Broadening Scholarship: Embracing Law Reform and Justice

Douglas L. Colbert

Introduction

The call for law faculty scholarship is familiar. From the moment we decide to go on the teaching market, we know our success will largely depend upon our record of publication. That record will be critical repeatedly throughout our academic careers as we face peer promotion evaluations or apply for research grants and sabbatical leaves. Like students at the top of the class, some faculty easily pass scholarship scrutiny and can be counted upon to continue producing first-rate scholarship. Others meet the standard although with considerably less enthusiasm, particularly after tenure. A smaller group falters. Some find the scholarship bar beyond their reach.

Why is it easier for some to complete the tenure obstacle course? Why do some continue in full stride beyond the 100-yard tenure sprint and incorporate scholarship as central to their marathon career and professional enrichment? How does a collective faculty remain energetically committed to the scholarly mission?

On some level it is presumptuous to address one of academia's vexing mysteries, a source of deans' and colleagues' constant headaches. But because of the importance of scholarship in legal academia, and the unique situation of clinical law faculty, it seems worthy of particular attention. I offer my perspective as a two-decade veteran clinical (and sometime classroom) teacher, whose career in many ways mirrors and is a product of the maturation of clinical/experiential teaching within the academy. Most of us clinicians were drawn to teaching from a commitment to further social justice. Our source of inspiration for scholarship finds its locus there as well.

I also am encouraged to ponder these questions about scholarship as the Equal Justice Project of the Association of American Law Schools has begun to

Douglas L. Colbert is a professor of law at the University of Maryland.

My appreciation to clinical colleagues who encouraged me to write this article after hearing my presentation at a panel discussion on scholarship and law reform at the annual clinic conference in Montreal in May 2001. Richard Boldt, Randy Hertz, and Suzanne Sangree deserve special recognition for generously giving of their time and for making excellent comments and suggestions at various stages of this draft. I also thank the organizers and participants of the AALS Equal Justice Project for sharing their thoughts and material, especially Marina Hsieh, James Liebman, Elliott Milstein, Jamin Raskin, and Dean Rivkin. Finally, special thanks to my research assistant, Elizabeth Fischer, for her dedication and invaluable contribution.

seriously focus on the importance of scholarly endeavors for social justice. It seems an appropriate time to formulate suggestions for increasing faculty productivity and professional satisfaction for those of my fellow travelers with whom I am most familiar—clinicians and experiential teachers ("clinicians") and nonclinical faculty engaged in law reform and the improvement of the justice system ("activists").

Clinicians and Activists

There is, of course, no universal explanation for what motivates the diverse academic community to remain committed to scholarship. To a greater or lesser extent we share an intellectual interest in pursuing new ideas and unraveling judicial doctrine and legal theory to reveal hidden truths in decision making. We value colleagues' respect. We stimulate and inspire each other at faculty workshops where we promote the ideal of a community of learners. We view institutional support, such as summer research grants, as an important affirmation of our scholarship.

While the academic community shares a similar scholarly baseline, many clinicians (including experiential teachers) and nonclinical faculty activists engaged in law reform are drawn to a further unifying principle. Many see scholarship as a vehicle for improving the quality of justice by righting wrongs and fixing problems in the civil and criminal justice systems.[1] Clinicians' and activists' scholarly activities usually reflect the unique experiential path they have traveled. Many entered academia from the front line of legal aid representation or the civil rights or public interest arena with the intention of inspiring students to be excellent lawyers and to make equality a reality for low-income populations. Intimately familiar with the ways courts and administrative agencies function in practice, clinicians and activists bring a depth of knowledge about a legal system that they have seen fall considerably short of its ideals.

Recently the AALS Equal Justice Project highlighted the work of faculty who devote their teaching, scholarship, and service toward bridging the widening gap between the promise of equality and the reality of inadequate representation for low-income people. During the 2000–01 school year the project organized nineteen colloquia throughout the nation to stimulate further law school commitment to equal justice work. At those colloquia and at the AALS annual meeting, faculty spoke fervently about teaching, scholarly, and service activities that integrated the equal justice model, while urging more colleagues to "test their ideas in public life" and "let justice drive the scholarly agenda."[2] Surprisingly, this passion for connecting scholarship to issues of justice and equality has met resistance within the academy and seemingly runs counter to its baseline scholarly expectations.

1. See, e.g., Robert D. Dinerstein, Clinical Scholarship and the Justice Mission, 40 Clev. St. L. Rev. 469 (1992).

2. The first phrase is Jamin Raskin's; the second, Marina Hsieh's. Both spoke at the Equal Justice Project colloquium in Washington, D.C., Sept. 22, 2000. I discuss their work below.

While students have applauded the real-world practice experience as a refreshing and attractive contrast to classroom doctrine, clinical and activist faculty's scholarly reform efforts have received a less enthusiastic, and often chilly, response from conventional colleagues. With some exceptions, senior faculty and administrators expect tenure-track clinicians and activists to publish according to traditional legal academic criteria, namely heavily footnoted law review articles in "respectable" law journals. The more elite the journal, the more likely that nonclinical colleagues will be impressed. Many clinicians have accepted this reality and have demonstrated a wide range of success in meeting these long-standing promotion criteria.[3]

Like other scholars, clinicians and activists recognize the investment returns of devoting time and discipline to the extensively researched and well-written law review article. They value acquiring a deeper understanding of the subject matter, contributing more to students' education, and becoming better teachers.[4] But clinicians and activists pay a high price when the academy applies a one-dimensional standard for "acceptable" scholarship during the tenure and promotion process.[5] Requiring them to follow a rigid scholarship model may represent a significant departure from their teaching of justice in practice and in the classroom. Further damage incurred in this strict publish-or-perish standard also undermines faculty interest in pursuing law reform activities that should count as scholarship but do not. Many not given the scholarly credit they deserve are discouraged from working toward justice reform and become alienated from scholarship and even the academy itself.

