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FIELDWORK AND THE POLITICAL

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FIELDWORK AND THE POLITICAL

*By Sameer M. Ashar**

It is not in our power to eliminate conflicts and escape our human condition, but it is in our power to create the practices, discourses and institutions that would allow those conflicts to take an agonistic form. This is why the defence and the radicalization of the democratic project require acknowledging the political in its antagonistic dimension and abandoning the dream of a reconciled world that would have overcome power, sovereignty and hegemony.

-- Chantal Mouffe¹

are the cops in our heads and hearts?

-- Paula X. Rojas²

The choice of fieldwork is central to the clinical enterprise and intensely political. As Chantal Mouffe argues, “political questions are not mere technical issues to be solved by experts. Properly political questions always involve decisions which require us to make a choice between conflicting alternatives.”³ The clinician, much like a program officer at a foundation or an agent of the government, makes decisions about how to distribute scarce resources to people with limited access to those resources. Describing one’s intake criteria as “apolitical,”⁴ providing “direct service,”⁵ exclusively focused on “small cases,”⁶ or triaged strictly by income or wealth are political choices that generate opportunity costs. Though all of these criteria reflect political choices made by clinicians, they are often described in such a way as to elide larger social conflicts, above and beyond the specific contexts of the individual case.⁷ This type of description, perhaps buttressed by “objective” factors such as the income of a prospective client, can protect clinics from hostile institutional forces and attract students with a broad range of ideological commitments. However, it also obscures the core social conflicts underlying the life conditions of disadvantaged clients. Clinicians who seek to avoid these core social conflicts preemptively limit the scope of their representation and their interventions, thus confirming—to both law students and society at-large—the view of law as status quo reinforcing.

In any case, it is essential for new clinical teachers to understand the rules, constraints, and expectations imposed by law schools and the legal profession, or the “politics” of clinical legal education. The preceding chapter well documents the issues meriting consideration in fieldwork selection. Indeed, this book as a whole implicitly captures and documents the “politics” of the current era of clinical legal education. It remains essential for established teachers to remain conscious of the limits imposed upon us by external forces, as well as by our own internal will-to-action, constrained as it is by path dependence, institutional context, and our psychological features. As time passes,

there may be a tendency to accept the politics of our field of practice and to refrain from interrogating those rules, constraints, and expectations. The challenge then lies in figuring out how to keep “the political”—alternative conceptions of society as articulated by those excluded from the established social structure—at the surface in clinical legal education.⁸

In this essay, I briefly describe two types of fieldwork that explicitly facilitate the engagement of clinical faculty, students, and law schools with the political: (1) lawyering in collaboration with social movements; and (2) lawyering on behalf of prisoners and detainees in the United States. The learning goals and opportunities, design principles, and environmental factors delineated in the main chapter create the space in which we work. How do we choose to fill that space? Do those rules, constraints, and expectations give any indication of flexibility or plasticity? As Bryant and Johnson explain, there is no specific kind of fieldwork necessitated by the commonly accepted learning goals and opportunities, design principles, and environmental factors in clinical legal education. The practice areas that I discuss below suggest that there is a modest degree of autonomy in clinical fieldwork selection. This autonomy – which we may underestimate or diminish – facilitates the engagement of clinical faculty, law students, and law schools with the political.

COLLABORATING WITH VISIONARY MOVEMENT ORGANIZATIONS

The search for appropriate cases and projects stemming from social movement activity is a difficult one. Movements do not advance on an academic calendar. Case and project development is often challenging: movement organizations with strong, centralized leadership raise questions about their democratic nature. Organizations with flatter, multipolar leadership structures may not be able to prioritize formulation of a legal project for a clinic. Movement campaigns sometimes gain momentum and at other times limp along or end completely. Partners pursuing multiple organizing strategies may decide, with their member-clients, to pull the plug on a case into which clinic students have poured their hearts. Organizers may shift their focus or member-clients may be demoralized by a campaign without tangible benefits. Campaign targets may be badly chosen, without deep pockets for the purposes of damages actions or with a deep well of resources including lawyers willing to wage a war of attrition with an overmatched clinic team.

