

(Just) in time for the holidays

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This is the late-running November edition, delayed by leaves on the line/ the wrong kind of snow/ editorial inefficiency (take your pick!). I know that the fantastic content will make up for the wait.

Leslie Wolf, Stacie Kershner and Lisa Bliss start us off with their exploration of how an innovative learning experience has supported students preparing to work in Health Law, a fascinating look at the alignment of demand from the job market, student need, tailored pedagogy and specialist knowledge.

This is followed by an important reflective piece on externships from Linda Smith, Jeff Giddings and Leah Wortham, looking across practice in the USA and Australia and distilling key considerations for clinicians in developing and maintaining effective externships.

We change scale but not theme with Larry Donnelly's article on 'disorienting moments': recognising the individual and critical learning opportunities provided within clinical education and reflecting on how to recognise as teachers and convey to students these 'moments of opportunity'.

Editorial

We stay in Ireland for the first of our practice reports, in which Sinead Eaton demonstrates the use of a contract, not simply to understand and become proficient in that example but to extrapolate from that to a broader and more holistic view of the law.

In our second practice report, Cosmos Nike Nwedu gives us a rich account of the clinic at Ebonyi State University in Nigeria, describing the history and current practice as well as the impact on local communities.

As promised, I am highlighting some of our classic papers in the second Archive Dive. Many of us are looking forward to a short break from the managerial aspects of clinic – dealing with competing demands, balancing accountability and action - and it is therefore comforting to recognise that we have been here before: [Volume 6](#) from 2004 has papers on quality (Hugh Brayne and Adrian Evans) and context (Roy Stuckey and Martin Wilson), impact (Liz Curran) and management (Ross Hyams).

We are delighted to be able to announce we are jointly holding the next IJCLE conference with Monash University in Melbourne, Australia on 28th-30th November 2018. The theme of the conference is *'Adding Value – How Clinics Contribute to Communities, Students and the Legal Profession'* and a detailed call for papers will be hitting your inboxes very soon. It promises to be an excellent conference with the added bonus of the option to attend/submit a paper to the [International Legal Ethics Conference](#) (6-8th December) following shortly thereafter.

A CONCENTRATED CERTIFICATE PROGRAM INCORPORATING
EXPERIENTIAL EDUCATION: HELPING STUDENTS PREPARE FOR A
CAREER IN THE DYNAMIC AREA OF HEALTH LAW

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Acknowledgements: This paper relies on the history and research that was laid out in the Health Law Certificate Proposal written by Professor Charity Scott and submitted through Georgia State University for approval of the health law certificate. Professor Scott is the founding director of the Center for Health, Law & Society at the Georgia State University College of Law and led efforts to create a health law certificate. Without her vision, leadership, and efforts, there would be no health law certificate and, therefore, this paper would not exist. Christine Lee, a Georgia State Law student, helped with transforming the proposal into a paper and conducting supplemental research. Luke Donohue, a Georgia State Law student, provided additional research and critical feedback. We are indebted to each of them for their efforts.

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Introduction

As law practice becomes both increasingly more complex and more specialized, law students must choose how to direct their course of study. In the U.S., practice in the area of health law, in particular, requires lawyers to be familiar with a wide range of federal, state, and administrative rules and regulations that affect all aspects of the healthcare industry. Lawyers practicing in this area also must be able to engage in complex processes and procedures to serve the needs of clients. Law students who wish to practice in the area of health law must acquire knowledge, skills, and values that are necessary for them to have an understanding of the legal issues that challenge lawyers and that prepare them for life-long learning in this rapidly growing and changing industry. This paper explores how a concentrated health law certificate program provides students a focused path through the law curriculum. Not only does the program require students to take a range of health law courses, but students take multiple courses that incorporate experiential learning, including clinics, externships, and other courses that integrate clinical teaching methodology. This article highlights the development of a health law certificate program, designed to guide students through the law curriculum to choose among the most beneficial courses for a health law practice. To identify the necessary courses, health law faculty and health law practitioners first explored the knowledge, skills and values that a successful health law practitioner needs. This article also examines the process of developing and implementing the certificate

program. It also explores how the integration of experiential learning into multiple courses required by the certificate allows students to gain insight into the practical realities of a variety of careers in health law and to direct their study in alignment with their chosen career path. The involvement and integration of experiential learning as a strong component of the program allows clinical educators to have a positive impact on the overall curricular experience of students receiving the certificate. Moreover, the infusion of clinical pedagogy throughout the health law curriculum benefits not only students who are enrolled in the certificate program but any law student who elects to enroll in any of the numerous health law courses. The success of this focused curricular program demonstrates that this model is effective, can be adapted to other areas of law,² and provides a more coherent and integrated education for future law students who will become the practitioners of tomorrow.

Background

In the United States, a law degree is a three-year post-graduate course of study. The first year typically is devoted to required courses covering a range of foundational legal areas (e.g., torts, property, contracts, criminal law, and legal research and writing), whereas the

² Since the inception of the Health Law Certificate, GSU Law has modeled three additional certificate programs after it. The school now offers Certificates in Environmental and Land Use Law, Intellectual Property Law, and Public Interest Law and Policy. Like the Health Law Certificate, other certificate programs require students enrolled in the programs to take experiential courses to satisfy the certificate requirements.

second and third years provide greater freedom for students to choose their course of study. There may be a few required courses (e.g., Georgia State law requires that all students take a specialized course in litigation, “Lawyering: Advocacy”) and recommended courses (e.g., topics that are tested on the bar exam, a necessary precursor to licensure), but, overall, the second and third year curriculum is primarily directed by student choices. Students may base their choices on disparate factors ranging from area of interest, scheduling convenience, or affinity for a particular professor. This relatively unfocused approach is largely unchanged from the model Langdell introduced at Harvard Law School over 100 years ago, and has been the subject of substantial criticism and calls for reform in recent years.³ Proposed legal education reforms have included calls for the elimination of the third year⁴ but mostly have focused on providing more coherence to the three year course of study.⁵

³ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (San Francisco: Jossey-Bass 2007) [hereafter the “*Carnegie Report*,” so called because sponsored by the Carnegie Foundation for the Advancement of Teaching under its Preparation for the Professions series]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf [hereafter “*Best Practices*”]; BUILDING ON BEST PRACTICES: REFLECTIONS ON TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (D. Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kass, Antoinette Sedillo Lopez eds., Lexis-Nexis 2015) [hereinafter *Building on Best Practices*]; New York State Bar Association, *Report of the Task Force on the Future of the Legal Profession* (Feb. 2011), available at <http://bestpracticeslegaled.files.wordpress.com/2011/03/taskforcereport.pdf> (particularly discussion on educating and training new lawyers, at 36-47); and ALI-ABA, *Critical Issues Summit, Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century* (2010) (final recommendations available at http://www.equippingourlawyers.org/documents/summit_final09.pdf).

⁴ Colleen Flaherty, *2 Years for Law School?*, Inside Higher Ed, Aug. 26, 2013, <https://www.insidehighered.com/news/2013/08/26/president-obama-calls-cutting-year-law-school>.

⁵ *Building on Best Practices*, *supra* note 3 at 52-58 (discussing Pathways, Integration and Sequencing the Curriculum), at 59-65 (discussing a three-year law school curriculum that engages students and effectively prepares them for the practice of law), *Carnegie Report*, *supra* note 2; *Best Practices*, *supra* note 2.

The move for reform has been advanced by influential reports, books and commentary over the last decade, including *Best Practices*, the *Carnegie Report* and *Building on Best Practices*.⁶ For purposes of this paper, we focus on a primary theme of the reform movement: the need for law schools to provide integrated learning and learning in context. Embracing this concept, which was one of central tenets of *Best Practices*, the *Carnegie Report* explained:

The key idea in [*Best Practices*] is that the findings of the learning sciences have converged on what the authors call “context-based education” [citation omitted]. The report’s thesis: ‘Students cannot become effective legal problem-solvers unless they have opportunities to engage in problem-solving activities in hypothetical or real legal contexts’ [citation omitted]. We concur with this thesis.⁷

The core insight behind the integrative strategy [in contrast to the traditional additive strategy of legal curriculum reform by simply adding new courses] is that effective educational efforts must be understood in holistic rather than atomistic terms. For law schools, this means that, far from remaining uncontaminated by each other, each aspect of the legal apprenticeship – the cognitive, the practical, and the ethical-social – takes on part of its character for the kind of relationship it has with the others.⁸

⁶ *Carnegie Report*, *supra* note 3; *Best Practices*, *supra* note 3, *Building on Best Practices*, *supra* note 2.

⁷ *Carnegie Report*, *supra* note 2, at 95.

⁸ *Id.* at 191. *The ABA Resolution and Report*, adopted as revised August 2011, http://www.abajournal.com/files/10B_2011.pdf, also acknowledges the importance of integrating theory with practical experiences and contexts in law school, and suggests ABA accreditation rules should address this integration: “Academics and others began to conceptualize professional development as a complex process involving an ongoing cycle of abstract learning and engagement with professional practice. That cycle permits each professional to develop individualized cognitive structures which enable the rapid problem-solving that characterizes expertise. . . . The process of developing judgment is individualized, difficult and time consuming. . . . Accreditation rules should emphasize how to apply theory and doctrine to actual practice, as well as encourage the process the development of professional

Over the last ten years, Georgia State law school has reflected on the *Carnegie Report* and other calls for reform, assessed its curricular offerings, and implemented a number of initiatives designed to improve the educational experiences of students. The full extent of these efforts is beyond the scope of this paper; rather, this paper will describe the Georgia State law school's health law certificate as a model for providing the kind of direction and integrated learning experiences that have been called for. In doing so, we connect the features of our program to best practices in legal education, as well as the needs of the legal profession.

The Development of a Health Law Certificate

By 2011, Georgia State Law had grown its health law faculty to several professors, representing substantial breadth, depth, and expertise in this rapidly growing area.⁹

Informed by recent critical analyses of legal education,¹⁰ the Georgia State health law

judgment." *Id.* at 3-4, 7. *Building on Best Practices* also addresses the importance of providing curricular pathways and concentrations to reinforce student learning and build connections across courses. *Building on Best Practices*, *supra* note 2, at 52-58.

⁹ Georgia State Law now has 12 faculty and 10 faculty fellows and adjunct faculty members teaching in the area of health law, which comprises six major areas, (health and business regulation, public and environmental health, health equity and social justice, bioethics and legal medicine, and health sciences and technology) and includes the on-site Health Law Partnership (HeLP) Legal Services Clinic and more than 20 courses and externships, Health Law: Quality & Access, Health Law: Finance & Delivery, Health Care Transactions, Health Care Fraud and Abuse, Public Health Law, Bioethics, HIV/AIDS and the Law, Food and Drug Law, Genetics and the Law, Human Subjects Research Law and Ethics, Law and Health Equity, Mental Health and the Law, Forensic Medicine, and Biotechnology, Law, Policy and Ethics. For a complete listing of the health law curriculum, go to <http://clhs.law.gsu.edu/education/health-law-courses/>.