Scholarly Reform

Clinical and activist scholarly reform activities come in different guises. They may take the shape of new legislative or judicial reform, as when clinicians and activists draft and revise legislation, submit fact-finding reports, testify before legislative or rules committees, or help reorganize a court system. On other occasions, activists and clinicians may conduct interdisciplinary empirical studies, publish findings on a Web site (not in a law journal), administer projects that address glaring gaps in community access to justice, or partner students' community-based reform scholarship. Many promote public discourse and understanding about the legal system by writing short

3. Examples include Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261 (1997); Clark D. Cunningham, A Tale of Two Clients: Thinking About Law as Language, 87 Mich. L. Rev. 2459 (1989). For a list of clinical scholarship focused on poverty law and clients' real-life experiences, see Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2119 n.42 (1991).

4. "It is that genuine quest for knowledge, coupled with the desire to explore hypotheses and test theories, that is reflected in much of the current clinical scholarship. It is the same motivation that underlies traditional scholarship." Lawrence M. Grosberg, Introduction: Defining Clinical Scholarship, 35 N.Y.L. Sch. L. Rev. 1, 4–5 (1990).

5. Classroom faculty also have been critical of law schools' emphasis on law review articles and their unwillingness to weigh other kinds of publications in the tenure and promotion process. See, e.g., Dennis J. Turner, Publish or Be Damned, 31 J. Legal Educ. 550 (1981); Philip F. Postlewaite, Life After Tenure: Where Have All the Articles Gone? 48 J. Legal Educ. 558 (1998); Erwin Chemerinsky & Catherine Fisk, In Defense of the Big Tent: The Importance of Recognizing the Many Audiences for Legal Scholarship, 34 Tulsa L.J. 667 (1999).

and accessible opinion and news articles, speaking to community and legal groups, or publishing books that target specific lay audiences. Frequently both faculty groups engage in litigation strategies and submit legal briefs that include cutting-edge reform arguments.

Within most sectors of the academy these activities are neither recognized as scholarship nor seen and commended as potentially important stages in the process toward writing the traditional law review article. Instead law reform activities are commonly relegated to public service, the least-regarded and most overlooked category of faculty evaluation criteria.[6] Much like the law firm that allows its associates to engage in pro bono work as long as they complete 2,000 billable hours, the academy gives clinicians and activists conditional approval for their law-reform hobbies as long as they have written their law review articles and thus satisfied the publication requirement.

This strong preference for traditional scholarship is costly to the profession and to society's pursuit of justice. Clinical and activist law teachers are in a privileged position to critique the policies and practice of law. They are uniquely situated to combine an insider's knowledge with an outsider's perspective. With the benefit of periodic school breaks and the mandate to understand and teach an overview of the justice system, they are able to share reflections with lawyers and judges, and advance the justice model in ways that practitioners and judges rarely have the opportunity to process for themselves. Clinicians' supervision of students' representation is ideal for observing systemic courtroom practices and for offering constructive suggestions for improvement. Activists' relationships to local communities are excellent resources for reform scholarship that analyzes the impact of legal policy on people's lives and identifies needed change.

Yet until the academy broadens the definition of acceptable scholarship and frees faculty from the straitjacket of producing the massive law review article, it will continue to view scholarly activities too narrowly and be justly criticized within the profession for not producing more scholarship that is relevant to the reality of law practice.[7]

Law schools, too, suffer as they move further from their goals of maintaining an energized, creative, and intellectually stimulated faculty. Over time, many discouraged faculty will struggle to produce conventional articles and disengage from scholarship as a means to pursue their passion for justice. Tenured colleagues are likely to drift from a primary devotion to the law school community to finding professional reward in outside private commitments, ranging from the practice of law to consultancy. Further alienation risks fossilization into the dreaded dead wood.

Fortunately the academy is now well positioned to reverse this bleak picture and move to embrace clinicians' and activists' nontraditional scholarly contri-

6. "[Scholarship and service] reinforce each other. Scholarship can and should be a service to the profession, and service to the profession can and does enhance scholarship." Colin C. Tait, Scholarship and Service to the Legal Community: Doing as Well as Teaching, 28 Conn. L. Rev. 287 (1995).

7. The by-now-classic critique is Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34 (1992).

butions. AALS sponsorship of the Equal Justice Project sent a clear message that law faculties should welcome and show greater interest in scholarly justice efforts. Law schools should heed the project's plea to reconsider their "rigid definitions of countable scholarship"[8] and encourage faculty, particularly the nontenured, to pursue reform or activist scholarship agendas. Institutional change is also fueled by clinicians' remarkable rise within the academic hierarchy. During the past decade clinical education has gained a secure place in the curriculum as law schools have generally responded positively to the American Bar Association's call for enhancing the professional skills of the new lawyers they graduate.[9] The next wave of clinical integration will require the academy to revise its outdated perspective on what counts as scholarship to include various nontraditional reform activities.

Those activities are time-consuming. To justify the huge investment and personal commitment required, law schools will need to provide institutional encouragement and reward to the same extent they do for traditional scholarship. Absent this clear message of support, clinicians and activists will continue to act pragmatically. Most will choose scholarship more in tune with the dominant legal culture than the uncertain pursuit of their passion for reform in hope of later translating it into a polished published work.

This article proposes two steps to correct the serious disconnect between the legal academy's professed goals and its practice of effectively discouraging reformers' activities. First, the academy must recognize a new and broader definition of scholarship, one that credits faculty law-reform endeavors. While not every small-step reform activity will result in a conventional law review article, expanding the scholarly range is likely to invigorate clinicians and activists and result in increased faculty publications. Acknowledgment of reform activities as scholarship will appeal to many who are less interested in purely academic accomplishments than they are in seeing their work move a legal system closer to its justice ideals. Ultimately such an expansive approach will lead the academy to embrace not only the classic scholar of legal theory who works in a cloistered office cluttered with papers, but also clinical and activist scholars more directly engaged in real-world issues who work with their doors open to students and to public officials interested in improving the administration of justice.

