

Transcription of the Oral History Interview with

**Randy Hertz
January 5, 2007
Washington, D.C.**

OGILVY: This is an oral history interview with Randy Hertz. We are in Washington, D.C. on January 5, 2007. The interviewer is Sandy Ogilvy. Randy, thank you so much for consenting to be a part of this. A question I always start with, with everyone that we talk to, is: What was your first exposure to clinical legal education?

HERTZ: Well, my first exposure was as a student. I went to Stanford Law School in the late '70s, from '76 to '79, and I was in Tony Amsterdam's clinic. So that – so I saw a master at work as a clinical teacher, and learned first-hand the benefits of clinical teaching, because I had the benefit of receiving clinical teaching from somebody who was clearly one of the very top people in his field at the time, and has continued to be.

I was a student of Tony's for Criminal Law my first year, and then applied for his clinic, which was actually not a clinic but a simulation course, a two-year-long simulation course, which was formally entitled "Clinical Seminar and the Trial of Mentally-Disordered Criminal Defendants," which he called the "Sick Seminar" for short. And we were never quite sure whether that referred to the defendants we represented or whether it referred to the people who were in it or the people who were teaching it. But it was a truly amazing course, which I can tell you more about if you like.

OGILVY: Yeah, talk a little bit about that.

HERTZ: Okay. Well, he co-taught it with Don Lunde, a forensic psychiatrist, and it was a one-year clinic – a one-year simulation course which you could then take for a second year. But it was divided up into teams, and each team had three first-track students – students who were in the course for the first time, which could be either a second-year or a third-year student. Then each team has a team leader, what he called a “retread,” which was somebody who had been in the course the year before. So if you were a second-year student you could re-up the following year as a retread. And then each team had Tony and Don Lunde in it, and also had a clinical psychiatrist and a clinical psychologist, who were training with Don Lunde to be forensic expert witnesses, and were getting their training by being part of the seminar. So they had four psychiatrists divided evenly among the teams and four psychologists divided among the teams. So it was an incredible amount of staffing for each of the law students who were in it.

OGILVY: How many students were in it at any one time?

HERTZ: Well, four teams of three students were first-trackers – so 12 first-trackers, and then four retreads. And we would meet round the clock. We would write memos constantly, plan out a strategy for handling these cases, which were all first-degree murder cases in which there was some kind of mental defense. So in two of the cases it was an insanity defense; in one case it was incompetency to stand trial defense; and one of them it was a person with epilepsy for whom, the theory was, that he was technically and legally unconscious at the time that he pulled the trigger of the gun.

OGILVY: And a yearlong course?

HERTZ: A yearlong course. And I was in it in my second year, and then re-upped for my third year as a retread. But then, in addition to that, I was also working for him at the time as a research assistant working on death penalty cases. So I had mammoth exposure to Tony, and basically saw both what he was like as a clinical teacher in the simulation course, but also had the chance to work with him on fieldwork, even though it wasn't part of the course.

OGILVY: Right. What year was this?

HERTZ: Well, I started law school in the fall of '76, so that would have been '77, '78 and '78-79.

OGILVY: Did you go to law school thinking you were going to do criminal law?

HERTZ: Yes. But thinking I either wanted to be a criminal defense lawyer or a mental health lawyer. I had started work back when I was a senior in high school at Legal Services in New York City, at Queens Legal Services. And then when I went off to college in Minnesota, at Carleton, I hooked up with the local Legal Aid Society and worked for them every summer of college as an intern, as a paralegal, and then throughout my last year of college in a mental health law project. So when I went off to law school I already had a lot of exposure to representing low-income clients, and especially in the mental health field, and a lot of exposure to mental health law issues. So I went into law school thinking I might want to do that. But also in the course of doing this paralegal work for Minneapolis Legal Aid I ended up seeing the juvenile court, because we represent kids in special ed hearings and sometimes had delinquency cases. So I went along with the lawyers and saw them operating in juvenile court. And we had some clients who had criminal issues and who

had been charged with minor crimes who were mentally retarded. So I saw that too, and thought to myself, “If I don’t think I’m a mental health lawyer, this is what I might want to do.”

OGILVY: How did a New York boy find his way to Minnesota in the first place?

HERTZ: Well, having grown up in New York, I knew that I wanted to get as far away from New York as I could possibly imagine for college. And I had a very limited imagination, so I only got halfway across the country, and then I managed to get the rest of the way when I went off to law school at Stanford.

OGILVY: What attracted you to Stanford?

HERTZ: Well, actually, Tony Amsterdam. So this – I told you before we began the camera rolling that this is going to be a lot about Tony Amsterdam. And he really is the reason why I went to Stanford. One of the lawyers who I had worked with at Minneapolis Legal Aid had gone to Stanford Law School, and she said to me -- because I said to her I might want to be a criminal defense lawyer – and she said, “If you want to be a criminal defense lawyer, the place to go is Stanford Law School, and the thing to do is to take Tony Amsterdam’s clinic.” So that’s why I chose to go there.

OGILVY: After graduation, what did you do?

HERTZ: Then I clerked for a year. And I had thought to myself that what I really want to do was to clerk for a court that was doing state constitutional jurisprudence. Because at the time, as you’ll remember, it was just the beginning of the era in which state courts were construing state constitutions more broadly to protect people’s rights more expansively than the U.S. Supreme Court – that time when the U.S. Supreme Court was cutting back on

federal constitutional protections. And Justice Brennan had just written that article in the Harvard Law Review about state courts and state constitutions and that being the wave of the future for protecting people's rights. So I thought to myself this is what I want to do. So I went to Tony Amsterdam, and I said, "I want to clerk for a judge who is on a court that is construing its state constitution more broadly and who is himself or herself at the forefront of this movement." And so Tony put all that into the computer brain and said, "Well, if that's what you want to do, there are basically three or four justices in the entire United States who fit your description of what you want to do." And so I applied to those four justices, and ended up choosing one of them, which was Justice Bob Utter, who was then the chief justice of the Washington State Supreme Court.

OGILVY: And where does it sit in?

HERTZ: It sits in Olympia. And the reason why he fit the model was that it's a nine-justice court, and there were basically five justices on the court at the time who were very amenable to construing the state constitution more broadly than the federal. And Bob Utter had already written some articles at the time on that issue and was very interested in that issue. And the clerkship was spectacular, because while I was on the court the court ended up construing its search and seizure clause more broadly than the federal, and that began an entire era of Washington State Supreme Court opinions construing the search and seizure clause more broadly.

OGILVY: How did the justice use his clerks? How did he use you?

HERTZ: Basically – well, it was actually quite instructive, because I ended up becoming close to two justices, both Bob and also another justice, Bill Williams, both of whom were the people who were most interested in doing state constitutional jurisprudence. And so both Justice Utter and Justice Williams tended to meet with their clerks, and often with both clerks simultaneously, to talk about where the state constitutional jurisprudence was going. So it was really an amazing opportunity to work not only on individual cases but to be thinking more broadly about what are the principles of state constitutional adjudication. And the other clerk and I often batted ideas around about sort of where should this lead, and not at all in a political way, not at all in terms of the results, but more in terms of what are the appropriate principles of state constitutional adjudication, because courts were really struggling with that at the time. And some state courts would just say we're doing result-oriented decision making and say, "We disagree with the U.S. Supreme Court on that result, and therefore we will construe our state constitution more broadly in order to reject that result." And what Bob Utter and Bill Williams were doing was they were trying to think through what are appropriate neutral principles for when a state supreme court should construe its state constitution more broadly than the federal, in order to guide all the decision making and not do it case by case in terms of what results they wanted to reach.

OGILVY: Sounds like an exciting time.

HERTZ: It was. It was great.

OGILVY: A year or two?

HERTZ: Just a year.

OGILVY: What was next?

HERTZ: What was next was that during that year my interest in doing criminal defense work really solidified. And that was also the result of clerking for a state supreme court. And nowadays I often – most of my students choose to go to federal court clerkships, and I certainly understand why they would choose to do that. But one of the things that I got out of a state court clerkship was really having a chance to see what criminal cases were all about, because those cases, as you know, tend to go mostly to the state courts, because it's state law. And of course in the feds you get the white-collar criminal work. But in the state courts it's where most of the street crime is. So sitting as a state supreme court justice, and then clerking for a state supreme court justice, is where one really sees the outcome of all the street crime prosecutions. And so as the chief justice's clerk I had a particular role of reviewing the cases, the petitions for review, because it is not automatic review in the state supreme court. There is an intermediate appellate court, and that intermediate appellate court handles the bulk of the criminal cases. The way that one gets to the state supreme court is through a certiorari or a petition for review process. And as one of the chief's clerk, I bore a particular responsibility for going through those and making recommendations to the court. And so I saw a lot of those cases, and also saw the crying need for some really good criminal defense work, because invariably the briefs on behalf of the criminal defendants were atrocious. And you know I realized early on that if they were that bad in the briefs that

were submitted to the highest court of the state, they must be really awful at the trial level. So I really started – that’s when I came to the conclusion, you know, I had been struggling until then about whether to become a mental health lawyer or a criminal defense lawyer. That’s when I realized that’s really where the need is greatest – at least that’s where I felt the need was greatest, and I figured that’s what I’ve got to do. And so I applied to defender offices, and struggled between whether to go to the Seattle King County public defenders or the D.C. Public Defenders, and concluded that I want to go to the D.C. Public Defenders, because it had the best training program in the country at the time.

