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CRITICAL THEORY AND CLINICAL STANCE

WENDY A. BACH AND SAMEER M. ASHAR*

INTRODUCTION

Clinicians have an ambivalent relationship with scholarship. Our relative lack of scholarly output has been used by colleagues as an excuse to hold back status, security of employment, and governance rights in law schools. And when faced with a choice of whether to write an article or represent a client, a great many clinicians will always choose the client, because most of us entered clinical legal education as an extension of our preceding public interest practice. Further, writing is hard. Scholarly inquiry requires a depth of immersion in literatures hard to undertake with our preexisting inclinations toward legal practice and the teaching and service obligations that go along with our entry into the academy. The actual process of putting words on paper can be grueling, especially in contexts in which our writing may be appraised by colleagues as subpar or nonnormative and when we are haunted by the specter of clients in difficult straits, unrepresented as a consequence of our self-indulgence.

When law schools structure incentives to provide clinicians with the time to produce scholarship, we make our mark. Many work on the same terrain as their colleagues engaged in traditional doctrinal analysis and make important contributions to those fields.[1] Others have focused on lawyering and law school pedagogy, boring into aspects of practice that were otherwise based on the incumbent norms of particular practice settings.[2] These clinicians originate new ways to

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[1] *E.g.*, Alina Das, *Administrative Constitutionalism in Immigration* Law, 98 B.U. L. REV. 485 (2018); Kristin Henning, *The Reasonable Black Child: Race, Adolescence, and the Fourth Amendment*, 67 AM. U. L. REV. 1513 (2018); Renee M. Hutchins, *Stop Terry: Reasonable Suspicion, Race, and a Proposal to Limit Terry Stops*, 16 NYU J. LEG. & PUB. POL. 883 (2014); Jennifer Lee Koh, *Crimmigration and the Void for Vagueness Doctrine*, 2016 WIS. L. REV. 1127; Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013); Rebecca Sharpless, *Finally, A True Elements Test:* Mathis v. U.S. *and the Categorical Approach*, 82 BROOK. L. REV. 1275 (2017). To be clear, these scholars' commitment to doctrinal interpretation is not exclusive. Each of them have written in the other threads of scholarship we trace in this essay.

[2] See, for example, Gary Bellow and Bea Moulton on the lawyering process; David Binder, Paul Bergman, and Susan Price on client-centered lawyering; Tony Amsterdam

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teach law students how to practice with intentionality. Indeed, the pages of the *Clinical Law Review* have been filled with this latter type of clinical scholarship. Both of these genres of clinical scholarship share the aspiration of transferability across legal education and legal practice. The work of clinicians on lawyering skills, for example, is as relevant in corporate law as it is in public interest practice. And the doctrinal work operates at the level of court-based legal interpretation and legislative drafting affecting legal practice and law-making through advocacy and adjudication.

If we have a complicated relationship to scholarship in general, our community has a perhaps even more complicated relationship to generating "theory." We are generally not interested in academic inquiry for its own sake, and there is a healthy skepticism amongst us about theory generation, as an even bigger self-indulgence and waste of time than other scholarship. It's one thing to write about pedagogy, which assists our students, or doctrine, which advances the interest of our clients, but advancing theory that might eventually alter the larger discourse without more immediate ends? Thank you, next.

Nevertheless, in this short essay, we highlight a third thread of clinical scholarship in which we, along with other clinicians, are engaged and which we strongly identify as growing from clinicians' unique and embedded stance. We seek to convince, using a few examples of clinical scholarship, that our collective critical stance has yielded, over the last several decades, a growing body of work that (1) is grounded in observation of lived reality and awareness of the operation of interlocking systems, (2) incorporates an innate criticality borne of the activism and advocacy of clinicians, and (3) meaningfully and productively generates and deploys theoretical insights in the wider world. Our examples draw from the areas with which we are most familiar and is in no way a comprehensive survey of all scholarship of this kind produced by clinicians.[3]

Ultimately, we aim to identify a space for critical theory generation, alongside clinical scholarship that focuses on doctrinal interpretation and pedagogy.[4] We also seek to identify space for all of this

and Peggy Cooper Davis on lawyering; Robert Dinerstein, Michelle Jacobs, Kate Kruse, and Binny Miller critiquing and refining client-centered lawyering; Sue Bryant and Jean Koh Peters on cross-cultural lawyering; and Jane Aiken, Deborah Epstein, and Wally Mlyniec on the clinic seminar.

[3] For Wendy, the area of greatest familiarity revolves around the relationship between punishment and social support and, for Sameer, around the relationships between law, lawyers, and social movements.

