

THE DEATH OF A CLINIC

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Don't read this if you are looking for answers. I don't have them. Instead, this essay is about the pain of looking for answers and not finding them. It is about the role that this community plays in sustaining one another through painful experiences—not just through our community's supportive listserv, conferences, and quick, thoughtful responses to emails and telephone calls asking for help—but within these pages as well.

When we are creating clinics, looking for ways to become better teachers, reflecting on ethical implications at the intersection of practicing law within the academy, we turn to clinical scholarship and find answers. In fact, after 25 years, we sometimes assume that we will always find the answers we need when we face challenges in clinical teaching, administration, ethics, and more. But we are wrong. Gaps remain. Huge ones.

And when you are hurt and tired and under attack and you look for the answers you need in the place where you have grown accustomed to finding them and discover that they are not there, you feel disappointed—maybe even betrayed. That is what happened two years ago. Sure it was my fault. I should have planned for it. I had known for over four years that my colleague Gwynne Skinner was battling cancer, but planning for death is hard, whether it is a person or a clinic. When it involves both—yikes!—you need all the help you can get.

THE DEATH OF A CLINICIAN

Death preys on all of us, but I think it is harder to lose a clinician somehow. You and I both know—assuming you, too, are part of the clinical community—that there is something about a clinician that makes it especially hard to let them go. I think not only of Gwynne, but of Stephen Ellmann. We lost both Gwynne and Steve within months of each other and even though we knew of their battles with

* Warren Binford is Professor of Law and Director of the Clinical Law Program at Willamette University College of Law. I would like to thank everyone in the clinical community who has provided wisdom, resources, and comfort throughout the more challenging years as we worked to keep clinics open, including Randy Hertz, Peter Joy, Suzan Marie Pritchett, Stacy Caplow, Liz Ryan Cole, Wendy Seiden, Danielle Renee Cover, Genevieve Mann, and many more. Naturally, this essay is dedicated to Professor Gwynne Skinner, who changed the course of our Clinical Law Program and so many lives, including my own.

cancer years before they passed, each of their deaths felt like a gut punch.

Both Gwynne and Steve lived their lives demonstrating that one individual really can make a difference, really can change the course of history on both micro- and macro-levels. Maybe that is why Gwynne and Steve chose to become clinicians in the first place, or maybe their clinical work helped to form them—to make them the exceptional human beings they were.

I can still remember the time Gwynne came into my office and casually said, “I just wanted to let you know that we are suing Donald Rumsfeld, so you might get some calls about it.” Then there was the time she warned we might get some “pushback from alumni” because we would be representing some “alleged terrorists” being detained at Guantanamo Bay. There were trips to Geneva, reports on human trafficking, countless asylum cases, human rights work, immigration work, corporate accountability roundtables, and that time just before her first diagnosis, or maybe it was after, when she stuck her head in my office and chirpily announced, “Hey! That case we argued in the Ninth Circuit could be headed to the U.S. Supreme Court. We filed the writ this morning.” She was fearless. Unapologetic. Indomitable.

That is the power of being a clinician. We have this platform on which we can take on some of the most intractable legal challenges on the planet and throw all of our being into them without having to worry about how to pay our staff, keep the lights on, cover our mortgages. Better yet, if we have security of position, which both Gwynne and Steve did, we can garner the courage to take on controversial matters as a matter of academic freedom without having to worry that we might be placing our families’ economic security on the line. Best yet, clinicians are able to use these cases and reports and research and classes to teach and train the next generation of attorneys to be creative and courageous, too.

THE INHERENT POWER OF CLINICIANS AND CLINICAL SCHOLARSHIP

It is that intersection of a platform to help change the world, the security of position, and the life-changing interactions with our students that I think make being a clinician the best job on the planet. Thanks to clinical histories published in the *Clinical Law Review* and elsewhere,¹ we know the history of the clinical movement—even

¹ See, e.g., J.P. “Sandy” Ogilvy, *Celebrating CLEPR’s 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 *CLINICAL L. REV.* 1 (2009); Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *VAND. L. REV.* 321 (1982); Thomas F. Geraghty, *Legal Clinics and the Better Trained Lawyer (Redux): A History of Clinical Education at Northwestern*, 100 *NW. U. L.*

those of us who are third or fourth generation clinicians. It is from that scholarship and those accounts that we gain historical context that empowers us. And so we keep focusing our passion and determination, frequently with our heads down, but eyes open and feet pointed firmly ahead, knowing that we are on the right path, surrounded by thousands of people like Gwynne and Steve, who also believe in our inherent power to transform the world, not just through teaching and service and scholarship, like all law school faculty, but through the practice of zealous advocacy, too.