Each of these challenges could be described as inherent to the representation by a clinic of any organization—activist or establishmentarian, non-profit or corporate, small or large. These challenges may also, with little effort, be transmuted to describe work with individual clients who are “difficult,” unpredictable, or resource-deprived.⁹ The root of these challenges—working with an ambitious, mission-focused organizational partner operating without adequate resources in a rapidly changing environment—requires tolerance for uncertainty and commitments to flexibility and experimentalism. Interestingly, these are some of the same primary features identified by legal education reform advocates based on their analysis of a profession in the midst of structural transformation.¹⁰

In a prior article, I outlined the many pedagogical opportunities created by collaborations with movement organizations¹¹ Central among those is the opportunity to work with clients with explicitly articulated visions of society. While every representation is political, a movement organization's critical vision brings to the fore important lessons for law students: about conflicts between professional norms and the political commitments of clients; the incongruence of law, legal institutions, and justice in a given case; and reflections on lawyer role, which have the potential to spur greater career intentionality amongst students. Engagement with the political through law school clinics speaks to the public values of the profession.¹² Ann Shalleck has discussed this as the responsibility of all law schools to train facilitators of democratic process and democratic governance.¹³ Jane Aiken formulates a related idea in arguing for the education of "provocateurs for justice."¹⁴ This thread of thinking within legal education and the profession is under stress as market pressures bear down on law schools. It is a resilient and noble ideal that requires an active defense. Clinics are positioned to advance this ideal within legal education through intentional fieldwork selection and collaborations with social movement actors.

Work with true movement organizations embraces the political by bringing outsider narratives to bear on the law. In the current context, this work is often premised on the fulfillment of the promise of prior legal enactments or by filling gaps in the latticework of civil rights law. Movements have also, by necessity, mobilized against the use by state and private actors of law to impede political organizing and solidarity. This oppositional stance is sometimes mirrored in the defense of individual criminal defendants, prisoners, and detainees. While the movement actors have been made marginal through legal and social norms, criminal defendants, prisoners, and detainees are literally banished from and isolated outside of home communities. For some defenders, the representation of an indigent person in this position is a political choice. In the next section of this essay, I set out the political underpinnings of individual representation in three different contexts of state authority.

LAWYERING IN "STATES OF EXCEPTION"

Thus Guantanamo fills an existential need for security. That we obtain such security through the quarantine of darkened bodies is a familiar compromise—at Guantanamo, as well as in the territorial United States—and one that is not easily disturbed. . . . Closer to home, the overincarceration of African Americans and Latinos in U.S. prisons promises safety through racial containment.¹⁵

The "man" who remains after ties to society have been nullified is nothing but a body, an extralegal being, an alien. Interviewees, who in many cases thought of themselves as quasi-citizens, discovered that, through detention, they became this alien.¹⁶

Physical isolation and compromised legal process are key features cutting across three contemporaneous regimes of state authority: "enemy combatants" held at Guantanamo, criminal defendants jailed prior to conviction and imprisoned thereafter, and migrants detained on the basis of civil violations of law. When the state engages in racial

(and class) containment by physically confining the disadvantaged, it is incumbent upon lawyers to fight for democratic values through individual representation. It is incumbent upon lawyers to pierce the isolation regime imposed by the state and abetted in some cases by private, for-profit penal companies. When clinics participate in these cases, they engage faculty, students, and law schools in the political. Judith Resnik connects sets of detainees targeted by the state over time in the service of a succession of wars waged on the enemies within: revolutionary ideology, drugs, gangs, terror, darkened bodies, the foreign-born.¹⁷ These wars are the result of a flickering national resolve fanned aflame by political actors. They use instances of collective vulnerability to impose punitive executive power on groups they choose to personify the scourge within.

