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Teaching from the Dirt: Best Practices and Land Use Law Pedagogy

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I. INTRODUCTION

The recent article concerning land use law pedagogy by Patricia Salkin and John Nolon, *Practically Grounded*,[1] compels three conclusions. First, the article is inspired by the authors' common love for and commitment to teaching land use law to law students, a passion that is evident in the extent of their influence. Second, the article presents a compelling case for the need to incorporate the professional competency needs of land use lawyers into legal education. As a complement to *Best Practices*,[2] *Practically Grounded* raises the expectations of students, teachers, and lawyers in what law schools ought to accomplish. Third, the article signifies that training in land use law is due a critical assessment to inventory the successes, failures, innovations, and opportunities that pervade law schools.

My focus in this discussion addresses what the authors of *Practically Grounded* have identified as a present deficiency in legal education: many, perhaps most, future land use lawyers graduate from law school without having looked at a parcel of

* Assistant Professor, Albany Law School. J.D., M.A., University of Connecticut; L.L.M., Lewis and Clark School of Law. I wish to thank Edward Sullivan, Patricia Salkin, John Nolon, Jonathan Rosenbloom, and Ashira Ostrow for insightful discussions. I also wish to thank all of the participants at the Practically Grounded conference – Michael Burger, Karl Coplan, Matthew Festa, Jill Gross, Michael Lewyn, Mary Lynch, Andrea McArdle, Dwight Merriam, Vanessa Merton, John Nolon, Jessica Owley, Jonathan Rosenbloom, Jamie Baker Roskie, and Patricia Salkin – for their illustration of such a wide variety of innovative teaching techniques and unique pedagogical opportunities in this area of law teaching.

1. Patricia E. Salkin & John R. Nolon, *Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices*, 60 J. LEGAL EDUC. 519 (2011).

2. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

real property from the perspective of a practicing attorney.[3] This essay will explore the opportunities presented by problem-based learning as applied to a course covering local environmental law.[4] Specifically, this essay offers a course model that incorporates "teaching from the dirt"[5] and discusses how such a course can help to connect the dots that lie between legal education and the practice of law.

Teaching from the dirt involves using the land as text—as a means of facilitating a student appreciation for and exploration of the facts and laws that govern land use. Requiring students to engage in this way goes beyond merely thinking like a lawyer: students in such a class are required to perform like lawyers.[6] To accomplish these goals, this course compels students to

3. It is commonly pointed out that too many law students enter the profession with a substandard grasp of legal research and writing. Fewer, but still too many, law students graduate without having met, counseled, or advocated for a client (whether real or simulated). The type of practical knowledge raised in this essay is only slightly different but perhaps more complex. We would, for example, be comfortable in demanding that students of contract law learn contract principles and then read and draft contract provisions as a component of the learning process. On the other hand, not all objects of regulation can be experienced during legal training: it might be impractical (and improvident) to ask students to learn products liability by committing to a particular medical treatment or trying out a lawn mower, just to see if the product performs as expected. Students of "land law" (including, but not limited to, land use control, environmental law, natural resources law, and related areas) seem to fit into both categories: land is tangible and touchable, but the practical dilemmas of using land (including cost and access) suggest that teaching a landed course may be too difficult. The approach in this essay was entirely made possible by the willingness of a neighborly and visionary developer who valued the practical lessons that this course could offer future lawyers.

4. In a previous article, I explored the foundations and methods of problem-based learning and considered the application of this approach in a land use law course. *See* Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 DREXEL L. REV. 1 (2009). This essay expands upon the principles of problem-based learning and offers insights gained from experimenting in a course taught without a textbook.

5. The phrase "touch the dirt" is borrowed from Chad Emerson at Faulkner University's Jones School of Law and his lecture delivered at SEALS in 2009. *See* Salkin & Nolon, *supra* note 1, at 546.