The body of scholarship that guides and empowers us goes well beyond the clinical movement's history. It provides us countless articles on strategies and arguments to help us succeed, as well as the names of people to reach out to when we need to make sense of actions that make no sense until you see them in the larger historical or political context.² Sometimes we are able to cite to resources such as law review articles or ethics opinions or accreditation standards and interpretations, and sometimes it is simply enough to say to an administrator inexperienced in law practice or clinical education or both, "I conferred with the Vice Dean of [Insert Top Law School Name Here] and the Dean of Experimental Programs at [Insert Name of Another Top Law School Here] and they have both assured me that I am handling this correctly. They said you are welcome to contact them and they will help you through the analysis." Sometimes that really is enough. Those names of experts are often identified through clinical scholarship (often published in these pages), which presumably, is what helped those individuals to advance to those levels of influence in the first place and enabled them to be in a position to empower other clinical faculty beyond their own campuses. It is a reminder to all of us of the duty we have to write scholarship, and to write it well and frequently. Scholarship remains the coin of the realm and the strength we garner through our research and publishing helps us empower other clinicians.

REV. 231 (2006); Laura G. Holland, *Invading the Ivory Tower: The History of Clinical Education at Yale Law School*, 49 J. LEGAL EDUC. 504 (1999); John S. Bradway, *The Beginning of the Legal Clinic at the University of Southern California*, 2 S. CAL. L. REV. 252, 252 (1928); Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENVTL. L.J. 3 (1995).

² See, e.g., Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. OF LEG. ED. 97 (2009); Elizabeth M. Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179 (1984-1985); Jonathan L. Entin, *Law School Clinics and the First Amendment*, 61 CASE WESTERN RESERVE L. REV. 1153 (2011); Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971 (2003).

GAPS IN THE KNOWLEDGE

So when I turned to the large and growing body of clinical scholarship to help guide me in navigating the aftermath of Gwynne's death and the challenges to her clinic, my heart sank. There was nothing to be found. Death of a clinician? Nothing. Death of a clinic? Nothing. Deconstructing a clinic? Nothing.

I already knew that there were a number of articles on how to create a clinic.³ I myself had relied heavily on those when I first began expanding and renovating the Clinical Law Program at Willamette University in 2005.⁴ In turn, I tried to make my own contribution to an emerging "clinic lifecycle" line of scholarship when I discovered a gap on renovating clinics as a young(ish) clinician. It seems that those first couple of generations of clinical scholars had enough experience to teach our generation how to construct clinics, but it fell to us to tell the next generation of clinicians how to reconstruct them. And so we did.

The days during which I wrote "Reconstructing a Clinic" were heady days. We were all fat and happy. Law school enrollment was booming.⁵ Salaries were up.⁶ More clinical faculty were gaining voting

³ Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175 (1996) and Donald N. Duquette, *Developing a Child Advocacy Law Clinic: A Law School Clinical Legal Education Opportunity*, 31 U. MICH. J. L. REF. 1 (1997).

⁴ When I arrived at Willamette University in 2005, the Clinical Law Program was comprised of one civil practice clinic and an externship program. The clinic was the second oldest law school clinic on the west coast, but had been neglected for decades. The university had undertaken a campaign to raise approximately three million dollars for an endowment of the program and had acquired an historical building on the corner of campus as a permanent home for the Clinical Law Program (following an extensive renovation of the building). Over the next eleven years, we launched seven clinics from that one civil practice clinic. This effort and the lessons we learned from it is detailed in W. Warren H. Binford, *Reconstructing a Clinic*, 15 CLINICAL L. REV. 283 (2009). My choice to use the title "Reconstructing a Clinic" was born from Philip Schrag's seminal article "Constructing a Clinic," *supra* note 3. However, there are lots of terms that could be used to describe what a law school is trying to do when it commits considerable resources to improving and expanding a clinic or clinical law program. What is different about this stage in the lifecycle of a clinic is that it tends to be midlife. The clinic or program is not being created, nor is it ending. It is a restart, a renewal, a recreation of that which already exists.

⁵ Richard W. Bourne, *The Coming Crash in Legal Education: How We Got Here, and Where We Go Now*, 45 CREIGHTON L. REV. 651, 660 (2012) ("In 2009, American law schools awarded 43,000 Juris Doctorate degrees, nearly 11% more than a decade earlier.") citing David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1, http://www.nytimes.com/2011/01/09/business/09law.html?_r=1&scp=1&sq=is%20law%C20school%C20a%C20losing%20game&st=cse. See also Jerome M. Organ, *Legal Education and the Legal Profession: Convergence or Divergence?*, 38 OHIO N. U. L. REV. 885, 898 (2012) ("As further evidence of the market dysfunctionality, first-year enrollment increased in 2009 and 2010 to record levels, even as 2009 and 2010 law school graduates found the job market for law school graduates in decline") citing Law School Admissions Council, Archive: 2000-2015 ABA End-of-Year Summaries—Applicants, Admitted Applicants & Applications, <https://www.lsac.org/archive-2000-2015-aba-end-year-summaries-ap>

rights and security of position.⁷ Both accreditation authorities and powerful bar associations were placing tremendous pressure on law schools to expand experiential educational opportunities for students,⁸

licants-admitted-applicants-applications (last visited July 25, 2019).

⁶ Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 309, 330 (2012) (“During this time, the average salary for a full professor grew from \$101,600 in 1998 to \$147,000 in 2008, a 45% increase.”) citing Jack Crittenden, *Why Is Tuition Up? Look at All the Profs*, NAT’L JURIST, Mar. 2010, at 40, 40. Crittenden based this calculation on voluntary salary surveys administered by the Society of American Law Teachers (SALT). *Id.* The 1998 survey compiled information provided by 95 of 196 surveyed schools, a 48% response rate, plus salary information for two law schools in publicly available documents. 2008-09 SALT Survey, SALT EQUALIZER, Mar. 2009, at 1, 1, available at http://www.saltlaw.org/userfiles/SALT_salary_survey_2009.pdf.