Mark Tushnet argues that “states of exception” are emergency periods that expose the role of politics in determining the course and content of law.¹⁸ Muneer Ahmad, looking as a detainee lawyer at the place and the processes that comprise Guantanamo, states that “[a]t some point, systematic illegality—particularly when enacted under a claim of law—crosses into lawlessness.”¹⁹ Giorgio Agamben, who revived the “state of exception” concept in the post-9/11 period, contends that the sovereign may attempt to naturalize the rules and power relations established during an emergency period.²⁰ Alexandra Natapoff implies the same in discussing over-criminalization in the United States:

In communities where fifty percent or more of the men are under criminal justice supervision at any given time, where the odds that a black man will be arrested in his lifetime are one in three, and where thirteen percent of the men are disenfranchised, the criminal system is the government. The central fact about this government, of course, is that it is coercive and punitive. However, its failings are exacerbated by the fact that it actively silences its constituents, cutting off traditional avenues for democratic change and practically ensuring official unresponsiveness.²¹

Lawfully imposed regimes of unconstrained executive authority wielded over groups of people in times of emergency become “the government” in those communities and for those groups. Representation of individuals subject to those regimes requires engagement with the political. The larger socio-political phenomena that created the individual case are fundamental to the lawyer’s understanding of the facts and the written and unwritten rules governing the proceeding.

The physical isolation of Guantanamo is obvious, accentuated by the efforts of successive administrations to prevent federal courts from establishing jurisdictional authority over the military base and detention center.²² Prisons have been sited in states far from the metropolitan areas in which policing and arrests are most prevalent. Even jails, such as Rikers Island in New York, though close to the home communities of inmates, are made inaccessible by correctional authorities. Lawyers from Manhattan have to take the subway to a bus to a parking lot in Queens, where they are transported to the island on corrections department buses. This intermodal route can take a half-day for a lawyer to meet a single client at the jail. Unsurprisingly, a New York Times report from 2001

indicated that only 36 percent of lawyers go to Rikers to meet their clients and indigent defense expert Steven Zeidman thinks that this number shrinks as each year passes.²³

Immigrants, who do not have a right to counsel for their deportation cases, were for many years transported long distances from their home communities to jurisdictions such as the Eastern District of Louisiana and the border cities of Texas. These transfers had the effect of distancing migrants from their friends, family, non-profit advocates, and potential legal representation and putting their cases in districts and circuits friendlier to the government's imperative to speed deportation.²⁴ Additionally, by placing migrants from Mexico and Central America in liminal spaces away from their communities in the United States and closer to their countries of origin, the government sought to make deportation feel inevitable rather than subject to legal checks and judicial discretion.²⁵ The Department of Homeland Security has recently shifted its policy on detainee transfers in response to advocacy efforts by activists and lawyers.²⁶ However, even when migrants are detained in the same metropolitan areas in which they were resident, they are placed in private and county facilities hours from central business districts where courts and lawyers are concentrated. Detainees are "present" at their court hearings by teleconference or lawyers are beamed into immigration courts in detention centers to represent their clients by teleconference, with attendant erosion of due process and effective assistance of counsel.

In its rawest form, the state employs the governance strategy of physical isolation by holding prisoners in "Supermax" facilities in solitary confinement 23 hours per day, seven days per week over many years.²⁷ Even in regular state and federal facilities, prisoners are managed and discouraged from contact with outsiders through physical battery and assault. Mika'il DeVeaux, a scholar and teacher formerly imprisoned in five different facilities in New York State, described the management strategy as follows:

I was assaulted so that I could be made into an inmate. Every encounter with people from the outside world, whether visitors or other guests, was followed by acts of humiliation, which included being stripped naked and made to expose every body cavity, running my fingers through my hair, and showing the bottoms of my feet.²⁸

This kind of physical abuse and the widening use of solitary confinement are commonly understood to foster mental illness amongst prisoners.²⁹ Less well understood is the impact of housing large numbers of already mentally ill people in prisons and jails. According to Paul Sarlo, "more Americans now receive treatment for mental illness in jails and prisons than hospitals or other facilities" and Rikers Island in New York is "the largest psychiatric facility in the nation" with approximately 3000 mentally ill inmates.³⁰ Moral outrage and litigation against inhumane conditions of confinement led to deinstitutionalization of the mentally ill; that kind of outrage and associated legal action is now blunted by the regimes of control that criminalize a particularly vulnerable segment of the population.

