

## RISKS AND REWARDS OF EXTERNSHIPS: EXPLORING GOALS AND METHODS

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### INTRODUCTION

This article grew from a presentation relating externship clinical programs to the theme of the July 2016 INTERNATIONAL JOURNAL OF CLINICAL LEGAL EDUCATION and Association of Canadian Legal Education conference: *The Risks and Rewards of Clinical Legal Education Programmes*. Externships or field placement programs involve students placed away from the law school and supervised by a person who is not employed by the law school. Externships offer many potential rewards for students as well as other stakeholders, including especially community institutions. But there are also risks—risks that the externship will be expected to accomplish too much with too few resources or that the externship program will be held back in the potential for

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contribution due to inadequate imagination or planning. This article seeks to encourage externship teachers to put aside assumptions that are sometimes made about how externship programs “should be” and consider some alternative approaches to course design and possible goals for externship courses.

Skills development often is assumed to be a primary goal for all clinical programs, including externships. Similarly, clinical education often is equated with encouraging student commitment to social justice, and some assume that all forms of clinical education including externships should be directed toward this end.<sup>1</sup> This article argues that broad characterizations of clinical programs generally, and externship programs specifically, as skills development or promoting social justice can obscure the need to look more specifically at what a particular course seeks to achieve with regard to student learning and motivation. We argue to put aside broad characterizations of goals for externship programs and instead to focus on intentional design working back from desired outcomes for students and considering the particular law school student population, community in which the law school is situated, and the externship courses’ place in the overall curriculum.

Part I discusses intentional design. While “skills” acquisition may be a desired outcome, a course should be specific about what “skills” students should acquire and choose design features in light of those objectives. Part II. A. discusses the wide-ranging conceptions of “skills” employed by various regulators and commentators on

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<sup>1</sup> THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE, Part II (Frank S. Bloch, ed. 2011); Jeff Giddings, PROMOTING JUSTICE THROUGH CLINICAL LEGAL EDUCATION, (2013).

legal education and how the malleability of the concept may make it less than useful without careful delineation of a particular course's desired outcomes. Part II. B. develops an "intentional" approach to design of externship programs considering how placement type, supervisor selection, division of responsibility between law school externship teacher and site supervisor, classroom component topics, and teaching methods might differ among two types of externships termed "tailor-made" and "retail" externships.

Many discussions of clinical education assume commitment to social justice is a necessary or overarching goal. With this assumption, some externship programs take as a given that only placement in non-profit agencies should be permissible. In doing so though, there often is little explicit consideration of how one would know students' commitment to social justice has deepened and what methods, aside from the design feature of placement type, are directed toward that outcome. Part III of this article considers complementary values toward which a program might be directed: formation of professional identity and institutional critique. An externship course could be directed toward helping students consider how to act consistent with their vision of the kind of lawyers they wish to be; it could critically assess how institutions function and what lawyers do within them. This part argues that a useful design frame toward these goals is the "micro" and "macro" exploration of values.

Micro examination of values refers to definition of the students' own professional identity and desired course for their legal careers. This may be achieved through working toward learning outcomes like enhanced student ability to learn from

experience, helping students establish patterns of intrinsic motivation and self-direction to carry through to their careers, and assisting them in deciding the kind of lawyer they want to be both in the sense of particular types of jobs and the broader sense of professional identity.<sup>2</sup> Macro exploration refers to the motivation to and capacity for institutional critique and the way lawyers function in the legal system and society more generally—carrying out the “public citizen” role referred to in the Preamble of the ABA Model Rules of Professional Conduct. Part III’s discussion of macro values explores externships’ potential to help students understand the dynamics and requirements of law-related workplaces<sup>3</sup> and consider critically whether and how lawyers’ behaviour promotes or hinders the achievement of justice. Stuckey *et al* observed that externships are well suited to enable students to engage in critique of legal institutions and practice but observed “What is surprising is the apparent absence of our collective appreciation of practice observation courses as a forum for studying the values, behaviors, attitudes, and ethical requirements of lawyers (professionalism).”<sup>4</sup>

In summary, the article urges moving past general references to “skills development” and “promoting social justice” to more specific articulation of the outcomes the

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<sup>2</sup> LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION 685 (Leah Wortham, Alexander Scherr, Nancy Maurer, & Susan L. Brooks, eds. 3<sup>rd</sup> ed., 2016) [hereinafter LFP].

<sup>3</sup> Robert Condlin, *‘Tastes Great, Less Filling’: The Law School Clinic and Political Critique*, J. LEGAL ED. 45 (1986); David Givelber et al., *Learning Through Work: An Empirical Study of Legal Internships*, 45 J. LEGAL ED. 1 (1995); Neil Kibble, *Reflection and Supervision in Clinical Legal Education: Do Work Placements Have a Role in Undergraduate Legal Education?*, 5 INT’L. J. LEGAL PROF. 83 (1998); Elliot Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL ED. 375 (2001).

<sup>4</sup> ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 198 (2007).

program seeks with regard to student motivation and capabilities and aligning design features to those outcomes. The article argues that a component of professional identity formation should be the capacity for and motivation to engage in institutional critique and work for constructive change consistent with the public citizen role. The concepts of micro and macro exploration of values are offered as a conceptual framework for learning objectives that promote social justice through students' enhanced competency and motivation toward that goal.

## I. INTENTIONAL DESIGN

As will be discussed in Part II, a range of national legal education regulatory schemes are converging in their use of student learning outcomes expressed as competencies to be gained in a legal education program and in particular courses.<sup>5</sup> This approach starts from what students should be able and motivated to do as a result of their education, including how assessments will measure if outcomes are met, how students will understand what they are supposed to learn, how they will receive

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<sup>5</sup> A.B.A. SEC. OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE 11-13 (2008). [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/reports/2008\\_outcome\\_measures\\_committee\\_final\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/reports/2008_outcome_measures_committee_final_report.authcheckdam.pdf) (reviewing practices from other countries); Stuckey et. al. *supra* note 4, at 45-49 (referring to developments in the Scotland, Northern Ireland, England and Wales, and Australia); Anna Huggins, *Incremental and Inevitable: Contextualising the Threshold Learning Outcomes for Law*, 38 U.N.S.W.L.J. 264 (2015) (history of Australian Threshold Learning Objectives for LLB and JD degrees and context including the experience of other countries); Anthony Niedwiecki, *Law Schools and Learning Outcomes: Developing a Coherent, Cohesive, and Comprehensive Law School Curriculum*, 64 CLEV. ST. L. REV. 661 (2016) (describing the US regulatory path to requirement of learning outcomes).

useful feedback to enhance progress to learning goals, and so on. More traditionally, teachers thought of what they needed to “cover.”

The “backward design” approach of Wiggins & McTighe<sup>6</sup> has been influential in US K-12 education and general university education and has now been applied by some US legal educators as well.<sup>7</sup> Legal education works from British Commonwealth countries<sup>8</sup> more frequently refer to the work of John Biggs.<sup>9</sup> *TEACHING LAW BY DESIGN*, a well-known book by American legal educators Michael Hunter Schwartz, Sophie Sparrow, and Gerald Hess, does not refer explicitly to Wiggins or Biggs.<sup>10</sup> It, however, takes a consistent approach focusing on beginning with goals, an assessment of the target learners, and consideration of the assessments that will provide information on whether the students are learning.<sup>11</sup>

Australian academic Nick James refers to the work of both Wiggins and Biggs, as well as other education researchers, to coin the term “educationalism” to describe an emphasis on university teaching consistent with education scholarship, which grew from some university professors’ interest in research on teaching and learning and

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<sup>6</sup> GRANT WIGGINS & JAY MCTIGHE, *UNDERSTANDING BY DESIGN*, (2d ed. 2005)

<sup>7</sup> See, e.g., Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 *CLINICAL L. REV.* 905 (2012); Wallace J. Mlyniec, *Developing a Teacher Training Program for New Clinical Teachers*, 19 *CLINICAL L. REV.* 327 (2012).

<sup>8</sup> See, e.g., Neil Gold, *Clinic is the Basis for a Complete Legal Education: Quality Assurance, Learning Outcomes and the Clinical Method*, 22 *INT’L J. CLINICAL LEG. ED.* 1 (2015); Angela Macfarlane & Paul McKeown, *10 Lessons for New Clinicians*, 13 *INT’L J. CLINICAL LEG. ED.* 65 (2008).

<sup>9</sup> JOHN BIGGS & CATHERINE TANG, *TEACHING FOR QUALITY LEARNING AT UNIVERSITY* (4<sup>th</sup> ed. 2011)

<sup>10</sup> MICHAEL HUNTER SCHWARTZ, SOPHIE M. SPARROW, & GERALD F. HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* (2<sup>nd</sup> ed. 2017).