[4] Arguably, this is an attempt to spur a debate about the contours of the emerging discipline of clinical scholarship. *See* Robert Post, *Debating Disciplinarity*, 35 CRITICAL INQUIRY 749, 769 (2009):

Disciplinary debates are always also about professional identity and solidarity. They

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work in the clinic, alongside legal services provision and lawyer development. Clinical scholars themselves must begin to take more seriously their potential for such work. We write against subtle forms of anti-intellectualism in legal practice, trimmed sails, and narrow clinical scholarship gatekeeping.

By describing and highlighting this scholarship, naming it as a product of what we call an embedded clinical stance, and by describing our own exploration of empirical methods, we hope to accomplish several things. First, we seek to encourage clinical scholars who have not yet done so to embrace an engagement with critical theory and structural critique. Second, we suggest, for those who define and convene clinical conversations, that the thread of clinical scholarship that we describe is central to our collective work. And finally, we seek to identify and explore how combining empirical inquiry with an embedded critical stance might further build on this work. In the following brief essay we start with what we mean by critical theory-generation and embedded clinical stance and highlight exemplary work in this thread by clinical scholars. Then we reflect on our individual decisions to turn toward empirical methods. We return to the topic of what's hard here and share some of our own struggles in doing this work.

I. What We Talk About When We Talk About Theory

Our central claims in this essay are that there is a significant strand of clinical scholarship that is engaged in an iterative process of generating, revising and deploying critical theory, that this is a product of our clinical stance, and that this type of theoretical engagement is worth both doing and claiming as a part of clinical scholarship. Making that claim involves explaining at least a few preliminary points: namely what is theory and what do we mean by *critical* theory.

Phyllis Goldfarb's work in *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education* is a good place to start. As Goldfarb, citing Robert Coles, reminded us, the word theory derives from the Greek root Themai, meaning "I behold." Coles asserts that this derivation expresses a view of theory as "an enlargement of observation."[5] So to theorize is to stand apart, to observe. It is also to derive,

are about the substantive nature of a disciplinary practice: the kind of discursive community scholars desire to inhabit; the kind of work that they find most meaningful and gratifying; the kind of colleagues they wish to recognize as peers; the forms of disciplinary language that are most suited to scholarly aspirations. These are deeply important and consequential matters, and they are all implicated in debates about the meaning of disciplinarity.

[5] Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 Minn, L. Rev. 1599, 1617 n.73. (1991) [hereinafter *Theory-Practice Spiral*].

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from that enlarged observation, narratives about how the world operates. This seeing and observing is a crucial part of the theoretical enterprise. But observing is never a neutral act. What you "observe" depends on the both the experiences you have had and the place from which you are looking. *Critical* theory does not stop with the act of observation or description. These are crucial, but in critical theory, observation and description lay the groundwork for understanding what must change. Critical theoretical work includes deploying theoretical insights in service of a demand for that change. Observation and description from a particular standpoint is crucial precisely because defining social reality is key to reforming any discourse that may fuel social dynamics, including progressive change.[6]

To take a quintessential example of critical theory, in 1989 Kimberlé Crenshaw published an article that would fundamentally change both feminism and critical race studies. The article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*,[7] introduced the concept of intersectionality. Crenshaw centered the intersectional experiences of Black women and argued that the failure of both feminism and anti-racism work, to center these experiences (or to put it in Coles' terms, to observe from that particular vantage point) "marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting

[6] On standpoint theory, see Nancy Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Historical Feminist Materialism*, *in* DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY, AND PHILOSOPHY OF SCIENCE (Sandra Harding & Merrill Hintikka eds., 2d ed. 2003). On discourse, see Samuel R. Delany*, The Art of Fiction No 210*, 197 PARIS REV. (Summer 2011):

> Discourse is a pretty forceful process, perhaps the most forceful of the superstructural processes available. It's what generates the values and suggestions around a concept, even if the concept has no name, or hasn't the name it will eventually have. It determines the way a concept is used and the ways that are considered mistaken. The following may be a bit too glib, but I think it's reasonable to say that if language is what allows us to think things, then discourse is what controls the way we think about things. And the second—discourse—has primacy.

Id. at 140.

Edward W. Said in ORIENTALISM (1978) offers an example of how discourse comes to govern a field of thought:

> The scientist, the scholar, the missionary, the trader, or the soldier was in, or thought about, the Orient because he *could be there*, or could think about it with very little resistance on the Orient's part. . . . [T]he imaginative examination of things Oriental was based more or less on exclusively upon a sovereign Western consciousness out of whose unchallenged centrality an Oriental world emerged, first according to general ideas about who or what was an Oriental, then according to a detailed logic governed not simply by empirical reality but by a battery of desires, repressions, investments, and projections.

Id. at 15–16.

[7] 1989 UNIV. OF CHI. L. F. 139.

