

# UNCOVERING AND DECONSTRUCTING THE BINARY: TEACHING (AND LEARNING) CRITICAL REFLECTION IN CLINIC AND BEYOND

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## ABSTRACT

*For me as a clinical teacher, the stalemate that so often emerges in our ongoing national conversations about things like abortion and gun control has provided new ways to think about the value of clinical teaching methodologies. The contours and contexts of the debates around abortion and gun control shift from year to year – when I started writing this, Sandy Hook and “legitimate rape” were fresh on everyone’s minds. Today, we mourn Michael Brown and the massacre in Charleston, and we rail against Hobby Lobby. Despite the shifting characters, however, these debates remain a constant presence in our national dialogue.*

*In this context, I am writing this as both a confession and an invitation. My confession is that I am prone to self-righteous and sometimes shrill proclamations designed to drown out the beliefs of people who don’t share mine. This is what I call binary thinking. At its extreme, binary thinking identifies just two ways to look at the world – my way and the wrong way. There is no room for compromise or connection or overlap. One of us will win and the other will lose. In this binary construction, we insist that words should mean the same thing whenever we use them. Legal scholars and activists before me have addressed the absurdities wrought by application of “formal equality” by looking beyond, around, and underneath the words to consider context: facts, emotions, people, etc. What I am trying to do in this paper is to describe and experiment with a technique for learning how to look beyond the words to consider context. In other writing I have called this practice “critical reflection.” In this the paper, I describe the binary debate between abortion and gun control advocates and opponents, and then offer a clinical teaching methodology focused on critical reflection as a way of making real progress in resolving the tensions in such debates. I conclude that clinical*

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\* Professor of Law, Mitchell Hamline School of Law. This piece has been years in the making, taking up space in my brain until I couldn’t stand it anymore. I want to thank Peter Knapp for listening to my initial ramblings about it; and Margaret Johnson for, once again and as always, being my steadfast scholarship buddy and encouraging me to take those ramblings to the next level. I would also like to thank William Mitchell for its support of this endeavor.

*pedagogy offers us, as both clinical teachers and human beings, opportunity after opportunity to push ourselves to be less binary and more open to possibilities for growth and change. This particular experiment involving my personal struggle with these intense social issues is only one example of how we can use our expertise in clinical theory and practice to become the teachers and parents and coworkers and citizens we strive to become.*

## INTRODUCTION

I am a mother, a teacher, a lawyer, an optimist, a person of faith, a thinker. I feel strongly, fiercely, passionately about important legal and social issues like abortion and guns. And I have come to realize that I can be deafened by the brilliant persuasiveness of those who believe as I do about these issues; and that my insistence on the right[eous]ness of my positions can result in a kind of entrenched paralysis that undermines my goal of achieving actual positive social change.

The contours and contexts of the debates around abortion and gun control shift from year to year—when I started writing this, Sandy Hook and “legitimate rape” were fresh on everyone’s minds. As I finish this article, we mourn Michael Brown and the massacre in Charleston, and we rail against Hobby Lobby. Despite the shifting characters, however, these debates remain a constant presence in our national dialogue. And as they once again make their appearance in Rachel Maddow’s opening monologue and Bill O’Reilly’s interviews, I have begun to fear that how I feel and talk about these two wrenching social issues might present an internal tension. Indeed, my son—who is in tenth grade—said, with a twinkle in his eye, that it seemed unfair that I believed that a woman should be able to have an abortion but not a gun. What? But I do believe that! And it sounded so bad when he pointed it out—inconsistent, unreasonable, not fair.

I am writing this, then, as both a confession and an invitation. My confession is that I am prone to self-righteous and sometimes shrill proclamations designed to drown out the beliefs of people who don’t share mine. Picture me with my hands over my ears and my eyes closed singing “La La La La La!” This is what I call binary thinking. At its extreme, binary thinking identifies just two ways to look at the world—my way and the wrong way. If you look at the world my way, you are good; if you look at the world any other way, you are bad. There is no room for compromise or connection or overlap. One of us will win and the other will lose. No wonder I react so fiercely and strongly and passionately in defending my beliefs. I am terrified! I don’t want to lose.

That's my confession. My invitation to folks who find themselves similarly blinded by their own passion—albeit offered with ambivalence about whether I really want anyone to RSVP “yes”—is to try a critical reflection experiment with me: is there a method to solve problems, make decisions, advocate positions that does not rely on my/this binary construction of the world?

In this binary construction, we insist that words should mean the same thing whenever we use them, without consideration of context.<sup>1</sup> An early reader of an early draft of this essay, Margaret Johnson, remarked, “This sounds like an insistence on formal equality.” Katherine T. Bartlett describes formal equality as “the familiar principle that individuals who are alike should be treated alike, according to their actual characteristics, rather than stereotypical assumptions.”<sup>2</sup> This theory requires that, to be fair, every rule must “treat women and men on the same terms without special barriers or benefits due to their sex.”<sup>3</sup> While compelling on its face for its evenhandedness, this policy wreaks havoc in the area of pregnancy-based discrimination and issues arising from the real differences that exist between the sexes. That is because laws without context are absurd.

Indeed, the dialogue around abortion and guns has gotten so distorted we're not even talking about real law anymore. Those of us with a binary worldview are posturing and grandstanding and ultimately alienating. Legal scholars and activists before me have addressed the absurdities wrought by application of “formal equality” by looking beyond, around, and underneath the words to consider context: facts, emotions, people, etc. And they have come up with legal frameworks and theories that encompass the lived realities of peoples' lives.

So what I am trying to do in this paper is to describe and experiment with a technique for learning how to look beyond the words to consider context. In other writing I have called this practice “critical reflection.”<sup>4</sup> One of the tenets of what has come to be called the “clinical method,” or “clinical pedagogy,” is this practice of reflecting critically, on ourselves, our clients, the legal system, etc.

