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by
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It was Justice Holmes who wrote in 1881 that the law is not simply logic, but experience.[1] The last twenty years have been marked by great tension between those legal educators who believe that coming to a comprehensive understanding of the law is best accomplished through logic and those who maintain it is better acquired through experience. This tension in legal education was manifested in the birth of the modern "clinical movement."[2] In the late 1960s law schools—primarily at the behest of students, the legal profession, and others outside of academia—

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1. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

2. Legal educators and practitioners have, in fact, never been of one mindset. Indeed, the tensions that I discuss here have existed since early days of legal education. For an excellent presentation of the development of the modern law school, and specifically a discussion of some of the sociopolitical and demographic forces, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 73-91 (1983). The clinical movement is but a modern manifestation of these tensions.

A number of "movements" have been born during the last twenty years and have had significant effects on the law. These movements, which have been pushing legal thought since the clinical movement began, share the common theme of a majoritarian critique. The critical legal studies, critical race theory, and feminist movements in their own ways attempt to peel away from the law its veneer of unbiased logic and reason. The clinical movement has operated separately from these movements for what appear to me to be obvious reasons. Notwithstanding this distance, many clinicians see themselves as having a great deal in common with these movements. As will be discussed later, clinicians heretofore have been at the margins of the academy and would doubtless further risk their delicate political position if they aligned themselves too closely with these movements. Moreover, even with their increased integration into the law school, clinicians may have more in common with those outside of the academy than with other insiders. Clinicians teach their students in the contexts of real cases with real clients. Their interactions with their students are often in the courthouse, government agency office, or interview room—settings more like those encountered by practicing lawyers and judges. While some clinicians may not engage their students through actual cases in progress, the real world provides a constant backdrop. Another reason for the distance between clinicians and these "movements" might be that clinicians are too busy "doing it to write about it."

began developing clinical programs with the objective of delivering legal representation to persons who traditionally were underrepresented.[3] While some of the clinicians who initially set up these "clinics" eventually left the law schools, others stayed and nurtured the further growth of the programs.[4] These teachers were perceived as serious educators only by their students and others outside of legal education. By other academics, they were seen as mere technicians. Clinical teachers themselves saw their objective as integrating the students' classroom experience with the "real" world.

Within the decade, those who had been brought in to teach clinics began to push for a place within the academy. As with the first stage, this second stage of the clinical movement met with much resistance from traditional classroom teachers. While not prevailing on the academy to provide them with equal status, the clinical teachers struck what might be described as a partial compromise. Clinicians sought to have the American Bar Association (ABA), which is responsible for the accreditation of law schools, implement a standard that would require law schools to provide clinicians with employment security, economic equality with traditional faculty, and a voice in faculty governance. Ultimately, however, the standard was written in aspirational rather than mandatory terms.[5]

While legal education was wrestling over what status to accord clinical education, lawyers, judges, and others who had obtained law degrees increasingly found themselves distanced from the academy. These professionals viewed legal education as preparatory for either the prac-

See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement,* 32 ARIZ. L. REV. 501, 521 n.94 (1990).

3. *See* STEVENS, *supra* note 2, at 215-16; Edgar S. Cahn & Jean C. Cahn, *Power of the People of Profession: The Public Interest in Public Interest Law,* 79 YALE L.J. 1005 (1970); *see also* WILLIAM PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS 21-31 (1980). As noted by Professor Seligman, as a result of William Pincus' efforts the Ford Foundation first issued grants to selected law schools and eventually funded the Council on Legal Education for Professional Responsibility (CLEPR) providing the impetus for the expansion of clinical offerings. JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 160-62 (1978).

4. This narrative does not fully describe the historical development of law school clinics but in broad strokes attempts to provide a context for the later discussion of clinical scholarship.

5. ABA Accreditation Standard 405(e), as enacted, provides that "[t]he law school should afford to full-time faculty whose primary responsibilities are in its professional skills program a form of security of position reasonably similar to tenure and perquisites reasonably similar to those provided other full-time faculty members." *See* Grant H. Morris & John H. Minan, *Confronting the Question of Clinical Faculty Status,* 21 SAN DIEGO L. REV. 793 (1984); *see also* Stephen F. Befort, *Musings on a Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s,* 75 MINN. L. REV. 619, 629 (1991).

tice of law or eventual entry into the judiciary. They saw legal education as becoming too theoretical, for it was during this time that law schools began to expect their faculty to be both teachers and scholars. Earlier, it had been sufficient for a law teacher to be primarily a good teacher, and only secondarily a good scholar.

