So Near and Yet So Far: Dreams of Collaboration Between Clinical and Legal Writing Programs

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I. An Experiment and An Epiphany

Once upon a time at Boston College Law School, I experimented with a new clinical model by involving some of the students in my Death Penalty class in appellate representation of a death row inmate. In particular, I offered a limited number of students in the class a clinical alternative for satisfying the course requirements. Instead of writing a research paper, they could write a petition for certiorari to the United States Supreme Court on behalf of a death row inmate seeking relief from an adverse decision by a state supreme court after a direct appeal.

Had I framed it differently, I could have offered this same opportunity as a freestanding death penalty clinic. For a variety of reasons, largely resource-related, I did not choose that option for this experiment, even though I came to see such a model as a powerful and promising potential clinic. At the same time, I had a passing realization that offering students a clinical experience that involved researching and writing a legal document seeking relief for a client-in-need could be a powerful and promising model for an advanced legal writing course as well.

1 While this was a new clinical model for me, it is not a new model in legal education generally. For example, in the 1990s Seattle University School of Law embarked upon a curricular reform that included “clinical labs,” creating a number of live-client clinical components that can be taken for additional credits in otherwise non-clinical courses. See John B. Mitchell, Betsy R. Hollingsworth, Patricia Clark & Raven Lidman, And Then Suddenly Seattle University Was on Its Way to a Parallel, Integrative Curriculum, 2 Clin. L. Rev. 1 (1995). Such options are offered through other law schools as “mini-clinics.” See Maureen E. Laflin, Our Clinic Is Growing In More Ways Than One, Clinic Chronicle, U. of Idaho College of Law (Sept. 2006).

2 In the future, I do plan to offer this opportunity as a freestanding clinic at The George Washington University Law School.

3 Others have had experiences that led to this realization as well. See Sarah Schrup, The
At times, the clinical segment of my Death Penalty class was indistinguishable from an advanced legal writing course. For example, we read and talked about the uniqueness of certiorari petitions as a form of pleading. We found and consulted the Supreme Court rules for filing them. We read and discussed the trial record together. We brainstormed legal issues for inclusion in the petition. We researched the issues and talked through our legal arguments. Once conceptualized, we did further research on the arguments, drafted them, re-drafted, and re-drafted again. We crafted a statement of facts that aided our arguments. This semester-long process concluded when we polished the petition into the form required by the rules and filed it on its due date.

Other tasks accomplished that semester were more common to clinical courses and to my classroom course in the death penalty. We discussed our relationship with the client and what it should entail. We met and consulted the client, corresponded with him, and explored both experientially and analytically the challenges of lawyering in the shadow of death. We examined the overall death penalty system and how it affects the lives of those involved in it. We considered the reliability of decisions about death, and we plumbed what it really means for a state to take life as punishment. My own development as a teacher is far greater with respect to the latter group of activities than to the former.

For the part of the course that involved the drafting and re-drafting process, I was cognizant that I was riding on the coattails of my skilled legal writing colleagues who had spent a previous year with each of my students teaching legal analysis. I was also cognizant that I had not given nearly as much thought as they had to the pedagogy of the drafting and re-drafting process — how I might offer instruction and give feedback in a way that most effectively and efficiently advanced the process of writing and revision.\(^4\) I know that my legal writing colleagues have developed considerable expertise in these very things, and late in the semester, I had an epiphany that fully supports the thesis advanced by Profs. Michael Millemann and Steven Schwinn that co-teaching by a legal writing teacher and a clinical teacher would enrich both professors’ and students’

experiences. By semester’s end, I had vividly grasped how felicitous it would have been to co-teach the experimental course with one of my legal writing colleagues, if only one of them could have been sufficiently freed from other full-time responsibilities to make such tandem teaching possible.

Admittedly, in some contexts, this can be a monumental “if.” Indeed, the “if” clause is the aspect of this vision that lends it a fairy tale-like quality. Both clinical programs and legal writing programs tend to have too few resources relative to the demands of their time-intensive pedagogies. No matter the benefits of collaboration, collaborating effectively is itself time-intensive and, correspondingly, it is a resource-laden endeavor. Therefore, the demands on the schedules of clinical and legal writing faculty may render them less able than other faculty to undertake collaborative experiments such as these.

Moreover, clinical and legal writing professors often occupy academic positions outside the tenure-track, and therefore on lower rungs of the academic hierarchy. Lower status, and the lower salary that typically accompanies it, can have a psychological impact that may make clinical and legal writing faculty reluctant to overload themselves for the benefit of an institution that they understand to underappreciate and undercompensate them. For a collaboration of the sort I envision here, these are weighty structural matters that may make virtually impossible what is otherwise eminently logical and desirable.

