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Introduction: Defining Clinical Scholarship [comments]

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INTRODUCTION: DEFINING CLINICAL SCHOLARSHIP

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Even a cursory reading of the articles in this volume shows that clinical writing is flourishing. The *New York Law School Law Review* has brought together works representative of the current scholarly production of clinicians. Only one other law review issue comes to mind as a compilation of a similar body of writing.[1] The papers in both collections were first presented, respectively, at the first and second UCLA-University of Warwick International Clinical Conference, a highly successful effort devoted specifically to the development of clinical scholarship. These two collections and the conference reflect the new stage at which we have arrived in the relatively short, twenty-year history of clinical education.[2] This relationship between the clinician and scholarly work product has steadily matured. The purpose of this brief introduction is to comment on that phenomenon.

Among legal educators there is no group more introspective than clinicians. We examine the role we have assumed within academia. We have lengthy debates on how we shall carry out our teaching responsibilities. To many in and outside our ranks, teaching methodology and clinical education are synonymous. A good deal of our energies are aimed at assisting our students in developing their skills of self-reflection, their ability to analyze critically what they do as lawyers. Among ourselves, we continue these reciprocal critiques and self-critiques, often to such an extent that to nonclinicians, it appears we are conducting an exercise in collective masochism. But that is not the case. Rather, it is our

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1. *See Symposium: Clinical Education*, 34 UCLA L. REV. 577 (1987). While there have been several compilations of articles on clinical education in the last twenty years, only this *New York Law School Law Review* issue and the UCLA volume seem dedicated solely to the dissemination of clinical scholarship. *See* Alfieri, *Essay: The Politics of Clinical Knowledge*, 35 N.Y.L. SCH. L. REV. 7, 7 n.1 (1990) (listing various recent law review issues dedicated to clinical education).

2. Another effort devoted to clinical scholarship is the Columbia Law School Clinical Theory Workshop, begun several years ago by Professor Stephen Ellmann. During the current academic year, six papers are being written for presentation at the Workshop.

pedagogical commitment to producing a law graduate who will be a better, wiser, more effective, efficient, and humane lawyer that impels us to scrutinize our activities to the extent that we do.[3]

That normative theme goes to the heart of one of our most heatedly debated current subjects of self-reflection: Should clinicians produce scholarship? From this threshold question flow other key concerns. If it is found that they should, what kind of scholarship should it be and at whose expense will it be produced? Will law students and the clients they serve be shortchanged because clinicians have less time for clinical supervision?[4] Will law schools facilitate clinical scholarly work by appropriately recognizing the physical and emotional limits of clinicians? These issues should be considered as you read and digest the papers in this volume.

Most of our discussions of these questions have been defensive in nature.[5] The tenor of the debates has been shaped by the circumstances that instigated them. One question is, "Why don't or can't clinicians publish?" The message asserted by the traditional academics is, "If clinicians want tenure or comparable job security, they must write. If they can't write, they are not our equals." If clinicians want a place in academia, they simply have to write.[6] I wish to change the tone of our

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3. One of the exhilarating experiences for me in attending many gatherings of clinicians over the years has been the opportunity to feel the genuine concern for the student. It is universal and often eloquently expressed. It is what causes us to examine and criticize what we do, what we say, what we teach, and as this issue shows, what we write. *See generally* Alfieri, *supra* note 1.

4. *See generally* Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343 (1989) (The paramount duty of law schools is to educate students to be competent practitioners. To the extent the scholarly mission exhausts limited resources, it undermines that dominant responsibility.).

5. For the most part, these clinical debates have been informal and recorded principally in the *AALS Clinical Section Newsletter. See, e.g.*, Hoffman, *Message from the Chair*, AALS SEC. CLINICAL LEGAL EDUC. NEWSL., March 1987, at 1, 2 (a hortatory call for scholarship so that we will be judged as "equals"); Palm, *Message from the Chair*, AALS SEC. CLINICAL LEGAL EDUC. NEWSL., Sept. 1986, at 1 (a very thoughtful discussion of such important issues as: How will it be funded? What should it be? What effect will it have on the quality and quantity of clinical teaching?); Simon, *How to Be a Scholarly Clinician?*, AALS SEC. CLINICAL LEGAL EDUC. NEWSL., March 1987, at 20 (a useful how-to-do-it guide); Strong, *Message from the Chair*, AALS SEC. CLINICAL LEGAL EDUC. NEWSL., March/April 1990, at 3 (a comment on the evolution of our oral tradition to a scholarly tradition). *See also* the comments of Elliott Milstein, Kandis Scott, and Philip Schrag, in *Panel Discussion, Clinical Legal Education: Reflections on the Past Fifteen Years and Aspirations for the Future*, 36 CATH. U.L. REV. 337, 360-64 (1987) (discussing the notion of traditional scholarship by clinicians); and most especially, David Barnhizer's article in this collection. *See* Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. SCH. L. REV. 87 (1990).