This essay considers how we learn and teach critical reflection, both in the classroom and clinic and in our own personal and professional lives. Because my goal as a professor is, of course, to help students identify and develop tools that will serve them well

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<sup>1</sup> Katherine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1 (1994).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> See, e.g., Carolyn Grose, *A Persistent Critique: Constructing Clients' Stories*, 12 CLIN. L. REV. 329 (2006).

professionally; but my goal as a person is to help them—and myself—identify and develop tools that will serve them—and myself—well in all aspects of our lives. Critical reflection is one such tool.

In the first part of this paper, I describe the binary debate between abortion and gun control advocates and opponents. In the second part, I lay out a version of client rounds I do in my clinic that requires breaking problem-solving into four distinct phases before taking action. Part Three analyzes this practice as actually one of teaching critical reflection. I attempt to engage in this kind of critical reflection in Part Four, where I run my abortion and gun tension through a hypothetical client rounds.

I conclude, exhausted from that rigorous endeavor, that we could all use a dose of rigidly structured critical reflection to make us more effective teachers and learners and champions of social change. And I take great comfort from that conclusion. The intention of this essay is not to solve the wrenching dilemmas present in either or both of these political and social debates. Rather, I suggest that clinical pedagogy—with its insistence on intentional critical reflective practice—offers us, both as clinical teachers and as human beings, opportunity after opportunity to push ourselves to be less binary and more open to possibilities for growth and change. This particular experiment involving my personal struggle with these intense social issues is only one example of how we can use our expertise in clinical theory and practice to become the teachers, parents, coworkers, and citizens we strive to become.

## I. PRO-CHOICE AND ANTI-GUN

Let me start by giving my progressive credentials. I am about as pro-choice as they come. I spent the late 1980s doing “clinic defense” in the metro-D.C. area. In law school, I interned at the New York Civil Liberties Union and the ACLU Reproductive Freedom Project, where I learned, among other things, pro-choice lyrics to the Scarecrow’s “If I Only Had a Brain.” I find the idea of government control over women’s bodies one of the most terrifying prospects facing my generation and those that follow.

I’m also pretty darn anti-gun. I don’t believe the Second Amendment provides individual citizens the right to own whatever and however many guns they want for whatever purpose they want. I believe the Second Amendment—like all the amendments and the U.S. Constitution itself—is about preventing consolidation of power in the hands of a few and protecting the rights of all, minority or majority. Alternative interpretations of the Second Amendment have given rise to things like the “castle doctrine” and border militia and “stand your

ground” laws, which I believe undermine not only the spirit but the actual words of the Amendment.

I know I am not the only one who has heard or had conversations like the ones below about reproductive freedom *and* about guns:

“I don’t understand how they can claim to need \_\_\_\_\_ in order to exercise their constitutional right to \_\_\_\_\_.”

“How can the government impose restrictions on my constitutionally protected right to \_\_\_\_\_ by making me go through all this rigmarole before getting my \_\_\_\_\_?”

“You can still obtain a \_\_\_\_\_. You just need to \_\_\_\_\_.”

“The right to \_\_\_\_\_ is not absolute and unrestricted. The government can impose limits and restrictions in order to protect \_\_\_\_\_.”

And I know I am not the only one who has noticed the use of the same formulation in discussing these two issues. There is a natural tendency, I think, to require that language and narrative when used in one context mean the same thing when used in a different context. So you draw a line down the middle, labelled “life” or “choice,” and you want to land—and you demand that others land, or be held accountable for not landing—on one side or the other, regardless of the context. And there is a delicious “Ah ha, I caught you!” moment when your adversary crosses that line rhetorically by using words associated with your position instead of with his. That is a binary victory!

Indeed, I have done computer searches on Second Amendment and abortion and have found numerous blogs and comment boards, generally along libertarian or right-wing lines,<sup>5</sup> that rail against the left for being “pro-choice” on abortion and “pro-life” on guns and the death penalty. A particularly colorful example of this comes from a blog called “Sifting Reality.” I learned from the homepage that the author, John Barron, seeks to provide “[r]eligious, political, and social commentary through the filter of a conservative Christian worldview.”<sup>6</sup>

In contrast to Mr. Barron, I pass my social commentary through the filter of an anti-subordination, progressive world view. But I feel as passionately about abortion and guns as he does. So I imagined the following dialogue between him and me regarding the issues. His actual words—from the blog—are on the left; mine are on the right:

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<sup>5</sup> See, e.g., *Liberals: Anti-Gun (Because They Kill) but Pro-Abortion (Because It's a Woman's Right)*, AR15.COM, [http://www.ar15.com/forums/t\\_1\\_5/1414553\\_.html](http://www.ar15.com/forums/t_1_5/1414553_.html) (last visited Nov. 18, 2015) [<http://perma.cc/7QDT-3XXH>].

<sup>6</sup> *John Barron*, SIFTING REALITY, <http://siftingreality.com> (last visited Nov. 18, 2015) [<http://perma.cc/NY8M-V7ZE>].

