Six Easy Pieces: Teaching Experientially

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TABLE OF CONTENTS

> "Tell me, and I will forget. Show me, and I may remember. Involve me, and I will understand."
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> Confucius (circa 450 B.C.E.)

I. INTRODUCTION: SOME CLINICAL HISTORY

Clinical legal education grew in response to a demand by law students in the early 1970s for a more relevant education.[1] The initial response to

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1. Possibly the earliest effort to describe clinical education is Jerome Frank, *Why*

this demand was the creation of the field clinic, where students, under the supervision of a clinical practitioner, could serve clients whose legal needs were not being met by the established bar. The educational advantages of the field clinic model were substantial: Students were highly motivated to learn, the learning was direct and based on real experience, it entailed both cognitive and affective domains, and working with real clients raised ethical issues ranging from client confidentiality to the inaccessibility of legal services for the poor.[2] The field clinic model also presented several teaching limitations: One clinician could only comfortably supervise about ten students at a time, the learning opportunities presented by the clients were unpredictable, and field clinic work did not necessarily coincide with the academic year. One methodological limitation of the field clinic model was that it offered no theory to explain why it was a good teaching model. Absent a theory, there was no systematic way to effect improvements. Yet whatever its limitations, the field clinic introduced experiential learning irrevocably into the teaching of law.

II. DAVID KOLB'S THEORY OF EXPERIENTIAL LEARNING

A workable explanatory theory eventually came along. In 1984, David Kolb published *Experiential Learning*, proposing a theory that described the process of experiential learning in simple terms.[3]

Not a Clinical Lawyer-School?, 81 U. PA. L. REV. 907 (1933). Although most clinical writers date clinical legal education from the early 1970s, some claim earlier origins in the late 1940s. Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 939–41 (1997). The University of New Mexico School of Law first required for graduation an internship at a legal aid or public defender office in 1955, and required participation in an in-house clinic in 1970. Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 312 (2001). Among the earliest reported clinic programs is one profiled by Gary Bellow & Earl Johnson, *Reflections on the University of Southern California Clinical Semester*, 44 S. CAL. L. REV. 664 (1971). My first involvement with clinical teaching occurred in 1972 when I was asked, as a Legal Services Attorney, to help supervise a weekly evening clinic that had been organized by a group of students at the University of San Diego School of Law. Prominently included among their numbers, quite appropriately, was Richard "Corky" Wharton, who presently supervises the Environmental Law Clinic and the School's celebrated National Mock Trial Team and Adjunct Professor Alex Landon, who has taught Sentencing & Corrections at the Law School for many years.

2. Concern for social justice has always been an integral part of clinical education. Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 287–90 (2001) (describing how the author, based on the developmental work of William Perry, primes students through their clinical experience to be "justice ready").

3. DAVID A. KOLB, EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT (1984). "Experiential," as a term employed in learning, has at least three different and distinct meanings. First, it means learning from primary experience, that is, sense experiences. Second, it may refer to a way of knowing as a

Although his learning theory has been subject to significant debate and revision over the intervening twenty years, his basic premise has remained remarkably vital and intact: that effective learning takes place experientially in a continuous, circular four-stage sequence. The four-stage sequence consists of experience, reflection, theory, and application. Experience is the immersing of one's self in a task or similar event—the doing. Reflection involves stepping back and reflecting on both the cognitive and affective aspects of what happened or was done.[4] Theory entails interpreting the task or event, making generalizations, or seeing the experience in a larger context. Application enables one to plan for or make predictions about encountering the task or event a second time.[5] Although the optimal initial stage is experience, effective learning can begin at any stage. According to Kolb's original theory, the stages always run in the same sequence: optimal learning takes place when one goes from experience to reflection and not, in the reverse order, from reflection to experience.

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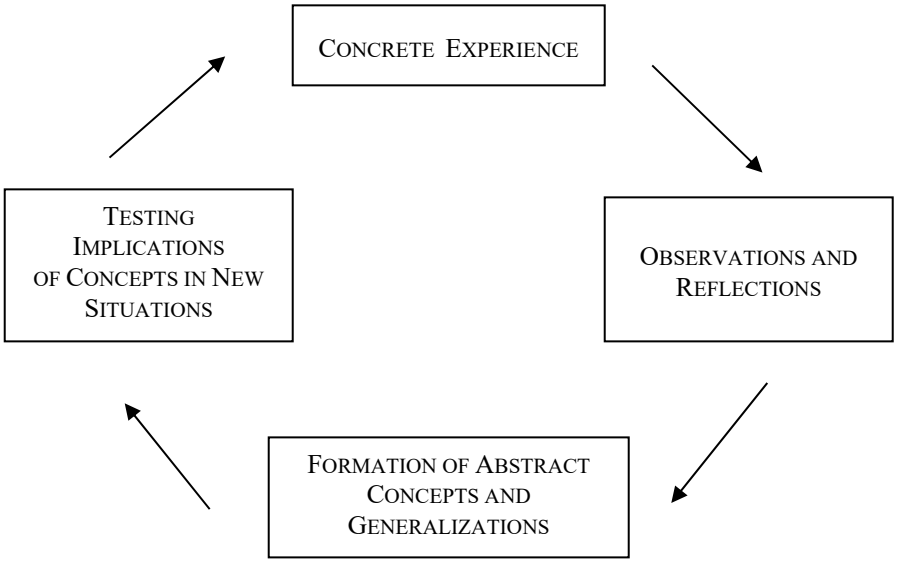
part of the cognitive-experiential self-theory of personality. *See* Seymour Epstein, *Cognitive-Experiential Self-Theory of Personality*, *in* 5 HANDBOOK OF PSYCHOLOGY 159 (Theodore Millon & Melvin J. Lerner eds., 2003). Third—as used in this article—it may refer to "learning undertaken by students who are given a chance to acquire and apply knowledge, skills and feelings in an immediate and relevant setting." Mark K. Smith, *David A. Kolb on Experiential Learning*, THE ENCYCLOPEDIA OF INFORMAL EDUCATION, *at* http://www.infed.org/biblio/b-explrn.htm (last updated Feb. 14, 2004).