<sup>11</sup> *Id.* at Chapter 3, *Designing the Course*, 33-59.

efforts to encourage colleagues to adopt methods consistent with this work.<sup>12</sup> He argues that in some instances these initial motives may have been co-opted by “corporatism,” which he uses to describe an emphasis on “the accountability of academics, and the efficiency, marketability, and growth of the law school as a corporate institution,” and the possible role of this convergence in faculty resistance to adopting new methods.<sup>13</sup> While the authors are concerned that bureaucratization and heavy-handed regulation can “hijack” concepts like learning outcomes and aligned assessment, we continue to believe that backward design and constructive alignment are useful approaches to course design toward their original purposes of enhancing students’ educational experiences.

Clinical education, by its nature, presses teachers to consider the nature of the experience from which a student would learn—not just what readings the teacher would assign or what she might say in a class. We all may have experienced trying to communicate that difference in the teacher’s role to classroom teachers, *e.g.*, in application of the law school’s teacher evaluation practices to clinical teachers. Traditional evaluation of classroom teaching for retention, promotion, and tenure normally includes classroom visits by faculty to observe “teaching.” It is sometimes difficult to explain to relevant law school committee members that an evaluation of a clinical teacher’s “teaching” would include looking at much more than what happens

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<sup>12</sup> Nick James, *‘How Dare You Tell Me How to Teach’: Resistance to Educationalism within Australian Law Schools*, 36 U.N.S.W.L.J. 779 (2013).

<sup>13</sup> *Id.* at 779, 784, 789-798.

in the “classroom component.” For example, an externship teacher’s teaching effectiveness is also based in choices about placement sites and supervisors, ways of interacting and communicating expectations to field supervisors, techniques for fostering student reflection and self-learning and evaluation, and other dimensions of structuring the student’s experience.

This article flows from our view that there are not per se “right choices” about such design features; they should flow from the objectives of the particular externship. Rather than using an intentional design approach, we have observed that teachers can fall into “assumptions” about the goals of clinical education and program structure. This article encourages externship teachers to “open the frame” and think about what they most would like to see students gain from a particular course, realizing that there are a broad range of learning outcomes that might be attained through the externship method. Program structure and design should then follow “intentionally” from those choices rather than from assumptions about how things “should be.”

For example, it sometimes is assumed that externship programs “are” directed toward enhanced proficiency in client representation and advocacy tasks so, therefore, it is best to have a small, repeating group of placements where the teacher is assured what tasks students will perform and that the placement supervisor has expertise in those tasks. As the examples of “tailor-made” and “retail” externships developed in Part II.B discuss, those design choices appropriately might vary if the skills considered were ones of more general work management and enhanced self-directed learning, depending on other coursework students might have had, and whether a primary

course goal was development of professional identity and consideration of the type of lawyer a student wants to “be.” Similarly, Part III considers an alternative approach to the assumptions that a primary goal of all clinical education including externships is promoting social justice and, therefore, placements should be limited to non-profit organizations engaged in social justice work.

## **II. ASSUMING SKILLS DEVELOPMENT AS A PREDOMINANT GOAL FOR EXTERNSHIP PROGRAMS**

### **A. The Malleable Definition of “Skills”**

Regulators and legal educators often characterize the skills associated with legal work in different ways. Some are more specific and detailed than others. There are also differences across countries in the expectations placed on law schools to contribute to the development of such skills.

In this part of the article, we provide an overview of some of the approaches taken to articulating skills that should be developed as part of a legal education. While there are points of common ground, differences relating to level of prescription and content make it difficult to distil the various views into a single framework. The approach taken in the USA and is more prescriptive of law school content than in Australia, Canada, and England. Australian and English regulators rely heavily on the acquisition of skills during a practice-focused training program that is generally undertaken separate from and following upon completion of a law degree.

While the term “skill” is used extensively by these various regulators, the term is generally not defined although examples may be given. The MACQUARIE DICTIONARY provides this useful succinct definition of the noun, “skill”: “the ability that comes from knowledge, practice, aptitude etc., to do something well.”<sup>14</sup> Externships and other forms of experiential learning can be designed to provide students with opportunities to build law-related skills through their blending of knowledge, practice, and aptitude. The potential of externships to contribute to this skill development is increased when the skills in question are fully articulated.

There is also variation in the terms used to describe the skills to be developed through a legal education. Some authors refer to “legal skills” while others refer to “lawyering skills” or “professional skills.” An alternative approach is Schultz and Zedeck’s development of “lawyering-effectiveness factors” through interviews with five stakeholder groups of University of California at Berkeley law school: lawyer alumni in three cities; clients plus reading complaints made by clients; faculty; students; and judges.<sup>15</sup>

Some characterizations of skills are narrow in their focus on specific tasks required of lawyers (for example, legal analysis and reasoning, drafting of legal documents) while others address skills that should be transferable between different professions and occupations (for example, collaboration, self-management). Most include

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<sup>14</sup> THE MACQUARIE CONCISE DICTIONARY 1086 (3<sup>rd</sup> ed. 2003).

<sup>15</sup> Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620 (2011).

interpersonal skills in legal contexts as well as skills related to self-evaluation and reflective practice.

Along with variation in the language used and concepts addressed, there is common ground among many of the various stakeholders in legal education regarding the importance of law schools graduating students who are “practice ready.” Kindred calls have come from critics, regulators, some law faculty, and students.

### 1. The Regulatory Approach

The American Bar Association (ABA), as the accrediting agency for American law schools, has taken significant steps to integrate “skills” into the curriculum by requiring at least six credits of “experiential course(s).”<sup>16</sup> The ABA Standards state that the “learning outcomes” to be achieved in a legal education shall include competency in “[l]egal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context” as well as “[o]ther professional skills needed for competent and ethical responsibilities to clients and the legal system.”<sup>17</sup> These “other professional skills . . . may include skills such as interviewing,

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<sup>16</sup> Am. Bar Ass'n, ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017 303(a)(3) (2016), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf). The New York Court of Appeals has gone one step further and now requires 15 credits of experiential learning, or an alternative certification of competence by the law school. 22 NYCRR 520. Order available at: <http://www.nycourts.gov/rules/Part520-Rule-Change-Final-121015.pdf> A 2013 California Task Force similarly recommended 15 credits of experiential courses or the equivalent. <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2013-Public-Comment/2013-07>.

<sup>17</sup> Standard 302, ABA STANDARDS, *supra* note 16.

counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation.”<sup>18</sup>

An experiential course must be “primarily experiential in nature” and must be “a simulation course, a law clinic or a field placement.”<sup>19</sup> Such a course must “integrate doctrine, theory, skills and legal ethics, and engage students in performance of one or more of the professional skills identified in Standard 302; develop the concepts underlying the professional skills being taught; provide multiple opportunities for performance; and provide opportunities for self-evaluation.”<sup>20</sup>

The very language of Standard 303 focuses on “skills” —multiple opportunities for their performance, the concepts underlying them, and the student’s evaluation of his or her performance of these skills. The Standard that governs simulation courses and law clinics further emphasizes the importance of “skills” by requiring “direct supervision of the student’s performance by a faculty member; opportunities for performance, feedback from a faculty member, and self-evaluation.”<sup>21</sup>

The ABA’s recent revision to Standard 304 explicitly defines externships, or “field placement” courses, as experiential courses if they provide “substantial lawyering experience that . . . is reasonably similar to the experience of a lawyer advising or

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<sup>18</sup> Interpretation 302-1, Standard 302, ABA STANDARDS, *supra* note 16.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Standard 304 (b)(i) and (ii) regarding law clinics, ABA STANDARDS, *supra* note 16. The language regarding simulation courses is almost identical at Standard 304 (a)(i) and (ii).

representing a client or engaging in other lawyering tasks.”<sup>22</sup> This standard requires “direct supervision of the student’s *performance* by a faculty member or site supervisor” as well as “opportunities for *performance, feedback* from either a faculty member or a site supervisor, and *self-evaluation*.”<sup>23</sup> The focus on performance, feedback, and evaluation underscores the importance of skills acquisition to the authors of this standard.

Externships and other forms of clinical and experiential learning are only peripherally addressed in the regulatory framework for Australian legal education. The Australian Qualifications Framework requires Bachelor of Law (LLB) and JD qualifications to satisfy a set of Threshold Learning Outcomes (TLOs) in six categories: (1) knowledge; (2) ethics and professional responsibility; (3) thinking skills; (4) research skills; (5) ability to communicate and collaborate; and (6) self-management.<sup>24</sup> These TLOs are designed to guide the general structure of Australian legal education programs rather than setting requirements for particular courses within a law program. They emphasize a range of skills that could be interpreted to include the micro and macro evaluation of values discussed in the next section of this article. The TLOs and the accompanying notes do not make any claims regarding the suitability of particular teaching methods for ensuring that students satisfy these requirements.

