions that experience in criminal practice is likely to challenge. First is the blanket assertion that

73. See, e.g., Tushnet & Jaff, supra note 4, at 372 n.52.
74. See, e.g., Goldstein, supra note 71. Because the imperfections in the conviction-generating process are primarily related to factfinding, Jerome Frank remains the foremost authority on the vagaries of this process:

[T]he major cause of legal uncertainty is fact-uncertainty—the unknowability, before the decision of what the court will “find” as the facts, and the unknowability after the decision of the way in which it “found” those facts. If a trial court mistakenly takes as true the oral testimony of an honest but inaccurate witness or a lying witness, seldom can an upper court detect this mistake. . . . Is the highly moral rule against murder actually enforced when a court goes wrong on the facts and convicts an innocent man?
FRANK, supra note 5, at xiv-xv, xxvii.
75. Tushnet & Jaff, supra note 4, at 372 n.52.
plea bargaining results in a defendant's conviction for a crime "less onerous than the state believes he or she actually committed."77 Given the authors' awareness of the phenomenon of overcharging,78 this assertion is surprising. In many jurisdictions the state's practice is to issue the most onerous charges, in number and degree, that it possibly can justify.79 This creates bargaining leverage, inducing a guilty plea to precisely those lesser offenses that accurately capture what the prosecutor believes to have occurred.

Secondly, in challenging the law and economics notion of a plea market, Tushnet and Jaff suggest that defendants generally overestimate the quality of a prosecutor's evidence, causing them to accept higher sentences than they would in a more optimally functioning market.80 Although the authors state that this is just their intuition,81 experience in criminal practice would likely inform their intuition otherwise. My own experiences, and those of my clinical students, suggest that defendants, with the assistance of defense attorneys, can often estimate the quality of a prosecutor's evidence quite accurately. Their risk assessment, however, often inclines them toward guilty pleas because they also accurately evaluate the systemic bias toward convictions, fearing the likelihood that in many cases a judge, or even a jury, will overestimate the quality of a prosecutor's evidence.82 The questionable assumptions embedded in Tushnet and Jaff's article hint at the value of exposure to law's operation in deepening one's understanding of law's meaning. This is the premise upon which the clinical movement rests.83

77. Tushnet & Jaff, supra note 4, at 370 n.41.
78. Id. at 366-67.
79. See HARRY I. SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 34-36 (1966) (describing the frequency of overcharging where plea bargaining is common); Albert Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 85-105 (1968) (describing the common patterns and practices of overcharging and indicating that the practice seems to be accepted as legitimate by most members of the legal profession); Kenneth A. Kraus, Plea Bargaining: A Model Court Rule, 4 MICH. J.L. REFORM 487, 490 (1971) (observing that "in jurisdictions where bargaining is the general rule, there is usually a corresponding, well-established practice of initial over-charging by prosecutors"). The official commentary on Article 350 of the American Law Institute's Model Code of Pre-Arraignment Procedure, which forbids overcharging, indicates that "overcharging ... [is a] widespread and accepted part of the ... plea bargaining process." MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, art. 350, cmt. at 615 (1975).
80. Tushnet & Jaff, supra note 4, at 372 n.49.
81. Id.
82. See, e.g., Goldstein, supra note 71. Court congestion, creating a systemic need to process defendants quickly, contributes to this phenomenon. On court congestion, see infra note 95. The inadequacies of defense counsel exacerbate this problem as well. See supra note 72 and accompanying text.
83. See Goldfarb, A Theory-Practice Spiral, supra note 17, at 1646-49.
Rather than focusing on law's operation, Tushnet and Jaff choose to fight formalism with its own analytic weapons. The limited value of this approach is revealed most sharply in the claim that the authors advance to challenge the law and economics framework. In this section Tushnet and Jaff describe the "plea market" as analogous to a "market for lemons" where low quality merchandise is sold for excessive prices. This phenomenon occurs when buyers know far less than sellers about the quality of the goods that they are purchasing. Most defendants know less than prosecutors about the actual strengths and weaknesses of the government's case because prosecutors may not fully reveal this information during plea negotiations. Consequently, under the law and economics model, this flawed plea market should generate suboptimal pleas.

