

**Transcription of the Oral History Interview with
Elliott Milstein
February 23, 2000**

Hall: You just go ahead and say anything that comes to mind.

Milstein: Say anything that comes to mind? It's Charlie, huh?

Hall: Charlie, that's right. Elliott, Sandy was telling me you are actually planning on writing a book on the subject at some point?

Milstein: I've been working on it for a long time. And because I'm actually doing it at the same time, and it's like, for most clinicians, hard to finish it. And it's – so, in any event, I have a lot of materials upstairs.

Hall: That's right, that's right. You know, one thing Sandy had mentioned and I cannot imagine anything – this video doing in any way; you know, colliding or conflicting with the book. It –

Milstein: No, I'm in fact excited by the fact that. You know, one of the things I intended to do was
0:01:00 to go out and talk to all these guys, and so having the tapes available will be great for me – save me a lot of legwork.

Hall: Okay, great. I hope they do help.

Milstein: I just got a letter from Roy Stuckey. I don't know if you saw this letter, but he sent it to six of the eight members of the Gang of Eight, the Key Biscayne Group Steering Committee, noting that six of us were present during my inauguration as president of the AALS.

Hall: One of the points I was hoping to begin with – A lot of the folks we have interviewed have been more, just purely [inaudible] on their own personal experience. But I was
0:02:00 hoping that since the video would start off with some of the long-term historical perspective, if you could just sort of look back in any of the decades leading up to the '60s and sort of point out things that you think were seeds that ultimately led up to clinical legal education.

Milstein: Well, you know, if we go all the way back to the beginning of legal education a hundred years ago – a hundred years ago the AALS began. But you know, it's in that period at the end of the 19th century that the preparation of lawyers moved from the law office to law schools, the creation of the formal educational model. Part of that movement was to really delegitimize the law office as the place to learn the law. And, you know, as part of
0:03:00 that, and just to be very – not to spend too much time on it – the casebook Socratic method struggled for supremacy and gained supremacy early in that history and moved from Harvard to the rest of the United States – and it had many attractive things about it.

One was a claim of there being a science of the law, you know, and that you could read appellate cases and abstract from them not only legal principles that we called legal doctrine, but also a methodology that could be better or worse, and that the way that you could judge the quality of a legal decision was by its symmetry with appropriate models of logic, and that if you taught law students using the reading of those cases, that they would adopt this method of thinking. And so the idea that that was something to be

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learned about the practice of law got really very delegitimized. And also the other thing that was attractive about the model was that it was a very inexpensive model. It was attractive to universities. It was inexpensive because it, you know, predominantly involved one professor, large classes – hundred more students in the class – and that through the use of the Socratic method that lawyers would be educated. And I suppose had we realized in the late ‘60s and early ‘70s the ways in which that model had won out against all challenges, the intractability of the model, we might have been daunted by the task that was ahead of us. But the fact is that one of the ways that it contained the seeds

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of its own destruction, to use the trite phrase, is that we weren’t taught any history. I mean, when I was in law school, I had two years of all required courses, all casebook Socratic courses, all – and most of them were property. And in the third year there, again, the courses were still – I mean, no one knew any different than to teach by reading a casebook. I had one course called Law and the Social Sciences that opened my eyes to new ways of proof and thinking about what’s truth, and how you would test for the truth of a proposition. But largely we were ignorant of the history of the very form of education we had. We were ignorant of the history of the law. We were ignorant of the

ways in which the Socratic method shaped the development of law in the United States. And so we didn't know about, at least where I went to law school at the University of Connecticut, we didn't know about the ways that the legal realist movement had tried to reform legal education and failed. We didn't know about any of the history of this. So we were ignorant. And then at the same time there's multiple progressive movements going on in American culture. We were that generation that was influenced by the presidency of Kennedy. We were the generation influenced by protests against racial apartheid in the United States. We're the generation that was affected by the protests against the Vietnam War. We're a generation that learned in undergraduate school that by pushing back against the university we could make a difference; and so that is we could change things. And so law school felt infantilizing to many of us, and we were – and we felt at the same time that it could be changed. And we didn't realize that it would resist the change as much as it did, and that it had. So the sort of social currents that are going on produce a cadre of lawyers who believe that law can be used as an instrument of social change are trying to figure out where they fit into the radical movements to protest the war, the radical movements too for economic and social justice, the radical movements for fighting against the draft, I mean, all – racism. Where do we fit as lawyers? And that was sort of part of the discussion that was going on among law students in law schools, although again in most schools not involving the faculty. But lots of those people went into – then took advantage of the other movement that's going on. I graduated law school in '69 – this was already in place – there were legal services programs, neighborhood legal services programs, public defender programs that had only

recently been put into place. So there was a vehicle for many people to carry out the social change agenda. But they felt very ill-equipped to do it. They discovered the things that they didn't know. I gave my speech, my inaugural address as it were as AALS president, and I described this thing which to me is the founding metaphor for clinical education. After the assassination of Martin Luther King, as you know, there were riots, and lots and lots of people were arrested. And the consequences of racism and poverty were really front and center in America, but in a very narrow and specific way. Joe Harbaugh, who was at that time the chief public defender of the state of Connecticut – and this was the year before he joined the faculty at Connecticut Law School to start the clinic, but had already been hired – came to speak at a banquet of the student legal aid organization that I was the president of or whatever – I think that was the title – president or director or whatever – but so Joe came to speak at the banquet, and this was right after these riots. And he gave a very fiery, terrific speech saying that it was the responsibility of the private bar and of the judges to ensure that all these people got represented. And so that summer the law students worked together with a group of volunteer lawyers to set up something called the Volunteer Defenders. And we did intake interviews for people who had been arrested, and quickly learned that we didn't know anything. Not only did we learn that we didn't know anything, but many of these lawyers didn't know anything either. And so together we tried to learn what to do. The following year the university's response to this social unrest was that they got a warehouse in a poor neighborhood of Hartford, next to the most notorious project in Hartford, and turned pieces of it over to different graduate schools, the medical school – no, there wasn't the medical school – the

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0:10:00 social work school – I don't remember all of them, but the law school. We – the student organization was given an office, a room, and it had a desk and a typewriter. No, maybe – maybe it wasn't even a typewriter. There's a desk and a chair and a phone and a wastebasket, and they said go do something. So to me the founding metaphor of clinical education is figuring out how to fill that room. What would we teach? What would we learn? What do we need to know in order to do good? What do we need to learn? How would we deliver the service? And so I like this image of this empty room, because I was lucky enough to be hired in my first year after graduation to be one of the first clinical teachers. Joe [inaudible] – Joe Harbaugh had been a Prettyman Fellow at Georgetown before the Prettyman Fellows were clinical teachers. He was in the program when the Prettyman Fellows were trained to be lawyers. And a lot of terrific lawyers in this area, in 0:11:00 D.C., have gone through that program. And Joe had gotten an LLM. And the model that they used was to bring in lawyers right out of law school. And Joe came with the belief that most lawyers in practice had already been spoiled by bad habits that they learned in practice. So he believed that if you hired people right out of law school and trained them to be lawyers they could simultaneously be teachers. I don't – almost no one believes in that model anymore. But that's the model that he had. And I was his research assistant in my third year, and then got hired as one of three such people in my first year after graduation. So in 1969, right out of law school, knowing very little, I became a clinical teacher.

You look like you wanted to.

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Hall: I did. I wanted to bring you back to that summer of '68 when you were doing the intake interviews. Just looking back at that experience, is there any illustration you can point to that sort of showed your lack of preparation, or, you know, when you found out you didn't know anything? In what ways did that manifest itself?