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<sup>22</sup> Standard 304(c), ABA STANDARDS, *supra* note 16.

<sup>23</sup> *Id.* (emphasis added).

<sup>24</sup> See <https://perma.cc/X93F-GHM5> and <https://perma.cc/KD4J-VQXF>. See also Anna Huggins, *supra* note 5.

While the contributions of experiential learning tend to be acknowledged by Australian legal educators, this has not resulted in clinical and placement experiences being embedded in the structures for LLB and JD studies. The AUSTRALIAN BEST PRACTICES IN CLINICAL LEGAL EDUCATION lists various possible learning outcomes for clinical legal education, including students developing and refining their:

- critical analyses of legal concepts through reflective practice;
- ability to work collaboratively;
- interpersonal skills, emotional intelligence, and self-awareness of their own cognitive abilities and values;
- awareness of lawyering as a professional role in the context of wider society (including the imperatives of corporate social responsibility, social justice, and the provision of legal services to those unable to afford them) and of the importance of professional relationships;
- developing preference for an ethical approach to legal practice and an understanding of the impact of that preference in exercising professional judgment; and
- awareness of the social issues of justice, power and disadvantage and an ability to critically analyse entrenched issues of justice in the legal system.

While they refer to the capacity of clinical courses to build in students an ability to practice ‘lawyering’ skills;<sup>25</sup> the authors of the AUSTRALIAN CLINICAL BEST PRACTICES emphasized potential learning outcomes well beyond narrow conceptions of legal

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<sup>25</sup> ADRIAN EVANS ET AL., BEST PRACTICES AUSTRALIAN CLINICAL LEGAL EDUCATION: THE FINAL REPORT OF THE PROJECT *STRENGTHENING AUSTRALIAN LEGAL EDUCATION BY INTEGRATING CLINICAL EXPERIENCES: IDENTIFYING AND SUPPORTING EFFECTIVE PRACTICES* (2013), file:///C:/Users/youngs/Downloads/PP10\_1603\_Monash\_Evans\_Report\_2013.pdf.

skills and substantive legal knowledge. Their intention was to highlight the potential of clinical programs to facilitate learning well beyond the skills focus often associated with such programs.

Upon completing an LLB, Australian graduates must also undertake a Practical Legal Training (PLT) program or a supervised work traineeship to gain admission to the legal profession. A PLT program must include at least 450 hours of programmed training along with at least 15 days of workplace experience.<sup>26</sup> The program must develop the competence of trainees in relation to three areas: skills, prescribed practice areas and values. The reference to skills covers four key skills areas: lawyers' skills; problem solving; work management and business skills; and trust and office accounting. This characterization focuses on narrow legal skills while also addressing interpersonal skills and cultural awareness. The lawyers' skills for which candidates must demonstrate competence are oral communication, legal interviewing, advocacy, negotiation, dispute resolution, letter writing, and drafting.

While the skills requirements are fairly detailed, there are only limited specifications for the workplace experience component of the PLT.<sup>27</sup> It was only in 2016 that Australian admitting authorities approved standards relating to the purpose of the workplace experience phase of PLT studies. The standards set four learning outcomes

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<sup>26</sup> The Practical Legal Training Competency Standards for Entry-Level Lawyers are contained in Schedule 2 of the Uniform Admission Rules 2015. See Law Admissions Consultative Committee, Practical Legal Training Competency Standards for Entry-Level Lawyers (2015), Standard 3.1 available at LEGAL PROFESSION UNIFORM ADMISSION RULES SCHED. 2 (LEGAL SERVICES COUNCIL 2015), <https://www.legislation.nsw.gov.au/regulations/2015-240.pdf>.

<sup>27</sup> *Id.*, Standard 4.1, *cf.* Standards 5.10, 5.12, 5.14 & 5.16 in relation to Skills requirements.

for such workplace experiences: applying their learning in the context of legal practice; being supervised in the execution of legal work; gaining a “basic understanding” of what legal practitioners do in practice; and critically reflecting on their experiences.<sup>28</sup> These arrangements mean that the opportunity to effectively integrate the placement with the other aspects of the PLT program has been missed. Concerns have been raised elsewhere in relation to this lack of engagement with issues related to the effective design of the workplace experiences undertaken by students.<sup>29</sup> The Australian PLT standards would benefit from specific detail regarding the purpose and content of the workplace experience and the skills learners need to develop.

In England and Wales, the Joint Statement on the Academic Stage of Training issued by the Law Society and the General Council of the Bar specifies that Qualifying Law Degrees and Graduate Diplomas in Law need to address skills including: legal research, analysis and application “to the solution of legal problems;” oral and written communication “to the needs of a variety of audiences;” problem solving; use of language “with care and accuracy;” electronic research, communication, and work

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<sup>28</sup> STANDARDS FOR PLT WORKPLACE EXPERIENCE (LAW ADMISSIONS CONSULTATIVE COMMITTEE 2017), [https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/240769433\\_8\\_Standards\\_for\\_PLT\\_Workplace\\_Experience.pdf](https://www.lawcouncil.asn.au/files/web-pdf/LACC%20docs/240769433_8_Standards_for_PLT_Workplace_Experience.pdf).

<sup>29</sup> Jeff Giddings, *The Assumption of Responsibility: Supervision Practices in Experiential Legal Education*, in GLOBAL LEGAL EDUCATION APPROACHES: SPECIAL REFERENCE TO THE MIDDLE EAST 29-52, Mutaz Qafisheh & Stephen Rosenbaum (eds. 2016); Jeff Giddings & Michael McNamara, *Preparing Generations of Future Lawyers for Legal Practice: What’s Supervision Got to Do with It?* 37 U.N.S.W.L.J. 1226 (2014).

processing.<sup>30</sup> The Bar Professional Training Program that graduates must complete in order to practice as a barrister addresses the development of skills related to advocacy, opinion writing, drafting, conference skills, dispute resolution, and legal research.<sup>31</sup> These standards involve a relatively limited set of lawyering tasks and have not addressed the broader conceptions used elsewhere.

The 2013 Report of the Legal Education and Training Review for England and Wales adapted a framework from medicine to identify 32 attributes related to professional competencies in legal services.<sup>32</sup> These competencies extend beyond a narrow conception of the skills required by lawyers to address six dimensions:

- Cognitive (including self-directed acquisition of new knowledge and learning from experience);
- Integrative (including managing uncertainty);
- Context (including understanding the professional work setting and professional work);
- Relationship (including handling conflict and supervision);
- Affective/Moral (including empathy and social responsibility); and
- Habits of mind (including willingness to acknowledge and correct errors).

Similarly, to Australia, legal education regulators for England and Wales have not set requirements as to the extent of law student engagement in experiential learning or

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<sup>30</sup> This summary of the Joint Statement requirements is taken from LEGAL EDUCATION AND TRAINING REVIEW FINAL REPORT, SETTING STANDARDS: THE FUTURE OF LEGAL SERVICES EDUCATION AND TRAINING REGULATION IN ENGLAND AND WALES Ch. 2, Annex 1 (June 2013), <http://www.letr.org.uk/wp-content/uploads/LETR-Report.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> LEGAL EDUCATION AND TRAINING REVIEW, SETTING STANDARDS: THE FUTURE OF LEGAL SERVICES EDUCATION AND TRAINING REGULATION IN ENGLAND AND WALES 140 (2013), <http://www.letr.org.uk/wp-content/uploads/LETR-Report.pdf>.

the content of any such experiences. The Report of the Legal Education and Training Review contained surprisingly little reference to the place of clinical and experiential methods in the LLB.

The English Clinical Legal Education Organisation (CLEO) published Model Standards for Live Client Clinics that refer to the development of “legal and transferrable skills” as one of four broad aims of live client clinics. The other aims relate to developing and enhancing the students' learning experience and understanding of the substantive law and legal process; professional responsibility and ethics; and the role of law and justice in society. The CLEO Model Standards represent good practice and are not intended to be prescriptive. Hence, they do not define skills or specify required learning outcomes but rather give possible examples including the development of skills related to client interviewing, drafting, dispute resolution through negotiation or advocacy, and group work.<sup>33</sup>

Canadian law schools are required to meet a National Requirement specified by the Federation of Law Societies of Canada.<sup>34</sup> This National Requirement outlines three sets of competencies: addressing skills (problem-solving, research, and communication); ethics and professionalism; and substantive legal knowledge. The Canadian Requirement also addresses the nature of the academic program in terms of its length (3 years full-time), mode (primarily in-person), pre-entry requirements, and

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<sup>33</sup> MODEL STANDARDS FOR LIVE CLIENT CLINICS (CLINICAL LEGAL EDUCATION ORGANISATION 2007), <https://perma.cc/HR7Y-HSY5>.