OGILVY: Had Tony worked in D.C.?

HERTZ: Tony had worked in D.C., although he worked for a year as an assistant U.S. Attorney, and went from there into teaching at Penn. So I ended up – I actually ended up appearing before some judges who had been fellow AUSAs with him when he was an AUSA.

OGILVY: Fascinating. And so you went back across the country.

HERTZ: Moved back East again, worked for the D.C. Public Defenders for five years, and then went into teaching.

OGILVY: Doing most felony work?

HERTZ: Well, at the D.C. Public Defenders at that time they moved you through a rotation, and you began in juvenile court for a year to a year and a half; then, theoretically, you went into misdemeanors for a year; and then into low-grade felonies; and then into felony ones, which were first-degree murders and first-degree rape. But the way that things were happening then was that

the misdemeanor court was so backed up that invariably – and this was also my experience – before you ever got a misdemeanor trial you already had some felony trials. So the misdemeanor practice, although it was supposed to be for a year, tended to get shorted out to just half a year. And so I spent about half a year doing misdemeanors, a year doing low-grade felonies, then a year in felony ones. Then at that point the director of PDS – a guy named Frank Carter – and I put together a lawsuit to challenge conditions in the juvenile correctional and detention facilities at the time. And I began working on that while I was still doing felonies. And then in my fifth year at PDS I left the felony unit to go into appeals so I would have the time to devote to putting together this class action lawsuit which we ended up filing that year.

OGILVY: Any case that stands out in your mind from that time?

HERTZ: Well, there were a lot of cases. The juvenile cases are really the ones that I remember most clearly, partly because they were the first ones and partly because they were really heart-breakers, because I represented kids in juvenile court and then they came back and ended up being clients of mine in adult court. But there were also the juveniles who didn't come back, or didn't come back as criminal defendants, and who would drop by my office every so often and just report in as to how they were doing and that they had a job – or one kid had gone on to the military – and that always felt so good. And I've kept in touch with a couple of my former clients, the ones who I represented as juveniles and then went on to represent as adults. And I'm

glad to say that the two I've kept in touch with both are no longer in trouble.

They're both employed, they both have families, and they're both doing well.

OGILVY: That's terrific. Why did you decide to leave?

HERTZ: Well, while I was at PDS in my second or third year I got a call from Tony Amsterdam asking me whether I'd have any interest in clinical teaching. And I said to him that I would be interested, but – and he was calling because he said there were open slots at NYU. And I said I'd be interested, but I want to get some more trial practice first. And he asked me how much time more would I want to be at PDS, and I said at least a couple of years. And so a couple of years went by, and then he called again, and he said, "It's been a couple of years and we now have a slot open again, and would you be interested?" And so I figured I'll do it.

OGILVY: Now we're up to what year?

HERTZ: I began teaching in the fall of '85. So he contacted me in what would have been academic year '84-85.

OGILVY: And what kind of clinic did you go into then?

HERTZ: Well, I had the opportunity to go into either the criminal clinic or the juvenile clinic, because both – juvenile defense or criminal defense – because both of them had spots that were open. And what happened was I applied for the position and there wasn't a decision made at that point as to which position I would go into. And I went through the usual hiring process of doing a faculty presentation. And then I ended up getting the offer; and at that point I made a decision as to which of the two spots I would want to be in. And I can talk about that if you like.

OGILVY: Sure.

HERTZ: Well, at that point, in terms of choosing whether to go into a criminal clinic or a juvenile clinic, I had to think about what kinds of things I would want to teach and what and how best to teach them. And so I wouldn't otherwise have had to think about that so early, but the requirement of choosing which of those two clinics forced me to think about that. And what I realized in talking to the people who were teaching those clinics at the time – and Marty Guggenheim was teaching the juvenile defender clinic at the time, which was called the Juvenile Rights Clinic; and Harry Subin and Chet Mirsky were teaching the Criminal Defense Clinic. And what I learned from them was that under the student practice order in New York – and this is still the case – if you're in adult court you can represent people in misdemeanors, although you can second-chair felonies. But second-chairing means, in New York, that you sit at counsel table as a student and you watch. So that doesn't sound to me like second-chairing; that sounds to me like watching.

In juvenile court, because delinquency cases are deemed to not be either a misdemeanor or a felony, the student practice order allows the student to handle any delinquency case, which means students can handle cases of kids who are charged with crimes which if committed by an adult would be a felony. And so that means in a juvenile clinic you can have students work on felonies, and get all the richness of the problem solving and case theory and case development that goes on in a felony; whereas in an adult court you're limited to misdemeanors. So not to gainsay what one can get out a

misdemeanor practice, which of course is a lot; it seemed to me you could get so much more out of the felony practice.

Now, there is a cost, and that was apparent to me from talking to them, which is that in juvenile court you can only have bench trials, because only about roughly one-quarter of the country or one-quarter of the states have chosen to give a jury trial to juveniles. And under the U.S. Supreme Court decision *McKeiver v. Pennsylvania*, there's no constitutional entitlement. So you're at the mercy of whether or not the state chooses to enact the statute to give the juvenile the right to a jury trial. And that's only been the case in roughly one-quarter of the states; and, even among those, some of the states limit it to the most serious felonies what they call extended jurisdiction delinquency cases.

New York is not one of the states that gives juveniles a jury trial, so all trials in juvenile court are bench trials. So I had to make the choice as to whether or not bench trials would be sufficient, and I concluded that the chance of doing the kind of case development and witness examinations that one can do in a felony case was such a rich opportunity in terms of clinical teaching that that was worth it. So I chose to go into the Juvenile Defender Clinic.

OGILVY: How many supervisors were in the juvenile clinic?

HERTZ: When I joined it, it was only Marty. And so – and in my first year I taught solo, because Marty was doing other things at the time. So what had happened was Marty had left the clinic for a few years to do other things, other courses. And so they had someone filling in for him for a couple of

years, a guy named Ray Kramer, who actually now is back at NYU as an adjunct teacher. He ended up – he left at that point and became an administrative law judge and did ALJ work for years, and still is an ALJ and has now come back as an adjunct to teach a mediation clinic. But he was leaving, so that's why there was a slot open. And so I stepped into his slot and taught the clinic solo for a year. And then Marty came back into the clinic and we co-taught it for roughly eight years. And then I went back to teaching solo.

OGILVY: While you were together, did you co-supervise students, or did you each have a group of students that you were primarily responsible for?

HERTZ: Well, he was doing a lot of other work at the time in other courses, so I was covering the fieldwork. And we co-taught the seminar. And then the reason we stopped co-teaching was that he decided to create a parents rights clinic, which he called the Family Defense Clinic, and he wanted to supervise cases in that clinic, so he went over to doing that and did that full-time.

OGILVY: Are you still teaching in the juvenile clinic?

HERTZ: Yes, I'm still teaching the juvenile clinic. Along the way I taught an additional clinic for a while, and the story of that is that after New York State enacted a death penalty statute in '95, Tony Amsterdam and I created a capital defender clinic, which we co-taught for a number of years. And then when I became director of clinics, I stopped teaching that and limited myself to teaching just the Juvenile Defender Clinic, because I was co-teaching the juvenile clinic and – I mean, I was simultaneously teaching the juvenile clinic and the Capital Defender Clinic. Tony is still teaching the Capital

Defender Clinic, and along the way we added another capital defender clinic, which is the Capital Defender Alabama Clinic, which is taught by Bryan Stevenson – and Tony co-teaches that as well. So Tony is co-teaching two capital defender clinics.

OGILVY: How does the Capital Defender Clinic work?

HERTZ: Well, I'll talk about each of them, because each of them are interesting.