⁷ Melissa H. Weresh, *Best Practices for Protecting Security of Position for 405(c) Faculty*, 66 J. LEGAL EDUC. 538, 541 (2017) (“Therefore, in 1996, the ABA revised the standard, now renumbered as 405(c), to incorporate the ‘shall’ language, noting that ‘full-time clinical faculty members must be afforded a form of security of position reasonably similar to tenure, and non-compensatory prerequisites reasonably similar to other full-time faculty members.’”); Bryan L. Adamson, *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 36 J. LEGAL PROF. 353, 374 (2012) (“Based on the 2007 CSALE survey, tenured or tenure-track clinical faculty members comprise 27% of all full-time clinical faculty nationally, and 48% of all ABA accredited law schools employ at least one tenured or tenure-track clinical faculty. Clinical faculty who report being employed on the tenure and tenure track have governance rights identical to other tenured and tenure-track faculty members: 100% of tenured clinical faculty reported voting on all matters of faculty governance.”); Todd A. Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for “Practice-Ready” Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U. J.L. & POL’Y 129, 137 (2013) (“Approximately 13 percent of clinical law professors are employed under a clinical tenure-track model, and 21 percent of full time clinical faculty are employed on long-term contracts. Excluding clinical fellowships, which make up an extremely small part of those teaching in law school clinics, 15 percent of all clinical faculty are employed on short-term contracts.” (Citations omitted.)); and Minna J. Kotkin & Dean Hill Rivkin, *Clinical Legal Education at a Generational Crossroads: Reflections from Two Boomers*, 17 CLINICAL L. REV. 197, 201 (2010) (“The number of clinical teachers has risen dramatically. At many schools, there is now a critical mass of colleagues. They occupy positions that are, more or less, secure.” (Citations omitted)).

⁸ Cheryl Rosen Weston, *Legal Education in the United States: Who’s in Charge? Why Does It Matter?*, 24 WIS. INT’L L.J. 397, 415, 419 (2006) (describing ABA’s influence as the accrediting body for law schools, and stating that “[t]he external pressure for emphasis on skills teaching has been a modern constant”; “The combined result is pressure on faculty and students to direct curricular focus in three areas: substantive courses tested on the bar exam, skills courses making students practice-ready, and substantive courses in specialty areas.”); Adele Bernhard, *Raising the Bar: Standards-Based Training, Supervision, and Evaluation*, 75 MO. L. REV. 831, 837–38 (2010):

In part as a result of the MacCrate Commission’s work, law schools offer more skills-based courses than they previously offered. Almost every student studies trial advocacy or enrolls in an interviewing and negotiating course. More schools make available experiential education opportunities where students can practice law under skilled supervision while still in school. Although change in the law school curriculum has not been as rapid or as pervasive as many law professors have desired, the Commission’s identification of the essential lawyering skills and values has enormously impacted law school education. (Citations omitted).

and suddenly everyone was hiring.⁹

Until they weren't.

The national law school enrollment downturn in 2011 has been widely documented,¹⁰ but the fallout for clinical programs was especially painful to witness. Following the old rule of last in, first out, members of the national clinical community witnessed the shuttering of clinics and clinical programs old and new,¹¹ a return to the marginalization of clinical faculty members,¹² and the retraction of clinical hiring to a trickle.¹³

But we did not talk about it much. Maybe we were embarrassed, ashamed. We might have worried that we were the only ones. Maybe we did not want to make our schools look bad. A fall in the rankings could be irreversible in such tough times. Maybe all of the above. And so we checked the audacity that made us hold our heads so high just a few years prior and put them down again, our step a little more timid

See also David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 206 (2003) (discussing research conducted by David A. Binder during 2000-2001, which “consisted of a survey of 407 lawyers [where] sixty percent of these lawyers reported that they received no practice or rehearsal training before taking their first deposition [and] half reported never having reviewed with a more senior litigator a transcript of a deposition that they had taken.”).

⁹ Debra Cassens Weiss, *Study Partly Blames Higher Law School Tuition on Forty Percent Leap in Faculty Size*, A.B.A. J., Mar. 10, 2010, http://www.abajournal.com/news/article/study_blames_higher_law_school_tuition_on_40_leap_in_faculty_size (“Law school faculties have increased an average of 40 percent over the last decade.”).

¹⁰ See, e.g., Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES (Jan. 30, 2013), <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html> (stating that applications to law school were “heading for a 30-year low” in 2013); Mark Hansen, *Law School Enrollment Continues to Drop, and Experts Disagree on Whether the Bottom Is in Sight*, ABA J., Mar. 2015, at 64 (stating that “enrollment at ABA-accredited law schools fell again in 2014 . . . It was the fourth straight year in which law school enrollment dropped after peaking in 2010”).

