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***113** PEDAGOGICAL SUBVERSION IN CLINICAL TEACHING: THE WOMEN & THE LAW CLINIC AND THE INTELLECTUAL PROPERTY CLINIC AS LEGAL ARCHAEOLOGY

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Legal pedagogy provides an important site for the subversion of dominant conceptions of law. For more than two decades, feminist law teachers have sought to enable our students to understand how the law interacts with social power to shape women's experience in society, to critique how the law operates in any particular situation with regard to gender, and to convey how lawyers have space to shape new legal tools that challenge the oppression of women in society. Feminist law teachers have taught about how the discourse of the law affects women's lives and how the material forces that shape women's experiences are related to legal rules and legal institutions. We have designed methods both to help students analyze problematic conceptions of women and gender that appear in legal texts and to foster in students alternative ways of approaching law that help to challenge oppressive practices that harm women. Thus, throughout its history, feminist pedagogy has had both a critical and a transformative agenda.

Our pedagogical efforts have developed over time, reflecting our changing understandings of the relationship of law, sex, and gender. They reflect the constraints and possibilities that have confronted us within the context of our particular educational institutions. As are other forms of feminist thought and action, feminist legal pedagogy is dynamic. Feminist pedagogical innovations may be suppressed or embraced; they may be ridiculed or celebrated. A feminist pedagogical innovation, once ***114** introduced, not only changes the contours of legal pedagogy, but is changed itself. What begins as subversive may be accommodated, distorted, expanded, or transformed once it becomes a part of legal academic culture. Therefore, as with all aspects of feminist legal thought and action, we must constantly reassess the impact and meaning of our pedagogical practices.

Despite recurring challenges from a variety of critical perspectives, American legal education, to a great extent, has continued to be about the authoritative pronouncements of doctrine by courts. [FN1] Primarily, students read and dissect appellate cases. Statutes and administrative rules make a supporting appearance, as do excerpts from other disciplines. Many law teachers, among them feminists, have, within the spaces available to them at their own institutions, introduced modifications of this basic model. [FN2] ***115** Some use critical readings to expose students to multiple and conflicting interpretations of cases. [FN3] Others conduct simulations in which students ***116** work with a legal problem in the context of a lawyering activity. [FN4] Still others, through clinical programs, have students provide representation to clients under the supervision of faculty and reflect upon their activities as lawyers, the experiences of clients, and the operation of legal institutions. [FN5] These efforts and countless others have in large and small ways challenged the fundamental model of American legal education. Feminist law teachers ***117** have been at the forefront of efforts to change legal pedagogy and the im-

plicit lessons about law and legal institutions that it conveys.

This panel on Subversion Through Pedagogy has examined how three different, yet related, pedagogical practices destabilize one aspect of the dominant form of legal knowledge. The three practices all question the assumption that law is only, or even primarily, the pronouncements of courts and legislatures. All three pedagogies diverge from the project of teaching a feminist critique of appellate court opinions. Engaging in critique of cases can implicitly transmit the lesson that official pronouncements constitute the law, even if feminist analysis of cases and statutes is substantially different from other approaches to case analysis. All three pedagogical practices identified here look beyond official pronouncements to find the law.

Professor Deborah Threedy presents "legal archaeology" as a subversive teaching tool, as well as a scholarly approach. [FN6] When students undertake the project of reconstructing the historical context of a case from clues extrinsic to a court opinion itself--from trial transcripts, contemporaneous accounts, personal narratives, and other historical materials--they examine differently the official story as articulated by the court and see how the official story distorts or submerges alternative stories. [FN7] Legal archaeology as a teaching tool, as well as a method of analysis, subverts the dominant form of legal understanding in at least three ways.

First, legal archaeology conveys unsettling ideas about what is worthy of study. [FN8] The materials of legal archaeology force students to see the texts and sources outside the confines of the court opinion as essential to knowledge of what the law is. Only through these materials can the students construct other stories about the operation of law and comprehend how and why the official story of law assumes its form and content. Many contemporary law students are strikingly similar to Christopher Columbus Langdell, seeking conceptual rules from appellate decisions, or to a caricatured legal realist, viewing appellate rules through an ungrounded appeal to functional interests (such as predictability, efficiency, flexibility, or fairness) termed "policy." [FN9] They inhabit the world of the law library (now the virtual world of computerized legal sources) in the quest to know the law. [FN10] Beyond the realms of Lexis and Westlaw lies a different territory. [FN11] Law school implicitly tells these students that materials beyond ***118** legal pronouncements are secondary to legal knowledge. [FN12] Legal archaeology requires students to develop an appreciation of diverse materials in order to understand the law. [FN13]

