

## ADVANCING A BROADER VIEW OF CLINICAL SCHOLARSHIP

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*“The heart of clinical teaching is immersion in immediate experience and reflection on it. The academic teacher seeks to enrich understanding of the general by deriving abstract principles from the particular; the clinician seeks to enrich understanding of the general by refining a capacity to discern the full context of the particular.”<sup>1</sup>*

Tony Amsterdam’s view of clinical teaching as expressed in his essay in the inaugural issue of the *Clinical Law Review* (CLR) remains as relevant today as when the journal was conceived. His observation on the importance of discerning the particular as offering insights on the general is helpful to appreciating the value of clinical scholarship. My take on the essence of Tony Amsterdam’s piece was that in time we would learn what clinical scholarship was and that whatever it was going to be would come out of the unique experience of the clinical teacher. Unlike the so-called “podium” teacher, the clinical teacher is enmeshed in the complicated world of law driven mostly by facts, clients, students, witnesses, judges, and countless other actors.<sup>2</sup> With a quarter century’s passage since the CLR’s founding, it is fitting that we take stock of how far we have come and the challenges that lie ahead.

Before the CLR’s first issue in 1994, few law reviews recognized clinical scholarship, let alone published on matters that were important to clinical legal education.<sup>3</sup> In those early days, few clinicians were engaged in writing, other than, of course, the volumes of research and written work produced on a daily basis within their clinics. Those inclined to write articles faced numerous obstacles to getting

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<sup>1</sup> Anthony G. Amsterdam, *Telling Stories and Stories about Them*, 1 CLIN. L. REV. 9, 39 (1994).

<sup>2</sup> I use the term “podium” teacher very reluctantly and not as a way of disparagement. The overall thrust of this essay is that we must eschew the idea that teachers and scholarship come in one-dimensional packages like clinical, non-clinical, podium, doctrinal, and theoretical.

<sup>3</sup> My purpose is by no means to attempt, nor would it be useful, to identify when clinical scholarship began to appear in the literature. Sandy Ogilvy, Karen Czapanskiy and others have put together extensive bibliographies of clinical scholarship. See, e.g., Sandy Ogilvy & Karen Czapanskiy, *Clinical Legal Education: an Annotated Bibliography* (3rd ed.), CLIN. L. REV. SPECIAL ISSUE (2005).

published, the most prominent of which was the difficulty of law student editors to appreciate the value of the work.<sup>4</sup> Non-clinical academics barely had an idea of what clinical teachers were doing.<sup>5</sup> Clinicians rarely were given the time and other resources needed to engage in research, writing, and the kind of reflection needed to produce meaningful contributions.<sup>6</sup> At some schools, engaging in scholarship was viewed as counter to the goals of the clinic. In some cases, clinicians felt that to engage in the type of scholarship that was prevalent was simply not the best use of their time. In their view, the life of a clinician was to teach their students and work on behalf of the clinic's clients.<sup>7</sup> Stated another way, some clinicians were not interested in being a part of "the Academy." Indeed, as some segments of the academy began to diverge and become less engaged with the profession, many clinicians were more comfortable with practitioners and judges. In the same period, there was a growing recognition of the importance of maintaining connections to the profession, the teaching mission of law schools, and preparation of students to enter the profession.<sup>8</sup> As we reflect on this journey, I believe that, while there is a firm place for clinical scholarship, some of the previously-described

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<sup>4</sup> Students were used to seeing more traditional scholarship. The idea that a piece might be focused on, for example, interviewing, counseling, case theory, teaching, or anything short of a discussion of theory or doctrine was a foreign concept.

<sup>5</sup> In the discussions of the formation of clinics within the law school many were literally housed in the basement. See, e.g., Philip G. Schrag, *Constructing a Clinic*, 3 CLIN. L. REV. 175, 223 (1996) (describing the Columbia Law School clinic that the author negotiated and established with the support of the then dean in 1984); 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 (1990); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 511 (1992); Binny Miller, *Telling Stories About Cases and Client: the Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000); Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L. J. 1965, 1997 (1999); Stephen Wizner, *Is Social Justice Still Relevant?* 32 B.C. J. L. & SOC. JUST. 345, 348 (2012) (describing the legal clinic at the University of Chicago).