Yet even if an act of magic or wisdom removed these structural barriers, I have to acknowledge that helping students become better legal writers was an

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5 See generally Michael A. Millemann & Steven D. Schwinn, Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year, 12 Clin. L. Rev. 441 (2006). See also Michael Millemann’s essay in this issue, Using Actual Legal Work to Teach Legal Research and Writing, 4 J. ALWD 9 (2007).

6 Women are found disproportionately at the lower rungs of the academic ladder. See Marina Angel, Women in Legal Education: What It’s Like To Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 Temp. L. Rev. 799, 804 (1988) (“Law schools have created a new caste system, and the lowest caste is comprised of women [clinicians and legal writing instructors].”); see also Marina Angel, The Glass Ceiling for Women in Legal Education: Contract Positions and the Death of Tenure, 50 J. Leg. Educ. 1 (2000). Surveys of both clinical and legal writing professors have documented gender bias in salaries, even within their own ranks. See Robert F. Seibel, Do Deans Discriminate?: An Examination of Lower Salaries Paid to Women Clinical Teachers, 6 UCLA Women’s L.J. 541, 547-51 (1996) (comparisons both within the tenure track and within the contract track show female clinicians are paid 10-15% less than male clinicians); Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. Leg. Educ. 562, 563 (2000) (female legal writing directors are paid 80% of the salaries of male legal writing directors, and are less often granted tenure, voting rights, and other benefits).

Some percentage of these contract faculty are women of color, particularly in the clinics. Superimposing on academic status issues additional issues involving gender roles, race hierarchy, and discrimination — which among other difficulties, implicate a history of uncompensated and undercompensated labor — compounds the complexity of turning to faculty at lower formal statuses to undertake without extra compensation any time-consuming new collaborative projects, regardless of their inherent value.
incidental motivation for me in that experimental semester. I was more intent on helping them use their legal writing skills to gain insight into appellate lawyering, the peculiar institution of the death penalty, and their own professional choices and identities, and as importantly, to provide high-quality legal assistance to somebody who desperately needed it, had not yet received it, and was in a dire situation as a result. But the fact that my goals were not in any way inconsistent with the goals of improving legal writing suggests that the two sets of goals could be mutually reinforcing, that they could be put in service of each other, with the consequence being a course enriched by that synergy in the ways that Profs. Millemann and Schwinn have persuasively described.  

II. Exploration

Legal writing programs and clinical programs rely not just on classroom education but on individual education and feedback as well. This similarity is simultaneously a basis for collaboration between them and an obstacle to it. The individualized instruction necessary in each program is an important reason that both are resource-strapped, and as mentioned above, resource limitations make undertaking a time-consuming collaboration especially onerous, no matter how promising it may be.

Another similarity between clinical and legal writing programs is that both engage students in the development and application of a range of skills central to performing the work of a lawyer. Therefore, in some law schools, these programs are considered peripheral to the law school’s core curriculum.  

To clarify, the standard core curriculum of most law schools, in which most tenured and tenure-track faculty do their teaching, emphasizes the important lawyer’s skill of doctrinal analysis, as discerned primarily in the reading and interpretation of appellate cases and as logically applied to other facts. Legal writing programs, often taught by non-tenure track faculty members, also emphasize these skills, but focus in a more sustained way than most classroom courses can on the lawyer’s work of finding and using legal authority to construct legal arguments that address a problem that arises in an elaborated factual setting. Clinical programs emphasize additional lawyering skills such as fact development and discovery, strategic planning, risk assessment, counseling, decision making, and so on, typically by placing the student in the role of a lawyer representing a client on a actual legal matter of some importance and facilitating both the student’s work on the case and her reflections on the experience of representation. Originally, clinical faculty were not hired on the tenure track, although currently there is discernible movement in the direction of creating tenured and tenure-track clinical positions.
even if, as in fairy tales, my wishes all came true and every law school miraculously came to regard and support both programs as richly as they deserve, I fear that clinical and legal writing programs would still experience difficulties in collaboration beyond their mere wish for involvement in a joint venture.

To my eyes, there are differences between clinical programs and legal writing programs that pose obstacles to their collaboration perhaps as formidable as thin resources. Stated simply, these differences relate to history, culture, and politics which, of course, are interconnected and overlapping. I will quickly sketch their contours.