Second, legal archaeology demands a method different than the one propounded in law schools. Deciphering the court's opinion is only one part of analyzing the story of the law. Students must search for the diverse and conflicting narratives that coexisted when the court constructed the official account. They must look to what is "irrelevant" from the perspective of the official story because the point is to recover the very narratives that the court rejected or ignored. Seeing the range of assumptions embedded in the conflicting stories and analyzing the choices fixed in the court's account, the student can begin to decipher the reasons driving the construction of the official story. [FN14]

Third, legal archaeology alters the content of legal knowledge. Law is the amalgam of conflicting stories told by different people, in different relationships to the legal system, in different segments of society. When our students unearth these narratives, they see what law is in its complexity, contradictions, and ambiguities. In the interaction of stories, the students can track the relationship of law as written and law as experienced, the impact on people's lives of legal and social institutions through which legal experience is mediated, and the relationship of law and social power. Legal archaeology helps unmask how law is used by those with power and by those without. [FN15]

In legal archaeology, students confront the importance of facts. They quickly discover that mastering legal doctrine, even in all its indeterminacy and mutability, is of only limited value in discerning how any particular case or set of cases develops. The students must take facts seriously [FN16] and learn methods of factual analysis that incorporate an appreciation for the intricacies, contradictions, indeterminacies, and uncertainties of facts. As critical legal thought has problematized legal analysis, legal archaeology problematizes factual analysis.

One way to see the Gender & Constitutional History course created by ***119** Professors Patricia Cain and Linda Kerber, is as an experience in legal archaeology. [FN17] Professors Cain and Kerber have transformed the narrative of constitutional doctrine, which drives most constitutional law courses, into a narrative of women's experience with constitutional law in the historical, social, and political context of the time. Doctrinal categories do not shape the accounts the students study. Rather, constitutional doctrine inscribes the ways women have attempted to remedy an injustice or have used the law to change their position in society. The students study constitutional law as it reflects and affects women's social and political power.

The course demonstrates how decoding the operation of gender is a central component in an archaeological project. [FN18] Understanding constitutional history requires examining the workings of gender in the world. Therefore, as students discover the underlying accounts of women in cases that employ constitutional doctrine, they see women's experience not divided by legal category, but grounded in a specific historical period characterized by particular normative structures of thought affecting concepts of gender, the experience of gender, and doctrines of constitutional law. Students search through archives to uncover clues from the multiple stories that eventually resulted in the narrative in the court's opinion. From these factual clues, they develop avenues of investigation. They probe to uncover the women's experiences and thoughts. They discover how legal, political, and social institutions functioned in the women's lives. They explore the political and social forces that affected the women, the lawyers, and the courts. From this information, the students construct the multiple stories outside the official account that nonetheless constitute constitutional law. Without these other stories, the court's opinions mask how constitutional law operates with respect to gender. With these alternative narratives, the students can better interpret why the doctrines of constitutional law are constructed as they are, evaluate the choices implicit in the official doctrinal narrative, and imagine how constitutional doctrines might be constructed differently.

This course also furthers the archaeological project by respecting chronology. [FN19] Constitutional law casebooks, which convey the dominant accounts of constitutional law, are structured around doctrinal categories. [FN20] These doctrinal classifications often distort the interrelationships of multiple aspects of women's experiences. Women's lives as workers, citizens, caregivers, and reproductive individuals are disconnected from each other and addressed only as their activities appear within each ***120** doctrinal context. Thus, the doctrinal stories obscure the interconnections among women's constitutional claims regarding the multiple aspects of their lives. Furthermore, the doctrinal organization undermines stories of structures of oppression told through feminist social movements. Many social movements of women framed constitutional claims to equality, fairness, and participation in the life of society within the context of opposition to patriarchal structures of power. [FN21] In this course, unlike in most other constitutional law courses, students do not learn to fit past cases into a current doctrinal matrix. Rather, in finding the alternative stories of individuals and social movements, students immerse themselves in the ways of thought and structures of society in which women lived, social movements developed, and the doctrines of constitutional law of the time took shape. They come to understand the processes by which the official accounts of women's oppression were chosen over others or shaped in interaction with other competing stories.

