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## Clinical Scholarship and the Justice Mission

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# CLINICAL SCHOLARSHIP AND THE JUSTICE MISSION

ROBERT D. DINERSTEIN<sup>1</sup>

To many people, the relationship between clinical programs and the justice mission of American law schools is so clear as to be self-evident. Many live-client clinical programs represent indigent persons in criminal cases or in numerous kinds of civil cases, such as domestic violence, landlord/tenant, public benefits, and social security disability matters, where (in) justice themes predominate. These programs may pursue justice on behalf of individual clients or for groups of clients through class-action or other impact litigation. Moreover, clinical teachers frequently discuss with their students the need for the latter to serve justice in their legal careers, whether as the principal focus of their legal work or through pro bono publico activities. Indeed, for many law students, the law clinic may be the *only* place in which concerns about justice are discussed and, at least sometimes, acted upon. Clinical teachers themselves are likely to be active in their own professional activities that contribute to achieving justice in local and national communities.

But what is far less clear is that there is—or can be—a positive relationship between clinical *scholarship* and the justice mission. In the scholarly domain, critics and friends of the clinical movement alike are apt to see other intellectual movements within the academy—feminist jurisprudence, critical race theory, critical theory, law and literature—as much more closely connected to the examination and pursuit of justice. Because scholarship remains the primary coin of the realm for success and influence within academia, the derogation of clinical scholarship contributes not only to the continued marginality of clinicians but also to the under-recognition of the considerable contribution that clinical scholarship can make to the justice mission.

The perceived unimportance of clinical scholarship has many causes. The paucity, until relatively recently, of a significant body of clinical literature that goes beyond program description or "mere" discussion of pedagogy has given credence to the criticism that clinical scholarship is deficient. The diminished academic status of many clinical teachers has made their pursuit of scholarship much more problematic than it is for other academics. The ambivalence that many clinical teachers have felt towards the desirability of even attempting clinical scholarship—whether such scholarship was worth doing and, if so, whether it was possible given the institutional constraints on the work lives of many clinical teachers—also has led to the devaluation of clinical scholarship as a force for positive social change. Furthermore, and paradoxically, the frequent gatherings of clinical teachers at AALS teaching conferences and workshops, which have served as important opportunities for clinicians to exchange ideas and information about clinical education, may actually have

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slowed the creation of a written clinical scholarship accessible to non-attending clinicians and non-clinicians alike.

In this brief essay, I want to suggest that clinical scholarship is not an oxymoron. Such scholarship already has contributed to nascent understandings of the different meanings of justice within the academy. If it develops to its full potential, it can broaden still further our understanding of the various visions of justice that exist within both the academy and society at large.<sup>2</sup>

Whether as a result of their current clinical work or as an outgrowth of their prior lives as legal services or public interest lawyers,<sup>3</sup> clinical scholars have often focused on the problems of poverty law. Some of the best clinical scholarship examines the manner in which indigent clients experience the welfare system, housing court, and other settings that exist far from the esoteric world of appellate cases.<sup>4</sup> This scholarship, which takes as its point of departure clients' actual experiences, can be a useful adjunct and even antidote to abstract theorizing about justice that too often characterizes legal scholarship.

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<sup>2</sup>For a discussion of the importance of clinical scholarship in general and a description of various themes within it, see Bob Dinerstein, *Message from the Chair*, AALS SECT. CLINICAL LEGAL EDUC. NEWSL., Sept. 1992, at 1, 3. One of the exciting new developments within clinical education is the creation of a new peer-edited clinical law journal, the first issue of which is scheduled to appear sometime in the spring of 1994. This journal, the first law journal devoted exclusively to clinical scholarship, will allow for the collection of clinical articles in one place, a phenomenon that heretofore has occurred only in the occasional symposia on clinical education that have appeared from time to time. More significantly, the existence of the journal should facilitate the development of a vibrant clinical scholarship that can address the many issues, including issues of justice, that clinical education embraces.

<sup>3</sup>As David Barnhizer has noted, clinical teachers in the early days of the modern clinical movement (in the late 1960s) came predominantly from legal services or public interest law backgrounds. David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87 (1990). In my experience, Barnhizer's observation remains true, though probably somewhat less so, for the current crop of clinical teachers. In fact, most live-client clinical programs continue to deal with the legal problems of poor people.

