

# CAN WE TALK?: IMPEDIMENTS TO INTERGENERATIONAL COMMUNICATION AND PRACTICE IN LAW SCHOOL ELDER LAW CLINICS

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*Because older and younger Americans bring vastly different life-perspectives to dialogic encounters, the current generations of older and younger Americans have difficulty discussing solutions to national problems that will affect both groups, such as health care and Social Security reform. The author, however, postulates that the two groups will be better able to communicate despite their different experiences if both groups meet in a common social milieu. Mr. Berenson suggests that because elder law clinics encounter issues similar to the national problems faced by both age groups, they are ideal arenas within which dialogic encounters can take place between older and younger Americans. Mr. Berenson concludes the article with a discussion of ethical issues that elder law clinic practitioners may face during such dialogic encounters.*

## I. Introduction

According to the popular press, America may be headed toward a full-blown generation war.<sup>1</sup> The projected conflict

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1. See, e.g., James A. Barnes, *Age-Old Strife*, 23 NAT'L J. 216 (1991); Christopher John Farley, *Taking Shots at the Baby Boomers: A New—and Young—Breed of Social Activists Issues a Call to Arms*, TIME, July 19, 1993, at 30; Lucy Howard & Ned Zeman, *Generation War*, NEWSWEEK, Feb. 10, 1992, at 8; Paul Magnusson, *Young*

focuses on issues such as the federal budget deficit and major federal programs including Medicare and Social Security, which are often portrayed as being excessively beneficent to senior citizens while being excessively burdensome to younger Americans.<sup>2</sup> Though this account may overstate the problem, a broad national dialogue concerning the content and scope of programs involving intergenerational transfers of wealth is both necessary and likely to occur in the near future. The outcome of any such dialogue will have a direct impact on current senior citizens and younger Americans. However, these two groups are poorly situated to discuss the important issues at stake in such a debate.

The ability of individuals to communicate with and to understand one another is largely determined by the social environment in which they are situated and by the collection of life experiences that each brings to dialogic encounters.<sup>3</sup> In the case of senior citizens and younger Americans, these factors are likely to be so different that genuine communication across generational lines becomes extremely difficult. However, dialogic encounters can moderate those differences in ways that will make future communications across generational lines more successful. Unfortunately, there are few opportunities for dialogic encounters between older and younger Americans in contemporary society.

This article examines law school elder law clinics as small-scale, but promising, sites for dialogic encounters between older and younger Americans. The result of such communication is certainly consistent with the broad educational goals of law school clinics. However, the standard conception of attorney-client relationships used in most law school clinics does not encourage, and may even be actively hostile to, the kind of dialogue that is necessary to intergenerational learning. One purpose of this article, therefore, is to sketch an outline of a more dialogic alternative to this standard conception. In addition to providing this intergenerational learning, such an alternative must deliver high-quality legal services and be consistent with existing ethical requirements for lawyers. This article's effort to de-

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*America's Rallying Cry: "Dis the Deficit,"* BUS. WK., Aug. 9, 1993, at 37; *Seniors, Boomers and Youth: Will It Be War?*, 25 NAT'L J. 803 (1993).

2. See Barnes, *supra* note 1; Farley, *supra* note 1; Howard & Zeman, *supra* note 1; Magnusson, *supra* note 1; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

3. See, e.g., Steven M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679 [hereinafter Feldman, *Republican Revival*].

velop such an alternative is achieved largely through the use of a hypothetical case involving the common elder law issue of counseling a client on advance health-care directives.

## II. The Coming Generation War?

To a follower of the mass circulation press in America in the mid-1990s, an all-out generation war seemed to loom on the horizon.<sup>4</sup> A number of advocacy groups, purportedly representing the interests of "Generation X," began advancing the claim that American social policy unduly favors the interests of older persons at the expense of younger generations.<sup>5</sup> Such groups featured provocative names such as "Lead . . . or Leave"<sup>6</sup> (Lead or Leave) and "Third Millennium,"<sup>7</sup> and cultivated images and tactics that were much more confrontational than conversational. For example, in the words of Jon Cowen, one of Lead or Leave's young and charismatic leaders who was fond of referring to the federal budget deficit as "my generation's Vietnam," "[w]e have to ask ourselves how [the elderly] can in good conscience sell out their children and their grandchildren's future."<sup>8</sup>

At around the same time as this activity among younger Americans, the chief advocacy group in support of the interests of older Americans, the American Association of Retired Persons (AARP), found itself under attack in Washington.<sup>9</sup> Congress held hearings addressing the question of whether the organization should lose its tax-exempt status.<sup>10</sup> The Republican Party's "Contract with America"—the plan on which the party based its recapture of a majority in the House of Representatives in 1994—contained planks calling for reforms to programs that primarily benefitted, and were extremely pop-

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4. See Barnes, *supra* note 1; Farley, *supra* note 1; Howard & Zeman, *supra* note 1; Magnusson, *supra* note 1; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

5. See Farley, *supra* note 1; Magnusson, *supra* note 1; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

6. See *Seniors, Boomers and Youth: Will It Be War?*, *supra* note 1. Lead or Leave derived its name from a pledge it asked Congresspersons to sign that promised that they would leave office if the federal budget deficit were not cut in half within four years. See also Magnusson, *supra* note 1.

7. See Farley, *supra* note 1.

8. *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1.

9. See Eric Weissenstein, *Senators, Not-for-Profits Set for Duel*, MOD. HEALTH-CARE, June 19, 1995, at 5, 5.

10. See, e.g., Thomas McArdle, *Golden Oldies: American Association of Retired Persons' Liberalism*, NAT'L REV., Sept. 11, 1995, at 44; Thomas Rosenteil, *Buying Off the Elderly*, NEWSWEEK, Oct. 2, 1995, at 40; Weissenstein, *supra* note 9, at 5.

ular with, older Americans.<sup>11</sup> Some writers went so far as to describe the current generation of older Americans as the "self-centered set," willing to do whatever it takes to preserve the current government largesse of which they are the beneficiaries.<sup>12</sup>

Of course, notions of intergenerational division are not new to American public consciousness. In his famous inaugural address, John F. Kennedy evoked just such an image in stating "[l]et the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans."<sup>13</sup> Later in the 1960s, Yippie icon Jerry Rubin coined the unforgettable aphorism "never trust anyone over 30."<sup>14</sup> More recently, in his 1993 inaugural address, President Clinton sought to invoke imagery similar to that used by President Kennedy when, after "thank[ing] the millions of men and women whose steadfastness and sacrifice triumphed over depression, fascism and communism," he proclaimed that "[t]oday, a generation raised in the shadows of the cold war assumes new responsibilities."<sup>15</sup>

Nonetheless, the more recent expressions of intergenerational conflict seem to differ from those just mentioned, and not only in terms of the harshness of their rhetoric. Whereas the earlier expressions of intergenerational conflict have their roots in broad conceptions of generational attitudes, experiences, and orientations, the roots of the more recent expressions of conflict are in the more mundane world of debits and credits concerning federal budgetary figures.<sup>16</sup> When organizations such as Lead or Leave and Third Millennium first achieved prominence during the first years of the 1990s,<sup>17</sup> the annual

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11. See CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 3-7, 115-23 (Ed Gillespie & Bob Schellhas eds., 1994).

12. See Barnes, *supra* note 1.

13. Theodore Otto Windt, Jr., *President John F. Kennedy's Inaugural Address, 1961*, in THE INAUGURAL ADDRESSES OF TWENTIETH CENTURY PRESIDENTS 181, 186 (Halford Ryan ed., 1993).

14. See generally Michael Tobin, *Yippie to Yuppie*, *INDUSTRY Wk.*, June 5, 1995, at 11.

15. Halford Ryan, *President Bill Clinton's Inaugural Address, 1993*, in THE INAUGURAL ADDRESSES OF TWENTIETH CENTURY PRESIDENTS, *supra* note 13, at 299, 304.