These conditions of physical confinement at jails, prisons, and detention centers compromise the legal process extended by the state to prisoners and detainees. By necessity, migrants litigate pro se and sign agreements stipulating to their own deportation rather than fighting to remain with loved ones in the United States.³¹ Legal representation

by teleconference is substandard and arguably a violation of constitutional due process. The Potemkin proceedings of military commission hearings at Guantanamo have been widely documented. As Muneer Ahmad argues, the totalizing narratives deployed by the state to justify harsh and isolating conditions of confinement erase individual histories and remove space for judges and agency personnel to exercise the discretion that might ease such conditions and potentially result in release.³²

Like the social movement cases, representation of prisoners and detainees presents a host of logistical and pedagogical challenges for law school clinics. However, teachers have structured excellent offerings in these contexts from the rise of modern clinical legal education to the present. Colleagues who have been doing work in these contexts constitute the pedagogical resource needed to grow the field.³³ The logistical challenges to formulation of client narratives, confrontations with deeply unjust systems and lawfully lawless spaces, and opportunities to relieve prisoners and detainees from the conditions of “bare life”—the methodical stripping of a person toward their becoming “just a body”³⁴—are essential lessons for law students. The values implicated in these cases speak to the foundational values of the profession.³⁵ This thread of clinical work should be elevated rather than submerged during a period of retrenchment in legal education. It should constitute an institutional imperative within clinical education—featured at the conferences and in scholarship—and amongst the many clinical programs in the midst of expansion or restructuring.

CONCLUSION

To be sure, the actual work undertaken in any area of poverty or civil rights law may lead to the co-articulation with clients of social visions otherwise excluded from politics. It is also true that organizational and individual defense clinics may carry out their charge in ways that undermine the political. However, as I have argued elsewhere,³⁶ because of the constrained nature of clinical practice—hemmed in by institutional requirements, the consumerist demands of students, and professional ethical rules that elevate individualistic client interests—context matters. Some areas of work and some types of engagements are more likely to enable faculty, students, and law schools to engage with the political. Both for new and established clinicians, consciousness and intentionality as to the kinds of practice that may lead to political engagement is essential. It is no less than a determination of the kind of moral/ethical, pedagogical universe in which we choose to place our selves and our students. There are too many incentives stacked in favor of marginalization and isolation and against solidarity and community. There are too many incentives stacked in favor of leaving social, economic, and political arrangements as they are.

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¹ ON THE POLITICAL, New York: Routledge (2005), 130.

² THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NON-PROFIT INDUSTRIAL COMPLEX, Incite! Women of Color Against Violence, eds., Cambridge: South End Press (2007), 197.

³ *Supra* note 1 at 10. Although the “Do the Math” schematic in the main chapter is elegant and useful, Mouffe’s conception of the political should cause us to exercise caution when using technical or technocratic approaches to clinic intake.

⁴ See, e.g., Adam Babich, *The Apolitical Law School Clinic*, 11 CLINICAL L. REV. 447 (2005); Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 331 (2012).

⁵ See, e.g., Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 CLINICAL L. REV. 347 (2012). Though unlike other scholars writing in this area, Sharpless acknowledges the limits of individual representation and makes an argument for the linkage of those individual cases to larger social struggles. *Id.* at 387-403.

⁶ See, e.g., Juliet Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333 (2009).