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from discrete sources of discrimination." It also creates a "distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of a much more complex phenomenon."[8] At the end of the article Crenshaw follows her observation and description with a demand that "those concerned with alleviating the ills of racism and sexism" focus their efforts on "addressing the needs and problems of those who are most marginalized and [on] restructuring and remaking the world where necessary."[9] This critical insight has taken concrete form in the recent "Say Her Name" campaign that brings attention to police violence against Black women.[10]

Another classic example of work that engages theory and presents a demand for change is Lucie White's 1990 article entitled *Subordination, Rhetorical Survival Shoes and Sunday Shoes: Notes on the Hearing of Mrs. G.*[11] In that article White centers a lengthy narrative about the rhetorical strategies of one welfare recipient in a case that she handled during her days as a legal services lawyer. In this famous story, Mrs. G. briefly defies the victim script laid out for her, by both the constraints of bureaucratic rules and the traditional lawyering strategies offered by her lawyer. She achieves a momentary victory, both because the agency does not go through with its threat to lower her welfare budget and perhaps also because, for just one moment, she defied the categories in which her lawyer and the legal rules placed her (victim/supplicant) and seized the terms of her own narrative. She seized space by declaring that Sunday shoes were in fact a necessity and then in effect dared her listeners to disagree. White opens the essay identifying the potential of *Goldberg v. Kelly* to move towards a robust, participatory notion of due process and then deploys a variety of theoretical literatures (on gender, voice and participation) to question that potential. Having deployed one set of theories (which contextualizes Mrs. G's voice) against a legal theory (due process) she then poses a series of questions about viable reforms that might let others in Mrs. G's position consistently participate. She ends her essay with a rumination on economic, cultural and legal reforms that might facilitate true participation. Procedural due process in its anemic form is nowhere near up to the task that she defines and it,

[8] *Id.*

[9] *Id* at 167.

[10] *See generally* Kimberlé Williams Crenshaw et al., *Say Her Name: Resisting Police Brutality Against Black Women* African American Policy Forum, Columbia Law School Center for Intersectionality and Social Policy Studies (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf

[11] 38 BUFF. L. REV. 1 (1990).

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and much more, must change in order to meet the goal of robust participation. So White, like Crenshaw, stands next to Mrs G., tells the story as well as she can from her client's perspective, enriches the story by wielding theoretical literature on bias and voice, and then deploys both the experience and the theory in service of her demand.

So at its best, this particular form of critical theory is generated from the stance of those who are most marginalized, describes the operation of law and policy from their perspective—deploying and challenging preexisting theory to do so—and, moves from that observation and description to a demand for change. Sometimes the demand involves changing the theory itself and sometimes it is deployed against a reform agenda. But it is always a demand for change borne of the description, which in turn is borne of the stance of the observer. So theoretical work in this form involves several steps: Observe from a particular position the operation of a set of laws and systems, describe the subject as it is perceived from that vantage point (sometimes deploying and sometimes generating or revising theory), and then deploy these insights to bolster and justify the demand —- see, describe, generate/deploy, demand.

As we've developed our own work and read the work of both clinical and activist lawyering predecessors it's become clear to us that there is a group of clinicians today whose scholarship fits this mold.

II. Clinicians Generating Critical Theory: A Few Examples

More recent clinical scholars are also engaging in this form of critical theory work. We are particularly taken with the work of some of our colleagues who deploy and revise theory to challenge central tenets of various reform agendas. Like Crenshaw and White, they use theory (what they see and describe in the world) to take these agendas to task for not being sufficiently responsive to the voices and needs of those are the most marginalized among us.

In criminal law, take the work of Amna Akbar in *Toward a Radical Imagination of Law*[12] and its relationship to traditional progressive visions of criminal justice reform.[13] The article is centered on a comparison between a central policy platform of the movement, *A Vision for Black Lives: Policy Demands for Black Power, Freedom and Justice* and the reports issued by the Obama Administration's Department of Justice on the policing practices in Ferguson, Missouri and

[12] 93 N.Y.U. L. Rev. 405 (2018) [hereinafter *Radical Imagination*].

[13] Wendy wrote a review of Akbar's article for Jotwell and some of the text here is copied without quotation marks from that text. *See* Wendy Anne Bach, *Hope*, Jotwell (Nov. 9, 2018), https://lex.jotwell.com/hope/.