The Capital Defender Clinic that Tony and I created, after working for a number of years with the New York Office of the Capital Defender, which handled most of the capital cases in New York State, and works at the trial level, we concluded that it just didn't really work well to have students working on trial level cases in capital cases because – and this gets us back to the felony cases – of course students can't work on – can't be the lawyer, the assigned lawyer, in a felony case – all they can do is second-chair – and that's particularly true in capital cases. So all the students were able to do in these trial-level capital cases was to second-chair, which basically meant writing memos and observing what happened in court. So after a couple of years of that we changed over to working with the NAACP Legal Defense Fund's Capital Punishment Project, where students were able to work on post-conviction cases and also on other projects. And that gave them more of a role. And also we figure that if there were hearings on habeas that that would give students a chance to participate in the hearings. We had some limited opportunities for them to do that, but it's mostly been students working on briefs and post-conviction.

Now, in the Capital Alabama Clinic, which is the one taught by Bryan Stevenson, together with Tony Amsterdam, that works in conjunction with Bryan's organization, the Equal Justice Initiative. And we have students take that as their only course for the semester. So it's a 14-credit course. And because they take no other courses, that means they are free to leave town. And what we do is we have them leave town and spend roughly half the semester in Alabama. And Bryan has them out investigating cases and developing mitigation evidence, mostly for post-conviction cases to challenge what happened at the trial level, in order to show, for example, in an effectiveness claim, that there was all kinds of mitigation evidence that the lawyer could have found. But they also go out to investigate jury-based claims, to challenge the verdict on that ground, as well as looking for new evidence that one can say should have been disclosed – if it had been known to the prosecution should have been disclosed as Brady. So he's got them really investigating cases, dealing with witnesses, and putting together a case for mitigation, which of course is exactly what – is a perfect vehicle for teaching case theory, working with the witnesses, working with the facts – all of the things you would want students to do that goes beyond what they can do with law.

OGILVY: How many students get that opportunity each year?

HERTZ: Eight to ten students in that clinic. And, because Bryan – what we do is we figure that Bryan is the sole teacher, who is full-time in that clinic, so it's a one-to-eight ratio. And Tony assists with the students.

OGILVY: What other changes in clinical legal education at NYU have you observed and been a part of?

HERTZ: Well, I suspect that the changes that we've had at NYU are a microcosm for what's happened throughout the country. When I first came there, there was a very heavy emphasis on fieldwork and on litigation. And Tony had come to NYU in 1981, so a few years before I got there, and he really ended up changing the clinics substantially from just teaching in the fieldwork mode to having a very substantial simulation component. And he created when he came there this three-part structure in which students would all take the lawyering program in their first year, which is a rigorous simulation-based course of instruction on lawyering skills and the cognitive skills involved in lawyering. And then they would move on from there to either simulation courses or fieldwork clinics, or a sequence set of lessons in which they would take the simulation course first in their second year and then move on to a fieldwork clinic in their third year.

So when I got there there was already this fairly substantial simulation-based methodology. And over the first, say, 10 years that I was there, that solidified and expanded. And, among other things, Tony's model of having students take simulation courses their second year and then take fieldwork clinics in their third year evolved, because a lot of students want to take clinics in their second year. So we started having more and more students taking clinics in their second year; and many of those went on to take clinics in their third year as well. But we also started seeing that students who had

taken a clinic in their second year wanted to have the additional instruction of a simulation course. And so although he had envisioned it as an orderly progression from lawyering to simulation courses to fieldwork clinics, we started mixing and matching, so that some students would take two years of fieldwork clinics, no simulation courses; or would follow his original progression; or would take a fieldwork clinic in their second year and then a simulation course in their third. So that was really the first ten years. And all that tended to be focused on litigation.

So then we moved to what was the next ten years – and I’ve been at NYU a little bit more than two decades. In the second decade what happened was that we started hiring clinicians who had an interest right as they came into teaching, or who had been teaching elsewhere and now had developed an interest in moving beyond litigation to do other kinds of work. And that’s really been the history of the last 12 years that I’ve been at NYU. We have expanded our curriculum of purely litigation clinics to have a much broader focus. So we added, with Kim Taylor-Thompson, a community defender clinic, in which she looked at defender offices in New York City and worked with them in reimagining how a defender office might most effectively represent its clients. And she didn’t have the students actually working on cases, but rather observing the offices and acting as essentially consultants to figure out how to reinvent the model of the public defender. Jerry Lopez came to NYU and brought with him the clinics he had been teaching elsewhere, which were a community-based clinic that does organizing and

community education. And that was one. And then he also brought with him a community economic development clinic. So there too we were expanding way beyond the old litigation model.

We also developed in those years a mediation clinic. And that was designed to meet a student demand. A number of students were very interested in mediation – had formed a group to do mediation work – and came to us and said they would really like a clinic on that subject. And that made sense to us, and so we created a mediation clinic, and it turned out that an office known as OATH, which is the Office of Administrative Trials and Hearings, had developed a mediation component, and it had been developed by a former NYU clinical teacher named Ray Kramer. So now Ray Kramer comes back into the story. And so we brought him on board to teach this new mediation clinic.

What else? Tony Thompson developed a Defender Reentry Clinic, which also did a lot of community-based work and looked at things from a nonlitigative perspective, to think about how do we best help people who are emerging from prison or about to emerge from prison, and involved legislative work, lobbying for new bills, administrative work, appearing before administrative agencies – all that kind of stuff. So in all those ways we expanded beyond litigative work; and all that was on the domestic front in the U.S.

Now, as you well know, what has also been the story of clinical teaching for the past little bit more than a decade is that there's been far more attention given finally, and appropriately, to the international front. And we've done that at NYU also, and we've created the International Human Rights Clinic, and brought on two extremely talented young people, Meg Satterthwaite and Smita Narula, to teach that. And then also Holly Maguigan moved out of the Criminal Defense Clinic to teach something called the Comparative Criminal Justice Clinic, in which she looks at representing people in criminal cases both here and also abroad. And then Nancy Morawetz and Mike Wishnie created an Immigrant Rights Clinic, which is based in the U.S. and focuses on U.S. cases, but is dealing with the immigrant population. And, finally, Paula Galowitz, who had been teaching the Civil Rights Clinic – I'm sorry, the Civil Legal Services Clinic for years started doing asylum cases, instead of just doing public assistance cases, Social Security cases and housing cases. So all that changed over the last decade or so.

Yet another thing that's changed, and that's also representative of what's been happening across the country, is that we've done more and more with interdisciplinary work. And Marty Guggenheim, in creating the Family Defense Clinic, chose to bring on board as a co-teacher a social worker from the School of Social Work, and also brought in social work students. Of course that clinic where they represent parents accused of abusing or neglecting their children, and where a key part of the advocacy is developing plans to propose to the court for how to reunite the family based on services

to the parent – obviously depends heavily on the social work component, and provided a wonderful opportunity for teaching students how to work across disciplines and with people from other disciplines.

The Capital Defender Clinic that Tony and I created in 1996, and offered for the first time in the 1996-97 school year, was also an opportunity for that. We brought in a forensic psychiatrist. Of course this goes back to the whole vision Tony had for his course at Stanford. And we brought in a forensic psychiatrist to work with us on a simulation, which became the core of the students' spring semester work. And we had a multiweek simulation in which the students worked with this forensic psychiatrist who had handled capital cases in a simulation based on a real case of his. And the students worked to put together a case and mitigation in the simulated case. So those were in those clinics.

Now Holly also brought in a social worker to co-teach her clinic and to provide a social work component to that, and invite social work students to be a part of that clinic. And in my Juvenile Defender Clinic I expanded something we had already been doing, which was working with the Legal Aid Juvenile Rights Division's social work unit, which is called the Juvenile Services Unit, and had my students doing a lot more with regard to the dispositional work in conjunction with the social workers there. So in all those ways we tried to find additional opportunities for students to work with other disciplines. And

that of course also has been the story of clinical teaching for the past decade and a half or so.

So in all those ways – the integration of simulations, the expansion into nonlitigative work, the focus on community work, the focus on interdisciplinary work and the focus on international work – NYU’s clinical program has changed in ways that are reflective of how clinics have been changing around the country.

OGILVY: I guess the obvious next question is: What’s next? Where’s the future?

HERTZ: Well, I would have said a few weeks ago that’s hard to say. But I think that the recent publication of the Carnegie Foundation’s new report on teaching really suggests what are the things we need to focus on in the future. And I don’t know if you’ve had a chance to see that report yet. It’s about a 250-page report based on the Carnegie Foundation interviewers going around to lots of different schools and seeing what’s being done both on the nonclinical front and the clinical front. And what they say is – and this doesn’t come as a surprise to anyone who’s been doing clinical teaching – that although there is a lot of virtue of course to the Socratic method and the stand-up lecture approach to teaching, that approach misses a lot of things which are done in clinical teaching in law and taken for granted in other fields of professional education like business, engineering, medicine; and, also, though they don’t talk about this much in the report, social work, nursing. And what the report recommends is that the academy, the law school, pay more attention to what’s being done in the clinics and in these other fields and think more

about how to integrate that methodology into other parts of the law school. And what the report says is that at too many schools the clinics are regarded as merely an add-on. And it recommends that the schools think about how to integrate this methodology and how to create a vision of legal education that is designed not just to be a part of the university, and the research model and scholarship and all that, but that is truly designed to help students get to where they need to go in terms of becoming members of a profession; and therefore it's fulfilling its responsibilities as a professional school.

