

1994

Why Not a Clinical Lawyer-Journal [comments]

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Recommended Citation

1 *Clinical L. Rev.* 1 (1994-1995)

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Foreword

WHY NOT A CLINICAL LAWYER-JOURNAL?

STEPHEN ELLMANN, ISABELLE R. GUNNING, AND RANDY HERTZ

The inauguration of the first journal in a field offers a singular opportunity to ruminate upon the history and present state of scholarship within that field and to speculate upon the directions such scholarship might take in the future. Being clinicians, we could hardly pass up the chance to practice what we preach (rather than merely preaching about practice) by engaging in the processes of reflection, critique, and future planning.

Histories of the field of clinical legal education usually begin by acknowledging Jerome Frank's 1933 article, "Why Not a Clinical Lawyer-School?"¹ It seems only fitting to do likewise in this first issue of the *Clinical Law Review*. For, with hindsight, it is apparent that Frank's article was one of the first works of clinical scholarship. Frank advanced a theory of clinical pedagogy and articulated specific approaches for teaching lawyering skills and thinking processes.

It was not until the late 1960's and 1970's that Frank's ideas bore fruit on a large scale. At that time, through funding provided by the Council on Legal Education for Professional Responsibility (CLEPR), clinics sprang up at law schools across the country.² At the same time, clinical scholarship began to burgeon. Indeed, CLEPR played a significant part in fostering clinical legal scholarship in this era. As a review of early scholarship in the field reveals, many of the now-classic sources were published or supported by CLEPR.³

While clinical scholarship thus has always accompanied clinical teaching, scholarship has assumed greater prominence in clinicians' lives over the years. This development has not been without its critics

¹ 81 U. PA. L. REV. 907 (1933). See, e.g., George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 168-69 (1974); Anthony Chase, *Origins of Modern Professional Education: The Harvard Case Method Conceived as Clinical Instruction in Law*, 5 NOVA L.J. 323, 326 (1981).

² For discussion of CLEPR's role in the field of clinical legal education, see, e.g., Lester Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 56, 56-71 (Working Papers for CLEPR National Conference 1973); Grossman, *supra* note 1, at 169-73.

³ See, e.g., CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING, *supra* note 2; JAMES D. FELLERS, MARVIN S. KAYNE, BRUCE S. ROGOW, HOWARD R. SACKS & ANDREW S. WATSON, *LAWYERS, CLIENTS & ETHICS* (Murray T. Bloom ed., 1974).

and skeptics, among them Gary Palm, who devotes his article in this issue to revisiting his earlier comments on the subject.⁴ As critics point out, scholarship inevitably takes time away from teaching. Such a cost is considerable, particularly in the clinical context where all three forms of instruction (simulations, in-house clinic fieldwork, and externship supervision) demand heavy investments of time on the teacher's part. For those fieldwork supervisors who entered academia with a goal of enlisting the law schools in the provision of legal services to indigent and disadvantaged people, scholarship also may be seen as incurring the significant cost of decreasing the time available for delivery of legal services. Especially at first, when scholarship was defined in very narrow, traditional terms,⁵ many clinicians viewed these costs as outweighing the potential benefits of scholarship.

Yet from the 1970's onwards, a steadily increasing number of clinical legal educators have recognized, or even embraced, scholarship as part of their role. One impetus for this development has been the growing, though still by no means complete, acceptance of clinical teachers in legal academia. Clinical teachers fought for this acceptance (and, when it was not voluntarily forthcoming, fought to compel it by invoking ABA Accreditation Standard 405(e)'s guarantee of equality for clinical legal educators⁶). Welcome as this growing acceptance has been, however, it has come (as many welcome developments do) at a price. The "price" is that clinical teachers increasingly are subject to the "publish or perish" rule of the tenure track.