Legal writing programs and clinical programs grew out of different sets of conditions. Clinics are the descendants of Jerome Frank’s school of legal realism.9 Progressive legal activism in the 1960s and 1970s, tied to the War on Poverty, the civil rights movement, and other political organizations and fueled by a responsive court system,10 led to the availability of private funds for the development of law school clinics to provide legal services to the poor.11

Many clinic faculty came into law schools from poverty law or public interest practices.12 They sought to serve the underserved and to inculcate in clinic students the value of service to the underserved while simultaneously teaching students about lawyering and professional responsibility.13 They developed pedagogies of reflection on experience that fit the uncontrolled, bustling, and sometimes hard-edged nature of poverty law practice.14 When the

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9 While a Professor at Yale Law School, Jerome Frank advocated that law schools follow the lead of medical schools in establishing clinics within which law students could learn about lawyering through the experience of providing legal services to those who could not otherwise afford them. See e.g. Jerome Frank, Why Not a Clinical Lawyer-School, 81 U. Penn. L. Rev. 907 (1933); Jerome Frank, A Plea for Lawyer-Schools, 56 Yale L. J. 1305 (1947). See also Karl Llewellyn, On What’s Wrong With So-Called Legal Education, 35 Colum. L. Rev. 651 (1935).


11 From 1968-1978, the Ford Foundation committed $12 million to create law school clinics. The Council on Legal Education for Professional Responsibility, affectionately known as CLEPR, was established by Ford to administer the funds devoted to the development of legal clinics in law schools across the United States. See e.g. Dubin, supra n. 10, at 1465-67.

12 See Stephen Winzer & Jane Aiken, Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice, 73 Fordham L. Rev. 997, 998 (2004) (“Many of the lawyers who started building and teaching in clinics at that time were lawyers who had worked in legal aid and public defender programs and in civil rights and other public interest advocacy programs.”)


14 See e.g. Justine A. Dunlap & Peter A. Joy, Reflection-in-Action: Designing New Clinical Teacher
legal system that poor clients faced did not live up to its advertised ideals, this
divergence created the space for students to critique law and legal institutions and
to consider and reconsider the possibilities of justice.15 Historically, culturally,
and politically, clinical professors may identify themselves as “cause lawyers” —
lawyers whose priority is advancing a cause that is consistent with advancing the
goals of particular clients — and may see their clinics as sites for the teaching and
practice of cause lawyering.16

Legal writing programs emerged in the latter half of the twentieth century
from different forces. Their growth responded in significant part to a concern
that law schools were graduating students who needed greater proficiency in legal
writing.17 The pedagogy of legal writing has been significantly professionalized as
a field of study and inquiry in recent decades.18 Drawing from New Rhetoric
theory, legal writing professors often construct pedagogy with an understanding
that law is a language and that legal writing is a non-linear process of thinking
and analysis that should address the needs and expectations of a law-speaking
audience.19

In some schools, legal writing professors are hired fresh from law school or
clerkships, but more frequently new legal writing professors come with
significant amounts of practice experience. It is far more common than in the
clinical world for these professors to have traditional sorts of practice
backgrounds, particularly law firm experience.20 This is highly appropriate
because many of the students that legal writing professors teach are aimed
toward private practice where they will spend years engaged in a considerable
amount of research and writing.

15 See e.g. Fran Quigley, Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of

16 The term “cause lawyering,” a variant of “public interest lawyering,” refers to lawyers who
use law as a means to broader social objectives, and who are therefore distinguishable from
conventional lawyers who view themselves as neutral and non-partisan servants of goals established
by a client. Through a series of volumes exploring the phenomenon of cause lawyering, Professors
Austin Sarat and Stuart Scheingold have popularized this conceptual distinction. See e.g. Cause
Lawyering: Political Commitments and Professional Responsibilities (Austin Sarat & Stuart Scheingold eds.,
Oxford U. Press 1998); Stuart A. Scheingold & Austin Sarat, Something to Believe In: Politics,

17 For a thoughtful elaboration of the theory and practice of contemporary legal writing
programs, see J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L.
Rev. 35 (1994).