Second, law schools should embrace the Equal Justice Project's call for scholarship that addresses issues of inequality within the legal system. Law schools are uniquely situated to close glaring inequities in the distribution of resources and availability of legal representation. Having accepted clinical pedagogy and the professional mission of preparing students for law prac-

8. Equal Justice Project, Association of American Law Schools, Pursuing Equal Justice: Law Schools and the Provision of Legal Services 7 (Washington, 2002) [hereinafter Pursuing Equal Justice].

9. Section of Legal Education and Admissions to the Bar, American Bar Association, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum (Chicago, 1992) (commonly referred to as the MacCrate Report).

tice,[10] the academy should take the initiative and promote pluralism and innovation in clinical and activist reform scholarship, removing this institutional barrier in the path to promotion.

Psychological Messages: Respect Makes a Difference

Deans and influential tenured faculty may be wondering what they have done to discourage reform scholarship. "We love scholarship, all kinds," they say. "We don't discriminate about a colleague's scholarly activities—as long as an article gets published in a respectable journal. But for purposes of argument, let's say we injured some overly sensitive reformers' feelings, or ignored or pooh-poohed a reform effort. What concretely do you suggest for moving this segment of the faculty forward?"

Here, of course, there is no prepared script. A mea culpa alone is not likely to be sufficient to keep clinicians and activists committed to scholarship, although it is certainly a good starting point for conversation. Recognition of law reform scholarship begins with a genuine appreciation that many clinicians and activists begin their scholarly travels by pursuing novel ideas and strategies for improving the quality of justice while practicing law. When hearing of such unfamiliar forms of scholarly activity, deans and senior faculty should avoid responding negatively. They should listen with interest and defend the reformers' choices against critics. Just as deans and senior faculty respect their colleagues' scholarship when the subject matter may be outside their own expertise, they should find law reform worthy of scholarly pursuit and support colleagues' passion for change.

Initial reactions deliver instant messages of official approval or disfavor. For most faculty, particularly new or untenured, nothing extinguishes the sparkle of an idea more quickly than a dean's or a senior colleague's disparaging or unenthusiastic comment. (Of course there always will be a few rebels who can use such resistance as an impetus to stay the course and continue their work.) Rather than sounding critical, deans and faculty should communicate an openness to examine the issue that has prompted a colleague's reform activity and explore its potential for continuing scholarship.[11]

In the hierarchical structure of the law school, deans and senior faculty have a golden opportunity to encourage and affirm reform scholarship. Many will find it a natural process. For others it will not be so easy. They will need to overcome the impulse to control and dismiss a reformer's beginning steps. When miscommunication occurs, they should be quick to correct. They are likely to find that clinicians, like students, appreciate the respectful exchange.[12]

10. *Id.* at 1, 6.

11. Encouraging faculty to discuss their law reform activities at an informal roundtable where they could present their preliminary thoughts about their work's scholarly potential would help to legitimize clinical and justice-based scholarship. For an argument that such an early workshop is more fruitful than a more combative work-in-progress presentation, see James Lindgren, Fifty Ways to Promote Scholarship, 49 J. Legal Educ. 126, 128–29 (1999).

12. Clinicians are familiar with the difficulty of responding empathically to unorthodox approaches. When observing a student's unconventional style, for example, we often are tempted to interrupt and say how we would do it. We have learned that it is better to exercise patience and understand the student's plan for action before offering our critique. But

Nontraditional Scholarly Reform

Let me illustrate with several examples.[13] I begin with my favorite—the op-ed article—and explain its significance at the beginning stage and throughout the continuing process of conventional scholarship. Writing to a wider audience about controversial and current justice-related subjects has been key to my identifying scholarly research topics and justifying the substantial commitment to complete the project. Most deans and faculty, however, question whether op-ed articles even belong in the scholarship portfolio.

The Op-Ed Article

Traditionally, the academy does not regard the op-ed piece as scholarship.[14] A 750-word advocacy article, they contend, lacks sufficient intellectual depth. Many are dismissive because they consider such a piece relatively easy and quick to write. While perhaps offering congratulations for the "nice article" they read over morning coffee, some may even resent this form of activism and regard the author as an intellectual lightweight or a media hound. A few may begin to wonder whether the writer measures up to faculty expectations.

Most clinicians and activists accept the scholarly limitations of an op-ed piece but think such criticism misses the mark. They would counter that they write for the op-ed page because this is an ideal way to further the public's understanding of a legal issue that requires immediate attention.[15] From this perspective, clinicians and activists consider the op-ed article the first stage, or perhaps an added layer, to an ongoing scholarly reform project. Rather than seeing this short article as the final word, they usually have much more to say and to discover.

Clinicians and activists scoff at the suggestion that writing an op-ed piece is easy. Anyone who has tried knows the difficulty of trying to explain a complex

sometimes we are caught off guard, and we use the wrong words or speak insensitively. When we acknowledge our error, most students are forgiving. When we don't, we often spend a big chunk of the semester trying to undo the damage.

13. I realize that some readers may question the relevance of personal accounts. But in the context of promoting dialog and reconsideration of the academy's current stance on nontraditional scholarship, these experiences reveal a great deal about clinicians and activists within the law school subculture.

14. Chemerinsky and Fisk are among the few who have tried to evaluate the place of op-ed articles in the promotion and tenure process. Acknowledging that "there is no doubt that such writings have value and faculty members should be encouraged to write them," they posed the unusual hypothetical of a person seeking tenure on the sole basis of op-ed pieces and popular magazine articles. In their view such a basis is insufficient; tenured scholarship must include writings that make a "significant, original contribution to knowledge about the law." Chemerinsky & Fisk, *supra* note 5, at 674. Few would disagree. Published op-ed and magazine articles alone *would* hardly seem sufficient to meet a tenure standard. The more pertinent question is whether op-ed articles with creative and original content should be included within the candidate's scholarship portfolio and given *some* weight.