Milstein: Well, there were lots of surprises, not just then, but in my first year, this year that I'm describing, which is a year of practice. And there the dynamics were the same. For one thing, we were brought up to believe that legal doctrine mattered, and that's what we were taught. We were taught about the manipulation of case law to make legal arguments. We were taught that the Supreme Court made decisions and that they would increase the availability of rights claims in the courts, that there were rights against unreasonable searches and seizures, and confessions had to be preceded by *Miranda*.
0:13:00 And this was, you know, there was the reform of the criminal law system going on at the Supreme Court level. Well, what it turned out was that those legal arguments seemed not to matter at all. We were drilled on the elements of all the common law crimes. Well, people weren't charged with common law crimes, they were charged with statutory crimes – so what did it matter? We were taught that there were things like *mens rea* and *actus reus* in the criminal law, but finding a space in the context of the criminal case to argue about those, there was no such space. It turned out that law was what the trial court said, not what the Supreme Court said. And it turned out that often it didn't matter what the trial court said anyway, because cases never got to the point where judges made

0:14:00 decisions. Trial court – really law was what the prosecutor said. And then it turned out often that it didn't matter what the prosecutor said. Law was what the police officer said, because prosecutors believed the cops, supported the cops – the cops and cases were disposed of in negotiation by plea bargaining. So human relationships mattered more in the criminal justice system than all the stuff that we were taught in law school. And the occasional trial involved the ability to do things like direct and cross, opening and closing, *voir dire* of juries, and we didn't have one minute of practice experience doing any of those things. Nor was there any training for that available anywhere. It wasn't available in law school, and it wasn't available anywhere that we knew about. So, there

0:15:00 was this enormous disconnect between what we had been taught to see and expect in the courts and what actually occurred. No law student that I know of ever went into a court, not to observe, not to – and the closest thing was that we had some judges who taught Socratic casebook courses at the law school. So, I think the disconnect was so apparent. And at so many levels we hadn't learned anything about negotiation. We hadn't learned anything about interviewing the client. I think back to my client interviews, there was something called – this was the earliest version of the *Amsterdam Manual for the Defense of Criminal Cases*, which came out I don't know exactly what year, but in that period – and there was a checklist of things that you should do – information you should get at the

0:16:00 first interview. And I interviewed with a copy of that checklist in my hand. So the interview was gathering what's your name, what's your address, what are the names of your closest relatives, where you work, what's – how much do I make, what are your community ties? And then after 10 pages of these questions, you finally get to tell me

about what happened. And it's just the opposite of what we now teach students to do about interviews. But it was – we were struggling to figure out – it's embarrassing now to think back to the ways that we practiced law, not to say that there weren't some victories. But it was, as I said, unlike what we were taught to expect.

Hall: Now, did you say that the first program in '68, was that actually student organized, or did the university somehow spearhead that?

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Milstein: The program that I was involved with I think is pretty common in most law schools. It was called the Board of Student Public Defenders in Legal Assistance. It was essentially a student-organized externship program where the students of the law school volunteered to work in legal services programs to work in, you know – I know the work I did early on was the ACLU had a volunteer lawyer who worked on religion cases, school separation of church and state cases. And I did research and wrote memos for him. And so this project of doing intake interviews in the evenings in Hartford was a piece of that. In those days, again, in Hartford at least, there weren't part-time jobs. There weren't so many part-time jobs available for law students, so that it was a way to get some practical experience

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while feeling like you were doing good.

Hall: Elliott, before I ask you to follow up on your teaching, you know, starting in '69, there were a few voices over the decades – Jerome Frank was one, and a few programs here and there. Why do you think that none of those really took root, and then things took root

so rapidly in the late '60s?

Milstein: Well, I think it was more in the '70s that things really began to blossom. Well, one was – I mean, I think the major factor was CLEPR. That is, CLEPR enabled enough people to have jobs as clinical teachers holding out money to law schools, that there was enough of a critical mass to develop a field. I mean, it's very hard for an isolated – one clinical
0:19:00 teacher to exist in a world where all – that's not considered legitimate. So the only way he can make it legitimate is by having enough people – critical mass – and also people who would think about how it should fit into the academy. You know, the fear always was that you're reintroducing the apprentice model. The question I was asked Day One here was, What are you going to teach students they wouldn't otherwise learn in their first six months of practice? There was a distrust of the practical, and I think that's – I mean, I don't disagree with that distrust. That is, if that's what clinical programs could do, it's not worth all the money and effort. If we would only teach what people would otherwise learn in practice, then it wouldn't be worth it. And so that challenge actually turned out to be fortuitous. But I'm not sure that the programs that existed before met that
0:20:00 challenge. Mostly, if you read Bradway's writings, he was more justifying the ways law students could provide legal aid in a world where there was little legal aid. It wasn't so much developing a sound pedagogy of lawyering. I think the – you know, the important – some important shifts in our thinking was moving away from justifying what we do as a legal aid program and justifying what we do as a pedagogical program that would be transferable to whatever it was that people would do as lawyers. That shift provided a fit

in the academy that the service provision piece of what we do could not – couldn't be sustained over time. It's not our role.

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Hall: So, do you see clinical legal education as more of a pedagogy than as, say, a social movement?

Milstein: Well, I don't think that those things – I don't think there's a bright line, because, you know, clinical programs teach, as they say, skills and value. They're intertwined. You know, why do we talk about client-centered interviewing except as a way to transform the relationship between lawyers and clients? Why do we examine the reasons that things happen to clients in the society and in the legal system and look at the consequences of race, poverty, gender, homosexuality? Why do we look at those except as a way to have lawyers understand the impact of injustice on results in the legal system? And so why do we have students examine what the difference would be with or without a lawyer in the legal system, except these are value questions that come up in the clinic that are integral to figuring out how to behave as a lawyer. But I don't think that most of us anymore think we're training the next generation of legal aid lawyers, because a small percentage of our students actually get jobs or take jobs or do that work. You know, we all hope that because the ideology of most clinical teachers is a progressive ideology, we prefer to think of our students doing good in the world. But having been at this now for, you know, 30 years, I can't make the claim that a majority of my students are serving poor people. It's just not true.

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Hall: Elliott, you had started talking about your first teaching experience in '69 and I pulled you away a little bit. But [inaudible] you were teaching [inaudible], you know, starting with an empty room, it seems like your first exposure to clinical legal education program, you were actually an instructor. What were the greatest challenges in getting this off the ground?

Milstein: Well, we didn't know what – Well, first of all, when I started in '69 there was no student practice rule. So we were the lawyers, the three of us who were in that program – we
0:24:00 were the lawyers, and the students second-chaired. And, so – it hadn't even occurred to us that there could be a student practice rule. So I'd say that in that first year the challenge was to figure out what to teach in a seminar component of the clinic. We hadn't thought of the major pedagogical instruments of clinical education. It just felt right to have students involved in real cases – do the legwork, talk to the clients, draft a motion. But my memory of that first year is a memory of me as a lawyer being assisted by students. And the course that we taught, along with it was a course in Advanced Criminal Procedure – that's the way you would think of it today. What's a motion to suppress? How do you draft one? What's the law? What's the hearing look like? Let's
0:25:00 do a mock hearing. But we had no language of lawyering. We hadn't a language of lawyering, we hadn't a theory of lawyering, we hadn't – so we had neither the pedagogy nor the substance under control. And I'm not sure that we even knew what we didn't know as we began. And then CLEPR, which had funded this, sent in an evaluator after we were at it for a month or two. Lester Brickman came in, and we considered him

Pincus's hatchet man, and he said, "This is crap. This is the blind leading the blind."

And perhaps he was right. But I'm not sure that anything better was possible then.

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Turned out that Joe was a hell of a lawyer, and a very good teacher, and so the agenda began to develop. Now, as I say, we were focused much more on teaching Advanced

Criminal Procedure at a practical level about how do you do this or that in the courts, as

rudimentary as that seems to me today, and as wrong as it seems to me today, as the core

of what the clinical course could be. It was still an amazing departure from what the

other curriculum in the law school was. Suddenly there was a law office buzzing with

activity, students and faculty going to court, seeing clients. And although we didn't have

an explicit agenda yet as to what would be taught given that very, very influential

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moment in the life of our students, or in our lives, we did teach about ethics, and all of us

had had a required one-credit Ethics course where we learned the rules. But all of a

sudden there were real ethical problems, so we taught about ethics. We struggled with

ethical problems. We began to develop an understanding of plea bargaining and

investigation and a more sophisticated understanding of the relationship doctrine and

results in the criminal justice system. And so, as I say, while we didn't have it down yet,

the seeds got planted in a very important way in that year. Luckily for us we weren't the

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only ones involved in this and luckily for us CLEPR began the practice of conferences

and bringing people together to learn from each other about what was working and what

wasn't working. But, as I say, it was quite rudimentary by our standards today in that

year.