During the 1970s law school enrollment grew dramatically and increasing numbers of graduates began entering the work force with some form of clinical experience. These graduates, as well as those who had been in practice longer, did not understand the unwillingness of traditional members of the academy to accept clinical training as valid education. To practitioners, clinical education did not seem at all problematic because the clinicians were, for the most part, doing what lawyers in fact ordinarily do.

As a result of growing practitioner interest in clinical education, clinicians were able to unite more forcefully with bench and bar to change legal education and strengthen the position of clinical training. Consequently a standard for accreditation of law schools was adopted by the ABA in 1984, which became known simply as "405(e)."[6] This accreditation standard called on law schools to provide law teachers in their clinical programs with a form of status substantially similar to academic tenure.

The adoption of accreditation standard 405(e) was a *quid* accompanied by an inevitable *quo*. The new standard appears to have had a significant impact on clinical programs, most notably on the types of clinical programs being offered and the scholarship of clinicians. Many schools began to reassess their need for clinical programs. While it was more common for law schools to offer in-house clinics prior to the adoption of 405(e), there has since been a shift to simulation programs.[7]

In addition, law schools began to require that their clinicians engage in scholarship as a condition to receiving the benefits of the tenure-like status required by the newly implemented standard. At the time the ABA instituted 405(e), the drafters thought that the scholarship pro-

6. *See supra* note 5.

7. Many clinicians believe that the shift to simulation programs occurred because of the cost of in-house clinics, and that the requirement of scholarship is incompatible with the time demands of close supervision. To my knowledge these are merely hypotheses as there have not been any empirical studies to substantiate such claims. *See* Don J. DeBenedictis, *Learning by Doing: The Clinical Skills Movement Comes of Age,* 76 A.B.A. J. 54, 56-57 (1990). The shift is significant because, if true, it takes clinicians away from one of the original objectives of clinical programs, of which I am an adherent. In addition, I believe that the only way the real ethical questions can be addressed is through an appreciation of what the client and lawyer experience every day.

duced by clinicians would be about clinics, clinical education, pedagogy, or lawyering. In fact, clinical scholarship has fallen into two broad categories: doctrine or jurisprudence, and the work of clinicians.[8] The scholarship is either mainstream[9] or work that more broadly comments on the legal system or legal education. It is written for a particular audience—the academic audience of tenure, namely the review committee that considers the clinician for renewal, tenure, or hire.[10] Ironically, clinical scholarship is rarely written for those actively engaged in the practice of law or those actively working on behalf of the underrepresented.

These developments in clinical education represent a significant departure from the motivating vision of the original clinicians. The clinicians of the late 1960s were engaged simultaneously in the daily representation of their clients and the education of their students. In the process they interacted with clients, students, lawyers, judges, and others involved in the legal system. These clinicians assumed that their students' education would flow automatically from this activity. In its sec-

8. It is always dangerous to make broad generalizations. I do not mean to say that all of the scholarship falls into these categories. Nonetheless, an informal survey of the scholarship leads me to conclude that most of the writing falls into these categories. My statement is not intended as a value judgement about the writing's relative merit, or lack thereof. I do not mean to argue that the more traditional scholarship is without value. I am merely pointing out what appears to be a pattern in the type of scholarship produced by clinicians.

9. I use the term "mainstream" to describe works dealing with a particular area of doctrine or jurisprudence.

10. While many potential audiences for legal scholarship may exist, it is undeniable that for the untenured faculty member, a highly likely audience will be a tenure review committee. It should also be understood that it is difficult to define "clinical scholarship." One commentator has described it as "writing that analyzes, reflects upon, and interprets legal practices as opposed to legal doctrine." Phillip C. Kissam, *The Evaluation of Legal Scholarship,* 63 WASH. L. REV. 221, 237 (1988). Professor Kissam describes the evaluation process of legal scholarship in general as being "contentious and less certain." *Id.* at 221. The problem of evaluation may be caused by a sense that even the more traditional scholarship is in a state of disarray. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship,* 86 MICH. L. REV. 1835 (1988). The problems that face clinical scholars as we navigate the course to tenure are not unique to clinicians. *See* Kathryn Abrams, *Hearing the Call of Stories,* 79 CAL. L. REV. 971 (1991) (describing the problem confronted by feminist scholars); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia,* 1990 DUKE L.J. 705; Randall L. Kennedy, *Racial Critiques of Legal Academia,* 102 HARV. L. REV. 1745 (1989) (describing the difficulties of critical race scholars). While no one seems ready to state outright that many nontraditional scholars tailor their work for purposes of securing employment security, it is the next logical step. Moreover, it seems that the clinician would be an easier target because she begins the process from what is perceived to be a "less academic" perspective. The end result is that "clinical scholarship" will be more difficult for the tenure committee to evaluate than the more "traditional scholarship."