6. *See generally* Cynthia G. Hawkins-León, *The Socratic Method - Problem Method Dichotomy: The Debate Over Teaching Method Continues*, 1998 BYU EDUC. & L.J. 1, 2 ("Gone are the times when it was sufficient to merely think like a lawyer – law school graduates need to be able to perform like lawyers.").

participate in a simulated regulatory process concerning the development of an actual parcel of vacant property,[7] to engage the controversy on behalf of a client, to navigate the legal process, and to envision how the law applies to the land and influences the outcome of the process. This course provides an effective context for the understanding of lawyering skills and an opportunity for students to master those skills.[8]

Section II of this essay provides a brief introduction to problem-based learning, the pedagogical approach that underlies teaching from the dirt. Section III discusses the goals and structure of a course in which a sustained problem-solving exercise may benefit students learning local environmental law. Section IV offers the specific circumstances that I introduce to students in this course and that underlie the real and messy circumstances of a local environmental law controversy. Section V considers how these circumstances might be used to engage students in a legal problem-solving exercise. This essay concludes that employing problems to teach local environmental law offers a wide array of benefits, and teaching from the dirt may offer an experience that compels students to adopt the roles of lawyers.

II. PROBLEM-BASED LEARNING

Problem-solving lies at the heart of expertise: it is important by itself.[9] Problem-solving is also important as a teaching tool.[10]

7. *See generally* Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010) (exploring the professional benefits of construing representation in a client-centered approach, instead of constructing clients as cardboard figures); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990) (examining the basis and approach of client-centered counseling).

8. *See generally* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8 (2007) ("Legal education needs to be responsive to both the needs of our time and recent knowledge about how learning takes place; it needs to combine the elements of legal professionalism – conceptual knowledge, skill and moral discernment – into the capacity for judgment guided by a sense of professional responsibility. Legal education should seek to unite the two sides of legal knowledge: formal knowledge and experience of practice.").

9. *See* Stephen Nathanson, *Designing Problems to Teach Legal Problem Solving*, 34 CAL. W. L. REV. 325, 328 (1998).

The constructivist method of problem-based learning recognizes that the integration of experience into the learning process and learning expectation influences the value of each lesson learned.[11] Problem-based courses place students into the roles of attorneys, require students to engage the process of lawyering and consider the client's concerns, and facilitate student discovery both *that* the law provides tools and *how* the tools are used. The crucial insight of this method is that through the type of participation problem-solving requires, students are compelled to mature from "passive receptors" into active and engaged learners of the law.[12]

An important point to be made by problem-based learning is that (for some students or for some courses) the classroom must provide a context in which participation is expected. Of course, cold-calling on students accomplishes the goal of student participation. In contrast, however, most problem-based teachers talk about the classroom experience as something enjoyable and fun.[13] What we get from problem-based learning is that students participate in a learner-centered discovery process: they are required to answer problems typically faced in the profession and discover how to accomplish the task. A choice to engage students in problem-solving may be based on the idea that law is more enjoyable and meaningful when students are able to engage law

10. *See generally* Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654 (1984); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998); Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241 (1992).

11. *See* Melissa Manwaring et al., *Orientation and Disorientation: Two Approaches to Designing "Authentic" Negotiation Learning Activities*, 31 HAMLINE J. PUB. L. & POL'Y 483, 487 (2010) ("constructivist philosophy posits that learners actively create (and re-create) their own understandings through experiences rather than passively receiving understanding from a teacher.").

12. Morgan, *supra* note 10, at 413-14.

13. Such assessments should not mislead – problem-based learning is rigorous. *See* David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449, 455 (1943) (searching for a teaching method that will "make [the student] sweat, mentally and physically."). However, using problems to teach also allows students to *enjoy* the process of learning law, as well as the process of lawyering. Hence, one might create an embarrassing process for perfecting an appeal in a problem, or encourage creative gambling in mock negotiations, and such frolics might allow students to find a comfort level at which participation is less threatening.

as a discovery process – a process of gaining mastery through experience.

Teaching law as an exercise in problem-solving is far from revolutionary, but using problems as a primary means of leading students through the law indicates a commitment to a particular understanding of learning, of teaching, and even of the materials themselves. These three ingredients of law teaching are often indistinct. However, in teaching through problems, we rely on each of these ingredients in special ways. First, problem-based learning adopts the notion that students learn by doing, or more specifically, that students learn by engaging the professional practices that will be expected of them.[14] Second, problem-based teachers relegate themselves to the roles of facilitators of a discovery process.[15]

The third ingredient of law teaching – the materials – is important to this essay. For ambitious problem-based law teachers, the materials of a well-designed problem are not law – at least not in the way that students are often provided "law" in doctrinal case books and their statutory supplements.[16] For problem-based teachers, the text for a course contains names, places, times, phone records, deeds, police reports, pictures, recordings, or even the dirt that lies on a parcel waiting to be developed. Problem-based teachers consider the course materials functional, where function is measured by the degree to which students are compelled to confront the chaotic and messy circumstances of our clients and engage in a meaningful exercise of organizing those circumstances to provide the legal basis for the story.