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Hall: Elliott, during that first year, just sort of describe your day in and day out. Did you have any classroom component to all of this? Or –

Milstein: Yeah, we had a classroom component that met, I think, once a week. As I said, there were three of us. We had a room that was a converted classroom as our office. We shared it. We had three desks and a secretary in there, and we used to see students in that room. And then next door there was a seminar room. And we took cases by referral from various social agencies. Legal Services couldn't take criminal cases. We were a Criminal Clinic. We only did criminal cases. And so we took cases that were referred to us – largely misdemeanors, a couple of felonies – and every case involved one of us and a couple of students. So all the students had some experience in these cases. And then we had seminar. And the seminar developed as – you know, looking at things like voir dire and reading the law and doing an exercise in class. We had, again, rudimentary simulations. Students actually examined witnesses in a hearing on a motion to suppress. We did various kinds of motions in Connecticut criminal procedure – it was focused on Connecticut. We also did some prisoner cases. We took some *pro se* complaints from prisoners and had students work on helping the prisoners draft new complaints and try to get lawyers appointed for them. We were also convinced that we were – we believed that we would be able to work in this program for a year, and then command to be able to then get jobs in law schools. And so we went to the what was then the AALS annual meeting where the – both hiring and the annual meeting took place – I believe that year was in San Francisco, my first time on an airplane, went out there and proceeded to not get a job. I

think law schools rightly saw us as a little bit too inexperienced. So, it took a while.

Hall: Elliott, in a certain sense you sort of knock down the program in certain ways, you know, talking about how rudimentary it was, and yet, as you all said, it was very different from what kids had been experiencing. What was the level of excitement during that first year?

Milstein: Well, it was extraordinary. And I don't mean to say that I knock it down. I see it as, you
0:32:00 know, I see this – the thing that I described in '68 as, at least for me personally, if not for all of clinical education, as a kind of a building block. We went from these unsupervised externships with no academic component to in-house clinical education with a rudimentary classroom component, not any sophisticated model of supervision to a, you know – we built it into something more. But it didn't – you know, it's evolving even today. One of the great things about clinical education is we it's a movement that believes that you have a theory, you apply it to experience, you test the theory in experience, you extract theory from experience, and revise theory in light of experience.
0:33:00 And that's both the way we teach, and that's also the way we teach each other. And so I don't mean in any way to denigrate what we did. It was such an enormous change. And the level of excitement in the school, which had been a place where, as I said, there were all required courses for two years. There was – all activity took place in the library. I personally spent most of my waking hours in those first two years in the library reading cases, briefing cases, and doing some volunteer work. Then this was a breath of fresh air, the likes of – I mean, it was an astounding change, that there was this beehive of activity

0:24:00 in a corner of the third floor of the building where the law school, for the first time, was focused outside – sort of inside-outside.

Hall: Are there any cases you remember in particular from that first year?

Milstein: Sure. I remember some of the cases vividly, and some of them are embarrassing. But one of them that's not embarrassing, or maybe it should be because I've used it as an example again and again. But I think it illustrates the very problem that we're talking about. There was a woman charged with the crime of night walking. She was a prostitute, drug addict, and the night walking was an old Connecticut statute that made it a crime to go abroad or about in the night season with the intent to invite sexual intercourse. It was essentially a crime defined as a way to punish someone at the moment before an attempted solicitation to prostitution. Normally you can't punish a guilty mind, you can only punish an act. Some acts can be a step on the way to the completion of a crime, which would be an attempt. So you could have an attempted solicitation for prostitution. This was before that moment. So they essentially used it to pick up people who looked like they were prostitutes, black women in blond wigs with short skirts. So, this was an obviously unconstitutional statute. And so I figured out how to challenge the constitutionality of the statute – what motions to file – and had no idea how these cases were normally handled, but I did file – my students and I worked on this motion and the motion to dismiss, I think it was called on the grounds of the unconstitutionality of the statute – wrote a long brief citing the Supreme Court and I – comes my day in court with

my client – and they called my case absolutely last. First, I mean, the sort of order of things in the court is, before court opened in Connecticut, they would bring in all the people charged with public intoxication, and they were all dealt with routinely without lawyers, and then court would open. And then cases would essentially be called in order of who were the lawyers and which lawyers were in favor and which weren't. And then so they call in all the lawyer cases. Then they call all the cases where there aren't lawyers. And then they got to my case. By then, it was 4 o'clock in the afternoon after being in court all day. So, I was punished for filing some motion. And there's this great scene in the movie, *The Firm*, where Tom Cruise finally goes to this mafioso guy – and it's played by Paul Sorvino – and I'll never forget the look on Paul Sorvino's face as Tom Cruise is playing out his theory of lawyer-client privileges – this look of total astonishment. And that was the kind of look that I got from the judge as I make this argument challenging the statute. And the prosecutor has filed no piece of paper, and instead makes what I learn was the classic prosecutor argument in those days, which goes something like, "Aw shucks Your Honor, don't you see what they're trying to do here?" And without writing an opinion or without taking it under advisement, the judge says, "This is a matter for an appellate court. I deny your motion." So then the case is rescheduled for another time to plea. And at that time they enter *nolle* in the case, which ends the case. A couple of weeks later my client is arrested again, charged with the same thing. I file a – and this time though, she's actually caught in *flagrante delicto*, in the back seat of a car at a supermarket. So I challenge. I file another challenge to the statute, and then they say, "Well, we'll let – if your client will plead guilty to" – I forget, some

breach of the peace – “she can have a ten dollar fine.” So I go to my client; that’s what she wants to do. I mean, so there became a way in which the system accommodated to this. I had developed – I had earned a stripe of sorts. And so the next time I was able to get some better, you know, some decent deal for my client. Next time she’s arrested on something more serious – it may have been a drug charge – and I’m sure I’m collapsing a lot of events, but at that time I get her into a drug treatment program, and she’s released on probation to go to a drug treatment program. And as I’m going to drive her there, she’s sitting next to me in the car, and I’m – and we drive into this neighborhood which was her haunt, stopped at a red light – and I’m supposedly taking her to the drug treatment program, and she jumps out of the car. And I don’t believe that I ever saw her again. I remember her name – I remember vividly – because I learned so much from the representation about the limits of benevolence. The importance, though, of benevolence I thought I was going to make a big difference in her life, but probably didn’t. I learned that I needed to know a lot more about the lawyer-client relationship if I was really going to be helpful. I began to learn something about the dynamics of negotiation. I learned both the advantages and disadvantages of doing something new in the criminal justice system and that the price was probably worth paying. I mean, there were lots of things that I began to learn about something which, again, law school didn’t teach, which was about lawyering, about persuasion.

And just as a sort of sequel to the story, once I began to file this challenge again and

again, the prosecutor would write – they wrote a memorandum. And it came to pass that I would photocopy y motion and my memorandum with a new name on the top. They would photocopy their response with a new name on the top, and the judge would – judges would give a written opinion that was also photocopied with a new name on the top. You know, some day it might go to a court of appeals for a decision, but it never did. And ultimately the statute was repealed in a recodification of the criminal law, having, I think, absolutely nothing to do with anything that I did. But there is a way the system accommodates to innovation. But when you're the innovator, sometimes you can do some good, and you can get some advantage from it.

Hall: Elliott, during your time at Yale, what was the evolution of the program from that first year to, you know, as new tools were developed for teaching?

Milstein: Yale?

Hall: Yeah.

Milstein: No, this was Connecticut.