Clinical courses, too, can subvert the understanding of law as authoritative pronouncement. In this article, I analyze two clinical courses I teach at American University, Washington College of Law as experiences in legal archaeology. In both the Women & the Law Clinic [FN22] and the Intellectual Property Clinic, [FN23] students experience the methodological and substantive subversions of legal archaeology. In the Women & the Law Clinic, as in Professors Cain and Kerber's Gender & Constitutional History course, the importance of gender to subversion is apparent. In the Intellectual Property Clinic, as in many other courses that do not explicitly address gender, the subversions identified by legal archaeology present the possibility of revealing how gender is part of the stories excluded from the official accounts of the law. Although the focus of legal archaeology may often be on the past, its methods can be equally useful in reconceiving law in the present. Therefore, as Gender & Constitutional History can be seen as an example of legal archaeology, so can student representation of clients in the Women & the Law Clinic and the Intellectual Property Clinic.

In both clinics, the students focus not on issues of doctrine, but on the activities involved in lawyering. As they represent a client under the supervision of a faculty member and as part of a structured clinical course, students engage in and analyze the activities of the lawyer. They ***121** experience the development of their relationship with a client, and they undertake all the tasks involved in representing that person or group. In the class, they explore the dynamics and nature of their relationship with the client; understand the client's often changing view of the situation; reflect upon each choice they make as lawyers in shaping and pursuing the legal matter(s) in the client's life; analyze the institutions that mediate the client's experience with legal rules and procedures; and examine the interaction of legal concepts, rules, and procedures with social and political power.

Although the structure of these two clinical courses, like many other clinical courses, requires the students to engage in work that differs greatly from the reading and analysis of appellate cases, the differences between the activities in a clinical course and those in any other law school course do not necessarily entail a challenge to the idea of law as the official account constructed by courts and legislatures. The message of a clinical course could be that lawyers engage in the process of applying “the law” as propounded by courts, legislatures, and administrative agencies to the particular “facts” of a client's case. This approach to clinical study would reinforce rather than subvert the concept of law as authoritative pronouncement. The students' activity as lawyers, the experiences and stories of the client, the meanings that clients, students, and other actors in the situation attribute to the different aspects of the representation, and the social and historical context within which representation develops could be seen as interesting and important but not part of “the law.”

A clinical course, although not inherently subversive, creates multiple opportunities to learn a different way to understand what constitutes the law. [FN24] Three elements that characterize both the Women & the Law Clinic and the Intellectual Property Clinic, as well as other clinical courses throughout the country, echo the methodological and substantive subversions of legal archaeology that are essential to the project of conveying a different understanding of what the law is and how it operates.

***122** First, the activities of the lawyer and the client are worthy of study. While lawyering has come to be a part of the curriculum of most law schools in the form of clinical programs, legal academia still contests that focusing upon the activities of the lawyer comprises more than a “skills” course, a course in how to apply the law as it is transmitted in the rest of the curriculum. [FN25] Therefore, the analysis of lawyering undermines the dominant conception of law as authoritative text only when the activities of the lawyer are treated as an aspect of law creation and elaboration. [FN26] The reconceptualization of lawyering as part of law is a central component of the subversive potential of a clinic. For example, in the Women & the Law Clinic, when students represent a woman who has been abused in an intimate relationship, they learn about the law of domestic violence

from the clues they find outside the cases or statutes, or even outside of the formal court procedures they might employ as part of a case. They learn about how the client's experience of being physically harmed by someone close to her becomes a subject of the law. They struggle to learn what the experience means for that woman. They must acknowledge and destabilize their own frameworks for understanding her experience. They grope towards learning how to accept her framework and not impose their own through the conscious or unconscious use of their power within the relationship. They discover that the woman's understanding of her situation is often dynamic, changing as she repeatedly reinterprets her experience in light of her interactions with other people, the history of the relationship in which the abuse occurred, her feelings for the person who harmed her, her material resources, her other needs, the response of the lawyer, her interactions with others during the steps in the legal process, her attitudes toward the law and the legal system, and factors that remain elusive. Students meet people who are angry at their client for causing the ***123** abuse or for remaining in a relationship in which abuse occurs. They deal with officials, from court personnel to judges, child welfare workers, and prosecutors, who often think they know what is best for the woman and for society. Students encounter court procedures and court forms that serve to limit the scope and applicability of the legal action. [FN27]