Problem-based learning strives toward these goals by encouraging certain features in the learning process. Problems reflect consideration of the subject matter, including the skills needed to practice effectively in the professional area.[17] Problems

14. *See* STUCKEY ET AL., *supra* note 2, at 170 (discussing the importance of teaching law students to "perform the tasks that lawyers perform.").

15. *See* Nathanson, *supra* note 9, at 326.

16. My sense is that to say that the text for a course is not law is to say something significant. However, it is not the same as saying that the problem-based course is not about learning the law.

17. Problem-based learning may be a good method for teaching local environmental law in particular. First, it accounts for the circumstance that

establish high performance expectations for students, stimulate creativity in problem-solving, and allow students to exercise and experiment with problem-solving skills under the direction of a teacher-facilitator. Problem-based courses often integrate collaboration into the problem-solving process to reach beyond individualized understandings of the subject matter.[18] Students must be also given an opportunity for reflective presentation on their discoveries in the problem-solving process.

For purposes of this essay, the most important goal is student ownership of the problem, a goal that requires some degree of authenticity of the experience, suggesting a need for realistic and engaging problems but in recognition of the fact that "[a]uthenticity is, of course, a complex concept."[19] Authenticity in problem-solving is driven by the goals that learning activities

local environmental law is varied and jurisdiction-specific. Although there are many reported cases on the subject, variation within the jurisdiction makes a rule-based course difficult. Problems can require students to explore local land use plans, regulations, and environmental studies about particular projects. Second, local problems allow students to explore the complexity of local codes in a relatively controlled example. This may be particularly effective given the vast libraries created by each county's or municipality's code of laws and regulations and the variations that characterize them. In the meantime, teaching through problems allows us to focus on the materials as tools to solve particular, but realistic, problems. Third, using problems may offer a mechanism to make students recognize that land use disputes are closely related to local values. As Ashira Ostrow notes, "land, by its nature, is inherently local," and this course deals with the land. Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719050##. Students can follow problems in this course to the source of the problem or solution, to the Town Hall, watershed challenges, community forums, and the land itself. Ultimately, the parochial aspects of local environmental law might be made more accessible through an engaging problem-solving exercise.

18. *See* Dorothy H. Evensen, *To Group or not to Group: Students' Perceptions of Collaborative Learning Activities in Law School*, 28 S. ILL. U. L.J. 343, 419 (2004) ("[t]o move knowledge to activity requires an acknowledgement of learning as social."). For his course in Sustainability and Its Application, Jonathan Rosenbloom notes that "the collaboration was well worth it, as it fostered a creative atmosphere, helped establish strong bonds among the students, and allowed the students to share similar experiences, but in different context, highlighting the diversity of sustainability." Jonathan Rosenbloom, *Now We're Cooking! Adding Practical Application to the Recipe for Teaching Sustainability*, 2 PACE ENVTL. L. REV. ONLINE COMPANION 21, 37 (2011).

19. Manwaring, *supra* note 11, at 484.

have relevance, are complex and open to multiple possible resolutions, integrate interdisciplinary needs of the profession, and require investigation, student-led organization, and discovery.[20] As a pedagogical driver, authenticity provides a foundation for lessons that are situated (by relocating the focus from textbook to controversy), substantive (as it pertains to professional competency in this specialty area), and professional (as it pertains to lawyering skills).

III. OVERVIEW OF THE COURSE

Before introducing the dirt that is the subject of this essay, it is important to recognize how the sustained problem fits into the course curriculum. Problem-based teachers often struggle with some predictable challenges, including time management, course coverage, and the effectiveness and impact of particular problem exercises, among others. This course attempts to provide broad course coverage by providing reference materials relevant to the topic, a series of research and writing assignments, and a final project that simulates a real land use development process. The topic of each exercise is intended to correspond to material covered, with each problem raising a different issue of professional competency.