16. See Russ Wiles, *Boomers, Generation X'ers May Fight over Benefit Scraps*, *ARIZ. REPUBLIC*, Feb. 4, 1995, at E1.

17. These organizations did not appear on the scene without precedent. In the mid-1980s, Paul Hewitt, an aide to former Minnesota Senator David Durenberger, founded the organization Americans for Generational Equity (AGE), which, prior to its demise in 1990, advanced themes similar to those advanced by Lead or Leave and Third Millennium. See Heather R. McLeod, *The Sale of a Genera-*

federal budget deficit swelled to nearly 300 billion dollars,<sup>18</sup> and the public debt of the U.S. Treasury exceeded four trillion dollars.<sup>19</sup> Interest payments on this debt amounted to more than fourteen percent of the 1993 federal budget.<sup>20</sup> At the time of this writing, the public debt stands at nearly five and one-half trillion dollars.<sup>21</sup> Given recent reductions in the rate of growth in spending for numerous other federal programs, the percentage of the federal budget devoted to debt service will likely increase at an even greater rate.<sup>22</sup> Many young persons view this debt, and the mandatory payments that are likely to be necessary to finance it into the distant future, as a legacy left to them by prior generations.<sup>23</sup>

Medicare and Social Security, the two federal programs that are the primary source of public benefits to older Americans, are of particular concern to many younger and older Americans. These programs are huge sources of public expenditures.<sup>24</sup> The cost of the Medicare program in 1991 was 102 billion dollars,<sup>25</sup> and benefits paid pursuant

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tion, AM. PROSPECT, Spring 1995, at 93. In 1992, former Senators Paul Tsongas and Warren Rudman, and former U.S. Commerce Secretary and Wall Street financier Peter Peterson formed the Concord Coalition, which shares many of the above-named organizations' budgetary priorities, if not their rhetoric of intergenerational conflict. Interestingly, Lead or Leave, AGE, and the Concord Coalition have all relied heavily on Peterson's financial support. See *id.*; *Seniors, Boomers, and Youth: Will It Be War?*, *supra* note 1. Those organizations and Peterson also have both financial and programmatic links to former presidential candidate Ross Perot and his Reform Party. See McLeod, *supra*. Indeed, former Colorado Governor Richard Lamm, who ran against Perot for the Reform Party's presidential nomination in 1996, is a former chairman of AGE. See Barnes, *supra* note 1, at 216.

18. The federal budget deficit reached \$290,403 billion in 1992. See *Receipts/Outlays/Deficit History* (visited Aug. 17, 1998) <<http://ibert.org/deficit.html>> (listing annual federal budget surpluses and deficits according to annual presidential budget submissions).

19. The U.S. Treasury reported the public debt to be \$4,064,620,655,521.66, as of September 30, 1992. See *The Public Debt to the Penny* (visited Aug. 17, 1998) <<http://www.publicdebt.treas.gov/opd/opdpenny.htm>> (the Treasury Department's daily, monthly and yearly listings of the public debt).

20. See BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., INTERIM REPORT TO THE PRESIDENT 10-11 (1994).

21. See *The Public Debt to the Penny* (visited Aug. 17, 1998) <<http://www.publicdebt.treas.gov/opd/opdpenny.htm>> (public debt as of November 25, 1997).

22. See Christopher Georges, *Budget Deficit at End of Fiscal Year Shrank to the Lowest Gap Since 1974*, WALL ST. J., Oct. 28, 1997, at A24.

23. See Magnusson, *supra* note 1.

24. See generally Mark Weinberger, *Social Security: Facing the Facts*, Soc. Sec. Privatization, SSP No. 3, Cato Institute, Apr. 10, 1996.

25. See RICHARD A. POSNER, AGING AND OLD AGE 265 n.5 (1995) (citing U.S. SENATE SPECIAL COMMITTEE ON AGING ET AL., AGING IN AMERICA: TRENDS AND PROJECTIONS 239 tbl.8.1 (1991)). If other federal programs that provide medical benefits

to the Social Security program amounted to 332 billion dollars in 1995.<sup>26</sup> In 1993, total expenditures on Medicare, Medicaid, and Social Security amounted to about eight percent of the U.S. economy as measured by the total gross domestic product (GDP).<sup>27</sup>

Moreover, there is reason to expect that these numbers will increase substantially with the coming "greying" of America. Currently, the percentage of Americans over the age of sixty-five is around thirteen percent.<sup>28</sup> However, that figure is projected to increase to approximately seventeen percent by the year 2020.<sup>29</sup> What Richard Posner describes as the "dependency ratio," that is, the proportion of those Americans of "retirement age" (sixty-five or older) to those of "working age" (twenty to sixty-four), is likely to increase dramatically as well.<sup>30</sup> Thus, while there are currently nearly five working age persons for each person over age sixty-five in America, that figure is expected to drop by the year 2030 to fewer than three working age persons for each person over age sixty-five.<sup>31</sup>

These numbers certainly seem daunting as they relate to Medicare. Older persons (those over sixty-five) already account for a disproportionately large percentage of medical expenditures in this country.<sup>32</sup> Specifically, older persons account for more than one-third of total medical expenditures despite making up less than thirteen percent of total population.<sup>33</sup> Therefore, the increase in the dependency ratio is likely to mean an increase in aggregate health care costs.<sup>34</sup> Unless the government makes changes to the program, the Medicare Public Trustees forecast that Part A of the program, which

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to the elderly (such as Medicaid) were included, this amount would increase to 126 billion dollars. *See id.*

26. *See* Richard L. Kaplan, *Top Ten Myths of Social Security*, 3 *ELDER L.J.* 191, 193 (1995) (citing George J. Church & Richard Lacayo, *Social Insecurity*, *TIME*, Mar. 20, 1995, at 24, 28).

27. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 14-15.

28. *See* POSNER, *supra* note 25, at 35 tbl.2.1.

29. *See id.*

30. *See id.* at 39. Posner properly points out that use of the dependency ratio figure is somewhat misleading, because not all persons over the age of 65 are "dependent" on "working age" persons in that older persons may not be retired or may be able to rely on accumulated savings for support. Additionally, not all persons of working age are "independent" in that many are not actually working. *See id.* at 40.

31. *See* BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 14.

32. *See* POSNER, *supra* note 25, at 36.

33. *See id.*

34. *See id.*

primarily covers inpatient hospital costs,<sup>35</sup> will be insolvent by the year 2001.<sup>36</sup> Moreover, if the extraordinary growth in health care costs that characterized the 1980s and early 1990s returns, the President's Bipartisan Commission on Entitlement and Tax Reform (the Kerrey-Danforth Commission) predicts that the percentage of GDP attributable to Medicare and Medicaid will increase nearly fourfold between 1993 and 2030 to approximately eleven percent.<sup>37</sup>

The impact of the changing dependency ratio on Social Security may be even more daunting given the implicit "intergenerational compact," which is the key to the program.<sup>38</sup> While in 1995, the Social Security program took in \$58 billion more in revenues than it paid out in benefits, current estimates are that the changing dependency ratio will cause benefit payments to exceed revenues collected by the year 2013.<sup>39</sup> Unless changes are made to the program, the Social Security "trust fund"<sup>40</sup> is expected to run out of money entirely by the year 2029.<sup>41</sup> Moreover, from the perspective of current workers, the "deal" of Social Security looks significantly less like a good one than it did from the perspective of previous generations of workers. The first generation of retirees under Social Security received a "windfall" in

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35. See LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 474 (2d ed. 1997). Medicare Part B, known as Supplemental Medical Insurance, primarily covers physician care expenses. See *id.*

36. See BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 16-17.

37. See *id.* at 14-15. The Commission's more conservative estimate, excluding the return of "extraordinary" health care cost increases, is that the percentage of GDP attributable to Medicare and Medicaid will nonetheless more than double, from 3.3% in 1993 to 7.2% in 2030. See *id.*

38. In using the term "intergenerational compact" here, I am referring particularly to Social Security's "pay-as-you-go" structure, pursuant to which contributions by current workers, in the form of payroll taxes, go to pay for benefits paid to current retirees, with the at least implicit expectation that future generations will similarly be willing to foot the bill for the current generation of workers' retirement. See generally Kaplan, *supra* note 26, at 193.

39. See BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 18-19.

40. As Richard Kaplan points out, the term "trust fund" is something of a misnomer, because there is no pool of money sitting around, in the sense of a bank account, to pay future Social Security benefits. See Kaplan, *supra* note 26, at 192-94. However, to the extent that the government has dedicated previous surpluses in the Social Security program to other governmental purposes, it is obligated to pay those funds back. See *id.* Thus, there is a sense in which past surpluses can be expected to be available to pay benefits in excess of annual receipts for some period into the future.