4. Probably the most influential book among clinicians on the importance of reflection in learning is DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER (1987). Clinical education has explored the use of journal writing as a reflective tool. J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996). The nuts and bolts of employing journal writing are set forth in Michael Meltsner, *Writing, Reflecting and Professionalism*, 5 CLINICAL L. REV. 455, 457–59 (1999).

5. In many institutions of learning, priority is given to the theory stage. One of the virtues of the experiential model is that each of the four stages is seen as equally important. David Kolb, *Learning Styles and Disciplinary Differences*, *in* TEACHING AND LEARNING IN THE COLLEGE CLASSROOM 127, 129–30 (Kenneth A. Feldman & Michael B. Paulsen eds., 2nd ed. 1998).

THE EXPERIENTIAL LEARNING MODEL



Kolb devised a simple test, the Learning-Style Inventory, which helps students assess their preferred learning style.[6] The test generates four learning styles: (1) "accommodators," who prefer to learn through application and experience (business and sales); (2) "divergers," who prefer to learn through experience and reflection (history and political science), (3) "assimilators," who prefer to learn through reflection and theory (sociology and economics), and (4) "convergers," who prefer to learn through theory and application (engineering and nursing). Law seems to be primarily taught by assimilators but is probably practiced by convergers. [7]

6. DAVID A. KOLB, LEARNING-STYLE INVENTORY (McBer & Company rev. 1985); *see also* BARBARA GROSS DAVIS, TOOLS FOR TEACHING (1993) (teaching tips with the Kolb test).

7. Studies of law students and instructors suggest a preference for assimilator and converger learning styles, although traditional law school teaching seems institutionally oriented towards an assimilator style of learning. Cynthia Ann Kelly, *Education for Lawyer Competency: A Proposal for Curricular Reform*, 18 NEW ENG. L. REV. 607, 621–24 (1982–1983). The daily practice of law itself seems closer to engineering than any other Kolb-tested domain. David Howarth, *Is Law a Humanity (or is it more like Engineering)?*, 3 ARTS & HUMAN. HIGHER EDUC. 9, 9 (2004) ("But if one looks at what lawyers do, one finds that law is more like engineering—lawyers make social devices and structures . . . . Just as engineers can usefully draw on scientific knowledge, lawyers

The Kolb theory can assist educators in constructing effective and efficient learning—particularly when the learning involves new domains of knowledge that are to be learned incrementally.[8] The Kolb model provides teachers with a blueprint: Start with experience, and then work your way through reflection and theory to applicable rules for encountering again the initial—or a similar—experience. Then provide your students with a second, more challenging experience that draws on what was learned from the first experience. From a Kolb perspective, the closer the blueprint adheres to the Kolb sequence, the more efficient the learning; as it deviates from the sequence, it loses learning efficiency.

Besides offering a model or template for an effective pedagogy, the Kolb theory provides a useful way of comparing the clinic field model with academic teaching. The obvious strength of the field clinic model lies in its emphasis and starting point in experience. The student experiences directly the handling of real clients with real problems. The model may touch on reflection if the students are given an opportunity and the incentive to reflect upon their learning experiences through group discussion, meetings with their supervisor, or journal writing.[9] Clinical teaching only rarely touches on legal theory. In my experience at least, field clinic teaching tends to assume application, rather than creating application from theory. Students learn to use practical manuals in the clinic, but they tend not to create them.

Academic teaching, in contrast, emphasizes the sequence of theory and application. The first year of law school traditionally stresses legal theory. Later courses—such as civil procedure, corporations, tax, remedies, and UCC—combine theory with application. Both the field clinic model and academic legal teaching are, from a Kolb perspective, incomplete learning models because both typically lack two stages in the learning sequence. The clinical field model lacks the theory stage and application.[10] The academic model lacks experience and reflection.

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can usefully draw on the Social Sciences and Humanities . . . .").

8. The model is also useful in counseling students how to match their experiential learning styles with various academic disciplines. Kolb, *supra* note 5, at 127–28.

9. The limitations of the field clinic in providing reflective critique are presented by Robert J. Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45 (1986). A rebuttal to Professor Condlin's thesis is offered by Kenney Hegland, *Condlin's Critique of Conventional Clinics: The Case of the Missing Case*, 36 J. LEGAL EDUC. 427 (1986).

10. Clinicians, overall, have not contributed much to what might be called a theory

Simulation, I will suggest, is a model that combines the clinic field model and academic teaching in providing a complete experiential sequence.

III. SIMULATIONS

Simulation is a hybrid form of clinical teaching that historically grew out of the field clinic model.[11] Field clinic supervisors created simulations when they wrote up actual field clinic experiences into hands-on teaching exercises. They did so in order to preserve the strengths of field clinic experience—such as its immediacy, motivation, and concern for ethics—while mending some of its weaknesses—such as the unpredictability of clients, the limited number of students involved, and the fitting of client events into the academic semester. Some of these simulations have, over time, grown in sophistication and power to teach. In the remaining section of this article, I will describe six simulations that I regularly employ in three different courses I teach.[12] I hope to demonstrate how they combine the field clinic and academic teaching models in completing the Kolb learning cycle of experience, reflection, theory, and application. These six simulations are called Bar Stories, Obituaries, Market Place, Flag Salute, Milgram, and Attorney Harassment.

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perspective of clinical teaching itself. *The Lawyering Process*, perhaps the one great classic of clinic literature and still readable and informative after more than twenty-five years, offers little in the way of a theory of clinical education. GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978). As exceptions, see Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory,* 45 J. LEGAL EDUC. 313 (1995) (arguing that cognitive science offers a model for teaching the kind of problem solving typically engaged in by lawyers). In a series of articles, I have begun an attempt to sketch out a comprehensive theory of clinical teaching. *See* Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 522–28 (1995); Steven Hartwell, *Moral Growth or Moral Angst?: A Clinical Approach*, 11 CLINICAL L. REV. (forthcoming 2004) (explaining how student moral development can be fostered based on Kohlberg's theory of moral development); Steven Hartwell, *Legal Processes and Hierarchical Tangles*, 8 CLINICAL L. REV. 315 (2002) (understanding trials and negotiations as informational processing systems); Steven Hartwell, *Classes and Collections: How Clinicians Feel Differently*, 9 CLINICAL L. REV. 463 (2002) (distinguishing between classes and collections as contrasting methods clinicians and academics use in creating informational categories).