Now, what the report also says, which is equally important, is that part of that process of preparing people for the practice of law and for being a responsible professional is the professional responsibility component, the legal ethics component, and that schools just are not doing a good enough job of teaching professional responsibility. And one of the things it mentions, which also gets us back to our roots as clinical teachers is that clinical teaching and real-world cases provide a – and simulations also – provide a wonderful opportunity for teaching professional responsibility in ways that are often more effective than the stand-up teaching method that is used in so many professional responsibility courses. Of course as you know, and as your first film showed, and as I'm sure a lot of the early interviews with early clinicians talked about, when clinics took hold in law schools in the '60s and '70s and really emerged as an important part of legal education, it was because of CLEPR, the Council For Legal Education for Professional Responsibility and the Ford Foundation grants, which were all about using

clinical legal education to teach professional responsibility. And a lot of the early scholarship and thinking was all about how do you do that and how do you use fieldwork and simulations to do that effectively.

Well, a lot of clinicians still are doing that. Of course it's part of all of our clinics to teach professional responsibility. But I think we've come a little bit too far from our roots in terms of really thinking carefully about how to clinics to teach professional responsibility. And the Carnegie Foundation report is really a reminder of that. So if this Carnegie Foundation report has the effects that I hope it will have, it will encourage law school deans, administration and the faculty to find ways to integrate clinical methodology into more parts of the curriculum, in which case clinical teachers will be working more with nonclinical teachers. And I think that's been a missed opportunity, because I think at far too few schools do we have clinical teachers working extensively with the nonclinical faculty. So I think that could change in the coming years.

Second, I think that this report could encourage schools to do far more professional responsibility, and particularly with using simulation methodology and fieldwork to teach that subject. And so I think that may be the story of our future, just like it's been the story of our past.

OGILVY: One of the common themes for clinical legal education has been the status issues of clinical faculty. Was that ever an issue at NYU? Is it an issue?

HERTZ: It is not an issue now. It was an issue right before I came. And, as you'll recall, the ABA accreditation standard, which requires security of position

for clinicians, was adopted in I think '84. And there had been a lot of discussion of it in the years leading up to '84, because there had been a draft circulated to deans all around the country of the new rule.

NYU saw that coming and at the time our dean of NYU was Norman Redlich, who was highly supportive of the clinical enterprise, but who also was a big player in the ABA. So he knew this was coming, so he pushed NYU to start thinking about this as the rule was already in draft. And so in the couple of years that that was under consideration by the ABA, NYU was considering how to change its rules for clinicians, which until then had been just contracts. And NYU ended up adopting a new mechanism of clinical tenure, which was in place when I was hired at NYU. And so by the time I got there that was already in place, and there had already been a shake-up as a result of that.

So, what was the shakeup? When the new mechanism of clinical tenure was adopted, all of the existing contract clinicians were given the option of either signing on to the clinical tenure track or leaving. And basically anyone who was there was invited to join the clinical tenure track. And it was simply a matter of them making the decision that they wanted to have a job that would require clinical scholarship. Well, a number of people chose to do that. Some people decided that that was not really what they wanted to do and that they loved teaching but that they didn't want to do scholarship. And so the latter group left; the people who wanted to do scholarship stayed and signed

on to the clinical tenure track. And so during those first few years I was at NYU we had some of the longer-term clinicians, like Marty Guggenheim and Chet Mirsky, coming up for their tenure reviews. And they got it and were tenured, and then after that there was the wave of the new people who had been hired. I was the first person of the newly hired people who came up for tenure, and then in short order I got tenure, and then in short order after that came Nancy Morawetz and Holly Maguigan, and then Sally Burns. And those were all the people we had hired in the first decade I was there. And then after that came Kim Taylor Thompson, Tony Thompson, Bryan Stevenson, Mike Wishnie – and I think I’ve now hit all of them. And then also we now have on our tenure track Meg Satterthwaite and Smita Narula.

Now, there were four people who had chosen to write and then realized that they preferred to concentrate on teaching. And what we did when they realized that was we changed horses in midstream, and we created a long-term tenure equivalent contract, basically for those four folks, because they had been at NYU for many years, had made an enormous contribution, were continuing to be some of our most effective teachers. And we decided the cost of letting them go simply because they had chosen not to do scholarship is too great a cost. So we created this additional tenure equivalent contract, although we said at the time we were grandparenting in those four people and that this would not be a model for other people, and that all subsequent hires would be presumptively onto the clinical tenure track. So that’s where things stand now. We now hire – although theoretically we could hire onto a long-

term contract, we have not done that; we hire exclusively onto the tenure track, and we are now about to start another search to hire another person under the clinical tenure track.

OGILVY: In terms of the writing that's required, is there a different standard than for the other regular tenure track?

HERTZ: Well, as we like to say, difference in quantity, not in quality. So – and this was something that the faculty had thought about a lot at the time they were adopting the clinical tenure track. There was a recognition, even at that time, that clinical teachers spend so much time in court, or in hearings, or in working with students outside of court to prepare for hearings, that it's simply not feasible for them to write as much scholarship as people on the academic track or nonclinical track. On the other hand, there was a real feeling that that is not a reason to ask for any lesser quality of scholarship. And so the faculty adopted a rule of scholarship that said that clinicians should write top-notch scholarship, but will not be expected to write as much scholarship as nonclinical teachers. They also recognized that clinical scholarship doesn't need to be exactly what academic scholarship is, and it doesn't need to be law review articles. It can also be other things. And so over the years we've given credit for things like trial manuals, law review articles that are not traditional in the sense that they don't focus on substantive law topics but instead focus on clinical pedagogy, or that focus on other kinds of things like models of lawyering. And so in all those ways we expand the definition of "content." But, again, the quality level is

expected to be the same high quality of what one would expect of a nonclinical teacher.

OGILVY: Is this a common law definition or a statutory definition?

HERTZ: Parts are statutory; parts of it were actually adopted into the rules for clinical tenure. Those parts are that clinical scholarship can be accepted, and also that the quantity can be less because of the demands on clinical teachers' time. There is no statutory definition of what clinical scholarship is, and we have been defining that as we go along.

OGILVY: That's interesting. You are certainly recognized by many, many people in the clinical movement as one of the national leaders. When did you first start getting involved with the section or what other activities that took you beyond just what was happening at NYU?

HERTZ: Well, that allows me to say a little bit about the importance of deans in terms of encouraging new faculty members to be involved in activities that benefit the profession. And there again I received the benefits of being mentored by and having advice from a wonderful role model, and that was my first dean, Norman Redlich. And, as I mentioned earlier, Norman was very actively involved in the ABA. He was also actively involved in the City Bar Association for New York, as was his predecessor, Bob McKay. And they had this notion that faculty members of a law school have a corporate responsibility to be involved in things like the ABA and its sister organizations at the national level, and also comparable organizations at the state and city levels. And so he encouraged new faculty members to do that. And taking my cues from him, I became involved early on with bar

association work of all sorts. So I became involved right away in screening of lawyers for court appointment in the family court. And actually through a set of circumstances that was odd and not worth talking about, I ended up like half a year after coming to NYU I became the chair of the screening committee for appointment of lawyers to the family court appointed counsel plan, which ended up taking a lot of time and a lot of work. But I did it for a number of years. I found it very worthwhile.

I also became involved at that point in City Bar Association work and also in ABA work, and continued doing that over the years – at first doing juvenile justice and criminal justice work, and then at some point in the first few years branching off to doing work in those organizations with regard to legal education also.

OGILVY: What sorts of things?

HERTZ: Well, early on I became a member of the ABA Skills Training Committee, so that was really my introduction. I had already become a member I guess in my first year of the ABA's Juvenile Justice Committee. Once I started doing work on the Skills Training Committee, I started becoming aware of nationwide issues having to do with clinical legal education, including the status issues which have plagued the legal education community for years and were especially problematic in those early years. But, as you well know, have again surfaced recently in a big way and once again are a big issue. So that was the beginning.