¹¹ Claire Botnick & Cort VanOstran, *Practice Makes Perfect: New Practitioners' Perspectives on Trends in Legal Education*, 53 WASH. U. J.L. & POL'Y 135, 143 & n.22 (2017) (stating that “tightening budgets and limited resources make clinical programs vulnerable to cost-cutting,” citing Peter A. Joy, *The Cost of Clinical Legal Education*, supra note 6).

¹² The percentage of traditional tenure/tenure track clinical positions declined from 31% in the Center for the Study of Applied Legal Education 2010-11 survey and 46% in 1998. CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION, THE 2016-2017 SURVEY OF APPLIED LEGAL EDUCATION, http://www.sale.org/files/Report_on_2016-17_CSALE_Survey.pdf (2017); Debra Pogrud Stark & Christine Hunt, *Re-Imagining Law School Clinics: Leveraging Resources to Do More, for More, Under A Hybrid Model*, 43 OKLA. CITY U. L. REV. 129, 148 (2019) (stating that “if a clinical professor wants pay on par with the doctrinal faculty and tenure status, he or she may be expected to engage in very time-consuming, traditional forms of scholarship”).

¹³ In 2013, there were eleven tenure-track hires of clinical professors. Two years later, there were only three. PrawfsBlawg, *Entry Level Hiring –PhDs and Clinical Hires*, <https://prawfsblawg.blogs.com/prawfsblawg/2018/05/entry-level-hiring-2018-phds-and-clinical-hires.html> (May 21, 2018).

as we began to bury our dead, both literally and figuratively—our colleagues and our clinics alike.

THE DEATH OF THE LEWIS & CLARK LEGAL CLINIC

Nothing embodied this downturn more to me than the quiet closing, in 2015, of one of the oldest and most well-respected law school clinics in the Pacific Northwest.¹⁴ Founded in 1971, the Lewis & Clark Legal Clinic was located in downtown Portland and provided debtor-creditor, landlord-tenant, and family law services, including a significant amount of work representing victims of domestic violence.¹⁵ The clinic was founded in 1971, and together its full-time faculty, Dick Slottee, Teresa Wright, and Mark Peterson had spent approximately fifty years combined at Lewis & Clark.¹⁶ All had security of position; Professor Slottee, the clinic director, had regular tenure. The clinic served approximately 230 low-income and indigent clients per year and involved 35 to 70 students.¹⁷

The summer before the Lewis & Clark Clinic was closed, the law school had touted the clinic's work in *Advocate Magazine*.¹⁸ In the words of one Lewis & Clark alumna, "The value derived from the Lewis & Clark Legal Clinic is immeasurable. It teaches practical skills and it provides students a special opportunity to put the legal theories we learn in an abstract manner in the classroom into practice . . . The focus is on the students and the students are wholly supported."¹⁹

According to the Lewis & Clark Law School dean at the time, Jennifer Johnson, the decision to close the clinic was driven by budget constraints. The Lewis & Clark Legal Clinic was the only clinic at the law school funded with hard dollars.²⁰ In her letter to the law school's alumni, the dean indicated that the goal was to offer lawyering skills and opportunities "for all students in a cost effective manner" and stated that "Going forward, we must focus our in-house clinics on those with significant fund raising potential," while asserting that "current budget realities-for both the law school and our students-make this move necessary."²¹ The rumor was that Lewis & Clark had

¹⁴ Jeff Manning, *Lewis & Clark Law School closes downtown legal clinic, cites enrollment, revenue decline*, THE OREGONIAN (Sept. 18, 2014), https://www.oregonlive.com/education/2014/09/lewis_clark_law_school_closes.html,

¹⁵ Melodye Finnemore, *Pioneer in Practical Skills*, ADVOCATE MAG. (Summer 2014), <https://law.lclark.edu/live/news/26151>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Email from Kathy Hessler to lawclinic@lists.washlaw.edu (September 21, 2014 12:11 p.m.) (on file with author).

²¹ Letter from Jennifer Johnson to Lewis & Clark Law School Alumni (Sept. 3, 2014)

an unexpected million-dollar shortfall and had already significantly cut the library budget (the largest budget item other than personnel), and so moved to the next largest item in the budget: the law school's clinic. True or not, Johnson's own framing of the decision exclusively as a financial one was worrisome. The same year that the decision was made to close the Lewis & Clark Legal Clinic, Robert Kuehn of Washington University Law found that offering clinical opportunities to law school students has no net impact on tuition and concluded that offering clinical opportunities to students is determined by the law school's will to offer such opportunities to students.²² But the precedent had been set.

As law schools considered how to balance their budgets and keep the lights on during the worst downturn in law school enrollment in modern history, it was natural that some administrators were tempted to conduct a casual analysis and conclude that high enrollment courses were the answer and try to cut costs by reducing smaller experiential courses. However, a familiarity with effective pedagogies and the comprehension and retention yields of various methods reveals that not all courses are equal when it comes to learning outcomes.²³ The value of courses and teaching methods should not be measured predominantly by teaching or staffing inputs, but rather by learning efficiencies, efficacies, and outcomes. After all, if we hold ourselves out as educators, we owe it to our students to have a reasonable familiarity with effective educational methods and to utilize and prioritize those, rather than continue to offer course and curricula designs that have been scientifically proven by study after study to be ineffective.