¹⁰ A wide variety of resources were reviewed during the course of discussions. (1) Background reading on health law programs included: (a) Lawrence E. Singer & Megan Bess, *Combining Pedagogy and Practice*:

faculty decided to develop a health law certificate program to allow students to develop core competencies in health law through a coherent curricular path. The faculty performed its analysis of what should be required with particular attention to the *Carnegie Report*¹¹ and *Best Practices*.¹² These resources emphasized the importance of providing students a well-rounded curriculum that includes simulation,¹³ as well as real-

Creating a 21st Century Health Law Curriculum, 37 J. L. MED. & ETHICS 852 (2009) (discussing process for developing health law curriculum at Loyola-Chicago); (b) Diane E. Hoffmann, *A Health Law Practice Workshop: Bridging Externship Placements and the Classroom*, 37 J. L. MED. & ETHICS 513 (2009) (discussing integrating health law externships through a course targeted at health law topics and skills); (2) Background reading on curriculum reform included: (a) New York State Bar Association, *Report of the Task Force on the Future of the Legal Profession* (Feb. 2011), available at <http://bestpracticeslegaled.files.wordpress.com/2011/03/taskforcereport.pdf>, particularly discussion on educating and training new lawyers, at 36-47) (b) ALI-ABA, Critical Issues Summit, *Equipping Our Lawyers: Law School Education, Continuing Legal Education, and Legal Practice in the 21st Century* (2010) (final recommendations at http://www.equippingourlawyers.org/documents/summit_final09.pdf); and (c) ABA, Section of Legal Education and Admissions to the Bar, Standards Review Committee, Student Learning Outcomes Subcommittee, Draft for April 2-3, 2011 meeting, Standard 302, Learning Outcomes; Standard 303, Curriculum (The final version of the learning outcomes standard was adopted, along with other revisions, at the ABA's August 12, 2014 annual meeting. The complete revised standards are available at http://www.americanbar.org/groups/legal_education/resources/standards.html); (c) Hanover Research Council, HEALTH LAW PROGRAMS (February 2010) (examining health law programs at various law schools across the country) [hereafter "2010 HANOVER REPORT"]. The faculty conducted an analyses of the literature, as well as information about the GSU program in health law.

¹¹ *Carnegie Report*, *supra* note 2.

¹² *Best Practices*, *supra* note 2.

¹³ Simulation-based courses are "courses in which a significant part of the learning relies on students assuming the roles of lawyers and performing law-related tasks in hypothetical situations under supervision and with opportunities for feedback and reflection." *Best Practices*, *supra* note 1, at 179. Simulation-based courses can achieve educational goals more effectively and efficiently and develop professional skills and understandings essential for practice. See *Best Practices*, *supra* note 2 at 179–88. ABA Standard 304(a) states, "A simulation course provides substantial experience not involving an actual client, that (1) is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a set of facts and circumstances devised or adopted by a faculty member...2016-17 ABA Standards and Rules of Procedure for Approval of Law Schools available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter3.authcheckdam.pdf.

world experiential learning opportunities,¹⁴ thus integrating the teaching of theory, doctrine, and practice.¹⁵ The faculty also noted that a 2011 ABA House of Delegates resolution echoed these recommendations in directing the ABA to “take steps to assure that law schools . . . provide the knowledge, skills, values, habits and traits that make up the successful modern lawyer . . . [and] implement curriculum programs intended to develop practice ready lawyers, including . . . capstone and clinical courses that include client meetings and court appearances.”¹⁶ The Georgia State health law faculty heeded these recommendations in developing the framework for the health law certificate program. The incorporation of experiential education was a central value in the development of the certificate program.

The development process was an iterative one. After identifying key knowledge, skills, and values for the proposed program, the health law faculty mapped the health law curriculum to identify the knowledge, skills, and values taught in each existing health law course in the curriculum. The faculty studied the map to ensure that a certificate student would achieve an appropriate distribution of desired outcomes based upon the proposed certificate requirements. Additionally, local attorneys, representing a wide range of health law practices, including major law firms, hospitals, state and federal

¹⁴ Experiential courses generally are those courses that rely on experiential education as a significant or primary method of instruction, and include simulation-based courses, in-house clinics, and externships. *Id.* at 165–67.

¹⁵ *Id.* at 97.

¹⁶ ABA Resolution and Report, adopted as revised August 2011, available at <http://www.abanow.org/2011/07/2011am10b/>.

government agencies, and legal services organizations, participated in focus groups to provide feedback on the proposal to ensure that students obtaining a certificate through GSU's program would be equipped with the necessary knowledge, skills and values to be effective legal professionals in the health law field.

Four key conceptual themes underlie the certificate program. First, health law is a broad, general field of practice. Competent health lawyers are usually generalists, working in, among other things, corporate, administrative and regulatory, tort, contract, and employment law. As generalists, their skills are applied to the demands of diverse legal work, which encompasses a broad array of general and specific laws affecting health and health-related organizations in a wide range of public and private practice settings. Second, contemporary health lawyers need to have a solid and well-rounded background and be able to work with professionals from other non-legal, health-related disciplines. Third, trends in legal education favor structuring a curriculum not only to integrate doctrinal knowledge and theories, but also to promote development of sound lawyering skills, effective interpersonal behaviors, and professional values, ethics, and habits.¹⁷

¹⁷ *Carnegie Report*, *supra* note 1, at 27–28, 145–47. The *Carnegie Report* refers to three domains (knowledge, skills, and values) as the three “apprenticeships,” which can be summarized in its discussion of moving toward an integrative model of education for law schools. “Law school should provide an initiation into all three aspects of that development [of professional competence and identity] . . . When thinking of the law school curriculum as a three-part model, whose parts interact with an influence each other, those elements are:

1. The teaching of legal doctrine and analysis, which provides the basis for professional growth
2. Introduction to the several facets of practice included under the rubric of lawyering, leading to acting with responsibility for clients
3. A theoretical and practical emphasis on inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession.”

Finally, while the certificate program uses the health field as a lens and context for studying law, the required curriculum offers a foundation in knowledge, skills, and values that is readily transferable to other legal fields. Students generally seek a health law certificate to acquire focused preparation for a career in health law. However, even students who do not plan a career in health law have recognized the benefits of following a prescribed curricular path that develops transferrable skills. Participating in the certificate program promotes students' resourcefulness and their ability to adapt successfully to rapidly changing legal, political, social, technological, and global environments, regardless of their ultimate area of practice.

Core Competencies in Health Law. To determine the specific course requirements of the certificate program, the health law faculty first identified the core competencies in health law each student should develop. "Competency" does not mean mastery, but rather, at a minimum, an initiation to the fundamentals of the subject matters, skills, and values that are considered central to an understanding of and orientation to the health law field. The

Id. at 194. This three-part framework of competencies in knowledge, skills, and values has also been adopted in the recent draft of ABA Standard 302 on "Learning Outcomes." *See supra*, note 7. It is also reflected in the ABA's Report that accompanies its recently-adopted Resolution, *supra* note 11 ("We used to think that being a good lawyer simply meant knowing the law. Today, we are more likely to think that good lawyers know how to *do* useful things with the law to help solve client problems. Society has shifted from a static understanding of professional competence as memorized knowledge to a dynamic conception of lawyers adding value through judgment and their ability to manage to solve complex problems . . . The basic impulse [in legal education reform] is two-fold: to sharpen both our understanding of the competencies, skills, knowledge, practices and values of a good lawyer and our ability to measure progress toward those goals." *Id.* at 2–3. These principles are further supported in *Building on Best Practices*, *supra* note 2.

faculty also agreed that development of any of these core competencies – particularly in skills and values -- does not depend on having specific health law courses to foster them. Nevertheless, if the faculty deemed a specific knowledge, skill, or value a core competency, then it was imperative to ensure that *every* certificate student had an opportunity to develop that core competency. Thus, knowledge competencies are typically delivered through the required courses, although they may be reinforced in other courses.

a. Knowledge Competencies: The health law educational program offers foundational subject-matter content that initiates students into the key concepts, theories, doctrines, laws, policies, ethics, systems, and institutions in the health field. With respect to knowledge competencies, reflecting the breadth of the health law field, the faculty identified a wide range of topics (as well as specific U.S. statutes and regulations within those topics) to which every health lawyer should be exposed. These include: (1) access to, payment for, and cost regulation of healthcare in both the private and public sectors; (2) regulation of healthcare providers; and (3) provider and institutional liability to patients. These topics are all addressed, in varying degrees, in two required health law courses – one that primarily addresses provider and institutional liability and the other that primarily addresses healthcare regulation. Students may opt to delve more deeply into these topics through health law electives.

Given that healthcare is a heavily regulated business, any student seeking a career in health law must understand administrative law, which addresses the ability of government to regulate, and corporate law, which addresses the legal structure of business entities that can influence how health care is delivered.¹⁸ Finally, the faculty identified exposure to either public health or bioethics as a core competency.¹⁹ For this competency, students choose from among several course offerings in either track. While students who elect the public health track may miss exposure to bioethics and vice versa, the faculty agreed to limit the requirements to maximize students' ability to take courses throughout the general law curriculum. Moreover, there is sufficient overlap between the two to feel confident that, in most cases, students will be exposed both topics throughout the various certificate course offerings.

In sum, the knowledge competencies for students enrolled in the certificate program are achieved by requiring two courses in the general law curriculum (administrative law and corporations), two specific courses in the health law curriculum, and one elective course

¹⁸ The decision to include administrative law and corporate law as required courses was strongly supported by the health law attorneys consulted while developing the program. It is also supported by the 2014 recommendations by the American Health Lawyers Association regarding health law curricula which were issued after the launch of our certificate program. THE AMERICAN HEALTH LAW ASSOCIATION, THE AHLA HEALTH LAW CURRICULUM MANUAL 9 (2014) (hereinafter AHLA MANUAL). The American Health Lawyers Association is the U.S.'s largest educational organization devoted to legal issues in the health industry with active members who practice in law firms, government, in-house settings and academia, and who represent physicians, hospitals and health systems, health maintenance organizations, health insurers, life sciences, managed care companies, nursing facilities, home care providers, and consumers. See <http://www.healthlawyers.org/About/Pages/default.aspx>.