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Baltimore, Maryland. It is also rooted in Akbar's experience representing groups associated with the Movement for Black Lives in Columbus, Ohio. The DOJ reports were, of course, written in the wake of the deaths of Michael Brown and Freddy Gray respectively. The Movement for Black Lives too, finds its spark (but not its roots) in these and other contemporary moments of state violence. But, as Akbar shows, the two sets of documents differ radically. There is much to praise in the DOJ reports, and Akbar gives them their due. But in the end, what is missing is the central understanding, at the heart of contemporary racial justice movements that "policing, jail and prison [are] the primary mode of governing Black, poor, and other communities of color in the United States."[14] Law here is not, as more moderate reform agendas might argue, a fundamentally just system that has gone astray but is instead the scaffolding upon which this violent system is built. Crucially, Akbar centers both the Movement and the Vision in a rich history of abolitionist theory and practice. This theory and practice is not only "deconstructive and critical" but also "reconstructive and visionary."[15] The vision includes not only divesture but reinvestment, demanding for example that funds currently invested in "prisons, police and surveillance," be "invested instead [in] restorative services, mental health services, job programs, meaningful healthcare, and education."[16] Akbar ultimately not only supports theoretical and activist abolitionist practice but suggests that those focused on criminal justice reform should stop working at the edges of a fundamentally violent system and instead "imagine with social movements"[17] the role law can play in creating a radically better world. These observations place Akbar at odds with many criminal law scholars in the United States, who begin with the assumption of the legitimacy of the criminal legal system. And her deployment of abolitionist theory justifies and gives coherence to her demand.

Like Akbar, Leigh Goodmark's work wields and critiques theory, stands in opposition to dominant arguments in the field of family law and is clearly grounded in her proximity to clinic clients. Her book A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM, challenges the sufficiency of firmly entrenched legal interventions focused on domestic violence. Goodmark traces the way that those legal interventions are rooted in one theoretical frame – dominance feminism. As she explains, dominance feminism paints the "paradigmatic victim [of domestic violence] as white [and] heterosex-

[14] *Radical Imagination*, *supra* note 12, at 412. R

[15] *Id.* at 479.

[16] *Id.* at 431.

[17] *Id*. at 425.

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ual"[18] As a result, dominance feminism fails to account for the ways that "race, sexual orientation, immigration status, class, disability status, and location all shape women's experiences of abuse."[19] Goodmark meticulously traces the effect of this theoretical failure on the ability of differently-situated women to benefit from the law. She deftly integrates individual stories with research from a wide variety of disciplines to make her points. She accounts for all of the ways in which the law, by relying on an essentialist set of assumptions, undermines the autonomy of women who experience domestic violence and fails to create a response that meets their particular needs. She then presents a theoretical alternative, anti-essentialism, which focuses not on a single view of woman (white, heterosexual, passive, victimized) but instead theorizes women in their particular contexts. Having reframed the theory that must drive our response, Goodmark traces the ways in which such a theoretical shift would yield a system more responsive to and respectful of women whose contexts, needs and goals radically differ. Crucially, and in direct response to those communities (communities of color, immigrant communities, poor communities, native communities) that have suffered more harm in legal systems and remain less trustful of those systems, this includes the autonomy to reject legal solutions and the development and support of interventions outside of the law. Interestingly, the book hardly mentions Goodmarks' clinic clients and her extensive clinical practice experience. The topic appears only once, in the acknowledgements.[20] Nevertheless it is clear that her years of proximity to those often "most marginalized" clients deeply informs the book. While Goodmark's analysis is likely threatening to those who conceptualize those who face domestic violence only as stereotypically passive victims of their abusers and who believe that only the law offers a strong enough response, it clearly reflects the lived experiences and goals of Goodmark's clinic clients. So her observation and research, driven by her lawyering experiences and the unique vantage point she holds having worked in the field as a clinician, informs the questions she asks, the theory she challenges and deploys and the demands that she makes. And the demands, in turn, are weightier and more effective in the world because they are grounded in a compelling theoretical narrative (or enlarged observation) of how we went astray and how we might correct that mistake.

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[18] LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2012), 70-71.

[19] *Id.*

[20] Goodmark thanks her husband, stating that "[m]y husband, Doug, has listened to me howl about the injustices my clients experience for more than 15 years." *Id.* at x.

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In a piece that defies subject matter categorization, Muneer Ahmad's 2009 article *Resisting Guantánamo: Rights at the Brink of Dehumanization*[21] sets out a theory of lawyering on behalf of prisoners captured by the United States in the "War on Terror" after September 11. It is based on his experience litigating for three years on behalf of a prisoner with clinical colleague Rick Wilson and his students at American University. The following is an incomplete list of the political and legal theorists from whom Ahmad draws:

- Hannah Arendt on the right to have rights,
- Robert Cover on narrative, jurisdiction, and law as violence,
- Elaine Scarry on torture,
- Kafka, Sartre, and Lewis Carroll on the absurdist tendencies of unchecked legal regimes,
- Peter Gabel & Paul Harris on the self-legitimation of legal systems,
- Giorgio Agamben on the propagation of lawlessness through law,
- Richard Abel on law as countervailing power,
- Martha Minow on rights as an assertion of community, and
- Frantz Fanon and Homi Bhabha on the colonized body.