The classic law and economics response to the "market for lemons" problem is that buyers will shop for the seller who most fully discloses information about the merchandise for sale. In the criminal context this claim translates as follows: Defendants will choose to commit their crimes in jurisdictions where prosecutors have an "open file" discovery policy. Tushnet and Jaff do not question the absurdity of the assumption that people choose criminal behavior after a detailed, hyper-rational calculus of its consequences, studying the comparative procedural costs of committing an offense in various jurisdictions before choosing its site. Rather, the article simply utilizes this assumption while showing that the logical conclusions to which it leads are problematic.

Tushnet and Jaff first object to the "market for lemons" response because defendants could never be certain whether a prosecutor's apparently open files were fully open or whether they excluded valuable information. Next, they compound the absurdity by suggesting that the increase in criminal activity in the open file jurisdiction would cause the fully disclosing prosecutors to "race to the bottom," modifying their discovery policies to withhold more information than prosecutors in neighboring jurisdictions. These possibilities, unfathomable though they are, demonstrate to Tushnet and Jaff that a system of plea bargaining does not necessarily function like an efficient market.

In this manner, Tushnet and Jaff join law and economics on its own terrain in order to show its indeterminacy. In the absence of information

84. Tushnet & Jaff, supra note 4, at 371.
85. Id. at 371-72.
86. Id. at 372.
87. Id.
88. Id.
89. Id.
about the worlds and world views of those who are charged with crimes, this approach may be necessary. But those who have participated in a criminal clinic or in criminal practice would be armed with sufficient information to make the authors' abstract, circuitous route unnecessary. The law and economics methodology collapses long before reaching an advanced stage if one has repeatedly observed the behavior, infrequently motivated by a well-considered calculus of consequences, of so many of those persons who inhabit the realm of criminal law.

E. Fact Skepticism

The authors seem to understand that experience in criminal casework would contribute to a critical perspective and they suggest that such an approach derives from the fact skeptics' version of legal realism. Although they see the fact skeptical approach as less well-developed than the contemporary cls version of rule skepticism, they suggest that "the wide scope of this [law-in-action] perspective is likely to lead to a more realistic and thoughtful response to the problems of law enforcement, and to useful insights into the operation of law more generally."91

The section of Tushnet and Jaff's introduction summarizing this law-in-action approach and promising its development in the second part of the article92 made my clinician's heart leap. Unfortunately, my hope proved to exceed the help actually rendered in this section. In fact, but for its focus on "the people at the bottom of the official hierarchy of jobs that constitutes the criminal justice system,"93 one is hard pressed to understand why Tushnet and Jaff call this a law-in-action perspective at all. Devoid of details or examples of how the system actually works at this level, the article suggests a series of reconceptualizations of the problems of a criminal justice bureaucracy.94 But the rush to conceptualize at high levels of generality before undertaking methods of immersion in the multilayered events about which one is generalizing is precisely the flower-cutting impulse that clinical educators are seeking to subdue and surmount. Careful empirical observation is the hallmark of clinical education, not because a litigator can ever know what really has happened in the world, but because the impossibility of really knowing creates an urgency about trying. Criminal justice participants, in clinical settings or otherwise, continually make judgments of grave importance

90. Id. at 376-82.
91. Id. at 363.
92. Id.
93. Id. at 377.
94. Id. at 378-82.
against a backdrop of uncertainty. Yet the stakes of these judgments require the actors to exercise as much care as possible in tailoring decisions to the problems actually confronted.\(^{95}\)

As Tushnet and Jaff’s references to law-in-action indicate, the authors are aware of the chaotic interplay of a wide variety of detail and doctrine, variables and values, people and perspectives in any criminal case. Yet they have chosen to discuss criminal procedure only at an elevated level of generality. Indeed, despite its focus on a single case, this article cannot be described as a case study (although the authors do describe it as such)\(^{96}\) in the literal sense of “the study of a case.” Instead, the article builds a conceptual schema that uses the vehicle of a criminal case to illustrate highly abstract notions. In this sense, the article exhibits the same tendencies as the Supreme Court opinions that the authors would likely view as so centrally linked to the maintenance of liberal legalism.\(^{97}\)

The choice to distill a welter of unwieldy primary material into a few general points whose meaning and import can be quickly discerned is not unavailing. The product is a conceptually intriguing work. Yet, from a clinician’s standpoint, a problem with both the Supreme Court and with authors like Tushnet and Jaff is that the wealth of crucial and pertinent data is underexplored and overinterpreted.