41. See BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 18-19.

the sense that they received benefits without having made any payments into the system.<sup>42</sup> In light of the relatively low tax burden imposed by the program,<sup>43</sup> and the unlimited duration of the benefits that the program paid in its early years, the average retirees for the next few generations still collected on average much more in Social Security benefits than they paid into the system in taxes.<sup>44</sup> However, with the changing dependency ratio, increases in the amount of Social Security taxes collected from each person,<sup>45</sup> and reductions in the amount of benefits paid, it is becoming increasingly likely that future generations may not be able to "recover" their full "investments" in the Social Security system.<sup>46</sup> While still receiving some benefit, many in future generations will not take in amounts greater than or equivalent to the full amount paid by them in taxes.<sup>47</sup> Of course, this news might not sound all that bad to the vast majority of young Americans who do not believe that Social Security will be around to pay them *any* benefits by the time they retire.<sup>48</sup> Indeed, in the *Top Ten Myths of Social Security*, Richard Kaplan points to a widely cited survey that revealed that nearly twice as many young Americans believe that UFOs exist than believe that Social Security benefits will be available to them when they retire.<sup>49</sup>

Despite the rather ominous picture painted above, the indicators of an all-out generation war seem to have died down a bit in the last couple of years. Lead or Leave closed its doors in 1995 amid accusations that it had greatly overstated its membership and degree of support.<sup>50</sup> As of the end of Fiscal Year 1997, the federal budget deficit had shrunk to a "mere" \$22.6 billion.<sup>51</sup> In his 1998 State of the Union Address, President Clinton announced projections that the federal budget will show a surplus beginning in Fiscal Year 1999.<sup>52</sup> The extraordinary inflation that characterized increases in medical costs dur-

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42. See POSNER, *supra* note 25, at 282-83.

43. See Kaplan, *supra* note 26, at 196-97.

44. See *id.* at 197.

45. See *id.* at 197-98.

46. See *id.* at 198. The reductions in benefits paid include those that will result due to the increase in retirement age.

47. See *id.*; see also POSNER, *supra* note 25, at 283.

48. See Kaplan, *supra* note 26, at 198.

49. *Id.* (citing Wiles, *supra* note 16).

50. See Martha Brant, *Gen X's Dynamic Duo Flames Out*, NEWSWEEK, May 22, 1995, at 22.

51. See Georges, *supra* note 22.

52. Transcript of the State of the Union Message from President Clinton, N.Y. TIMES, Jan. 28, 1998, at A19.



ing the 1980s and early 1990s abated significantly with the widespread implementation of managed care and other cost-cutting measures in the health care industry.<sup>53</sup> This fact should make addressing the Medicare budgetary crisis considerably more manageable.<sup>54</sup> Moreover, there is good reason to believe that the Social Security system's long-term viability could be ensured through relatively minor changes, such as a small increase in the payroll tax and a very gradual rise in the retirement age one must reach to qualify for full benefits.<sup>55</sup> Also important is President Clinton's pledge reserving 100% of any future federal budget surplus to fund Social Security until there is an assurance of the program's solvency.<sup>56</sup>

### III. Impediments to Dialogue and Understanding Between Senior Citizens and Twenty-Somethings Regarding the Nature and Scope of Future Changes to Public Programs

The continuing debates over the degree of changes necessary to ensure viability of the Medicare and Social Security systems, or whether such programs ought to be preserved at all, are fierce and are likely to continue indefinitely into the future.<sup>57</sup> The issues are sufficiently complex that a detailed analysis of the policy choices available would go beyond the scope of this article. What seems clear, nonetheless, is that the required changes will be of sufficient magnitude and consequence as to warrant a broad national debate over the form, substance, and degree of any such changes.<sup>58</sup> Although President Clinton has initiated a series of public forums to discuss possible changes to the Social Security program,<sup>59</sup> it is far from clear that these will lead to

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53. See BIPARTISAN COMM'N ON ENTITLEMENT & TAX REFORM, 105TH CONG., *supra* note 20, at 16-17.

54. See *id.*

55. See *id.* at 18. The Bipartisan Commission that was appointed to "fix" the Social Security system in 1983 found that the system would remain solvent for the next 45 years through the enactment of minor changes. See Kaplan, *supra* note 26, at 213. Of course, there are many who disagree significantly with this conclusion, and a variety of dramatic alterations to the program have been proposed. See, e.g., Weinberger, *supra* note 24.

56. See Transcript of the State of the Union Message from President Clinton, *supra* note 52.

57. See generally Barnes, *supra* note 1; Farley, *supra* note 1.

58. See generally Church & Lacayo, *supra* note 26, at 24.

59. See Richard W. Stevenson, *Clinton Opens Campaign for Quick Action on Social Security*, N.Y. TIMES, Feb. 10, 1998, at A16.

a broader national dialogue. Moreover, there is reason to believe that the two constituencies with perhaps the most at stake in such a debate—the current and near-future beneficiaries of these programs and the newly employed, Generation X workers—are ill-suited to carrying on such a broad dialogue with each other over the future of these programs.

A number of factors are likely to impede a genuine dialogue between senior citizens and twenty-somethings regarding the proper future scope of social programs affecting transfers of wealth between generations.<sup>60</sup> This article will discuss two; namely, that (1) senior citizens and younger Americans generally inhabit very different physical and social realms;<sup>61</sup> and, (2) given that the formative stages of life for senior citizens and younger Americans occur during very different time periods, fundamentally different social variables are likely to have shaped the thinking and understanding processes of the two generations with very different results.<sup>62</sup> Each of these factors is likely to have a negative impact on any efforts by older and younger Americans to communicate with and understand one another regarding major public policy issues.

To an increasingly large extent, older and younger Americans tend to inhabit separate physical and social environments.<sup>63</sup> For example, increasingly large numbers of older Americans reside in a variety of age-restricted housing communities.<sup>64</sup> Older persons do not generally spend much time in the locations where younger persons most frequently tend to congregate, such as schools and workplaces.<sup>65</sup> Also, most older and younger persons tend to spend their social and recreational time in different settings from the other.<sup>66</sup>

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60. See generally Barnes, *supra* note 1; Farley, *supra* note 1; Church & Lacayo, *supra* note 26.

61. See Magnusson, *supra* note 1.

62. See generally Wiles, *supra* note 16.

63. See generally Magnusson, *supra* note 1.

64. See generally Senior Civil Liberties Ass'n, Inc. v. Kemp, 761 F. Supp. 1528 (M.D.Fla. 1991); Metropolitan Dade County Fair Hous. & Employment Appeals Bd. v. Sunrise Village Mobile Home Park, 511 So. 2d 962 (Fla. 1987); Taxpayers Ass'n of Weymouth v. Weymouth Township, 364 A.2d 1016 (N.J. 1976); Mary Doyle, *Retirement Communities: The Nature and Enforceability of Residential Segregation by Age*, 76 MICH. L. REV. 64 (1977).

65. This has been exacerbated by the fact that the median age of retirement (i.e., exit from the workplace) has been declining for decades and is expected to reach age 62 by the year 2000. See POSNER, *supra* note 25, at 36-37 & fig.2.3.