A. Coverage and (Con)Text

Although textbooks can add structure and substance to course coverage, one circumstance of this course is that the students are neither benefitted by nor burdened with a textbook. The students do not typically object to avoiding the bookstore, but more importantly, the ability to focus on something other than a textbook has proven an opportunity. Course materials have included some assigned readings to introduce the basic subject matter: important judicial opinions, law review articles, environmental impact statements (EIS), or planning documents that spark active and impassioned discussions about local environmental law. The core materials are supplemented

20. *See id.* at 490-93 (identifying relevant and important features of authentic problems).

through student research to answer questions designed to engage student discovery of sources of state and local authority, constitutional limitations, and standards of review. For each topic, the syllabus includes both grounded and more abstract questions about regulation of the particular environmental resource. Students have also been responsible for researching and finding examples of local government implementation of a given topic (e.g., wetlands ordinance, critical areas element of comprehensive plan, urban forestry plan, green building ordinance, etc.).

Given the nature of the topic, there might be no set formula for designing a curriculum for a course covering local environmental law. Nonetheless, coverage of a few traditional and innovative tools is essential for the course: zoning and planning; subdivisions and site plan review; Smart Growth and Sustainability; SEQRA/SEPA review; habitat considerations; tree protection; and storm water control, watersheds, and wetlands. Although these topics can be introduced through scientific literature, I have asked students to review reports, manuals, and regulations in which law, policy, and science collide. Moreover, as discussed below, the relevance of these topics is explored in the field, on the ground, and in the dirt.

B. Specific Research and Writing Projects:

Due to the demands of lawyers, students benefit from performing a variety of types of legal writing.[21] Accordingly, throughout the semester, students are individually responsible for completing four research and writing projects – analyzing a code enforcement action against unpermitted land use activity, analyzing an environmental assessment, drafting an ordinance, and evaluating a public hearing – that are designed to give students a taste of the variety of contexts in which land use lawyers are expected to write. The projects are coordinated with the classroom progress in the subject matter and are intended to

21. *See* Nancy Levit, *The Theory and the Practice – Reflective Writing Across the Curriculum*, 15 J. LEGAL WRITING INST. 253, 260 (2009) ("Students will learn best by writing about a subject; thus, they need to write in every one of their doctrinal classes to get the most out of them.").

allow students to more deeply explore specific issues within the context of professional expectations.[22] These projects also provide an opportunity for individual assessment in the particular assigned tasks.

1. Basic dig-without-permit scenario

In some respects, the most pervasive (procedural and substantive) lessons about the local authority to regulate land use activities are illustrated in a simple permitting exercise. In this problem, students are informed that their clients (in an identified jurisdiction) want to build a modest (approximately 20 ft. x 20 ft.) gazebo in their back yard. They tell nobody (including their attorney) and begin to dig. They are soon visited by a local code enforcement officer. Everyone agrees that there will be no significant adverse environmental impacts from the gazebo (either during construction or during use). Students are asked to prepare an objective memorandum examining their clients' regulatory exposure in this basic permitting scenario.

Although this project requires students to engage local land use restrictions, perhaps for the first time, the expectations of this problem are relatively clear and straightforward. Students are required to research a manageable range of local laws, engage in statutory construction, and present their analysis in legal memoranda. The research and analysis are accessible for second- and third-year law students.

2. Environmental Assessment

Enough states have adopted versions of NEPA (referred to as "little NEPAs"[23]) that coverage of such statutes may be essential to a course in local environmental law. These statutes typically

22. In these projects I am indebted to Patricia Salkin for sharing her insights on the types, frequency, and expectations of staggered research and writing projects.

23. *See* Philip Michael Ferester, *Revitalizing the National Environmental Policy Act: Substantive Adaptations from NEPA's Progeny*, 16 HARV. ENVTL. L. REV. 207, 209 (1992) (counting twenty-eight states with similar statutes to NEPA); Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 951 n.16 (2006) (identifying seventeen states).

require agencies to complete an environmental impact review to precede most public projects and regulatory approvals of private land use action. In this exercise, a client proposes clearing and leveling approximately 30 acres of forest in order to prepare the site for a 60-lot subdivision. An EIS prepared for this project concluded that the trees were not biologically necessary to the region's environment. Friends of the Earth have argued that an ecosystem services analysis would reveal that the existing tree stands provide quantifiable local benefits, including at least $30,000 in stormwater, shade, and soil retention services (in addition to the habitat provision). However, the EIS did not include an ecosystem services analysis.