18 See e.g. Linda L. Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader

19 See e.g. Maureen Arrigo, Hierarchy Maintained: Status and Gender Issues in Legal Writing
Legal writing courses are typically embedded in the traditional first-year curriculum with a pedagogy of carefully sequenced lessons tied to the first year’s emphasis on doctrinal analysis. This too is highly appropriate, because integrative pedagogical approaches are especially effective. As a consequence of the history and culture that led to this positioning, legal writing programs reflect conventional lawyering models more than the cause lawyering models that animate so much of clinical education.21

Another way to frame these differences may be in terms of implicit political perspectives. Legal writing students typically learn to analyze legal problems while making use of standard legal materials — cases, statutes, regulations. Some clinicians worry that this methodology implicitly leads the students to conclude that law is primarily a cognitive, rational, logical process. A program that does so without asking explicit questions about this assumption is a pedagogy that cultivates an insider’s perspective, an understanding of law’s internal architecture.22 By contrast, viewing law through the eyes of the clinic’s clients, as clinical faculty typically urge their students to do, tends to yield an outsider’s perspective that can look very different.23

When looking at law in its social and political contexts, one might see that law can be an instrument by which dominant classes maintain advantages over disempowered classes. The veneer of decision making by an internal logic rather than external imperatives may provide the cover story by which that can happen. From this contextualized external perspective on law, often accessible in law school clinics, law’s claim to autonomy and rationality is a mechanism that can mask law’s complicit role in conditions of structural inequality.

21 After I presented an earlier draft of this paper at the AALS Annual Meeting in January, 2007, Jennifer Lyman, clinical professor at The George Washington University Law School, stated that the differences in history and culture that I had cited between legal writing programs and clinical programs have resulted in temperamental differences between faculty drawn to each program. In other words, people drawn by disposition to the predictability of controlled pedagogical environments prefer to become legal writing teachers and those drawn by disposition to the excitement of uncontrolled pedagogical environments prefer to become clinical teachers. She suggested that these differences in temperament and identity, which may also correlate with differential preferences for conventional lawyering and cause lawyering, may pose another potential hurdle to collaboration that requires acknowledgement if it is to be overcome.

22 For a related observation expressed more strongly, see Kathryn M. Stanchi, Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law’s Marginalization of Outsider Voices, 103 Dick. L. Rev. 7, 9 (1998) (“[B]ecause legal writing pedagogy reflects the biases in legal language (including legal reasoning), its effectiveness in “socializing” law students comes at the price of suppressing the voices of those who have already been historically marginalized by legal language.”)

23 See e.g. Phyllis Goldfarb, Picking Up the Law, 57 U. Miami L. Rev. 973, 980 (2003) (“The student, whose clinical process urges her to try seeing the world through her client’s eyes, may also see that the bureaucratic process does no such thing.”); see also Stephen Ellmann, The Ethic of Care as an Ethic for Lawyers, 81 Geo. L.J. 2665, 2700 (1993) (observing that a caring lawyer should seek “to enter her client’s world without leaving her own.”)
In sum, legal writing programs like clinical programs — and unlike some other aspects of the law school curriculum — try to advance the laudable goal of helping students gain some comfort with the practice of law. But clinical programs — probably unlike many legal writing programs — are also trying to cultivate some discomfort with the ordinary practice of law. Given whom clinicians serve and the nature of their work, law often appears to them as a social and political psychodrama sponsored by law’s shadow side as much as it seems a world of doctrine and logic. When students observe these phenomena, they can become disillusioned, but they can also begin developing a fuller — and to my mind, more accurate — sense of law’s paradoxical character. Then, with a clearer sense of the rocky road on which they are traveling when undertaking to represent the disadvantaged, clinic students may begin to explore the possibilities for using law strategically in an effort to realize its perhaps latent capacity for reducing suffering, protecting the vulnerable, and promoting greater equality and substantive justice.

III. Extension

I do not mean to overdraw the contrasts between clinical programs and legal writing programs. Some clinical programs may well hew to a more internal technocratic perspective on the skills necessary to function effectively in the legal system. Some legal writing programs may well seek to cultivate an outsider’s perspective, viewing law as an artifact of unequal social structures, perhaps through the design of particular legal writing problems. Nonetheless, I think the

24 See e.g. Phyllis Goldfarb, A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education, 75 Minn. L. Rev. 1599, 1657 (1991) (“Although clinics offer fledgling lawyers the comfort that derives from a growing familiarity with the practice of law, they also seek to cultivate discomfort with the practice of law, a discomfort that derives from introspection and self-consciousness about the meaning and consequences of the professional behavior of oneself and others.”)

25 For a compelling description of how justice education can occur in a law school clinic, see Jane Harris Aiken, Striving to Teach “Justice, Fairness and Morality,” 4 Clin. L. Rev. 1 (1997).