Hall: Oh, I'm sorry; University of Connecticut.

Milstein: Well, it's hard to say for me, because I was only there for one year, and so that wouldn't

be so easy for me.

Hall: Okay. Well, we will just focus on your story. Where did you –

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Milstein: So, I then got a Ford Urban Law Fellowship, which was a program that existed for two years that was sold to the Ford Foundation that law teachers would be created who were interested in urban problems. And, as it came to pass the three of us who were in the program went to the Ford Urban Law Program next. Lou Parley and I went that year, and then Paul Rice stayed another year and went in the next year. And there was a fellowship to spend the summer working at a New York City agency, and then have seminars in New York at NYU. And then the 20 of us were divided into five each, went to Harvard, Yale, Columbia, or NYU. I went to Yale. And the Yale clinic was just underway. And the two people who were – well, there were really three people involved, but two most closely – Steve Wizner and Denny Curtis were there. And they were both older than me, and had experience as lawyers that was greater than mine. And then there was also Dan Freed, who was not a clinical teacher but had done a lot of the fund-raising and thinking about the development of the clinic. And he taught a course that he called a Clinical Course in Pretrial Supervision – Pretrial Detention, rather – which was his area of interest. I was then the only one at the law school who had experience as a criminal lawyer in Connecticut, so I worked with them – not any official role – I worked with them in their early years of the clinic there. And the seminar that I was involved with, that was Freed's Pretrial Detention Seminar, was a whole different approach. I mean, I helped – what they

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did was they had interviewed prisoners who couldn't get out on pretrial release, and then I would help them go into court and argue for their pretrial release, or help them draft motions and the like. So I was – I had some role that was similar to the role I had at Connecticut as a clinical supervisor. But the seminar was a seminar really in institutional analysis, which was a very big part of the approach to education at Yale, understanding of institutions and telling stories about the institutions, and trying to understand them at a deeper level. And at some point, they brought in they talked about, Well, what would it be – what would be an ideal place to house pretrial detainees? So they brought in architecture students, and there was an interaction between architecture students and law students about it. And it was really an interdisciplinary approach. And I forgot to say that in the year that I was at Connecticut we began to use the insanity defense in what now seems inappropriate ways. But I asserted an insanity defense to a breach of the peace case, for example, and largely because we found a psychiatrist who was on the faculty at the medical school who was very interested in the insanity defense. And so we formed a little teaching team about law and psychiatry in the clinic. So the experience of having a psychiatrist in that year, and then architects in this year, began to develop I think an interest for me and for other clinicians in the interdisciplinary aspects of lawyering.

And, you know, also the thing that was interesting about the Yale clinic in that year – and here we're talking the year is '70, '71, was that students had a lot more responsibility than the students did at Connecticut the year before. And I think that was part of the evolution that ultimately led to student practice rules. And there was agitation at that point that had begun. I think again it had come nationally from CLEPR and others, that there should be

0:48:00 student practice rules – and I’m sure that some of them were already in place, although there wasn’t in Connecticut in that year. But students were given more responsibility to actually go to prisons and come back with petitions that were filed in federal court, representation of mental patients in the Connecticut Valley Hospital. And these pretrial detainees, there was, you know, always an attempt then to find things that students could do that nobody else was doing, and to get them to be able to do it. And so for me, again, it was a process of evolving to one where it wasn’t the lawyers who were responsible, it was the students. So it was an important evolutionary moment for me.

Hall: What do you think were the greatest concrete successes of those early years?

0:49:00 Milstein: Survival. I mean, I think convincing – the scheme that CLEPR had was that they gave schools seed money grants that they would be irresistible, and they always conditioned the seed money grants on the replacement of the seed money with law school money. So that was an important achievement in those years, to get law schools to agree to do that. And then, the other more – and – achievement that I think created the clinical movement was the bringing together of clinicians to talk about their craft, to talk about what you know, all these questions you are asking: What would be taught in the classroom? What would be supervision? What would be – what’s the subject matter of clinical education? What’s the –“what”? It’s not just, What’s the pedagogy? It’s, What’s the stuff? And – and that evolved from these early seeds and how do we train people to be clinical teachers. There was in the early years a lot of churning, as people would be in these

0:50:00 grant-funded positions for short periods of time, and so there were always new clinical teachers. So, beginning to – I would say we didn't realize in 1970 the importance of all this networking that CLEPR was just beginning, but those conferences, we came to realize were very, very important.

Hall: Looking back, are there any conferences that stick out as having particular significance?

Milstein: Yeah, sure there were. And for, you know, conferences for different reasons – there were different size conferences. So the first big conference that I remember, and I – maybe the first big conference that there was was called the Buck Hill Falls Conference, and everybody talks about that and it had a couple of important dimensions. One was, for me,
0:51:00 was the first time I heard Gary Bellow give a talk. And Gary Bellow's idea of what should be taught in a clinic was radically different from what others were claiming. And so some people at the Buck Hill Falls Conference were talking about creating efficient models of delivering legal aid. I remember Bob Oliphant, who's now built his life as the head of NITA, was then running a clinic at University of Minnesota, and his clinic involved a lot of forms that as a student would have – could find the forms to file motions in a book that they provided. He would – they would find – they wanted to talk to the supervisor, they filed a pink one. If they wanted to have permission to do something else,
0:52:00 they'd file the yellow one. And so, it was trying to create an efficient model of service delivery. Bellow gave a talk on teaching negotiation using concepts that were brand-new to me, some game theories. So, it was a way that instead of looking at the service

delivery and the like, it began to take apart the sub-pieces of lawyering in ways that we now take for granted. We now take for granted that lawyering consists of interviewing, counseling, negotiation, persuasion, case theory, and trial skills – opening, closing, direct and cross. And, you know, slicing and dicing the things that lawyers do into these categories had not yet been fully done, and it's not – you know, the project goes on today. But that was really an important thing that I saw at this conference in Buck Hill Falls. Another thing that happened at Buck Hill Falls was there were a lot of people, so there were, I don't even know how many – I'm sure tiny by today's standards – maybe 40 people, but began to see and to develop a network.

Another thing that CLEPR conferences did, which is kind of an odd thing to say, is we got treated like grown-ups for the first time. We were taken to New York for a conference, put up in a really nice hotel, the speakers had fruit baskets in their rooms, and we were taken out to nice restaurants and treated like we were important people. And since, again, clinical teachers were working under conditions where they weren't treated like important people; had come from legal aid where they were used to working in the basement with broken furniture, this was a whole new way of experiencing yourself, and I think in part, you know, I think ultimately a nice piece of the developmental years.

Hall: What recollections do you have of Pincus during that period?

Milstein: Well Pincus – you know Pincus is a very powerful presence. He has big, firmly held

opinions, very strong advocate for his opinions. His opinions weren't always right –

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surprise, since only my opinions are always right. Pincus could be a real pain in the ass, a real irritant. But it turned out that he was brilliant. I mean, he had a great product, and he sold it very, very well. By the time he stepped down, by the time CLEPR ended, a lot of law professors were really mad at him. They saw him as the devil because of what he had done, which was to be this One-Note Charlie pushing for clinical education. What's

interesting is I just, in terms of preparing a speech that I gave about him in January, saw something which I hadn't remembered, which was he was an advocate both for clinical education, which he saw as an important way of teaching lawyers the importance of

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commitment and the importance of fighting for social justice. He hadn't seen all of the ways that it would develop into a theoretically sound pedagogy, or he hadn't foreseen all the ways that it would go. He did see the importance of the politics of it; that is, he needed a cadre of people. They needed to have permanence. They needed to have permanent jobs. They needed to be on the tenure track. But at the same time, he was an advocate for theory; that is, he was an advocate that history and jurisprudence was an important part of the education of lawyers. So, the thing that we now think of as the theory-practice dichotomy, or the trichotomy of theory-doctrine-and-practice that dominates many conversations in law schools about curriculum and scholarship, Pincus

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kind of pre-figured both of the new things: practice and theory, because, again, in my law school there was only doctrine. And what they claimed as theory was not theory.