11. An early description of the creation of simulations as part of a field clinic course is found in Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581, 592–96 (1976).

12. Clinicians often talk together about specific teaching methods at conferences, but they less commonly write about them. *See* Aiken, *supra* note 2, at 305 n.53 (asserting that clinicians need to write more about their teaching methods). *See also* Philip G. Schrag, *The Serpent Strikes: Simulation in a Large First-Year Course*, 39 J. LEGAL EDUC. 555, 555–66 (1989) (describing a year-long simulation designed for a class in Civil Procedure).

A. Bar Stories

I introduce this exercise during the first hour of the first class in Professional Responsibility. I explain to the students that I will be asking them in a few minutes to describe, in writing, the worst thing that they have done in their life that they will admit to and that they would least like the State Bar to know about. Although, as I will explain, this exercise will be handled with the maximum degree of confidentiality and anonymity possible, I cannot guarantee absolute protection. I give each of them an identical sheet of blank paper and an identically sharpened #2 pencil. They have five minutes to briefly outline their story. At the end of five minutes, they fold their papers in half and then in half again. I then collect all of their writings, mix them up in a box and return them randomly. Although it is mathematically possible that someone will get back his or her own writing, each student is more likely to get back someone else's. Students then have ten minutes to peruse the story they have received, make some notes, and begin to re-write it in their own words. The story will now become "their" story. At the end of the ten minutes, I collect all of the original stories and shred them in class. What remain are only the rewritten stories.[13]

I then ask the students to do the following: First, complete the rewriting of their story so that it makes a cohesive, grammatical narrative.[14] They may, if they wish for clarity and presentation, add some details—as long as the basics of the original story are retained. Second, read the section in the text on character and admission to the state bar.[15] Sometimes I will add a current article from a bar journal, for

13. Professor Samuel Gross has experimented with using actual events in students' lives in creating simulations. In his simulation-based evidence workshop, he has his students construct trials from real events in their lives that might have plausibly ended in real lawsuits. He reports the same realism and internalizing in using actual student accounts that I find in the simulation described herein. Samuel R. Gross, *Clinical Realism: Simulated Hearings Based on Actual Events in Students' Lives*, 40 J. LEGAL EDUC. 321, 323–34 (1990).

14. The act itself of writing—of turning a perception into the written word—typically has a significant and positive effect on learning. JUDITH A. LANGER & ARTHUR N. APPLEBEE, HOW WRITING SHAPES THINKING: A STUDY OF TEACHING AND LEARNING 42, 93–95, 135 (1987). Directed writing can help students deal with emotionally difficult subject matter, such as homosexuality. Steven Hartwell, *Out of the Closet: Writing to Learn*, *in* CONTESTED TERRAIN: DIVERSITY, WRITING, AND KNOWLEDGE 151, 163–65 (Phyllis Kahaney & Judith Liu eds., 2001).

15. The Model Rules do not explicitly set out standards for admission to the bar, except to say an applicant "shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the

example, on character and bar admissions.[16] Third, I ask them to decide tentatively, based on "their" story, whether they should be denied bar admission on the basis of character, or, if admitted upon any conditions. They then meet with a small group of students to decide what each of them think the rule should be. Although they may consult the Model Rules if they wish, they must construct their own rule—or if they cannot agree—their own individual rules. Most student groups vote for a group rule. They often suggest thoughtful and useful rules. One group, for example, decided on a "balancing test" with the following criteria: (1) Occurrence—did it happen once or repeatedly; (2) How far back in time? Events more than ten years old did not count; (3) Severity—using the penal code as a guide; (4) Effect on others—whether specific individuals were hurt (theft), a group was hurt (the item stolen was insured), or perhaps no one was hurt (private drug use); (5) Life situation at the time (under pressure, depressed); (6) Age—considered worse if older; (7) Clarity of rule. For example, cheating on an exam was a clear violation but "cheating" in a relationship was not; (8) Attempts to mitigate or remedy—any showing of remorse or apologies tendered?; (9) Premeditation versus unplanned event; and (10) Life pattern since event. Did the individual face the same situation a second time, for example, and not succumb to temptation? Did they take steps to alter their life—such as drug counseling or anger management?

They have a week to complete their story and apply their rule. After I collect their final version, I photocopy a second set without their names showing. I use the first set to record their completion of the assignment and to make any comments. I return this first "named" set to them so

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[applicant] to have arisen in [application] . . . ." MODEL RULES OF PROF'L CONDUCT R. 8.1 (2003). However, as a matter of practice, bar admission authorities borrow, so to speak, the standards of Model Rule 8.4 that describes misconduct. Misconduct includes "a criminal act that reflects adversely on the [applicant's] honesty, trustworthiness or fitness as a lawyer in other respects; [or] conduct involving dishonesty, fraud, deceit or misrepresentation . . . ." MODEL RULES OF PROF'L CONDUCT R. 8.4 (2003).

16. Some states, such as my home state of California, have established explicit standards for "good moral character." California defines it in two codes: the CAL. BUS. & PROF. CODE §§ 6060, 6062 (West 2003) and the CAL. RULES OF STATE BAR R. X § 1 (West 1996). Factors that courts consistently appear to consider include: a) an admission of wrong; b) applicant trustworthiness; c) proximity of wrong in time to application; d) seriousness of wrong; and e) evidence of rehabilitation. Arpa B. Stepanian, Comment, *Law Student Clerkships: Walking a Thin Line Requirement of "Good Moral Character" for Admission to the Bar*, 3 J. LEGAL ADVOC. & PRAC. 67, 80 (2001). After her review of the history of character requirements for state bar admission, Professor Deborah Rhode concluded that "the moral fitness requirement has functioned primarily as a cultural showpiece. . . . Although the number of applicants formally denied admission has always been quite small, the number deterred, delayed, or harrassed [sic] has been more substantial." Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493–94 (1985).

that I have nothing laying around my office that might suggest to an uninformed reader that the students whose names appear in the upper right hand corner actually did what they described. I then make a dozen copies of the second set which I distribute in class. I ask them to find their "real story"—the one they wrote that became the genesis of what was published—and comment on the resulting narrative and analysis. I am particularly interested in how they react to their redactor's analysis. Did they feel their redactor was too hard on them? Perhaps not hard enough?