Even if one is not motivated by effective pedagogy, from a business perspective, we know that students care about clinics. A survey at the time indicated that clinics and externships are one of the most significant factors students consider when deciding where to attend law school (location and scholarship are the only two factors more important than clinics/externships according to the survey).²⁴

After the decision to close the Lewis & Clark Legal Clinic was

(on file with author).

²² Robert Kuehn, *Pricing Legal Education*, 92 DENV. U. L. REV. 1 (2014-15).

²³ John Dunlosky, Katherine A. Rawson, Elizabeth J. Marsh, Mitchell J. Nathan, & Daniel T. Willingham, *Improving Students' Learning with Effective Learning Techniques: Promising Directions from Cognitive and Educational Psychology*, PSYCH. SCIENCE IN THE PUB. INTEREST 14(1) 4, 26 (2013).

²⁴ In May 2013, the Law School Admission Council published survey results in its newsletter showing that clinics/internships are ranked third (tied with bar success) behind location and scholarships in a list of highest ranked factors prospective students consider important in choosing a law school. The original newsletter was posted at [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/may_2013_lsr.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/may_2013_lsr.pdf), but the link is no longer live.

announced, another Lewis & Clark faculty member, Kathy Hessler, sent an email to the national clinic listserv informing the members of our community.²⁵ I expected a national outcry, a carefully and passionately coordinated response to try to save the Lewis & Clark Legal Clinic, but just eight emails were copied to the listserv in response, most conveying condolences. Even though Hessler noted that the closing of the clinic was part of a larger trend and suggested that “[W]e as a community might need to discuss how to address the loss of clinic seats, and access to low income services, resulting from the changes occurring in law schools,”²⁶ no larger conversation emerged at that time. Instead, it was suggested that CLEA, the ABA, or AALS might want to take action and it was pointed out that the theme of that year’s conference was the effect of the “new normal” on clinical legal education.²⁷ That was it.

At the Northwest Clinical Conference that year, it felt like we were attending a wake. Clinicians whispered about clinic closings and retirements elsewhere in the region. We tried to rally as we voted to send a letter to the Lewis & Clark dean expressing our deep concern over the decision. That letter was signed by 36 faculty members from all six of the other law schools in the Northwest U.S.²⁸ The letter assumed a positive tone, (1) praising Lewis & Clark for its program of legal education with the clinic at its core for over four decades, (2) reminding the dean of education trends with experiential learning playing a prominent role in 21st century legal education, and (3) expressing concern for the students, clients, and faculty of the Lewis & Clark Legal Clinic.²⁹ Despite the positive tone, the entire undertaking felt futile and depressing and we heard nothing more other than a sharp response from Dean Johnson, copied to our respective deans.

At the time, I posted about the experience on the Clinical Law Prof Blog with a line adapted from T.S. Eliot’s “The Hollow Men”: *This is the way a clinic ends. This is the way a clinic ends. This is the way a clinic ends. Not with a bang, but with silence.*³⁰

It was the first time I had felt disappointed in the clinical community. I don’t know why, but I had come to believe that we could do anything together. But maybe everyone was too busy trying to save

²⁵ Hessler, *supra* note 20.

²⁶ *Id.*

²⁷ Email reply from Alexander W. Scherr to Kathy Hessler and lawclinic@lists.washlaw.edu (Sept. 22, 2014; 10:37 a.m.).

²⁸ Letter to Dean Jennifer Johnson, Lewis & Clark Law School, from Bryan Adamson, et al. (Dec. 2, 2014) (on file with author).

²⁹ *Id.*

³⁰ Warren Binford, “The Death of a Clinic,” Clinical Law Prof Blog (January 11, 2015), https://lawprofessors.typepad.com/clinic_prof/2015/01/the-death-of-a-clinic.html.

their own clinics. I know we were.

BATTLES AT HOME

Despite the almost three-million dollar endowment for our program, the newly renovated building, the tenure lines for our clinical faculty, and the significant expansion of our clinical offerings since 2005, a new administration arrived at Willamette Law in 2013 simultaneously with the national drop in law school enrollment. Suddenly, I found myself having to fight battles of my own. After overseeing the launch of seven clinics, the party abruptly ended. In three years, I buried three.

Well, technically, I did not bury them. Keeping in mind that the average tenure of a law school dean was 2.8 years on average, and thanks to tenure and the Clinical Law Program endowment, allies on and off campus assured me that if I just put my head down, kept my eyes wide open, and my boots marching straight ahead, I could outlast the administrative assault by quiet perseverance, if nothing else. So I sadly and discreetly put the three clinics on life support, and marched on.

Then Gwynne died. It was one thing for them to come after my clinic or the Law & Government Clinic run through a partnership with the Oregon Department of Justice. We would still be here when the administration eventually changed hands again and we could decide whether to relaunch then. But Gwynne was not there to defend herself, her clients, her students, her cases. This was her legacy. In her near decade at Willamette, she had created an internationally recognized human rights clinic that had a profound impact on countless students and changed the course of dozens of clients' lives, many of whom still had cases pending. It was hard enough to bury a clinical colleague. There was no way I was going to bury her legacy alongside her. The suggestion that we shut down Gwynne's clinic unleashed a scorched earth fury in me.