I use the term "traditional scholarship" to describe the conventional doctrinal scholarship that has dominated legal academic literature since the end of the last century. I use the term "clinical scholarship" to describe the scholarly writing of clinicians.

ond phase the clinical movement shifted away from a daily representation focus and began to explore the learning process and use of legal problems as a vehicle for teaching about the law. The most recent stage in the development of the clinical movement appears to be a shift even farther away from the client to an increased focus on the scholarly development of theoretical models to understand the practice of law.

In the growth of this new clinical scholarship two basic problems seem immanent: communication or the comprehensibility of language, and the testing of theories. First, if we as clinicians expect to undertake the challenge of reforming both legal education and legal practice with any success, we will have to speak in language understandable to all of our constituencies.[11] Unfortunately, some of the recent clinical scholarship has been characterized by abstract language, understandable to few and relevant only to the academy.[12] Second, new theories of practice will require constant testing in the reality-laboratory of the clinic. The results of such laboratory tests must be communicated back to our constituencies and be repeatedly retested before publication. For the most part, this has not been the course of the recent clinical scholarship, which has not taken advantage of the many constituencies found within the world of law and practice.

A general survey of writing by clinicians leads me to the preliminary conclusion that much of the recent writing emulates more traditional scholarship. It would be cynical and unrealistic to argue that clinical scholarship is completely enslaved by the machinery of tenure. But one can safely assume that the tenure process does have some impact on the subject matter and approach of clinicians' scholarly work. As only a relatively short period of time has passed since law schools began to implement 405(e), however, it may be too early to assess the standard's ultimate impact. Notwithstanding these qualifications, some of the re-

11. I use the term "constituencies" as a means for describing the many persons encountered by the lawyer in the course of representing a client. The lawyer is seen as one person who works in concert with many other people on behalf of the client. In the context of the clinic, constituencies includes but is not limited to clients, lawyers, students, teachers, judges, social workers, and doctors. In the context of the practicing lawyer the persons included are too numerous to list.

12. I am not suggesting that the work is worthless, rather I am criticizing the lack of clarity in the message. Indeed, much of what has been written by clinicians has been immensely helpful in informing "traditional" scholars and other clinicians. My critique concerns the importance of informing those who have not been considered part of the academy. My critique was best stated by Steve Bingham, a legal services lawyer, at the Theoretics of Practice Conference who stated that there was a tremendous amount that could be learned from a real dialogue, but that the level of the discussion usually was so abstract it was rendered meaningless.

cent scholarship of clinicians, while representing a significant contribution to understanding the role of law and lawyers in society, is more exclusive than inclusive. This clinical scholarship has not taken advantage of the clinic's great strengths. It does not speak in the language of clients, lawyers, or even judges. In short, it does not serve as a bridge between these important participants in our sociolegal system. Whereas traditional doctrinal scholarship was more accessible to lawyers and judges, much of the new clinical scholarship is becoming less accessible to all groups, with the exception, perhaps, of some segments of the academy.

The question that we should be asking is whether we are going to be a bridge between the academy and the larger world of lawyers and clients, or whether we will merely inform others in the academy of our own perspectives on law. The roles are quite different. In the former we are communicating amongst all of the groups that shape the law; in the latter we communicate only within the academy. While this need not be an either/or proposition, I believe the choice must include providing a bridge between the academy and the larger world. This is the proper choice because we stand in two positions: within the academy, and in the midst of the larger world of the law in practice.[13] As active practitioners within the academy, we are uniquely able to contribute to legal education's understanding of the outside world.[14] Each of our constituencies has an important contribution to offer the academy, and we are in an excellent position to talk with and among those constituencies.

Much has been written about the gap between that which we teach in law school and that which actually goes on in the practice of law.[15] The extent of the division between the theorists and the practitioners does not appear to be narrowing. I believe that bridging this widening gap will become even more difficult. There are three major obstacles to a genuinely informative scholarship about practice; all of them are structural. First, law schools are hard pressed to evaluate writing that is unconventional. Second, clinics, for what have been described as fiscal

13. This "larger world" can be quite expansive because of the complexity of the law and the client's legal problems. In a client-centered practice the client's needs go beyond the legal problem, and by necessity must cross into the social sciences and medicine.

14. A less appealing alternative would be the clinician who, as a member of the academy, attempts to contribute to the academy's understanding of the outside world without maintaining external ties.