I guess I became involved in a much more active and concerted way in the late '80s when the MacCrate Task Force, which was a task force on – called “Narrowing the Gap” – and was to focus on what was then originally styled as the disjuncture between legal education and the practice and how to narrow the gap. And it was a task force headed by Robert MacCrate, a partner at Sullivan & Cromwell, who had been president of the ABA and had a number of deans and also clinical teachers and people from practice and also judges on it. It had been formed or the idea had been initiated by Justice Rosalie Wahl, a justice of the Minnesota Supreme Court, who was on the task force. And Tony Amsterdam was also on the task force. And the task force had to come up with a plan for what skills and values lawyers should be taught in law school. And what the task force concluded was that you can't talk about that until and unless you have a vision of what skills and values are needed for practice. And to use a term that Tony Amsterdam borrowed from cognitive psychology, ends means thinking, which is a style of problem solving, requires that you look at the end result and figure out how you get there. And so as Tony encouraged the task force to do, the task force concluded that they need to think about what do lawyers need to know in terms of the skills they need to be proficient in and the values with which they need to be familiar. And then wind the clock back to think about how to teach those things, either in law school or after law school. So that required that they come up with a plan for what lawyers need to know. And they looked around at the literature and concluded there was no such plan out there and they needed to create one. So that meant finding someone to do it

for them, because everyone on the task force was an overcommitted dean or senior clinician or judge or partner at a law firm. So they concluded what they needed was a younger clinician who would have the time to think about this stuff. And Tony mentioned my name – and Norman Redlich was also on the task force, and he knew me – and so they told the task force about me; the task force looked at various possibilities and decided to offer me the role of consultant to develop this plan. So that’s what I did. So in the late ‘80s I came up with this document which became what we called the Statement of Skills and Values, or the SSV. And I developed a first draft, came to the task force and presented it to them, and got a lot of feedback from them, and then worked with a small subcommittee to refine it further. And the amount of feedback I got was wonderful. And I remember even in the very first meeting folks like – well, right before that I had been getting immense feedback from Tony and from Norman. But then at the first meeting I remember that Joe Harbaugh, who was then at the University of Richmond School of Law as the dean, and now is at Nova Southeastern, was just reacting to lots of stuff in the draft and also in my oral presentation, and just – like giving me ideas like a mile a minute, which I was racing to take down. And Rosalie Wahl, also from her perspective from having been a judge and also a clinical teacher at William Mitchell School of Law, was coming up with a lot of stuff; Roy Stuckey, who was on the task force and from the University of South Carolina – he was coming up with a lot of stuff. So I was getting all these great ideas coming back to me – and also from Bob MacCrate. And I can’t say enough about what a wonderful role Bob played

in all aspects of the task force. He was the driving force in terms of making sure the task force got things done, and also making sure that it reached out to all the right people. But he was also a driving force in terms of creativity, and he was constantly coming up with things that played an important role in our thinking and also that shaped what we eventually produced.

(Tape change.)

Okay, before the tape ran out, we were just talking about Bob MacCrate and the task force. And what I was trying to say was that Bob was not only the driving force in terms of pushing the task force to get the job done and also to be as inclusive as possible in terms of ideas and feedback from around the country, but also a driving force in terms of creativity. From the very beginning he said that SSV, the Statement of Skills and Values, needs to be not an atomized set of two separate lists of skills and values, but the two concepts need to be integrated. And what he said and what found its way into the document and is there and is very important as a conceptual device, is that the values frame everything that we think about and provide the overarching structure for the skills, and the skills and values interrelate and inform each other. So his original vision of that became a central part of the conceptual vision for the Statement of Skills and Values.

Now, after the task force gave me a lot of feedback, and I refined the draft numerous times, we came up with what we regarded as our working draft of the task force. And then again because of Bob's notion that you have to be as inclusive as possible and get ideas from as many people as possible, we

circulated the draft all around the country. And that was in the days before e-mail, so we shipped it out around the country in hard copy to deans of law schools, to clinical teachers, to heads of all the ABA sections, to the heads of the AALS and other appropriate organizations and got feedback from all of them. And then revised the draft – and we also held hearings and got input that way – and then ended up revising the draft substantially in response to all the feedback that we got; and then finally put that into the task force report along with a lot of background reports and lots of other things, and the overall conclusions of the task force, and published the whole thing in 1992.

OGILVY: Looking back as you got into it, did you share the task force opinion that you had the time to do this with everything else you were doing?

HERTZ: No. At the time that they asked me to do it, I thought, Oh, sure, how much work can it possibly be? And of course that was one of many times I said that to myself and realized how far off the mark I was. And it turned out to be a much more massive project than I ever expected. But I got so much out of it that I don't regret at all having done it.

OGILVY: As you took on the task and started thinking about how to organize yourself, how did you organize yourself to do this?

HERTZ: Well, at the time I was teaching – I wasn't teaching the Capital Defender Clinic yet – I was teaching the Juvenile Defender Clinic – but I was teaching the clinic as a solo law office, in which I was the only senior partner. And I had eight or sometimes ten students a year who would work on felonies under my supervision, and we would pick up these cases on intake and handle them as we went along. And that ended up being an immense amount

of work, because I was often in court three or four days a week, and would end up sitting around court all day long waiting for cases to get called, and so wasn't available to meet with students. But of course this – and that was also in the days before e-mail and before cell phones. So the only times I could meet with students were in the evening, so I would typically be in court all day long, come back; I'd meet with students till all hours of the night, and then would work on the task force SSV drafts until like two or three in the morning.

Now, one of the ways that I integrated the different things I was doing was that, especially during the years in which I was finalizing the drafts of the MacCrate report SSV, what I did was that I gave it – I gave drafts to my students and asked them for feedback, and asked them to tell me how much of that stuff did they feel they were learning and how much did they feel was important to them in terms of what they were doing in the clinic and what they were seeing with regard to practice. And I ended up getting a lot of feedback from my students, especially in the 1990-91 year, which was the year in which I was finalizing all that stuff and was asking them for a lot of feedback. That also happened to be the year that I was up for tenure. And so my poor students were not only being dragooned by me into reading these drafts of the task force report, but also because in the fall semester of that year we had what was the old process for reviewing clinicians, which was the Academic Personnel Committee came in and sat in on classes, and all members of the faculty came and watched. And so my students had all these nonclinical people coming in and watching me teach. But then midyear the

school moved to a new system in which they created a Clinical Personnel Committee, which would handle reviews of clinicians. And so suddenly at that point I was being reviewed by the Clinical Personnel Committee, which meant clinicians were coming in to watch my teaching. And so basically those students had faculty members sitting in classes constantly throughout the year.

This leads to something – I think – which was that the students ended up getting so interested in getting what it takes to become a teacher and what the enterprise of teaching is all about, that at some point in the year they said to me they really would love to just hear about how you become a clinical teacher. So I end up having this extra session with them in which we just talked about clinical pedagogy.

All right, so I don't know whether this actually had this impact or not, but out of the eight students who were in the clinic in that year were Bridget McCormack, who now is the director of clinics at the University of Michigan Law School; Paul Holland, who is the director of clinics now at Seattle U; and Angela Burton, who is a clinical teacher at CUNY Law School. So three out of the eight became clinical teachers – one of them who works as a public interest lawyer, Craig Levine, is not a clinical teacher but he teaches regularly at Princeton, and teaches a juvenile justice course at Princeton. So four out of eight went into the teaching field. Now, I don't know whether or not their exposure to all that stuff, including the MacCrate Task Force reports, had an impact or not. But that's certainly a higher percentage of

students in a clinic that have gone into teaching than I've ever had before or since.

OGILVY: That's remarkable. That's remarkable. One final question with regard to the MacCrate report is, again, as you started to organize yourself, what sources did you begin to look at to decide what skills that would be considered?

HERTZ: Well, partly I looked at the legal education literature, and partly I looked at some of those studies that had been done in which they talked to people who are in practice and asked them what had they learned in law school. This is the kind of stuff that Bryant Garth has been doing a lot of. And he was hired as a consultant to the task force, and he and Joanne Martin wrote the first of many pieces as one of the consultants' reports for the task force.

Now, most recently, starting in the year 2000, we have this After the JD study that's going on, which is going to produce the most extensive material and data we have had yet as to career patterns; and is also giving us an opportunity for getting feedback from people at different points in their career as to what things in law school turned out to be the most important for them in practice. So there was a little bit – there was some rudimentary stuff of that sort available already, and I looked at that.

OGILVY: Yes, finally with respect to this, what is your impression, your feeling, about the impact, about the reception that the MacCrate report has received since publication?