But clinicians also have turned to scholarship because of its intrinsic value. Like their nonclinical colleagues, clinicians have come to see scholarship as a means of disseminating information about innovative approaches and exploring ideas that grow out of clinical teaching experiences. Precisely because clinical pedagogy is such a new discipline, clinicians still are debating fundamental questions concerning the nature and potential of the teaching enterprise. These debates, which have tended to take place in the give-and-take of discussions at clinical conferences, have been very rich, but they also have been episodic and often incomplete. The exceptional importance of the teaching conferences to the development of clinical education rightly reflects the interactive nature of our work — but even

⁴ Gary H. Palm, *Reconceptualizing Clinical Scholarship as Clinical Instruction*, 1 CLIN. L. REV. 127 (1994). For other discussions of the potential costs of scholarship for clinicians, see, e.g., Richard A. Boswell, *Keeping the Practice in Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187 (1992); John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989).

⁵ See Palm, *supra* note 4, at 127.

⁶ AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 405(e) (October 1992).

after these conferences, there is more to be done. Increasingly, that work is being done in insightful articles by individual clinicians, at regional workshops on clinical scholarship,⁷ and in wide-ranging, often interdisciplinary symposia whose results have been published in a number of law reviews.⁸

As clinical scholarship has developed, it has become increasingly apparent that the field needs a central forum for discourse on clinical theory and experience. The fashioning of "a room of our own" offers the promise of a special, constructive, and probing conversation among clinicians. A journal that carries forward, in print, the intellectual challenge and emotional responsiveness of the best of our clinical conferences can help generate such a sustained conversation, both in its own pages and at future workshops and conferences. And by doing so, it offers us further hope of tackling and resolving the extraordinarily difficult problems that confront us as we seek to understand and to shape legal practice.

With such goals in mind, many clinical legal educators in recent years have put their time and energy into creating a specialized journal for scholarly pieces relating to clinical legal education. Like many an idea whose time has come, the proposal seemed to emerge simultaneously in several different places. Clinical faculty at N.Y.U., as well as at other schools, began to discuss the possibility of founding such a journal at their schools. Members of the AALS Clinical Section's Committee on Scholarship explored the idea as well. Gradually, a group of clinical teachers, among whom Nina Tarr and Bob Dinerstein played especially active parts, began to transform the idea into a reality.

In 1992, the newly formed Clinical Legal Education Association (CLEA) publicly called for the creation of a clinical law journal. As an organization representative of the entire clinical legal education community, CLEA sought to create a journal that would represent the full range of perspectives within that community. Although the journal necessarily would be based at a single law school, CLEA's vision

⁷ Among these are the Clinical Theory Workshop at New York Law School and the Mid-Atlantic Clinical Theory Workshop for teachers at schools in the D.C.-Baltimore area. The annual Midwest Clinical Teachers Conference is differently structured but plays a similar role.

⁸ See, e.g., Symposium, *Lawyering Theory: Thinking Through the Legal Culture*, 37 N.Y.L. SCH. L. REV. 1 (1992); Symposium, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 HASTINGS L.J. 717 (1992); Colloquium, *Currents in Clinical Scholarship*, 35 N.Y.L. SCH. L. REV. 1 (1990); Symposium, *The American Bar Association's National Conference on Professional Skills and Legal Education*, 19 N.M. L. REV. 1 (1989); Symposium, *Clinical Legal Education and the Legal Profession*, 29 CLEVE. ST. L. REV. 345 (1980).

of the journal called for the involvement of representatives of many schools in the leadership and production of the journal.

The journal that has emerged from this process, the first issue of which you hold in your hands, reflects CLEA's vision. The *Clinical Law Review* is jointly sponsored by three organizations: CLEA; AALS; and N.Y.U. School of Law, which serves as the host school for the journal. Each of the *Review's* three editors-in-chief is drawn from a different school's clinical faculty, as is each of the members of the *Review's* Board of Editors. The *Review* is committed to publishing pieces that represent the many voices within the clinical legal education community. In bringing these voices together in a continuing conversation in these pages, our goal is to press clinical inquiry even further than it has already gone.

The *Review* has no editorial line. Instead, we have editorial questions. It seems to us that even the question of what this journal should be about is very much a matter for debate, and so we begin publication with exactly that debate. For this first issue of the *Review*, we have invited some of the leading members of our field to share their very different visions of clinical teaching and scholarship. In particular, we encouraged these authors to propose, and simultaneously to demonstrate, the type of scholarly writing they would hope to see in the journal in the coming years. This issue begins with the authors' insightful and sometimes quite controversial appraisals of the current state of clinical scholarship and the directions it might take in the future.