26 Concerns such as these have been raised among clinical legal educators. See Dubin, supra n. 10, at 1469 (“[T]he emerging emphasis on clinical education’s skills training and professional competency functions has led to law schools’ increased reliance on less resource intensive models of instruction that downplay social justice and public service concerns.”); Louise G. Trubek, U.S. Education and Legal Services for the Indigent: A Historical and Personal Perspective, 5 Md. J. Contemp. Leg. Issues 381, 389 (1994) (expressing concerns that clinical education was diluting its commitment to serve the poor); Nina W. Tarr, Current Issues in Clinical Legal Education, 37 How. L.J. 31, 32 (1993) (observing that efforts had been made to “legitimize” and “sanitize” clinical legal education by viewing it as skills training without focusing on problems of “poverty law and justice.”); Marc Feldman, On the Margins of Legal Education, 13 N.Y.U. Rev. L. & Soc. Change 607, 610 (1985) (highlighting criticisms of clinical programs for withdrawing from initial emphasis on “access and justice” and “meaningfully expos[ing] students to gross injustice and unfairness of our legal system”).

27 Some suggestions from legal writing faculty on how this might be done are described in Stanchi, supra n. 22, at 51-57; see also Lorne Sossin, Discourse Politics: Legal Research and Writing’s Search for a Pedagogy of Its Own, 29 New Eng. L. Rev. 883, 901 (1995) (“Students should be required both to
historical, cultural, and political differences that I describe are real as a matter of tendency. These tendencies are likely among the reasons that legal writing programs and clinical programs, despite some similarities, have not frequently collaborated and have some challenges to confront in any attempts at creating collaboration.

I detail these challenges not to stymie collaboration, but to encourage it. Collaboration between clinics and legal writing programs need not be a fairy tale that we construct against a backdrop of awareness that unfortunate realities will prevent it from ever happening. But turning the hope of such programmatic collaboration from a fairy tale to a proposal to a memoir requires consciousness of the threshold differences that can undermine the effectiveness of the project. Only by consciously addressing these differences can we devise suitable methods for facilitating the hard work of surmounting the challenges to create genuine collaborations.28 When this pragmatic groundwork is laid, a collaborative environment can be established that offers hope of providing mutual enrichment of the sort experienced by Prof. Millemann’s clinic and Prof. Schwinn’s legal writing class.

A fertile concept for focusing such collaborations might be narrative. Narrative can be a way of reasoning, writing, and persuading — activities central to legal writing programs.29 Narrative also provides a compelling means of taking an outsider’s perspective to critique the under-acknowledged power dynamics of law in operation — an activity central to many clinical programs.30 Narrative’s capacity to bridge both clinical and legal writing programs, to serve the pedagogical goals of each simultaneously, provides reason for optimism about the role narrative can play in a collaborative enterprise.

A pioneering analysis of narrative’s persuasive powers is found in the book Minding the Law, co-authored by Tony Amsterdam and Jerome Bruner.31 The text explores how law deploys longstanding cultural narratives to uphold traditional values. Having illuminated the mechanisms by which this occurs, Amsterdam and Bruner enable lawyers to activate the same rhetorical structures on behalf of their clients. Even lawyers for the disempowered — in Amsterdam’s world, these have often been death row inmates — have access to narrative devices that, when research and write ‘like a lawyer’ and also to see the social, political, and economic implications of this form of discourse, and to be aware of the alternatives.”).
employed, carry an almost surprising degree of rhetorical power. Through their collaboration, Amsterdam and Bruner, lawyer and cultural psychologist, have helped their readers appreciate how legal argument can entail using narrative structures in service of persuasion. A collaboration between legal writing faculty and clinical faculty might create the best available chance of bringing these ideas into service of the clinic’s clientele, a population that might reap inordinate benefits from the use of persuasive tools that can move reluctant decision makers to recognize and respond to its pressing needs.

IV. Epilogue

The title of this symposium, *When Worlds Collide*, comes from a 1930s science fiction novel made into a 1950s film about a rogue planet hurtling through space that will crash into Earth and destroy all we know.32 The human race has a chance to survive only if some people collaborate effectively enough to quickly build a spacecraft within which they can escape to a new and hospitable planet. In contrast to this symposium’s namesake, catastrophe does not likely hang in the balance on whether a collaborative path is found between clinics and legal writing programs, nor is it likely that the future of legal education depends on abandoning all we have ever known. Yet having opened with “once upon a time,” it may be fitting that I close with an appropriate moral for my story: Millemann and Schwinn, Amsterdam and Bruner, and a handful of others have built us prototypes of a valuable collaborative project. If we are willing to be guided by them, we can undertake our own collaborations in an effort to build a useful craft that promises to take us somewhere new, a place well worth exploring.

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32 Edwin Balmer & Philip Wylie, *When Worlds Collide* (Frederick A. Stokes 1932). The 1951 film adaptation of the same name won an Academy Award for special effects.