We list all of these scholars to demonstrate the breadth of Ahmad's theoretical engagement and the time taken to work through relevant literatures. The theoretical engagement is a methodical attempt to search for patterns of meaning in the moral desert in which Ahmad found himself at Guantanamo. It is both a potential source of meaning and a philosophical undergirding for Ahmad's approach to lawyering in this context. Indeed, the article starts with a disavowal of the role of legal historian and the embrace of "accidental" legal ethnography. This signal of what he is and is not doing in the article is a reminder to himself and a clarifying note to his readers.[22] From the moment that Ahmad boards a small, noisy plane to the island, to the juxtaposition of normalcy for soldiers and barbarity for prisoners that he finds on the island, to the tragi-comic stories of legal representation in makeshift "courts," and, finally, to the harrowing stories of torture and forced feeding of prisoners, we are brought into another world guided by our clinician-writer. Ahmad does not rest on description, even as arresting and revelatory as this account is. He discusses the Supreme Court litigation and Congressional maneuvering proscribing the rights

[21] 103 Nw. U.L. Rev. 1683 (2009).

[22] Of the three exemplary pieces that we describe in this part, Ahmad's is the one that is most transparent about methods.

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of Guantanamo prisoners and mounts a strong critique of human rights law from the perspective of his client. Ultimately, the article is purposeful and spirit-renewing in envisioning a role for public interest lawyers in the face of overwhelming state violence. We have gone on a journey with Ahmad and though it feels as if he has lost a part of himself on this journey, his meaning-making is communal and life affirming. The range of theoretical sources on which he draws substantiates the human erasure that he documents and links Guantanamo to a long line of oppression and genocide. Theory also creates an intellectual scaffolding for Ahmad's ideas on how and why those subject to dehumanization may respond as they do and how lawyers might resist such regimes through rights assertion.

III. Clinical Stance and Critical Engagement

So we hope at this point that we have convinced you that there is something shared in the work being done by these seemingly disparate pieces of work by clinicians, but we have yet to identify why clinicians are well-situated to do this important scholarly work. This returns us to what we have been calling the embedded clinical stance and depends on what we term the innate criticality of this work.

As to clinical stance, in 1980, Carrie Menkel-Meadow wrote an essay, entitled *The Legacy of Clinical Education: Theories About Lawyering*.[23] In that essay Menkel-Meadow suggested that clinicians stand at a particular "vantage point" with respect to lawyering. As she framed it, "[a]s both a working professional and a scholar or expert on the legal system, the clinician can view the aggregate impact of the individual lawyer on the legal system and, conversely, the legal system on the lawyer. Indeed, the clinician is ideally situated in time and place to develop a legal sociology or anthropology."[24] In *A Theory-Practice Spiral*, Goldfarb built on this core insight. She argued that there is a parallel between the particular structures of feminist theory and learning in the clinical setting. As she described it, feminism has a theory about theory. Feminism holds that "theory is a practice, that it must emerge from an understanding of diverse lived realities and be tested against those realities."[25] By creating theory out of the lived reality, "feminists and others who are doing similar work, hope to discover the absences of things, the exclusion of a variety of perspectives from law and other disciplines that subvert what we can know."[26] Goldfarb argued that clinical scholars occupy a similar space and have

[23] 29 Clev. St. L. Rev. 555 (1980).
[24] *Id*. at 569.
[25] *Theory-Practice Spiral*, *supra* note 5, at 1630. R
[26] *Id*. at 1634.

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the potential to do similar critical theory work. Clinicians, unlike their doctrinal peers, are embedded in their clients' experiences of the legal system. Because of this location in the legal academy, "they have the potential to transform the study of law into the study of a culture that deploys law for various purposes."[27] So for Goldfarb the embedded stance of clinicians creates opportunities for clinicians to stand with and see the operation of laws and legal systems, from the perspective of their position in the clinic, standing beside their clients.[28] Relatedly, in 2010, shortly after *Resisting Guantanamo* was published, Muneer Ahmad and Ann Shalleck presented at New York Law School's Clinical Theory Workshop and shared an unpublished draft entitled *Toward a Jurisprudence of Clinical Thought*.[29] In their essay, they identified, among many other strands in clinical scholarship, the work of "clinical scholars [who have] formulated critiques of the socio-legal world that are rooted in the experiences of people caught up in the legal system." While acknowledging that many scholarly traditions focus on these broad and crucial issues, Ahmad and Shalleck suggested that, "the ways the law operates in their clients' lives provides to clinical scholars a different vantage point for identifying the intrusive, distorting, demeaning or harsh aspects of a legal rule that might not be evident to a judge or an outside observer."