66. See generally *id.* at 122-56 (discussing a wide variety of behavioral differences between the young and old).

The fact that older and younger persons spend so much of their time in different settings is likely to inhibit their ability to communicate with and understand each other. A person's understanding of another's communicative actions is heavily influenced by the social environment within which the receiver of the communication is situated. In the words of literary critic Stanley Fish, all hearers are members of "interpretive communities."<sup>67</sup> Such communities constitute "a form of life," which includes certain "objects, purposes, goals, procedures, values, and so on" that influence and shape the way we hear and interpret other's statements.<sup>68</sup>

A classic example from Fish comes from the title question of his essay, "Is There a Text in This Class?"<sup>69</sup> Upon hearing this question, students in the typical college classroom are likely to interpret it as an inquiry into whether there is an assigned textbook for the course.<sup>70</sup> However, students in a literary criticism course would likely view the same question as an inquiry regarding the appropriate theory of literary interpretation for the class. Each of these conflicting interpretations would be equally "correct" in the different setting within which the question was heard.<sup>71</sup> Thus, meaning depends upon the situation within which the interpreter is located.<sup>72</sup>

In other words, all understanding is contextual.<sup>73</sup> "A sentence is never apprehended independently of the context in which it is perceived, and therefore, we never know a sentence except in the stabi-

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67. See Feldman, *Republican Revival*, *supra* note 3, at 707 & n.169. The discussion throughout the remainder of this section draws on understandings developed in the fields of interpretation or hermeneutics. The two theorists primarily relied upon, Stanley Fish and Hans-Georg Gadamer, have done most of their work regarding the interpretation of literary texts and works of art respectively. See RICHARD J. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 35 (1988 ed.); Feldman, *Republican Revival*, *supra* note 3, at 705 n.161. Nonetheless, the principles articulated by these theorists can be applied to "any meaningful thing, event or action that can be understood or read as if it were text." Feldman, *Republican Revival*, *supra*, note 3, at 707 n.167. Speech and other communicative actions between members of different generations plainly qualify as such "text-analogues." *Id.*

68. Feldman, *Republican Revival*, *supra* note 3, at 707 & n.169 (quoting Stanley Fish, *Is There a Text in this Class?*, in *IS THERE A TEXT IN THIS CLASS?* 303-04 (1980) [hereinafter Fish, *Is There a Text*]).

69. Fish, *Is There a Text*, *supra* note 68.

70. See *id.* at 303-04.

71. See *id.*

72. See *id.*

73. See Feldman, *Republican Revival*, *supra* note 3, at 709.

lized form a context has conferred already.”<sup>74</sup> However, a statement’s meaning can change as the context within which it is received changes.<sup>75</sup> Thus, senior citizens and younger Americans appear to inhabit different interpretive communities given the extent to which the two groups’ social circumstances differ. The contexts in which each group will interpret communicative efforts regarding social policy issues may be so different that each will attach different meanings to similar statements, making effective communication across the generations difficult or impossible.

Not only are persons’ understandings of communicative actions shaped by their current interpretive communities, but such understandings are also shaped by the personal histories and the wealth of life experiences that each person brings to each communicative encounter.<sup>76</sup> Philosopher Hans-Georg Gadamer refers to these collective reservoirs of meaning as “traditions.”<sup>77</sup> “Our historical consciousness is always filled with a variety of voices in which the echo of the past is heard. Only in the multifariousness of such voices does it exist: this constitutes the nature of the tradition in which we want to share and have a part.”<sup>78</sup> Such traditions direct and constrain our understanding.<sup>79</sup> Thus, older and younger Americans are likely to have differing interpretations of communications across the generations to the extent the two groups have gone through different stages of their lives during different historical periods.

While this perspective seems to suggest that understanding across generational lines is extremely difficult, the good news is that, although traditions in the above-described sense are constraining, they also are enabling.<sup>80</sup> In Gadamer’s terms, from tradition, we de-

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74. *Id.* at 710 n.178 (quoting Stanley Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, in *INTERPRETIVE SOCIAL SCIENCE: A READER* 243, 256 (Paul Rabinow & William M. Sullivan eds., 1979).

75. *See id.* at 709.

76. *See id.* at 707.

77. *See id.* at 707 n.168 (quoting HANS-GEORG GADAMER, *TRUTH AND METHOD* 284 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989) [hereinafter *GADAMER, TRUTH AND METHOD*]).

78. *Id.*

79. *See id.* at 707.

80. *See id.* at 708; *see also* Stephen M. Feldman, *The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas, and Civic Republicanism*, 81 *GEO. L.J.* 2243, 2249 & n.34 (1993) [hereinafter *Feldman, Persistence of Power*].

velop certain "prejudices."<sup>81</sup> However, Gadamer does not view the term "prejudice" in its current pejorative form, meaning an unthinking bias against someone or something.<sup>82</sup> Rather, Gadamer views prejudices as those preexisting cognitive structures allowing us to experience or understand statements in the first place.<sup>83</sup> "[P]rejudices, in the literal sense of the word, constitute the initial directness of our whole ability to experience. Prejudices are biases of our openness to the world."<sup>84</sup>

Moreover, not only are such prejudices enabling in that they allow us to understand, but both prejudices and the traditions they spring from are mutable, and new experiences can alter them.<sup>85</sup> In fact, the very statements we are trying to understand alter our prejudices and traditions, reshaping them as part of the very act of interpretation itself.<sup>86</sup> Stephen Feldman describes this interpretation as a dialogue: "[I]t requires one to question the text, to probe for its meaning, to ask new questions, to listen to the answers, and to continue in this dialogical process as if in conversation."<sup>87</sup> The "fore-understandings" that one brings to the dialogic encounter as a result of one's prejudices and traditions are thus transformed by the communicative actions themselves.<sup>88</sup>

Where the "text" to be interpreted is another person, the analogy to dialogue becomes more than a metaphor. "In a dialogue, meaning and understanding arise in the give and take between the two speakers."<sup>89</sup> As Gadamer writes: "To reach understanding in a dialogue is not merely a matter of putting oneself forward and successfully as-

81. Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem*, in JOSEF BLEICHER, *CONTEMPORARY HERMENEUTICS* 128, 133 (1980).

82. See BERNSTEIN, *supra* note 67, at 127.

83. See Feldman, *Republican Revival*, *supra* note 3, at 707 n.170.

84. *Id.* at 709 n.173 (quoting GADAMER, *TRUTH AND METHOD*, *supra* note 77, at 133).

85. See *id.* at 712-13.

86. See Feldman, *Persistence of Power*, *supra* note 80, at 2249-50 & n.37.

87. Feldman, *Republican Revival*, *supra* note 3, at 711.

88. See *id.* Here, Feldman relies on Gadamer's concept of the "hermeneutic circle." In its most basic form, the concept refers to the relationship between a text and its constituent parts. A text as a whole can only be understood by understanding its separate parts. However, the meaning of the separate parts is dependent upon understandings of both the other separate parts and the text as a whole. See *id.* Expanded to dialogic encounters, Feldman describes the hermeneutic circle in terms of complex relationships between text, interpreter and tradition, in which all three must account for, but at the same time change, the others. See *id.* at 711-12.

89. Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661, 684 (1991) (quoting GADAMER, *TRUTH AND METHOD*, *supra* note 77, at 377).

serting one's own point of view, but being transformed into a communion in which we do not remain what we were."<sup>90</sup> Thus, encouraging dialogic encounters that focus on factors that keep older and younger Americans apart is one method of overcoming communication barriers regarding urgent public policy matters.

#### IV. Elder Law Clinics as a Space for Dialogic Encounters Between Young and Old

Through dialogic encounters, senior citizens and younger Americans can break down the physical separation inhibiting communication between them and begin to moderate their radically different perspectives of contemporary social problems. Unfortunately, for reasons set forth earlier, there are few settings within which such dialogic encounters can take place.<sup>91</sup> However, one promising location for such encounters is law school elder law clinics. A growing number of law schools maintain elder law clinics,<sup>92</sup> as elder law itself is a growing practice area.<sup>93</sup> Student-attorneys in such clinics work with elderly clients regarding a wide range of legal issues that affect older persons, including estate planning, health-care planning, capacity, Medicare, Medicaid, and Social Security benefits, housing, and age discrimination in employment issues.<sup>94</sup> Within the student-attorney/client relationships that develop, students and elders experience first-hand how their different perspectives on such legal problems may lead to different approaches to and desirable resolutions of the legal issues at hand.<sup>95</sup>

One particular area of practice where such differing perspectives are likely to manifest themselves in law school elder law clinics relates

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90. *Id.* at 684 (quoting GADAMER, *TRUTH AND METHOD*, *supra* note 77, at 379).

91. See *supra* notes 63-68 and accompanying text.

92. See, e.g., Suzanne J. Levitt & Rebecca J. O'Neill, *A Call For a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect and Exploitation: One Legal Clinic's Experience*, 5 *ELDER L.J.* 195 (1997); Jay Lawrence Westerbrook, *In Memoriam: Michael P. Rosenthal*, 68 *TEXAS L. REV.* i, vi (1989); Molly M. Wood, *Changing with the Times: The KU Elder Law Clinic and the Kansas Elder Law Network*, 44 *KAN. L. REV.* 707 (1996).