**Barron**

**Grose**

<p>“If I may generalize a bit here, the political Left generally and full-heartedly support unfettered choice when it comes to abortion, but not so much when it comes to guns.”<sup>7</sup></p>	<p>And the political Right generally and full-heartedly support unfettered choice when it comes to guns, but not so much when it comes to access to reproductive options like birth control and abortion.</p>
<p>“Abortion, [the Left] say[s], is a right guaranteed by the Constitution. Not one explicitly stated, but fall[ing] under the ‘penumbra’ of the right to privacy. Thus the abortion defender concludes that elective abortion is a right somehow guaranteed by the Constitution. Regardless of the intellectual gymnastics required to make this argument, you will find abortion defenders up in arms, so to speak, any time a State legislature passes laws which they believe hinders [a] mother’s ease of access in any way to obtain an abortion. Laws which require the mother to make an informed decision, i.e. [sic], hear the baby’s heartbeat, or view an ultrasound picture of their baby <i>in utero</i>, requiring parents of minor children seeking abortion to be notified, etc. are decried as taking away rights, guaranteed rights. I have even heard it said that implementing restrictions will lead to full confiscation of the <i>right</i> to an abortion, a slippery slope after a fashion.”<sup>8</sup></p>	<p>Individual and unfettered gun ownership, the Right says, is a right guaranteed by the Constitution, one explicitly stated in the Second Amendment. Regardless of the intellectual gymnastics required to make this argument, you will find gun defenders up in arms, so to speak, any time a state legislature or, even worse, the Federal Government, considers laws which they believe hinders an individual’s ease of access in any way to obtain or use a gun of any kind. Laws which require the potential gun owner to make safe and informed choices about the kind of gun or amount of ammunition he can buy or how he must store his guns and ammunition or that guide a potential gun seller about the kinds of information he can require before making a sale, and where he can safely do business, etc. are decried as taking away rights, guaranteed rights. I have even heard it said that implementing restrictions will lead to full confiscation of the right to unlimited gun ownership, a slippery slope after a fashion.</p>

<sup>7</sup> John Barron, *Abortion and the Second Amendment*, SIFTING REALITY (Jan. 31, 2013) <http://siftingreality.com/2013/01/31/abortion-and-the-second-amendment/> [<http://perma.cc/Q84B-WP5H>].

<sup>8</sup> *Id.*

<p>When it comes to the people’s <i>right</i> to keep and bear arms—a right that shall not be infringed—the political Left has no qualm using any politispeak necessary to restrict, regulate, and even infringe the citizen’s explicit right: ‘This type of arm or ammunition is not protected, guaranteed, or ‘necessary.’”<sup>9</sup></p>	<p>When it comes to the people’s right to choose what kind of birth control and reproductive options to use, including abortion, the political Right has no qualm using any politispeak necessary to restrict, regulate, and even infringe the individual’s right to privacy. “This type of procedure is not protected for teenagers; an abortion for any reason other than to save the life of the mother is not guaranteed; this kind of birth control is not necessary.”</p>
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What is interesting about this partially hypothetical back-and-forth is not the snarky Right and Left baiting, though that is, of course, a lot of fun. Nor is it the Constitutional arguments about penumbras and guaranteed rights. Those arguments are best made by actual constitutional scholars, not the likes of Mr. Barron and myself. And those are not really what Mr. Barron and I are arguing about in a dialogue such as this.

What is most interesting to me—and why I’m writing this at all—is the rhetorical framing that each side does on the question of “choice” and the argument of individual versus common good. Indeed, Barron begins his post, “Let’s discuss one’s right to choose. Of course which side of the political aisle you find yourself on determines which choices you like to exercise.”<sup>10</sup>

Barron and others who write similar blogs and make similar arguments on the Right *and* folks like myself who feel passionately about these issues on the Left seem to believe that we cannot come down on the same side in both issues. Framed as it is using the language of “choice” and “life” and “rights,” there doesn’t seem to be an internally consistent rhetorical frame that allows you to be both pro-choice on abortion and pro-regulation on guns. And the same goes for pro-choice on guns and pro-regulation on abortion. According to our binary worldview, words should mean the same thing.

But really, the extremes of both positions are absurd: arguments over when life begins (at, before, after conception, or some other time?) and arguments over what kills people (guns, bullets, people, or something else?) seem equally beside the point. On both issues, some balancing needs to take place between the rights and needs of an individual (a pregnant or potentially pregnant women; a gun owner or

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

potential gun owner) and the rights and needs of other individuals (a potential fetus; a member or members of the public). And the same “Constitutional” frame won’t work to determine that balance. Even the question of “choice,” as the dialogue above demonstrates, can and does get distorted by unreflective “individual rights” positions.

One snippet from the horror of Newtown stands out for me as a perfect illustration of the absurdity of my insistence on an application of formal equality. In testimony before the Connecticut Legislature, David Wheeler, the father of Ben Wheeler, one of the children killed at Sandy Hook Elementary, invoked the Declaration of Independence’s guarantee of “life, liberty, and the pursuit of happiness.” He reflected, “I do not think the order of those important words was haphazard or casual. The liberty of any person to own a military-style assault weapon . . . is second to the right of my son to his life.”<sup>11</sup>

This snippet got a lot of play on the social media newsfeeds of my progressive friends and sites like MSNBC. It’s a compelling formula, isn’t it? The right to life of those elementary school kids is greater than the right to liberty of those who want to own guns. Uh oh. I just said right to life. If we carry this through, well, you know where we end up: the right to life of an unborn or preborn fetus is greater than the right to liberty of the pregnant or potentially pregnant woman. Where will it end? They are going to win and I am going to lose!

## II. CLIENT ROUNDS

Back in the safety of my office, I prepare to teach a clinic I have been teaching for ten years, using techniques and theories that I have been practicing for fifteen years and that I learned over twenty years ago. One of my teaching goals has always been to help students become more critically reflective, critically thinking practitioners, and I gear all of my teaching toward some version of that goal.

One of the teaching methods I use, to that end, is a version of structured case rounds introduced to me several years ago by Deborah Epstein. These rounds contain four distinct phases: fact gathering, diagnosis, problem-solving, and evaluation. I have adapted this structure, renaming it Client Rounds, for use in my transactional clinic as a way both to help students identify and solve problems that arise in their client matters and to challenge them to practice in a more intentional and critically reflective way.