15. Steven A. Drizin makes the argument: "An op-ed in the Chicago Tribune will reach a million people, be read by policymakers, and lead to possible law reform. Most law review articles gather dust on a shelf and rarely contribute to any meaningful social change." E-mail communication (Apr. 11, 2002) (on file with author).

issue concisely and clearly in limited space. Most clinicians and activists invest substantial time in the publication process and experience considerably more rejection, particularly in the national print media, than occurs in the relatively easy acceptance process of law journal submissions.

Many deans and faculty heavyweights fail to respond positively to the op-ed article. But they should commend colleagues who take the plunge into the unpredictable and prickly public arena to reach a larger audience about an important issue. They should evaluate the op-ed article for its content and its potential to spur its author to continue walking along the scholarship path, adding more depth and reflection to future writing. Where there is an obvious link between the op-ed piece and a subsequent traditional publication, the op-ed article surely should be given additional points as part of the scholarly package.

Here I want to illustrate the differing reactions of deans and senior faculty to reform scholarship, and some of the ways that activist engagement can turn into scholarship, with an account of my own experience. When I moved from practice to teaching, I had no interest in devoting hundreds of hours to producing a law review article. After eleven years on the front lines of the criminal justice system, having witnessed the inequities of indigent defense and inadequacies of prosecutorial representation, I entered teaching to improve the quality of attorneys' advocacy, particularly for the economically disadvantaged. I was not interested in becoming a scholar. Like many clinicians, I primarily wanted to contribute to law students' becoming excellent, well-prepared, and ethical advocates dedicated to improving the justice system. I wanted to influence future practicing attorneys to act professionally, not vindictively, toward the many poor people (disproportionately people of color) they would encounter.

While traditional scholarship had little appeal, writing op-ed articles and letters to the editor about the criminal justice system seemed consistent with meeting academic expectations and aspiring to be a reformer. Because criminal justice issues are usually front-page news and often divide communities, they are prime subjects for op-ed comment.

My first dean. Midway through my second year of teaching, Bernhard Goetz shot four unarmed black teenagers on the New York subway. For weeks the story dominated the news. When students returned from winter recess, they engaged in lively discussions and sponsored forums about the case. My participation on a student panel led to writing an op-ed article in which I criticized the city district attorney for failing to indict Goetz.[16] I argued that race had played a crucial role in the grand jury outcome. Specifically, I suggested that the prosecution identified too strongly with Goetz as the white "victim" who believed he was going to be robbed, and unconsciously viewed the injured men as stereotypically criminal. I argued that the DA's office should be held

16. DA's Decision Made Jurors Miss Evidence, Newsday, Feb. 7, 1985, at 75.

responsible for the miscarriage of justice in not protecting African-Americans' personal security.

Soon after the article appeared, my dean summoned me to his office. Apparently he had received numerous phone calls criticizing my perspective. (I later learned that a United States senator who sided with Goetz and was a political friend of the law school had been one of the callers.) Naively, I said to the dean that public disagreement was healthy and in tune with the robust exchange of ideas within an academic community. The dean agreed. He concluded the conversation, however, by volunteering to read any future op-ed articles I wrote before I sent them for publication. I thanked him and said I did not expect that would be necessary.

As I left his office, I thought about his reaction to the political fallout. He had never commented before when I published op-ed articles about other controversial subjects. In this first feedback session about my publications, I had expected to hear his support, or at least neutrality, not his implicit disapproval. Perhaps the offer to review future articles was not meant to chill future expression, but was an awkward attempt to be helpful. In a few months the faculty would vote on my contract renewal. I assumed the dean would have the biggest say on my future employment. Would the Goetz article or my negative response to the dean's offer of prepublication screening hurt my chances? Were these unfounded worries? I decided to confide in two senior colleagues. Each believed the dean's message, whether intended or not, violated the spirit of academic freedom. They made their thoughts public and rallied to my defense—they liked the editorial! I believe their vigorous support was instrumental in my contract extension. I also was pleased to receive many colleagues' encouragement to continue writing op-ed articles.

The following year I ventured into a different political minefield with an op-ed piece describing the Nicaraguan government's constitutional reform process.[17] This article had the unintended consequence of inspiring law review students to extend me an invitation to write my first law review article. I accepted the challenge. Plunging into a world I had seen as foreign and foreboding, I ultimately found a comfortable place for combining law reform and scholarship.[18]

Soon thereafter the law school created two tenure-track positions for clinicians. For my tenure piece I returned to my Goetz article and wrote about jury selection and the current use of the peremptory challenge to gain an all-white jury in instances of racially motivated violence.[19] A few years later I achieved tenure and the rank of full professor. Looking back, it is clear that the Goetz article was an important step toward writing the lengthy law review article. I also noticed that during the tenure and promotion process, I had not pub-

17. Nicaragua's Charta: Hopeful Sign? Newsday, Mar. 20, 1986, at 88, 1986 WL 2353742.

18. The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial, 39 Stan. L. Rev. 1271 (1987); The Motion in Limine: Trial Without Jury—A Government's Weapon Against the Sanctuary Movement, 15 Hofstra L. Rev. 5 (1986).

19. Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1 (1990).

lished a single op-ed article. Perhaps I had become the cautious clinician who succeeds by following a prudent strategy for meeting tenure requirements and the expectations of colleagues. Or had I branched out and begun to acquire the scholarly discipline necessary to delve deeply into areas of historical and doctrinal interest? Probably both were true.

My second dean. In 1993, my tenth year of teaching, I spent the academic year as a visiting professor at a different law school. At orientation the school's newly appointed dean addressed the faculty. As customary at such gatherings, he spoke about the importance of scholarship and commended many for contributing to the school's intellectual environment. Unlike other deans with whom I was familiar, he praised faculty who had engaged in law reform litigation and legislative activities. He encouraged the faculty to become involved in issues that affected the local urban and national communities. He urged them to take their scholarship into the public arena and write op-ed pieces and other accessible articles. He promised that such published material would receive credit during the faculty evaluation and promotion process.