The bar stories make amazing reading. Some students are shocked by what they read. The seventy-six stories collected most recently broke down into six major subject matter areas. Ten stories involved school cheating, one of which involved a student who successfully cheated on the LSAT and later gained access to a law school final exam question. For purposes of the assignment, the student was ruled "admitted" to the bar. However, another student who successfully cheated on a law school exam, ruled himself as "not admittable." Twenty stories involved theft of some kind, including lying to authorities to escape punishment. Fifteen were admitted to the bar and five were not. Several students admitted stealing regularly from their employers by taking relatively small amounts from the cash register. They were uniformly not admitted. Five admitted to sexual indiscretions, typically with their best friend's lover. All were admitted, mostly on the basis that personal indiscretions are none of the bar's business, unless the indiscretion involves a professional relationship. Four involved ethical indiscretions as law clerks.[17] Typical were situations where the student had participated in an unethical act by the firm, such as participating in hiding discoverable documents or falsifying records. Three were not admitted.

Twenty-nine stories—by far the largest group—involved abuse of alcohol or other drugs. Many had life-threatening drug abuse records as teenagers that were frightening to read. Students reported blackouts, car accidents, and drug thefts on the edge of violence. A number reported growing their own marijuana. Many—but not all—reported that they had reformed. Among the twenty-nine, twenty were admitted, four were not, and five on condition. The last group—and perhaps the most

17. Law students who serve in clerkships may encounter potential problems regarding the "good moral character" standard as they seek to please their employers in the hopes of securing later employment. Stepanian, *supra* note 16, at 80.

disturbing—were those who reported violence. The violence included descriptions of some ugly brawls. Four were admitted and two were not. Overall, among the seventy-six applicants, fifty-five were admitted and twenty-one were either rejected or provisionally accepted upon meeting certain rehabilitative conditions.

Nearly all of the students were easily able to locate their original re-written stories. Most of them thought that their redactors had treated them fairly in either admitting them to the bar or not. Those who had been admitted on conditions thought the conditions were fair. One of the strengths of the exercise is that the collective opinion of the students, as reflected both in the stories related and the penalties imposed, reflected the actual behavior and thinking of bar associations. The activities that the students self-reported reflect the sort of activities that appear to get reported to bar committees; the decisions the students made about these activities reflect what bar committees actually render.[18]

Rather than having students read an academic article about what happened to someone else—about people and events they neither know nor care about—I have them read about themselves and the people they sit next to in class. As we do many interactive small group exercises in class throughout the semester, these students get to know each other well. They read of these indiscretions within the context of people they get to know well. Theory—in the sense of a praxis or an operative explanation of who gets in trouble and why—emerges directly from experience.

B. Obituaries

During the first class meeting of Interviewing & Counseling, I pair up students and ask them to interview each other for purposes of writing an obituary.[19] Each student has about thirty minutes to conduct an interview of their "client" and to take notes, and then another thirty

18. *California Lawyer* publishes a monthly department, "Disciplinary Reports," profiling California bar members currently subject to discipline.

19. Obituaries have generated considerable organization and literature. Since 1999, obituarists can join the International Association of Obituarists. *See* The International Association of Obituarists, obitpage.com, *at* http://www.obitpage.com/ join.html (last visited July 8, 2004). The Great Obituary Writers' National Conference is held annually. Their Seventh Annual Conference, meeting for the first time outside of the United States, will convene in Bath, England in April 2005. *Id.* at http://www. obitpage.com (last visited July 8, 2004). Obituarists—as they call themselves—consider themselves to be people who have "a great respect for history and research, a keen intellect, a wicked sense of humor, an interest in memorable lives and an endless curiosity." *Id.* at http://obitpage.com/why_obits.html (last visited July 8, 2004). Currently, more than half a dozen books are out as anthologies of obits or as novels concerning obituaries. *Id.* at http://www.obitpage.com/books.html (last visited July 8, 2004).

minutes to be interviewed as the "client." The students then use their notes, out of class, to write up a draft obituary of the student they interviewed. When they have completed their draft, they give it to their clients. The clients may correct any factual errors—such as a name or date—and may delete anything that would unduly embarrass them or someone else, but they may not otherwise change the draft. After all of the obituaries have been approved by the clients, I collect them and make a number of photocopies. The photocopies are distributed in class along with a questionnaire. The questionnaire asks the student to reflect on the obituaries: How do the writers want to be remembered? What seem to be the consistent themes? In reading your own obituary in the context of the others, what if anything would you change in your own? How, if at all, would you change your life? In having your obituary written by another, you were placed in the position of a law client, who places the telling of his story into the hands of another: What was it like to have someone interview you about such personal things in your life? To have someone present your life publicly to others? To have had only limited control over how someone presents you to others?

Like the Bar Stories, the obituaries make for some intriguing reading. About one quarter of my students make no mention of ever practicing law and another half disclose that they devoted only a few years to law practice before turning to other things. Some of these latter moved into politics, but others opened a bed & breakfast or an events-planning agency. One of the interesting emerging themes is the students' concern for animals and animal rights. Roughly a quarter of my students imagined devoting some part of their professional lives working toward the protection of animals, most often the protection of dogs and cats. Most all of them left behind spectacularly successful progeny, and more often, a surviving spouse. Their mean and median age at death was eighty-five.