The week before a Client Rounds class, I ask the students to email me a question about something in one of their cases. I tell them

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<sup>11</sup> Evan Puschak, *A Sandy Hook Parent Gives Testimony the Senate ‘Should Have Heard,’* MSNBC (Jan. 30, 2013, 11:54 PM) <http://tv.msnbc.com/2013/01/30/a-sandy-hook-parent-gives-testimony-the-senate-should-have-heard/> [<http://perma.cc/H6AC-C3VA>].

that the question should concern a real, live, issue—something the student is really struggling with—and that it should *not* be a purely legal question (e.g., something that can be answered simply using legal research tools). I encourage them to think not only about strategic questions—what tactics should we use to get out of this mess?—but also to consider ethical and emotional tensions they might feel in any of their client matters. I review all the questions submitted and pick the one I think will lead to the most fruitful discussion. I base that assessment on my sense about a number of factors: which question/problem might be generalizable beyond the one client or student; which question raises issues that might or do recur, either in the clinic or in a student’s practice; whether any question might require particularly urgent resolution, etc. I let the students know at least twenty-four hours before class which one of them will be the Question Presenter.

The class itself begins with the pre-selected student or team briefly presenting their question. The class then proceeds through the four stages: fact-gathering, diagnosis/problem-definition, problem-solving, evaluation. More than simply describing and discussing the issue, I ask that the presenting student and his classmates follow this framework to learn about, diagnose, and ultimately solve the problem presented. I monitor each stage quite rigidly at first, both in substance and time elapsed. But I also guide the students to go deeper into each stage of rounds by building in critical reflection on a micro/meta level. To that end, I have the students reflect first and then engage in each stage. And then, of course, we reflect on the whole process at the end.

#### *A. Stage One: Fact Gathering*

The class begins with a reminder from me of the “rules” of rounds, and then I turn it over to the presenting student. She introduces her issue with a very brief description of the question or problem she is grappling with. I then have the other students write down at least three questions or topic areas they want to explore. Once they have done that, the presenting student fields their factual questions for twenty minutes.

The goal of this stage is to gather as much information as possible about the relevant characters and relationships, client context and background, client goals and desired results, history of lawyer-client interaction, student lawyer’s personal concerns or feelings about the client’s case, etc. These questions must call for information—legal or factual—not diagnosis or strategy. I intervene with a buzzer-like sound if a question or answer is too much like a diagnosis or a problem-solving suggestion.

A common question presented in these rounds is some version of

“We can’t reach our client. She isn’t responding to our attempts to contact her. What should we do?” In the fact-gathering stage of this rounds problem, students may start with basic questions like, “What have you done to try to contact the client?” “How long has it been since you heard from her?” “Were there other phone numbers or email/postal addresses you could try?”

They move from these questions to wondering about why the presenting student needs to contact the client: “What information are you looking for?” “Why do you need the information?” Which might lead to questions about other sources for the information: The students start to wonder about the client’s family and friends network, e.g., “Is there someone else we can contact to get information to/from the client?” Or even further removed from the client: “Are there public agencies where you might be able to get reliable information that you need?”

These questions might lead to concern about pursuing information from sources other than the client: “Is there any reason not to trust what the client’s daughter might tell you?” “Is it worth it to the client to have you reach out to people she doesn’t want you to, even if they have information that could help her?” “Is it okay with the client for you to look elsewhere?” Etc.

Students also ask, initially encouraged by me to do so, about the presenting student’s feelings about the situation. Is she frustrated? Angry? Overwhelmed? Curious? And why? What is underneath those feelings?

At the end of twenty minutes or so, I have the students take thirty seconds to write their answers to a simple question: “What did I just learn?” The students, of course, have gathered a lot of information about this client and her situation. But that’s not what they tend to write in response to my question. Rather, they reflect with surprise and humility on how much information they do not have, have not gotten, about this client and her situation. This is, of course, part of the goal of the client rounds: to show students how important it is to develop a very full and rich factual story in order to effectively represent your client.

The other thing students reflect on in this thirty-second quick-write is their feelings, both about their colleague’s question and about their own feelings. Whether they feel smug and superior because they aren’t having this particular problem or deeply empathetic because they are, students almost universally reflect on the fact that they have an emotional response to the presenting student’s question and the fact-gathering that follows. For many, this might be the first time in law school that they recognize their emotional connection to the work

they are doing; and, even more important, how that emotional connection might impact that work. They are able to learn and internalize these valuable lessons through their reflection on fact-gathering during the client rounds session.

### *B. Stage Two: Problem Definition*

Once the fact-gathering stage and reflection thereon is over, we transition to the second stage: diagnosis or problem definition. Here I ask the students to brainstorm ideas about the contours of the problem itself. To do this, they have to integrate the factual information they have gathered and come up with a plausible explanation for the behavior presented. We describe this stage, variously, as the diagnosis or problem-definition phase. What do the students think the presenting student's problem really is?

In order to jump start the brainstorming, I have the students do another quick-write, this time around Jean Koh Peters' and Sue Bryant's "Parallel Universe Thinking" exercise.<sup>12</sup> I ask each student to write a plausible explanation for the situation he learned about in the first phase and also any additional information he believes he needs in order to flesh out or confirm that explanation. When the students have completed that, I have them imagine a parallel universe and come up with a second, equally plausible, explanation for the situation described in the first phase and any additional information they believe they need in order to flesh out each explanation.

In other words:

- What do you think is the explanation/theory that explains the situation? What additional facts do you need to know to prove/disprove this theory?
- What *else* do you think could be the explanation/theory that explains this situation? What additional facts/information do you need to know to prove/disprove this theory?