Students are often surprised to see that a legal action originally sought by feminists as a legal tool for providing women some protection from dangerous situations of domestic violence has been transformed into a routinized set of procedures that often distort women's experiences, endanger them further, threaten their custody of their children, fail to address the range of needs women in abusive relationships have, and operate differently depending on race, ethnicity, and class. [FN28] Students who enter the clinic thinking that the official rubric of legal actions to enjoin abusive behavior by a family member or an intimate partner constitutes the legal framework for addressing domestic violence soon see that they must listen to and absorb the multiple stories of intimate violence in order even to begin to comprehend how these experiences take on meaning in the legal system. If students try to squeeze their client into the statutory categories and requirements or counsel her to fit within judicial expectations of how an abused woman should behave, they feel the multiple tensions among the woman's experience as conveyed to them, the reactions of others to her situation, and the construction of the legal rules. [FN29] Thus, students discover that the material they find in the world is essential to the law of domestic violence. Furthermore, they learn that these tensions are not irrelevancies ***124** to be suppressed or bemoaned. [FN30] Rather, they provide a starting point for lawyers to engage in a constant process of seeking to reshape the law to reflect their discoveries about women's experience of domestic violence. With this knowledge and experience, the students are poised to question how and why the law of intra-family offenses came to be as it is and how it could be different.

As in the Women & the Law Clinic, the students in the Intellectual Property Clinic must listen for and identify clues that exist outside of formal legal materials in order to understand the law. In representing a woman inventor seeking to claim infringement of her patent, the students in the clinic must look past the law of infringement. As they face the limited nature and scope of the type of their client's patent, they pursue clues about the conditions under which she obtained that patent. By following these clues, they discover an invention submission company and unravel the circumstances under which the firm induced her to pay for a worthless patent. They see that the operation of this company, the company's connections to other firms, the client's aspirations in contracting for the services, and her interactions with its representatives are critical to understanding the limitations she faces in claiming that others have improperly taken and used her invention. Had the students not listened carefully to all parts of her account, in particular those that appeared “irrelevant” to her intellectual property claim, the students could easily have concluded that the law did not provide her with the remedy she wanted. According to the doctrines of patent law, she could not stop large corporations from producing products

similar to the one for which she had obtained a patent. The students' activity would have been to counsel their client about how the law would not secure for her the legal remedy that she thought she deserved.

Instead, the students probe to find out the desires their client articulated to the representatives of the patent submission firm about patenting and marketing her invention. They call upon the client to remember the representations made to her by the representatives of the patent submission firm; they comb through the brochures and the promotional materials of the firm; they identify the actions the firm took to secure her a patent; they document the actions the client took in response to the advice of the firm's representatives. While they calculate the money that their client paid to (and borrowed from) an interconnected web of companies to obtain its "services," the students slowly decipher her motivations and reasons for committing so many financial resources over the extended course of her interactions with the firm, when she had so little ***125** money. They hear about her hopes as she took each step in her relationship with the firm. They encounter the client's religious fervor about making her invention available to other women. They discover the trust she brought to her relationship with the invention submission firm. They examine the services that the company provided in return for her money and her trust. Through the course of the representation, as the client learns about the failures, inadequacies, and deceptions of the invention submission firm, of the collusion among a web of legal entities surrounding the company, the students must address their client's disappointment, anger, and sense of injustice. They work with her to explore new ways to address the limitations of the patent that the firm obtained for her. They wonder if, as an African-American woman, she was affected by assumptions about race and gender in her dealings with the invention submission firm. With their knowledge and experience, the students in the Intellectual Property Clinic are in a position to explore how the work of the inventor, the process of invention, and financial gains from entrepreneurial effort are shaped by money, power, and access to lawyers.

The second subversive element of both clinical courses is the methodology of searching for diverse and conflicting stories. The interaction of these stories and the interplay with the construction of the official story, reveal the operation of the law. Lawyering, like legal archaeology, is about discovering, constructing, and articulating multiple stories. However, in the representation of a client, unlike in legal archaeology, the most important account is the story that develops in the relationship with the client. In the context of representing a client, the account the client wants told, as decided through interaction with the lawyer, is primary. At the center of the lawyer-client relationship is working with the client to identify, understand, and continually reformulate her different stories, particularly in light of the ways these narratives interact with legal doctrine and ethical and professional norms.