The answers this issue offers to the question of the future of clinical scholarship are not contained exclusively in these articles. We also asked two prominent members of the clinical community to submit a type of piece that we have termed a "clinical essay" — an account of a particular moment of clinical experience and of the author's reflections about that moment. These two essays are important parts of this issue's debate over the substance of future scholarship; they are also particularly important parts of the *Review's* answer to the question of the form of future scholarship. Just as we will welcome full-length articles with fully-elaborated answers to important questions in our field, we will also welcome shorter pieces that seek to advance inquiry in a more discrete fashion through the clarity of their observations, the questions they raise, and the areas they identify as deserving of exploration. We invite readers to submit such clinical essays, which we think of as roughly analogous to the "case notes" of medical journals. We also welcome "letters to the editor." And, more generally, we invite our readers to assist us in finding a diverse range of formats

to accommodate the clinical intellectual community's diverse group of scholars.

The articles and clinical essays of this issue amply reflect how complex and how rich that intellectual community is. The question of what our scholarship is about is at once a question of what our overall enterprise is about, and so the writers here focus (often, with very different results) on the question of what our fundamental goals should be. Peter Hoffman maintains that fundamentally our function is skills training, and that too much of our attention has strayed from this central and honorable mission.⁹ Gary Palm and Lucie White, by contrast, focus here on clinics as sites of efforts to achieve social change, although the methods by which they would pursue those goals are by no means identical.¹⁰ Phyllis Goldfarb, though not challenging the importance either of skills training or of working for social change, adds an emphasis on what might be called the moral education of the student, not simply as a lawyer but as a person.¹¹

Even if we could agree upon a single goal or set of goals, we would still have profound questions to answer concerning the paths by which the goal(s) should be pursued. For example, most of us probably agree that learning how lawyers can work effectively is an important part of our mission. But what should we look at in seeking that understanding? Focusing on the specific skill of valuing cases for settlement, Peter Hoffman explores step-by-step methods by which novice law students can accumulate and assess information objectively.¹² Lucie White also seeks objective data but of a very different sort; in her externship course, students embark on the task of "mapping" resources for social change by studying (and working for) community organizations.¹³

In contrast, Tony Amsterdam, Nancy Cook and Phyllis Goldfarb all suggest that we should look at stories — a perspective reflecting their engagement with the growing literature on narrative as a means, perhaps *the* means, of communication. But clinicians who look at stories can look at them in very different ways. Amsterdam offers us a micro-analysis of the story-telling techniques of Thurgood Marshall and his adversary, John W. Davis, in the Supreme Court argument of

⁹ See Peter T. Hoffman, *Clinical Scholarship and Skills Training*, 1 CLIN. L. REV. 93, 98-110 (1994).

¹⁰ Palm, *supra* note 4, at 131-32; Lucie E. White, *Collaborative Lawyering in the Field? On Mapping the Paths from Rhetoric to Practice*, 1 CLIN. L. REV. 157 (1994).

¹¹ Phyllis Goldfarb, *A Clinic Runs Through It*, 1 CLIN. L. REV. 65 (1994).

¹² Hoffman, *supra* note 9, at 115-25.

¹³ White, *supra* note 10, at 161-63.

Brown v. Board of Education.¹⁴ Cook and Goldfarb are less concerned here with the techniques of story-telling than with the lessons that stories, well-told and well-heard, can impart. Goldfarb uses a novel by Gita Mehta and her personal experiences in litigating a capital case to explore the paths we follow in learning to hear others' stories.¹⁵ Cook draws the reader along with her on a journey through a multitude of real and fictional stories growing out of a clinic case she supervised.¹⁶

Most of us probably would also agree that one goal of clinical teaching is to foster, and to carry on, legal practice in the public interest. But our understanding of this goal is changing, and so is our understanding of the means by which it might be achieved. Issues of race continue to be a critical concern. They echo throughout Tony Amsterdam's analysis of the *Brown* arguments.¹⁷ They also are a central focus of Michelle Jacobs' clinical essay, in which she examines certain unique issues clinicians of color confront when applying generally accepted modes of clinical supervision and instruction.¹⁸ As Jacobs observes, the clinical legal education community is at last becoming a racially diverse community. This welcome change helps assure that we will see much more work in the future that re-examines the validity of clinical theories and practices from truly multicultural and multi-racial perspectives.