<sup>4</sup>See, e.g., the articles cited in Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L. J. 2107, 2119 n.42 (1991). One of the most influential articles in this genre is Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990). For an excellent recent analysis of tenants' experiences in a local housing court, see Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

By studying the settings in which legal services are provided to poor people, clinical scholars also contribute to our understanding of both the incredible hardships under which legal services lawyers function and the ways in which they unknowingly may hinder their clients' pursuit of justice. Clinical scholars such as Gary Bellow, Carrie Menkel-Meadow, and Paul Tremblay<sup>5</sup> have examined the structure of decision-making in legal services offices in an effort to describe the ways in which critical decisions about client needs and goals are determined. Much of clinical scholarship about lawyering for poor people is critical—frequently, self-critical—of it. While sometimes controversial,<sup>6</sup> clinical scholarship of this type is fully grounded in client and lawyer experience and can provide important insights into the many ways in which society denies justice to poor people.

One of the most important ways in which clinical scholarship can contribute to the pursuit of justice is in its examination of the lawyer-client relationship itself. Too often, well-intentioned lawyers for clients facing injustice have dominated their clients, thereby replicating some aspects of the very injustice they were fighting on their clients' behalf. Clinical concepts such as client-centered counseling, while justified on numerous grounds,<sup>7</sup> aim in part to extend the reach of more egalitarian attitudes and actions to the lawyer-client relationship itself.

Clinical scholarship that examines client experience and lawyer-client relationships suggests elements of a more far-reaching scholarship about law practice. Such a practice-oriented scholarship could analyze the justice components of the operation and structure of law practice<sup>8</sup> in addition to the

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<sup>5</sup> See, e.g., Gary Bellow, *Turning Solutions Into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106 (1977); Gary Bellow & Jean Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337 (1978); Carrie Menkel-Meadow & Robert G. Meadow, *Resource Allocation in Legal Services: Individual Attorney Decisions in Work Priorities*, 5 LAW & POLY Q. 237 (1983); Robert G. Meadow & Carrie Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociological Ambivalence in the Delivery of Legal Aid for the Poor*, 9 LAW & HUM. BEHAV. 397 (1985); Paul R. Tremblay, *Toward a Community-Based Ethic of Legal Services Practice*, 37 UCLA L. REV. 1101 (1990); Paul R. Tremblay, *A Tragic View of Poverty Law Practice*, 1 D.C. L. REV. 123 (1992); and Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 HASTINGS L.J. 947 (1992) [hereinafter, *Street-Level Bureaucracy*].

<sup>6</sup> See my discussion of the theoretics of practice movement in Robert D. Dinerstein, *A Meditation on the Theoretics of Practice*, 43 HASTINGS L.J. 971 (1992) [hereinafter *Theoretics of Practice*]; see also *Street-Level Bureaucracy*, *supra* note 5.

<sup>7</sup> See Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 502 (1990).

<sup>8</sup> See, e.g., GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992).

more skills-oriented approach that the term might otherwise imply.<sup>9</sup> Clinical scholarship about practice can build on clinical education's historic concern with issues of professional responsibility,<sup>10</sup> as well as on the growing literature on and critique of professionalism in law and the other professions.<sup>11</sup>

For scholarship about justice in an increasingly complex world to be most effective, it must draw on inter- and multi-disciplinary perspectives. Clinical scholarship is well situated to make such connections to sociology, anthropology (especially ethnography), learning theory and psychology, among other disciplines. Clinicians have long availed themselves of developments in these areas in their teaching and increasingly their scholarship reflects this as well.<sup>12</sup>

From the beginning, clinicians saw the clinic as a laboratory in which ideas about lawyering and the legal system could be examined and tested.<sup>13</sup> While that testing has occurred in many programs, scholarship reflecting this process has not kept pace. Nevertheless, clinical scholars are in what may be a unique position within the law school to test their ideas about justice empirically.<sup>14</sup> If empirical work within the clinic presents numerous difficulties—requiring expertise clinical scholars may not possess, raising client confidentiality

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<sup>9</sup> For a recent call for more legal scholarship that addresses the concern of practice, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). For an earlier plea, see John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989). The recent publication of a report by the American Bar Association's Task Force on Law Schools and the Profession: Narrowing the Gap, known popularly as the MacCrate Task Force Report, could well stimulate the kind of practice scholarship to which the text adverts. In particular, Part II of the Report, *A Vision of the Skills and Values New Lawyers Should Seek to Acquire*, and Chapter 5 thereof, *The Statement of Fundamental Lawyering Skills and Professional Values*, will be debated, explained and critiqued extensively within law schools. Clinical scholars need to be part of this process. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, AMERICAN BAR ASSOCIATION, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992).