Although the story or stories of the client have a privileged status in the students' work representing clients, students, to be effective lawyers, must also discover, understand, and sometimes reconceive and reformulate the narratives of others who are part of the case. [FN31] In addition, students ***126** must discern the available, or stock stories, that underlie legal doctrines or legal practice. [FN32] More importantly, they need to learn to interpret the space that they can create or occupy for telling alternative stories. Helping a client decide whether to conform to stock stories or how far to depart from, to alter, to challenge, or to ignore these stories pervades the students' activity. [FN33] When understood this way, the work of the lawyer, whether labeled as interviewing, counseling, investigation, negotiation, making opening and closing statements, or examining witnesses, is about stories. An awareness of multiple stories drives these lawyering activities, and the accounts that are told throughout the process of representation reflect the work of the lawyer in each activity of client representation. Clinical scholars have often reframed the idea of storytelling centered on the client as "case theory" and "client theory," but both concepts have storytelling at their core. [FN34]

Returning to the domestic violence case in the Women & the Law Clinic, the students constantly use the information they obtain from the multiple sources they consult to frame different stories. In working with the client, they become increasingly comfortable with the processes that the client goes through in understanding her own experience. The students must constantly listen for how the story changes based on developments in the client's relationships, feelings, sense of self, material needs, and goals. They explore to what extent and in what ways the client sees herself as a victim and in what ways she feels like and acts as an agent in the world. They examine how social and legal institutions constrain women's capacity to act in the world. They are mindful of the client's understanding of the threat to her security and possibly the security of those she cares about. They consider the client's views of the person who was violent to her. Is ***127** he a perpetrator? A companion? A monster? A father to her children? A victim himself? A provider? These multiple, sometimes conflicting, characterizations of self and others come from not only a woman's own experience, but also the prevailing images of men and women in situations of domestic violence. As the students counsel the client about the possibility of filing a court action, they gauge how the narratives that dominate the court system and social service systems will interact with the story the client wants to tell. And they must discover the story that the person who abused her will probably tell. They formulate a story to present to the court. As in legal archaeology, the students' search for these diverse stories is central to the law. In the identification and articulation of these disparate and conflicting narratives, students see law in the making.

In the Intellectual Property Clinic, students similarly search for multiple stories about their client's experience of seeking and obtaining a patent for her invention. They, like the students in the Women & the Law Clinic, must be aware of their client's shifting perceptions of herself and others. She is proud of herself as a creative person. When she sees products on the shelves of the supermarket similar to the one for which she obtained a patent, she is indignant that large corporations are making money from an invention she believes she developed before they did. She thinks that her invention would have helped other women. She sees her work as part of a religious mission. She wants to believe that the people at the invention submission company meant to help her. She is disillusioned by the misrepresentations they made to her, and she is dismayed by the company's failure to obtain anything of value for her. She is angry that they took so much of her money. She is embarrassed about being misled. She is angry at their betrayal of her. She is outraged at being manipulated and exploited by a large and complicated company that systematically took advantage of the dreams of inventors with few resources. She wants to help others who may be similarly harmed.

While discovering their client's shifting stories, the students also seek to know the multiple accounts of the invention submission company. Is it a legitimate enterprise attempting to make complex and highly technical services available at a reasonable cost to ordinary people who would not on their own be able to obtain help in protecting and marketing their products? Is it a sleazy operation in league with other operations, preying upon vulnerable people who do not have much income beyond what they need to live? Are they creative entrepreneurs who have identified a need in the market for patents and have filled that need? Have they behaved honorably by following the laws designed to protect consumers? Did they fully disclose to the client that she was unlikely to make money from her invention? If so, does that disclosure constitute sufficient openness? Have they “cleaned up their act” by complying with a consent decree they ***128** entered several years earlier? Or have they interpreted every requirement as narrowly as possible in an attempt to continue to induce people to buy worthless services?

As in the representation of a client in a situation of domestic violence, the students who represent the woman with the patent encounter and construct and respond to diverse and conflicting stories. The interaction of the conflicting stories about a woman, a patent, and a company comprises critical information about the law of pat-

ents, information excluded from the doctrines of the law. When the students comprehend the official account of patent law within the context of these conflicting stories, they know the law differently. The doctrines regarding the nature and scope of patents are neutral, seemingly equally accessible to all. However, in the multiple stories of the client and in the conflicts of the client's stories with the stories of the invention submission company, the students confront how the formal doctrines of patent law erase an understanding of how patents are realized and given effect in the world, depending upon the position and resources of the individual seeking a patent.