Similarly, although we are becoming more sensitive to the role of gender, we do not yet have easy formulas to tell us what sorts of lawyering will best express and respect the many meanings of men's and women's experiences. Nancy Cook explores a clinic case in which the client rejected the stories the student attorney sought to tell on her behalf regarding gender, race and class discrimination by the police;¹⁹ Phyllis Goldfarb reflects on the possible importance of her being a woman to the powerful bond she developed with a male client on death row;²⁰ and Liz Ryan Cole, in her clinical essay, describes the techniques she used to encourage a woman student to make herself more "visible" and, in the process, to enhance the student's sense of herself as a lawyer.²¹

¹⁴ Anthony G. Amsterdam, *Telling Stories and Stories about Them*, 1 CLIN. L. REV. 9 (1994).

¹⁵ Goldfarb, *supra* note 11.

¹⁶ Nancy Cook, *Legal Fictions: Clinical Experiences, Lace Collars and Boundless Stories*, 1 CLIN. L. REV. 41 (1994).

¹⁷ Amsterdam, *supra* note 14, at 13-37.

¹⁸ Michelle S. Jacobs, *Legitimacy and the Power Game*, 1 CLIN. L. REV. 187 (1994).

¹⁹ Cook, *supra* note 16, at 47-55.

²⁰ Goldfarb, *supra* note 11, at 71.

²¹ Liz Ryan Cole, *Lessons From A Semester in Practice*, 1 CLIN. L. REV. 173, 183 (1994).

Of course, race and gender are not the only significant lines of difference or division. Margaret Russell reminds us that age, class, disability, ethnicity, and sexual orientation all are parts of the range of "salient factors for analysis." She also underscores the importance of confronting questions of difference from the beginning of students' law school education.²²

All of these are complex matters. Many of them are new. But old questions remain, and are as important as ever. Clinical teachers must shape courses in which their answers to these questions are embodied in effective education. What kinds of courses, then, should we teach? The articles in this issue reflect each of the strands of the clinical community: in-house clinics, externships, and simulation teaching. Margaret Russell calls for greater incorporation of clinical techniques and insights into non-clinical courses²³ — a seemingly modest proposal that may disturb both committed doctrinal teachers and clinicians who wonder whether more radical reforms are needed. Liz Ryan Cole and Lucie White both describe externship models: Cole's, a course in which students may be placed off campus for a full semester; and White's, a class in which law students seem as much social scientists as lawyers.²⁴ Gary Palm and Phyllis Goldfarb emphasize the significance of the interaction between clinical teacher and student in the student's encounter with clients and with the law — a distinctive virtue of the in-house fieldwork clinic.²⁵ Every one of the courses these writers have in mind may be valuable, but their obvious contrasts remind us that the questions of how to structure a clinical experience, and why, remain very much on our agenda.

If we have succeeded at our task of selecting and editing the articles and essays in this issue, you will find yourself vehemently disagreeing with much of what you read here. Our most fervent wish is to spur debate and thereby to stimulate new ideas. We hope to hear such debates at this Spring's AALS Clinical Workshop and CLEA conference, and at future conferences and lawyering theory colloquia. And we hope that some of you, at least, will be moved to write pieces in response to this issue — and to submit them to the *Review* for publication in future issues. We look forward to your objections, suggestions and insights. There is a great deal to be done.

²² Margaret M. Russell, *Beginner's Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 CLIN. L. REV. 135, 138-45 (1994).

²³ *Id.* at 145-47.

²⁴ Cole, *supra* note 21; White, *supra* note 10.

²⁵ Palm, *supra* note 4; Goldfarb, *supra* note 11.