When academics fight, including clinicians, our weapon of choice is knowledge, so I immediately began researching everything I could get my hands on to help defend Gwynne's clinic and ensure that we would manage the transition ethically: academic articles, ethics opinions, practice guides. I called colleagues at other schools, the Oregon State Bar, and practicing attorneys. I printed checklists for closing law practices and taking over clients. But I found nothing—nothing, about what to do when a clinical colleague dies, as distinct from a private attorney. That dearth of knowledge, that gap in the clinic lifecycle line of scholarship matters because law school clinics are not like other law practices. There are more complex ethical obligations in the law

school clinic setting than in a traditional private practice, more interested parties to consider, as well as more political challenges to navigate.

Take, for example, an ethics decision from the North Carolina Bar during the closing of the Charlotte School of Law.³¹ In that case, the law school terminated the employment of the clinicians overseeing the students' case work.³² The clinic director, who was not a North Carolina attorney, told the clinicians that InfiLaw, the corporate parent of the law school would take responsibility for the active cases.³³ According to the North Carolina bar, the attorney-client relationship was between the individual attorneys (the clinicians) and the clients. Thus, the clinicians had to maintain responsibility for the clients and their files during the transition from their employment and maintain confidentiality throughout the process.³⁴ Accordingly, they could not reveal any confidential information to the law school, the clinical law program director, or InfiLaw.³⁵ Clear lines had to be drawn between the non-attorneys and the attorneys and their clients, and these lines are difficult for law school administrators to understand, especially when they view themselves as the employer and supervisor of both the clinic administration and faculty, and the ones writing the checks every month.

The implications of this decision for clinicians are potentially game-changing. Does this mean that we need to negotiate our employment contracts to include terms addressing what happens to our clients if we resign, are terminated, or die? If we accept new employment with a law school in a different region, does this mean we might have continuing obligations to the clients at our former law school, especially if the law school refuses to hire an attorney to replace us? Who would compensate us for that continuing representation, whether transitional or ongoing—the old law school or the new one? Would we have to pay for it ourselves? Does this mean that we should be negotiating compensation and reimbursement for expenses in case these circumstances materialize or build our exposure into our overall compensation packages? In the corporate world, they call the exit provisions a “Golden Parachute,” and describe the compensation an executive receives for doing nothing upon their departure. What would we call just the opposite in the clinical world—still having all of the

³¹ *Duties of Supervising Lawyer for Charlotte School of Law Clinic*, North Carolina Bar Ethics Dec. 2017-1 (Jan. 27, 2017).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

responsibility for our clients, but without pay, students, or even resources to cover the expenses—the “Leaden Anvil”?

SLEEPLESS NIGHTS

There are so many questions about lines of authority and responsibility among a clinic, its supervising attorneys, the clinical law program, its administrator, the law school, the deans, and the law school faculty. Some of the answers were easy, but I could not find clear answers readily available to many of the most pressing questions following Gwynne’s death. They began swirling in my head and keeping me up at night:

- Do we have any obligation to continue to offer a clinic after the death of the clinician who created it? If we do not have that obligation, who makes the choice about whether or not the clinic should continue to operate: the clinic administrator, the law school faculty, the dean? If we do have that obligation, to whom is that obligation owed: the clients, the students, the larger community we serve, the faculty who voted to create the clinic or hire the clinician in the first place, the law school?
- Does the clinic have a continuing responsibility to a deceased clinician’s students? Does that responsibility differ between students currently enrolled in the clinic and those who came to the law school because of our clinic offerings?
- Does the clinic have any continuing responsibility to the clients? If so, what is the nature of that responsibility? Must we continue to represent them? Must we simply find them new representation? If the latter and the clients have limited means, must the new representation be pro bono? Do we have a heightened ethical responsibility, explicit or implied, given the types of clients we serve and the prejudice they might experience should we terminate our representation?
- Who can terminate a particular client representation after a clinician dies? Is that a decision that should be made by the clinic administrator? What if a dean wants the client representation terminated? Can they force the clinic administrator to terminate clinic clients? What if the clinic administrator refuses to do so? Can the law school administration take employment action against the clinic administrator? To whom can the clinic administrator turn for recourse: the law school faculty, the university administration, the state bar, the ABA, AALS, the media?
- Are the clients to be viewed as clients of the deceased clinician or the clinic or both? Does it matter what the practice area is?
- If a law school dean asks for a list of a deceased clinician’s cases and a report on their status, must a clinic administrator give it to them? Can they do so ethically? What if the dean is not an attorney?

EMPLOYEE CONFIDENTIALITY

It was not just the issues around the case management that kept me up at night. There were employment ones, too. One of the first challenges following Gwynne's death was defining the scope of my authority and responsibility for her records. For example, when an attorney dies, regardless of whether you are winding down or transferring their practice, you have to gain control of their records related to clients, including electronic documents and emails. If you are at a law school where the dean is not an attorney, they might not appreciate the fact that the law school administration is not part of the firm and so does not have authority to access client files.³⁶ This means that only those who are part of the law firm (the law school clinic), can normally access those records. At the same time, the clinic supervisor—whether director or dean—might have authority to access the clinician's documents and emails unrelated to the clinic (such as correspondence with students from other courses or confidential human resources matters), but they might not, depending on the scope of their supervisory authority.