Although some students report in their journals that they did not really enjoy having their obituaries written, the almost universal response is that the obituary exercise caused them to think about their lives seriously in thinking about how they want to be remembered.[20] The exercise

20. Students in this course are invited to comment on the writing of their obituaries as one of four journals they submit over the semester. Typical journal responses from students are that they became more aware of the importance of relations in their lives, that they have been overly concerned about debts and future earnings, and that they felt initially uncomfortable in leaving the writing of their lives to another person. For a

helped them put various parts of their lives into perspective. In their day-to-day lives, virtually all of the students, for example, worry about getting a good job and paying off their student loans.[21] While having their obituary written by another does not cause their student loans to evaporate, students do tend to see their loans in a less compelling light. Overall, in helping students see their lives in a more balanced way, the obituary writing has a therapeutic effect.[22]

C. Market Place

I first learned this exercise from participating in a teaching colloquium presented by Dirk Yandell, Professor of Business, at the University of San Diego.[23] I offer here my version of his exercise that my students in a Legal Negotiations course perform. First, I have the students help me prepare the classroom by moving all of the chairs and tables to the sides. This movement permits a large, open "forum" in the center of the room. I then randomly divide the class into two teams who then move to opposite ends of the classroom. Students on the left side are designated "buyers" and those on the right as "sellers." The buyers are given written instructions that their law firm is in need of a certain expensive collection of tax guides for which they are willing to pay up to $22,000. Meanwhile the "sellers" are given written instructions that they own a slightly used but otherwise perfect set of the tax codes for which they are willing to sell for as little as $4,000. Each set of instructions—buyer's and seller's—bears a sequential number at the top such that each buyer and seller is uniquely paired. Buyers and sellers now call out their pairing number, locate their partner and find a reasonably private place—inside or outside the classroom—to negotiate a sale. Students have eight minutes to make—or not—a sale.

At the end of eight minutes, the students return to class and call out two figures: (1) the final sale price; and (2) the initial offer that was made by either party. I write these two figures in parallel columns on the board. Two immediate observations almost jump off of the board:

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sensitive review of the different educational purposes journals may serve among law students, see Ogilvy, *supra* note 4. Ogilvy observes that journals in some form or other have been used as educational tools for more than 2000 years, going back at least to Aristotle. *Id.* at 56 n.3.

21. An inquiry into 9/11 obituaries became the starting point for a consideration of the financial needs of the survivors. Karen Gross, *Portraits of Grief: A Focus on Survivors*, 46 N.Y.L. SCH. L. REV. 631, 631–52 (2002–2003).

22. Writing one's own obituary has been used as a therapeutic tool with troubled teenagers. Isabelle Rubin LaBelle, *Obituaries by Adolescents: A Therapeutic Technique*, 32 SOC. WORK 538, 538–39 (1987).

23. DIRK YANDELL, USING ECONOMIC EXPERIMENTS IN THE CLASSROOM 12–25 (1999).

(1) The close correlation between initial offer and final sale price is startling: the initial offer typically dictates the price of the final sale within a few thousand dollars; and (2) the person who offers first almost always makes a bad deal. Sellers who offer first ask for some amount approaching their $4,000 bottom line and settle for something near that. Buyers who offer first ask for some amount approaching their $22,000 maximum—and they settle on some price near that figure. This first exercise leads easily into the second.

In the second exercise, the students all retain the same position as buyer or seller as in the first, only they are now able to bargain with whomever they wish in the classroom forum. The classroom suddenly becomes a cacophony of shouted out offers and counter-offers. Deals are made in a matter of seconds, and, as they are announced, I write the sale prices on the board. The prices are spread within a range of a few thousand dollars—between, for example, $9,000 to $12,000 or $7,000 to $10,000. After the students have had a minute to peruse these figures, we plunge into a third exercise—which is a repeat of the second. Armed with the knowledge of the range set forth on the board, the students once again call out their offers and counteroffers. This time, however, the range shrinks. Instead of a range of, say, $9,000 to $12,000, it shrinks to $9,500 to $10,500 or from $10,500 to $11,500. As soon as this third round is completed, the students plunge into a fourth and then a fifth round. By the fifth round, the selling price has stabilized at or near a single figure, such as $10,000, a number that is attained in seconds. The process has quickly moved from negotiations to sale.

In the last part of the exercise, the students retain their roles as buyers and sellers, but are given new bargaining positions. Rather than all of the sellers having a bargaining position of $4,000 and the buyers a position of $22,000, they are given a variety of positions between $8,000 and $15,000. Some of the sellers are saddled with selling positions higher than the buying positions of some buyers. For example, some sellers cannot sell for less than $13,000 while some buyers cannot pay more than $12,000. Other buyers and sellers have more favorable buying and selling positions, positions that easily facilitate a sale. As the students begin bargaining in the forum, they do not know that they represent such a wide spectrum of buying and selling points. The question is: What is the effect of these new buying and selling restrictions on the sales prices? The answer is, amazingly: virtually nothing. If the previous selling prices had been $10,000, it remains that.

All that happens is that those buyers and sellers who cannot profit at that figure are eliminated from the market. If your expenses exceed the market-established price, you cannot sell, and if your resources are less than the market, you cannot buy.

For readers steeped in market theory, these findings may be old hat. But for students who come from liberal arts undergraduate majors—as well as some business school types—these findings come as a kind of revelation. Through discussion, students typically offer these insights about the interplay between negotiations and markets, insights that they learn experientially from doing the exercise:

(1) If you and your opponent do not know the going market price for something (tax books), the person who makes the first offer loses.
(2) As a corollary, if you do not know the going market price of tax books and your opponent does, you will get killed.
(3) Rule: avoid negotiating when you do not know the market. If you must participate, avoid stating any figure.
(4) A market soon fixes a price even when the overlapping range between buyer and seller is great—that is, the buyer will pay high prices and the sellers will sell for little.
(5) Given a fixed range (all buyers will pay up to $22,000 and all sellers are happy with $4,000), although the settled market price will be between $4,000 and $22,000, the exact market price is not predictable. (They cannot learn this, unfortunately, from the exercise itself. I can only tell them that previous classes settled at figures as variant as $6,000 and $11,000.)
(6) As a corollary to (5), as long as the commodity is one that people will continue to buy and sell despite differences in prices, different regional markets may set different prices. Students who drive in southern California, know, for example, that gas prices historically differ between San Diego and Los Angeles by nearly 50%.
(7) Even when buyers and sellers have differing minimal buying and selling prices (some buyers can spend up to $20,000; others only up to $11,000), a stable market price is set soon, typically around the mean of all of the buying and selling minimals. Buyers or sellers who cannot make that mean are shut out of the market. Sellers with a minimal price of $14,000 in a market with a mean of $13,000 may not be able to sell at all—unless they are willin to incur a loss.
(8) Psychologically, we all tend to inflate what we think we can sell at if we have to invest in selling our item. Sellers whose prices

are too high or buyers with too little money continue to bargain dutifully but hopelessly—even after they know rationally that they have been priced out of the market.