<sup>34</sup> <http://docs.flsc.ca/NCANatReqNov2015.pdf>

the inclusion of a course dedicated to ethics and professionalism. No reference is made to the extent and content of law student engagement in experiential learning. Canadian clinicians have not yet developed universal best practices or standards for the operation of experiential programs.<sup>35</sup>

These statements from regulators illustrate that skills development is taken to be an important focus for legal education and for experiential programs that form part of the preparation of lawyers for their profession. Some statements tend to be concerned with specific tasks required of lawyers rather than addressing the more generalized skills required for working with clients and other aspects of successful law practice. Further, they provide little in specificity on the particular skills to be developed by experiential programs such as externships.

## 2. Commentators' Approaches

While it is clear that “skills” are important, it is less clear exactly what skills legal education should impart. Some writers use broad categories while others are more specific. The specifically legal skills identified tend to relate to legal research, working with clients, various forms of legal communication, dispute resolution and trial practice. The broader approaches incorporate reference to collaboration, recognizing and addressing ethical issues, work management, and self-evaluation. Externships

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<sup>35</sup> Email from Gemma Smyth to Jeff Giddings, (August 25, 2016) (on file with the author).

have the potential to provide students with development opportunities across the range of these skills.

The 1992 MacCrate Report<sup>36</sup> provided an Overview of Skills and Values that lawyers need, and includes as “fundamental lawyering skills” the following: problem-solving, legal analysis and reasoning; legal research; factual investigation; communication; counseling; negotiation; litigation and alternative dispute-resolution procedures; organization and management of legal work. It broadens this list by also identifying the importance of recognizing and resolving ethical dilemmas.<sup>37</sup>

The 2007 BEST PRACTICES FOR LEGAL EDUCATION<sup>38</sup> book identifies “attributes of effective, responsible lawyers” as including:

1. Self-reflection and Lifelong Learning;
2. Intellectual and Analytical Skills;
3. Core Knowledge of the Law;
4. Core Understanding of the Law;
5. Professional Skills; &
6. Professionalism.

These attributes indicate a broader conception of the requirements for effective lawyering. Externships and other forms of experiential learning have valuable and distinctive roles to play in relation to Attributes 1, 5, and 6 in particular. Externships—

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<sup>36</sup> AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT-AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report\).authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf). [hereinafter MacCrate Report].

<sup>37</sup> *Id.* at 138–40.

<sup>38</sup> STUCKEY ET. AL., *supra* note 4, at 65–79 (2007).

both the practice-based experience and the related classroom component—can provide students with opportunities to understand and develop reflective practices. They can develop the ability to learn from their own experiences as well as those of clients and colleagues.

In exploring the “Professional Skills” required by lawyers, the 2007 US BEST PRACTICES book identifies the following:

- the application of techniques to communicate effectively with clients, colleagues, and members of other professions;
- the ability to recognize clients’ financial, commercial, and personal constraints and priorities;
- the ability to advocate a case on behalf of others and participate in trials to the extent allowed upon admission to practice;
- effective use of current technologies and strategies to store, retrieve, and analyze information and undertake factual and legal research;
- an appreciation of the commercial environment of legal practice, including the market for legal services;
- the ability to recognize and resolve ethical dilemmas;
- effective skills for client relationship management and knowledge of how to act if a client is dissatisfied with the advice or service provided;
- employment of risk management skills;
- the capacity to recognize personal and professional strengths and weaknesses, identify the limits of personal knowledge and skill, and develop strategies that will enhance professional performance;
- the ability to manage personal workload and manage efficiently, effectively and concurrently a number of client matters; and

- the ability to work effectively as a member of a team.<sup>39</sup>

There appear to be four key dimensions to these professional skills. They relate to:

1. working with clients. Externships can assist students to gain a grasp of the importance of context. The capacities and constraints faced by clients become clearer;
2. acting in accordance with ethical and professional duties. Externship experiences can enable the nature of these duties to be more clearly identified and understood with students offered frameworks and exemplars for effectively addressing such issues;
3. working with colleagues. Externships can show students the importance of working with a supervisor and illustrate the challenges of such relationships. Students can build their understanding of the dynamics of teamwork and responsibility in a legal workplace;
4. managing your own work and learning from experience. Externships provide students with opportunities to structure their work as well as to understand and implement reflective practices.

More recently Shultz and Zedeck conducted an empirical study and developed a list of twenty-six “lawyering effectiveness factors.” They encompass specifically legal skills as well as those capable of addressing broader dimensions of professional

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<sup>39</sup> *Id.* at 77.

identity development.<sup>40</sup> They used a frame of “knowledge domains, general tasks, and skills and abilities,” classifying various specific legal skills as tasks while broader capacities were characterized as “skills and abilities.”

Shultz and Zedeck identified a series of factors that go beyond previous conceptions of the skills required of lawyers. The additional factors address both the personal (passion and engagement, diligence, creativity/innovation, stress management) and the professional (developing relationships within the legal profession, networking and business development, mentoring, community involvement and service).

A recent book, *BUILDING ON BEST PRACTICES*, identifies the following broad set of skills-focused learning outcomes for all externships:

- “build lifelong commitment and the skills to learn in professional settings, including learning about learning;
- engage in effective self-reflection that fosters learning from experience transferring those lessons to more complex problems and to other settings;
- recognize and articulate the elements of problem-solving in the practice situation and display those elements in their legal work;
- develop broad modes of ‘thinking like a lawyer’ using:
  - role-based legal analysis
  - narrative reasoning
  - ends-means thinking
  - using and building theory through contextual thinking
  - critical thinking
  - creative thinking

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<sup>40</sup> Schultz & Zedeck, *supra* note 15; Kristen Holmquist, Marjorie Shultz, Sheldon Zedeck and David Oppenheimer, *Measuring Merit: The Shultz-Zedeck Research on Law School Admissions*, 63 J. LEGAL EDUC. 565, 577–787, n. 45 (2014).

- improve capacities to manage uncertainty, exercise judgment, and take action, especially widening the moving parts and unpredictability of real life.”<sup>41</sup>

This book goes on to identify other possible skills that could be acquired through externships:

- “seek and receive timely and effective feedback and supervision, in order to improve future work product
- engage peers for collaborative learning
- develop skills associated with the human dimensions of practice;
  - understanding the perspective of another
  - interpersonal interaction
  - self-knowledge and self-regulation
  - communication and intercultural competence.”<sup>42</sup>

Another recent book also emphasizes the value of a broad conception of the skills required by lawyers. AUSTRALIAN CLINICAL LEGAL EDUCATION draws on the Australian Clinical Best Practices Project referred to earlier, in identifying a set of potential Learning Outcomes for clinical courses in general and externships in particular, addressing a broad range of skills.<sup>43</sup> They include the more conventional “lawyering skills” as well as the broader framework of learning from experience and self-knowledge skills. While acknowledging the suitability of clinics for teaching students a broad range of skills, the authors emphasize the importance of analysis and

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<sup>41</sup> Carolyn Wilkes Kass with Batt, Bauman & Schaffzin, *Experiential Education: Delivering Effective Education in Externship Programs*, in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 216 (Maranville, Bliss, Kaas & Sedillo López, eds. 2016).

<sup>42</sup> *Id.* at 216–17.

<sup>43</sup> ADRIAN EVANS, ANNA CODY, ANNA COPELAND, JEFF GIDDINGS, PETER JOY, MARY ANNE NOONE, & SIMON RICE, AUSTRALIAN CLINICAL LEGAL EDUCATION: DESIGNING AND OPERATING A BEST PRACTICE CLINICAL PROGRAM IN AN AUSTRALIAN LAW SCHOOL (2017) available at <http://press.anu.edu.au/publications/australian-clinical-legal-education>.

reflection as well as taking opportunities to critique “the apparently value-neutral nature” of legal skills as part of the process of students developing “a consciousness of the value-laden nature of legal practice.”<sup>44</sup> They also highlight the role of the classroom component of externships and other clinic courses in “creating both the opportunity for comparative experiences and the challenge of finding common ground.”<sup>45</sup>

As recent sources specifically focused on clinical legal education, these books provide valuable guidance for those considering the design and operation of extern-based clinical courses and skills that might be targeted for development through such experiences.