Building on their written reflections, we work to differentiate symptoms—the factual information gathered in the first phase—from the problem itself. Often, the students' initial diagnosis of the problem is a

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<sup>12</sup> See, e.g., JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 241-328 (2007); Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, AND LAW (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001); Susan Bryant & Jean Koh Peters, *Six Practices for 41 Connecting with Clients Across Culture: Habit Four, Working with Interpreters and Other Approaches*, in THE AFFECTIVE ASSISTANCE OF COUNSEL (Marjorie A. Silver ed., 2007); Jean Koh Peters, *Habit, Story, Delight: Essential Tools for the Public Service Advocate*, 7 WASH. U. J.L. & POL'Y 17 (2001).

simplistic response to the facts they have learned. The parallel universe exercise pushes the students to explore beyond that initial assessment to consider other possibilities and develop a more complex understanding of the problem.

Let's go back to the recurring rounds about not being able to contact a client. Remember, the presenting student initially posed the problem as, "We can't reach our client." The students' initial assessment of the problem (part one of the parallel universe exercise) is usually some version of, "The client is not responsive because she doesn't care about the issue/doesn't understand how important it is." Pushed beyond that simplistic explanation by part two of the parallel universe exercise, students suggest other possible explanations such as that the student attorney might not have been using the right tools to try to get information; the student attorney herself might not understand what information she needs; the client might not understand what the student attorney is asking for and why; the client might not be clear about what her goals are; the student attorney might not be clear about what the client's goals are; the student attorney might not feel comfortable prying for information; the client might not feel safe with this particular student attorney for some reason; the student might not feel safe/confident with this particular client for some reason, etc.

The brainstorming that follows, therefore, is richer and more fruitful than a simple connect-the-dots exercise. The students force themselves and each other to consider hypothetical explanations beyond the knee-jerk ones; they explore different avenues and wonder about other possible unknown/unknowable facts. They come to understand, quite quickly, that this portion of the rounds boils down to: "What problem could explain the symptoms presented? And, "What *other* problem could explain the symptoms presented?" We get there by starting in the fact-gathering process, which provides richer context and awakens empathy, and then by engaging in a rigorous exploration of symptoms and counter-symptoms to come up with a diagnosis. The originally stated problem becomes both bigger—more universal—and more intimate—focused on a particular relationship with a particular client. This brainstorming leads to discussions of ethical considerations and empathy and context.

### *C. Stage Three: Problem Solving*

Having gathered information and determined both what they know and what they don't (but should?) know, and developed a working understanding of the presenting student's "problem," the students now turn to the task of solving the problem. I have them do another

quick write, outlining three concrete things the presenting student should do when he leaves the classroom. We then spend twenty minutes or so discussing the students' proposed strategies. This discussion entails generating options, analyzing choices, predicting the likely consequences of a particular course of action, assessing each option in light of the client's goals, and agreeing on a concrete list of next steps for the presenting student.

I find that this is the stage and set of tasks that students are most comfortable with. In many ways, it is what they (we) do all the time, as law students and lawyers: strategize actions based on information we have gathered. In fact, we tend, if left to our own devices, to *start* in this phase, and only work backwards to fact gathering and problem definition if forced to slow down and deconstruct the problem more fully. By the time I finally allow the students to let loose their "problem-solving" talents, they are raring to go, and full of concrete action ideas.

I have each student write down three things the presenting student should do after leaving class in order to address the problem they have all identified. Interestingly, the strategies the students come up with are almost never the ideas for next steps that might have been offered at the outset of the class, when the presenting student first described her problem.

In our example of the student who can't reach his client, other students might start the class suggesting the solution of simply trying harder, calling again, emailing, writing, etc.; or, if things become desperate, send the client a warning shot that her case is about to be closed. I consider these "connect-the-dot" solutions because they fail necessarily to identify, consider, and solve any underlying or overlapping issues that might exist. They fail, in other words, to recognize that not being able to reach the client is a symptom, not the problem itself.

Having gone through the almost hour-long process of gathering information and defining the contours of the underlying problem, however, the solutions and actions presented in this stage are quite different. If the students have diagnosed the problem as that the client is not responding to the presenting student's efforts to contact her because she does not feel safe or comfortable in the legal system, the students might suggest that the student attorney write a letter or email acknowledging that and offering to meet somewhere neutral or affirmatively safe for the client, to offer some reassurance. If the students have diagnosed the problem as that the client is not responding because the student hasn't made it clear why she needs the information, the students might suggest that the presenting student write a letter or email laying out what she needs to know and why, and the

consequences to the client if the student is unable to get the information.

Students come to learn, through going through stages one and two, that they have to take action on the fact that most problems are multi-dimensional, and require multi-dimensional solutions.

#### *D. Stage Four: Evaluation*

The final stage of the rounds class is shorter than the first three. I have the students engage in a final quick write, answering again the question, “What did you learn?” In fact-gathering, we explored among other things the personal feelings/positions of the relative characters; in diagnosis, it became evident that those personal feelings were very important in the ultimate decision-making, but that they couldn’t totally control the decision because of competing needs; the decisions of how to act, though, took those concerns seriously and attempted to address them.

Students tend to reflect on the distinct phases as being more or less helpful, depending on the problem presented. Pretty consistent takeaways, though, are to linger in the definition/diagnosis phase for deeper, richer, more holistic understanding of the problem and the solution. Almost universally, semester after semester, rounds after rounds, students identify the importance of going through each phase in order to prepare for the next, and ultimately to come to a satisfying set of strategies. Problem description leads to problem definition leads to problem-solving: the more detailed you get at each phase, the more you discover, and the more satisfying and effective the solution.

Students learn over the course of the semester that breaking down problems and the process of solving them into these distinct stages leads to complex, long-term solutions quickly and authentically. This practice of taking a problem and deconstructing it very deliberately before attempting to solve it is essentially a practice of critical reflection. Moreover, the deconstruction of problems in this way is flexible and transferable, and can thus increase a student’s—and lawyer’s—ability to critically reflect on her role and identity within a particular framework, or in general practice. In other words, these structured client rounds have helped my students, my colleagues, and me solve all kinds of problems in all kinds of contexts.