Hall:

What do you think accounted for his strong feelings? Because there had been some

discussion off and on about this for decades, and then suddenly you have this one guy with a petition to deliver the money who really obviously felt a passion about making it happen. What do you think accounted for that?

Milstein: Well, the way he writes about it is that he was very angry about the way the poor were abused in the legal system. I mean that he was a – you know, I guess he was a good liberal. He comes from Long Island, the Great Neck. He was a foundation person, was a program officer at the Ford Foundation. His beat was law schools and the legal profession. So he studied the legal profession. He heard a lot about it from people who
0:58:00 wanted to reform it. He saw it through that lens, and he began to believe, he said, that law schools were part of the problem rather than part of the solution. So he became skeptical about giving grants to law schools – thought it would just be used to perpetuate the problem because law schools said, Not our – this is not what we do. We do something different. So, I think it was his personal convictions about social justice that led him to believe that law schools needed to do something different if the legal profession was going to contribute to making things better for the poor and for minorities.

Hall: Now, I can understand why the mainstream law school thought he was a pain in the ass, but you used that term for him also, just up close in your dealings with him –

Milstein: No, for me he was. I mean, don't forget he controlled money, and money was what we needed. And so he was like any authority figure in that regard, which is he was

0:59:00 somebody who needed to be persuaded that the way you wanted to do it was the right way, and the way he wanted you to do it maybe wasn't the right way. But he wasn't a pain in the ass. But getting money from him was not a free transaction. You had to perform, and you had to meet standards. But, you know, for me, it was – not only did he fund my first job, but when I came here, at American University in 1972, there was already a CLEPR grant in place. It was a two-year grant. There was one year left. The first year had paid for things that did not involve an in-house clinic, and I was able to reprogram the money with his permission to create an in-house clinic. I got a combination of LEAA money and CLEPR money to create the first in-house clinic. He bought me my first videotape recorder in 1972 or '73, a black and white video recorder. He invited me to meetings. Without him, you know, my career wouldn't have existed. But he had very strongly held opinions, and luckily he was on my side. And another thing that he did one year – we were going – in 1977, we were doing remodeling, and I – and he was giving out money for physical space, because he believed that if the clinic had a physical space in the law school that it could be permanent. So he saw faculty status, hard money, and physical space as the cornerstones of permanence. And so he came to meet with me. Flew in from Washington, came to meet with me – flew in from New York, came to meet with me to talk about physical space. And his idea about what we should have was to me so pie in the sky, so impossible, and actually so much less than what we have now. But he inspired me to think about – I mean, the clinic that I had here in its first years was a double faculty office with a half wall between me and a secretary and the students. The students and a secretary worked in one half of the room. There was

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a half wall. I was on the other half of the room. I never had privacy for one second. And that was the clinic. And he had this idea –

Hall: Tell us a little about this quasi one room schoolhouse –

Milstein: Yeah. And then what Pincus envisioned was students having a desk, a phone, a
1:02:00 typewriter, the – essentially an office for every student, or an office that students could use. And so he was willing to fund bricks and mortar projects that did that. Well, that was not at all in the cards for me, so we never really applied for the money. But it just didn't seem it wasn't – it was such a departure from anything that there was. But it was a really important vision. And if you go up to the fourth floor and you see what we have now, that vision is more than fulfilled. So he was really a visionary. Now, I've skipped over some really important things, because I'm talking now about 1977. And, you know, we go back to '72 when I came here. I'd been a legal aid lawyer in New Haven and done
1:03:00 criminal work. I was still very young. I was three years out of law school: one year at Connecticut being a lawyer clinical teacher; one year at Yale being a student, but also working in a clinical program and doing some minor amount of lawyering; and then one year as a criminal defense lawyer in a legal aid program, where I'd been senior – I mean, this sort of shows you again the state of things. I was senior staff attorney running an office three years out of law school, or two years out of law school. So there was a whole bootstrapping nature both to clinical education and to legal aid practice. But you know we wouldn't hire anyone here with as little experience as I have to be a practitioner in

residence, which is our entry level, where we're teaching people to be – they just – they couldn't come with as little experience as I had when I came here to direct the program.

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So it's kind' of, you know, it gives you some sense again of what's grown. But I did have some system of beliefs that came from the early years dealing with the clinics at Connecticut and Yale and the CLEPR religion. The most important cornerstone of the religion was clinics should be in-house, not farm-out. They were. Pincus had invented the phrase "out house" – in house or out house – and in house was very much to be preferred, an in-house clinic being one that was staffed by people who will work for the law school, who had faculty status of some kind. And, again, that's all to be developed. But I came here, and there had been a – my predecessor, who had been denied tenure, had

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created a clinic that was an externship – not called externship in those days. Students would spend a semester prosecuting and a semester defending criminal cases in one of two suburban counties. At the end of the first semester, they would switch function and they would switch county. And while they were doing those things, they worked for a public defender or a prosecutor. So it was an externship program. The second source – these threads will converge – the second source of funding for clinical programs after CLEPR was LEAA. LEAA was the Law Enforcement Assistance Administration. It was an invention of the Nixon administration to give block grants to states to be spent on law enforcement assistance. Defense services was one of the things the money could be spent

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for. In Maryland there was the organization that gave out the block grants – was called the Maryland Governor's Commission – and mostly they were criminal justice professionals: police chiefs, wardens, prosecutors, public defenders who were on this

commission, and they essentially divided up the money. One of the people who was on the commission was Bill Greenhalgh, who was the head of the clinic at Georgetown. So I was hired in the spring to come be a teacher here, and later Georgetown got a grant from the Maryland Governor's Commission, LEAA money, to start a clinic where students prosecuted one semester, defended another semester, in the various counties that we were operating in, and would have had this thing gone forward, displaced our students – would have ended our clinic. And the then-assistant dean of the law school engaged in a pissing match in the newspapers claiming that Greenhalgh had a conflict of interest, and that he was stealing our program. And that was the environment that I walked into when I came in the summer. Luckily for me, Bill Greenhalgh and Joe Harbaugh, you remember from the last chapter, were very close friends. And so Joe was able to smooth the waters, tell Greenhalgh that I was a good guy. And I called him. He said, "We're not giving you any money because you have an out-house clinic." So within a few weeks of coming here – I came on July 1, 1972 – within a few weeks, I negotiated an agreement where we got a grant from LEAA to start an in-house clinic. So I was able to reprogram the CLEPR funds, add them to the LEAA funds, and hire the first in-house clinical supervisor in that year. And I think that really was – it was just a stroke of luck beyond imagination, because the school didn't have that kind of money. The school, and we – the faculty in those days were limited to 500 photocopies a year, and I had suddenly had a \$2,000 budget for photocopies, you know? There were things like that. And so I set out to experiment with in-house clinical programs right from the day that I came and used a model where we brought in lawyers really, not people who wanted to be professors. They

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were lawyers with experience in those counties, and they would stay for two years. I ultimately was able to get two slots from the law school with a fixed salary in each. So the people made – I forget – I would say it was \$15,000 in the first year, \$17,000 in the second, and then they'd be gone. And so it began here having a clinical program staffed by non-tenure track people who were, some of them, quite young, but people with some experience in the particular counties that we went to, and we made the defense part of it in-house. And we began a seminar program and tutorials for the prosecutors. So we had both a faculty-supervised externship and an in-house program almost right from beginning of when I came in 1972. And that – you know, I ended up writing an article about that program that was published in the guidelines, the ABA/AALS guidelines for clinical education, because it was this [hybrid] model at a time when people were fighting over whether in-house or “farm out,” as it was called, would be the respectable model for clinical legal education. At the same time in 1972 – I still have a copy of the first syllabus that I drafted, along with the guy who was teaching on the prosecution side of the clinic who was here, Dave Aaronson – and our first syllabus, the topics are – the first topic is grand jury and indictments; the second is, you know, essentially it was that course again, the course in Advanced Criminal Procedure. Joe Harbaugh had at that point taken a job at Duke, but Duke gave him a semester's sabbatical and he went to Harvard to work with Gary Bellow – maybe the whole year – work with Gary Bellow. And Joe was writing a piece on simulation. And so I went up, and I got to see what was going on at Harvard and to debate some of the ideas that I had about how to do it. That was a very influential time for me, because Bellow's position was, “Why are you reteaching what

1:11:00 they should have learned elsewhere in law school?” And I said, “Because now they need to know it.” And he said, “But what makes you think that they will learn it any better if you give the lecture as opposed to the time that they did it in their first or second year of law school? They learn the law,” he said, “when they need to know it in the context of a case.” There was, by the way, a student practice rule in place by the time I got there, so students could actually practice. So that was a transformative thought for me.