#### **B. Aligning Program Design to Learning Outcomes**

The skills that will be developed in any given externship should be determined at the outset. Some externship programs are “tailor-made” for each individual student and placement while others are “retail” operations in which regular placements offer similar skills acquisition opportunities to students, semester after semester. The methods used to ensure the student acquires the appropriate lawyering skills through an externship vary depending upon which approach is used. Similarly, the roles of faculty supervisor and site supervisor will vary depending upon the structure of the program.

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<sup>44</sup> *Id.* at 73.

<sup>45</sup> *Id.* at 91.

**1. “Tailor-Made” Externships**

In the tailor-made externship the faculty member consults with the student about the skills the student wishes to acquire, helps to arrange a placement that will allow the acquisition or development of those skills, consults with the placement supervisor as needed, and arranges for the student to be prepared to take advantage of that placement.<sup>46</sup>

In tailor-made externships, student and faculty member should consider any instruction the student has already had in the relevant skills. In most cases the student will have completed a foundation course in legal research, reasoning, and writing and should be prepared for research and writing tasks. Other students will have taken a Trial Advocacy course and be prepared to represent clients in court, or they will have completed a class in Interviewing and Counseling and be prepared to interact productively with clients. The externship experience can be more robustly focused on skills where the student is prepared by having taken simulation courses that have introduced the student to the theory and techniques for the skills at issue. In that situation, the site supervisor is not asked to teach these skills but rather to provide opportunities for the student to observe and practice these skills and provide feedback and critique to the student. Likewise, the faculty supervisor typically sponsors the

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<sup>46</sup> See: Liz Ryan Cole, *Lessons from a Semester in Practice*, 1 CLINICAL L. REV. 173, 175 (1994) and Laurie Barron & Nancy M. Stuart, *Charting Your Path to Success—Professional Development Planning*, in LFP, *supra* note 2 at 15.

student's reflection about his observations and performances to integrate the "doctrine, theory, skills and legal ethics."

In tailor-made externships where the student has not been introduced to the skills and theories about them through a simulation course, either the faculty supervisor or the field supervisor must structure opportunities for the student to learn them through directed self-study or more direct "teaching." Sometimes, the site supervisor will be the most qualified person to teach the relevant skills, particularly if the placement is quite specialized. In this case, the site supervisor will be selected with an eye toward this capacity and the plan for the externship should include this on-site instruction of both the techniques and the "concepts underlying" the relevant skills. Alternatively, the faculty supervisor may be able to introduce the relevant skills.

Here is where the economies of scale, efficiency, and expertise come into play. The faculty supervisor may not be qualified to teach the full range of practice skills that all the externship students with tailor-made externships seek in a semester. Or the faculty member may not have time to teach various tailor-made sets of skills to a large number of externship students. In either case the faculty member may lift out skills that are common to all externship students to include as learning goals for them all. Skills that could apply to all externships include learning to learn from experience, interpersonal skills, self-awareness, teamwork, and workload management to name a

few.<sup>47</sup> The faculty supervisor could efficiently include such skills in an accompanying classroom component for students at a wide variety of placements.

While focusing upon those skills that all externship students will develop is efficient, the classroom component may feel less engaging for some students who would prefer a focus that is more congruent with the particular lawyering skills they are developing in their placements. Some have argued that “individual tutorials” or other approaches to “faculty-guided reflection”<sup>48</sup> are superior to a classroom component where extern placements are diverse.<sup>49</sup>

## **2. “Retail” Externships**

The alternative approach to externship programs is for the faculty member to develop a range of regular placements that will all offer similar experiences and opportunities to acquire a set of lawyering skills to all students, semester after semester.<sup>50</sup> For example, local prosecutor and public defender offices may all offer the opportunity to develop pre-trial, trial and strategic planning skills in criminal cases;<sup>51</sup> local legal aid offices may all offer the opportunity to develop interviewing and counseling skills

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<sup>47</sup> See LEARNING FROM PRACTICE, *supra* note 2, for a comprehensive set of possible learning goals. The Best Practices Australian Clinical Legal Education contain a similar list of potential learning outcomes.

<sup>48</sup> See ABA Standard 304, *supra* note 16.

<sup>49</sup> Erica Eisinger, *The Externship Class Requirement: An Idea Whose Time Has Passed*, 10 CLINICAL L. REV. 659 (2004). See also Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students’ Critical Reflection*, 5 CLINICAL L. REV. 437 (1999).

<sup>50</sup> See Linda F. Smith, *Designing an Extern Clinical Program: Or as You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 539 (1999).

<sup>51</sup> See Linda F. Smith, *Benefits of an Integrated (Prosecution & Defense) Criminal Clinic*, 74 MISS. L. J. 1239 (2005).

with low-income clients. Once the array of similar placements is established, students may be placed in any one of the participating sites to participate in an externship program with the advertised goals and methods.

With this approach the supervising faculty member could offer a skills-focused classroom component for the externship. There she could integrate “doctrine, theory, skills and legal ethics” that the students would all need in their similar placements. In a skills-focused class the faculty member could observe the “student’s performance” and provide “feedback” on the skills in order to enhance the students’ preparation for the placement work.<sup>52</sup> During the course of the externship the students’ reflections might focus upon the skills they are developing, and the faculty member could guide these reflections and provide further feedback. Such reflections could involve class discussions as well as individual journals or papers.

Such a “retail” externship program offers certain advantages. The class may be appreciated by the students as it provides specialized skills instruction needed for the placement, and the students may be assigned more responsible roles in the placement if they are thus better prepared. The skills focus addresses the “quality control” problems alleged with externships in which students may be “just practicing mistakes” and may “accept supervisor (practitioner) advice uncritically.”<sup>53</sup>

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<sup>52</sup> See ABA Standards 304, *supra* note 16.

<sup>53</sup> Robert Condlin, *Learning from Colleagues: A Case Study in the Relationship Between “Academic” and “Ecological” Clinical Legal Education*, 3 CLINICAL L. REV. 337, 431 (1997).

It would not be necessary for site supervisors to teach the skills that had been covered in the classroom component. Rather, site supervisors would be asked to give the students opportunities to observe and employ these skills and provide feedback about the students' performances. The site supervisor could focus on the exercise of the skills in the particular context of the office's work. The initial focus on lawyering skills also provides some assurance that the student will not take away bad lessons from the externship experience. The student will benefit by having learned the theories behind the skills, from having observed good models during class, and from having received professorial feedback. Such a student is prepared to critique skills he observes that are inconsistent with the theories and models from class, and to theorize when and why performances might appropriately differ.

Ultimately the students must share their experiences and conclusions with the faculty supervisor to maximize their learning. Conclin explains:

[L]aw teachers need two types of information to review student practice experience critically: student conclusions about what they learned from the experiences, and trustworthy and detailed descriptions of what the students did.<sup>54</sup>

Where the faculty member and student engage in this descriptive and critical review, the necessity of selecting supervisors to teach and model the relevant skills with excellence will not be as important as in the tailor-made externships in which greater

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<sup>54</sup> *Id.* at 432.

reliance is placed on the site supervisor to teach the specialized skills needed in the placement.

### III. “VALUES”

While developing professional skills is a possible goal for externships, the ABA Standards’ seeming focus on “skills” as the *raison d’être* for externships and other experiential courses risks the loss of other equally important goals that can be achieved through mediated externship experiences.

Live clinical experiences, and particularly externships, can be excellent opportunities for development of “professional identity, . . . professionalism, social responsibility, [and] ethics,”<sup>55</sup> the third element of legal education that the Carnegie Report identifies as needing development. We argue that the externship seminar or guided reflection should include substantial opportunities to explore these important values. However, we first note that the Carnegie Report and other sources typically conflate different concepts into the call for the development of “professionalism.”

Two distinct endeavors should be considered here. The first is the micro goal of the student’s development of a professional identity. This can range from gaining an applied understanding of the rules of professional conduct, to consciously developing habits and practices that are consistent with being a responsible professional, to integrating one’s personal morality and vision into one’s identity as an attorney, to

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<sup>55</sup> SULLIVAN ET AL., *supra* note 62, at 12-14

acquiring a motivation to seek social justice. The second is the macro goal of engaging in institutional critique. This occurs when “substantive doctrine” is combined with “field work experience” and “the policy considerations implicated in legal doctrine.”<sup>56</sup>

Robert Condlin was the first to contend that “political critique is the most important clinical objective. . . . The ability to judge day-to-day practice against objective standards of justice and fairness is an essential quality of a good citizen and a good lawyer.”<sup>57</sup> Institutional critique may well lead to an appreciation for social justice, but it may be sufficient that students develop the habit of questioning and critiquing the status quo that they encounter. Externships offer an especially rich opportunity to engage in institutional critique because the law student is placed in an actual community agency or law office and because the case work supervision is separate from the faculty member’s supervision of the student’s learning.<sup>58</sup>

Part III.A below reviews authorities that recommend focusing upon these values, noting that they fail to differentiate the micro goal of professional identity formation and the macro goal of institutional critique. Part III.B discusses methods for exploring these two different but related goals.