¹⁹ All core competencies and the relationship between core competencies and the requirements for the certificate are found at <http://clhs.law.gsu.edu/education/health-law-certificate/core-competencies/>.

from the health law offerings in either public health or bioethics.²⁰ More in-depth knowledge may be developed through additional electives in health law, as well as through the skills and values competencies described below.

b. Skills Competencies: The health law certificate program offers instruction in the key cognitive, behavioral, and lawyering skills needed for successful professional practice and permits students to take advantage of similar offerings in the law program generally. Just as many knowledge competencies are common to lawyers practicing in other legal fields, the skills competencies in health law are common to many fields of legal practice. The following core professional skill competencies were identified as critical to health law: (1) critical thinking and analysis, including the ability to apply common law, constitutional law, legislation, and regulations in health law contexts, (2) the ability to undertake both legal research and interdisciplinary research reflecting the interdisciplinary nature of health law; (3) the ability to engage in a range of types of writing in health law contexts, including writing for private and public audiences and for publication; (4) the ability to communicate effectively in a range of settings, including with colleagues, clients, and others privately and publicly; and (5) the ability to engage professionally in real-world contexts, including working collaboratively, engaging in

²⁰ On an on-going basis, there are approximately 6 offerings in public health and 5 in bioethics from which students may choose.

creating problem-solving, developing practice management skills, and demonstrating cultural competency.

Students have multiple opportunities to develop professionally from courses across the health certificate curriculum. Indeed, Georgia State Law has established a reputation for innovative, experiential teaching throughout its courses, and our health law faculty have been integral to that movement.²¹ Our faculty have infused experiential learning into traditional, doctrinal courses.²² For example, students in the required health care liability course have two experiential learning exercises: an interview of “clients” about end-of-life treatment preferences and drafting of a complaint as a way of applying concepts of institutional liability to a group of institutions not discussed in class. Both assignments have a mandatory self-assessment, which enables these assignments to be used in a larger class (25-50 students). Students in our public health law classes regularly draft legislation or regulation as part of their coursework. Students in GSU’s forensic medicine course

²¹ The infusion of experiential learning throughout the curriculum at Georgia State Law has been supported through the offering of “Teaching Innovation Grants” by Dean Steven Kaminshine. See also, *Building on Best Practices*, *supra* note 2 at 427. Additionally, GSU Professor Andrea A. Curcio reported on experiential learning activities across Georgia State Law’s curriculum at the Educating Tomorrow’s Lawyer’s Conference held at the University of Denver in October 2014 through a video of participating faculty (available at <http://law.gsu.edu/practice-based-learning/> under “Hands-on Learning In the Curriculum”). The college is also home to the Health Law Partnership (HeLP) Legal Services Clinic, which is an interdisciplinary collaboration among Georgia State Law, Atlanta Legal Aid Society, and Children’s Healthcare of Atlanta that allows students to develop professionally while representing clients and working side-by-side with physicians, social workers, and other health professionals (information available at <http://law.gsu.edu/clinics/help-legal-services-clinic/>).

²² See Courtney L. Anderson, Jessica Gabel Cino, Nicole G. Iannarone, Leslie E. Wolf, “Incorporating Experiential Learning Into Every Class: Required Courses, Seminars and Live-Client Representation” in *EXPERIENTIAL EDUCATION IN THE LAW SCHOOL* 63-84 (E. Grant, S. Simpson, K. Terry eds., *forthcoming* 2017).

have conducted mock hearings. These activities augment and complement the more in-depth training students receive through lawyering skills courses.

All certificate students are required to take a lawyering skills course because the faculty believes it is the experience, rather than exposure to the substantive content, that is essential to student development. The goal is for students to have extensive experiences engaged in realistic lawyering work.²³ Students may satisfy this requirement through enrollment in any of the in-house clinics (including tax and investor advocacy), externships, or simulation classes (e.g., negotiation).²⁴ However, GSU offers an increasingly rich range of lawyering skills options that are health law specific. GSU's medical-legal partnership clinic, the Health Law Partnership (HeLP) Legal Services Clinic, provides students with the opportunity to represent low-income children and their families in a range of cases with the goal of improving the children's health.²⁵ A course in health legislation and advocacy engages students in working with community partners, developing proposed legislation and shepherding it through the legislative process. GSU also offers several externships that allow students to work in health law practice environments, including with the Centers for Disease Control and Prevention,

²³ This responds to one of the issues addressed by *Best Practices*: law schools not fully committing to preparing students for practice. See *Best Practices*, *supra* note 2, at 17.

²⁴ GSU's rich array of experiential offerings and the mix of both real and simulated practice environments meet the best practices identified for experiential education, see *Building on Best Practices*, *supra* note 2 at 162-187.

²⁵ Information about our HeLP Legal Services Clinic is available at our Center website: <http://law.gsu.edu/clinics/help-legal-services-clinic/>.

the U.S. Department of Health and Human Services, the Veteran’s Administration, and the Georgia Hospital Association. Other options include innovative courses that teach doctrine in context through either direct client interaction or simulation. For example, students in law and health equity class learn about the social determinants of health and apply legal analysis of those concepts while working with members of Atlanta neighborhoods to address issues that negatively impact the community’s health.²⁶ Additionally, students enrolled in a new team-based and client-oriented capstone course, the health care transactions practicum, learn how to negotiate and draft deals through realistic simulations carried throughout the semester. The course provides students the opportunity to hone critical skills in drafting, reviewing, and negotiating health care contracts; applying health laws and regulations, conducting due diligence, and collaboration.²⁷ It is co-taught by a full-time faculty member together with two local attorneys who focus their practices in health law. The course was designed on the kinds of work that the practicing attorneys wished their entry-level attorneys knew how to do.²⁸ In addition to the lawyering skills course requirement, students further their analytical skills through the certificate writing requirement, which must be based on a health law topic. The law school already requires a research paper as a requirement for graduation.

²⁶ For a full description of Law and Health Equity, See *Incorporating Experiential*, p. 81-83. More information about this course is available at: <http://clhs.law.gsu.edu/2014/09/09/hands-course-addresses-health-disparities-local-neighborhoods/>.

²⁷ See <http://clhs.law.gsu.edu/2014/11/28/health-car-transactions-course>.

²⁸ *Id.*

Certificate students can use their health law paper to meet their graduation requirement or may do an additional health law paper.²⁹ Most health law topics require research of non-law resources. Accordingly, the required paper allows students to develop their interdisciplinary research skills, as well as their communication skills. The writing requirement also provides an opportunity for health law professors to mentor students as they investigate important issues of health law, and to assist them in seeking publication opportunities as appropriate. Several faculty have helped students to publish in law and non-law venues, which has fostered students' professional development.³⁰

The requirement for experiential education in the health law context allows students to gain insight and develop critical skills and connections needed for a successful health law practice. It also means that clinical and other faculty can have a significant impact on students' professional development. Often, faculty who are engaged in clinical pedagogy

²⁹ The AHLA encourages a "capstone" course with a strong writing component, which is consistent with GSU's writing requirement. AHLA MANUAL, *supra* note 13, at 13-14.

³⁰ See, e.g., Katie Hanschke (student), Leslie E. Wolf (faculty) & Wendy F. Hensel (faculty), *The Impact of Disability: A Comparative Approach to Medical Resource Allocation in Public Health Emergencies*, 8 ST. LOUIS U. J. HEALTH L. & POL'Y 259 (2015); Jessica D. Gabel (faculty) & Karyn D. Heavenrich (student), *Reigning in the Wild West: The Necessary Outcomes and Inevitable Pitfalls of Reforming Forensic Science*, 24 ALB. L.J. SCI. & TECH. 81 (2014); Leslie E. Wolf (faculty), Mayank J. Patel (student), Brett A. Williams (student), Jeffrey L. Austin (student) & Lauren A. Dame, *Certificates of Confidentiality: Protecting Human Subject Research Data in Law and Practice*, 14 MINN. J.L. SCI. & TECH. 11 (2013); Rachel L. Hulkower (student) & Leslie E. Wolf (faculty), *Federal Funds for Syringe Exchange Programs: A Necessary Component Toward Achieving an Aids-Free Generation*, 22 ANNALS HEALTH L. 307 (2013). Jonathan Todres (faculty) & Michael Baumrind (student), *Human Trafficking: A Global Problem with Local Impact*, GA. B.J. at 12 (2012); Jessica D. Gabel (faculty) & Ashley D. Champion (student), *Regulating the Science of Forensic Evidence: A Broken System Requires a New Federal Agency*, 90 TEX L. REV. 19 (2011).

develop an accurate and deep understanding of a student's skills, weaknesses, and abilities. This intimate knowledge of a student's capability means that faculty engaged in experiential teaching are able to transmit to potential employers specific examples of a student's skills and experience in a way that is more meaningful than a grade report. Additionally, clinical and other experiential faculty are connected to practice and have a wide network that enables them to assist students in securing opportunities for employment, fellowships, and advanced degrees that may enhance their professional development. Finally, the requirement for experiential learning as part of the certificate program is a way to integrate all of a student's learning in the health law area. This knowledge is transferable to any practice, and will have lasting benefits for certificate program students as well as students from the general JD program who take health law classes as electives.

c. Values Competencies: In addition to developing specific knowledge and skills, the health law certificate program fosters professional ethics and values, including habits of mind and mindsets that promote the responsible, civil, and ethical practice of law generally and in the health law field particularly. Just as many knowledge and skill competencies are developed through the law program generally, the values-oriented competencies in health law are common to all fields of legal practice. Core competencies in professional values in health law are the abilities to: (1) appreciate how professional ethics plays out in health law contexts; (2) engage in self-reflection and self-awareness,

including the ability to self-critique and commit to life-long learning and self-care; (3) develop professional identity; (4) retain sense of personal and professional fulfillment; (5) treat others with respect and civility; (6) promote justice in health; and (7) commit to pro bono and community service.³¹

As with the experiential learning requirements, the values competencies are taught throughout the health law curriculum, as well as through the general law curriculum. However, our lawyering skills, particularly the clinical courses, play a special role in developing these professional values, providing a context in which these issues become more salient and alive.³²

To further instill the professional values critical to a health lawyer, certificate students are also required to participate in fifteen hours of extracurricular activities or attend five approved health law events over a student's second and third years of law school. Such activities can promote many of the core values competencies the faculty identified, including leadership, community-building, developing professional identity, and commitment to pro bono service. This requirement lays the foundation for an actively engaged professional life. Activities that students may use to satisfy this requirement include participation in student activities that have an educational component and

³¹ The core values-oriented competencies in health law are consistent with the best practice of integrating professionalism throughout the program of instruction and best practices for teaching professionalism generally. See *Best Practices*, *supra* note 1, at 79–91, and *Building on Best Practices*, *supra* note 1, at 253–80.

³² See, e.g. *Building on Best Practices*, *supra* note 2 at 203-04, 291-93.

require a significant time commitment, such as moot court,³³ law review, leadership in any student organization, or serving as a research assistant to a professor, the various health-related events sponsored by the various organizations on campus, including our Center for Health, Law & Society, our Student Health Law Association, and our partners in the business school and public health, and externally sponsored health law-related events, including State Bar programs and health-related service activities.³⁴

d. Additional considerations

In developing the requirements, the number of required credits was limited to ensure that students had the freedom to explore other topics in the general law curriculum or to dig more deeply into the rich health law course offerings.³⁵ Accordingly, the certificate program requires only 16-21 credits, depending on courses selected. A minimum grade

³³ For example, GSU health law certificate students have participated in health law competitions, including the University of Maryland Compliance & Regulatory Competition, the SIU National Health Law Moot Court Competition, and the Loyola Health Law Transactions Competition.