Students are asked to prepare an objective memorandum analyzing whether the Friends' assertion justifies additional study of the project's impacts. In contrast to the permitting question, this problem compels students to explore the grey areas of state, local, and environmental law.[24]

3. Ordinance Drafting

Accordingly, following the initial exercises, which involve code and case analysis, students in this course are required to draft an ordinance for a specific, identified town. I have chosen habitat regulation as the subject matter for the ordinance both because it raises questions of the degree of expertise required to administer the science of habitat protection and because habitat protection standards found in such ordinances often straddle the line between science and parochial value.[25] The problem requires students to coordinate their proposed ordinances with the town's existing code and to address habitat functions and values.[26]

24. *See, e.g.*, Clinch Coal. v. Damon, 316 F. Supp. 2d 364 (W.D. Va. 2004) (finding that NEPA does not require any particular type of analysis, so long as the analysis is performed).

25. For more discussion on parochial influences on science in local environmental law, see Keith H. Hirokawa, *Sustaining Ecosystem Services through Local Environmental Law*, 28 PACE ENVTL. L. REV. 760 (2011).

26. One excellent resource for this exercise is the report prepared by the Environmental Law Institute (ELI) on the ecological purposes served by habitat protection. *See* ENVTL. LAW INST., CONSERVATION THRESHOLDS FOR LAND USE PLANNERS (2003).

4. Attend a Public Hearing

At some point during the semester, students are required to individually attend a local public hearing that involves some issue of environmental relevance to the state or local government. Students report on their experience in a short memorandum explaining the land use application or enforcement issue in the case, the identity of the parties, the evidence introduced (if any), and the resolution of the case (if available). In performing this exercise, students are required to articulate their understanding of the purposes of representation in the given controversy and evaluate how the attorneys performed their tasks.

C. Final Project

For the final project, students form small, collaborative law firms. Each firm is responsible for representing a client in a local environmental law controversy. The students are directed to adopt the roles of attorneys and to zealously represent their clients to the extent of their abilities. The final project for this course runs a little more than half of the semester but only demands significant class time for a few particular exercises (client interview, negotiation, and site visit).[27] On the other hand, the project is as rigorous as the students' sense of professionalism demands, especially when students take the initiative to engage the clients or other student firms by email, phone, or face-to-face meeting.

IV. OVERVIEW OF THE PROBLEM

Because this course is not supported by a textbook, use of a specific property is helpful in tying the various lessons to a common text. The property allows the class participants to consider (and debate about) the value of applying particular restrictions and how such regulations influence the parcel's development. By touching the dirt, students can see how certain

27. Adding a practicum component can be a time consuming exercise. *See* Elizabeth Fajans, *Learning from Experience: Adding a Practicum to a Doctrinal Course*, 12 J. LEGAL WRITING INST. 215, 216 (2006) (discussing use of a sustained problem and "taking a few minutes from class.").

activities trigger legal duties and observe the ways that regulatory choices make demands on the way that land is developed.

A. The Dirt

The property is a 60-acre vacant parcel, approximately half of which is comprised on a fairly level and flat pasture that has been historically used for agricultural purposes. The balance of the property is forested with a few creeks and other small and confined wet areas. Tree stands used during deer hunting season can be seen at the wooded edges of the pasture. The property is longer than it is wide, with abrupt slopes on each end.

The property is set in a New York capital region town that boasts a population of approximately 3600 residents. A few hundred yards off of Main Street is a small, 20-lot subdivision. The subdivision is typical of the area, quiet and modest. At one corner of the subdivision, a narrow gravel road leads over a creek and into the brush. The gravel road (which is a public road) cuts through a fairly dense and diverse forest. A traveler on this road will witness the scatter of deer, rabbits, groundhogs, squirrels, chipmunks, turkey, and perhaps a fox. The road provides access to only two properties, both of which are served by public utilities. One is a house set on a 2-acre parcel, and the other is the 60-acre vacant parcel.