HERTZ: Well, it's been very interesting. At first the immediate reaction was that some deans, prompted by a law review article written by Dean John

Costonis, then the dean of Vanderbilt University Law School, said, “Oh, this is all well and good, but this is much too expensive. We can’t possibly do all the things the MacCrate Task Force is recommending we do.” And there was a lot of that stuff at first – not anyone disagreeing with the recommendations as to what ought to be done, but a lot of people saying it just can’t be done because it’s too expensive.

Well, the MacCrate Task Force recommended that schools meet and have curricula planning discussions to talk about how they might do some of the things that the task force had recommended. It also recommended that law schools meet with other institutions, like the judiciary and the practicing bar. And in the wake of the MacCrate Task Force’s publication there were these kind of curricula planning meetings at a number of schools, although not a very high percentage. And so that was a lost opportunity. There were also conclaves – state-based conclaves in a number of states, beginning with Virginia, in which the academy met with representatives of the judiciary and the practicing bar to talk about the MacCrate report and also how to implement it. And there were a number of reforms that grew out of both the curricula planning meetings at some of the schools and also these conclaves, but not as much as one would have hoped. And so I really felt at the time that this – or I feared that this might be one of those things, one of those kinds of reports that prompts a flurry of activity immediately thereafter and then doesn’t produce long-lasting change, and ends up just sitting on a shelf.

I've been encouraged to see over the last 14 years since the publication of the MacCrate Report that it continues to be used actively and that it has produced a lot of change. Now, the way it has produced change has been in large part through a ripple effect. And what happened, I think, if you trace it back and think about why it's had that ripple effect, what happened was that the MacCrate Task Force Report and its vision of legal education ended up informing the ABA Section of Legal Education and Admissions to the Bar, which handles the accreditation of law schools and has accreditation standards. And the section, the Legal Education Section, ended up amending its accreditation standards to integrate quite a bit of what the MacCrate Task Force had said about what law schools ought to be doing in terms of professional skills instruction. That became part of the accreditation standards. As a result, law schools, in order to meet that accreditation standard, changed what they were doing. Then, as a number of the law schools changed what they were doing to expand their professional skills curriculum to meet that accreditation standard, the schools that didn't were discovering that other schools with which they were competing were offering students all the stuff in terms of professional skills instruction and were marketing it. And so the schools that didn't have it realized that students were attracted to it, because it's an obvious draw for anyone who wants to become a lawyer that a school is offering them courses in how to become a lawyer. And so the schools that weren't offering it then felt like they had to in order to compete. And so what we've seen in the last 14 years is this evolution in which more and more schools were expanding their professional

skills curriculum – not directly in response to the MacCrate Report, but through this set of ripple effects.

Now, the Section on Legal Education and Admissions to the Bar did a study a few years ago of how the curriculum has changed in the years from – in the 1990s. And they did – they also looked back at the ‘80s, so it’s basically a 20-years-after study done by Cathy Carpenter of Southwestern University Law School. And what the study found was that the biggest change during the decade of the ‘90s was the expansion of clinics and professional skills instruction in law schools and that that was, as they put it, the dramatic story of the 1990s. And the report directly attributes that to the publication of the MacCrate Report. I think that’s right, although I think the story is more complicated in terms of how the MacCrate Report prompted these changes.

OGILVY: That’s interesting. That’s certainly true at my school, that the decade of the ‘90s was the major expansion of skills training. I think that myself, but I think there was more than that going on.

Well, certainly one of the other major things that you are associated with is the *Clinical Law Review*, and so I want to talk a little bit about the creation of the *Clinical Law Review*, your role in it, your continuing role in it. You’re going to die with your editorial boots on it looks like.

HERTZ: I’m trying not to, both in terms of having editorial boots on when I die, and also trying to put off the date of death. But, yeah, I’ve been involved with that from the beginning. But that also is a story of collaboration, because I

played only a small role in it as one member of a group of people who brought that into being. So let me talk about all the different groups that were involved in that and some of the people who were involved in that.

That was also an example of a confluence of people and ideas coming together to produce something tangible. What had happened – and you’ll remember this – what had happened in the ‘80s as a result of the adoption of ABA Accreditation Standard 405 – then (e), now (c) – was that schools were adopting requirements, either clinical tenure or tenure equivalent contracts, for people to come on board to write scholarship and not just teach. That prompted clinical teachers who were not already producing scholarship to start doing it. Now of course we already had a rich legacy of clinical scholarship from people like Gary Bellow, Mike Meltsner, Phil Schrag, Tony Amsterdam, Dean Hill Rivkin – all of them who had been pioneers of clinical legal education had also written important work in the field. But it was a fairly small body. Carrie Menkel-Meadow, who came in a little bit after them, had also written some very important works. But, again, a very small number of people.

As a result of the adoption of that accreditation standard, schools started requiring as a requirement of hiring that people agree to do scholarship. That expanded the number of people writing clinical scholarship. Now, a number of those people wrote pieces in substantive law areas that were published in traditional law reviews. But a number of them chose to write clinical pieces.

And what they found was that traditional law reviews, edited by student editors who were law students, who are not interested in publishing pieces about clinical teaching – which is not all that surprising, because students don't, for obvious reasons and for understandable reasons, don't think about pedagogy; they think about the content of the subjects that they're studying. And so they think about substantive law issues and are very eager to publish articles on substantive law issues, but are not that interested in teaching and issues of pedagogy, and therefore are not that interested in publishing articles about pedagogy. That is in fact why the *Journal of Legal Education* came into being, to provide a vehicle for teachers to publish articles about the enterprise of teaching. But the *Journal of Legal Education* only sometimes published articles about clinical teaching, because it was a mainstream journal which tended to focus on mainstream teaching, which at the time was defined as nonclinical.

So there was no real place, no real house, for publishing articles about clinical teaching. And a number of people were feeling the lack of that, because they would shop around their articles to law reviews, and the law reviews would say things like, "Well, I'm not all that really interested in all this stuff about clinics, but if you just refashion this as a substantive law article and ditch all that stuff about clinics, or maybe just put it into footnotes, then we'd be interested in the article." And so people who had had that experience thought there really ought to be a place where we can publish the articles that we care about and that will inform other teachers and help them become better clinical teachers.

So a number of schools started talking about trying to create a journal, and NYU was one of those schools. Also, the AALS Clinical Section started talking about that, and the newly formed Clinical Legal Education Association, with the acronym of CLEA, also began talking about that. So you had this push from all these different directions. And what happened was CLEA took the lead and formed what they called the CLEA Advisory Committee on the Creation of a Clinical Law Journal.

OGILVY: Do you remember what year that would have been?

HERTZ: It would have been like 1992 or '93, thereabouts – I think 1992 – and brought together a lot of people to talk about this, and that group included among the people Nina Tarr – well, a lot of people – Nina Tarr, Jeff Hartje, Steve Ellmann, Richard Boswell, Marty – I was part of it, Liz Ryan Cole, Ann Shalleck – I'm sure I'm shortchanging people – oh, Tony Alfieri, Bev Balos – those are the people that come to mind. I'm sure I'm shortchanging people, and I apologize to them. But I remember those were all part of the initial group. And we all got together and talked about how to create this new journal, and came to the conclusion that it ought to be jointly sponsored by the AALS and by CLEA, and that it ought to be housed in a host school. And we talked to various schools that had some interest, which then were invited to submit proposals – and NYU was one of them – and the Advisory Committee ended up accepting NYU's proposal and designated NYU as the host school. And so then we officially launched the Clinical Law Review as an institution that was co-sponsored by CLEA, the AALS and NYU, and

housed at NYU for all the production work. And I think – well, our first issue I believe was fall of '93 – but I could be off on that. I can tell you that we are now in the thirteenth year, so I think the math works, because fall 2006 would have been the first issue of the thirteenth year. So I think the math works, but I'd have to go back and check to make sure.

But, what's more important, more interesting than the fact that I'm math-challenged, which I am, is that we again try to make this as collaborative an enterprise as possible. So even though it was going to be based at NYU and therefore would have one editor-in-chief who would be an NYU faculty member, we decided to have a troika of three editors-in-chief, only one of whom would be a NYU faculty member, and two of whom would be selected from other schools. We also decided that the board should be composed of people representing all different constituencies. So we had one person on the board from NYU, but we then had a group of people initially selected by CLEA and a group of people initially selected by the AALS Section on Legal Education. Thereafter, for future boards, we opened it up for election and opened it up to the entire community.