93. See generally Lawrence A. Frolik, *The Developing Field of Elder Law: A Historical Perspective*, 1 *ELDER L.J.* 1 (1993).

94. See *id.* at 3-4.

95. For purposes of this article, I assume most of the student-attorneys in such law school clinics are part of the twenty-something generation. In doing so, I do not mean in any way to disparage the place or work of the many older students who are valuable members of law school communities.

to advance health-care directives. Advance health-care directives are "written instructions concerning the level of medical care to be given a person in the event of his or her incapacity."<sup>96</sup> The two most common forms of such directives are "living wills" and durable powers of attorney.<sup>97</sup> A living will is a legal instrument in which an individual gives specific instructions regarding future medical treatment in the event that person becomes terminally ill or enters a "persistent vegetative state."<sup>98</sup> The living will describes the forms of treatment a person is willing or unwilling to undergo, as well as whether and under what circumstances the person desires to have life-sustaining treatments administered or withheld.<sup>99</sup> In contrast, durable powers of attorney are more general legal instruments that name a surrogate decision-maker who has authority to act in the event that the person who executed the instrument becomes incapacitated.<sup>100</sup> Although such instruments can cover a wide range of circumstances, they are often intended to cover decisions relating to the provision or withholding of certain forms of medical treatment.<sup>101</sup>

Most states now have statutes providing for living wills in certain circumstances,<sup>102</sup> and a large number of states also now have statutes that provide for durable health-care powers of attorney.<sup>103</sup> With the enactment of such statutes, counseling regarding the drafting of such instruments is likely to become a larger component of elder law practice, both in private practice and in law school clinics. Such advance health-care directives present an excellent example of a situation in which the very different life circumstances and perspectives of elderly clients and young student-attorneys are likely to cause the two groups to have very different opinions as to the advisability of entering into and the appropriate nature and scope of such instruments.

For example, for young people, the thought of being connected to life-sustaining equipment in their old age, such as a respirator or an intravenous feeding tube, is one of the most horrifying images that

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96. WAGGONER ET AL., *supra* note 35, at 491.

97. *See id.*

98. *Id.*

99. *See id.*

100. *See id.* at 493.

101. *See id.*

102. *See id.* at 492. Statutory provisions detailing the requirements for and circumstances under which living wills will be upheld are complex and vary a great deal from state to state. A detailed discussion of the range of such provisions is beyond the scope of this article.

103. *See id.* at 493.

they can conceive.<sup>104</sup> Young people tend to state adamantly that they would not want to receive such life-sustaining treatments at the end of their lives.<sup>105</sup> Thus, it is my hypothesis that younger law students are likely to view advance health-care directives favorably and to think it nearly irrational for older persons to have any reluctance whatsoever to execute such instruments.<sup>106</sup>

In contrast, it is my belief that elderly persons are likely to be much less enthusiastic than their student-attorneys regarding the desirability of executing advance health-care directives. One of the greatest fears of older persons is that they will lose control over their lives.<sup>107</sup> Advance health-care directives, at least in varying degrees, ask persons prospectively to surrender control over future fundamental, perhaps even "life and death," decisions.<sup>108</sup> Moreover, the value of life may seem very different to a person in the last stages of life than it would to a person in life's younger stages.<sup>109</sup> Indeed, despite how difficult it is for younger persons to fathom, evidence suggests that the

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104. Of course, for many younger persons, the mere thought of themselves as older persons is extremely distressing.

105. According to the results of a Gallup Poll published in James Lindgren's article *Death by Default*, 56 LAW & CONTEMP. PROBS. 185, 233 tbl.8 (1993), 85% of persons ages 18-29 stated that they would want treatment withheld if they were on life support systems without hope of recovery.

106. Students' support for such instruments is also likely to be bolstered by the excessively "legalistic" perspective that is often taken by new law students. For example, it seems law students are much less likely than experienced attorneys to be aware of the fact that there is strong evidence that, even for the small percentage of persons who have executed advance health-care directives, such instruments are widely disregarded by medical personnel. See WAGGONER ET AL., *supra* note 35, at 492. In any event, my hypothesis regarding law student enthusiasm for advance health-care directives was supported by in-class discussions regarding the issue in a seminar on Elder Law conducted at Harvard Law School during the fall 1997 term.

107. See, e.g., Jan Ellen Rein, *Clients with Destructive and Socially Harmful Choices—What's an Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1151 (1994).

108. To the extent that advance health-care directives apply only in the event of incapacity, they may not properly be described as surrendering control, because, by definition, they will not take effect until such control has already been lost. Nonetheless, executing such instruments requires persons to acknowledge and face up to the prospect of the loss of control over oneself at a time when it is extremely difficult and unpleasant for many people to do so.

109. Richard Posner offers a telling anecdote of his mother, who, while still robust at the age of 65, upon seeing a woman in a wheelchair, whispered to Posner's wife: "If I ever become like that, shoot me." POSNER, *supra* note 25, at 87. However, two decades later, when she became "just like that," Posner's mother expressed no desire to die. See *id.* To the contrary, Posner was of the view that his mother, at that time, had quite a strong desire to live. See *id.*



elderly are in fact *happier* than younger persons.<sup>110</sup> The differing outlooks that people have towards basic issues, such as life and death at different stages of their lives, have led theorists to introduce the concept of "multiple selves."<sup>111</sup> This concept proposes that the younger and elder stages of a single person's life should be effectively treated as two different lives of two different persons.<sup>112</sup>

Senior citizens and younger student-attorneys are likely to have different conceptions regarding the advantages and disadvantages of advance health-care directives. The dialogue surrounding these instruments appears to present a great opportunity for the modification of Gadamerian prejudices and the altering of traditions that yield those prejudices. Additionally, it allows for the type of "enlarged thinking" that comes from considering other perspectives that differ radically from one's own. However, the traditional attorney-client relationships that are modeled in law school clinics do not necessarily contemplate the kind of free-flowing exchange of ideas that is necessary to allow for the kind of dialogic encounters discussed in the previous section. Thus, there may be a conflict in the law school clinic between learning to be a lawyer and learning from communication across generational lines.

## V. The Standard Conception and Dialogic Lawyering

### A. The Standard Conception

In his 1980 article, *Moral Responsibility in Professional Ethics*,<sup>113</sup> Gerald Postema coined the phrase "the standard conception."<sup>114</sup> This phrase describes the dominant view of lawyers' professional role and responsibilities created by relevant "institutional structures and public expectations, as well as the personal attitudes and self conceptions of [lawyers]."<sup>115</sup> Postema also addressed two central ideals that mark the standard conception:<sup>116</sup> partisanship and

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110. More particularly, Posner cites evidence "that the percentage of people who are 'very happy' is greater among octogenarians than among people in their thirties or forties." *Id.* at 110 & fig.5.1.

111. *See, e.g., id.* at 84-94.

112. *See id.*

113. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63 (1980).

114. *Id.* at 73.

115. *Id.*

116. The term "standard conception" has become a familiar phrase in the vernacular of discussions about lawyer professional responsibilities and appropriate

neutrality.<sup>117</sup> According to Postema, the partisanship ideal requires that “the lawyer’s sole allegiance [be] to the client.”<sup>118</sup> “[T]he lawyer is committed to the aggressive and single-minded pursuit of the client’s objectives.”<sup>119</sup> On the other hand, the neutrality ideal requires the lawyer to pursue the client’s objectives regardless of the lawyer’s opinion regarding the substance of those objectives.<sup>120</sup>

Although these two ideals are obviously interrelated, and are, in some sense, mutually reinforcing in the context of legal practice,<sup>121</sup> the latter concept is of concern here. In William Simon’s earlier critique of the standard conception,<sup>122</sup> he described the neutrality principle as prescribing “that the lawyer remain detached from his client’s ends. The lawyer is expected to represent people who seek his help regardless of his opinion . . . of their ends.”<sup>123</sup> In a quote that is often repeated in support of this ideal, Samuel Johnson once wrote, “a lawyer has no business with the justice or injustice of the cause which he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the Judge.”<sup>124</sup> Because the standard conception requires the lawyer to remain detached from the client’s ends, there is little room for dialogue between an attorney and a client regarding the substance of those ends. Under the standard conception’s neutrality tenet, it is inappropriate for an attorney to engage the client in deliberations regarding the substance of the client’s desired ends unless requested by the client.