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<sup>56</sup> Carrie Menkel-Meadow, *The Legacy of Clinical Legal Education: Theories About Lawyering* 29 CLEV. ST. L. REV. 555, 571-72 (1980).

<sup>57</sup> Robert Condlin, *“Tastes Great Less Filling”: The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 50-51 (1986).

<sup>58</sup> *Id.* at 53-55.

**A. Defining Values Goals in Legal Education**

Commentators more than regulators have called for more explicit and effective integration of values into legal education. The MacCrate Report not only recommended teaching a set of lawyering skills, it also recognized that law students should acquire a set of important professional values.<sup>59</sup> “The analysis of professional values recognizes that ‘training in professional responsibility’ should involve more than ‘just the specifics of the Code of Professional Responsibility and the Model Rules of Professional Conduct’; it should encompass ‘the values of a professional dealing with the lives and affairs of clients.’”<sup>60</sup> The four values that the MacCrate Report identifies are

“the value of competent representation, analyzing the ideals to which a lawyer should be committed as a member of a professional dedicated to the service of clients, . . . the value of striving to promote justice, fairness, and morality; . . . the value of striving to improve the profession; . . . [and] the value of professional self-development. . . .”<sup>61</sup>

The Carnegie Report discusses<sup>62</sup> “professional identity and purpose” by referencing the Preamble to the Model Rules (see discussion below) and a 1996 report from the ABA, quoting:

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<sup>59</sup> MACCRATE REPORT, *supra* note 36.

<sup>60</sup> MACCRATE REPORT, *supra* note 36, at 135, citing Robert B. McKay, *What Law Schools Can and Should Do (and Sometimes Do)*, 30 N.Y.L. SCH. L. REV. 491, at 509-10.

<sup>61</sup> *Id.* at 136.

<sup>62</sup> See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW* (2007).

A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good.<sup>63</sup>

Considering both sources, the Carnegie Report concludes they put forth “a demanding ideal of legal professionalism”:

They describe the lawyer as expert in legal thinking and practice, while committed to service of both clients and the welfare of the larger community that is organized by the legal order.<sup>64</sup>

The 2007 American BEST PRACTICES FOR LEGAL EDUCATION book defines “professionalism” as “appropriate behaviors and integrity in a range of situations; the capacity to deal sensitively and effectively with clients, colleagues, and others from a range of social, economic, and ethnic backgrounds, identifying and responding positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client’s objectives.”<sup>65</sup> They then discuss five professional values that they believe “deserve special attention during law school: a commitment to justice; respect for the rule of law; honor, integrity, fair play, truthfulness and candor; sensitivity and effectiveness with diverse clients and colleagues; and nurturing quality of life.”<sup>66</sup>

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<sup>63</sup> Professionalism Committee of the American Bar Association’s Section of Legal Education and Admissions to the Bar, Report 1996, at 6.

<sup>64</sup> SULLIVAN, *supra* note 62, at 125.

<sup>65</sup> STUCKEY, *supra* note 4, at 79

<sup>66</sup> *Id.* at 84 and 84–91.

The related 2015 BUILDING UPON BEST PRACTICES book also addresses professional values and opines that the following “learning outcomes in the professionalism sphere should apply to all externship students:

- Articulate the concept of professional identity and develop their own facets of professional identity;
- Exercise responsibility, responsibly; and
- Perform ethically with attentiveness to all relevant rules of professional conduct and self-awareness.”<sup>67</sup>

This book goes on to suggest other optional professionalism-related goals for externs:

- “Practice with purpose;
- Integrate personal and professional identities;
- Connect with and serve clients while respecting dual loyalty to the profession;
- Recognize and articulate the elements of competent practice, and how knowledge, skill, and values are woven together in service of a client or cause;
- Identify the fundamental values of the legal profession and recognize the presence or absence of those values in practice situations; or
- Articulate the role of lawyers and identify changes to the profession that are occurring in the particular setting.”<sup>68</sup>

The Australian Best Practices Report identifies a set of potential Learning Outcomes from clinical courses that speak to professionalism rather than to skills:

- an understanding of continuing professional development and a desire for life-long self-learning; . . . .
- an awareness of lawyering as a professional role in the context of wider society (including the imperatives of corporate social responsibility, social justice and

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<sup>67</sup> MARANVILLE ET AL., *supra* note 39, at 226-27

<sup>68</sup> *Id.*

the provision of legal services to those unable to afford them) and of the importance of professional relationships;

- a developing personal sense of responsibility, resilience, confidence, self-esteem and, particularly, judgment;
- a consciousness of multi-disciplinary approaches to clients' dilemmas – including recognition of the non-legal aspects of clients' problems;
- a developing preference for an ethical approach and an understanding of the impact of that preference in exercising professional judgment;
- a consolidated body of substantive legal knowledge, and knowledge of professional conduct rules and ethical practice; and
- an awareness of the social issues of justice, power and disadvantage and an ability to critically analyse entrenched issues of justice in the legal system<sup>69</sup>:

The codes or canons of ethics provide a further frame for the values that law students should acquire. The Preamble to the American Bar Association Model Rules of Professional Conduct teaches us that a lawyer's job is three-fold: "a representative of clients, an officer of the legal system, and a *public citizen having special responsibility for the quality of justice.*"<sup>70</sup> The Australian Solicitors Conduct Rules provide that a solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.<sup>71</sup>

The ABA Preamble provides this discussion of the lawyer's role as public citizen: "As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal

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<sup>69</sup> EVANS ET. AL, *supra* note 25, at 11.

<sup>70</sup> MODEL RULES OF PROF'L CONDUCT PREAMBLE [1] (AM. BAR ASS'N 1983) (emphasis added).

<sup>71</sup> AUSTRALIAN SOLICITORS CONDUCT RULES r.3 (LAW COUNCIL OF AUSTRALIA 2015), [https://www.lawcouncil.asn.au/files/web-pdf/Aus\\_Solicitors\\_Conduct\\_Rules.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf).

profession.”<sup>72</sup> Here the Preamble seeks “improvement” in four important areas. It does not surface any likely conflict between the role of “public citizen” and the role of client representative, but states: “As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.”<sup>73</sup> The public citizen role includes the role of community educator: “In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”<sup>74</sup> However, this public educator function does not suggest the attorney should be an apologist for a flawed system. To the contrary: “A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.”<sup>75</sup> Note that the Preamble does not just call for “pro bono services”<sup>76</sup> to address unmet legal needs, but instead enjoins us to “use civic influence” to address this problem and to employ our knowledge “in reform of

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<sup>72</sup>MODEL RULES OF PROF’L CONDUCT PREAMBLE [6] (AM. BAR ASS’N 1983)

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See Rule 6.1, that states “Every lawyer has a professional responsibility to provide legal services to those unable to pay.” MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 1983)

the law.” This section of the Preamble concludes: “A lawyer should aid the legal profession in pursuing these objectives . . . .”<sup>77</sup>

The “professionalism” and “values” discussed by these various authorities combine both “micro” values dealing with the attorney’s personal development and “macro” values dealing with institutional critique and the bar’s professional responsibility to society. Of course, the bar’s responsibilities to society to advance justice should also be incorporated into the attorney’s personal development and personal identity. However, in identifying goals for an externship program, we believe that professional identity development and institutional critique should be pursued separately before linking them and exploring the individual attorney’s role as “public citizen.”

**B. Micro & Macro Exploration of Values: An Alternative Way of Thinking About Learning Objectives**

Because “professionalism” and “values” includes both micro values of professional identity formation and macro values of institutional critique, social justice and the public citizen role with a special responsibility for the quality of justice, it is useful to discuss separately the methods that are well suited to the pursuit of each of these two separate goals.

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<sup>77</sup> *Id.* Preamble [9].

### **1. Professional Identity Formation**

The American BEST PRACTICES book suggests that “practice observation courses” might accompany externships to provide “a forum for studying the values, behaviors, attitudes, and ethical requirements of lawyers (professionalism).”<sup>78</sup> The authors suggest that externships offer a superior vehicle for such study, as the student is immersed in an actual functioning law office or judicial chambers rather than an in-house clinic that may not accurately replicate such a setting. Moreover, the teaching role is disaggregated from the supervision role, so that faculty member can objectively respond to and guide the student’s reactions to and critique of practice.