**IV. Clinical Response to the Case**

How would a clinician approach the case of *Bordenkircher v. Hayes*? Most likely, through an attorney-client relationship with Paul Hayes. What would she see when standing in this position? Certainly she would see doctrines about plea bargaining and prosecutorial discretion. She would also see the motivations, personalities, customs, prejudices, and values of the various actors, as well as the swirl of local political, eco-

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95. Systemic overload often undercuts the care with which actors would make these judgments were they practicing under more desirable conditions. A limited caseload distinguishes clinical education practice from most other lawyering settings, which are impelled by the primary aims of profit and/or service. Some authors have urged limiting caseloads even in an indigent legal services context, though they recognize the difficulty of doing so. See Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. Rev. 337 (1978); Carol Ruth Silver, *The Imminent Failure of Legal Services for the Poor: Why and How to Limit Caseload*, 46 U. Det. J. Urb. L. 217 (1969). On criminal court congestion specifically, see Barry Mahoney, *Changing Times in Trial Courts: Caseflow Management and Delay Reduction in Urban Trial Courts* (1988); Peter F. Nardulli, *The Caseload Controversy and the Study of Criminal Courts*, 70 J. Crim. L. & Criminology 89 (1979).


97. See Jerome Frank’s analogous criticism of the rule skeptics, *supra* note 55.
omic, bureaucratic, and psychological factors that all constitute this case. These are the factors, not doctrine alone, that define what the criminal law is for Mr. Hayes.

We can now only speculate about the factors that comprise this case. Perhaps a close reading of the original case record (trial transcripts, pleadings, briefs, and so forth) might offer hints about some of these factors. Yet the texture of the case is not recorded in written form, despite its inevitable influence on the way the case evolved. In the absence of a richly reconstructed ethnographic study, we can only ask questions about material that we would likely have absorbed instinctively had we been present for the original proceedings. How did the prosecutor understand Paul Hayes; did he, for example, view him as a menace to society? What were the grounds for his judgment? What were the racial identities of the players? Did racial stereotyping play a role? Did the prosecutor have knowledge of others in Hayes' family? Had he had prior contact with Hayes' defense attorney? What were the psychological motivations for the prosecutor's harsh action; might his conduct derive from personal pathology, a vindication of his psychological needs through a vindictive approach to others? Was his typical bargaining style more lenient? Was this an exception? Was it a re-election strategy? Had his leniency in another case backfired? Was he seeking to bolster his reputation before a particularly harsh trial judge? Was he simply inexperienced? Was he quite experienced and quite jaded?

How did the trial judge understand Paul Hayes? Had the judge been a proponent or an opponent of the habitual criminal statute? Was the judge politically ambitious? Was the judge politically vulnerable? What professional experience had the judge acquired before taking the bench? Had years of sitting on the bench hardened the judge to another defendant's tale of woe? Was he personally acquainted with anyone like Paul Hayes? Did the judge have a strong personality? Conversely, was he easily intimidated by a staunch prosecutor?

What would a defense attorney want to know about Paul Hayes? Why did Hayes refuse to plead guilty, ignoring the prosecutor's threat to indict him as a habitual criminal? Did he firmly believe in his innocence of the charge? Did he acknowledge his legal culpability, but view even the original plea offer as unreasonably steep? Did he believe mitigating circumstances existed that entitled him to leniency? Was his an act of uncompromising dignity despite the calculated risk? Was it politically

98. It appears from the reported judicial opinions that all of the primary actors in this case were males. Hence, I use male pronouns throughout this discussion.
motivated—a symbolic refusal to give the state coercive authority over the choices entrusted to him by law? How did Hayes experience the other actors in his case—prosecutor, judge, defense attorney, and others—and how did he experience the events themselves? Was his course of action worth it to him? In retrospect, did he regret it deeply?

There is no basis for anything but speculation about the answers to these questions concerning the constellation of forces potentially influencing this case. The point is that for a clinical professor and student, simultaneously studying this case and assuming professional responsibilities within it, the inquiry would be grounded in the experiential reality of the case. A full, contextualized understanding of the case would be essential to the lawyer's roles of problem-solving with Hayes about legitimate informal mechanisms available for favorably affecting the result, advising him about the risks and possible outcomes of various courses of conduct, and helping predict the likelihood of various outcomes. A contextualized understanding would also be essential to truly grasping what the law means and should mean in circumstances like these.