15. *See, e.g.*, E. Gordon Gee & Donald W. Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695; Stephanie B. Goldberg, *Bridging the Gap: Can Educators and Practitioners Agree on the Role of Law Schools in Shaping Professionals?*, 76 A.B.A. J. 44 (1990); Alex M. Johnson, *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991).

reasons, increasingly are moving away from client representation and in the direction of simulation and externship supervision, making it more difficult for us to observe and comment on the profession.[16] Third, and perhaps related to the second obstacle, as we drift further away from others in practice we become more like others in the academy.[17]

The counter arguments to the obstacles I have outlined are conveniently laid out in three points. First, while it is true that we may find it difficult to have our "nontraditional" writing reviewed by our institutions, we must find more creative ways of educating our nonclinical colleagues, since we are the only ones within the academy situated at the gap.[18] Second, even if clinics move toward simulations and externships, we need not become totally isolated from the profession.[19] Third, while it seems true that we are drifting further away from practice, we need not fall totally into the nonclinical realm.

The modern clinical movement presently stands at a crossroad. The path it takes will either marginalize its capacity to contribute meaningfully to social justice and legal education or make it the catalyst of a morally revitalized practice. This brings to mind Professor Gary Palm, of the University of Chicago's Mandel Legal Aid Clinic, who called on us

16. It is often asserted that client representation, or "live-client" clinics, are more expensive to operate. This is so because the student-to-faculty ratios are smaller than in simulation courses, and students working on real cases require more careful supervision. While I do not intend to explore the pros and cons of this proposition, it should be noted that these issues are being explored by a committee of the Clinical Section of the Association of American Law Schools. Assuming that this proposition is true, this shift will take the clinicians even further away from our direct interaction with clients, lawyers, judges, and others.

My conclusion at first glance appears to be at odds with a report that concluded that "live-client, in-house clinics [are] more robust now than at any time since the inception of these programs." Marjorie A. McDiarmid, *What's Going on Down There in the Basement: In-House Clinics Expand Their Beachhead,* 35 N.Y.L. SCH. L. REV. 239, 241 (1990) (footnotes omitted). While Professor McDiarmid noted that there were many in-house clinics, she also noted that faculty status problems persist and that, where clinicians are fully tenured faculty members, we spend significantly less time in the clinics. *Id.* at 273. One specific item that was not addressed in the article was the extent to which clinicians are teaching more courses outside of the in-house clinic than we were prior to the adoption of 405(e).

17. Clinicians have often been criticized by nonclinicians as separate and apart. At the same time, clinicians often describe nonclinicians as not regarding our work with the same degree of respect as that of other "colleagues." The clinicians' fear is that, as we become more a part of the academy, we will be transformed, thereby becoming less able to communicate with our colleagues outside the academy.

18. Presumably, clinicians' unique position enables us to talk about the academy and the profession in a way that enriches the discussion. Therefore, it is incumbent on us to engage in the kind of scholarship that explores every facet of practice.

19. Indeed, one presumes that the clinician has a genuine interest in the profession, and that she has chosen this area of teaching because of a conviction that experiential learning has intrinsic value.

to return to our roots.[20] He warned of the demise of in-house clinical programs, and he called on clinicians not to forsake the origins of the clinical movement. Professor Palm was referring to the modern clinical movement's roots in direct client representation during the late 1960s.

If we delve into the original *raison d'être* of the clinical movement, we see that it sought to fill a moral vacuum plaguing legal practice and education. This moral vacuum, which was "discovered" during the Vietnam War era, still exists and needs to be filled. Moral questions and hard choices are the heart of the law school clinic and the work of clinicians. Therefore, we must not be afraid to raise such questions in our scholarship, for the failure to raise these questions itself represents an implicit moral choice.

A more morally emphatic, living scholarship is needed to fill the gap between theory and practice. The legal theoretical movements of the last twenty years have provided excellent critiques of the dominant legal order. At their core, these movements cry out for a greater sensitivity to justice. But justice is a hollow word unless it has moral content and appeal. New clinical scholarship need not supplant the critical theories of the past two decades, but could inform each constituency about the other: scholarship that focuses on what clinicians talk about and experience on a daily basis in our interactions with clients, students, lawyers, judges, social workers, legislators, and countless others; scholarship that willingly addresses and grapples with moral and ethical questions. This kind of scholarship might help to draw links between each of these important constituencies of our work. Indeed, it might well lead us to a deeper mutual understanding.

20. Gary Palm, Remarks at the Association of American Law Schools Annual Conference (Jan. 1989).