Using the student’s externship experiences to explore the student’s formation of a professional identity is widely appreciated in the externship literature. The LEARNING FROM PRACTICE text’s 2016 third edition includes a chapter on Professional Identity Formation that urges students to be intentional about becoming both skilled and ethical attorneys.<sup>79</sup> It suggests that “observation, practice and reflection” during the externship can support the development of good professional habits. The authors argue that knowing the ethical rules is not enough; the student should also develop ethical sensitivity (involving empathy), ethical motivation (the importance given to ethical values in competition with other values), and ethical implementation (having the courage to do the right thing). The authors also contend that the extern should endeavor to weave together his personal identity and professional identity, to have a

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<sup>78</sup> STUCKEY, *supra* note 4, at 198.

<sup>79</sup> Daisy Hurst Floyd & Timothy W. Floyd, *Professional Identity Formation, in LFP, supra* note2, at 685.

psychologically healthy career. This chapter provides exercises such as rereading one's law school admission essay or imaging one's life in 15 years, in order to encourage the student to form an integrated identity.

The LEARNING FROM PRACTICE text includes other chapters that relate to professional identity formation: *Charting Your Path to Success—Professional Development Planning*,<sup>80</sup> *Externships and Career Development*<sup>81</sup> and *On Finishing Strong: Looking Back and Looking Forward*.<sup>82</sup> There are also five chapters that cover professionalism and particular ethical issues: *Professionalism*,<sup>83</sup> *Ethical Issues in Externships: An Introduction*,<sup>84</sup> *Ethical Issues in Externships: Confidentiality*,<sup>85</sup> *Ethical Issues in Externships: Conflicts of Interest*,<sup>86</sup> *Ethical Issues in Externships: Duties to Tribunals and Third Parties*.<sup>87</sup> The text further provides chapters that deal with particular practice settings (judicial, criminal, public interest, public service, and transactional), permitting an exploration of ethics particular to these settings and identity formation related to different practice contexts.<sup>88</sup>

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<sup>80</sup> Laurie Barron & Nancy M. Stewart, *Charting Your Path to Success—Professional Development Planning*, in LFP, *supra* note 2, at 15.

<sup>81</sup> Avis L. Sanders, *Externships and Career Development*, in LFP, *supra* note 2, at 725.

<sup>82</sup> Susan L. Brooks & Alexander Scherr, *On Finishing Strong: Looking Back and Looking Forward*, in LFP, *supra* note 2, at 799.

<sup>83</sup> Nancy Maurer, *Professionalism*, in LFP, *supra* note 2, at 237.

<sup>84</sup> Lisa G. Lerman & Lisa V. Martin, *Ethical Issues in Externships: An Introduction* in LFP, *supra* note 2, at 261.

<sup>85</sup> Alexis Anderson, *Ethical Issues in Externships: Confidentiality* in LFP, *supra* note 2, at 279.

<sup>86</sup> Cindy R. Slade, *Ethical Issues in Externships: Conflicts of Interest* in LFP, *supra* note 2, at 295.

<sup>87</sup> Lisa G. Lerman & Lisa V. Martin, *Ethical Issues in Externships: Duties to Tribunals and Third Parties*, in LFP, *supra* note 2, at 335.

<sup>88</sup> Mariana Hogan & Michael H. Roffer, *Judicial Externships*, in LFP, *id.* at 489; Russell Gabriel & Hans P. Sinha, *Criminal Justice Law Placements*, in LFP, *supra* note 2, at 559; Susan B. Schechter & Jeffrey R. Baker, *Public Interest Lawyering*, LFP, *supra* note 2, at 605; Jeffrey R. Baker & Susan B. Schechter, *Public Service Lawyering*, in LFP, *supra* note 2, at 627; Ann Vessels, Stacey Bowers, & Mark Popielarski, *Transactional Lawyering* in LFP, *supra* note 2, at 645.

While this text regularly encourages dialogue with the site supervisors, the overarching plan appears to be having this text provide the frame for the students' reflections and for the faculty supervisor to support that reflection to advance the students' professional identity formation.

Where professional identity formation is a primary goal of the externship, it seems important that the student have substantial responsibility for selecting the externship site. This will ensure that the site is congruent with each student's visions of his professional path. Similarly, the law school should ensure that the site supervisor not only has relevant skills but the professional character that would constitute a good role model for the student. If such vetting takes place, the site supervisor would also be well positioned to reflect with the student about the ethical values that are required for success in the particular legal practice area.

One issue that often arises is the students' notions of how an attorney in an area of practice is "supposed" to act or what attitudes he must have. For example, "many student prosecutors believe that a good prosecutor must always go for 'the max' and that all defenders are bleeding-hearts who naively and unfailingly believe clients' stories and excuses."<sup>89</sup> One can work through this notion by analyzing mock cases together with guest speakers and see that experienced practitioners from both sides

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<sup>89</sup> Smith, *supra* note 51 at 1256. See also Russell Gabriel & Hans P. Sinha, *Criminal Justice Law Placements*, in LFP, *supra* note 88 at 559; and the accompanying Teacher's Manual chapter, both co-written by clinical teachers from prosecution and defense backgrounds, TEACHER'S MANUAL TO LEARNING FROM PRACTICE: A TEXT FOR EXPERIENTIAL LEGAL EDUCATION 685 (Leah Wortham et al. eds., 3d ed., 2016), <https://www.dropbox.com/s/5ruigomhtpguugf/Learning%20from%20Practice%2C%20Teacher%27s%20Manual%20-%203rd%20Edition.pdf?dl=0>.

often view these cases in the same way.<sup>90</sup> Readings on “prosecutorial discretion and defense ‘ethics’ . . . encourage students to appreciate that they have the right to define for themselves the role they will play and the moral justifications they will develop as a prosecutor or defender in the criminal justice system.”<sup>91</sup> Class discussion should move from theory to feelings in practice: “Students are asked to consider what frustrations they have experienced in dealing with ‘the other side’ or with ‘the system,’ whether they had any preconceived notions about their own role and what difficulties they have faced in assuming the role.”<sup>92</sup>

Another issue that may arise is the student’s desire to stay true to her own values. Sometimes this suggests the student seek a practice setting that supports and comports with his values. Externs might be asked to “audit”<sup>93</sup> their placement by considering the placement’s mission, whether the mission is integrated into the daily work of the organization, and how the mission serves the needs of the organization’s stakeholders. Student “audits” can also consider the rapport within the organization, how stress is managed and success is defined, and how work-life balance is addressed.<sup>94</sup>

At other times, the extern may realize that some of her important values may be challenged by issues that arise in the organization. Accordingly, the extern seminar may wish to address behavioral ethics such as those presented in the Giving Voice to

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<sup>90</sup> Smith, *supra* note 51, at 1256.

<sup>91</sup> *Id.* at 1256-57.

<sup>92</sup> *Id.* at 1257.

<sup>93</sup> Thanks for these ideas and for the “Placement Audit” exercise are due to Inga Laurent.

<sup>94</sup> *Id.*

Values (GVV) curriculum.<sup>95</sup> This curriculum, developed for the business school setting, addresses what one can do when she knows the right thing to do, but faces situational or environmental pressure against doing what is right. Vivien Holmes writes of having integrated these concepts into the Professional Practice Core course at Australian National University to help students “develop their own ethical, professional identity.”<sup>96</sup> In this program students face ethical challenges and are asked to develop a GVV approach to voice their concerns while considering several factors. Study of this curriculum gives early results that it helps students develop valuable ethical skills.<sup>97</sup>

Finally, it behooves the externship faculty member to raise issues of the stresses of legal practice and strategies to avoid burn-out and confront challenges such as secondary trauma. There are today numerous sources for such inquiry including various articles,<sup>98</sup> web resources,<sup>99</sup> and these books:

- SUSAN DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004);
- MARJORIE A. SILVER, *AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION* (2007);

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<sup>95</sup> MARY C. GENTILE, *GIVING VOICE TO VALUES: HOW TO SPEAK YOUR MIND WHEN YOU KNOW WHAT’S RIGHT* (2010).

<sup>96</sup> Vivien Holmes, ‘*Giving Voice to Values*’: *enhancing students’ capacity to cope with ethical challenges in legal practice*, 18 *LEGAL ETHICS* 115, 129 (2015).

<sup>97</sup> *Id.* at 133-36.