The quality of one's insights about the arrangements that promote substantive justice depends on studying law, including doctrine, in the colorful, textured, and tangled web in which it lives. Further, the context widens the range of insights that one might have about nondoctrinal matters, while enhancing the possibility of coming to grips with the actual and normative limits on prosecutorial discretion in its interaction with plea bargaining. Cutting off doctrine from the complex events in which doctrine functions serves to narrow and diminish the range and quality of doctrinal understanding and understanding generally.

V. Developing a Clinical Response to Critical Legal Theory

As suggested by the clinical response to Bordenkircher v. Hayes and to Tushnet and Jaff's discussion of the issues raised by the case, clinical education contains an implicit constructive critique of critical legal theory. This critique centers on the absence of epistemological awareness in some cls work, in its inattention to the process by which it builds theory.

Clinicians are seeking to chart a theory-building course more sensitive to the variety, complexity, and ambiguity of the highly charged

99. For arguments that the assumption of professional responsibility is an essential aspect of the clinical inquiry, see Barbara Bezdek, Reconstructing a Pedagogy of Responsibility, 43 HASTINGS L.J. 1159 (1992); Theresa Glennon, Lawyers and Caring: Building an Ethic of Care into Professional Responsibility, 43 HASTINGS L.J. 1175 (1992). Although empirical observation alone can ground clinical inquiry, the assumption of professional responsibility adds greater emotional weight and immediacy to the lessons drawn.
events upon which lawmakers pass judgment and to the pluralism of interpretations of these events in the minds of a diverse array of legal decisionmakers and legal observers.¹⁰⁰ Otherwise, clinicians fear that they may unwittingly perpetuate biases and submerge genuine issues that are clearer to others who view the same data from a different standpoint.¹⁰¹ For these reasons, clinical education offers hope of repairing the theory/practice split that pervades other movements.

Clinical education could contribute to.cls a theory-building epistemology rooted in lawyers', clients', and others' experiences of legal bureaucracies in all their chaos and complexity. In developing this contribution, clinical educators would join the ranks of feminist legal theorists and critical race theorists who have expressed appreciation for certain aspects of cls theory while simultaneously developing important critiques. Like feminist and critical race theorists, clinical educators would challenge the failure of cls to fully develop its method of “experiential deconstruction”—the exploration of an historically specific context centered on how a person experiences society and the legal system and feels their impact in his or her daily life.¹⁰²

Critical race theorists claim that the absence of contextualized methodology has led cls to ignore the material conditions and belief systems that characterize the lives of many people of color and to overlook the power of racist consciousness in engendering acquiescence to current social arrangements.¹⁰³ The cls literature, critical race theorists observe, overemphasizes the role of consent (to legal hierarchy) and underemphasizes the role of coercion (in maintaining race hierarchy).¹⁰⁴ Critical race scholars view the experiences of people of color as suggesting a more important role for rights acquisition and rights rhetoric than certain cls scholars have advocated.¹⁰⁵

¹⁰⁰. See Goldfarb, A Theory-Practice Spiral, supra note 17, at 1673.
¹⁰¹. Id. at 1675-87 (stating that clinical education, when borrowing directly from feminist methods, gains an “enhanced appreciation of the existence and consequence of multiple perspectives”).
¹⁰². This term, with the qualifying adjective “experiential,” comes from Cook, supra note 2, at 988.
¹⁰³. Id. at 985-86; see also Crenshaw, supra note 2, at 1356-58.
¹⁰⁴. Crenshaw, supra note 2, at 1358-60.
A feminist critique of cls parallels the critical race critique in numerous respects. Feminist legal theorists claim that the failure of cls scholars to adopt a contextual methodology has led them to ignore the material conditions of many women's lives, limiting the applicability of cls theories. Feminist scholars also fault cls for overlooking the power of patriarchal consciousness in engendering acquiescence to social arrangements and overstating the role of consent (to legal hierarchy) at the expense of the role of coercion (in gender hierarchy). Theorists involved in the feminist movement have interpreted their experiences to recommend, contrary to cls, the value of rights acquisition strategies in the quest for substantive equality, although like the critical race scholars, feminists are neither unsophisticated nor unconflicted in their approach to rights consciousness.