⁷ For an analogous point substantiated by a recent study of legal aid lawyers, see Marina Zaloznaya & Laura Beth Nielsen, *Mechanisms and Consequences of Professional Marginality: The Case of Poverty Lawyers Revisited*, 36 LAW & SOC. INQUIRY 919 (2011) (“We suggest that because reform litigation is no longer accessible, present-day practitioners have to seek different ways to cope with marginalization. In this context their deep engagement with clients, ideals of empowerment, and social justice orientation are gradually replaced by emphasis on limited individual assistance, emotional detachment from clients, lifestyle benefits, and ‘satisficing’ within the constraints of the system rather than changing the status quo. These coping techniques have a profound effect on the quality of legal assistance for the poor.” *Id.* at 941.)

⁸ See Slavoj Zizek, *Carl Schmitt in the Age of Post-Politics*, THE CHALLENGE OF CARL SCHMITT, Chantal Mouffe, ed., London: Verso (1999), 27-28. See generally Robin West, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM*, London: Cambridge Univ. Press (2013). A full interrogation of the politics of clinical legal education remains beyond the scope of this essay.

⁹ See Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

¹⁰ See, e.g., William D. Henderson, *A Blueprint for Change*, 40 PEPPERDINE L. REV. 2 (2013) (“First, the types of education that will attain the highest valuation are complex problem-solving skills that enable law school graduates to communicate and collaborate in a highly complex, globalized environment. This is not vocational training; it is the creation of a new model of professional education that better prepares our graduates for the daunting political and economic challenges ahead.” *Id.* at 493).

¹¹ Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008).

¹² Robert Gordon disturbs a common understanding of legal ethics that assumes clarity and mechanical application:

There simply is no standard conventional wisdom or consensus, and certainly no source of unambiguous directive rules, that novice lawyers can simply sign on to

and complacently accept—at least, none that provides any real guidance to resolving the hard dilemmas of professional practice life. Like anything else really important, the practice of law is a messy, dispute-riddled, contentious, politicized field of ideas and action, calling for sustained reflection and complex discretionary judgment.

LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE, Susan D. Carle, ed., New York: NYU Press (2005), xvi. Susan Carle goes on to challenge the view that zealous advocacy is the sole ethical conception of the good lawyer and presents a series of alternative precepts set forth in the legal academic literature (and in legal practice):

that lawyers should give higher priority to seeking justice than to advancing their clients' interests; that lawyers should give of their talents and skills to solve the public problems of their day; that lawyers should maintain a high degree of professional independence from their clients; that lawyers should provide legal services for all members of the community, including those who cannot pay; that lawyers should devote their energies to fighting on behalf of downtrodden, underrepresented, and/or unpopular clients; and that lawyers should be engineers for social justice.

Id. at 1-2. These are articulations of the public values of the profession to which I refer in the text.

¹³ Interview with Ann Shalleck, October 2, 2010.

¹⁴ Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287 (2001).

¹⁵ Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 Northwestern U. L. Rev. 1683, 1695-96 (2009) (footnotes deleted).

¹⁶ Susan Bibler Coutin, *Confined Within: National Territories as Zones of Confinement*, LAW AND SOCIETIES IN GLOBAL CONTEXTS: CONTEMPORARY APPROACHES, Eve Darian-Smith, ed., New York: Cambridge Univ. Press (2013), 195.

¹⁷ *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 663 (2010).

¹⁸ Mark Tushnet, *Meditations on Carl Schmitt*, 40 GA. L. REV. 877, 886 (2006). Tushnet goes on to differentiate between “low” and “high” politics, in terms analogous to Chantal Mouffe’s distinction between “politics” and “the political,” referenced above.

¹⁹ *Supra* note 15, at 1711.

²⁰ STATE OF EXCEPTION, Kevin Attell, tr., Chicago: Univ. of Chicago Press (2005), 22.

²¹ *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1490 (2005) (footnote deleted).

²² See Ahmad, *supra* note 15, at 1704-05 (“[I]n the eyes of the law, the prisoners were made invisible. Hidden on a remote and mysterious island, which was made inaccessible to lawyers and human rights advocates for nearly two years, the prisoners were nearly erased.” *Id.*).