Third, both clinical courses mirror the subversions of legal archaeology by reshaping the content of legal knowledge. When students listen to the shifting stories of their client and of others; when they frame and reframe stories; when they see how the stories interact with each other; when the students develop their capacities as lawyers to affect those stories; when they analyze the possibilities of and limits to gaining acceptance of some of those stories; when they see the power that operates as some stories are elevated over others; and when they explore how legal doctrine can be transformed within the legal system to produce results in tension with those intended, they learn law in a subversive way. In experiencing how the stories people tell are connected to their different relationships to the legal system, they gain an understanding of how the law operates. Because the stories are frequently complex, chaotic, inconsistent, and ambiguous, the law is difficult to grasp. Nonetheless, these stories reveal the law as experienced, the law as mediated through legal and social institutions, and the law as connected to the exercise of power. Without the lawyer's constant attention to stories in the present life of a case (or without the legal archaeologist's efforts to uncover those stories in the cases of the past), the law appears as an abstract pronouncement, distinct from the clash of stories, the disputes among people, the conflicts among groups, the activities of social movements, and the exercise of power.

When students in the Women & the Law Clinic look outside the official story about domestic violence, they experience how focusing on the substantive and procedural aspects of civil protection orders constricts their legal knowledge. The legal rules, procedures, and remedies alone often fail their client, as they embody limiting and sometimes damaging assumptions ***129** about women's experience of violence, do not embrace the range of effects that violence has in women's lives, and can expose women to greater danger than they faced before seeking or obtaining an order. The students also face the operation of power as they come to know the meaning of violence in the woman's life. The students feel the consequences of the choices they make with the client in constructing stories and in handling conflicts in the stories.

These consequences come in many forms. If students do not hear their client's story in a way that makes her feel comfortable or if they distort her story, she may abandon legal actions that might otherwise help her. If they frame her story too narrowly within the confines of existing legal categories, the client may seek through the court system relief that she would more safely and effectively obtain elsewhere. If the client decides to proceed with a court action, the students face the exercise of judicial power. The choice of stories is, at the moment of decision, not just about narrative or history. The choice affects whether a client seeks and/or gets the relief that the legal system offers, whatever its limitations and distortions. Therefore, students immediately and concretely experience the effects of consulting multiple sources, framing stories, and analyzing the conflicts among the amalgam of narratives. The materials that they consult throughout their representation and the stories that they encounter and shape enable them to comprehend the law of domestic violence as one arena for contemporary struggles over how a woman can achieve not just meaningful safety, but also the capacity to participate fully in relationships and in society, free from oppressive constraints such as systematic violence.

As students represent other women in the clinic in other types of legal actions, and as they approach their work with all their clients in a similar fashion, they also begin to relate the mixture of stories in those cases to

the stories in the original domestic violence case. Students may not emerge from a year in the Women & the Law Clinic with a well-developed understanding of how the multiple stories in the different spheres of women's lives intersect with each other, but they do begin to appreciate how law is a site for contesting the numerous ways that women in many different situations continue to be excluded, constrained, discriminated against, and oppressed, depending upon their particular position in society. With this vision of law, students are better able to see themselves as capable of acting as lawyers to help women who must fight against the official accounts contained in the legal system or want to use the legal system or other social institution to reshape possibilities in their own lives or in the lives of other women.

Students in the Intellectual Property Clinic, by looking outside the official story about patents, also realize that they must approach patent law ***130** from outside its doctrines in order to understand how it operates. Patents are accessible to inventors who occupy privileged positions in society. The students find out how a patent is only one element in making an invention valuable in the world. Resources and economic organizations are also needed. They become conscious of the space for exploiting vulnerable people who do not begin with power or resources for obtaining and benefiting from the rights that the legal rules of patents create. They begin to comprehend one woman's impulse to invent and have others benefit from her invention. When they recognize the partial and distorted quality of the dominant stories about inventors and the process of invention, they question why those stories conflict with the experiences conveyed to them by their client. The students wish they knew more about how gender and race affect the experience of their client, and how the world of invention and the activities of production and marketing of inventions are marked by race and gender.