Following the scholarly lead of these alternative movements, clinical educators would join critical legal scholars in some of their work, but hope to influence and broaden the methodology of cls. Given the relationship between doing and knowing, clinical educators recognize that broadening one's methods is likely to broaden one's knowledge and broadening one's knowledge is likely to change one's theories. Clinicians would urge cls scholars to involve themselves regularly in the realities of legal processes as an important precondition for the intensive reflection that will lead to theorizing about the nature and efficacy of these processes.

Critical scholars may find, for example, that in the bureaucratic context of criminal case processing, legitimation is a less powerful phenomenon than expected. True, the rituals of criminal processes, such as plea hearings and adversarial trials, must have some legitimating effect. Otherwise, people might refuse to believe that fair, equitable, and important reasons justify locking in institutions for much of their lives a disproportionate number of poor and dark-skinned people. Yet the need

106. See West, Jurisprudence, supra note 3, at 3-15.
Underlying both radical and cultural feminism is a conception of women's existential state that is grounded in women's potential for physical, material connection to human life, just as underlying both liberal and critical legalism is a conception of men's existential state that is grounded in the inevitability of men's physical separation from the species.

Id. at 14.

107. See Crenshaw, supra note 2, at 1358-60; West, Critical Social Theory, supra note 3, at 66.


109. Most studies indicate that white defendants receive statistically shorter sentences than similarly situated African-American and Hispanic defendants. See, e.g., Marc Mauer,
for the bureaucracy to churn the cases quickly leads to speeding through rituals in a disinterested fashion. Pro forma compliance may undermine some of the legitimating power that ritual can have.\textsuperscript{110}

Moreover, some criminal defendants who are the objects of these rituals may be perfectly aware that the system expends little official effort on trying to understand their lives, their motivations, their claims of innocence, or the full stories of the actual events that underlie specific charges. Therefore, legitimation may work best for those who know least about what criminal justice bureaucracies actually do. Critical scholars may find that coming to know more about law's working in bureaucratic settings leads to different nuances in elements of their theoretical structures and perhaps to new structures entirely.

One way in which clinical educators might influence cls is by exposing cls theory more directly to the clinic caseload which, in its typical form, is spawned by the conditions of poverty and poverty's concomitant problems. Through this exposure, clinical education offers cls an opportunity to interact in an instrumental setting with people of diverse backgrounds and to modify its theories to account for the infusion of their narratives and perspectives. For feminists, critical race scholars, and clinical educators, this infusion represents a moral and epistemological imperative for a transformative project aimed at reducing hierarchy. Hence, clinical education offers cls a chance to ground its theories and to bring its work more closely in line with its political and ethical intentions.

Clinical education may also offer cls a way out of the conceptual schism that has impeded its work for the past several years. The conceptual schism arises because some of the early cls scholarship employs a structuralist analysis,\textsuperscript{111} whereas the poststructuralist influence on recent


\textsuperscript{111} Drawing from the work of Ferdinand de Saussure, Jean Piaget, and Claude Lévi-Strauss, see \textit{Terence Hawkes, Structuralism and Semiotics} 11-58 (1977), structuralists assert that bipolar structural tensions—for example, tensions between individual freedom and community needs—underlie the surface content of legal doctrines and texts, and that doctrine mediates between these structural poles. Because the circumstances and conditions that underlie legal conflicts can vary so widely, doctrine's mediating role, which always provides alter-
scholarship sabotages these prior insights.\textsuperscript{112} In \textit{The Structure of Blackstone’s Commentaries}, for example, Duncan Kennedy wrote that the cognitive structure underlying legal thought was the fundamental contradiction between the individual and the community.\textsuperscript{113} Legal doctrine in every field, he asserted, was designed to mediate the universal tension between collective values and individual will.\textsuperscript{114} But poststructuralists deny the possibility that any claim can represent the grand, transcendent truth about law. Poststructuralists reject any account that purports to distill numberless details into single, dearly held interpretations.\textsuperscript{115}