<sup>6</sup> It was not uncommon for clinicians to be supervising large numbers of students, each of whom also were carrying large numbers of cases. The cases of course took on a life of their own and could not be put down for summer reflection because each involved the lives of the clients represented in the clinic. Clinics after all are about the practice of law and with that practice comes the lawyer's duty to address the needs and interests of the client. George Critchlow, *Professional Responsibility, Student Practice and the Clinical Duty to Intervene*, 26 GONZ. L. REV. 415 (1990).

<sup>7</sup> Most law school clinics originated and operated as mini-legal service offices with students working on large numbers of cases supervised by attorney/professors. In turn when the students were not in the clinic during breaks, the clinic attorneys continued to work on the cases until the students returned from their breaks.

<sup>8</sup> One cannot understate the importance of the impact of the MacCrate Report and other studies not to mention the work of many individuals in bringing about this major shift in legal education. These reports and the work that guided them gave legitimacy to the scholarship that clinicians produced.

obstacles to its growth persist.

Obstacles to clinical scholarship varied among law school and individual clinicians. Some clinicians were responsible for so many students and cases that the idea of writing about or reflecting on what they were doing was far from their minds. Others, who were inclined to write (notwithstanding their heavy case and student loads), were at schools that did not support or value scholarship and did not have the time to engage in scholarship. I describe these as institutional obstacles, and they predominated at the founding of the CLR.

I will begin this essay with my conclusion: Clinicians *must* write for the betterment of our students, clients, and the larger profession. The nature of the writing should be left for individuals to determine over time, but write we must, for the sake of our profession, the education of our students, our clients, and society at large. I view clinical scholarship broadly as encompassing the full breadth of writings informed by the interaction of clinicians, students, and clients within the clinics they occupy. I include within that definition explorations of doctrinal questions, commentary on broader social issues that intersect with the law, and everything that clinicians do.<sup>9</sup> I say this because clinical work involves such an important part of our legal system.<sup>10</sup> My definition of scholarship must also be broad because clinicians engage in work with students covering so many substantive areas. Most importantly, our work is the closest place in the academy to the world of the practicing bench and bar. The critical difference between the clinician and the full-time practicing lawyer (or judge) is that we are engaged in full-time teaching and practice and likely have more opportunities to reflect on our interactions.<sup>11</sup> Below, I will explore what we write when we write, the continuing impediments to clinical scholarship, the continuing view that “clinical” scholarship is not really scholarship, the challenges ahead, and finally where I think we are going in this enterprise.

#### WHAT CLINICIANS WRITE (WHEN WE WRITE)

When the CLR was founded in 1994, clinical scholarship was not

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<sup>9</sup> This definition only begins to cover the breadth of what has become accepted as clinical scholarship. My point here is that it needs to encompass much more of what we are doing in our clinics.

<sup>10</sup> In addition to providing representation for underserved communities, law school clinics are often involved in major law reform efforts and pathbreaking legal cases.

<sup>11</sup> By this I do not mean to say that the practicing lawyer or judge cannot make significant contributions, only that clinicians stand in a unique place between the academy and “practicing” world and as such should have something meaningful to offer. Our existing scholarship bears this out for it covers a wide range from student supervision, client interaction, learning theory, legal ethics, and numerous substantive fields.

well defined. Some wrote about what that scholarship might look like; it is only in retrospect that we can begin to paint a picture of what that scholarship has become. Today many more clinicians are expected to write and are writing and disseminating their work. The *Clinical Law Review* and New York University Law School have done a great deal to nurture this expression through its annual Writers' Workshops.<sup>12</sup>

At these annual gatherings in New York, clinicians at all levels of experience come together to share their written work or nascent ideas in small groups with the singular goal of improving the quality of their product. These gatherings are replicated at regional conferences and workshops throughout the country. Clinicians also come together to talk and share ideas about their teaching and scholarship at meetings held outside of the U.S. In one or various ways the fruits of these exchanges find their way into written work. That may be books, articles, legal briefs, doctrinally-oriented pieces, or other forms. Most importantly, clinicians share their knowledge and contribute immensely to the existing literature and much of that may be within the context of the legal subject matter of their clinic.