³⁴ The Center for Law, Health & Society regularly sponsors events that educate about current issues in health law. For example, recent Center events have addressed U.S. Supreme Court cases involving the Affordable Care Act, state legalization of medical marijuana, and laws regarding end-of-life decision-making. The Center also sponsors students to attend two annual continuing legal education events in health law and encourages students to attend the bar's health law events. These activities provide greater exposure to health law as experienced by those in practice and an opportunity to network with those in the field. The Center and Student Health Law Association (SHLA) also regularly bring practicing attorneys and others working in health law to campus to discuss their work in the profession that help students appreciate the various options available in health law and what the work entails. Volunteer opportunities, from working with asylum seekers to blood drives, instill a commitment to serving the community that is an essential component of the profession,

³⁵ GSU law regularly offers over 20 health law courses. [http://clhs.law.gsu.edu/education/health-law-](http://clhs.law.gsu.edu/education/health-law-courses/)

[courses/](http://clhs.law.gsu.edu/education/health-law-courses/)

point average (GPA) is not required for a student to enter the certificate program so as not to discourage students who may have found their first year of law school particularly challenging and who are fully capable of overcoming those challenges in their upper-division years, especially where they may be motivated by a specific interest in the health law field. However, to ensure that certificate represents a level of achievement and education to the legal community, to qualify for a certificate a student must attain a minimum GPA (of 3.0) for all courses taken in satisfaction of the certificate requirements and the writing requirement. The minimum GPA for health law courses ensures that the certificate is evidence of a level of achievement in health law study.

The Benefits of the Health Law Certificate Program

The health law certificate program provides multiple benefits to our students. The primary benefit is to provide a thoughtful pathway through the curriculum, designed to provide students with an integrated and progressive learning experience in the area of health law.³⁶ The combination of required courses, elective courses, experiential learning, and additional activities gives students necessary guidance through the curriculum that allows them to take advantage of the second and third years of law school in a way that meets their individual learning goals and better prepares them for their careers. An

³⁶ *Carnegie Report*, *supra* note 1; *Best Practices*, *supra* note 2.

integrated health law curriculum offers students the opportunity for spiral learning – building and reinforcing the basics as they progress through courses and applying the core competencies in more advanced contexts.³⁷ A secondary benefit is the commitment of the health law faculty to giving enhanced advisement to certificate students. Although all students in our law school are assigned a faculty mentor in their first year, these assignments are done administratively and do not reflect students' educational and career interests. Thus, students may not take full advantage of these relationships. Assignment of a curricular-specific advisor through the certificate program can provide more targeted guidance. Through the health law certificate program, students have faculty available not only to assist them in designing course packages in health law and from the JD program generally that match their intellectual and employment interests, but also to provide guidance on career paths, and to suggest opportunities for future professional development, such as dual-degree programs and fellowships in health law.³⁸ While not a primary reason for adopting the program, certificate programs with a robust experiential component can also be a way to distinguish a law school and attract students

³⁷ An integrated curriculum has three parts that interact and influence each other. *Best Practices*, *supra* note 2, at 255. Those elements are first, the teaching of legal doctrine and analysis; second, introduction to the several facets of practice included under the rubric of lawyering; and third, a theoretical and practical emphasis upon inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession. *Id.*

³⁸ The Georgia State College of Law offers multiple dual-degree programs, including programs in health administration and business and in public health. (See <http://clhs.law.gsu.edu/education/dual-degree-programs/>). Dual-degree programs can help develop additional domain knowledge and interdisciplinary skills that can be a competitive advantage in an increasingly complex practice environment. They also can provide contacts with potential employers or clients from those fields through involvement in the other departments' professional and student organizations, activities, and networking opportunities.

who are interested in a school's existing curricular strength. For example, many students report that the reason they chose to attend Georgia State Law over other law schools is the HeLP Clinic and/or the health law certificate program.

The *Carnegie Report* notes the importance of on-going coordination among faculty at a law school in order to develop an integrated curriculum.³⁹ To ensure genuine integration, the health law faculty strives to reinforce in their respective courses the knowledge, skills, and values that have been identified as core, and to build on these domains across the health law curriculum.⁴⁰ This requires a level of self-conscious discipline and on-going collective discussion by health law faculty among themselves and with faculty colleagues across Georgia State law to examine opportunities for integrating knowledge, skills, and values in each course and across courses. Having a certificate program and a dedicated faculty to administer it provides motivation and structure for such on-going faculty collaboration to ensure the program's quality and responsiveness to student needs.

As part of overall coordination efforts, the center committed to engage in assessments of the certificate program to ensure it continues to meet students' needs. The health law field

³⁹ "Integrating the three parts of legal education would better prepare students for the varied demands of professional legal work. In order to produce such integrative results in students' learning, however, the faculty who teach in the several areas of the legal curriculum must first communicate with and learn from each other. . . . [I]ntegration can flourish only if law schools can consciously organize their emphases through ongoing mutual discussion and learning." Executive Summary, *Carnegie Report*, *supra* note 1, at 8, 10. Development of a structured curriculum is also discussed in detail in the book, *Building on Best Practices*, *supra* note 1.

⁴⁰ *Best Practices* also identifies the importance of an engaged, effective faculty. The effectiveness of full-time and part-time faculty in these types of courses is enhanced by "hiring qualified faculty, providing professional development opportunities, and assigning reasonable workloads." *Best Practices*, *supra* note 1, at 178.

has changed dramatically over the past several decades, and it is expected to continue to change in response to changes in the delivery of health care in America and other external forces. For example, after the certificate program began, the American Health Lawyers Association (AHLA) issued recommendations for developing a health law foundation for law students.⁴¹ For the most part, GSU's required classes align with the AHLA's recommendations with respect to topics required to develop a foundation for health law students.⁴² However, there are a few health law topics not covered in the required courses. For example, the required courses do not directly cover life sciences and the Food and Drug Administration, but students may choose among electives that do.⁴³ The AHLA also suggested requiring a course in labor and employment,⁴⁴ which is not currently required for the GSU certificate. However, the law curriculum contains a variety of labor and employment courses relevant to health law settings that students may take, and the requirements are sufficiently flexible to permit students to take such a class. However, GSU will consider whether changes are necessary in light of the AHLA recent recommendations. If GSU does not change its requirements, the AHLA's recommendations can be incorporated into student advisement to provide better guidance to them about what courses employers might like to see. Similarly, the AHLA

⁴¹ AHLA MANUAL, *supra* note 13.

⁴² *Id.* at 12–13.

⁴³ *Id.*

⁴⁴ *Id.* at 14.

recommended covering the importance and limitations of public health law, including laws relating to vaccinations, tobacco control, and others.⁴⁵ While these topics are covered in several of the public health and in some of the bioethics offerings, not all certificate students are guaranteed to study these topics. Requirements could be revised, or GSU could offer a blended bioethics and public health course that ensures coverage for all students. Periodic assessment of offerings provides the opportunity to make appropriate changes and keep pace with the knowledge, skills, and values students need.

Although the certificate program is only entering its fifth year, the curriculum has already been reviewed to ensure that it is meeting the promises made through the program. Specifically, faculty have reassessed whether GSU is delivering core knowledge, skills, and values in each course and across courses and whether changes are necessary based upon this review and on student feedback. Certificate students are surveyed annually. While these responses have not resulted in substantive changes, they have highlighted some areas to change to improve the student experience, such as scheduling courses to facilitate completion of the certificate, especially in conjunction with our dual-degree programs. GSU continues to seek input from the legal community, which guides our assessment of how to respond to the AHLA recommendations. On-going reflection and

⁴⁵ *Id.* at 13. The importance and limitations of public health law, including mandatory vaccinations, tobacco control, wellness programs, and emergency preparedness/quarantine powers.

reconsideration of the effectiveness of the program is essential to maintaining a quality program and meeting students' needs.

The growth of the health law certificate program since its launch in 2012 suggests that GSU has been successful in creating a program that responds to students' needs. In its first year, 7 students completed the requirements of a health law certificate. Enrollment now averages 30 2Ls and 3Ls, with 15 students graduating each year. Of the 40 students completing a health law certificate, 19 have graduated with honors⁴⁶.

Conclusions

In developing a health law certificate program, Georgia State Law sought to incorporate best practices in health law education. Accordingly, the health law certificate program offers an integrated learning experience that reflects and reinforces foundational knowledge, skills, and values across the program and that leverages the strength of offerings in the JD program generally. The program is structured to offer a coherent, progressive learning environment where foundational knowledge, skills, and values are reflected and reinforced across courses. The program also promotes the habits of the reflective practitioner, encourages the skills of self-awareness and self-critique, and fosters commitment to life-long learning, and professional and community engagement.

⁴⁶ Honors are awarded to students who earn a GPA of 3.6 or higher in their health law courses (required courses and electives).

Additionally, the health law certificate program is designed to meet the needs of students. The curriculum has sufficient breadth in health law, policy, ethics, and practical skills for students to appreciate the real world of health law practice as well as sufficient depth for them to be able to hone their skills and begin to develop expertise in their chosen area of health law interest. There is also sufficient flexibility to meet the needs of part-time and full-time students. Because the practice of health law is not static, the faculty is committed to regular evaluation and, if needed, revision of the certificate program to ensure that its requirements correspond to the needs and realities of legal practice and the qualifications of future legal professionals. These experiences can be adapted and will inform other efforts to provide students with an integrated learning experience.

RISKS AND REWARDS OF EXTERNSHIPS: EXPLORING GOALS AND METHODS

Linda F. Smith*, Jeff Giddings**, Leah Wortham***+

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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+ The authors would like to thank Stephen Young, Elizabeth Edinger, and Emily Black, reference librarians at Columbus School of Law of The Catholic University of America (CUA), for their invaluable research assistance and the Albert and Elaine Borchard Fund for Faculty Excellence. The authors were privileged to develop the ideas presented here through presentations at The International Journal of Clinical Legal Education and The Association of Canadian Clinical Legal Education Conference: *The Risks and Rewards of Clinic*, joined by Neil Gold and Martina Cartwright at the University of Toronto in July, 2016; at the American Association of Law Schools 39th Annual Conference on Clinical Legal Education, joined by Erika Curran, Elizabeth McCormick, Melissa Swain and Martina Cartwright in Baltimore, Maryland in May, 2016; and at Externship8 Conference, joined by Fred Klein, Inga Laurent and Phyllis Kotey in Cleveland, Ohio in March, 2016; the authors would like to thank the sponsors of these conferences and their co-presenters.