B. The Clients

The problem comes with three potential clients: the town, the developer, and the local community group. The town has an established sense of itself as a rural community. The neighborhood group seeks to minimize changes to the site that will affect quality of life and the surrounding environment and has begun to voice opposition and experiment with legal and political tools available under the circumstances. The developer, whom I have conceived as a relatively experienced developer and builder, has proposed some specific use for the site. In the past, I have used outdoor music venues and subdivisions. For this property, I have assigned Motocross (MX) facilities, ski mountains, and wind farms. In my construction of the problem,

the developer does not want to submit to the application process. The students meet their clients early in the controversy. Student-lawyers are informed by their clients that the developer has submitted some preliminary plans and reports to the Town.

C. The Record

The administrative record gives some substance to the controversy and largely determines the range of opportunities the problem can offer: more ambitious students may follow their research into deeper and more complex regulatory arenas but only if there is a controversy to trace. There are obvious advantages (fact, law, and making demands upon "multiple lawyering intelligences,"[28] among others) of basing this problem on an actual, developable parcel of real property. Property owners may be willing to provide maps, surveys, title instruments, photographs that are useful in lawyering through the development process. Owners may be willing to provide an otherwise elusive history of the site. I have been fortunate enough to obtain all of the above and a wetland delineation report.

The administrative record can provide a wonderful opportunity to present the constructivist challenges that lawyering entails. Wetlands, habitat, and traffic studies can help to illustrate the differences and convergences in how the various players to a land use controversy perceive their roles. In addition, I have tried to make the reports and comment letters in the record contain as many relevant facts as groundless assertions and red herrings – although students benefit from considering the importance of expert testimony and documentary evidence, they must learn not to assume the truth of every assertion in the record.[29] Either way, when students report on

28. *See* Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15 (2004).

29. The specific items and challenges of the record are likely less important than that the students be able to use an administrative record. Nevertheless, in one instance, students reviewed a wetland delineation report for a property in New York. The report made reference to delineation and mitigation standards in the State of Washington rather than New York. In another, a traffic report concluded that no roadway improvements were necessary from the project, but it

finding defects in "expert" reports and realize the grasp of law required to identify the defect, the process becomes much more theirs. Finally, comment letters and reports in opposition might allege on-site and/or off-site flooding conditions, possible hydrological impacts of development, compatibility problems with the development, and the community's historical use of this site for outdoor recreation (uses that could be thought of as trespassing). Comment letters might also identify potential terrorist threats, unconfirmed species of concern sightings, or on-site areas of local historical significance.

V. USING THE PROBLEM TO MAKE ATTORNEYS OUT OF LAW STUDENTS

Once the problem is designed, the next step is to determine how students should interact with this problem to insure an effective learning exercise. The tasks assigned to students should be engaging and challenging and should illustrate the main course topics. The problem itself and the context should be realistic enough to make students feel they are acting out an authentic experience and engaging the types of problems that lawyers face so that students are compelled to take ownership of the problem-solving process.

Beyond these basic goals lay a universe of possible directions. For instance, a facilitator of this problem might ask students to engage in advocacy, or might choose to place students in the role of constructive and collaborative community-building. Student groups might work independently, in competition or collaboration, or they might be forced to exchange ideas and interact in a negotiation. Students might be assigned discrete issues or might be assigned clients in a more comprehensive exercise. Each approach supplies its own benefits.

My local environmental law class employs the "actual" problem as an exercise in comprehensive representation. I manage the problem with some flexibility over the direction of the

also disclosed that the report was prepared for an entirely different type of land use. In some instances, consultants have made conclusions that did not clearly respond to the applicable regulatory standards. Other worthwhile controversies might concern the level of experience of the consultant, the vantage point for the investigation, or time spent on the property to perform the investigation.

controversy and demands for representation with an eye on keeping the problem messy and realistic. To take advantage of our access to an actual parcel, the students have participated in (or were presented with) an initial client interview to establish representation and assess the client's case, a code enforcement order, a legislative process, three-party negotiations, a site visit, and a final presentation.

A. Meeting the client

In groups, student attorneys meet with their "clients" (developer, neighborhood group, or Town) to discuss the possibility of representation. I have played the role of client. In this capacity, I have asked students to prepare a representation and/or retainer agreement for this meeting.