<sup>98</sup> See, e.g., Dianne Molvi, *The Toll of Trauma* 84 *WIS. LAW*, Dec. 2011, at 4, <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=84&Issue=12&ArticleID=2356> (exploring a study of public defenders and “compassion fatigue”).

<sup>99</sup> See, e.g., <http://www.nctsn.org/resources/topics/secondary-traumatic-stress>, and [http://www.childtraumacademy.com/surviving\\_childhood/index.html](http://www.childtraumacademy.com/surviving_childhood/index.html)

- NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* (2010);
- DOUGLAS O. LINDER & NANCY LEVIT, *THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW* (2014);
- CARY CHERNISS, *BEYOND BURNOUT: HELPING TEACHERS, NURSES, THERAPISTS, AND LAWYERS RECOVER FROM STRESS AND DISILLUSIONMENT* (1995).

In some instances, the students themselves will be dealing with traumatizing cases, and they will need this guidance in order to have a healthy clinical experience. In other cases, students may be encouraged to observe how their supervisors and others deal with the stresses of practice.

In sum, externs are socialized to the practice of law through the externship experience. It is far preferable that this be intentional learning rather than incidental learning. Accordingly, it should be incumbent upon the externship program to include relevant readings and reflection opportunities regarding the student's professional identity formation.

## **2. Critique & Improvement of the Law & Legal System**

The BEST PRACTICES book notes that “some externships also provide excellent opportunities to study and learn about the functioning of the legal system and its capacities and limitations. It is especially important for students to study issues of justice in our society and to learn to appreciate the importance of the rule of law for ensuring justice to all members of society.”<sup>100</sup>

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<sup>100</sup> STUCKEY, *supra* note 4 at 199.

There will be many placements in which the student will be confronted with issues about the “quality of justice” by the nature of the day-to-day experience. These include criminal defense and prosecution offices, legal aid offices, and the courts. The judicial extern may be exposed to pro se parties or parties represented by less-than-adequate attorneys,<sup>101</sup> and benefit by reflecting upon topics ranging from access to legal counsel, to the adversary system, to how judges should deal with inequities. Students externing in the criminal justice system may encounter the economic pressure to plea bargain, the extensive discretion possessed by the prosecutor, the challenge to prosecutors in negotiating fairly with unrepresented defendants, the collateral consequences of conviction, and drug cases for which the criminal justice system may seem ill-suited.<sup>102</sup> Students placed in legal aid offices may encounter the poor, persons with disabilities, persons of color, and individuals from other cultures speaking other languages. They may also encounter bureaucracies from housing courts to welfare offices and opposing parties such as pay-day lenders.

If the faculty supervisor knows that the students will encounter such issues about the quality of justice, then it is wise to include readings and discussion topics on them. The *LEARNING FROM PRACTICE* text includes institutional critique in several of the chapters dealing with particular practice areas, such as criminal defense. Including

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<sup>101</sup> See, e.g., Linda F. Smith, *The Judicial Clinic: Theory and Method in a Live Laboratory of Law*, 1993 UTAH L. REV. 429, 464, 468 (1993).

<sup>102</sup> See, e.g., Smith, *Criminal Law Clinic*, *supra* note 51, at 1261-79.

such readings and discussion topics establishes that exploring these issues and the lawyer's public citizen role is one of the goals of the externship.

In other placements, issues of the quality of justice may not arise so apparently. One can imagine that students externing at various governmental agencies or in-house counsel offices may well not encounter issues of power imbalance or aspects of the law that seem "unjust." In that case, the program will likely be unable to have instilling appreciation for social justice as a significant goal. But in that case, should the program also leave aside "institutional critique" as a goal? There are two arguments why institutional critique should nevertheless be included as one of the programmatic goals.

First, even if the extern does not directly address issues of poverty and quality of justice, the student can be encouraged to study the institutions she encounters or in which she is placed with an eye toward "improvement of the law . . . and the administration of justice." No matter where the student is placed, he can be encouraged to ask critical questions about the law and the procedures and the practices he confronts. Some field supervisors will not encourage that inquiry, but others may welcome a fresh set of ears to share their frustrations with foolish laws or time-wasting procedures they face in their practices.<sup>103</sup> All institutional critique need not proceed from the perspective of the disempowered; it is enough that the student

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<sup>103</sup> In an empirical study of Australian placement supervisors (both externships and clinics), Giddings identified a small group of supervisors who do not identify and address the social justice issues raised by the matters students work on. See Jeff Giddings, *Supporting Social Justice Through Student Supervision Practices*, in *SOCIAL JUSTICE AND LEGAL EDUCATION*, (Chris Ashford & Paul McKeown, eds., forthcoming 2017).

begin to incorporate a critical eye and an attitude to “reform the law” when he encounters problems that should be corrected.

The second reason to include institutional critique in the classroom component linked to an externship is relevant when students are engaged in different types of placements and practices. The student enjoying sufficient time to do thorough and detailed work in the in-house counsel office or governmental agency will benefit from hearing the legal defender externs discuss pressures to plea-bargain because of inadequate resources and the legal aid extern discuss the fact that many clients get only limited scope services. Thus, the class will be able to explore differentials in the quality of justice they encounter.

Nevertheless, including institutional critique must be done with care for a number of reasons. First, we are asking the placement supervisor to teach and oversee the student, and we are asking the student to respect and learn from the supervisor. Accordingly, it will be dysfunctional to present criticism that the student would understand as being levied against her supervisor or placement. Instead, the faculty supervisor should simply introduce topics, concepts and readings that raise the relevant critical issues. The faculty member can recognize the reality of institutional challenges and pressures. The student should understand his role as not only a student learning from the supervisor but also a participant-observer in an anthropological quest to learn from the supervisor and the placement.

Students will bring their own attitudes and beliefs to the placement. Sometimes these attitudes and beliefs will be entirely congruent with critiquing the law and practices

she encounters. For this student, including institutional critique will give the student permission to engage in this endeavor. But this student must be pushed to do the additional readings and analysis, not simply react. Other times the student will have attitudes that are not sympathetic toward the disempowered clients she encounters; she will be frustrated with legal aid clients who are so “ungrateful” that they miss appointments and victims of domestic violence who ask to dismiss the protective orders. The faculty supervisor cannot ask a student to deny the feelings she has but can provide this student with readings about poverty and domestic violence, which should provide context for the client’s actions. The faculty supervisor can also encourage the student to ask her site supervisor about whether he has similar feelings and how he deals with them. In this way, the student moves from emotional reaction to critical perspective. Finally, some students may be overwhelmed or shocked by some of the practices they encounter. These students need a sounding board for their reactions so that they can consider how to deal with the stresses of practice and think about how their experiences can be integrated in development of positive professional identities. But they also should be encouraged to study the aspects of the practice that are concerning with an eye toward improving the law or the administration of justice so that it is more just and effective.

Including institutional critique in the externship seminar will be responsive to the desires of many of the students to better understand the institutions, practices, and law they encounter and will establish the practice of assuming the public citizen role as one of the fundamental aspects of the lawyer’s identity.

## **CONCLUSION**

We have explored the risks and rewards of designing and teaching in an externship program, the goals one might have, and the methods one might use. We have argued that it is important to pay attention to the principles of intentional design when developing an externship program. In particular, we have identified and challenged the assumption that skills development must be the predominant goal for externships. This is a common assumption on the part of legal education regulators in our respective home countries, the USA and Australia, as well as in England and Wales. Skills development can, but does not have to, be a focus for every externship. If it is to be a focus, the targeted skills should be articulated as clearly and specifically as possible. Students must learn the theory and methods behind the skills to be used in the placement, either through appropriate pre-requisites, a skills-focused classroom component, or a clear understanding that the placement supervisor will be able to impart both the relevant theory and methods. Then the reflection component also must be designed to enhance students' acquisition of the identified skills. We have explored how this can be done with either the "tailor-made" or the "retail" externship structure. However, we believe the regulatory focus on skills has obscured the important values that can be acquired through a well-designed and well-taught externship.

Commentators have identified both skills and professionalism as lacking in legal education. Externships have special advantages in terms of their suitability for development of professional identity and for institutional critique--the micro and the

macro aspects of professionalism. By definition, externships are in the “real world. Students are able to try out a professional identity and to study the ways in which their supervisors enact the lawyering role. This provides fruitful material for reflection which the faculty instructor should facilitate. The emotional and analytical distance between the teacher at the law school and the day-to-day supervisor also should facilitate critical inquiry into the institutions the student encounters. This inquiry may include social justice concerns and explore how the lawyer as public citizen might address these problems. This alternative frame of professionalism—both the micro personal identity, and the macro institutional critique aspects of professionalism— is a rich and important goal, we argue, that extern programs ought to seek.