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lawyer roles. See, e.g., DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 135 & n.1 (1995 ed.).

117. See Postema, *supra* note 113, at 73.

118. *Id.*

119. *Id.*

120. See *id.*

121. See William Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 37.

122. Simon used the phrase “ideology of advocacy” to describe the system of beliefs about lawyers’ professional role and responsibility that Postema described as the standard conception. See *id.* at 30-31.

123. *Id.* at 36. In addition to the principles of neutrality and partisanship, Simon also identifies the notions of procedural justice and professionalism as being central concepts in the ideology of advocacy. See *id.* at 38. For a further description of the neutrality principle, using the term “nonaccountability,” see Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978).

124. Postema, *supra* note 113, at 73-74 n.28 (quoting SAMUEL JOHNSON, *BOSWELL’S JOURNAL OF A TOUR TO THE HEBRIDES*, Aug. 15, 1773, at 14 (F. Pottee & C. Bennett eds., 1936)).

The ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct are the closest approximations to "official" codifications of the standard conception in that they both reflect and support the above-described neutrality ideal.<sup>125</sup> For example, according to Disciplinary Rule 7-101 of the Model Code, "[a] lawyer *shall not* . . . [f]ail to seek the lawful objectives of his client through reasonably available means."<sup>126</sup> Ethical Consideration 7-7 further provides that "the authority to make decisions [relating to the representation] is *exclusively* that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."<sup>127</sup> This provision further states that "a lawyer is not expected to give advice until asked by the client."<sup>128</sup> Similarly, Rule 1.2 of the more recent Model Rules of Professional Conduct provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation."<sup>129</sup> Moreover, the comment to Model Rule 2.1 clearly states the general rule that "a lawyer is not expected to give advice until asked by the client."<sup>130</sup>

Certainly, one of the primary objectives of clinical legal education is to help students develop a familiarity with and facility in applying professional responsibility standards of the type just discussed.<sup>131</sup> Another objective is to help students understand the broader conception of the professional role and responsibilities of an attorney that is part of the standard conception.<sup>132</sup> Thus, the standard conception's neutrality tenet will likely influence practice in law school clinics. This statement should not be read as a failure to acknowledge the substantial number of clinical law teachers who struggle mightily to get their students to adopt a critical stance toward the

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125. MODEL RULES OF PROFESSIONAL RESPONSIBILITY (1997); MODEL RULES OF PROFESSIONAL CONDUCT (1997).

126. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1997) (emphasis added).

127. *Id.* at EC 7-7 (emphasis added).

128. *Id.*

129. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1997).

130. *Id.* at cmt.5.

131. See generally ASSOCIATION OF AMERICAN LAW SCHOOLS AND AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUC. (1980) [hereinafter GUIDELINES FOR CLINICAL LEGAL EDUC.]; Kate E. Bloch, *Subjunctive Lawyering and Other Clinical Paradigms*, 3 CLINICAL L. REV. 259 (1997); Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 219 (1989); Stephen Wizner & Dennis Curtis, "Here's What We Do:" *Some Notes About Clinical Legal Education*, 29 CLEV. ST. L. REV. 673, 678 (1980).

132. See generally GUIDELINES FOR CLINICAL LEGAL EDUC., *supra* note 131; Bloch, *supra* note 131; Motley, *supra* note 131; Wizner & Curtis, *supra* note 131.

standard conception. Nonetheless, it is my belief that student practice in most law school elder law clinics reflects the standard conception's neutrality tenet to a large degree.

### B. A Hypothetical Case

For the reasons discussed above, the standard conception's neutrality principle weighs heavily against the prospect of genuine dialogue between elderly clients and their student-attorneys in elder law clinics regarding the substantive issues related to advance health-care directives. A hypothetical case will help illustrate what is likely to occur when dialogue aligned with the standard conception is used in the law school clinic setting. Assume Ms. Walker, an elderly widow, desires a law school clinic's assistance in drawing up a simple will.<sup>133</sup> Ms. Walker divulged to her student-attorney that the reason why she wants to write a will now is that she was recently diagnosed by her doctor as suffering from the beginning stages of Alzheimer's Disease.<sup>134</sup> However, the student-attorney has no reason to believe that Ms. Walker presently lacks testamentary capacity.<sup>135</sup> During the course of her discussions with her student-attorney, Ms. Walker mentioned that she was not terribly disturbed by her recent diagnosis of Alzheimer's, because, having suffered from a couple of forms of cancer previously, she did not think she had very much longer to live anyway.

To our thoughtful student-attorney, Ms. Walker represents the perfect case for execution of an advance health-care directive. Her diagnosis of Alzheimer's disease makes it likely that she will lose the capacity to make decisions concerning her health-care treatment sometime in the not-too-distant future. Yet, the fact that she has suffered previously from cancer makes it all the more likely that difficult treatment decisions will need to be addressed. However, given that Ms. Walker's purpose in seeking legal representation was the drafting

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133. Ms. Walker expects to have some assets to distribute upon her death, but does not have so many as to disqualify her from receipt of the clinic's services.

134. For a brief discussion of Alzheimer's Disease, see POSNER, *supra* note 25, at 21-22.

135. For a thoughtful discussion of issues raised by the client of questionable capacity, see Rein, *supra* note 107. See also Peter Margulies, *Access, Connection and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Competence*, 62 FORDHAM L. REV. 1073 (1994); Paul R. Tremblay, *Impromptu Lawyering and De Facto Guardians*, 62 FORDHAM L. REV. 1429 (1994); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515.

of a testamentary will, the standard conception seems to discourage our student-attorney from even raising the question of advance health-care directives with Ms. Walker.<sup>136</sup> Nevertheless, the standard conception probably does not absolutely prohibit a student-attorney from raising the issue of advance health-care directives, either. Indeed, Comment Five to Model Rule 2.1 states that while “[a] lawyer ordinarily has no duty to initiate investigation of a client’s affairs or to give advice that the client has indicated is unwanted . . . a lawyer may initiate advice to a client when doing so appears to be in the client’s interest.”<sup>137</sup> Because our student-attorney genuinely believes that an advance health-care directive would be in Ms. Walker’s best interest, the student would seem to fall within the contemplation of the above-quoted provision in offering such advice.

Let us further assume, however, that our student-attorney’s initial inquiry as to whether Ms. Walker has given any consideration to an advance health-care directive was rejected by Ms. Walker out of hand and without explanation. According to the standard conception, it appears that our student-attorney should go no further.<sup>138</sup> Recall Comment Five to Model Rule 2.1 and Ethical Consideration 7-7’s warning against attorneys giving unwanted advice.<sup>139</sup> The client is the ultimate arbiter of the ends to be pursued by the representation and, in the case of our hypothetical, Ms. Walker has rightfully determined that the purpose of her representation is to draft a simple testamentary will and nothing more. Therefore, the standard conception defines our student-attorney’s role at this point as simply drafting Ms. Walker’s will as zealously,<sup>140</sup> and diligently,<sup>141</sup> as possible.

Despite becoming a more proficient drafter of wills and improving client-interviewing skills, our student-attorney has not fully exploited the educational opportunities available during the representation of Ms. Walker. Our student-attorney is likely to conclude the representation of Ms. Walker without having the student-

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136. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1997) (“a lawyer is not expected to give advice until asked by the client”); MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 cmt.5 (1997) (“a lawyer is not expected to give advice until asked by the client”).

137. MODEL RULES OF PROFESSIONAL CONDUCT 2.1 cmt.5 (1997).

138. See generally *supra* note 136 and accompanying text.

139. See *supra* notes 127-28 and 130 and accompanying text.

140. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1997) (“A lawyer should represent a client zealously within the bounds of the law.”)

141. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1997) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”)

attorney's belief in the advisability of advance health-care directives challenged or altered in any way. Indeed, the experience may affirm the student's stereotypes of older persons as stubborn, unthinking, and unwilling to change their views. On her end, Ms. Walker lost the benefit of our student-attorney's "professional expertise" regarding the advisability of advance health-care directives, as well as the youthful perspective that the student would bring to the discussion of such issues. Thus, the appropriate question is whether an alternative exists to the standard conception that would allow for a broader type of learning across the generations while providing clinical law students with appropriate instruction regarding lawyering skills and elderly clients with adequate legal services.