Building on the earlier work of Menkel-Meadow, Goldfarb, and Shalleck and Ahmad, we believe that clinical scholars are well suited to produce this type of scholarship because of their unique positionality. It is our job as clinicians to stand not only with our students but also with our clients, many of whom are, in Crenshaw's terms, the "most marginalized." Certainly we acknowledge, as both White and Ahmad do in their work, that there is an enormous difference between being our client and standing next to them. There are distances, ellipses and gaps in understanding. Nevertheless this is where we are located and to whom we are proximate. Akbar works with racial justice organizers and the questions she asks are, in part, borne of her solidarity with them. Goodmark has spent decades representing marginalized women experiencing domestic violence and Ahmad has done the same on behalf of immigrants, prisoners, and workers.

[27] *Theory-Practice Spiral*, *supra* note 5, at 1656. R

[28] Clinicians have sought to integrate critical theory into their pedagogical work with students. *See generally* Anthony Alfieri, *Against Practice*, 107 MICH. L. REV. 1073 (2009); Alina Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1 (2015); Caroline Bettinger-Lopez et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. POVERTY L. & POL'Y 337 (2011); Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 J. GENDER SOC. POL'Y & L. 161 (2005).

[29] Unpublished manuscript on file with authors.

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And we have both spent decades representing the individual and group clients whose experiences and critiques drive our scholarship. This stance inevitably affects the questions we ask about the world and the conclusions we draw; our lower caseloads create the potential for theoretical engagement.[30] So we make a claim that scholarship written from the embedded stance of clinicians adds to the critical enterprise because we "observe" from our standpoint beside clients. The first two steps – seeing and describing – are borne of our embedded clinical stance.[31]

But there is another crucial aspect, and that is what we are naming as the criticality of clinical stance. Clinicians engaging in the representation of the most marginalized do not have the luxury of simply standing and observing, nor do we have the luxury of (or interest in) refining theoretical insight simply for its own sake. It's not generally in our wheelhouse to simply describe, demonstrate interest, or, as an end goal, improve description. Our job, most days, is to act and to react. So we wield theory when it is accurate and we revise it when it is not, but in either case we wield it for our clients and for ourselves. We employ and revise theory to make meaning in the places that we find ourselves, whether it be poor people's courts, prisons, or welfare offices and we wield that meaning on behalf of our clients. Akbar wields abolitionist theory and Black radical thought to find meaning for law and lawyers in the aftermath of Ferguson and Baltimore. She spotlights the theory and praxis that arises from this work. For Goodmark, feminists picked the wrong theory (dominance feminism) in confronting domestic violence and expanded the carceral state. She proposes an anti-essentialist intervention to correct the course of the anti-violence movement. Ahmad deploys theory to understand lawyering in the midst of lawlessness, ultimately to chart a path for effective lawyering in our proliferating states of exception in the U.S. and globally. In our own work, we have engaged in modest challenges to theory when it has failed to describe the realities that we have observed. In *The Hyperregulatory State*,[32] Wendy challenged two related feminist theories—vulnerability theory[33] and the theory of the sup-

[30] This is not a certainty: many clinicians may use their time with other highly laudable goals, such as focus on pedagogy, institutional service, and innovations in public interest practice. And lawyers in practice (not in the academy) may deploy and generate critical theory. To be embedded or clinical does not assure structural critique, it simply offers the potential for theoretical engagement.

[31] *See* Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. 201 (2016) (on "local knowledge" gained through clinical lawyering).

[32] 25 YALE J.L. & FEMINISM 317 (2014).

[33] *See generally, e.g.*, MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State,* 60 EMORY L.J. 251 (2010).

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portive state[34]—by deploying a description of how social welfare and punitive systems interlock to create an ever-escalating series of harms for the disproportionately poor and Black women about whom Wendy was writing. In *Movement Lawyers in the Fight for Immigrant Rights*,[35] Sameer draws from and challenges the limits of the work of Patricia Ewick and Susan S. Silbey,[36] as well as Austin Sarat,[37] on everyday resistance to legality. Social movements collectivize resistance and create important, if not essential, roles for lawyers in the process of resistance and reconstruction of law. Each of these works makes a demand for recognition and change on legal systems and the legal profession.

We believe that this clinical scholarship is productive for several reasons. First, we hope and believe that the descriptions offered and the demands made are responsive to the lived realities of those with whom we stand. Second, and importantly, the development, refinement and wielding of theory makes sense of and bolsters the demand. To the extent that we can make a claim that what we describe is an "accurate" or "more accurate" description of the experiences of the "most marginalized" subject to legal systems, this gives credibility and weight to the demand. But none of this means that any of it is easy.

IV. Obstacles and Challenges

In the final part of this essay we turn to some of what makes doing this work challenging and, in the course of doing so, briefly describe our own early explorations with employing empirical methods to strengthen our capacities to see, describe, generate/deploy and demand.