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.¹ 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

¹ 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.² 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 workplaces³ 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).”⁴

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

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

³ 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).

⁴ 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.⁵ 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

⁵ 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 (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 & McTighe⁶ has been influential in US K-12 education and general university education and has now been applied by some US legal educators as well.⁷ Legal education works from British Commonwealth countries⁸ more frequently refer to the work of John Biggs.⁹ *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.¹⁰ 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.¹¹

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

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

⁷ 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).

⁸ 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).

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

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

¹¹ *Id.* at Chapter 3, *Designing the Course*, 33-59.

efforts to encourage colleagues to adopt methods consistent with this work.¹² 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.¹³ 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

¹² 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).

¹³ *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.”¹⁴ 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.¹⁵

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

¹⁴ THE MACQUARIE CONCISE DICTIONARY 1086 (3rd ed. 2003).

¹⁵ 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).”¹⁶ 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.”¹⁷ These “other professional skills . . . may include skills such as interviewing,

¹⁶ 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. 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>.

¹⁷ 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.”¹⁸

An experiential course must be “primarily experiential in nature” and must be “a simulation course, a law clinic or a field placement.”¹⁹ 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.”²⁰

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.”²¹

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

¹⁸ Interpretation 302-1, Standard 302, ABA STANDARDS, *supra* note 16.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 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.”²² 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*.”²³ 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.²⁴ 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.

²² Standard 304(c), ABA STANDARDS, *supra* note 16.

²³ *Id.* (emphasis added).

²⁴ 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;²⁵ the authors of the AUSTRALIAN CLINICAL BEST PRACTICES emphasized potential learning outcomes well beyond narrow conceptions of legal

²⁵ 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.²⁶ 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.²⁷ 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

²⁶ 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>.

²⁷ *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.²⁸ 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.²⁹ 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

²⁸ 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.

²⁹ 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.³⁰ 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.³¹ 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.³² 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

³⁰ 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>.

³¹ *Id.*

³² 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.³³

Canadian law schools are required to meet a National Requirement specified by the Federation of Law Societies of Canada.³⁴ 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

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

³⁴ <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.³⁵

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

³⁵ 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 Report³⁶ 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.³⁷

The 2007 BEST PRACTICES FOR LEGAL EDUCATION³⁸ 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—

³⁶ 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].

³⁷ *Id.* at 138–40.

³⁸ 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.³⁹

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

³⁹ *Id.* at 77.

identity development.⁴⁰ 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

⁴⁰ 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.”⁴¹

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.”⁴²

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.⁴³ 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

⁴¹ 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).

⁴² *Id.* at 216–17.

⁴³ 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.”⁴⁴ 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.”⁴⁵

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.

⁴⁴ *Id.* at 73.

⁴⁵ *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.⁴⁶

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

⁴⁶ 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.⁴⁷ 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”⁴⁸ are superior to a classroom component where extern placements are diverse.⁴⁹

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.⁵⁰ 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;⁵¹ local legal aid offices may all offer the opportunity to develop interviewing and counseling skills

⁴⁷ 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.

⁴⁸ See ABA Standard 304, *supra* note 16.

⁴⁹ 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).

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

⁵¹ 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.⁵² 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.”⁵³

⁵² See ABA Standards 304, *supra* note 16.

⁵³ 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.⁵⁴

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

⁵⁴ *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,”⁵⁵ 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

⁵⁵ 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.”⁵⁶

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.”⁵⁷ 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.⁵⁸

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.

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

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

⁵⁸ *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.⁵⁹ “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.’”⁶⁰ 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. . . .”⁶¹

The Carnegie Report discusses⁶² “professional identity and purpose” by referencing the Preamble to the Model Rules (see discussion below) and a 1996 report from the ABA, quoting:

⁵⁹ MACCRATE REPORT, *supra* note 36.

⁶⁰ 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.

⁶¹ *Id.* at 136.

⁶² 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.⁶³

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.⁶⁴

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.”⁶⁵ 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.”⁶⁶

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

⁶⁴ SULLIVAN, *supra* note 62, at 125.

⁶⁵ STUCKEY, *supra* note 4, at 79

⁶⁶ *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.”⁶⁷

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.”⁶⁸

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

⁶⁷ MARANVILLE ET AL., *supra* note 39, at 226-27

⁶⁸ *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 system⁶⁹:

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.*"⁷⁰ 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.⁷¹

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

⁶⁹ EVANS ET. AL, *supra* note 25, at 11.

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

⁷¹ AUSTRALIAN SOLICITORS CONDUCT RULES r.3 (LAW COUNCIL OF AUSTRALIA 2015), https://www.lawcouncil.asn.au/files/web-pdf/Aus_Solicitors_Conduct_Rules.pdf.

profession.”⁷² 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.”⁷³ 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.”⁷⁴ 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.”⁷⁵ Note that the Preamble does not just call for “pro bono services”⁷⁶ 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

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

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 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”⁷⁷

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.

⁷⁷ *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).”⁷⁸ 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.⁷⁹ 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

⁷⁸ STUCKEY, *supra* note 4, at 198.

⁷⁹ 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*,⁸⁰ *Externships and Career Development*⁸¹ and *On Finishing Strong: Looking Back and Looking Forward*.⁸² There are also five chapters that cover professionalism and particular ethical issues: *Professionalism*,⁸³ *Ethical Issues in Externships: An Introduction*,⁸⁴ *Ethical Issues in Externships: Confidentiality*,⁸⁵ *Ethical Issues in Externships: Conflicts of Interest*,⁸⁶ *Ethical Issues in Externships: Duties to Tribunals and Third Parties*.⁸⁷ 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.⁸⁸

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

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

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

⁸³ Nancy Maurer, *Professionalism*, in LFP, *supra* note 2, at 237.

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

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

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

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

⁸⁸ 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."⁸⁹ One can work through this notion by analyzing mock cases together with guest speakers and see that experienced practitioners from both sides

⁸⁹ 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.⁹⁰ 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.”⁹¹ 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.”⁹²

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”⁹³ 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.⁹⁴

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

⁹⁰ Smith, *supra* note 51, at 1256.

⁹¹ *Id.* at 1256-57.

⁹² *Id.* at 1257.

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

⁹⁴ *Id.*

Values (GVV) curriculum.⁹⁵ 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.”⁹⁶ 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.⁹⁷

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,⁹⁸ web resources,⁹⁹ 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);

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

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

⁹⁷ *Id.* at 133-36.

⁹⁸ 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”).

⁹⁹ See, e.g., <http://www.nctsn.org/resources/topics/secondary-traumatic-stress>, and 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.”¹⁰⁰

¹⁰⁰ 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,¹⁰¹ 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.¹⁰² 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

¹⁰¹ 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).

¹⁰² 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.¹⁰³ All institutional critique need not proceed from the perspective of the disempowered; it is enough that the student

¹⁰³ 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.

“PUTTING ‘DISORIENTING MOMENTS’
AT THE CENTRE OF LEGAL EDUCATION”

Lawrence Donnelly¹

I. *Introduction*

In recent years, law schools throughout Ireland have begun to embrace clinical legal education. Irish law schools have been late to adopt what is regarded by many as “one of the most significant and successful pedagogical developments since Langdell’s case method at the beginning of the twentieth century.”² Yet clinical legal education programmes have continued to grow and expand apace over the past decade in Ireland.³ While still well behind their counterparts in places like the United States, United Kingdom and Australia, Irish clinical programmes have achieved significant successes in a short period of time.⁴

Interestingly, the mainstreaming of clinical legal education in Ireland, once regarded as exotic and described in Part II, has coincided with the emergence of a rapidly proliferating body of what might be termed “crisis literature” on the state of legal

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² Richard Wilson, “Training for Justice: The Global Reach of Clinical Legal Education” 22 *Penn State International Law Review* 421, 421 (2004).

³ Lawrence Donnelly, “Developing Irish Clinical Legal Education” in (Thomas Mohr and Jennifer Schweppe eds) *30 Years of Legal Scholarship: The Irish Association of Law Teachers* (Thomson Round Hall, Dublin 2011) 359, 360.

⁴ Lawrence Donnelly, “Clinical Legal Education in Ireland: Some Transatlantic Musings” 4 *Phoenix Law Review* 7, 15-19 (2010).

education in recent years.⁵ While much of this literature has emanated from the US, which has some of its own distinct problems to try and solve in the imminent future, legal educators around the world must confront complex challenges. A substantial portion of these challenges have been precipitated by the onward march of globalisation and technology.⁶

Without delving into these quandaries – doing so could easily engender a rather lengthy tome (or tomes) – but mindful of the current, perhaps unprecedented, context, this article asks and endeavours to answer the following questions: What should we as legal academics seek to place at the heart of the educational experience for our students? And how can we do it?

The article argues that the disorienting moment should be a central component of the optimal twenty-first century legal education and that clinical legal education programmes are the ideal conduits for bringing about disorienting moments for students. The article shares the reflections of students in the clinical programme in the School of Law at the National University of Ireland, Galway. These reflections, it is submitted, establish that clinics are likely the best means of provoking the deeper questioning that flows from disorienting moments. Furthermore, the students' reflections, on their own, make a powerful case for why law schools should prioritise and resource clinical programmes. Beforehand though, and in the interest of laying

⁵ See, for example, Brian Tamanaha, *Failing Law Schools* (University of Chicago Press, 2012); Paul Campos, "The Crisis of the American Law School" 46 *University of Michigan Journal of Law Reform* 177 (2012).

⁶ See generally Mary Daly, "The Structure of Legal Education and the Legal Profession: Multidisciplinary Practice, Competition and Globalization" 52 *Journal of Legal Education* 480 (2002).

the foundation for these arguments, it is important to examine the progress of clinical legal education in Ireland and to pose some inherently complex questions.

II. *Clinical Legal Education: Defining the Goals*

While specifically denominated clinical legal education programmes have only sprung up in Ireland in the past fifteen years, a handful of Irish legal academics, such as Dr. (and later Justice of the High Court) Bryan McMahon and Professor Gerard Quinn, who had studied law in the United States, sought to incorporate more practical elements into third level legal education in the preceding decades.⁷

There has been for some time an element of opposition to and/or scepticism about the merits of teaching “practical law” in Irish law schools.⁸ Given that law is an undergraduate subject and that graduates who wish to qualify as barristers and solicitors must complete a part-academic, part-professional training course administered by the professions before they are admitted to practice, some in the academy view any vocational instruction as beyond our collective remit.⁹ That clinical legal education programmes have proliferated and thrived in other jurisdictions with similar frameworks for qualifying as lawyers has not diminished typically unspoken, yet undeniable, doubts about clinics in Ireland.¹⁰ Moreover, the widespread diminution of law school autonomy, the absolute prioritisation of the doctoral degree

⁷ Lawrence Donnelly, “Developing Irish Clinical Legal Education” in (Thomas Mohr and Jennifer Schewpe eds) *30 Years of Legal Scholarship: The Irish Association of Law Teachers* (Thomson Round Hall, Dublin 2011) 359 et seq.