<sup>10</sup> See Barnhizer, *supra* note 3, at 87, 89-90.

<sup>11</sup> See *Theoretics of Practice*, *supra* note 6, at 525-34.

<sup>12</sup> See generally Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980).

<sup>13</sup> See, e.g., Stephen Wizner & Dennis Curtis, "Here's What We Do": Some Notes About Clinical Legal Education, 29 CLEV. ST. L. REV. 673, 678-79 (1980).

<sup>14</sup> For examples of empirical work by clinical scholars, see James H. Stark et al., *The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin*, 37 J. LEGAL EDUC. 409 (1987) and James H. Stark et al., *Directiveness in Clinical Supervision*, 3 B.U. PUBL. INT. L.J. \_\_\_\_ (forthcoming 1993).

concerns, and demanding time clinical scholars may not have—it offers exciting possibilities as well.

The isolation of many clinical teachers within law schools may also have caused their estrangement from many of the intellectual developments within law school scholarship. But clinical scholars are beginning to forge connections with other intellectual movements, especially feminism, critical race, and critical theory.<sup>15</sup> Clinical scholars' concerns with the complex and frequently recursive relationship between theory and practice<sup>16</sup> dovetails well with similar concerns in these other movements.

Clinical teachers' status as outsiders within many law school communities can give them crucial insights into the need to promote justice in the broader society. Obviously, the status of being a white male clinical teacher is not equivalent to being poor or a member of a group that has suffered deep-seated societal discrimination. But the lack of appreciation that many clinicians feel for their talents; the distinctions at many schools between clinicians and non-clinicians concerning status, role in institutional governance, and salary; the tension between demanding equal treatment and being loathe to risk even tenuous institutional standing; and the sense in which clinical teachers may not fully feel at home in the worlds of either practice or academia; all these experiences and more can provide clinicians with important insights from which empathy for those suffering more serious injustices can flow. Clinicians' more explicit reliance in their scholarship on their outsider status in the academy can provide a fuller context for their discussions of the injustices their clients suffer in the legal system.

Clinical scholarship can also assist in redefining what is considered scholarship and thereby increase the ability of legal scholarship to promote justice. Because it is often difficult to convey the insights of clinical education in the traditional law review format, the full range of clinical learning is not brought to bear on the academic audience that reads law review articles. Indeed, many insights from clinical education are difficult to present in any written format, or at least in a written format divorced from live or videotaped

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<sup>15</sup> Recent symposia in the *Hastings Law Journal* and *Cornell Law Review*, containing numerous contributions by clinical teachers, reflect these developments. See *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 *HASTINGS L.J.* 717-1257 (1992); *Speeches from the Emperor's Old Prose: Reexamining the Language of Law*, 77 *CORNELL L. REV.* 1233-1511 (1992). Phyllis Goldfarb's contribution to the Hastings symposium, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 *HASTINGS L.J.* 717 (1992), as well as her earlier article, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 *MINN. L. REV.* 1599 (1991) [hereinafter, *Theory-Practice Spiral*], are especially good examples of an effort to connect clinical theory with other jurisprudential movements.

<sup>16</sup> See, e.g., *Theory-Practice Spiral*, *supra* note 15; see also Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 *UCLA L. REV.* 577 (1987).

presentations. Clinical scholars frequently convey their ideas at professional conferences and workshops, schools or prisons (through street law programs), bar meetings, presentations to judges and attorneys and other settings not conventionally seen as sites of scholarly activity. To be sure, not all such presentations are scholarly in nature. But insofar as at least some of these presentations reflect the thoughtfulness, thoroughness, and critical perspective that characterizes good scholarship, they may open up possibilities for dissemination of scholarly work that promises to reach a broader public than reads law reviews.

Clinical education is still a comparative newcomer on the academic block, and clinical scholarship can sometimes seem like the newcomer's new toy. Despite the impressive efforts of clinical scholars, much work remains to be done for such scholarship to reach its full potential as a force for justice. In particular, clinicians must do a better job of articulating theories of justice in lawyering and in other activities so that their ideas can be examined rigorously and criticized where necessary. For now, it is enough to insist on the importance and potential of the clinical scholarship project.