### III. WHAT IS CRITICAL REFLECTION?

We teach critical reflection by modeling it and by engaging in exercises that require students to stop and think and then to reflect. I use this structured rounds in my clinics as a way to teach the theory

and skill of critical reflection. By critical reflection,<sup>13</sup> I mean the process by which we self-consciously locate ourselves within the system in which we are operating and in relation to the other players in that system. Through this process, we are able to identify what assumptions are at work and the effect they are having on us, on the other players, and on the system itself. Having identified those assumptions and how they are operating, we find ourselves with more room to make intentional choices about how to proceed with the representation of our client, and we end up being more effective advocates for them, both because we ourselves make space to hear our clients' stories, and because we create that space in the legal arena so that the clients' stories can be heard (and maybe even believed) there. As such, critical reflection is a skill that makes us better lawyers.<sup>14</sup>

In this context of learning problem-solving in a highly structured setting, critical reflection means the process of asking questions before seeking answers, and then evaluating what we have learned, and what more we need to know before moving forward. This could be called simply strategic thinking and planning, but on a deeper level, this kind of critical reflection provides an opportunity to deconstruct what we know: to uncover and challenging assumptions we all have about facts, about law, about client identity, and about how all those elements interact with one another.

We hope that experiences such as those described in the Client Rounds exercises will open up awareness and prompt discussion about the students' assumptions. As teachers, we participate in this process by watching our students grapple with the decentering they experience and then by reflecting on it with them, encouraging them to explore their feelings of disorientation and to recognize what space opens once they identify their assumptions and analyze their thoughts and thought process. As learners along with them, we also push ourselves to be self-conscious about extracting theory—lawyering theory and teaching theory—from this practice and by framing the practice itself in the theory of critical reflection.

Clinicians and other legal academics and scholars have long realized that this kind of critical reflection is a powerful and necessary tool to engage in the kind of intentional lawyering described in this article.<sup>15</sup> Through critical reflection, the lawyer self-consciously situates herself within the particular context in which she is operating. Specifically, she situates herself in relation to the system and its rules.

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<sup>13</sup> As distinct from "self-evaluation." Critical Reflection is not always or necessarily about one's performance.

<sup>14</sup> See, e.g., Grose, *supra* note 4.

<sup>15</sup> *Id.*

She also situates herself in relation to the other characters involved both in the system in general and in the particular interaction she is a part of. Those other characters could be the other people—the judge, the other lawyers, the witnesses, the government agency, the opposing party, the client. But the other characters are also the relevant rules, rituals, and practices of the particular system.

Through critical reflection, the lawyer is able to identify her ability to operate among these characters, as well as the limitations on that ability, noticing what prevents her from moving freely among the various pieces of the system. She is also able to identify the ability of the other characters—particularly the people—to move freely within the system, and the impediments on their ability to do so. By noticing these things, the lawyer can further identify the available choices about how to operate within the system in which she is situated. She can then identify the impact those choices have on her position and on the position of the other characters in the system, and on the system itself. In this way, therefore, critical reflection is the means for the lawyer to identify the shifting nature of her position within the particular context in which she is situated, the shifting nature of all the other characters situated in that context, and the shifting nature of the context itself.

Law students often struggle with this aspect of representation. Jane Aiken, who has written about the stages of learning to be a critical thinker, notes that while the first step is for students “to see that law is constructed rather than discovered,” the next, and often much harder, step is for the student to recognize herself as a source of knowledge and thus power, as a player within the legal system.<sup>16</sup>

This is tricky. Without critical reflection, it is virtually impossible for the lawyer to know—to see, to hear, to understand—her clients. Too often, lawyers unconsciously rely on their knowledge of and familiarity with their own experience in the world and with the tools of their new craft—the language and rituals of the law. They skip over the necessary step of attempting to see and hear their client. The story they tell to the audience outside the relationship, therefore, is at best a distorted version of the client’s story and at worst the lawyer’s own version of what she thinks the client’s story is or should be. In neither case is the client herself able to speak or be heard.

Slowing case rounds down and getting students to focus piece by piece on the elements of a problem and the stages of problem-solving is one way to get students to engage actively in critical reflection. Indeed, by using the structured Client Rounds, I am in fact teaching the

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<sup>16</sup> See Jane Aiken, *Provocateurs for Justice*, 7 CLIN. L. REV. 287, 299 (2001).

theory and skill of critical reflection. In this context—of learning problem-solving in a highly structured setting—critical reflection means the process of asking questions before seeking answers. It means looking for answers about what the client actually wants and cares about. Through that process, the lawyers might come to a better understanding of what brought their clients to them and, as a result, might be better able to resolve whatever ethical or other issues that could arise. Through time and deliberate effort—asking questions and really listening to the answers—the lawyers might put together truly effective solutions to their clients’ problems.

As supervisors leading these rounds, we have a role to play along with the students. First, we might recognize that we have what Elliott Milstein and Sue Bryant describe as a “choice moment”<sup>17</sup> about how to proceed. By conducting this kind of critical reflection, we might uncover what leads us to make the choices we tend to make, and then we can act with consciousness and intentionality about those choices. This is important not only so the supervisor herself can make a conscious and intentional choice about how to proceed, but also because she might be able to use her process of reflection, either openly or implicitly, to teach her student to engage in a similar process.<sup>18</sup>

I have found that these exercises do open up awareness and prompt discussion about the students’ assumptions. As the teacher, I participate in this process by watching the students grapple with the decentering they experience and then by reflecting on it with them, encouraging them to explore their feelings of disorientation and to recognize what space opens once they identify their assumptions. But I am also a learner along with them, and I push myself to be self-conscious about extracting theory—lawyering theory and teaching theory—from this practice. I don’t have all the answers, and I try hard to take the opportunities presented by these client rounds to learn more about the practice and theory of critical reflection.