Many of the faculty embraced the dean's offer. Within this community-spirited environment, they produced reform scholarship for the public's consumption. To activists and clinicians, the dean's message validated scholarly work they valued. I marveled at the faculty's creative energy. Nearly every week I attended faculty-organized workshops and study groups. The dean's leadership and the faculty response revived my interest in publishing op-ed articles and participating in new law reform scholarship.

My third dean. After my visit concluded, I joined another law school's faculty. Within weeks I had written an op-ed article—"What if O.J. Was Poor?"—about the O.J. Simpson trial.[20] Two local criminal court judges complained to the dean that I had impugned the integrity and fairness of the criminal justice system. From their perspective, every poor person received colorblind justice and was treated fairly. What was a person of my ilk, they asked, doing at "their" law school? The dean called me to his office to tell me he welcomed the op-ed article, but in the future he wanted advance notice of publication so that he could be better prepared to defend faculty against detractors. With pleasure, I said, fully appreciating his support. During the next several years, op-ed articles and letters to the editor continued to shape my law reform scholarly activities and future conventional scholarship.[21]

Times have changed considerably since I began teaching. Many law schools now have a media liaison who encourages a faculty presence in the national and local media. While applauding this trend, I suspect that op-ed articles are still miscategorized and not credited as scholarship. If true, this remains a formidable obstacle for clinicians' and activists' continuing scholarship and

20. Balt. Sun, Jan. 22, 1995, at 1E.

21. I wrote a series of op-ed articles about local criminal justice systems where poor people are unrepresented by counsel at the bail stage. See, e.g., For Want of a Lawyer, Many Do Time, Balt. Sun, Apr. 7, 1996, at 6F. Those led to two substantial articles: Thirty-five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings, 1998 U. Ill. L. Rev. 1; Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail, 23 Cardozo L. Rev. 1719 (2002).

reform activities. Change will require the academy to recognize the op-ed article as a beginning, not the endpoint, of scholarship. Over the long haul, the academy should credit faculty writing about subjects that have meaning in the real world of law practice. Such recognition will help sustain teachers' enthusiasm for scholarship long after they have achieved job securiry. It also will spur them to disseminate their ideas to a broader public audience.

Seeing Scholarship Differently: Legislative Reform

Op-ed articles are but one type of law reform activity that can evolve into scholarship. Clinical and activist faculty engage in a wide array of reform projects and ideas that fit easily with scholarship. Clinicians attending the 2001 AALS annual clinic conference indicated that a high percentage had taken leadership roles in legislative reform, conducted empirical studies, written bar journal articles as well as op-ed pieces, and submitted scholarly law reform briefs. Interestingly, few expected that their nonclinical colleagues would place much scholarship value on these efforts.[22]

Again I turn to an example. Barbara Babb, professor of law at the University of Baltimore, recognized her fortune in leaving law practice to join a faculty that supported her scholarly interest in reforming Maryland's family court system. "It allowed me to become serious about my writing," she told me. "I had struggled to identify a legal framework for translating my interest in court reform into scholarship. As a law professor, I knew I could assist with the legislative process. Yet, as a clinician, I wasn't sure how to identify a scholarly framework."[23]

Having previously directed the Baltimore Legal Aid Society's family division and practiced family law in upstate New York, Babb entered teaching keenly aware of the inefficiency and inequities of the limited jurisdiction Maryland courts possessed in family matters. Under the then-piecemeal system, litigants often appeared before several different judges to resolve separate but interrelated problems. Because a court's jurisdiction was limited to hearing and deciding specific subject matters, such as paternity, divorce, or domestic violence issues, neither judges nor litigants could develop a comprehensive approach to family situations.

Babb was hired on a three-year contract to teach in a new Family Law Clinic. Combining her primary teaching mission with a profound interest in unifying Maryland's family court system, she devoted substantial time during her first contract period (and for the next several years on the tenure track) to a series of legislative scholarly reform activities. Surprising some colleagues who had not expected a clinical teacher to produce conventional scholarship, Babb's sustained commitment to reform became the inspiration and centerpiece for her law review publications that followed.

22. At a panel on scholarship and law reform, about two-thirds of the 75 clinicians who responded to the written questionnaire said they had engaged in each activity. Only one in five, however, thought that their school's faculty would credit these efforts as scholarship. AALS Workshop on Clinical Legal Education, Creating Scholarship to Reform Legal Systems, Montreal (May 11, 2001).

23. Conversation (May 14, 2002).

The progression of Babb's scholarly travels is familiar to clinicians and activists who participate in ground-breaking legislative reform work and then search for ways to analyze and reflect upon this experience in their scholarship. Following her first teaching year, the Family Law Clinic received a two-year grant from the Maryland Legal Services Corporation to study poor people's denial of access to legal services in domestic cases statewide. Babb spent her second and third years of clinical teaching gathering data on unified family courts and approaches for Maryland to follow. She published an excerpt of the study's results in a bar journal article that circulated to Maryland's legal and legislative communities.[24] Calling for statewide family court unification, she shared her research with legislators interested in reform. Working closely with legislators and judicial officers, she drafted proposed legislation, offered compelling testimony, and provided scholarly input. Undeterred by the bill's legislative defeats over five years, she remained a principal force in the legislative hearing process. During this period between 1992 and 1997, she spent considerable time educating the judicial and legislative branches, as well as gaining support from the outside public community. Eventually Babb's leadership succeeded in building the judicial and legislative consensus needed to create a statewide unified family court system.[25]

From the very beginning of her eight-year reform effort, many of Barbara Babb's colleagues expressed interest and approval. When she applied for a tenure-track position, her presentation to the faculty was a blueprint for a more efficient family court; she showed the value of applying social science data through an interdisciplinary and jurisprudential analysis. While a few colleagues remained skeptical of the utility of scholarship growing from such an extensive investment in reform work, most saw the connection and encouraged further progress on the scholarly project. During the next few years, Babb published several impressive and highly regarded law review articles.[26]

Babb credits her colleagues and deans for their support during those early stages. She applauds them for "making it easier to carry on my scholarship agenda to this day. They provided genuine respect and peer recognition, and made it possible for me to become as passionate about my writing as I have always been about court reform."[27]

24. Barbara Babb, Family Court for Maryland: The Time Has Come, Md. B.J., Nov.-Dec. 1992, at 17.

25. Following the 1997 session of the General Assembly, the Maryland Judicial Rules Committee adopted Maryland Rule 16-204, which mirrored the proposed unified family court legislation and created a Family Division of the Circuit Courts. In January 1998 the rule went into effect; by October 1998 the family court system was operable.