(9) Moral from (8): Don't invest time and money in items before you know the market. Practical Example—Question: When, as an attorney, do you invest in a medical malpractice suit in San Diego? Answer: When you have demonstrable damages of $100,000 or more (2004 market) and at least two available medical experts. Less than that and the market excludes you.

(10) Hartwell's Chaotic Market Rule: Markets change overnight in unpredictable, chaotic, and sometimes catastrophic ways. Examples: Airline stock after 9/11, San Diego real estate prices if we should have three straight severe drought years in a row in northern California, personal injury cases after Melvin Belli's 1950s courtroom changes in demonstrative evidence such as "day-in-the-life" films, and cigarette smoking verdicts after release of "smoking gun" memos, demonstrating that cigarette companies: (a) knew their product was addictive and dangerous and (b) added chemicals to make them more addictive.[24]

D. Flag Salute

In Interviewing & Counseling, we had been talking about empathy and the difficulties we all encounter in trying to understand the mindset of another. One class meeting happened to coincide with the day the Supreme Court heard oral argument in the Newdow "flag salute" case.[25] In listening to students casually talk among themselves about this case, I felt that they dealt with it in an abstract, unempathic way. I wanted to test my assumption with them that (1) they were comfortable with the present "under God" inclusion because they had become so habituated to its language they did not hear it anymore, (2) if they were made aware of

24. *See* Melvin M. Belli, Sr., *Demonstrative Evidence*, 10 WYO. L.J. 15 (1955) (describing how the author, a celebrated pioneer proponent of demonstrative evidence, doubled the damage award in a retrial through his dramatic presentation to the jury of the prosthetic device his client was to wear for the rest of her life). *See also* Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999) (recounting how the successful strenuous efforts by the State of Minnesota to discover incriminating documents from the major cigarette companies changed forever the face of tobacco litigation).

25. Elk Grove Unified Sch. Dist. v. Newdow, No. 02–1624, 2004 U.S. LEXIS 4178 (June 14, 2004).

its religious nature, they would be less comfortable with the inclusion, and (3) given that awareness, they would be more receptive to the removal of the language. My larger teaching goal was three-fold: First, to suggest that in the absence of empathy for the emotional or feeling content of a dispute, we immediately turn it into a purely analytical thinking debate; second, if we frame the issue experientially, consistent with the Kolb learning cycle, we include the feeling content which we then retain in talking theory; and third, if students rethink theory without losing contact with their feelings, they may think differently.

I conducted Flag Salute in the following way: First, I distributed an anonymous questionnaire, in which I asked the students whether they (1) favored retaining "under God," (2) favored removal, or (3) were undecided. The votes were: fifteen for retention, nine for removal, and three undecided.

Second, I marched into the classroom with an American flag and set it into its pedestal. I asked the students to rise, face the flag, and recite the Pledge of Allegiance. Then I gave them a form in which I asked them—again, anonymously—to indicate their level of comfort, however defined, in reciting the pledge. I directed their attention to the remaining items on the form. These items set out how we were going to repeat the pledge four more times with the following additional language: "under God. Hear, O Israel, The Lord Our God, the Lord Is One," then, "under God, and Mohammed is His Prophet," then, "under God, and His Only Begotten Son, Jesus Christ," and finally no "under God"—just "one nation, indivisible . . . ."

When they had completed their recitations, I collected their completed forms and asked them to do a five-minute "quick-write" in which they were invited to write anonymously their immediate reflections. I instructed them that, on completion, they should either write "read aloud" or "do not read" at the top. Meanwhile, I tabulated their "comfort" forms. Their responses broke down into five groups: (1) comfortable with present inclusion, comfortable with exclusion, and uncomfortable with additional language: eleven; (2) comfortable with present inclusion, somewhat less comfortable with exclusion, uncomfortable with additional language: five; (3) uncomfortable with present inclusion, more comfortable with exclusion, uncomfortable with additional language: four; (4) comfortable with present inclusion, uncomfortable with exclusion, uncomfortable with additional language: three; and (5) "it does not matter": three. Only two were at least moderately comfortable with "and Mohammed is his Prophet" and five strongly supported "and His Only Begotten Son, Jesus Christ." One was comfortable with the inclusion of *both* "Mohammed" and "Jesus"!

Here are several samples from the anonymous quick-writes:

> I was surprised by my feelings during the pledge. I thought I would really dislike removing the words "under God" from the pledge, but once we did it, I didn't feel any less touched by our country's pledge. I did not like saying all of the added religious words; even the ones that related to my religion made me uncomfortable. I think most of the discomfort comes from not wanting others to have to say something they did not believe in. At the beginning of class, I voted to leave in "under God," but now I'm not so sure . . . .
>
> Saying "under God" felt very comfortable because that is what I'm used to saying and hearing. Adding the other lines felt uncomfortable because I don't believe in some of the things that were added. Not saying the words 'under God' felt slightly awkward, but I think I could support a change to remove the phrase now that I've experienced how it feels to have phrases added to the pledge that aren't part of my beliefs.
>
> I feel very comfortable saying "under God" in the pledge. Probably because I am a Christian and believe in God, but also probably purely out of habit . . . it is surprising to me that people have nothing better to do with themselves and their energy than to get upset . . . . Of course it seems trite to me because it is not offensive to me.
>
> We need "under God" in our pledge. Nine out of ten Americans want it in the pledge. Our forefathers fought for freedom of religion—including the exercise thereof. All of those who founded this country believed in God, and our country was founded upon Judeo-Christian values. As to the atheists, we respect your right not to believe. But they must respect what the majority of Americans believe. And also, whether or not they believe in God, they must respect what our founders fought for and believed in . . . .