#### IV. ROUNDS ON PRO-CHOICE AND ANTI-GUN BELIEFS

So let’s imagine that I present this problem to my class: “I believe that a woman should be able to get an abortion, but not necessarily a gun, and I don’t know how to reconcile those two beliefs.”

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<sup>17</sup> See, e.g., Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLIN. L. REV. 195 (2007).

<sup>18</sup> The Client Rounds format has an additional challenge and benefit. Rather than going through the process of asking questions and listening to answers on his or her own, alone with his or her client or supervisor, in Client Rounds, students have the benefit of the group interaction.

### A. *Stage One: Fact Gathering*

We start with the fact-gathering:

“Why do you believe that?” I am asked.

My response initially is, “I just do. Bottom line, that’s the society I want to live in” (with my eyes screwed shut and my fists clenched, and maybe with a little stamp of the foot).

“Say more about what exactly you believe,” my students may/should/hopefully will ask.

I insist that I want women to have the right to unfettered access to birth control, reproductive health care, and abortion on demand. And I believe the government and the government alone should have control over all weapons of any kind.

Having been very well trained in the art of fact-gathering to uncover hidden assumptions, the students dig deeper: “What do you think a society like that would look and feel like?”

Initially, I might say, “Great!”

The students pursue a different line of inquiry: “On what basis do you think women should make choices about their reproductive health?”

This is an easy one—I’m back on solid ground. “On whatever basis they want. That’s the whole point: it’s their choice. Women should be able to do whatever they want, for whatever reason, when it comes to their reproduction.”

“So you feel okay about government support for women choosing to abort a fetus if she learns it has the ‘gay gene?’ Or if she learns that it is a girl?”

Uh oh. I feel my hands begin to clench again, and my eyes screw themselves shut. I don’t want to have to think about these details. It’s a simple question of a woman’s right to choose outweighing everything else in all circumstances. Or at least that’s what I want it to be!

But in the face of these persistent students’ questions, I have to admit that, no, I am not comfortable with government support of abortion as a form of birth control or a tool for genetic purification. In fact, I find that idea terrifying.

“And what about the other part?” the students wonder. “Can you say more about your feeling that guns should be in the hands of the government and no one else?”

“Yes,” I can insist with confidence, “government agents and officials have a duty to protect and serve the people of this country, so they should be the only ones able to carry weapons. The rest of us don’t have that duty, so don’t need the weapons.”

“So who exactly do you think should be allowed to have guns?”

“Anyone with a duty to serve and protect—police, military, etc.

They can all have guns. But they have to be trained and retrained.”

The probing students might/should/hopefully will continue, “Can you imagine a scenario in which it might be okay for someone not part of the government to have a gun?”

Initially, my response is, of course, “No!” (with a little stamp of the foot). But living in Minnesota, I have to admit that hunting is an important part of the state economy and that guns are necessary for that endeavor, much as the whole thing makes my stomach turn.

“So your vision of society is one where hunters, members of the military, and other law enforcement agents have access to guns, and no one else?”

“Yes,” I can say, again with certainty.

“So you feel comfortable with police officers carrying guns in communities where other citizens do not carry guns?”

Smart students – we can all feel among us the ghosts of Michael Brown, Freddie Gray, Eric Garner, Jamar Clark, Tamir Rice . . .

“Well, no I am not comfortable with that. But I certainly don’t think things would feel more secure if community members were also armed to the hilt! I guess I trust the government to make these distinctions more than I trust individuals.”

“So you want the government out of the business of regulating women’s reproductive choices and health and in the business of regulating guns?”

“Right.” I say, pleased that they understand.

“What if Jeb Bush or Ted Cruz is president, instead of Hillary or Bernie?”

I imagine a society like that and feel my certainty waiver. I confess that in the world of my creation—where women have total reproductive freedom and the government has all the guns—Barack Obama and Elizabeth Warren are rulers for life. I trust them to make good choices around these issues because their beliefs are the same as mine. I have to confess that I am unwilling to give the government that kind of control in the abstract.

The students move from the particulars to the general. “You said you were uncomfortable holding these two positions at once. Can you say more about that?”

“The two positions—for choice when it comes to reproductive health, against choice when it comes to guns—don’t seem rhetorically consistent. I’m using the same word—choice—and attaching different normative values to it. I’m fighting for a world in which I’m in favor of government regulation in one area (gun control), and against government regulation in another area (reproductive health). I’m not comfortable with that inconsistency.”

“Why is consistency important to you?”

I’m getting frustrated. “Because my argument isn’t strong when I seem to be flip-flopping or manipulating language. My argument would be stronger if I could just say, across the board, ‘I believe in an individual’s right to choose;’ or ‘I believe the government should play a regulatory role.’”

“In what way is your argument weaker when you can’t say those things, across the board?”

Really? What is so hard to understand? “It’s weaker because the other side—of either issue—can point to my position on the other issue and say, ‘You are being inconsistent! There is a hole in your rhetorical logic! You lose! I win!’”

“Huh.” The students might say, exchanging knowing looks. “Maybe we should move on to problem-definition.” Good idea.

### *B. Stage Two: Problem Definition*

My students ask me:

- What do you think is the explanation/theory that explains the situation?
- What *else* do you think could be the explanation/theory that explains this situation?

In answer to the first question, I might reiterate what I said at the end of the fact-gathering: my arguments are weaker when I can’t make them using a consistent rhetorical frame. I believe I either have to change my rhetoric, or convince the other side that my understanding of the words is the right understanding. In other words, I believe I will either lose (by changing my rhetoric—giving up ground), or win (by claiming my rhetoric as the Right and Good).