While not the only, but certainly the most important U.S. repository of clinical scholarship, the CLR sustains, nurtures and encourages clinical scholarship.<sup>13</sup> While articles appearing in the CLR encompass lawyering theory and a broad range of topics within clinical legal education, my definition is intentionally much broader and covers how writing by clinicians is informed by their unique place in the academy. Today the CLR is not the only journal that publishes work that falls into the category of lawyering theory and clinical education. Others within the academy, such as those who write in the fields of law and society, legal ethics, poverty law, and numerous other areas, also con-

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<sup>12</sup> The purpose of the "Workshops" go beyond just supporting "clinical scholarship." They also are intended to foster scholarship by clinicians. Clinical scholarship must be viewed both from the perspective of what clinicians write about and what clinicians do — or what can be learned from the "clinic," something which I would describe as a "clinical perspective."

<sup>13</sup> The CLR is managed by three co-editors in Chief, one selected from the faculty of New York University Law School and the others selected by the Board of Editors for five-year terms through a process in which the Clinical Legal Education Association (CLEA) and the Association of American Law Schools (AALS) are involved. Its editorial board is selected in an inclusive process involving CLEA and the AALS, and each member is involved at some level in the selection and editing of articles. I served for a five-year term as a co-editor in chief and was involved in the founding of the CLR and continue to serve on its Board in an *ex-officio* capacity. From its inception even when we did not accept an article for publication, our review process included detailed comments (which were provided to authors) from our editorial board and editors on "rejected" pieces with the goal of improving the ultimate product. The basic philosophy was that there was intrinsic value beyond the articles which were to appear in the journal itself, and that was to improve the quality of the scholarship produced by clinicians.

tribute a great deal. Because of the clinics' subject matter focus and clinicians' interests, some of our work may look like the work of some of our non-clinical colleagues. I suspect though, that the strongest influences on the topics that we write about are informed by our exposures within the clinic.<sup>14</sup> Another important component of that work involves all aspects of working with marginalized communities and advancing issues of access to justice.

Even though it might be hard to quantify the impact of clinical scholarship, it is most likely significant. Clinicians are alive and well at virtually every law school in the U.S. and in many parts of the globe.<sup>15</sup> We are in multiple statuses within the academy, and we teach in many substantive areas of practice and are active in both the academy as well as the profession. Since its founding the CLR has made a concerted effort to provide a forum for publishing the work of clinicians broadly defined.

I believe that our scholarship should be infused with notions of justice and values. I realize that "justice" and "values" are not easy to define. Some clinical scholarship takes on the issues in a very deliberate way; others are more veiled. Also encompassed within this scholarship are the myriad of problems and challenges of what happens in the clinic.<sup>16</sup> The clinic is like a laboratory and is bound up in the messy world of client interactions, stories, and facts including the major barriers that clients and those representing them face in achieving justice. Students' daily clinical experiences mirror the challenges faced by lawyers and clients as they engage with the legal system. For example, how should clients and lawyers deal with racial bias or income inequalities as they attempt to deal with and secure relief within the context of a dispute? Because the overwhelming number of clinics represent low-income and marginalized clients, these difficult issues come up all the time. Since clinics take on these important issues on a daily basis, this is a worthwhile area for deeper scholarly exploration by clinicians.

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<sup>14</sup> It is important to note that sometimes because of the politics within a particular law school, clinicians are writing to their review committees until they feel comfortable branching out. In most law schools, scholarship review is driven by colleagues made up of non-clinicians who sometimes are unreceptive to less traditional writing.

<sup>15</sup> In her essay in this issue Leah Wortham writes about the extensive and growing body of scholarship by clinicians from around the world. Frank Bloch, Richard Wilson, and others have written about the expansion of clinics around the globe. *See, e.g., THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* (Frank S. Bloch ed. 2011); RICHARD J. WILSON, *THE GLOBAL EVOLUTION OF CLINICAL LEGAL EDUCATION: MORE THAN A METHOD* (2018).

<sup>16</sup> Here the issues could encompass topics such as teaching pedagogy, learning theory, and lawyering skills.