As students represent other clients who want to protect or to use those cultural products that are labeled as “intellectual property,” they discover multiple and conflicting narratives about the process of cultural production. They encounter writers, artists, dancers, computer programmers, historians, archivists, scientists, librarians, music enthusiasts, journalists, and social activists, as well as inventors, who engage in the creation of “intellectual” works and in the use and dissemination of the products of our culture for many purposes. The students hear and construct many conflicting accounts of how these activities benefit society. The multiple stories, in conjunction with reflection upon those stories in the clinic class, enable the students to begin to see the forces shaping contemporary concepts of intellectual property. Individuals differently situated regarding intellectual work, powerful societal forces that generate and profit from the creation of cultural products, and people who enjoy and value the products of culture create complex, ambiguous, and conflicting stories about the values implicated by the process of cultural production. With this knowledge and experience, students begin to perceive the law of intellectual property as embracing the sphere of cultural production.

These three subversive elements of clinical pedagogy, which also characterize legal archaeology, all require exploring the nature and contours of factual indeterminacy. Understanding factual indeterminacy is as critical to the project of lawyering [FN35] as it is to legal archaeology. As students in a clinical program come to appreciate the complexity, ambiguity, and instability of the facts of any case, as well as the constraints and the possibilities that characterize the construction of facts, they realize ***131** how law is fraught with factual malleability. Facts are not just given in the world for the law to act upon. Rather, facts are embedded in situations, institutions, and relationships. Seeing them, hearing them, finding them, and interpreting them are parts of the larger project of understanding the context in which they arise. Lawyers also daily confront limitations on the malleability of facts. Part of the material world, facts are only partially indeterminate, yet they are perceived, experienced, and understood differently by different actors in the world. Therefore, students in a clinic face at once both the boundaries created by the facts they encounter and the shifting and variable nature of those boundaries. These characteristics of facts are not incidental to the development of law. Rather, the contexts within which

facts appear and are understood are part of both an individual case and the dynamics that shape the development of legal doctrine and law. In both clinics, understanding factual indeterminacy as part of and not separate from law undermines the concept of law as authoritative pronouncement.

In the three pedagogical activities presented in this panel, challenging the idea of law as authoritative pronouncement is part of current feminist subversive activity. Although official pronouncements may not always be about women or may not always implicate questions of gender, the process of reshaping the concept of what constitutes law is important to feminist legal theory. As the stories of the law, in their multiplicity and ambiguity, are revealed, analyzed, and studied in law school classes, our students and we are can better understand how gender operates in apparent and invisible ways throughout the law. We have learned much from analysis of the gendered assumptions underlying authoritative texts. We have explored the contradictions and ambiguities that are inherent in those texts. Now, by attending to the conflicting stories that constitute the law, as found in sources outside of official pronouncements-- especially those alternative stories that have been rejected or distorted--we have much to discover about the experiences of women as the law pervades their lives, much to examine about the operation of power as expressed in the authoritative stories that dominate the law, and much to explore about the possibilities for and limitations on transformation through the stories that we tell in seeking to change the law.

[FNa1]. Professor of Law and Carrington Shields Scholar, American University, Washington College of Law. I thank my colleagues in the clinical program at the Washington College of Law who constantly embrace expansive visions of the project of clinical education. In particular, I appreciate the creativity and openness of the colleagues with whom I have worked so closely in the development of the Women & the Law Clinic and the Glushko-Samuelson Intellectual Property Clinic: Diane Weinroth, Vivian Hamilton, Peter Jaszi, Christine Farley, Vicki Phillips, Joshua Sarnoff and Richard Ugelow.

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[FN6]. Threedy, supra note 1, at 128.

[FN7]. Id. at 127.

[FN8]. Id. at 128.

[FN9]. Feinman & Feldman, supra note 1, at 882; Gordon, supra note 1, at 391.

[FN10]. Cain & Kerber, supra note 1, at 102; Grodin, supra note 1, at 548.

[FN11]. Professors Cain & Kerber share my perception of students' reluctance to seek knowledge beyond traditional legal sources. Cain & Kerber, supra note 1, at 102. Perhaps the students are not so dissimilar from many of their teachers. Gordon, supra note 1, at 391.

[FN12]. Even students who embrace legal perspectives that would seem to require knowledge and analysis from beyond legal texts, such as law and economics, frequently tend to rely on the official pronouncements about how those materials should inform legal decision making. See Gordon, supra note 1, at 391-92.

[FN13]. Threedy, supra note 1, at 127.