This explanation relies on my belief in Formal Equality—everything needs to be the same. John Barron and I are both operating within that very restrictive and simplistic belief when we engage in the dialogues imagined above. We need to be able to make the same argument about the same basic ideas, just substituting abortion for guns and vice-versa.

But in fact, neither one of us can make the same argument about the same basic ideas, just substituting abortion for guns and vice-versa. We are both equally trapped by our insistence on formal equality. His argument is just as weakened by its rhetorical inconsistency as mine is. He is not going to win any more than I am; I am not going to lose any more than he is. We are stuck.

So what is the second explanation that might explain the facts gathered? What if I consider the possibility that my insistence on rhetorical consistency is a symptom of my being trapped in the binary

system that Formal Equality symbolizes?

I want this to be an issue where the rhetoric is clear and clearly delineated along the same superficial fault lines, without performing any kind of contextual analysis. My problem, though, is that we do not live in a society where such superficial consistency can exist in any meaningful way. Instead, we live in a society where contextual factors weigh heavily—far more heavily—than do feelings of allegiance to rhetorical consistency. We live in a society where black women are far less able to get much-needed, even medically necessary, abortions than their rich white counterparts; and where black men are far more likely to be shot and killed by the police than their rich white counterparts. We live in a society where discussion of individual rights versus collective good cannot take place because everyone is terrified that we are playing a zero sum game. We do not live in a society governed by a sense of formal equality.

The question my imaginary students force me to consider, then, is not, “How do I make my rhetoric more consistent so I can win these arguments.” No, it is, “What can I do to shift the arguments away from the binary zero-sum game, toward a framework that makes room for the possibility of change on both sides?” My problem, it turns out, is that I want to live in a society where we can balance competing needs based on wisdom and compassion and unbiased attention to the details of individual lives; where decisions about things like reproductive health and possession of firearms are made based on concrete realities, as well as fundamental principles.

### *C. Stage Three: Problem-Solving*

What steps can I take toward creating such a society? The key, it seems to me, is humility and honesty. I can admit to my son that I don’t know how to reconcile my beliefs and that I’m kind of scared to try. But that I am going to try. What happens if I open my eyes and my fists just a little and say, “I believe some regulation of reproductive health care and even abortion probably makes sense”? And what if I squint and say, maybe very softly, “I can see how individual citizens could be allowed to own guns to use responsibly, even if they don’t ‘need’ them for security reasons”? What if I present myself, in these very small ways, as available to listen to the John Barrons of the world with a truly open mind—as a learner along with him?

### CONCLUSION: STAGE FOUR

In the evaluation phase of my hypothetical rounds on these issues, I will admit that I have shifted. When I first wrote this reflection, I remained steadfast in the belief that my lack of rhetorical consis-

tency hurt my arguments. I enjoyed creating the imaginary dialogue with John Barron, gleefully highlighting *his* rhetorical inconsistency. Indeed, I wrote the first part of the essay as a diatribe against the Right for their hypocrisy.

As I engaged in the critical reflection, though, I found myself getting frustrated with my binary understanding of the issues and the argument. As I forced myself to linger in the problem-definition phase, in particular, my position shifted. I moved out of the frame of formal equality and into one requiring contextual analysis—whether that be an anti-subordination analysis or an understanding based on racial and economic disparities. I came to be aware that my beliefs and my arguments are works in progress, not pillars of stone. I have come to embrace the reality that there are so many more questions than answers. And what a glorious relief that is!

Having gone through these imaginary rounds, I can conclude with the same certainty that I started with, on a different proposition: I believe in making room for the possibility of a middle ground. I am open to allowing myself to imagine that someone who disagrees with me about these issues is not out to destroy me. I realize that in making room for that possibility, I am, in fact, guided by the very principles I hold dear, the ones that lead me to feel so strongly about both reproductive rights and gun control. Those principles are grounded in trust and respect and compassion, in love and in community, and in a commitment to a project greater than our individual freedom and livelihood.

Clinicians and other reflective practitioners have long believed that in order to achieve actual positive social change, we might need to be willing to participate in a less binary dialogue; a dialogue that makes room for a multiplicity of voices and opinions, and for the possibility of common ground, even if it means opening our clenched fists just a little bit. We work with our students to be responsible participants in and creators of this dialogue.

I offer these reflections, then, not to change anyone's mind—even my own—on abortion and guns. But rather, I offer these reflections to affirm the utility and effectiveness of using these structured client rounds as a technique to teach and practice critical reflection and complex critical thinking.

More than that, though, I have come to believe that the underlying process of information-gathering/problem-definition/strategizing is a powerful tool in all kinds of contexts, well beyond the clinic classroom, or even the law school classroom. From assessing new experien-

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tial course offerings<sup>19</sup> to discussing important social issues with our growing children, to managing complex coalitions and political movements, lingering in each of these distinct phases of investigation and analysis breaks down the binary constructions that lead to deadlocked, paralyzing, [un]civil discourse. Critical reflection works as a problem-solving method. And this jewel-in-the-crown of clinical pedagogy teaches not only our students, but also us, to be effective, thoughtful, socially responsible problem-solvers.

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<sup>19</sup> See, for example, a presentation by Ann Shalleck, Laura Rovner, Donna Lee, Phyllis Goldfarb, Wendy A. Bach, and Claudia Angelos at the 2015 AALS Conference on Clinical Education. ASS'N OF AM. LAW SCH., 38TH ANNUAL CONFERENCE ON CLINICAL LEGAL EDUCATION 93-96 (2015), <http://www.aals.org/wp-content/uploads/2015/05/ClinicalBooklet.pdf> [<http://perma.cc/HRZ5-FD4N>].