## IMPEDIMENTS TO CLINICAL SCHOLARSHIP

In the earlier days of clinical education, there was some controversy over whether clinicians should even be engaged in scholarship. That view slowly gave way to the realization that clinicians had much to contribute to the literature on lawyering and in the substantive areas in which their clinics operated. Even now when clinicians are writing and contributing to a vibrant discourse, some resistance remains on whether clinicians should be writing. Some of the obstacles to scholarship may come from deans and faculties who do not appreciate the value of clinical scholarship regardless of how it might be defined. Indeed, clinicians themselves may be apprehensive of the “scholarly” exercise and resist engaging in it. I believe, though, we should be writing as part of an effort to advance the causes or issues that we believe are important.<sup>17</sup>

As clinicians we often talk of how our work with students, clients, and larger issues of justice make it more difficult to produce scholarship. Now when so many communities and legal institutions are under attack from many quarters, scholarship might seem like a superfluous exercise.<sup>18</sup> These pressures are aggravated by the increased polarization that we are witnessing in the larger society and the many attacks directed at the communities served by our clinics. All of this places even greater demands on us as clinicians and makes it more difficult to produce scholarship. While this can be an impediment to scholarship, it might also serve to motivate us to do more writing that will benefit our clients and their communities.

The realignments which are occurring in legal education present another impediment to our scholarship. The declining enrollment, budget cuts, and increasing competition between law schools around rankings are all manifestations of this realignment. Depending on where one teaches, these factors may put greater pressure on clinicians to teach and do more apart from scholarship.<sup>19</sup> While it is understandable that these pressures will make it more difficult for clinicians, it is not a justification for withholding the knowledge and insights that

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<sup>17</sup> The cause could be improving how we teach, changing a law, righting an injustice, highlighting an important cause, or a myriad of other topics.

<sup>18</sup> Traditionally clinics have represented low-income and marginalized communities. Even in the best of times representing vulnerable populations is challenging. The current administration has directed the considerable resources of the federal government to immigration enforcement, deregulation of environmental laws, curtailing public benefits, and other initiatives that place enormous pressures on clinic clients.

<sup>19</sup> This may even be the case where scholarship is viewed as part of the person’s job expectation. Simply put, it can be reasonably expected that deans will place greater demands on their faculties while providing them with fewer resources.

one has gained in the clinic.<sup>20</sup> To the extent that clinicians have not been supported by their home institutions, the clinical community and the CLR may be the perfect venues to provide the needed support for our scholarship. In fact the CLR's Writer's Workshop has served that function for many of us.

THE VIEW THAT CLINICAL SCHOLARSHIP IS NOT REALLY  
"SCHOLARSHIP"

Some in the legal academy do not share the view that what clinicians write is worthy of being called scholarship. This critique has been the headwind that clinicians have faced since the modern clinical movement began. What is or is not treated as good or valuable scholarship is a subjective judgment. The critique against clinical scholarship is not as strong today than when the CLR was founded. CLR's work is one important explanation. Another is that clinicians are writing more, and their work is appearing in mainstream journals covering most subject areas.

As well as being subjective, what is regarded as "real" scholarship is subject to change over time. Unlike when the CLR was founded, today much of the scholarship appearing in mainstream journals is interdisciplinary and empirical.<sup>21</sup> Some suggest more clinical scholarship could be in this direction. Changes in clinical scholarship, though, should be consistent with the needs and interests of clinic clients, or at a minimum, informed by client and student experiences. In short, it must be grounded both in the messy world of practice as well as in the justice mission of the clinic.

In the end, it may not matter whether others accept our scholarship as legitimate or worthy because it will stand on its own merit and borne out over time. In the long run, it may not matter that there are those who remain skeptical of the value of clinical scholarship since we are now past the point of treating it as a legitimate critique.

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<sup>20</sup> An additional and less often articulated argument for encouraging scholarship is that when it is done well, it helps one to become a better teacher.

<sup>21</sup> What is or is not valued as scholarship has changed over time. For example, empirical scholarship has only recently become more widely accepted. In 1999 Michael Heise noted the dearth of empirical scholarship. See Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 810 (1999). Recently Shari Diamond noted that while once novel empirical scholarship has emerged as "an active and valued player" even though it has not replaced doctrinal scholarship. Shari Seidman Diamond, *Empirical Legal Scholarship: Observations on Moving Forward*, 113 NW. U. L. REV. 1229 (2019). Similarly there was a time when interdisciplinary scholarship was less common and then later became much more accepted. See, e.g., Robert C. Clark, *The Interdisciplinary Study of Legal Education*, 90 YALE L.J. 1238 (1981); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1899 (1988).