6. *See* Barnhizer, *supra* note 5, at text accompanying notes 121-46. Professor Barnhizer presents a strongly worded critique of any clinician who even thinks about resisting the need

discussion of the scholarship question. We are past the defensive stage and now may consider these issues from a different and more positive vantage point.

Much is unique about clinicians' perspective on the law, lawyering, and learning how to be a lawyer. It is this uniqueness that some of the recent clinical scholarship is beginning to illuminate. We should applaud these scholarly pursuits (which I am doing here) and encourage them (which most usefully must be done by our nonclinical law school administrative and academic colleagues). Unlike the lawyers who do not teach or have time to reflect, let alone write, or the nonclinical teachers who do not do any lawyering, the clinician does or at least could do all of these things. This is where our scholarly potential lies.

A few comments about two of the papers in this volume, the Hartwell and Peters' articles, will help me make my point.[7] These articles usefully illustrate the naturalness of the process of creating clinical scholarship. Both demonstrate vividly how such scholarship flows directly from live-client clinical supervision. It is that process that best defines clinical scholarship.

Steven Hartwell's article[8] is a clinician's multidimensional response to an issue directly related to the concern for producing better and more humane lawyers — namely, should a clinician try to influence the role that morality plays in the life and practice of the lawyer. The question arose directly from his supervision of a student in a live-client clinic. He researched related philosophical and psychological materials, in particular, Kohlberg's theory on moral development.[9] After developing tentative interdisciplinary theses about the relevance of this theory to lawyering, he took the next clinical step: how to apply the thesis in his teaching. He devised a pedagogical plan, based, not surprisingly, on experiential learning, and then carried it out. Hartwell did not stop there, but instead sought to measure empirically the impact of his pedagogy.[10]

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and appropriateness of scholarship.

7. I should add that this is not the place to summarize or review all of the articles in this issue. Tony Alfieri, in fact, does just that in his critical essay at the beginning of this volume. *See* Alfieri, *supra* note 1. These brief observations, therefore, in no way suggest a lesser importance or value in the other articles. To the contrary, each of these seven articles, diverse though they are, makes a valuable contribution to clinical education. Rather, my remarks are offered as a commentary on the process of creation of clinical scholarship.

8. Hartwell, *Moral Development, Ethical Conduct, and Clinical Education*, 35 N.Y.L. SCH. L. REV. 131 (1990).

9. *Id.* at 133.

10. Empirical research in the clinical context, under carefully designed conditions, offers wide opportunities for scholarship. *See, e.g.,* Stark, Tegeler & Channels, *The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin*, 37 J. LEGAL EDUC. 409 (1987).

While not definitive in any statistical sense, the effort reflects a clinician's sensitivity to the nexus between theory and practice. Hartwell's paper exemplifies the innovative efforts of the modern clinician who conceptualizes, implements, assesses empirically, and then analyzes. It is clinical scholarship in the best sense of our new and developing tradition.

In a similar fashion, Don and Martha Peters take a relatively straightforward proposition—that a lawyer who is more self-aware probably can become a better interviewer—and subject it to a clinician's analysis.[11] Using the Myers-Briggs psychological type indicator as a vehicle for their analysis, they posit their hypothesis about the interrelationship of psychology and skills learning theory: test it through use, observation, and study; and then analyze the results. Like Hartwell, their article reflects both interdisciplinary and empirical work. In a fascinating manner, they correlate the psychological dispositions of lawyers to two very concrete facets of interviewing skills: the ability to ask properly formed questions and the ability to listen. Doing something only clinicians usually do—videotaping initial interviews of twenty-three actual matrimonial clients (with their consent)—they transcribed the tapes and analyzed them. Their data, while concededly very limited, is striking. Among other things, it confirmed my own instincts and anecdotal observations. More importantly, it suggests some discrete methods that clinicians might use to teach interviewing.

Hartwell and the Peters personify the triple-threat clinician: the clinical educator; the lawyer (who provides important services together with clinical students to a needy client population); and the researcher/scholar. It is only in the live-client clinical context that such a multifaceted feat is achievable. Proceeding with sensitivity so as not to intrude on the lawyering function, they closely examined interviewing interactions. Furthermore, they did so in an interdisciplinary and, in one instance, a collaborative way that facilitated the compilation of empirical data that supported both their theories and possible additional research. A common denominator of both of these papers is the pursuit of ways to improve the quality of our law graduates, which continues to be the goal of clinical education generally.