In many ways, the initial client interview presents the most simple but ambitious and fruitful opportunity to engage in a constructive learning exercise. This initial encounter may provide an opportunity to explore the role of the lawyer relative to the client's perceived interests. At the initial meeting between student-attorneys and the developer, students practice interviewing skills as a lawyer as they seek to ascertain their client's needs. Students are made aware that "[w]hen clients come to lawyers for legal advice and representation, their legal issues are often entangled with values, projects, commitments, and relationships with others."[30] Nevertheless, students invariably struggle with the appropriate role of the attorney's perspective, as well as the dilemma of inadvertently influencing the stories that clients tell.[31]

Second, in this exercise the students are not provided with the applicable law – the property provides its own location and features. Moreover, the students are provided with materials that are descriptive enough to explain the project but wholly insufficient to complete a land use application. Although the developer insists the law requires no more, the students are

30. Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 132 (2010).

31. *See id*. ("In discussions with clients, lawyers inevitably emphasize and order information in ways that influence clients' choices.").

responsible for analyzing materials and regulatory requirements to determine what needs to be done to complete the application.

In like manner, representation of the neighborhood group requires students to ascertain what legal tools are available to pursue their client's goals. For instance, the neighborhood attorneys are not provided all of the application materials or relevant documents, a fact that becomes clear early in the problem. Students must research to formulate a strategy for compelling disclosure of public records (generally through some state counterpart to the Freedom of Information Act (FOIA)). More ambitious students will draft and file their requests for public records disclosure.[32]

Additionally, the initial encounter offers an opportunity to vary the students' experiences among different roles. Hence, at the initial meeting, Town attorneys in this course have met with only one member of the Town's regulatory body who, by happenstance, is a neighbor and frequent visitor to the parcel subject to the proposal. This decision maker is outwardly biased against the developer and demands that the Town attorneys advocate for denial of the project. Student-attorneys in this role have the unique opportunity to consider both the identity of the governmental client and professional and governmental ethics in the course of their representation.

B. Administrative Process and Code Enforcement — Stormwater/ Erosion Control

As a second component of this problem, the clients ask their student-attorneys to navigate the administrative process. Students are informed that the developer received a Stop Work Order alleging the removal of an identified amount of vegetation and soil. In this exercise, the developer is charged with failing to seek or secure permits, such as a Stormwater Pollution Prevention Plan (SWPPP), grading permits, or some other requirement of the Town Code, compelling students to consider

32. Obviously, a facilitator might let this particular issue run to its completion. In my course, I do ask the Town attorneys to resolve the matter, although I suggest that there may be defects in the disclosure request or that there may be some basis for denying the request.

the types of activities that might trigger such regulatory schemes. The developer is also notified of fines and an appeals procedure. In this problem, students are faced with the procedural demands of code enforcement (which, for the developers' attorneys, requires the students to confront and counsel a client who objects to the very idea of regulation) and the process for perfecting an administrative appeal.[33]

C. Legislative Process — New Habitat Ordinance

Following a string of influential state court decisions in the 1970s, many jurisdictions have recognized a distinction between the processes of legislative and quasi-judicial decision-making.[34] The difference may determine the scope of procedural protections afforded to the parties and likely does determine the character of the decision-making process. As noted above, one of the individual writing projects of the semester required students to draft a habitat protection ordinance.[35] A few weeks into the final problem, one student-drafted ordinance is chosen and distributed to the firms, attached to a letter from the Town Clerk suggesting impropriety by the Town.[36] As a substantive matter, this problem provides an opportunity to engage in code interpretation and analyze the habitat report (included in the record) against the regulatory standards. As a matter of land use process, this problem raises issues of moving goal posts and vested rights. The problem requires students to analyze the situation and counsel their clients on the local legislative process and the process of

33. My impetus for including this component of the representation problem stems from an experience in which students accepted as true the allegations in a Stop Work Order (as they might in reading an appellate decision).

34. *See, e.g.*, Fasano v. Bd. of County Comm'rs, 507 P.2d 23 (Or. 1973) (quasi-judicial decision); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (legislative).

35. In the first year that I taught this course, the Town was actually in the process of adopting a new Comprehensive Plan. That year, student attorneys were asked to counsel their clients on the benefits of participation in the legislative process. In the second year, the exercise benefitted from the prior adoption of the Comprehensive Plan.