After reading aloud these and the other quick-writes, I had the students read an editorial from that day's *New York Times* by William Safire, "Of God and Flag."[26] Safire says that virtually everybody likes the pledge the way it is, noting only that, "[t]he only thing this time-wasting pest Newdow has going for him is that he's right."[27] Safire concludes that the only workable solution is "to inform students they have the added right to remain silent for a couple of seconds while others choose to say 'under God.'"[28] After reading this editorial, the students met in groups of threes and fours to decide what should be done. I did not keep precise count of the solutions they chose, but the class pretty clearly divided in half, with several students declaring that they had moved from "include" to "exclude" and several embracing the Safire solution.

The exercise clearly engaged the students and got them to thinking about the pledge case in a new way. By actually participating in saying

26. William Safire, *Of God and the Flag*, N.Y. TIMES, Mar. 24, 2004, at A21.
27. *Id.*
28. *Id.*

the pledge with alternative wording, they experienced quite directly what it feels like for many non-theists who recite the pledge.[29] The exercise was enjoyable. The students actually had fun as they learned something. The exercise involved peer learning.[30] It was intentionally constructed around the Kolb sequence: It began with an *experience*. The students stood, faced the flag, and pledged their allegiance—six times. It moved to *reflection*. They all wrote reflective quick-writes. It moved—somewhat—to *theory* as they talked among themselves, sometimes engaging in constitutional arguments with which they were already familiar.[31] It ended with *application*, as they thought about ways to resolve the dispute. With some imagination, most any current legal dispute—particularly legal disputes that have lost their footing in reality and have slipped off into the netherworld of legal argument—can be vivified by an experiential exercise.

E. Milgram Exercise

Stanley Milgram, as I tell my students, was a Jew from the Bronx who wanted to know why the Nazis tried to murder all of his ancestors—and why the rest of the world mostly stood by and did nothing. His curiosity led to his now legendary studies on obedience to authority first published forty years ago, in 1963. He was a totally brilliant original thinker. It is my experience that most students initially do not really accept Milgram's essential finding—that most people, when asked to do so by an authority figure will, given the right circumstances, willingly commit atrocities on others.[32]

Before conducting my "Milgram Exercise," I assign my students in Professional Responsibility the opening chapter from Milgram's book,

29. The group of "nontheists" would include not only atheists and agnostics but many Buddhists, Hindus, and Taoists—as well as theists who may oppose flag salutes in their entirety, such as Seventh-Day Adventists.

30. For example, one student whose family is Buddhist observed that Buddhists do not "believe in God" in the Christian sense. A second student, a history buff, observed that many of the founding fathers were deists who, though they believed that God is the source of natural law, did not hold that God intervened in the affairs of the world. Hence, as deists they probably would not have said "under God" in the current ongoing sense. The question is obviously one of great current controversy. See the 1993 Pulitzer prize winning account by GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992).

31. As students are immersed in legal theory every day in class but divorced from experience and reflection, I concentrate on providing these latter two.

32. *See generally* OBEDIENCE TO AUTHORITY: CURRENT PERSPECTIVES ON THE MILGRAM PARADIGM, (Thomas Blass ed., 2000) (providing modern perspectives on Milgram's experiments and conclusions) [hereinafter MILGRAM PARADIGM]. Most recently, I began using ROBERT P. ABELSON ET AL., EXPERIMENTS WITH PEOPLE: REVELATIONS FROM SOCIAL PSYCHOLOGY 245, 245–47, 251, 253 (2004).

Obedience To Authority.[33] The chapter briefly describes the original "Milgram Experiment." Milgram set up a bogus "psychology laboratory" in a storefront in New Haven, Connecticut where naive subjects were solicited by a $4 offer appearing in a classified ad to participate in a study of memory and learning. On arrival, the naive subject finds two people waiting: a man who appears to be another naive subject—but who is in fact an actor working for Milgram—and a second man dressed in an official looking lab coat, who introduces himself as a lab scientist. The actor and the naive subject draw straws, but, whatever the outcome, the naive subject is designated "the teacher" and the actor, "the learner." The subject is told the experiment is designed to study the effect of punishment on learning. He is then shown how to operate an electric shock generator. The shock generator features a series of labeled electrical switches, ranging from 15 volts to 450 volts in 15-volt increments, accompanied by verbal descriptors which range from "*mild shock*" to "*danger—severe shock*." The teacher is to administer a "learning test" to the learner. He is to shock the learner whenever the learner errs, beginning at fifteen volts and increasing the shock by fifteen volts each time the learner makes a mistake.

Meanwhile, the subject sees that the actor is all wired up and strapped into a chair in an adjoining room where, once the door is closed, he can be heard but not seen. Once the learning experiment begins, the learner soon errs and the teacher begins the shocks. All goes well at first, but soon the learner begins to protest, eventually begins to yell, then scream and then, finally, as the voltage reaches its maximum, he remains eerily silent. At some point, the naive subject typically seeks advice or complains to the experimenter. He is told by the experimenter that he—the teacher—must continue the experiment and that the shock will cause no permanent damage to the learner.

Before conducting the experiment, Milgram asked various groups of people to estimate what percentage of naive "teachers" would actually electrically shock another person in the proposed experiment. Most responded that few people, if any, would do such a thing. Yet in the particular configuration described above, fully 65 percent of the subjects endured to the end, administering the full 450 volts.

To make reading and discussion about Milgram's experiment as real

33. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 1–12 (1974).

as possible for my students, I administer a very modest, mini-Milgram in class. Although the exercise has taken slightly different forms over the years, I typically begin class by distributing a (bogus) consent form to my students. The letter asks them to agree—by their signature—that they will permit me to do something patently unethical on their behalf. For example, I may ask them to post-date a letter testifying that they have (already) passed Professional Responsibility or passed the national MPRE—a test they have not yet taken—or both. Other times, I have asked Interviewing & Counseling students for permission to let me use their verbatim client interview notes—which would reveal their clients by name and circumstances—in any upcoming book we are supposedly writing. Occasionally a student asks if what I have requested is ethical or appropriate. I respond that I am their teacher and I will be responsible. No one will be hurt. Because few students ever inquire, I often inform one or more students in advance what I plan to do so that they can raise an objection. Their objection typically does nothing to the class and few naive students have ever been induced to join in with their concerns. Over the years, perhaps three or four students out of five hundred have voiced any opposition.