1:12:00 And the second was I watched him teach and talk to Joe, and I was there maybe three days, but those three days were very influential. I came back completely reoriented as to what should be taught in the clinic. Second thing that happened that was of critical importance was the first day that I got here I had a phone call from a professor in the psychology department, and he said, “I have a PhD candidate who wants to experiment with three different ways of teaching interviewing to law students.” And I know I gave him some arrogant, pissy reply, but he didn’t give up, and I later apologized to him for that, because this woman, Joan Krash, whose husband’s a big-time lawyer at Arnold & Porter, Abe Krash, taught not in the clinic but in this other course that I taught called Fundamentals of Legal Practice, three different ways of teaching interviewing, and taught me about Rogerian methods of teaching interviewing. So I learned how to teach interviewing and how to think about interviewing, which – and then looking back on those three years of practice that I had before, I’m embarrassed about the way I interviewed clients, but made me one of the first law teachers to think about how to teach interviewing.

1:13:00 And then seeing what they were doing at Harvard in terms of thinking about the dynamics of lawyering, theories of lawyering, changed my whole orientation – so moved away from this advanced course in Criminal Procedure to something more like what we do today. And I don't remember exactly what year, but early drafts of the Bellow-Moulton book were then passed around in photocopy. And we began to develop simulations, videotaping students doing things that all began to emerge during those early years.

Hall: It seems clear from what you're saying, Elliott, that you placed a tremendous amount of stock in the communication that went back and forth between teachers and programs that I get the sense that you would have been very hamstrung trying to do this on your own.

Milstein: Well, I think, you know, it's hard – remember, as I said, I had a model where the people I brought in to be my colleagues were here for one or two years. No sooner did they begin to learn how to do what they did that they were gone. So the lack of permanence meant that I was constantly training new people. So it wouldn't have been possible, I think, to develop what was developed without a forum in which people could exchange ideas, because – I don't know. Duncan Kennedy once said to me theory comes from the networking of good little ideas that work. And I think that's really been a core part of the clinical movement. I mean, I think, you know, as I'm writing my own history of clinical education, I write it as clinical – the history, intellectual history of clinical legal education can be seen through the prism of the clinical conferences that were held. And they were – you know, they've become more sophisticated over time, which is really why I say that

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it's part of the intellectual history. And we realized it in the mid '70s, because it's in 1977 that the final clinical CLEPR conference was held, you know? The background at that point is that there has been authorized, but never funded, a federal grant program specifically for clinical education. The third major source of funds, CLEPR, LEAA, now there's to be what was then called Title XI, later to be renamed Title IX, but the clinical legal experience – legal education and experience program. So it's been authorized, not funded, and CLEPR's about to go out of existence. The last big bang of CLEPR is the Key Biscayne Conference, and it was very clever – and I've asked Pincus whether it was purposely clever – and it's not clear to me whether he had had this planned, but it certainly worked. There were a lot of clinical teachers there. I have no idea what the numbers were. But the podium was given only to the enemies of clinical education. There were bar leaders, judges and the like who were advocating for reform of legal education that [inaudible] of the Chief Justice Littlejohn of South Carolina wanted to require that every student take legal accounting. And there were different schemes for practical required courses that were idiosyncratic that came from a bunch of different ones of them, none of them really understanding clinical education. There were the traditional law professors who said, "No, the only thing that's important is theory. And theory can only be taught using the Socratic method." Remember, this is again before critical legal studies, before jurisprudence was a big, you know, and its progeny was part of the curriculum. And so there were the traditionalists essentially. And then there were the third – the third branch was the scholarship and that scholarship's the most important, and clinical teachers don't write scholarship. And then, the fourth was the cost and report

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1:18:00 on the cost of legal education. So there were all these obstacles that were on the podium. Then one morning of the conference Pincus calls a meeting of clinical teachers. And some amendments had been placed in the authorization for Title XI, And John Kramer, who was actually sympathetic to clinical education, had been the lobbyist for the AALS. And the amendment permitted money to be given for simulation as well as live-client clinics. And Pincus said, “See?! You see what they’re trying to do?! They’re trying to steal your money. They want to give this money for trial practice programs. They want to give the money for legal writing programs. They don’t want this money to go to you

1:19:00 guys. And if you don’t get organized, you’re dead. If you don’t get organized, you’re dead.” So we called the meeting without Pincus, I believe, for the next day. And it had to be real early in the morning because of the schedule of the conference. And a lot of people showed up, and we organized. And the signatures to this thing, to this organization, were called the Key Biscayne Group. And then eight people were selected as the steering committee, and that was Joe Harbaugh, Gary Palm, Roy Stuckey, Dean Rivkin – wait a second, I have a list here in my pocket – yeah, Dean Rivkin, Gary Palm,

1:20:00 Elliott Milstein, Joe Harbaugh, David Barnhizer, Roy Stuckey, and then two people who are no longer in legal education, Peter Smith and Rod Jones – and they’re from all over the country, and we set out to make a plan and carry out a plan for the future of clinical education. And I recently have looked at the list of things that were our agenda, and every one of them was accomplished, and I think every one of them was important.

One of the things that we had to decide was whether clinical education would be organized within or without the AALS – Are we going to be an inside organization or an outside organization? And we chose inside and decided to empower the clinical section of the AALS to be the voice of clinical education, and that led to the ultimately formal adoption of bylaws and officers and executive committee, or whatever we call it, you know, governing board committees, newsletter, dues, and a voice within the AALS for the advancement of clinical education. And that structure – I think Dave Barnhizer was the first chair. But over the years, most of the surviving members of the Gang of Eight, which we later called ourselves because there's this Gang of Eight in China – most of them became chairs of the section, certainly having – Stuckey was, Rivkin was, Harbaugh was, I was at the very least. The newsletter became a great vehicle for organizing and communicating.

Second thing was we wanted to have a committee within the ABA to push for clinical education, and so we went and met. We went to New York at the invitation of the ABA, and we were put up at the Yale Club as I recall, and we met with the chair of some committee, which I think in those days might have been called the Skills Training Committee, which later got changed to the Committee on Clinical Education, which later got changed to the Skills Committee, which is what it's called today, but [inaudible] – get that committee active. It had never met. And the third thing that we wanted was a committee of the AALS. In addition to the section we wanted a committee. That committee was formed.

The next thing we wanted, and I think the most important thing, was we wanted conferences. We wanted somebody to take over the role. I mean, what we wanted, we wanted CLEPR to be re-funded. But if CLEPR was not to be re-funded, we wanted the AALS or the ABA to host an annual clinical teachers conference. And we cut a deal with the AALS people to have an annual clinical teachers conference. And starting in the next year, and continuing to today, there has every year been a clinical teachers conference that now attracts over 300 people. It's the AALS's most successful professional development conference, and has been for years. It's been a really, really important vehicle for the intellectual growth – and the political organizing – but the intellectual growth of clinical teachers. In answer to the question in those days of, How do you keep people who call themselves clinical teachers from spoiling the brand name?, or How do you train them to be good? We wanted there to be clinical teachers on tenure track, and we set out to create the conditions to make that happen. And now the vast majority of clinical teachers, I believe, are on tenure track, or certainly every school has some form of job security for clinical teachers, not always a perfect one, but the ABA – we pushed for, and the ABA ultimately adopted, this 405(e) requirement. It wasn't the perfect one, but we pushed for it. And so I don't know that that's the complete list. And of course we pushed for funding of what became Title IX. But this list of things that we drew up, which was the organizing agenda for those early years, turned out to be, I think, prophetic in terms of what the movement needed. And they were all accomplished. And now, as you probably know, there are more than 1,100 clinical teachers.