## THE CHALLENGES AHEAD

The market crash and its impact on law school admissions have increased the ever-present tensions on how resources are allocated within individual law schools. These are exacerbated in faculties where there already were divisions. In times of diminishing resources, people may move back to previously-held camps. We also cannot underestimate the impact of law school rankings on both our teaching and scholarship. How those rankings are determined could impact on the stature of clinics within the law school. If the rankings tilt in favor of the contributions of non-clinical faculty, clinicians could be marginalized, thereby diminishing their value and importance in the law school. How we negotiate this changing environment within each of our institutions will determine the impact of these changes.

Recently the *U.S. News & World Report* announced that it was considering the use of a new set of criteria in ranking law schools that include within its a separate category under the heading “scholarly impact.”<sup>22</sup> The proposed ranking system could present serious challenges, not just for legal education generally, but to clinical teaching and scholarship in particular. As described by the magazine, scholarly impact would be calculated based on the median citation scores per faculty member at a given school based on law review articles published in the most recent five-year period.<sup>23</sup> Setting aside broader criticisms that can be made about such a measurement tool, it could have negative impacts on clinics and the value accorded to clinical scholarship more generally.<sup>24</sup> The idea that the impact of one’s contribution to a body of knowledge can be measured by the number of times a piece is cited is highly dubious, and when the calculation is based only on articles published in the last five years it could have even greater negative impacts. The extent to which the ranking is used by law school deans to allocate resources could cause further shifts. One could easily envision its impacting whether the writing is clinical, doctrinal, theoretical, interdisciplinary, empirical, or otherwise.<sup>25</sup>

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<sup>22</sup> Robert Morse, *U.S. News Considers Evaluating Law School Scholarly Impact*, Feb. 13, 2019, <https://perma.cc/M4TE-UF8E> (last visited July 23, 2019).

<sup>23</sup> Measuring scholarly impact is highly controversial. My purpose here is not to launch a full-blown critique of the methodology but merely to raise the issue of whether the increased focus on productivity and citation counts could diminish the value of clinical scholarship.

<sup>24</sup> One critique of the most-commonly-used scholarly impact measures is that it fails to recognize the work’s impact on judicial opinions and social scientists. Gary M. Lucas, Jr., *Measuring Scholarly Impact: A Guide for Law School Administrators and Legal Scholars*, 165 U. PA. L. REV. ONLINE 165, 171 (2017).

<sup>25</sup> *Id.* According to US News they will attempt to measure case law citations.



## CONCLUSION

In my articulation of a definition of clinical scholarship, the core theme has revolved around the dissemination of knowledge and contributions to the advancement of the law and society in general. Underlying my vision of an expanded definition of scholarship is that a narrower conception of writing does not fully embrace the range of contributions made by clinicians. I reject the notion that we might allow ourselves to be confined to just teaching and supervising students in their legal work. I believe that if we limit ourselves in this way, we will squander the potential benefits that we could be making to our communities the profession and society at large. We teach our students that much can be learned from our experiences through thoughtful reflection. We also teach our students that the clinic is a unique place to engage in this type of reflection. If we “practice what we are preaching” we will see that by spreading the reflective knowledge gained from the specific case, the better we are able to understand the general. To encourage this broader dissemination of knowledge will mean that we will need to more creatively expand the definition of what constitutes clinical scholarship. We must also recognize that no matter how we broaden this definition of clinical scholarship it will be met with some level of resistance.<sup>26</sup>

Clinical scholarship has come a long way since the founding of the CLR. It has weathered much resistance and has proven itself vibrant and useful. It has been influenced by all of the work that we do in our clinics. We are teacher-practitioners and as such, stand in a unique place within the legal academy. Only we can embrace a vision of our scholarship that includes the full panoply of voices found in our clinics. Just as our mainstream colleagues have advanced and redefined their scholarship, we must unabashedly expand the voices in our clinical choir—in doing so, we will further redefine our scholarship in a more creative and expansive way.

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<sup>26</sup> It is worth noting that in traditional academic circles there have been major moves at times to change the concept of what is worthy of recognition of scholarship. I wonder if clinicians have been too timid to push for such a reconceptualization.