⁸ Lawrence Donnelly, “Clinical Legal Education in Ireland: Some Transatlantic Musings” 4 *Phoenix Law Review* 7, 12 (2010).

⁹ *Ibid* at 11-12.

¹⁰ *Ibid* at 15.

above experience of law practice in recruiting legal academics and the scarcity of resources all militate against clinical legal education in Ireland.¹¹

Nonetheless, the move toward more practical legal education in Irish law schools and the growth in clinical programmes, in particular, are unmistakable.¹² Most Irish law schools now have well-established clinical programmes – the vast majority are externship/placement-based clinics – and all stress the number of opportunities to develop practical skills on offer.¹³ The fledgling and still informal Irish Clinical Legal Education Association (ICLEA) was formed in 2013 and has organised major conferences and a series of less hidebound roundtable meetings, seminars and workshops.¹⁴ ICLEA seeks to pool resources, draw upon international expertise and provide a vital forum for the small cohort of academics directing clinical programmes.¹⁵ It also intends to promote the expansion and enhancement of clinical programmes in Ireland and the interests of stakeholders of clinics in Ireland.¹⁶

The primary issues that *Irish* clinical legal education and those leading this broad enterprise must fully confront in order to emulate other jurisdictions around the world and realise its full potential often surface at ICLEA events. These include constraints on resources and other complications which render moving from the now prevalent externship/placement clinics to the “live client” model; balancing inherently time-

¹¹ *Ibid* at 9-15.

¹² *Ibid* at 15-19.

¹³ Lawrence Donnelly, Report, *Clinical Legal Education in Ireland: Progress and Potential* (Free Legal Advice Centres Ltd/Public Interest Law Alliance, 2015) 8-33.

¹⁴ *Ibid* at 48.

¹⁵ *Ibid* at 48.

¹⁶ *Ibid* at 48.

consuming and labour intensive clinical work with the pressure to undertake research, present papers and publish articles; the reality that Irish clinical programmes are typically “sole trader” operations with few administrative or other supports; as well as the very nature and core objectives of clinical programmes.¹⁷ Should clinical legal education in Ireland be purposed primarily to develop students’ practical skills, or to advance the public interest and equip students with a heightened social consciousness, or both?¹⁸

Considering these complex and hugely important matters, which are not amenable to ready consensus or swift resolution, necessarily entails some examination of those broader quandaries about the future legal education that are being pondered by colleagues almost everywhere law is taught. What are the ideal components of the optimal legal education experience for students in 2016? In an overarching sense, what should be its defining characteristics? And what role can clinical programmes play in this admittedly worrying time, when a lot of existential questions are being asked, in best preparing law students for their careers in an environment that has been changed utterly by technology and globalisation?¹⁹ The scholarship provides some keen insights on these points.

¹⁷ Ibid at 45-52.

¹⁸ Ibid at 46.

¹⁹ See generally Emily Benfer and Colleen Shanahan, “Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School” 20 *Clinical Law Review* 1 (2013); Anita Bernstein, “On Nourishing the Curriculum with a Transnational Law Lagniappe” 56 *Journal of Legal Education* 578 (2006).

III. *The “Disorienting Moment”*

In a seminal article published in 1995, Fran Quigley persuasively argued that the “disorienting moment” should be central in legal education.²⁰ This is a term borrowed from adult learning theorist Jack Mezirow to explain the time when a learner’s “prior conceptions of social reality and justice are unable to explain the clients’ situations” in a clinical legal education programme.²¹ Stated another way:

“Adult learning theory maintains that when a learner begins describing an experience with the phrase, ‘I just couldn’t believe it when I saw...,’ an opportunity for significant learning has been opened. The phenomenon is called the ‘disorienting moment,’ when the learner confronts an experience that is disorienting or even disturbing because the experience cannot be easily explained by reference to the learner’s prior understanding – referred to in learning theory as ‘meaning schemes’ – of how the world works.”²²

Much of students’ usual experience of legal education, however, runs against their being thrust into such disorienting moments. Students, particularly in Irish law schools, often learn passively.²³ They learn “through reading and digesting a large

²⁰ Fran Quigley, “Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics” 2 *Clinical Law Review* 37 (1995).

²¹ *Ibid* at 46. See Jack Mezirow, “How Critical Reflection Triggers Transformative Learning” in Jack Mezirow, et al (Eds), *Fostering Critical Thinking in Adulthood: A Guide to Transformative and Emancipatory Learning* 1 (Jossey Bass Publishers 1990). See also Sarah O’Rourke Schrup, “The Clinical Divide: Overcoming Barriers to Collaboration between Clinics and Legal Writing Programs” 14 *Clinical Law Review* 301, 310 (2007).

²² Fran Quigley, “Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics” 2 *Clinical Law Review* 37, 51 (1995).

²³ See generally Yvonne Daly and Noelle Higgins, “The Place and Efficacy of Simulations in Legal Education: A Preliminary Examination” 3 *All Ireland Journal of Teaching and Learning in Higher Education* 58.1 (2011).

body of judicial decisions, articles and books and then disgorging it.”²⁴ In lecture theatres or classrooms, a student may become “a mere recipient of the professor’s teaching” who “yields to the professor an ability to express personal thoughts and to criticize the message taught.”²⁵ This can have the unfortunate – and some would say tragic – consequence that “students learn how to think like lawyers by adopting an emotionally remote, morally neutral approach to human problems and social issues, distancing themselves from the sentiments and suffering of others, avoiding emotional engagement with clients and their causes, and withholding moral judgment.”²⁶

But clinical offerings in law school curricula take place in a vastly different arena and in a context that is poles apart. For instance, one criminal law professor recounts how her experiment in bringing first year law students to court for the day has turned into an invaluable asset for her as a teacher.²⁷ She notes that students’ emotions “range from excited to scared, bored to curious” and is invariably struck by the gulf between what they expect to happen and what actually happens in a courtroom.²⁸ Although they watch proceedings that involve some various serious crimes, they are also

²⁴ Jane Aiken, “The Clinical Mission of Justice Readiness” 32 *Boston College Journal of Law & Social Justice* 231, 235 (2012).

²⁵ *Ibid* at 235.

²⁶ *Ibid* at 236.

²⁷ Emily Hughes, “Taking First-Year Students to Court: Disorienting Moments as Catalysts for Change” 28 *Washington University Journal of Law & Policy* 11 (2008).

²⁸ *Ibid* at 21.

exposed to “the steadiness of the seemingly mundane” which “is an important revelation for some students.”²⁹

These have included seeing a black teenager sentenced to spend two days in jail because he was apprehended when attempting to avoid paying a public transit fare, parents who were charged with felonies for falling behind in child support payments and a young mother facing a second-degree robbery charge for brushing against a security guard when trying to shoplift a VCR.³⁰ While the elements of both serious and relatively non-serious crimes that the students have learned from their reading and in classes are central in the disposition of these matters, witnessing the human element that plays an equally central role in the administration of justice adds another entire dimension to the learning experience. And clinical or practically-oriented instruction – whether or not it is the “live client” model – is the ideal vehicle for supplementing theory with reality.

Of course, upper level, well-resourced clinics have a unique capacity to engender disorienting moments that give law students serious pause for thought and reflection. For example, one final year law student in a clinic, authorised to represent indigent clients under the applicable state rules, acted for a client in a domestic violence hearing and won a protective order for her client following a withering cross-examination.³¹ As the student celebrated the outcome, her clinical supervisor questioned if she was

²⁹ Ibid at 22.

³⁰ Ibid at 21.

³¹ Jane Aiken, “The Clinical Mission of Justice Readiness” 32 Boston College Journal of Law & Social Justice 231, 240 (2012).

at all troubled by what had happened and how it happened.³² When she responded in the negative, the supervisor reminded her that the individual she had successfully “destroyed” on the witness stand had no legal representation, nor did anything in the applicable statutes require that he be provided with a lawyer.³³ And as a result of the hearing, he lost all rights of access to his children for the time being and would be arrested if he attempted to make contact with them.³⁴ Yet “[W]ithout personal reflection and ethical challenges in law school, law students do not have the opportunity to face the moral dilemmas critical to moral development.”³⁵ Here, again, clinic has provided such an opportunity in a way that traditional pedagogy simply cannot.

IV. *Externship Clinics and Disorienting Moments for Galway Law Students*

While disorienting moments occur frequently, and for obvious reasons, in “live client” clinics, they also transpire in externship or placement clinics. As one externship director notes:

“[A]n externship program centered on the development of professional identity and values is a pedagogical device that law schools can employ to meet this goal. An externship is a type of clinical experience in which a student works for academic credit in a legal setting outside the law school under the supervision of an attorney and also attends a related seminar class at the law

³² Ibid at 240.

³³ Ibid at 240.

³⁴ Ibid at 240.

³⁵ Subha Dhanaraj, “Making Lawyers Good People: Possibility or Pipedream” 28 *Fordham Urban Law Journal* 2037, 2067 (2001) citing Joseph Reimer, et al, *Promoting Moral Growth* (1979) 40-42.

school. This combination of work experiences in an actual practice setting and guided reflection on those experiences in the seminar provides students with an ideal opportunity to explore the moral, ethical, and professional dilemmas that lawyers regularly encounter.”³⁶

The fact that students are a significant step removed from an academic supervisor only heightens the extent to which they can grow as putative legal practitioners, and as people.³⁷ They must exercise “their own professional judgment” in all the varied aspects of law practice.³⁸ This distance from their academic supervisor also facilitates wider ranging and more open and honest student reflection both in journals and seminars – a vital element in the structure of any externship clinic.³⁹

Moreover, externships are ideally situated to ensure that students attain a broader perspective on the law and the legal system – “to examine legal doctrine in the context of societal problems, apply jurisprudential and other philosophical considerations to the practice of law, and compare and critique legal systems.”⁴⁰ They can discuss the application of law and the merits or shortcomings of the legal system with various stakeholders.⁴¹ And their time spent on placement can bring abstract theory to life in a way that absorbing material in a library or classroom setting cannot.⁴² In sum, “while a criminal law professor may teach the concept of *mens rea*, and a clinical

³⁶ Kelly Terry, “Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose” 59 *Journal of Legal Education* 240, 243 (2009).

³⁷ *Ibid* at 255.

³⁸ *Ibid* at 255.

³⁹ Lisa Lerman, “Professional and Ethical Issues in Legal Externships: Fostering Commitment to Public Service” 67 *Fordham Law Review* 2295, 2296-2297 (1999).

⁴⁰ Robert Seibel and Linda Morton, “Field Placement Programs: Practices, Problems and Possibilities” 2 *Clinical Law Review* 413, 420 (1996).