The first thing we acknowledge is privilege. The authors whose work we have highlighted have, in general, had positions that are structured to support their scholarly endeavors. Akbar, Goodmark, and Ahmad are all in tenure-track, tenured, or tenure-equivalent positions and have received fellowships and/or research leaves to support their work. We have each also benefited, at various points in our careers, with that level of support.[38] But even with this privilege there

[34] *See generally* Maxine Eichner, The Supportive State: Families, Government and America's Political Ideals (2010).

[35] 64 UCLA L. Rev. 1464 (2017) [hereinafter *Movement Lawyers*].

[36] Patricia Ewick & Susan Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 New Eng. L. Rev. 731 (1992).

[37] Austin Sarat, *"The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 Yale J.L. & Human. 343 (1990).

[38] Wendy has been in a tenure-track clinical position at Tennessee since 2010 and has received generous support (in the form of writing grants, research leaves, research assistant and travel support) from her institution to write. Sameer has been in tenured or tenure-

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are significant challenges. We, like all of our clinical peers, are busy lawyers. No matter how much support an institution provides, clinic is demanding of one's time and focus in a way that doctrinal teaching simply is not. In addition to the demands of casework, we effectively administer small law firms with a constantly changing staff of student lawyers. And we are sometimes asked to play an outsized role within our institutions. Beyond these time and resource constraints there are complications inherent in being clinicians (and lawyers) who do this work.

When clinicians engage in the kind of scholarship we are describing it is often subject to a few standard criticisms. The work can be seen as not rigorous. It is assumed that our duty of loyalty to clients means that we cannot write credibly and critically about cases in which we are involved. We are not detached enough to produce *scholarship*. But in our embrace of the embedded nature of clinical stance, we are claiming and celebrating our proximity to clients and communities as a standpoint from which to observe and describe. We are, arguably, better positioned to generate critical theories and structural critique than our non-clinical colleagues, given equal time and resources.

Two additional critiques we have seen are perhaps more worrisome. First, our duty to particular clients can compromise the work. For example. Sameer has struggled to write about movement lawyering in the field of immigrant rights. How should potential future collaborations with movement lawyers affect the documentation of past work? And how should non-lawyer movement actors–both individual and organizational—be incorporated into the work? As public interest lawyers, we are sensitive to the burdens we place on past or future clients, who may view their cooperation with us as the price to pay for necessary legal services.[39] These constraints affect how we

equivalent positions since 2002 and received research leaves and research and travel support.

[39] *See* Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 24 AM. INDIAN L. REV. 229, 561–62 (1999-2000):

> I deliberately strive in this paper to prevent placing either clients or communities in the position of feeling violated by my work with them for the sake of academic scholarship. We seek through our clinic to help without transgressing cultural and intellectual boundaries by preserving the trust of both individuals and communities through an ethic of non-exploitation. As a native academician and community lawyer, this is an extremely critical component of my work with native peoples and communities. The development of research principles by indigenous peoples to protect their communities, especially in relation to outside academicians is an out growth of the movement to develop protections for the cultural and intellectual property rights of indigenous peoples. The appropriation of the native voice, experience and culture has been such a recurrent theme, that I found it difficult to incorporate specific examples of native clients and communities without feeling conflicted. The Mataatua

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write, how critical we can be, and to whom we reach out to tell the stories we wish to tell in our scholarship.

Second, for any project like this, the first step is observation or, or to put it in research terms, how we gather the generally qualitative data that forms the basis for our observations. Qualitative data gathering presents complications for clinical scholars. First, most of us do not have graduate training in a non-law discipline such as sociology or anthropology. Students in those disciplines are subject to deep immersion in methods at the start of their graduate education.[40] Lawyers receive an education steeped in doctrinal interpretation without much focus on *facts*: how snapshots of social reality are gathered and woven together to produce legal doctrine. The lack of disciplinary method is sometimes made manifest in clinicians' approach to the use of facts from their own cases in their scholarship.[41]

These critiques and challenges have impelled us to take a step out of our client relationships, to begin to use empirical methods to write closely observed work in fields in which we are immersed but outside of the lawyer-client relationship and direct clinical practice.[42] We turn to these methods not only to solve these problems but because of what empirical methods offer. Inspired by the work of many of non-clinical colleagues both in law and in related fields (anthropology, sociology, political science) we have also turned to empirical methods with the hope that such a turn might help us build upon and improve our work.[43] To use the language of this essay, we hoped that empirical methods might enable us to be better at seeing and describing. We believe that our lawyering with marginalized clients and communities have placed us in a position to describe some ways in which laws and

Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples broadly declares "that all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease."

[40] Of course, disciplines have been criticized as rigid and as enforcing orthodoxy. E.g., Benjamin I. Schwartz, *Presidential Address: Area Studies as a Critical Discipline*, 40 Journal of Asian Studies 15 (1980).