And so what we now – and we said there should only be one board member from each school, and the idea was to make this as representative and diverse a body as possible. And the board has continued to be an all-important force in the running of the *Clinical Law Review*. In fact, they've become evermore important over the years. At first the board was nothing more than just an

advisory board. Then we had the board start reading manuscripts, and they were extremely valuable in terms of that role. And then the board members started saying, “Hey, we can do more than this. We’d be very willing to edit articles too.” And at first only the initial three editors-in-chief – the three initial editors-in-chief were Steve Ellmann, Isabelle Gunning and me. So at first the three of us did all the editing. By the way, later, after Steve served a decade or so, he stepped down and was replaced by Richard Boswell. And then Richard stepped down and was replaced by Kate Kruse. And so the current editors-in-chief are Isabelle, Kate Kruse and me. And Isabelle is now stepping down, after being an editor-in-chief since 1993, and will be replaced by someone else next year.

So the editors-in-chief are doing all the editing. And the board said, “We’d be willing to do a bunch of that.” And so now we evenly apportion the editing assignments for articles across the board – that was no pun intended – across the board to all the board members, and all board member participate actively in editing articles. They also participate actively in setting policy directions for the law review. In fact, right before I came down to do this interview, we just had one of our two *Clinical Law Review* board meetings per year – and we hold them every year, one at the AALS annual meeting and one at the AALS annual workshop for clinics.

Now, one other thing – well actually two other things about the *Clinical Law Review*. One is that for the first issue of the *Clinical Law Review*, because

we had had a lot of discussions within the advisory board, but also within the newly created *Clinical Law Review* board of editors, about what kind of scholarship should we feature and what is clinical scholarship, and we hadn't come to any views about it – any final judgments about that. We thought to ourselves, “Well, let's open this up to the entire country to have a national conversation. And so for the first issue we invited people who were doing clinical scholarship of all different sorts to submit an article in which they talked about their vision of clinical scholarship; and then didn't just talk about it in the abstract, but also provided an example in their own article. So Tony Amsterdam, for example, talked about using narrative theory, and then gave as an example a detailed narrative theory analysis of the arguments in *Brown v. Board of Ed* in the U.S. Supreme Court. Nancy Cook also talked about narrative theory, and then used storytelling in all different kinds of interesting ways within her article. Another example: Peter Toll Hoffman had a vision of clinical scholarship as being skills scholarship, and talked about that and then did a detailed exposition of skill scholarship in one area. So they and a bunch of other people all both talked about what they thought we should be publishing, and also gave us examples. And that first issue then sparked lots of thinking around the country, and also sparked a lot of other people to write stuff, which we published in the years since then.

OGILVY: Looking back at the time of the creation of the CLEA committee to the first issue, it's been a relatively short period of time.

HERTZ: Right. We moved very quickly.

OGILVY: Accomplished a lot in a very short time.

HERTZ: Yeah. And I want to, as they say, give a shout out to Nina Tarr, who was the driving force on that one. She really pushed us to move quickly, and kept everything moving. And then she was on the first board and was an extremely important member of the board. We ended up honoring her, as you'll recall, here at the AALS when the AALS section gave – although for its Pincus Award each year it annually gives an award to a person, one year it gave the award to the *Clinical Law Review*. And Nina was the person who came up and accepted the award on behalf of us. And that gave us an opportunity before she said anything to say a few words about how important a role she played in the creation of the *Clinical Law Review*.

Now, I said to you I wanted to mention one other thing about the review. This past spring we had our first ever *Clinical Law Review* workshop, and that also grows out of our experience. And we have found that – and we've been told that – the *Clinical Law Review* provides a wonderful opportunity as a journal to spark discussion in regional workshops of clinicians, and that in turn helps to prod people and inspire them to do scholarship on their own. And, as you know, these regional workshops have been great at giving people a chance to workshop their pieces. But it seemed to us that the number of people that get to workshop their pieces is fairly small, and that it'd be wonderful to expand that pool. And so this past year, this past academic year, we tried out the idea of having a national workshop, hosted by the *Clinical Law Review*, which would give everybody who wanted to workshop a piece a chance to do so in a small group with other people who

were writing in the same field, and with a discussion group leader who was a member of the Board of Editors or an editor-in-chief, and who therefore had been editing articles. And so we did that last spring, and we piggybacked it on the AALS Clinical Workshop. And it turned out to be an immense success. And we got a lot of great feedback. And now a number of people who presented their pieces there have now published their pieces or are on the verge of doing so. And so we've decided to institutionalize that; in fact, we made that final decision this morning – we decided to institutionalize it – and so we are going to offer another one of those next year, and we look forward to doing it every year from now on.

OGILVY: How many people participated in the first one?

HERTZ: Again, I'd have to look it up, but I think it was something like close to 60 people, divided up into small groups of anywhere from eight to ten people per group.

OGILVY: Over the 13 years, has there been any evolution of the editorial policy of the law review in the types of things you select, types of things you reject, the way you work with authors?

HERTZ: Not so much in terms of what we accept, because we've always tried to be as open-minded and as broad as possible in terms of our definition of clinical scholarship. We started out from the beginning deciding that we were not going to publish substantive law pieces, because those have a home in other journals; and that we would publish pieces on clinical scholarship. And we said we would not define clinical scholarship narrowly, because we wanted to give as many people a chance to publish their work as possible, and give

people a chance to expand the conception of clinical scholarship. And so we always, because of that broad definition, that has meant we've always been open to lots of things and have published lots of different kinds of stuff.

Now, what has changed over the years I guess is that we've come to play much more of a role in terms of taking drafts that we get, that we find to be not quite ready for publication, and giving feedback to people, encouraging them to refine their article in various ways and then to resubmit it to us for publication. And we're finding a number of people are doing that and taking us up on the offer. So that's been a very encouraging change, which we weren't able to do at the beginning, because all of the editing was done by the editors-in-chief. Now with the board involved in editing, and also involved in a lot of the administrative and production work, that's freed up the editors-in-chief to give much more feedback to people who submit articles which we end up not accepting for publication and which then don't go to the entire board.

OGILVY: So the editors-in-chief do kind of the first cut and then parcel them out?

HERTZ: Right. So we do – exactly – we do the first cut. Once we accept an article for publication, then it gets assigned to a board member who then mentors the person who has written it and helps them shepherd it – shepherds it along and helps them refine it and get it ready for publication. But we won't accept a piece until it is at a fairly polished place. And so a lot of the pieces we get are too rough or have problems of various sorts. And for those pieces in the early years we would generally reject them and say to people, "We're sorry

to reject it. It needs a lot of work. If you want to rework it, certainly you can resubmit it” – without giving them direction as to how to rework it. Now we’re giving people a lot more direction.

What we’re also doing more of is we are also a little bit more willing to accept pieces that are not as polished, and accept them for publication, because the board is playing such an active mentoring role; and also because now people have a chance to get feedback on their drafts from lots of sources. And, as you know, Steve Ellmann and Rick Marsico of New York Law School have created an SSRN extension called CRI, the Clinical Research Institute, which allows people to post articles online and get feedback from other clinicians. And so what we’ve taken to doing is accepting articles for publication for a year away or a year and a half away, and saying to authors, “We think this needs a fair bit of work. Here’s the kind of work we think it needs. We’re accepting it anyway on the understanding that you will do this kind of work and fix it in the following ways, and we encourage you to publish it on the CRI network and get feedback from people on both the subjects we’ve identified and any other subjects people may spot, and then refine and revise it in the year or year and a half that you’ve got before we have to send it off for publication.

OGILVY: Do you have a sense that the CRI system is working?

HERTZ: I think so. I’m certainly getting feedback from some of the authors that they posted it, that they’ve gotten lots of great ideas and that they’ve revised their articles in light of those ideas.

OGILVY: In terms of numbers of submissions to the law review, has that changed over time?

HERTZ: Yeah, it's increased – not a huge amount, but a fair amount. One thing that has changed is that over the years we ended up forming relationships, as you well know, with some organizations that hold annual or periodic conferences. And one such organization is the Externships Conference which initially was based at Catholic and which you founded, and which now I gather has moved – has spun off and is now housed at Southwestern.

OGILVY: Well, they did the last one, yeah, at Southwestern and Loyola in Los Angeles. But we understand Seattle is interested in doing the next one.

HERTZ: Oh, that's great.

OGILVY: So it could be moving around the country.

HERTZ: Okay, that's great. Well, so the first two were at Catholic, and because you approached us we ended up agreeing to publish papers that emerged from those two conferences. And then we've kept up that relationship with Barbara Blanco and published pieces – and we're going to be publishing pieces that grow out of Externships³ and we'd certainly be interested in continuing to do that with future Externships Conferences.

We also formed that kind of relationship with UCLA Law School and its Lake Arrowhead Conference, which is the UCLA IALS Conference. And we've now published I think three sets of conference papers – the most recent was this past fall when we published an issue that was twice its ordinary size because we had so many papers from that conference.

OGILVY: The other thing you've done is publish a bibliography.