Hall: Elliott, at that point how vulnerable did you guys feel? Did you really see that there was a danger that these programs would just fade away?

Milstein: Absolutely. Well, I don't – I mean, you know obviously politics are different in different schools, but we recognized – we could see that the people who were clinical teachers often didn't have any job security. And when the money ran out they were killed off – or for whatever political conditions made it possible in schools, they were killed off. There was a new dean in the school, they were killed off. And they had no power in their schools in many cases. So creating permanence was really agenda number one. But we recognized and depended on intellectual legitimacy. And so these things obviously are seamless in terms of their importance. So you know I think that the Key Biscayne organizing was very, very important, maybe because I was part of it. But it was for me a great break to be – to get on that committee, because after that I was then able to – I was on, except for the first one which I didn't get to go to in Cleveland, I was on the faculty or the planning committee of almost every clinical conference up until the time I became dean here in 1988. And I've still been on – and I was – so I've been very involved in this development at a very intimate level – then had the opportunity to shape this movement through those conferences.

Hall: This may seem like a bit of a detour, but I think it ties in with what you're talking about. Obviously a recurring theme has been the different status of the clinical teachers versus the mainstream law school. And yet you yourself did become a dean before the '80s were

out, which was a great different –

Milstein: No, before the '90s were out.

Hall: Before the '90s were out, I'm sorry – but for – but it seems like a very different track than a lot of people within the clinical field experience. How did your path unfold the way it did?

Milstein: Well it's a miracle really. I mean, I don't know that I fully understand it. I certainly – if you had asked me even the year before I became dean whether that was something that I would either want or get, I would have – it would have amazed me. I mean, I came here literally with a beard and sandals, so the idea – and as a reformer. But I suppose for me personally I've always, you know, I had my own way of trying to be persuasive, and one way is always acknowledge the importance of the other person's perspective. I mean, I think the most important thing that I try to teach students is to see the world from the perspective of others. It may sound trite, but I think active listening and empathy are the core things that make good lawyers good lawyers. And so I think that the ability to do that helped me a lot in terms of my own political strength. Also, because I was trying to change the school, I paid a lot of attention to the internal politics of the school. I went to lunch with my colleagues, and made sure people knew what I was doing and believed – one of the other disagreements among clinical teachers was where should the clinic be located. I believed that it should be located in the school. Others believed that it should

be located in the neighborhood somewhere. But because I thought that we needed to survive as a pedagogical enterprise, it taught essential things that were useful to all lawyers. I thought it was important that it be in the school. So my political life and my intellectual life, except for when I could go to clinical conferences, was taking place within the law school. So that was a really important part of having political legitimacy here. And I served on all kinds of important committees, long-range planning committees and the like, at the law school.

Second thing was that this very important part of my life's work of the permanence of clinical teachers, the work on tenure track, was taking place on two tracks. One was the national track, and the other was a track here. We needed to – in order to get the
1:31:00 clinicians here on tenure track, the thing I needed in order to convince people to change it was a rule from outside. So, I worked very hard on 405(e). I was the chair of the clinical section during the crucial year and got to play a leadership role in shaping that. And just a little footnote is that David Vernon was the president of the AALS that year, and opposed the – that is, on behalf of the AALS – opposed the 405(e). And there was a debate on the floor at the House of Representatives of the AALS about it, and I debated him in public on that thing. I mention that footnote because the last year of my deanship
1:32:00 here, we had an ABA inspection, and David Vernon was on the team. And he said to me at the end of the inspection, he said, "You know, you and I pursued very different visions" – he was the dean of Iowa – "very different visions of what a clinical faculty would look like and what they would be. Yours was right." So it was a great moment.

He's a lovely man, and it was a really great moment. So, at the same time that this thing is going on out here, meanwhile, through various grants and getting law school money, the clinic here had grown in size. And when I began to see that in order for the clinicians to be on tenure track, they were going to have to look more like faculty members, change the hiring criteria, and hire people with fancier law degrees, fancier intellectual pedigrees and people I was learning from. So, it was a great group of people and they were in place at the time that the faculty ultimately voted to put the clinicians on tenure track. Footnote again: Joe Harbaugh at that point was on our faculty and was the chair or served on the committee that helped do this, so Joe's been an important person for my whole life. But he happened to be here for – I don't know, five years or so – during this period. So, at the time then that we had a deanship collapse here, the faculty asked the dean to step down after a couple of years. There needed to be an acting dean and at that point I had the most experience in hiring, training, fund-raising, administration of all kinds. I had the support of a majority of the faculty. But the majority of the faculty at that point included, I think, six clinical teachers who suddenly had the vote and that helped. That obviously helped. But I ultimately had the support of three quarters of the faculty when I decided to be a candidate for the permanent deanship. So, it wasn't just that, but that was a big help, obviously. Is that responsive to your question?

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Hall: Yeah, I think so.

Milstein: More than you wanted to hear?

Hall: Well, it seems like you made a decision that, in a sense, you really had to become a part of the law school rather than apart from the law school. I mean, is that a correct assessment?

Milstein: I mean, I like institutions, and it felt like being – I discovered that I could actually help
1:35:00 change the law school. It didn't seem like it at first. But it didn't just change in a way that enabled the clinic to grow. It changed in a number of ways. So, I really enjoyed being an institutional insider. And so that was a piece of it. And, also, I became an AALS insider, not – I've moved from being the – through all the sort of ranks of the clinical section and then began to serve on various AALS and ABA committees. So, I'm a committee guy.

Hall: I want to ask you about the 405(e) campaign, which is, as essential as it seems like it was, obviously some kind of tenure track was seen as a crucial step. How did you plot out that campaign and what were the key moments?

Milstein: Well, that's an interesting question because I'm not sure that I remember the key
1:36:00 moments. I do know that right at the beginning, when we met with the ABA people at this New York meeting we had three things as I recall on our agenda. One was we wanted the committee to be active and to be an advocate for clinical education. We wanted the ABA to require that clinical teachers be on a tenure track or that they be treated equally, because we felt like it was more likely to come from the profession than it

was to come from the professoriat. And, third, we thought they could be a vehicle for hosting conferences. Instead we ended up doing the conferences through the AALS, but that committee became a vehicle for pushing for the ABA to change its rules. And I don't remember how exactly it got to the point where there was a proposal to change standard 405, which was faculty status, to require that clinical teachers have parity of employment. It was a very simple concept, but it got watered down over time. There was something called the Standards Review Committee, which still exists. It was headed by Gordon Schaber. There was a lot of Strum und Drang around this and ultimately they came up with a compromise which is the – you know, they say that a giraffe is a horse put together by a committee and 405(e) is certainly a giraffe. It doesn't require exact parity. It permits a separate tenure track. It permits long-term contracts. It permits non-tenured track people in short-term positions and it's ambiguous as to – and ultimately there had to be separate findings on whether clinicians were entitled to vote, and I think the major contentious issue that is still being fought out at some schools is clinicians' participation in governance.

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Hall: As of this point, how far would you say you've succeeded in making clinical professors a legitimate and equal part of the greater whole?

Milstein: Well, it's different in different places. But at this point about 15 percent of the professoriat labels themselves as clinical teachers by paying dues to either the clinical section or CLEA, and you know most of them pay dues to both, and that's unbelievable.