26. An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective, 72 Ind. L.J. 775 (1997); Fashioning an Interdisciplinary Framework for Court Reform in Family Law: A Blueprint to Construct a Unified Family Court, 71 S. Cal. L. Rev. 469 (1998); Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts, 32 Fam. L.Q. 31 (1998).

27. Conversation (May 16, 2002). During the 1999–2000 school year her law school recognized Babb's court reform efforts by nominating her for a university public service award. She received the award in May 2000. At the beginning of the 2000–01 year the law school established the Center for Families, Children, and the Courts, which Babb directs.

The Equal Justice Project

Created in December 1999 by Elliott Milstein, then president of the AALS, the association's Equal Justice Project focuses on law schools' crucial role in closing the substantial gap between the legal system's promise of meaningful legal representation and the dismal reality facing most economically disadvantaged people and communities.[28] Given law schools' mission to prepare new lawyers entering the profession and to promote equality in the legal system, the Equal Justice Project called upon the academy, particularly its clinical and activist members, to lead the charge in addressing issues of inequality and injustice in their teaching, scholarship, and public service.[29]

The project's report provided a snapshot review of clinical law programs' early development during the 1960s and '70s when individual faculty assumed an active role in confronting social justice issues. From these early beginnings, clinical programs introduced students to poverty law, to concepts of law as an instrument of social justice, and to representation of poor people in a variety of civil and criminal justice arenas. The report briefly referred to the academy's initially uncertain and sometimes hostile attitude toward the clinical faculty and the struggle to integrate clinical education within the mainstream law school culture. Fast-forwarding, it described clinics' growth and eventual acceptance as an "institutionalized component of legal education." The report concluded that today "there is little dispute about the merits of clinical legal education," and it applauded the "staggering" diversity of clinical programs nationally.[30]

But the report expressed concern that faculty emphasis on traditional scholarship has prevented many clinical and activist faculty from engaging in equal justice scholarship that "link[s] theory, passion and values with useful action." It went on to explain that "rigid definitions of countable scholarship have often inhibited faculty, usually at the pretenure stage, from conducting research on controversial, contested social or political issues or linking their research to the activities of grass-root groups."[31] It reminded academics that they have an ideal vantage point from which to observe "the growing gap between the received rhetoric of the legal system and its stark underbelly." Because legal aid lawyers typically have little time to publish, the report

28. Milstein named the project (and its report) Pursuing Equal Justice: Law Schools and the Provision of Legal Services. The project was subsequently funded by the Open Society Institute's Program on Law and Society and is directed by Dean Hill Rivkin, professor of law at the University of Tennessee, who works closely with a six-member steering committee. The report makes clear that overcoming legal inequality means more than providing effective lawyering. Lawyers also need to learn new advocacy skills, including the importance of educating and working with community groups. Pursuing Equal Justice, *supra* note 8, at 3.

29. The project considered ways to (1) identify models of equal justice teaching, scholarship, and service; (2) stimulate law schools' cross-cutting interest in and commitment to providing legal services to underserved individuals, groups, and communities; (3) establish formal relationships between law schools and equal justice communities; (4) encourage collaboration among law schools and faculties in addressing equal justice issues; and (5) create sustained commitments to equal justice education, scholarship, and work in law schools. *Id.* at 8.

30. *Id.* at 14.

31. *Id.* at 7.

encouraged clinicians and activist faculty to fill the gap by engaging in scholarly activities that "involve the delivery of legal services, reflect innovative scholarship, both theoretical and empirical, [and develop] strategies of advocacy."[32]

Introducing New Faculty to Reform Scholarship

Faculty entering the academy from practice, particularly from the public interest arena, usually have many excellent ideas for filling this gap and producing meaningful law reform scholarship that would be useful to lawyers, judges, and underserved communities. Yet they frequently encounter some variation of the following warning: *Avoid activist or advocacy scholarship. Subjects that are too political are not good scholarly choices. Start by choosing a safer and more neutral subject.*

This message is diametrically opposite to what reformers need to hear before launching a major scholarly project. What activist scholars want instead is collegial support for maintaining their voice in scholarship that connects to advancing the cause of justice. This is true especially when the subject creates controversy.

At the first Equal Justice Project colloquium Marina Hsieh, professor of law at the University of Maryland, offered many concrete suggestions for maintaining harmony between activist scholars' voice for justice and their interest in scholarship. Focusing upon the "law made by lawyers," she proposed identifying research projects that resonate for "audiences outside the traditional confines of law school faculties and [beyond the] footnote law review police." Believing that "great scholarship is almost always about justice," Hsieh urged faculty to discover "the hot issues" by mingling with practitioners and publishing what they believe is ripe for change. Joining a public interest board, speaking to attorneys at a conference, or agreeing to take on an interesting amicus brief project would heighten the justice scholarship learning curve. Potential articles also could come from heeding judges' calls for relevant scholarship or answering a community's plea for legal assistance to remedy immediate problems. One could consider the potential justice implications of changes in a state's practice rules or a law school's student admissions policy. Hsieh also discussed interdisciplinary scholarship that applies empirical data to understanding and improving the administration of law.[33]

Hsieh's remarks illustrate the plethora of possibilities for reform scholars as well as the passion we often hold for topics. Topic suggestion, however, might only be the first of several hurdles. Clinicians and activists often face rebuff from influential colleagues who seem bent on telling us (even before we have written a word): "You can be (are) a great lawyer. And you have the makings of

32. *Id.* at 10, 20.