36. In this problem, the Town has been unable to produce any evidence that the ordinance was subjected to the normal notice and hearing process, although I have withheld such information except upon a public records disclosure request.

challenging land use legislation. It presents an additional opportunity to explore a variety of regulatory tools, subject only to the creativity exhibited by students in their habitat ordinances.

D. Negotiations

In this exercise, student firms are invited to engage in three-party negotiations. The student firms arrange to meet with their clients outside of class to discuss strategies and expectations. Although students are not allowed to negotiate their way out of the adversarial component of the final project, the negotiation exercise does give them a needed opportunity to sit down with opposing counsel in a non-adversarial setting with the goal of collaborating towards a middle ground. Having the students engage in this exchange has proven an opportunity for students to hear (not from me) about alternative interpretations of the law and the circumstances. This exercise generally requires students to recognize the importance of client contact, the need to gain a deep understanding of the client's values and needs, and the possibilities of resolving disputes without a battle.

E. Touching the Dirt

A group field trip[37] to the site provides an opportunity for the students to meaningfully explore interdisciplinary and professional learning. Invitations to engineers, biologists, and planners for a site visit with students may result in insights and instruction on the subject matter, such as traffic analysis or wetland delineation methodology. The face-to-face contact with consultants offers a unique opportunity to access the perspectives, demands, and importance of other professionals in this process.

Although I do not pretend to teach ecology in this course, it is essential that environmental lawyers understand the roles that the environmental sciences play in environmental decision-making. Therefore, the site visit includes discussion of a wide variety of touchable environmental features. Students view the

37. I have not restricted the students' access to the site, a benefit that was graciously extended by the property owner.

site's topography to explore the reasons and mechanics of stormwater flow and drainage regulations. Students examine the site habitat features to consider functions and values, the character of different habitats, and different types of potential impairment. Students observe wildlife and human use of site and consider challenges to access. Students explore the neighborhood to contextualize neighborhood concerns about character and compatibilities. Students are also asked to conceptualize ways to describe the property based on natural features, such as adaptability to different land uses and value of current uses.

Although it might not be surprising, the site visit typically exposes misconceptions about land development and misunderstandings of the site characteristics. For these students, touching the dirt, walking the site and neighborhood, observing evidence of wildlife and human use, and even listening, smelling and hearing the property, forces students to recognize that lawyering occurs outside of the classroom.

F. Final Project and Presentation

For the final product of this project, students prepare their research and advocacy in a persuasive memorandum. The expectations are high. The students succeed only by demonstrating professional competence on the factual issues, law, and clients' concerns presented in the controversy. Generally, the students have prepared thorough and persuasive memoranda on behalf of their clients, often uncovering unintended legal or relevant factual issues and always extending their analysis beyond the subjects covered in the course.

Reflection on and presentation of their work product is considered an essential element in the discovery process. In prior courses, students have advocated for their clients in a simulated administrative hearing. This year, I refocused the setting and purpose of the final presentation. Instead of a presentation on the finished product, I asked students to discuss with the class the various challenges that they faced in representing their client's interests in the project. Essentially, I asked them to share their perspectives of the discovery process in order to bring to the fore the context of what the students were learning and

how the expectations of the profession did (or did not) drive their performances.

VI. CONCLUSION

Problems can allow law teachers to implement a wide range of goals and outcomes. Problem-based learning internalizes the notion that rethinking the type of participation in which we engage students can have a profound impact on the quality of their learning and understanding. Moreover, by requiring students to perform the tasks required of lawyers – through collaborative resolution of messy and realistic problems – students become more willing to participate, more engaged, and more vested in the outcomes of the learning process.

In the final analysis, teaching from the dirt takes the class outside of the textbook. Of course, teaching limitations (real or perceived) that may be attributed to the textbook may remain, yet students and teachers approach a problem-based learning process with different goals and expectations. Using "real" problems helps the students to see the need to take ownership of their roles and the connection between the tasks they are doing and the tasks that are demanded of the profession. Using "real" clients helps students to become comfortable in the messes that clients bring. Using real properties helps students to see that the relevance of statutes and cases depends on the context of the dispute and their clients' needs. And, at least by the end of this course, the students have touched dirt.