Gwynne and I have both been fortunate to be on a fairly integrated faculty. We have taught numerous non-clinical courses and had other responsibilities outside of the clinical law program. While I was her direct supervisor in clinical matters (and for the record, that was never our dynamic—if anything, she told me what to do and I often gladly obliged!), I was not her direct supervisor for her non-clinical courses, her scholarship, her service, and her administrative work (such as her period as externship director). This meant that I had no inherent authority to access, review, and process those non-clinical records, and frankly, I did not want the responsibility. Thus, after several weeks, the university and I eventually agreed to have a technology support person segregate client-related documents on Gwynne's computer, electronic files, and email correspondence. It would have been great to be able to anticipate the need for this approach from the beginning rather than lose precious weeks negotiating with university administrators to allow me access at all and then to define the appropriate scope of access and method for implementing the transfer within that scope. Those weeks spent trying to figure this all out were spent under that shadow of fear that a critical email was being missed from a client in the lurch, and that stress could have been avoided, and less stress is always great, but especially so in the midst of mourning the loss of a friend and colleague.

³⁶ *Id.*

PROTECTING CLIENT CONFIDENTIALITY

Even after that challenging dialogue early on, a similar issue arose at the end of our first semester without Gwynne, when one law school administrator directed the adjunct professor who had run Gwynne's clinic that semester to prepare for him a list of clients and their status. Fortunately, the adjunct copied me on the email and memo and I was able to immediately direct the administrator not to open the memorandum, explaining that it contained confidential client information and he was not part of "the firm." He pushed back so hard on the concept of his limited authority with regard to the clinic that I was compelled to enlist the help of the university's general counsel, the Oregon State Bar, ABA ethical opinions, and the authority of deans from other law schools before he agreed not to read the memo.

In talking to the adjunct about her decision to send the law school administrator the memorandum, she explained that he had asked for it and she was just trying to do what she was told and assumed that the law school administrator had rights of access to client records since it was a law school clinic. Although she was an experienced attorney with years of law firm experience, this was her first experience teaching, let alone practicing, in a law school setting and she truly never considered that the "firm" did not extend to the law school administration (other than the clinic director). A law review article that addressed the deconstruction of a law school clinic might have helped me to do a better job onboarding new faculty, part- or full-time, who were brought on to help transition a clinic during a transfer or closing so that this conflict, which consumed a significant amount of time, energy, and goodwill, could have been avoided altogether.

ARRANGING FOR SUBSTITUTION OF COUNSEL

But the most perplexing of issues was the question of who would be the attorney of record for Gwynne's clients after her passing. The administration was pressuring me to close her clinic and fire her clients, but I was determined not to let that happen. Gwynne had been representing a child rape victim of the Boko Haram who had a very promising asylum claim pending. Were we willing to fire that client? Of course not.

The year was 2018 and immigration and asylum attorneys were already overwhelmed with pro bono requests and commitments as a result of the Trump Administration's war on migrants—including refugees and immigrants. We would be hard pressed to find anyone to take on the active clients remaining on Gwynne's docket, and everything about it felt wrong on a core level.

When Gwynne first created her “International Human Rights Clinic” in 2008, we agreed that 80 to 90 percent of the cases would be discrete enough that students could serve in the role of lead counsel, and 10 to 20 percent would be more complex, such as human rights reports and impact litigation. In thinking about the best kinds of human rights cases for a student to handle as lead, Gwynne decided that affirmative asylum cases would make the most sense. They provided rich interviewing and fact investigation opportunities, research experience, and hearing practice, all within a relatively short period of time. At that point, affirmative asylum cases were being decided in six to twelve months, which meant that a student could see a case through from beginning to end within 2-3 semesters. However, by the time of her passing almost a decade later, we had cases that had been pending for three to four years. Fortunately, the Trump administration decided to hire additional asylum hearings officers in order to clear the backlog of cases, which gave me the ability to go to the law school administration with a plan: many of Gwynne’s cases would be heard on a more expedited basis, which meant that the law school’s financial commitment to staffing supervision on many of her cases would be shorter term. They agreed to hire a part-time faculty member to “wind down” her clinic with the understanding that we were prohibited from taking on any new clients. But whose clients would they be now?

At first I tried to transfer the clients to the Clinical Law Program as an entity, so that we could be flexible in how the cases were supervised. I did not know who would be supervising Gwynne’s cases from one semester to the next and I did not want to file substitutions of counsel three times a year (at the start of the fall, spring, and summer). Almost immediately, I learned that entities cannot represent legal clients, only people can. How did it take me almost 20 years to learn that lesson? During my eight years at Pillsbury Winthrop Shaw Pittman, there was never any question that the clients belonged to the firm, not some lowly (but fortunately, well-paid) associate. At most, it was an intersection between attorney and firm, and I distinctly recalled the 2004 California Supreme Court decision that sanctioned both a departed attorney of record and his former firm when no one appeared for a court appearance.³⁷ Even then, the California Supreme Court held that the law firm was the attorney of record, rather than the attorney who was a former employee of the law firm.³⁸ To say that only the individual attorney of record was responsible for a client had

³⁷ *In Re Raul V. Aguilar and Allen J. Kent on Contempt*, No. S099667 (Ca. Sup. Ct. Sept. 23, 2004) (stating “Although we agree with Kent that the law firm. . . was the formal attorney of record. . .”).