Whatever were the numerous external factors that led clinicians in prior periods to publish, clinical scholarship now has its own internal force. It is evolving almost unrestrainedly, building on the openness and innovative spirit that have characterized clinical education. This scholarship moves forward on its own terms and for its own purposes. It is that genuine quest for knowledge, coupled with the desire to explore

11. Peters & Peters, *Maybe That's Why I Do That: Psychological Type Theory, The Myers-Briggs Type Indicator, and Learning Legal Interviewing*, 35 N.Y.L. SCH. L. REV. 169 (1990).

hypotheses and test theories, that is reflected in much of the current clinical scholarship. It is the same motivation that underlies traditional scholarship. The resulting richness and diversity of clinical scholarship is demonstrated in this volume.[12]

The question now is how can we maintain the development and evolution of this clinical scholarly tradition, while preserving that which is integral and valuable about clinical education—namely, the teacher closely supervising the student on a live case and exploring that experience fully and in ways that lecture or even simulation cannot possibly replicate. The short answer is we must do both. While it will not be easy, the difficulty should not deter us from making the effort.

Pluralism should be central to any response by either the clinical movement or the legal academy. Some clinicians may want to do only traditional doctrinal or theoretical analysis. At the other end are clinicians who prefer to do only clinical supervision. The latter task is not only integral to the continued lifeblood of clinical education, but it is also so different from the teaching performed by the nonclinical law professor (and one that most academics simply do not want to, or perhaps cannot, provide), that a category for the pure clinical teacher ought to be facilitated, encouraged, and certainly respected. Otherwise, it may be impossible to provide anything that approaches an adequate level of clinical opportunities. Similarly, the kinds of writing or scholarship we ask

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12. These articles by no means exemplify all of the categories of our scholarship over the last twenty years. But the coincidence of their compilation in one volume justifies, I believe, my attempt to offer this more positive perspective on the status and definition of clinical scholarship. Large categories of uniquely clinical scholarship that are not represented in this issue include innovative course materials: *see, e.g.*, G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978); M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION (1974) (both classics in clinical education); videotapes: *see, e.g.*, the ethics series produced by the University of Pennsylvania Law School Center on Professionalism, Professional Responsibility for Lawyers: A Guided Course (1990); papers with a feminist focus: *see, e.g.*, Eyster, *Integrating Non-Sexist/Racist Perspectives into Traditional Course and Clinical Settings*, 14 S. ILL. U.L.J. 471 (1990); articles integrating doctrinal and skills issues: *see, e.g.*, Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 W. NEW ENG. L. REV. 139 (1987); Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 SYRACUSE L. REV 709 (1989). Other loose categories of scholarship that are reflected in this volume include pedagogical: *e.g.*, Binder, Bergman & Price, *Lawyers as Counselors: A Client-Centered Approach*, 35 N.Y.L. SCH. L. REV. 29 (1990); theoretical: *e.g.*, Barnhizer, *supra* note 5; Alfieri, *supra* note 1; empirical: *e.g.*, 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) (an analysis of clinical education). Articles like those by Peters & Peters, *supra* note 11; Hartwell, *supra* note 8; as well as Weinstein, *Teaching Mediation in Law Schools: Training Lawyers to Be Wise*, 35 N.Y.L. SCH. L. REV. 199 (1990), defy categorization, except of course to say that all three are uniquely clinical scholarship.

clinicians to produce should reflect the nature of clinical, not traditional, legal education. In that respect, diversity, not conformity, should be the operating norm.[13] The community of clinicians, and in turn the larger world of legal educators, ought to be able to accommodate clinicians who write, those who do not, and most importantly, those whose scholarly production is as different in nature from other clinicians as it is from that of traditional legal scholars.

The goal is not to make ourselves over in the image of our traditional colleagues. We must do what we are uniquely qualified and genuinely inclined to do, and we should proceed in our typically creative, free-wheeling, and often self-critical manner, ideally free of the intellectual and emotional constraints that may have blinded us temporarily during the earlier stages of the clinical scholarship debate. By compiling this volume, the editorial board of the *New York Law School Law Review* has contributed importantly to the continued development of a clinical scholarship tradition.

13. This is not the place to debate such questions as what kinds of work will count as clinical scholarship for purposes of tenure or other forms of job security. A good start, however, would be to include at least all of the categories just noted. *See supra* note 12.