After everyone has had an opportunity to either sign on or, possibly, object, I ask the students if they did the Milgram reading and if they have any observations to make. Virtually no one connects the reading to the exercise. Even when other students begin to realize that they were just now willing participants in a Milgram exercise, other students still do not understand what they have done. The slow unfolding has a powerful effect on the class as a whole. The fact that not only did everyone initially participate but that many students experience difficulty in understanding what had happened after an explanation is highly persuasive in promoting Milgram's basic message—that most all of us will do what we are told to do by an authority figure without ever thinking twice.

During the discussion, students sometimes ask whether it matters that Milgram's 1960s subjects were all men, whether people today would respond the same way, and whether knowing about Milgram's experiment affects a subject's willingness to participate. Although the evidence is somewhat sparse, what evidence we do have suggests that women participate at the same rate as men, that subjects today act no differently than people forty years ago, and that knowing about the experiment does not affect willing participation.[34] The effect of the exercise on students is surprisingly subtle. I receive journals from students weeks later, commenting on its effect on them. I have had two

34. *See* MILGRAM PARADIGM, *supra* note 32, at 35, 47–53.

alumni comment to me on the exercise more than ten years after graduation.

F. Harassing Attorney

This simulation can be performed in either Professional Responsibility or Interviewing & Counseling. Students are paired as either "interviewing attorney" or "client." Care should be taken to ensure that about half of the interviewing attorneys are male and half are female. The interviewing attorney's instructions say only that the client they are going to see has a family law problem which the attorney will presume he or she is competent to handle. The client's instructions say that the client seeks a restraining order against his/her spouse from whom he/she is separated because the spouse has made unwanted sexual demands. The client is to say he/she saw a previous (male) attorney about this, but that he "acted inappropriately professionally."

If, and only if, the interviewing attorney inquires about the "inappropriate" behavior is the client to reveal the details—"that he first asked you out for lunch to discuss your case, that he began to share intimate details from his personal life, that he began calling you at your place of work, that he said he was very attracted to you, and that he began to greet you with more than friendly hugs. On your final meeting, at his suggestion, the two of you went out for a drink. On return to his office, he said that you were a 'very special person,' and that he wanted to help you with any retainer or costs. You said that you needed to get home, but when you got up to leave his office, he stood in front of the door, put his arm around you and pulled you against him and asked you to stay and talk. What you want to do is create an *opportunity* for the interviewer to ask these questions without your initiating them."

The real question presented is: Does the interviewing attorney inquire about the inappropriate behavior, and, if so, how?

The responses of the interviewing attorneys breaks down according to their sex: Women inquire but men do not.[35] Men explain that what the previous attorney might have done is none of their business, that they did not want to embarrass the client, or they deny that the client said anything about inappropriate behavior. Those who do ask usually ask

35. Over the years, I would estimate that about 75% of the women inquire and about 25% of the men. If the client is a man, even a lesser percentage of male interviewers inquire.

permission first: "May I ask you about what your former attorney did that was inappropriate?"

If this simulation is performed in Professional Responsibility, it raises immediate ethical issues of reporting professional misconduct.[36] In an Interviewing & Counseling class, it raises additional issues of the comfort level of interviewing attorneys in handling sensitive issues, especially when the client is male. One of the interesting comments in discussion is that men tend to estimate that the previous attorney's behavior was a one-time occurrence and women are more often convinced it is part of a pattern.

IV. CONCLUSION

These experiential learning activities not only teach something useful, they also serve another function of creating and sustaining interest in learning. Many observers of academic law teaching report on the boredom many law students feel by their second year.[37] Students do so among other reasons, in my view, because traditional academic teaching does not engage the full person, but only a limited part of their intellect. In teaching experientially, the whole person of the student is engaged, helping to re-create some of the interest in doing justice and providing service that brought them to law school in the first place.[38]

Clinicians assert—and appropriately so—that no simulation duplicates the reality and challenge of immediate client contact in a field clinic.[39] Having supervised students in field clinics myself, I do not contest the assertion. There are, however, in my view certain kinds of learning that are optimally produced by simulation. The Milgram Exercise and Harassing Attorney, as examples, can only be done through simulation. These problems cannot be duplicated in a field clinic. When students merely read about such issues in an academic setting, they typically

36. MODEL RULES OF PROF'L CONDUCT R. 8.3 cmt. 1 (2003).

37. Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 113–14 (2002).

38. Experiential teaching nourishes student passion for learning and provides a context for doctrinal learning. Some students derive their passion to learn from the intellectual challenge of legal doctrine; others are motivated by competition to be at the top of their class or by fear of looking bad before their peers. Adult-learning theory emphasizes the motivational power of learning in context—that is, learning connected to real life circumstances. Deborah Maranville, *Infusing Passion and Context into the Traditional Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 51–52 (2001).

39. A criticism of simulation is that, while it may teach theory and/or skills effectively, it may fail to address the larger question of pursuing justice and working for social change. Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327 (2001).

come away from their reading thinking, "I would never do the wrong thing!" The power of these exercises is not in the ethical dilemmas they pose, but in their demonstration that one fails to perceive a dilemma. The failure is more one of perception than in moral reasoning. The exercises need to be done in a group—the larger, the better—so that students see it is a collective failure, not an individual failure. Similarly, the lessons of Flag Salute can, in my view, only be taught through simulation. The subtle issues of empathy engendered simply do not happen through reading or through working with clients at a field clinic. Again, where the number of students is always a problem in a field clinic, an exercise like Flag Salute works best in a large class. With only ten students, it is possible that no student is offended. But raise the number to twenty-five or more students and the chances are greatly enhanced that a critical mass of students will be sufficiently upset to affect the class.

Another pedagogical advantage I find in simulations is getting students to respond and speak up. Getting students in a field clinic to speak their mind is never a problem, but getting students, in my experience, to speak their mind in a large classroom is a problematic venture at best. By the third year, students have just stopped volunteering. Students often resent being called on and calling on students often results in cautious, noncommittal responses. A good simulation creates a palpable excitement that encourages voluntary and spontaneous participation.