⁴¹ *Ibid* at 420.

⁴² *Ibid* at 420.

professor may teach the subtleties of opening argument, the externship professor may have the students address the fairness of our criminal justice system from their experiential perspective.”⁴³

The following excerpts from reflective essays written by Galway law students in recent years are proof positive of observations made both in the recent scholarship on externships and in Quigley’s decades old article on the capacity of clinics to create disorienting moments. The thoughts – and indeed the all around thoughtfulness – expressed here are from students who were engaged in placements within the broad public interest and social justice sphere.

“What really struck me about working in [the firm] was the moral challenge of the work I was doing. While it seems quite clichéd, working in criminal defence involves the constant balancing of justice and due process. While representing a person who has been convicted of multiple murders, for example, is quite morally challenging and often looked down on by the general public, it is a job that needs to be done all the same I our legal system is to ensure that every person who enters the system is given a fair trial and afforded all the rights that they are entitled to. The moral dilemma alluded to and played up in many television series and movies is real.”⁴⁴

The student’s points about the law and morality are fascinating. While there is a strong systemic justification for all accused persons to have a vigorous legal defence, in the “real world” it nonetheless presents an array of moral challenges that the student identifies here.

⁴³ Ibid at 420. See also Harriet Katz, “The Past and Future of Externship Scholarship” 23 *Clinical Law Review* 397, 400-401 (2016).

⁴⁴ Student Reflective Essay (on file with author).

“The emotions I felt whilst observing this [murder] case were greater than the emotions I felt while reading case files at the office or for exam purposes. This goes to show how important placements are when studying law at university. It is never enough to read about it and achieve firsts in every exam. That is not sufficient to prepare any law student for life as a lawyer. The reality is that there are so many aspects of a case or in the trial process that are not mentioned in text books or stated by lecturers.”⁴⁵

In short, the study of law and its practice are fundamentally different. The human element encountered in litigating cases of all types is often crucial to their resolution and cannot be sufficiently accounted for when reading case law at a distance.

“The event [conference] also demonstrated the passion and enthusiasm of the volunteers and people who are involved in NGOs have. It has highlighted the problems of inequality in our country and made me appreciate how influential the work of NGOs in our society is. The experience was a high point of my work that proved to be extremely rewarding. Being able to hear the struggles of people who are experiencing injustices as a result of deficiencies in our legal system is something that cannot be offered in a classroom setting. The event clarified that one of the main purposes of law is to help the marginalised people in society.”⁴⁶

As well as highlighting the invaluable work NGOs do, usually on a shoestring budget, the student’s time spent helping to organise a conference demonstrated to her the importance and utility of gathering together regularly to share experiences, grow networks and gain insights. The law does not operate in a vacuum; those who work

⁴⁵ Student Reflective Essay (on file with author).

⁴⁶ Student Reflective Essay (on file with author).

with it can lose out if they don't engage with stakeholders with ample knowledge and wide-ranging outlooks.

“Within both of these places [the children's and family courts] what is noteworthy is that pragmatism and common sense often override strict application of law as it is written down. For instance, often the types of persons you deal with in such settings are quite vulnerable individuals. In this light, and particularly in the context of children who find themselves before the courts having committed breaches of law, they are afforded sufficient leniency with regard to potential punitive sanctions. The vulnerability of these persons is often considered as a significant factor in determining the outcome of their particular case, as often, due to their own circumstances it would be unjust itself to severely punish them. In contrast, a classroom debate over how to deal with a young person, particularly one who has relapsed into crime on a few occasions and caused inconvenience to someone else will often produce a 'logical' result in the light of the crime and relevant legislation...Judges, however, often tend to look to the bigger picture, measuring the weight of the inconvenience concerned to the injured party and the circumstances which led the accused to act in a manner inconsistent with the law.”⁴⁷

Again, that the administration of justice is ultimately a very human – warts and all – enterprise is now manifest to this student. Moreover, he recognises that the tabloid headlines about “out of control judges” and “criminals going scot free” are misplaced in most instances. Compassion and discretion are the lifeblood of the system and, in reality, most men and women would prefer judges who strive to be truly just in executing their vital duties.

⁴⁷ Student Reflective Essay (on file with author).

“Those [lawyers] who volunteer their time and skills are particularly inspirational. It is important that financial gain is not the only motivation. A willingness to help others shows that a person is truly passionate about what they do. Legal information, and especially assistance in understanding the information, is something which everyone should have access to. It is extremely difficult for someone who does not have a legal background to understand legislation or directives and to interpret their rights. Many visitors [to a clinic] also had problems with language. In a negative respect, it was disheartening to hear stories from a number of individuals who felt they were taken advantage of by solicitors. A number of complaints were made by vulnerable immigrants who appear to have been overcharged. When considering the prospect of entering into a profession, one is filled with prospects and ideals; it is appalling to consider that sometimes these ideals are not implemented in practice.”⁴⁸

The first lesson from this placement is that there remains a gulf between vulnerable people and lawyers. The second is more complex. Certainly, some lawyers are unscrupulous and that, sadly, will forever be true. But there can be two very different accounts of the same lawyer-client relationship. And sometimes, the truth is in the middle.

This is a very small sampling of literally hundreds of reflections shared by students in seminars and in essays over the decade that the clinical placement programme has been running in Galway. It is indicative of the reality that the vast majority of the deepest, most soul searching, intellectually and otherwise self aware and, frankly, profound comments offered by students have come from those who worked in an

⁴⁸ Student Reflective Essay (on file with author).

environment where the limits of the law and legal system and the struggles of so many men, women and children are laid bare every day.

This is not to say that the experiences, and related contemplation, of students who have worked in commercial or other fields are not valuable. They are. It is to say – or more accurately, to argue – that clinics are best when, in addition to aiding in the development of crucial practical skills, they “are intensely aware of the mission of lawyers in serving justice, and in representing the weak against the strong” and when, as a consequence, almost every moment can be a disorienting one.⁴⁹

V. *Conclusion: Final Thoughts and Further Questions*

The benefits that have accrued to law students in Galway who have participated in an externship-based clinic are manifest. In addition to fulfilling the pedagogical goals of the programme – “learning by doing,” intertwining theory with practice and heightening a collective consciousness of inequality and injustice chief among them – graduates who have taken the clinical module repeatedly indicate that their initial offers of employment stem in large part from having had practical experience of the law and legal system under the rubric of a structured, supervised, highly regarded programme of clinical legal education.

Correspondence and other informal contact with these employers suggest strongly that it is their cognisance of the fact that clinic students will have encountered far more

⁴⁹ Richard Wilson, “Western Europe: Last Holdout in the Global Acceptance of Clinical Legal Education” 10 *German Law Journal* 823, 823 (2009).

disorienting moments than those who sat beside them in classrooms that captures their attention when sifting through a pile of CVs. That's even if the law firm partner or NGO director doesn't label these critical learning opportunities as such and has never heard of Fran Quigley's article. Graduates who have previously "been around the block" once or twice and have had to think about what they were confronted by afterward are more attractive candidates for obvious reasons. The practice of law, which involves a significant amount of drudgery and, at times, precious little engagement with either big or small legal issues, is quite unlike its study in many ways.⁵⁰ At every stage and in almost every context, it is still a reflection of our shared humanity. Clinics, and more specifically, the disorienting moments they produce, showcase reality, not fantasy. As such, they are arguably core, not complimentary, to the study of a discipline that is both academic and vocational in nature – and that holds true regardless of whether a graduate goes on to qualify professionally as a lawyer or not.

While disorienting moments are crucial to getting a "good" legal education in 2017, there are challenges to legal education and legal educators of a new sort. Indeed, the very nature of law practice is changing rapidly and is already very different to what it was just a quarter of a century ago.⁵¹ In a time where legal careers spanning multiple jurisdictions and even different hemispheres will be the norm, not the exception, and

⁵⁰ See generally Timothy Floyd and Kendall Kerew, "Marking the Path from Law Student to Lawyer: Using Field Placement Courses To Facilitate the Deliberate Exploration of Professional Identity and Purpose" 68 *Mercer Law Review* 767 (2017).

⁵¹ Stephen Sieberson, Alex Fayad, Carola Cintrón-Arroyo, "Changing Times in the Legal Profession – A Survey of Practicing Lawyers" 50 *Creighton Law Review* 443,443-445 (2017).

where technology can minimise human interaction, reduce the need for as many lawyers, accelerate the rate at which the “wheels of justice” spin and engender new and perhaps unrealistic expectations from clients – or consumers as they might regard themselves in future – are disorienting moments of the sort outlined above as necessary?

The answer is yes. Although some disorienting moments may be different to what was envisaged when Fran Quigley wrote in 1995, they should forever remain at the heart of legal education. For instance, they can take place when a student is forced to grapple with technological innovations that lie beyond anything she has been exposed to before and are, to some extent, at variance with much of what she has learned in law school about substantive and procedural law. Moreover, they can occur where a legal dispute involves multiple jurisdictions and wholly different legal and broader cultural contexts in which some of the student’s most fundamental assumptions about life and humanity may be turned upside down. Crucially, and contrary to what is argued trenchantly by some observers, the twin forces of technology and globalisation don’t necessarily exacerbate the problems of the less well off; they have unique capacities to ameliorate them, too. It is now imperative that law students are introduced to and comprehend this brave new world.

In the end, the disorienting moment – where a student asks (or shrieks) “why?” and can’t even attempt to answer without having to then question everything he has always presumed to be true – will always be indispensable to providing a worthy legal education. Those of us in the broad church that is the global clinical legal education

movement should be ever mindful that we are driving the ideal vehicles to create such pivotal instants in ever-expanding ways and push ourselves and our students accordingly. As Quigley concludes, “[T]hese future policy-makers clearly deserve such enlightened instruction. A just society clearly demands it.”⁵²

⁵² Fran Quigley, “Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics” 2 *Clinical Law Review* 37, 72 (1995).

ENHANCING LEGAL AID THROUGH UNIVERSITY LAW STUDENT ENGAGEMENT: A CASE STUDY OF EBSU LAW CLINIC MODEL

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Abstract

The provision of legal aid to underprivileged and vulnerable citizens who could not have ordinarily been able to provide for self legal representation and access to the court system is infrequent in many societies today, especially in most developing countries. There is also an observed non-inclusiveness in the delivery of legal aid. These have starkly resulted to a gap that impacts administration of justice negatively. However, the emergence of clinical legal education (CLE) at different law schools and universities around the world becomes a remedial approach both to increasing the consistency and breadth of legal aid activities, including promoting inclusiveness. CLE is gradually assuming a great height of unprecedented importance and progress in academic curriculum globally. Many universities and law schools have begun to incorporate law clinics into their educational curriculum not just as an essentially approved aspect of their legal education or a novel course of study that involves different pragmatic approaches of engaging law students on learning, but also as a practical mechanism for providing unmatched pedagogy that focuses on diverse lawyering skills successively maximized in providing free legal services to those citizens whose survival depends on the public mercy. This paper discusses how the engagement of university law students from CLE perspective helps to enhance the provision of legal aid to underprivileged and defenseless citizens. Consequently, Ebonyi State University (EBSU) Law Clinic model is used for a methodological case study analysis to that effect. EBSU is a State University in Nigeria and has effectively run its Law Clinic since inception till date, combining both empirical and theoretical approaches in providing pro bono oriented legal services to unprotected Nigerians. The paper further examines the *modus operandi* of the EBSU Law Clinic and highlights significant reasons why the Clinic stands to be a reference practice model.