²³ Jane Fritsch & David Rohde, *Lawyers Often Fail New York’s Poor*, NEW YORK TIMES (April 8, 2001); email from Steven Zeidman, September 26, 2013.

²⁴ See Nancy Morawetz, *Detention Decisions and Access to Habeas Corpus for Immigrants Facing Deportation*, 25 B.C. THIRD WORLD L.J. 13, 17 (2005) (“The combined effect of the stay practices of the Western District of Louisiana and the Zalawadia decision is to give the government the power to move noncitizens to a law-free zone. Although immigration

detainees can nominally take their case to court, the court can neither protect them from removal prior to, nor at the conclusion of their case.” *Id.* (footnotes deleted)).

²⁵ This strategy is foundational within the Guantanamo regime:

It was no accident that visiting the base was difficult: inaccessibility was a core design element of Guantanamo. The geographic remoteness of the base from the territorial United States reflected and facilitated the legal and psychic dispossession that the government intended Guantanamo to achieve. The prisoners were deliberately lost at sea, held outside the realm of the normal, as part of a twofold strategy to free the hand of the government—both literally and figuratively—and to induce despair among the prisoners.

Ahmad, *supra* note 15, at 1701, citing Joseph Margulies, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER*, New York: Simon & Schuster(2007), 27.

²⁶ U.S. Customs and Immigration Enforcement, *Policy 11022.1: Detainee Transfers*, (Jan. 4, 2012), available at <http://www.ice.gov/doclib/detention-reform/pdf/hd-detainee-transfers.pdf>.

²⁷ Brittany Glidden & Laura Rovner, *Requiring the State to Justify Supermax Confinement for Mentally Ill Prisoners: A Disability Discrimination Approach*, 90 *DENV. U. L. REV.* 56, 57 (2012).

²⁸ *The Trauma of the Incarceration Experience*, 48 *HARV. C.R.-C.L. L. REV.* 257, 276 (2013).

²⁹ See Resnik, *supra* note 17, at 639.

³⁰ Paul Sarlo, *Financing Mental Healthcare: A Budget-Saving Proposal for Rethinking and Revitalizing Florida’s Involuntary Assisted Outpatient Treatment Law*, 42 *STETSON L. REV.* 207, 216-17 (2012) (footnote deleted).

³¹ See Alison Parker, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States*, Human Rights Watch (June 14, 2011); Jennifer Koh, *Waiving Due Process (Goodbye): Stipulated Orders of Removal and the Crisis in Immigration Adjudication*, 91 *N.C. L. REV.* 475 (2013).

³² See Ahmad, *supra* note 15, at 1697, citing Robert M. Cover, *Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4, 40.

³³ For example, the UC Davis Prison Law Clinic and the University of Denver Civil Rights Clinic represent prisoners. The Immigration Law Clinic at UC Davis and the University of Miami Immigration Clinic prioritize cases involving detained clients. Law clinics at American, CUNY, Fordham, Seton Hall, Texas, and Yale have represented detainees at Guantanamo. I am most familiar with the excellent work of CUNY students and faculty who represent adult and juvenile criminal defendants, though such clinics exist at law schools across the United States.

³⁴ See Giorgio Agamben, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE*, Daniel Heller-Roazen, tr., Palo Alto: Stanford Univ. Press (1998); Hannah Arendt, *THE HUMAN CONDITION*, 2nd ed. Chicago: Univ. of Chicago Press (1998).

³⁵ See discussion on public values of the profession, *supra* note 12. See also *HOW CAN YOU REPRESENT THOSE PEOPLE?*, Abbe Smith & Monroe H. Freedman, eds., New York: Palgrave Macmillan (2013); Irving Stone, *CLARENCE DARROW FOR THE DEFENSE*, New York: Signet (1971).

³⁶ See, Ashar, *supra* note 11.