[41] We have written articles of this type. *See, e.g.*, Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007); Wendy A. Bach, *What If Your Child Were the Next One in the Door? Reimaging the Social Safety Net for Children, Families and Communities*, *in* A NEW JUVENILE JUSTICE SYSTEM: TOTAL REFORM FOR A BROKEN SYSTEM (Nancy E. Dowd ed., 2015).

[42] Both of us has written work of this type. *See, e.g.*, *Movement Lawyers*, *supra* note 35; Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care,* 60 WM. & MARY L. REV. 809 (2019). R

[43] For example, both of us have been deeply inspired by the work of Monica Bell who currently teaches at Yale Law School. E.g., *Police Reform & the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054 (2017); *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 LAW & SOC'Y REV. 314 (2016).

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legal systems operate and to make significant and meaningful demands for reform. We also believe that a more expansive empirical basis will strengthen our theoretical engagement and our demands.[44] So we do our best to learn and deploy those methodologies.[45] We move a few more steps out of our fields of immersion, perhaps in collaboration with colleagues in other departments, who are drawn to us because of our very immersion. We are able to access key actors through relationships and reputations established in the course of clinical practice, actors who may be muted or unheard in other scholarly work. We still serve as brokers of "client" voice, but with a few degrees of detachment from our interview subjects and with an enlarged sample of such voices. The distance we have created mitigates the conflicts and coercion about which we worry.

But even so there are complications. Wendy recently moved to the use of empirical methods in a recent study of the prosecution of women for "fetal assault" in Tennessee and has been very conscious about how her position as an advocate and as someone who also works within these systems has affected her empirical research in both positive and negative ways. On the one hand it has been a tremendous asset. One of the sources of data she gathered was a set of criminal court files. The case file gathering and analysis could certainly be done by a non-clinician. But there's no question that her familiarity with the nitty-gritty of how courts operate made the job of obtaining and interpreting the documents far easier.[46] She also interviewed professionals in the court system as well as defendants. In the interviews her positionality was more complicated. On the one hand she knows the systems and actors that she was interrogating fairly well. The vocabulary shared between her and court actors made it easy to go deep into conversation fairly quickly. And in talking with a defendant, she could easily understand the details of case events in a way that perhaps others could not. Perhaps this capacity, combined with her visible identity as a person who works on behalf of individuals in poverty, built trust. But then again there are plenty of bad lawyers and plenty of reasons to think that this identity might undermine trust. In addi-

[44] *See* Brenda V. Smith, *Boys, Rape, and Masculinity: Reclaiming Boys' Narratives of Sexual Violence in Custody*, 93 N.C. L. Rev. 1559 (2015) (setting forth the value of "thick description" in defining and deepening our cognizance of a problem).

[45] On this front, the community as a whole and Wendy in particular are in debt to the AALS Clinical Section Bellow Scholars Program for their support of empirical work by clinicians.

[46] For another example of the systematic analysis of large batches of case files by clinicians, see the work of Anna E. Carpenter, Colleen F. Shanahan, and Alyx Mark. *See, e.g.*, Anna E. Carpenter et al., *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & Soc. Inquiry 1023 (2017).

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tion, in the interviews with professionals both this fluency with the system and her own identity as a defender no doubt left things unspoken that might have been shared with someone with less insider knowledge and a more credible claim on some form of neutrality. What questions did she leave unasked because she assumed that a shared vocabulary meant that both speaker and listener meant the same thing? How much did her identity as a poverty lawyer and defender affect her questions and her subject's answers?

So we continue to puzzle through these issues and to learn new methods to improve our work, knowing that the enterprise is difficult but worthwhile.

Conclusion

Clinicians, unlike their doctrinal peers, are embedded in their clients' experiences of the legal system. Because of this location in the legal academy, "they have the potential to transform the study of law into the study of a culture that deploys law for various purposes."[47] Even as many law schools proliferate soft-money funded experiential education without support for clinical scholarship, we seek a self-recognition and recognition, by our clinical peers as well as by our non-clinical colleagues and deans, of critical scholarship borne of clinical stance as an important form of empirical study in the legal academy. We ourselves continue to think critically about degrees of bias with the understanding that all scholarly work is bent by both bias and detachment. And we continue our own education in methods. Nevertheless, the theory that we invoke and revise from our standpoint beside clients enables us to make credible demands for social structural change. We should make those demands by all means necessary, including by seeking to alter and reform the discourse that is created by others about the communities with which we work. We invite clinicians to challenge us and to help us further define this body of work, and we invite those who are not yet engaged in this form of clinical scholarship to join us in this enterprise.

[47] *Theory-Practice Spiral*, *supra* note 5, at 1656. R

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