33. Hsieh had recently participated in an interdisciplinary conference about the jury system in which social scientists and law scholars examined empirical research and legal issues concerning bilingual jurors. Marina Hsieh, The Jury in the Twenty-first Century: An Interdisciplinary Conference, "Language-Qualifying" Juries to Exclude Bilingual Speakers, 66 Brook. L. Rev. 1181 (2001). The cross-fertilization process helped the researchers and practicing lawyers understand the bilingual juror during the trial and during the deliberation. Hsieh also referred to her current research about new developments in class action lawsuits, which grew from a presentation to civil rights lawyers.

a terrific teacher. But you will never be a scholar or academic because you are too much an advocate." Whether such fighting words are mean to challenge or to insult those of us who relish the practice of law, the search for personal harmony in scholarship will become considerably easier when the academy encourages and accepts activists' and clinicians' scholarly passion for writing about justice, exposing truths out there, and saying what needs to be said.

Linking Scholarship to Community Reform

Jamin Raskin's scholarly interest in extending voting and democratic rights to noncitizens and unrepresented groups reinforced the possibilities of a strong connection between participation in nontraditional scholarly activities and meeting high standards of law review scholarship. Believing justice scholarship is an expression of faculty creativity that is a "part of the flow of life," Raskin, a professor of law at American University, challenged his audience at the first Equal Justice Project colloquium to become "fully engaged" in their scholarly research by testing their ideas in public life. He urged reformers to follow a shared philosophy in which "the true value of an idea is measured by the courage with which we try to make it real in the world." He explained the important stage of transformation when scholars convert their creative thoughts for social change to usable scholarship. He suggested that this evolutionary process includes many types of scholarly events, from writing essays and op-ed articles to educating the public, pursuing litigation and submitting legal briefs, and publishing law review articles.

Describing the unconventional path he traveled before writing his first major article, Raskin explained the beginnings of his journey soon after being selected to serve on a local election task force charged with redrawing District of Columbia city council districts after the 1990 census. The group soon discovered that equalizing districts by census population figures produced the unexpected result that there were twice as many eligible voters living in some districts as in others because of the very high numbers of noncitizens living in certain areas. While some members of the task force suggested redistricting according to the voting population to equalize matters, Raskin wondered aloud whether noncitizens could themselves be counted as voters and granted the right to vote in local elections. The other task force members asked him as the law professor authority whether this notion of noncitizen voting was possible. Confessing his complete lack of knowledge on the subject, Raskin proceeded to conduct extensive legal research revealing a lost history of noncitizens voting and participating in politics in the eighteenth and nineteenth centuries. After the task force recommended extending the vote to noncitizens, the local city council scheduled a referendum on whether to change the city charter to allow for this reform. Resigning from the task force, Raskin then organized a Share the Vote Campaign. He published pamphlets and educational materials about the immigrant residents who would be able to vote if the measure passed. Strong opposition by anti-immigrant groups attracted national and local media attention. After the measure passed, Raskin "found the discipline" he needed to write and publish his first law review

article canvassing the history, constitutionality, and theoretical dilemmas of noncitizen voting.[34]

This process of first engaging in scholarly reform and community work before committing to write the conventional article makes sense to most activists and clinicians. Raskin's drafting of new legislation and a public referendum for the city council, as well as his writing about voting rights for the immigrant population for the public's education, are good examples of producing nontraditional scholarship at the beginning experiential stage. Fortunately Raskin's colleagues agreed; they, too, valued the project and had faith that these preliminary steps were crucial toward the publication of a conventional article.

What would have happened had his colleagues been initially hostile or unsupportive of Raskin's reform efforts? Most new faculty, I suspect, would have invested considerably less time and energy in democracy building, and instead would have responded to colleagues' expectations and concentrated on publishing the conventional article.

Raskin's subsequent scholarly projects further illustrate the potential of linking conventional scholarship to reform activities. What is interesting here is the wide range of real-world activities that were integral to producing rigorous conventional scholarship and to continued engagement in reform projects. In 1992, for instance, Raskin successfully worked with Eleanor Norton Holmes, the nonvoting delegate from the District of Columbia, to expand her voting rights in Congress. Norton won the right to vote in the House Committee of the Whole, only to see it revoked when the Republicans took over the House in 1994. Raskin analyzed his unfolding constitutional and political strategy and tactics in the Norton controversy in an article in the *Harvard Civil Rights-Civil Liberties Law Review*.[35] His scholarly activities turned to speaking, writing op-ed pieces, disseminating information in news articles, and eventually commencing a lawsuit with the District of Columbia's corporation counsel challenging the congressional disenfranchisement of the people of Washington.

After gaining tenure Raskin continued to integrate his interests as a lawyer and organizer into traditional scholarship. His interest in campaign reform provided the opportunity to test his scholarly ideas as the lawyer for presidential candidate Ross Perot. Perot had been denied the right to participate in the 1996 national election debates, and Raskin brought suit challenging his exclusion. He argued that corporate sponsorship of a debate limited to the Democratic and Republican candidates was an illegal political contribution and violated federal election law. He then transformed these arguments into a First Amendment theory of democratic competition and published an article in the *Texas Law Review*.[36] More recently he successfully represented high

34. Jamin B. Raskin, Domination, Democracy, and the District: The Statehood Position, 39 Cath. U. L. Rev. 417 (1990). See also Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. Pa. L. Rev. 1391 (1993).

35. Jamin B. Raskin, Is This America? The District of Columbia and the Right to Vote, 34 Harv. C.R.-C.L. L. Rev. 39 (1999).