### C. Previous Efforts to Incorporate Dialogic Principles into Legal Practice

A few legal scholars have challenged the standard conception by attempting to introduce dialogic principles into settings related to legal practice. For example, in his article *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*,<sup>142</sup> Joel Handler addresses the issue of incorporating dialogic principles into interactions between dependent people and representatives of the modern social welfare state.<sup>143</sup> Although Handler does not focus directly on legal practice or attorney-client relationships, it is possible to analogize the relationship between dependent persons and government bureaucrats engaged in the delivery of social services to the attorney-client relationship in the legal services setting generally,<sup>144</sup> and in law school clinics in particular.<sup>145</sup>

Handler believes that introducing the theory of dialogism into citizen/state interactions regarding the delivery of social services would serve the values of autonomy, participation, and community.<sup>146</sup> However, Handler also believes that before the introduction of dialogic principles into such interactions can occur, the power imbalance

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142. Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999 (1988).

143. See *id.* at 1001.

144. See Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Services Practice*, 37 UCLA L. REV. 1101, 1104-09 (1990) [hereinafter Tremblay, *Toward a Community*].

145. See Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 721 (1994).

146. See Handler, *supra* note 142, at 1001.

between dependent persons and the social services bureaucrats that they deal with must be redressed.<sup>147</sup> Handler does not think that genuine dialogue can take place where there is a great imbalance of power between the would-be dialogic partners.<sup>148</sup>

I agree with Handler that power imbalances between participants inhibit dialogue, and I also agree with those who have highlighted the particular disparities in power between lawyers and clients in the legal services setting.<sup>149</sup> Such disparities, I believe, are somewhat lessened in the law school clinic setting due to the relative youth and lack of experience of student-attorneys. More importantly, the Gadamerian perspective outlined earlier suggests that dialogue itself is inherently equalizing. It forces one to recast prejudices, traditions, and ideologies that create unequal power in the first place.<sup>150</sup> Therefore, I offer the dialogic approach as a means towards equalizing power. Interestingly, Handler offers professional norms as one means to incorporate the dialogic perspective in the delivery of social services setting.<sup>151</sup> Earlier, I argued that dialogism in legal practice is inhibited by the standard conception's affect on professional norms. In the next section, I will attempt to describe a set of professional norms that will encourage attorney-client dialogue in the legal practice setting.

Anthony Alfieri's *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment* is another example of an effort to apply dialogic principles to a legal practice setting.<sup>152</sup> This work represents Alfieri's conception of a poverty law practice that focuses on awakening the poor's critical consciousness so that they view themselves as a historical class capable of effecting its own social, economic, and political transformation.<sup>153</sup> Alfieri sees dialogue as a necessary element in achieving empowerment among the poor.<sup>154</sup> He bases his conception of dialogic legal practice on the writings of theologian Martin

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147. See *id.* at 1078.

148. See *id.* at 1101.

149. See, e.g., Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 691-92 (1987-88) [hereinafter Alfieri, *The Antinomies*].

150. See *supra* notes 77-90 and accompanying text.

151. See Handler, *supra* note 142, at 1094.

152. Alfieri, *The Antinomies*, *supra* note 149.

153. See *id.*

154. See *id.* at 695-96. In addition to focusing on lawyer/client dialogue, Alfieri also views client/client and client/community dialogue as being central components of his theory. See *id.* at 701, 704. However, the latter two concepts go beyond the scope of this article.

Buber.<sup>155</sup> According to Alfieri, Buber offers a “relational theory of dialogue” in which dialogic partners “destroy the ‘barrier of separation’” between them and enter into a “real relation” in which each person gives everything and “may withhold nothing of himself.”<sup>156</sup> Alfieri criticizes poverty lawyers for failing to enter into such real relations with their clients.<sup>157</sup>

I am skeptical of Alfieri’s theory of dialogue in that it requires lawyers and clients to step outside of themselves in a way that may not be possible. Gadamer persuasively argues that no one can step outside of their traditions entirely.<sup>158</sup> According to Gadamer, we all enter into dialogue from the vantage point of our “horizon” and cannot avoid viewing another from it.<sup>159</sup> Thus, there is no such thing as a “view from nowhere.”<sup>160</sup> Gadamer also believes that our dialogic interactions constantly change our traditions and horizons.<sup>161</sup> Therefore, while Gadamer’s interpretive theory may not provide for the kind of immediate radical transformation that Alfieri would like to see, it does provide a vision of dialogue that is both transforming and empowering.<sup>162</sup>

Both Handler and Alfieri identify basic conditions that must be present in order for dialogic approaches to be successful. For Handler, those factors are trust,<sup>163</sup> equality of power, and participation.<sup>164</sup> For Alfieri, those factors are faith, practical wisdom, respect, and sympathy.<sup>165</sup> Developing an entire model for a dialogic approach to practice in an elder law clinic based on these factors would go beyond the scope of this article; however, our earlier hypothetical case may serve as a context for a tentative sketch of a more dialogic approach.

#### D. Dialogic Lawyering and Our Hypothetical Case

It seems that, at a minimum, a dialogic approach to legal practice would require our student-attorney to inquire into the reasons for Ms.

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155. *See id.* at 696.

156. *Id.* (quoting MARTIN BUBER, *I AND THOU* 77, 99-100, 110-11 (1937)).

157. *See id.*

158. *See* GADAMER, *TRUTH AND METHOD*, *supra* note 77, at 302, 306-07.

159. *See id.*

160. *See* Feldman, *Persistence of Power*, *supra* note 80, at 2251 n.45 (quoting Linda J. Nicholson, *Introduction to FEMINISM/POSTMODERNISM* 1, 9 (Linda J. Nicholson ed., 1990)).

161. *See* GADAMER, *TRUTH AND METHOD*, *supra* note 77, at 306-07.

162. *See id.*; Alfieri, *The Antinomies*, *supra* note 149, at 696.

163. *See* Handler, *supra* note 142, at 1076.

164. *See id.* at 1080.

165. *See* Alfieri, *The Antinomies*, *supra* note 149, at 698.



Walker's opposition to an advance health-care directive. It would also require, at some point in the discussion, that our student-attorney share some of the student's knowledge and perspectives regarding advance health-care directives. Although doing so is an essential component of the conversation that is necessary to dialogic learning, the student-attorney would have to avoid imposing his views on her. The literature on lawyering is filled with justifiable criticism of lawyer domination of clients. This is particularly true where the client lacks the power, education, and/or status of the attorney, as is the case with poor and elderly clients.<sup>166</sup>

Combatting lawyer domination of poor clients is partly the intent of Alfieri's "Theory of Dialogic Empowerment."<sup>167</sup> However, in our hypothetical case, the goal of dialogic lawyering is *not* to have Ms. Walker necessarily accept our student-lawyer's view regarding the wisdom of advance health-care directives. Rather, it is that both the attorney and the client learn from and are changed by the other's perspectives. Thus, both parties reach a deeper, if not different, decision regarding whether or not to proceed with such an instrument in the particular case.

As pointed out above in part V.A, the standard conception certainly does not encourage such a dialogic approach to legal practice. However, I do not believe that the authoritative texts of the standard conception, the Model Code of Professional Responsibility and the

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166. See, e.g., Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning the Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Gerald F. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603 (1989); Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990). I think that the problem of lawyer domination is much less likely to occur in the case of law school clinics than in traditional legal services offices. See *infra* notes 176-82 and accompanying text. However, some troubling anecdotal evidence that I heard from students working in a law school clinic around the time of this writing may suggest otherwise. Those students indicated that advance health-care directive "forms" were routinely given to elderly or other terminally ill clients as part of the packet of forms they were asked to fill out as part of their representation with regard to estate planning issues. The implicit pressure on clients simply to fill out such forms without asking any questions is great, and the students spoken to suggested that they had little, if any, discussion with their clients about the advance health-care directive forms. Although the use of some such forms may be appropriate in the "triage" type of practice that may be necessary in the legal services setting, see Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123, 133 (1992), their use seems particularly troubling with regard to "life and death" matters such as advance health-care directives. Moreover, their use is at odds with the dialogic conception of lawyering being advanced here.