[FN14]. Id.; see also Naomi R. Cahn, Inconsistent Stories, 81 Geo. L.J. 2475, 2480-81, 2485-88, 2495, 2514 (1993) [hereinafter Cahn, Inconsistent Stories].

[FN15]. Threedy, supra note 1, at 132; see also John M. Conley & William M. O'Barr, Hearing the Hidden Agenda: The Ethnographic Investigation of Procedure, 51 Law & Contemp. Probs. 181 (1988); Austin Sarat, "... The Law is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 Yale J.L. & Human. 343 (1990).

[FN16]. Threedy, supra note 1, at 133-34.

[FN17]. Cain & Kerber, supra note 1, at 91, 95-97, 102-03.

[FN18]. Id.

[FN19]. Id. at 91.

[FN20]. Id.

[FN21]. Id. at 91.

[FN22]. The Women & the Law Clinic is a two-semester, fourteen-credit course in which students represent clients in a wide variety of legal actions, while simultaneously studying the theory and practice of lawyering in a seminar organized around simulated cases that draws on readings about lawyering and about the operation of gender in the legal system.

[FN23]. The Glushko-Samuelson Intellectual Property Law Clinic is a two-semester, fourteen-credit course in which students represent individuals and groups in matters involving intellectual property and examine how legal categories that construct intellectual property have an impact on the public interest.

[FN24]. Chavkin, Spinning Straw into Gold, supra note 5, at 133; Spiegel, supra note 2, at 590-91; Stephen Wizner, Beyond Skills Training, 7 Clinical L. Rev. 327 (2001). For examples of clinical approaches that reject the model of law as constituted by official pronouncement, see Susan D. Bennett, "No relief but upon the terms of coming into the house"--Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System, 104 Yale L.J. 2157 (1995); Barbara Bezdek, Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process, 20 Hofstra L. Rev. 533 (1992); see also Patricia Ewick & Susan S. Silbey, The Common Place of Law: Stories from Everyday Life (1998); William L.F. Felstiner & Austin Sarat, Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions, 77 Cornell L. Rev. 1447 (1997); Austin Sarat, Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education, 41 J. Legal Educ. 43 (1991); Sarat, supra note 15; Barbara Yngvesson, Inventing Law in Social Settings: Rethinking Popular Legal Culture, 98 Yale L.J. 1689 (1989).

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[FN26]. Amsterdam, The Lawyering Revolution, supra note 1, at 12; Gerald P. Lopez, The Work We Know So Little About, 42 Stan. L. Rev. 1, 9-11 (1989); Gerald P. Lopez, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1608 (1989) [hereinafter Lopez, Reconceiving Civil Rights Practice]; Gerald P. Lopez, Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education, 91 W. Va. L. Rev. 305, 322 (1989); Chavkin, Spinning Straw into Gold, supra note 5, at 133; Shalleck, Toward a Jurisprudence, supra note 25, at 15-20; Shalleck, Constructions of the Client, supra note 1, at 1744-46; Lucie White, Paradox, Piece Work, and Patience, 43 Hastings L.J. 853, 855 (1992); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1, 45-50 (1990) [hereinafter White, Subordination].

[FN27]. Susan Bryant & Maria Arias, Case Study: A Battered Women's Rights Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering that Empowers Clients and Community, 42 Wash. U. J. Urb. & Contemp. L. 207, 216, 219-20 (1992); Cahn, Inconsistent Stories, supra note 14, at 2487-88, 2490-91; Naomi Cahn, The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice, 77 Cornell L. Rev. 1398, 1442-46 (1992) [hereinafter Cahn, Looseness of Legal Language]; Leslie G. Espinoza, Legal Narratives, Therapeutic Narratives: The Invisibility and Omnipresence of Race and Gender, 95 Mich. L. Rev. 901, 908-09, 911-12 (1997); Phyllis Goldfarb, Describing Without Circumscribing: Questioning the Construction of Gender in the Discourse of Intimate Violence, 64 Geo. Wash. L. Rev. 582, 614 (1996); Martha R. Mahoney, Legal Images of Battered Women, 90 Mich. L. Rev. 1, 2-4 (1991); Ann Shalleck, Theory and Experience in Constructing the Relationship Between Lawyer and Client: Representing Women Who Have Been Abused, 64 Tenn. L. Rev. 1019, 1033-34, 1040-44 (1997).

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