³⁸ *Id.*

mind-blowing ramifications, especially in the law school clinic setting.

If that were so, technically, the law school clinic would be off the hook entirely with respect to Gwynne's clients. Or would we? Did we have other obligations beyond "attorney of record," not only to the clients, but to the students, the curriculum, the law school, the larger community that had come to depend on our services? How were we to prioritize those obligations during a national downturn in law school enrollment when many, if not most, law schools were already struggling to stay in the black and not drop in the rankings?

What about when a clinician quits or is fired? Under this practice model, would they still be responsible for clients after they left a law school regardless of circumstances? If the clinic doesn't have a responsibility to represent the client and the law school is not part of "the firm," then whose responsibility is it—the clinician's remaining colleagues? Does it matter that the law school benefited from all of the great work of the clinician in terms of recruiting, public relations, and more? Does it matter that our law school clinic had eligibility guidelines such that we actively sought to serve clients who were financially disadvantaged and that the kinds of clients we sought and accepted could not easily find another attorney to take over their case on similar terms?

ABA Formal Opinion No. 99-414 makes clear that it is the ethical responsibility of the attorneys remaining at the firm, as distinct from the firm as an entity, who are responsible for ensuring that transitions do not negatively impact the clients.³⁹ What this means is that the *remaining clinicians* bear a disproportionate ethical responsibility to clinic clients compared to the law clinic as an entity, let alone the law school. And that is how I became attorney of record for all of Gwynne's clients, in addition to all of my own. The part-time faculty members we hired were unwilling to assume the risk of being responsible for the clients beyond the few weeks of their contracts especially for the small amount of compensation that adjunct faculty are paid.⁴⁰ The law school was unwilling to make a longer term or bigger financial commitment to staffing the clinic other than with adjuncts. So with some gumption and risk and an unerring belief that if you do the right thing, God or Allah or Jehovah or the Universe or Mother Nature or whatever it is that keeps the earth from spinning off its axis,

³⁹ See, e.g., *Ethical Obligations When a Lawyer Changes Firms*, ABA Formal Opinion No. 99-414 (September 8, 1999) (explaining that both the responsible attorneys who remain at the law firm and the departing attorney owe ethical duties to clients to ensure that the client is not adversely affected by the attorney's departure).

⁴⁰ This is not unique to Willamette. See, e.g., Joy, *The Cost of Clinical Legal Education*, *supra* note 6 at 321 (noting that adjuncts are "often paid at a small fraction of the rates of full-time faculty").

will send some good mojo to make sure that you don't regret doing the right thing (at least not very often), I substituted myself in as counsel for Gwynne's clients—all of them. Gulp.

A CALL FOR A MORE OPEN CONVERSATION AND SCHOLARSHIP AROUND DEATH

But what can really empower us as much as faith and goodwill is planning, really good planning. This essay is not about just one or two law schools. These are challenges that many of us are facing and will continue to face as clinical faculty continue to gray. More clinicians will die. Some will become disabled. Others will resign. A few may be terminated. Clinics will continue to be born. Some will be renovated. All will eventually die. It is the natural cycle of life. It is past time for our community to recognize this reality and to start to produce scholarship that will enable us to plan for the inevitable. It is time for us to stop feeling shame in being associated with a clinic that is closing.⁴¹ We need to move away from hushed whispers in back hallways at conferences with other clinicians deemed safe. We need to tackle this issue head on and outline strategies for succession planning and clinic closures to ensure that our colleagues who are in the midst of the pain of the death of a clinician or the death of a clinic or both, have access to the answers and wisdom they need to navigate these perilous waters. It is that relevance to the reality of our daily lives practicing law within the academy that makes clinical scholarship such a source of strength to us all.

And what about Gwynne's clinic? It has been four semesters since she stopped teaching and three since she passed. Her office still sits empty, and her students still come by and talk about what a difference she made in their lives. Her cases are still being covered, and in the decisions issued thus far, almost all of her clients have prevailed, including the rape and kidnapping victim of the Boko Haram. We have two adjunct professors signed up to cover her clinic again this year. The recent jump in national enrollment after the last presidential election has us a little flush. The administration has stopped fighting with me to close Gwynne's clinic and has listed the Child and Family Advocacy Clinic on the fall semester course offerings. At the last faculty meeting of the year, the dean announced that he will be stepping down, and last week, the chair of our hiring committee reached

⁴¹ I note with gratitude the contribution that Jennifer Lee Koh is making to this area of scholarship with her essay, *Reflections on Elitism after the Closing of a Clinic: Pedagogy, Justice and Scholarship*, which can be found later in this volume at page 263. In her eloquent essay, Koh describes with grace and openness the impact of the closing of the Western State College of Law on her students, clients, and community.

out to say he understood that we needed to hire a new clinician to replace Gwynne. So keep your fingers crossed: maybe it is not the death of this clinic after all.