36. Jamin B. Raskin, The Debate Gerrymander, 77 Tex. L. Rev. 1943 (1999).

school students in a censorship claim; they had been barred from producing their monthly cable television show because of objectionable subject matter. His First Amendment research led to a book, *We the Students,* intended to inform students of their constitutional rights and responsibilities based upon Supreme Court rulings.[37]

Extending the Audience

Along with his colleagues Jeffrey Fagan and Valerie West, Jim Liebman, professor of law at Columbia University, published a twenty-three-year statistical death penalty study on the Web. It illustrates the enormous potential for nontraditional scholarship to reach a larger public audience, including policymakers and decision makers. Liebman's study captured national attention by first exposing the high error rate in state and federal capital trials: 68 out of 100 death sentences imposed between 1973 to 1995 were reversed on appeal or on habeas review because of serious flaws.[38] The second part of the Liebman study identified the main factors responsible for the high reversal rate: incompetent lawyers, police or prosecutorial misconduct, misinformed and biased judges or juries.[39] Liebman's project had grown from a research investigation begun ten years earlier when the then chair of the U.S. Senate Committee on the Judiciary asked him to calculate the frequency of habeas corpus relief in capital cases.

Deliberately bypassing the traditional law review or book publication, Liebman chose to publish the study on a user-friendly Web site. Like most scholars, he was familiar with the unpredictable publication dates of law journal articles and with the limited readership of an academic audience. Liebman wanted the Columbia study to contribute immediately to the ongoing public debate and to the recent disclosure that five Illinois death row defendants were among many who had been wrongfully convicted of a capital crime.[40] Seeking broad dissemination of the study's findings, Liebman hoped

37. We the Students: Supreme Court Decisions For and About Students (Washington, 2000). Raskin and his colleague Steve Wermeil also launched a "constitutional literacy" project to send law students who have done well in Constitutional Law into public high schools to teach a course on the Constitution and public schools.

38. A Broken System: Error Rates in Capital Cases 1973–1995 (Justice Project: Campaign for Criminal Justice Reform) <http://justice.policy.net/proactive/newsroom/release.vtml> (June 12, 2000). The study examined more than 5,400 state and federal appeals between 1973 and 1995. Of the 68 persons whose death sentences were overturned, 82 percent received a sentence less than the death penalty on retrial. This included 7 percent who were acquitted.

39. A Broken System II: Why There Is So Much Error in Capital Cases (The Justice Project: Campaign for Criminal Justice Reform) <http://justice.policy.net/cjreform/dpstudy/study/index.vtml> (Feb. 12, 2002). The study found that 76 percent of the state and federal reversals were due to these three factors. It also found that serious error was most likely to occur when the defendant was African-American and the victim was white, and when sentencing state court judges faced popular election.

40. In the late 1990s David Profess and his students at Northwestern University's Medill School of Journalism succeeded in revealing the innocence and reversing the capital convictions of five Illinois defendants who were awaiting execution. Medill, Students Contributed to DNA Exonerations <http://www.medill.northwestern.edu/inside/2002/protess-dna.html> (Jan. 25, 2002). Since January 25, 2002. more than 100 capital defendants in the U.S. have been exonerated and freed; the Innocence Project at Yeshiva University's Benjamin N. Cardozo School of Law, created by Professors Barry C. Scheck and Peter J. Neufield in 1992, has led these efforts. *Id.*

his lay audience would take greater responsibility and become more involved in the imposition of the death penalty. Because he was writing to a mass audience rather than the usual discrete group of fellow legal academics, Liebman avoided a doctrinal and legal analysis. Instead he referred to a series of charts and diagrams and vivid report cards for each state to support the study's conclusion that the death penalty is flawed. Accomplishing his objective of writing with "simplicity and intelligibility," Liebman also eliminated the often distracting footnotes—a prerequisite of law journal articles.[41]

Liebman spent considerable time writing an accessible executive summary. He briefed journalists before the study's release. His efforts were well rewarded. More than 1,000 newspaper editorials and news stories reported and commented on the study. The news articles were prominently displayed, usually on the front page. Liebman appeared on numerous national television and radio talk shows; broadcast news programs also devoted extensive attention to the study's findings and analysis.

Liebman received generous support from his dean and his law school throughout the research project leading to the report's publication. He was a tenured and highly respected academic entering his seventeenth year of teaching when he published the study. When asked whether law faculties would value similar scholarship at the pretenure stage, he responded: "Surely there would be some question how faculty members generally would evaluate a Web site publication. While I expect my colleagues would treat it as part of a scholarship portfolio, I can see where a nontenured colleague would have an incentive to present the study differently and in a conventional form." He added that his publishing outside the expected law review boundaries has caused some concern among colleagues. "People in the academy still are not sure how to react to the study, given the dissemination and the audience."[42]

Therein lies part of the unsolved mystery within the academy. Why is a serious empirical study that leads death penalty advocates and the citizenry to pause and reconsider existing policy not a sure bet to be accepted and valued by colleagues considering tenure and promotion? For clinicans and activists who are motivated by a passion for reforming the justice system, the position that such scholarship should not "count," or the uncertainty about whether it will count, makes little sense. It can also represent a major roadblock to their pursuit of scholarship.

* * * * *

Clinicians' and activists' interest in law reform is what inspires and gives meaning to their scholarly efforts. Conventional colleagues' unwillingness to embrace their nontraditional reform activities is harmful. It deprives the legal and public community of a needed and valuable critique of the legal system as well as a fertile source for new solutions.

41. He included an extensive appendix for the reader interested in source material.

42. Telephone conversation (Apr. 30, 2002).

The time is now ripe to expand the definition of clinical and activist scholarship to include less traditional forms. They often are the steppingstones to conventional publications, and they are valuable in themselves. By broadening the meaning of scholarly currency beyond law review articles, the academy would invite the creation of more publicly accessible publications, such as Web site studies, law reform reports, community-based scholarship, and op-ed and bar journal articles. Within the profession, expanding the meaning of scholarship translates to more useful information for decision makers, judges, practicing lawyers, and legislators. Importantly, it strengthens our democracy and results in a better informed and educated citizenry.

The recognition of reform scholarship as productive academic scholarship would reduce a constant source of friction that many clinicians and activists experience—the tension between their colleagues' definition of acceptable scholarship and their own powerful interest in justice scholarship. Broadening the scholarship standard would tell clinicians and activists that their scholarship counts. Encouraging them to do what they are passionate about is the key to refueling and sustaining their commitment to scholarship, to their school, and to the academy.