167. Alfieri, *The Antinomies*, *supra* note 149, at 674-75.

Model Rules of Professional Conduct, absolutely prohibit such an approach. In what Deborah Rhode and David Luban describe as a "counter-text" to the ethics codes' stance towards the standard conception,<sup>168</sup> Ethical Consideration 7-8 of the Model Code provides:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.<sup>169</sup>

This provision should not be read as an invitation to lawyer domination of clients. In fact, the provision goes on to state that "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."<sup>170</sup> Nevertheless, the above-quoted provision suggests that the student-attorney who wishes to engage the client in dialogue regarding the advantages and disadvantages of advance health-care directives is on firm ground as far as the prevailing ethics codes are concerned.<sup>171</sup>

Indeed, in what is perhaps the most lucid defense of the standard conception, Professor Steven Pepper agrees that there is a place in legal practice for "moral dialogue" between attorney and client.<sup>172</sup> Pepper's conception of moral dialogue, however, is not directly applicable to the situation presented in our hypothetical case. He presents moral dialogue as a possible solution to the problem that the combination of the attorney's "amoral" role with a legal realist view of law leaves little in the way of restraints on client conduct that may be injurious to third parties or society at large.<sup>173</sup> I have refrained from introducing such collateral effects into our hypothetical case, although it is quite clear that the end-of-life decisions addressed by advance health-

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168. See RHODE & LUBAN, *supra* note 116, at 135.

169. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1997).

170. *Id.*

171. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt.1 (1997).

172. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 4 AM. B. FOUND. RES. J. 613, 630-31 (1986).

173. See *id.*

care directives may have substantial impact on third parties. For instance, family members may bear financial and emotional costs associated with providing life-sustaining treatments to elderly patients.<sup>174</sup> Also, society as a whole may be saddled with financial costs related to life-sustaining medical treatments; not to mention the intangible costs in terms of the "value of life" that may result from widespread use of advance health-care directives.<sup>175</sup> In any event, if Pepper's conception of the attorney and client in moral dialogue is not inconsistent with ethical requirements, then the dialogic conception of legal practice advanced in this article is not inconsistent with those requirements either.

It should be pointed out that Pepper believes that the occurrence of the attorney and client engaged in moral dialogue should be the rare exception to the lawyer's traditional amoral role.<sup>176</sup> In contrast, I agree with Pepper's critics who believe that such a moral dialogue should be a more frequent and central part of the lawyer's role.<sup>177</sup> Nonetheless, Pepper points out two drawbacks to the moral dialogue approach, which are relevant to the dialogic approach advocated here.<sup>178</sup> The first is that dialogue between attorney and client is expensive, because dialogue takes time and "time is money" in legal practice.<sup>179</sup> It is a partial, but not a complete, response to suggest that this concern is much less significant in non-fee-for-service settings such as law school clinics.

Nonetheless, an entity with limited resources, such as a law school clinic, serves fewer clients when it spends more time on a particular lawyer-client relationship. Also, given the great scarcity of resources available for the provision of legal services to low-income

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174. Indeed, the impact of issues raised in an elder law practice on family members may be so significant that some writers have argued that in certain circumstances, the entire family unit should be treated as a single client for purposes of legal representation. See, e.g., Patricia M. Blatt, *The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys*, 6 GEO. J. LEGAL ETHICS 319 (1992); Steven H. Hobbs & Faye Wilson Hobbs, *The Ethical Management of Assets for Older Clients: A Context, Role, and Law Approach*, 62 FORDHAM L. REV. 1411, 1421 (1994). But see Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994) (critiquing family unit representation).

175. See generally Posner, *supra* note 25, at 240-41.

176. See Pepper, *supra* note 172, at 634-35.

177. See, e.g., David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 4 AM. B. FOUND. RES. J. 637 (1986).

178. See Pepper, *supra* note 172, at 631-32.

179. See *id.* at 631.

persons, any decision to emphasize quality of representation over its quantity is fraught with moral overtones.<sup>180</sup> However, I agree with those who advocate the rationing of legal services in order to increase the quality of poverty lawyering.<sup>181</sup> It is my view that the provision of high-caliber professional services by a lawyer and the receipt of high-quality legal services by a client outweigh competing interests to serve as many people as possible subject to some minimal standard of care. This argument is even stronger with regard to law school clinics, which are generally not considered to be the primary providers of legal services to the poor in the communities in which they are located.<sup>182</sup> On top of this, the law school clinics' additional obligation to educate their students weighs heavily in favor of the dialogic approach. Of course, this argument may not be as strong when applied to a private practice context, because there is a much weaker obligation in that setting to educate attorneys by exposing them to dialogue with persons of radically different views.

Pepper states that the second drawback of the moral dialogue approach is that some clients may be unable or unwilling to engage in moral dialogue with their lawyers.<sup>183</sup> Although this is certainly true to a limited degree, I believe that Pepper overstates the problem. It is true that some clients may lack the capacity to engage in dialogue with their attorneys, and this problem may occur more frequently in elder law clinics where the question of capacity is always lurking in the background more so than in other settings.<sup>184</sup> However, recent literature from the poverty lawyering context argues persuasively that lawyers typically underestimate their clients' capacity to contribute to the effectiveness of legal representation.<sup>185</sup> Questions about elderly clients regarding their capacity to engage in dialogue with their lawyers may result more from stereotypes regarding the capabilities of older persons than from genuine client limitations.<sup>186</sup> For example,

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180. See Gary Bellow & Jean Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Tremblay, *Toward a Community*, *supra* note 144.

181. See Bellow & Kettleson, *supra* note 180, at 354-62.

182. See Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599, 1647 n.203 (1991).

183. See Pepper, *supra* note 172, at 632.

184. See *supra* note 135 and accompanying text.

185. See *supra* note 166.

186. An interesting, but seldom asked question regarding dialogue between lawyers and clients is whether the lawyers are in fact capable of engaging their clients successfully in dialogue about issues that go beyond narrow or technical

where an elderly client's life is at issue, the client need not be conversant in the terminology of biomedical ethics in order to contribute in a meaningful way to a discussion concerning the advisability of entering into an advance health-care directive.

Of course, there are cases where the client will not engage in a dialogue with the attorney despite having the capacity to do so. In such cases, both the ethics codes,<sup>187</sup> and basic notions of dignity and autonomy suggest that the client's wishes must be respected.<sup>188</sup> Thus, in our hypothetical case, if Ms. Walker persists in her unwillingness to talk about or to consider an advance health-care directive, the student-attorney must respect her wishes. However, as stated above, I believe that Pepper overestimates the likelihood of this occurrence, at least in the elder law practice context. An elderly client might view an invitation into dialogue by a concerned student-attorney very positively, particularly because the client has reached a stage in life when the client's views are not sought very often, or where those views are marginalized by the listener, or where the opportunities for social interaction are increasingly few. Therefore, elderly clients might relish the opportunity to contribute to the mutual learning that can result from dialogic exchange, as an alternative to being a passive recipient of services from a law school clinic.

## VI. Conclusion

This article has begun an attempt to sketch out an outline of a dialogic approach to legal practice for use in law school elder law clinics. This approach provides for the kind of intergenerational dialogue necessary for successful communication across generational lines re-

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questions of law. See Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 11 (1995).

187. See *supra* note 136 and accompanying text.

188. An interesting question is whether, in the context of our law school clinic, a refusal by a prospective client to engage in dialogue with a student-attorney would be considered proper grounds to refuse acceptance of the case. It seems pretty clear that if an attorney-client relationship has been formed, withdrawal would not be permitted for this reason under existing ethics guidelines. See MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.16 (1997); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110 (1997). I tend to believe that refusal of representation to the recalcitrant prospective client in such circumstances would be unduly harsh. Moreover, it seems quite possible that a person who is initially unwilling to engage in dialogue might have a change of heart over the course of the representation if the attorney-client relationship develops on the basis of mutuality, caring, and trust. See *supra* notes 163-65 and accompanying text.

garding major issues of public policy in the future. Such a dialogic approach would not be inconsistent with either existing ethical requirements or with the provision of high-quality legal services to elderly clients. Additionally, such an approach broadens the perspectives of younger student-attorneys in that they must account for the perspectives of their older clients. The promise of the dialogic approach is that it will ensure encounters between older and younger persons, in which both are changed for the better, and are moved toward a common understanding of the appropriate ends of their collective efforts.