I don't know the numbers as to how many of them are on tenure track or a long-term contract, but if you see the institutions that have been created to support this and support the work of this group, we've got the *Clinical Law Review*, which is one of the few peer-review journals in all of legal education, because of the scholarly output, they're clinical – there's the clinical conference, as I said, has gotten very large. There are regional conferences all over the country that bring clinical teachers together. There's an active listserv. Books are published every year about lawyering and there's no respectable law school that doesn't have a clinic and it's one of the criteria that the hated *US News & World Report* uses to evaluate law schools. Clinical programs are ranked, which I think has been a big help, even though I hate *US News & World Report*, and it's inconceivable that this movement could be – isn't permanent, as much as anything is permanent today. And many more law firms are looking to hire people who have been in clinical programs – it's big firms as well, which only used to hire people based on law review credentials. And certainly legal aid and public defender programs and prosecutor offices that come here to interview only want to interview clinic students. So, in D.C., you know, we're – D.C.'s kind of a Mecca – D.C. and New York are the sort of, I think, two Meccas of clinical education. Georgetown, AU and Catholic all have big clinical faculties, big clinical programs with tenure-track faculty members. GW has been more recalcitrant. Howard also has a decent size clinical faculty with clinicians on tenure track. So, the battle is won here. D.C. School of Law, of course, comes from a clinical pedigree. So, George Mason's the only holdout. Baltimore – both schools in Baltimore have big clinical programs with terrific tenured clinical faculty. So – and then in New York

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1:40:00 schools also have a big cadre of clinical teachers. The fact that NYU's been a leader has been helpful. But NYU and Columbia both have terrific clinical faculties and the other schools do as well – Fordham. So, I'd say that the area where we've been less successful has been in California, and that's in the process of changing, so Berkeley, the last holdout has now tenure-track clinical teachers. So, we're in very good shape. And the ABA standards have been helpful, but I think it's really now the – I don't think – I don't think the battle's being won anymore through regulation, the battle's being won through the intellectual strength of the movement. Also, on this AALS – you know, the AALS's opposition in the '80s, early '80s, to this is about to change because I convinced the executive committee now that I'm president to issue a statement of good practices on clinical tenure, and I've been a little tardy in getting the committee together, but that will happen.

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Hall: Actually, if I could ask one brief question about the AALS, then I'll ask you a broader question.

Milstein: Okay. I'm just – we have only – we're supposed to go till noon.

Hall: What time is it now? [Inaudible] Wow, that changes my picture. I'll skip the question I was going to ask.

Milstein: I mean, if we go a few minutes over it's – .

Hall: That's fine. That's fine.

Milstein: But I only have so much more time.

Hall: Okay. I appreciate you telling me that. You mentioned a lot of names. If you were to single out a handful who have been the most influential people in the growth of clinical education, which names would come to mind and why?

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Milstein: Well, let's see. It would be Bellow and Moulton, because their book was so influential in creating the intellectual framework for clinical education. They would certainly have to be on any list. I'd have to put Joe Harbaugh, even though Joe has not done live-client clinic for many years. Joe's a great politician and a great advocate for clinical education. And he's – most of his work has been in the area of simulation – and when I'm generous I say there are three branches to clinical education: in-house, externship, and simulation

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that sometimes co-exist, sometimes exist separately. And so there's Joe, and maybe because he was so influential on me that I – that I have Joe on the list. I'd have to say Bill Greenhalgh, even though Bill Greenhalgh was one of the most disagreeable people you've ever met. Bill Greenhalgh was a pioneer He had a very confined set of beliefs, but he believed in them very strongly. And, again, he believed in in-house clinical education, and pushed for it. And Georgetown was a good place from which to advocate. And he

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trained a lot of clinical teachers there. I'd have to – and even though there are many maddening things about both of them, I'd have to put Stuckey and Palm on the list,

because they've done the legwork at the ABA, been ABA insiders. And I think we have very different visions of clinical education, them and me. And Gary, at this point, may be, you know, much less effective than he once was [inaudible] he pissed off so many people at the ABA. But I have to put them on the list. I would put Ann Shalleck on the list, because of her really important work in teaching us about supervision through an important article and the roles that she's played in clinical conferences, although she came much later. Sue Bryant would have to be on the list. She's been on the faculty of most clinical teachers conferences and on things like commitment, on interviewing, on critique, on collaboration, and on the "-isms." Sue's been an important contributor.

Hall: You talk a lot about intellectual viability of clinical education. What clients have been the greatest contributions clinical education has made to teaching of law over these 30 years?

Milstein: Well, the most important involve – I think there are three concepts. One is that the client should be part of legal education. The client was barely mentioned in traditional legal education. So bringing the client as a concept as well as a reality into the law school. So, making legal interviewing and legal counseling part of the curriculum and discussions of a responsibility to clients and commitment to clients. The second is the – is facts – facts were not part of the curriculum either. Facts were always given. In an appellant case they're given in a couple of paragraphs. In the appellant case in the casebook they're given in one paragraph, and there's no sensitivity to where those facts came from and the

1:47:00 role the lawyer has in actually developing those facts. They're not a given. And the third is the concept of case theory, which essentially says the lawyer can drive the result in the case by coming up with a concept of how to tell the client's story that leads to strategic planning and fact investigation and the use – and how you use doctrine. It's an organizing principle – so, theory-driven lawyering. I mean, I think those are the three greatest intellectual contributions of clinical education. And maybe I'd have to add a fourth, if you'll let me, which is the core idea that law comes not from the oracles but law comes from a combination of rational and non-rational factors that there's a mixture in understanding how the system will operate and a mixture of what does the rule say, what does the doctrine say, and then who were the people who are going to apply that doctrine and what are their values, what are their role concepts, what's their role definition and how the institutions behave. And those things were missing from the curriculum before. And that latter piece of the mixture of values and law, politics and law, history and law, really, I think, prefigured the critical legal studies movement. And I think that's not really appreciated by most people who call themselves theory scholars.

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Hall: I'm down to my last two questions. Stepping beyond the clinical program, per se, and looking at the entire law school, how is legal education in the other parts of the law school different today than before you guys began?

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Milstein: Well, as I've been saying, the introduction of theory and interdisciplinary courses – so we've talked about that. The mixture of teaching methods – so using simulation in what

traditionally were casebook courses is another big change, the influence of the clinic on it. The faculty has changed. That is, there are more people trained in other disciplines and interested in other disciplines. So I just said this at an ABA meeting to someone who said legal education hasn't changed in 50 years – I said, “You just couldn't be – you just couldn't be more off the mark, because even though the required courses – although there are fewer of them, they have the same names. They're taught – they're very different courses from the ones that I had when I was in law school. We ask not just what the law is but what the law should be and why the law is and how the law got to be this way. And so there is a mixture of history, policy, politics, as well as doctrine. And so the courses are very different courses from the courses that we took even though the names are the same.

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Hall: What do you see the future of clinical legal education being?

Milstein: Well, you know, I don't. It's really, you know, who can predict the future? But the – and luckily the future happens one day at a time, not – we don't suddenly – we don't wake up and it's suddenly the year 2025. I think clinical education does a really great job of preparing students for the future because deep down we say we're teaching people how to learn from experience. And because it happens one day at a time, they can process the experience and learn from it and grow. I have this secret – maybe it's a fear and maybe it's a fantasy – but there's all this talk about distance education, you know, Internet-based education. And I believe that any course that can be taught on the Internet is a course

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where the faculty member is teaching wrong. But let's assume that you can do the Socratic method or something like it to teach doctrine and legal analysis by an interaction over a computer in a remote location and do it less expensively or more profitably. That suggests that the law school that we understand doesn't exist anymore. But the thing that you can't do remotely, that you can't do over the computer, is you can't do clinical education. You can't do the – provide students with their first practice experience in a supervised setting where the supervisors are by design ethical practitioners with the pedagogical abilities to make them better. That can't happen anywhere but in a clinical program. And so if the predictions that the university as we understand it disappears, because of the Internet or some variation on that, if the software can be developed that permits what happens in big classrooms to take place over the computer, then clinical education may be the only thing left. Good ending, hunh? Sometimes I think of myself as one of the rhetoricians of clinical education.

Transcription of audio taken from video -- By: Sabrina Hilliard

and Barbara McCoy