The growing discomfort of critical thinkers with a claim to an essential interpretation of complex, interactive, worldly phenomena has been fed by both poststructuralist intellectual currents and by the coinciding critiques of distinct groups, especially feminists and people of color, who assert that the essentialist interpretations previously advanced have excluded their experiences and perspectives.\textsuperscript{116} Accordingly, these critics assert, original cls interpretations are incomplete, if not invalid. Clinical legal education, on the other hand, may provide a setting which native decisional options, creates indeterminacy. For premier examples of structural legal analysis, see Duncan Kennedy, \textit{The Structure of Blackstone’s Commentaries}, 28 BUFF. L. REV. 209 (1979) [hereinafter Kennedy, \textit{Blackstone’s Commentaries}]; Duncan Kennedy, \textit{Form and Substance in Private Law Adjudication}, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, \textit{Form and Substance}].


\textsuperscript{113} Kennedy, \textit{Blackstone’s Commentaries}, supra note 111, at 211-12.
\textsuperscript{114} \textit{Id.} at 213-14.
\textsuperscript{116} \textit{See} Boyle, \textit{supra} note 115, at 773-78.
minimizes the intellectual and exclusionary problems of single interpretive accounts.

Clinical educators seek to use clinical experiences as the springboard into critical examination of a variety of topics.117 These topics include the lawyer's professional roles and responsibilities, the structure and function of the legal system, and the possibilities for systemic improvement in the interests of substantive justice. Although clinical participants will derive broad insights from their insider's view of legal phenomena, no particular interpretation is collectively advanced.118 Rather, the clinical methodology underlines the importance of the process by which one gathers and synthesizes information in coming to one's own interpretations.119 Clinical education, then, is an epistemology, not an orthodoxy. Clinical educators encourage and expect clinical participants, all of whom have access to thick layers of data, to devise multiple interpretations of multiple phenomena.

A clinician would assess the value of a structural analysis not in substantive terms, but by virtue of the process by which it was derived. A deficient analysis is one derived in the absence of careful empiricism and devoid of the data from which alternative interpretive accounts might be constructed. An analysis might also be critiqued for overstating its hold on truth and excluding the possibility of other takes on truth. Clinical theory can reach any number of intermediate destinations as long as it remains open to inductive and deductive analyses that may move the theory-building endeavor to yet another, never assuredly final, location.120

This clinical methodology diminishes the problem of reification.121 Although the clinical method depends on generalizing from one's exper-

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117. See, e.g., Goldfarb, A Theory-Practice Spiral, supra note 17, at 1654-56.
118. The fact that clinical participants are sometimes well-positioned to develop broad insights does not mean that they will do so. Variables affecting this outcome include personal inclination and clinical pedagogy. Moreover, there is danger in drawing overbroad insights that are not justified by the particularities of the experience. Nevertheless, clinical education has the potential to engage its participants in examining the cultural role of law, the meaning and impact of their profession, and the extent to which they can generalize from their experiences. See Gary Bellow, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 394-97 (1973). See also Goldfarb, A Theory-Practice Spiral, supra note 17, at 1646-67 (describing pedagogical aims of clinical education).
119. See, e.g., Goldfarb, A Theory-Practice Spiral, supra note 17, at 1675-87 (drawing on feminist approaches to theory building in understanding and developing clinical methods).
120. Id.
121. Reification refers to the tendency to treat concepts as having an objective reality independent of created, interpreted reality. See generally Peter Gabel, Reification in Legal Reasoning, 3 RES. L. & SOC. 25 (1980) (exploring the reification of legal concepts and processes).
iences, these generalizations are not polished off and set apart from their contexts—the conditions under which reification flourishes. Rather, the generalizations are folded back into the everyday context from which they emerged for purposes of verification and refinement.

In clinical settings all interpretive theories, structural or poststructural, emerge from thick layers of data. Unless these theories perpetually withstand the test of further data, they will be subject to constant revision. Therefore, nothing in the clinical method precludes either structuralist analysis or poststructuralist awareness. Critical legal scholars would do well to turn to clinical legal education to help reconcile the tensions that have stunted their growth. The inherent contextualism of clinical legal education is the source of its healing and the intellectual secret to letting flowers keep growing.

122. Id.

123. Clinical education might help to heal not just this scholarly rift, but the rift between some critical theorists and practitioners. Bob Gordon has identified this tension in his essay in The Politics of Law, supra note 21, at 281-82.