HERTZ: Yes, I'm sorry, right. I should have thought of that. Another thing which you are centrally involved in was the clinical bibliography. And you provided a great service to the clinical community by creating the online clinical bibliography, and then approached us about publishing a hard copy version of it, which we did a number of years ago, and then did again – I guess it was last year, right?

OGILVY: Two thousand three I think it was.

HERTZ: Oh, that's right, yes – and did a second edition of the bibliography. And I have heard nothing but praise for the bibliography, both from senior clinicians who use it as a constant resource when they're writing, and also from newer clinicians who use it to find out about sources that they should be reading in order to learn about different aspects of clinical teaching in their first year as they come to appreciate why those things are important.

OGILVY: Do you have any sense that you have more competition now for articles? That the mainstream journals are starting to take more clinical articles? Are you still the only show in town?

HERTZ: Well, Cooley now has a journal, called the *Journal of Clinical and Practical Law*, and also the *Journal of Legal Education* takes some clinical pieces, and some journals take clinical pieces. What people say to me when they submit articles – and I don't know whether this is just that they are clinical teachers and know how to make a good pitch – but they say to me that the *Clinical Law Review* is the journal where they want to publish and that they would only publish elsewhere if we reject them. Now, a large part of that has to do with the audience that we reach, and that is an important part of the story

also, and one I was hoping to get to, which is it loops CLEA back in. And what CLEA did early on was they made a subsidiary subscription to the *Clinical Law Review* part of the CLEA dues, which means that every person who pays dues and becomes a member of CLEA gets a copy of the *Clinical Law Review* mailed to them. And so because most clinicians are CLEA members means that most clinicians get a copy of the *Clinical Law Review* the two times a year we publish it. So that means we have a built-in audience and a built-in marketing device. And any clinician who knows about that – and they all know about it because they get the *Clinical Law Review* as part of their CLEA membership – knows that that’s the best way to reach their target audience, because again what we’re talking about is articles about clinical pedagogy. So articles of that sort need to reach clinical teachers. And the best way to do it is with this journal that goes to the vast majority of clinical teachers. And so I think for that reason as a practical matter it makes sense for clinical teachers to publish in the *Clinical Law Review*.

Now, we can’t publish everything we get, and so I’m glad there are other places to publish because I can then encourage people to submit their articles to those journals. There’s also the *International Journal of Clinical Law*, which tends to publish clinical pieces with an international focus.

OGILVY: Now, the AALS is still a part of this?

HERTZ: Yes.

OGILVY: And what role do they play?

HERTZ: Basically just as a sponsor organization. But that turns out to be useful and valuable, because that means at AALS functions we are an authorized body; we are listed in the program and there is a designation of the *Clinical Law Review*, like the *Journal of Legal Education*, as essentially a house organ for AALS. And so AALS doesn't play an active day-to-day role like CLEA does, but that affiliation I think is useful for the *Clinical Law Review*.

OGILVY: And I assume they don't provide any other financial resources?

HERTZ: That's right. Now, what CLEA does is CLEA gives us an annual payment that comes out of their subscription, and we have a percentage of the calculation that we worked out with them many years ago, and that helps to defray the cost of production. The rest of the costs are borne by NYU.

OGILVY: Which is probably a primary reason that you won the proposal in the first place, I would assume?

HERTZ: Yeah, right. So when we submitted our bid, part of the bid was a commitment by the school to how much it would put up in terms of paying for production, providing money for a faculty member to be part of the *Clinical Law Review*, providing money for staff – all that kind of stuff – and all that was part of the package that caused NYU to get it.

OGILVY: Right. Other than your time, what other resources does NYU have to provide for this?

HERTZ: Well, we have a staff person who is designated as being a quarter-time for the journal, and she functions as our business manager – that's Michelle Williams – and she handles a lot of technical stuff; you know, gathering all the subscriptions, dealing with the subscribers other than CLEA, putting

together the labels and all the subscription lists to give to the publisher, giving volume counts to the publisher – things like that. And then I play a big role in the production work. But now all the board members do too, but I end up playing a bigger role, because I handle stages of the process that the board members don't have to handle. And Marty Guggenheim, who is a faculty member at NYU, and was one of the founding members of the journal, is a permanent member of the Board of Editors – he handles all the financial aspects of things.

OGILVY: Just one of the things that you still do at, say, 2:00 in the morning?

HERTZ: It's spread out. I no longer spend three or four days in court, so that really frees me up. What I do now – I'm now the director of clinics at NYU, and because of the administrative responsibilities for that, and because I now teach one of our simulation courses, a 24-student seminar called Criminal Litigation, in the spring, I just can't spend that much time in court anymore, and I especially can't afford to spend most of the day waiting for cases to be called. And, unfortunately, there's no way around that. So what I've done in my clinic is I've created a hybrid model in which I work with outside lawyers from the Legal Aid Society's Juvenile Rights Division, and I pair up each of the 10 students in my clinic with one lawyer each from the Juvenile Rights Division. And the students get cases – each of the students get their cases from that lawyer. I work with the students in the out-of-court work, and I'll work with them in terms of preparing drafts of motions, preparing drafts of witness examination questions, overseeing the investigation, things like that. For all routine court appearances, the student appears in court with

their legal aid lawyer. Then when the case is called for trial, if I can be in court – in other words, if I'm not teaching another course or doing something I've got to do as director – then I will go to court. But a lot of times the court hearings are adjourned, and so I can't guarantee – if I could control when the cases are on for court, I would be in court for those times. I can't control that, so therefore what I do is the – what I've worked out with the lawyers is the lawyer is at counsel table with the student, and I come to watch as much of the trial or hearing as I can, and then give feedback to students based on what I've seen. And if I couldn't be there then I give feedback to them based on their own report to me about what happened, and also the lawyer's report about what happened. So that's been my compromise for how to juggle all these things. It's not a great compromise in my view, because I would prefer to actually be in court for all those hearings and to play a bigger role. The benefit for me is that I no longer have to be in court so much, which means I don't lose all that time, and I can schedule a lot of stuff, do a lot of things during the daytimes, and not just in the evenings. And the other thing is that it has become easier to handle a lot of things and to fit things into the day because of e-mail, as you well know. So you know in the old days it was a bother for us to have people constantly asking for meetings and to have to constantly be scheduling people for in-person meetings or for phone meetings, and it'd be common to have 40 to 50 phone calls – phone messages a day from people who wanted you to call them back that day, and then you spend a lot of time on the phone. And now most of those people e-mail and ask a question by e-mail that you can respond to in a couple of minutes by e-

mail. Now, of course it's still important to have face-to-face meetings, and there are a lot of things that can only be done in face-to-face meetings or in phone meetings; but a lot of the stuff that we used to do in person or by phone now are handled by e-mail.

OGILVY: One final question I have of you, and then if anything else pops up that you think we should talk about, please let's do. But what's in the future for you? Have you looked forward at all yet of what you'll do next?

HERTZ: I have trouble thinking about what I might be doing in the next hour, let alone in the next week, month or year. So, no, I haven't really thought much about that, except for the stuff that I know is on my plate, which is that I am now the vice chair of the Council of the ABA Section on Legal Education and Admissions to the Bar, which means that I'll be one of the prime candidates for chair, and that will be decided this coming spring at a vote. Also, I'm on this ABA Accreditation Task Force, which is looking at accreditation from, as the current chair of the section calls it, "from 40,000 feet up" – in other words, looking at how we're doing things and thinking about whether we should reinvent the wheel and do things in a completely different fashion. So that's going to be a big project. I would love to be involved in helping to implement some of the ideas coming out of the Carnegie Foundation report, and Roy Stuckey is going to be holding a conference on that next November at University of South Carolina, and was kind enough to invite me; and so I'm hoping to be involved in that enterprise. And then Roy, as you know, is about to issue his CLEA Best Practices Report, which is going to generate a lot of work and a lot of thinking about

clinical pedagogy and also traditional law school teaching methods, and I hope to be part of that.

OGILVY: Sounds like you're not slowing down any time soon.

HERTZ: I'm trying not to.

OGILVY: That's the questions that I have. Anything else?

HERTZ: I think that's it. I just want to put in one plug for the great value for what you're doing here with these videotaped interviews. I think it is wonderful that you are doing it and that you are capturing these recollections by people like Tony Amsterdam, the other pioneers of the field, before they pass on. I mean, I hope that Tony is around for a long time, but we've already lost some people like Gary Bellow, and at my school Chet Mirsky. And it is such a tragic loss. They are irreplaceable. But having them on tape and engaging in recollections about what they did and what the field was like when they started is just such an important legacy for the future, and so I think it's great that you're doing it.

OGILVY: Thank you.