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1. Introduction

The provision of financial support or other legal services usually by government in the form of legal aid to underprivileged and vulnerable citizens who could not have ordinarily been able to provide for self legal representation and access to justice remains an inevitable core component of the justice system and of course the foundation of CLE particularly in the modern society. The notion of legal aid in principle underpins four cardinal principles: unrestricted access to the court system, equality before the law, the right to counsel, and the right to fair trial. These fundamental principles have been unmistakably articulated in a wide range of supreme national and international laws.

Although a variety of cases ranging from criminal to civil can receive legal aid, what really constitutes a legal aid may differ from country to country especially in terms of the nature of cases and qualifications of those who receive it. For example, the primary rule within England and Wales in the United Kingdom (UK) is that a recipient of legal aid in non-criminal matters will not have earned above the gross income of £2,657 monthly.² In Nigeria, the extent of legal aid and access to justice delivery encompasses three major areas that include criminal defense service, advice, assistance and legal representation in civil cases and community-based legal services for which legal aid

² The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, section 7 (1) (b) (entered into force on April 1 2013)

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recipient will not have earned an income exceeding national minimum wage,³ save in exceptional circumstances as encapsulated under the Legal Aid Act.⁴ Additionally, case determination as to qualification for legal aid is generally subject to the test of merit and proof of indigeneship in Nigeria. Whereas the need for legal representation and access to the court system anywhere in our contemporary time calls for support of mainly the poor people irrespective of the nature of the crime allegedly committed, perhaps, it is also pertinent to consider legal advice to the needy and the rich as an essentially prerequisite of legal aid delivery services since both may lack the mental and intellectual abilities desirable to seek the right direction for legal representation and access to justice in spite of their income levels. Most importantly, timeous representation of these people is the key exceptionally upon being suspected or accused of committing a crime, mindful of the need to guarantee absolute presumption of innocence.

However, it is noted with dismay that the delivery of legal aid to citizens ensnarled by extreme pauperism is in a measure in many societies, specifically in the developing countries and this has taken a continuous decrease. The reason for this is not far-fetched. It has become a tradition to see government as the only right institution to offer legal aid by way of monetary help to citizens whose financial status makes it practically impossible for them to access the court system and be represented in a

³ The current basic National Minimum Wage (NMW) for employee salary earners in Nigeria is 18,000 thousand Nigerian Naira per month equivalent to \$57 US Dollar. See Nigeria's National Minimum Wage (Amendment) Act 2011

⁴ Legal Aid Act 2011, Act No. 17, articles 8 (1) and 9(2) respectively

court case. This has resulted to many negative effects hampering the administration of justice mostly the congestion of prisons, excessive courts caseloads, including the marring of equality before the law in some jurisdictional settings. For instance, a statute⁵ introduced in the UK in 2012 has been widely criticized because, it undermines free legal services as it cuts legal aid budget by £350 million.⁶ The implication of this can lead to non-inclusive representation of people that deserve free legal support within the regions.

Against the common perception that the provision of free legal representation and access to justice remains within the exclusivity of government responsibility and sometimes to includes non-governmental organisations (NGOs), we must understand that such does no longer align with the legal demands of the contemporary society. This eccentricity falls out of the context of modern justice education (JED) and as such, inhibits the streamlining of the traditional notion of legal aid. The emergence of CLE has, therefore, come to aid mainly as an innovative socio-legal tool for university and law school students in enhancing legal aid. The general purpose of this paper is focused on the discussion of how Ebonyi State University (EBSU)⁷ Law Clinic model

⁵ Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act, 2012

⁶ See, 'Legal aid: Why equality before the law no longer exists in the UK in 2016' (LawCareers, 01 February 2016) <<http://www.lawcareers.net/Information/Features/01022016-Legal-aid-why-equality-before-the-law-no-longer-exists-in-the-UK-in-20>> accessed 01 May 2017

⁷ EBSU is a multi-disciplinary State University created by Ebonyi State University Law No. 7 1999, with its Faculty of Law located at the former College of Agricultural Science (CAS) Campus in Abakaliki, the Capital City of Ebonyi State. The EBSU Law Clinic, founded by the former and current Dean of the Law Faculty Professor Amari Omaka C. now a Senior Advocate of Nigeria (SAN) is a general interest legal clinic for law students of the University's Law Faculty <<http://ebsu-edu.net/history-overview/>> accessed 6 May 2017

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promotes effective legal aid that underscores the preceding four cardinal principles to the indigent and vulnerable citizenries in Nigeria within the framework of CLE. The paper is divided into 5 sections of which section 1 is on introduction. Section 2 discusses CLE as a tool for enhancing legal aid while section 3 takes a look at the overview and the *modus operandi* of EBSU Law Clinic. Section 4 discusses why the Clinic is a practice model for a case study. Finally, section 5 draws a conclusion.

2. Clinical Legal Education-A Tool for Enhancing Legal Aid?

The delivery of legal aid at different levels around the world has become an important development so much that the present meaning and scope ascribed to it has become dynamically broader like never before. Firstly, it is now crystal clear to understand that charting legal aid causes does not only involve governments, it also includes higher institutions of learning where law is taught as a professional course. Secondly, it is noted that other organisations such as civil societies or NGOs, including non-profit or profit-based private organizations like law firms alike voluntarily provide free legal services to those citizens whose survival depends on the public mercy. It is by this understanding that the actual role of lawyers in the society reflects the real essence of legal education on one hand whereas on the other hand, the actual role of law schools and universities then reflects partly in their students engagement towards delivery of free clinically-based community services, in either sense, for the pursuit of

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social justice in the society. This establishes a strong interface between legal education, legal aid and social justice⁸ that meets increasing legal calls of the modern society.

Indeed, CLE is gradually assuming a great height of phenomenal importance and progress in academic curriculum globally. Many universities especially modern ones⁹ and law schools alike have begun to incorporate law clinics not just as an essentially approved aspect of their legal education¹⁰ or a course of study that involves different approaches of learning,¹¹ but also as a practical mechanism for providing unmatched pedagogy that focuses on different lawyering skills to law students¹² and which they in turn maximize in providing realistic legal aid to indigent and vulnerable people. It is not doubtful whether CLE has come to stay. Nevertheless, its sustainability demands a match of innovative ideas that would mirror the realities of our time, environments, needs, and divergent legal systems. There is need to synthesize old ideas for a broad-based new justice initiatives. To achieve this literally means we must look beyond the normal learning environment. Our definitions of the subject must

⁸ Ibijoke Patricia Byron, 'The Relationship Between Social Justice and Clinical Legal Education: A Case Study of the Women's Law Clinic, Faculty of Law, University of Ibadan, Nigeria' (2014) *International Journal of Clinical Legal Education*, 20(2) 531-646

⁹ Nicola Antoniou and Patrick Hassan-Morlai, 'Live Client Clinics: Bridging the Gap' (2014) *International Journal of Clinical Legal Education*, 21(2)

¹⁰ William Pincus, *Clinical Legal Education for Law Students* (New York, 1980) 467. See also Richard J. Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education' (2003) *Penn St. Int'l L. Rev.* 22, 421

¹¹ Mark Spiegel, 'Theory and Practice in Legal Education: An Essay on Clinical Education' (1987) *UCLA L. Rev.* 34, 577

¹² Binny Miller, 'Give Them Back Their Lives: Recognizing Client Narrative in Case Theory' (1994) *Mich. L. Rev.* 485. See also Robert D. Dinerstein, 'Client-Centered Counseling: Reappraisal and Refinement' (1990) 32 *Ariz. L. Rev.* 501; Philip F. Iya, 'Legal Education for Democracy and Human Rights in the New South Africa with Lessons from the American Legal Aid Movement' (1994) *J. Prof. Legal Educ.* 12, 211

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also transcend parochial thinking for a deeper understanding that truly appreciates it as a tool for enhancing legal aid as opposed to definitions that only appreciate CLE as a mere learning process. For example, as quoted in Emil Winkler, Grimes defined law clinic to mean,

*'a learning environment where student identify, research and apply knowledge in a setting which replicates, at least in part, the world here it is practiced.... It almost inevitably means that the student takes on some aspect of a case and conducts this as it would... be conducted in the real world.'*¹³

This definition no doubt lacks one of the sacrosanct pillars of CLE, but instead succeeded in accentuating the scholastic constituent of it, forgetting that legal aid is the foundation of a law clinic.

In like tension, Woodruff and Bucker argued that, *'clinical legal education is a method of training law students by putting them in situations where they must apply the legal theory, principles, and doctrines they have studied in a class room setting.'*¹⁴ This is a far weaker definition, as it perceives CLE a replication of typical classroom knowledge of law in the legal practice. These foregoing definitions have not only direct implications on the broader understanding and application of CLE; they also have correlated impacts on the delivery of legal aid within the framework of JED for transformative social justice. While that is the case, some authors have certainly attempted to offer thicker explanations of CLE. One of such attempts comes from Jeff Giddings who argued that,

'clinical legal education involves an intensive small group or solo learning experience in which each student takes responsibility for legal or law-related work for a client (whether real or simulated) in collaboration with a supervisor. Structures enable each

¹³ R. Grimes, 'The Theory and Practice of Clinical Legal Education' (1996), in J. Webb and C. Maugham (eds.) *Teaching Lawyers' Skills*, 138.

¹⁴ William A. Woodruff and Andreas Bucker, 'The Bologna and German Legal Education: Developing Professional Competence through Clinical Experiences' (2008) *German L.J.* 9, 575.

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*student to receive feedback on their contributions to take the opportunity to learn from their experiences through reflecting on matters including their interactions with the client, their colleagues and their supervisor as well as the ethical dimensions of the issues raised and the impact of the law and legal processes.'*¹⁵

Although Giddings' definition to a great extent focused on the learning side, it is at minimum contemplative of a wider understanding with an implied assumption suggestive of client-based legal aid and is rooted in the understanding that CLE is a progressively important tool driven by student-clinicians together with university law professors, and or teachers to providing hands-on skills for law students in rendering varied free legal and civic services in the society.¹⁶

Better still, Emil Winkler simply argued that law clinic is, "*a combination of practical legal education and legal aid.*"¹⁷ And subsequently broadens his definition in the following words, '*the term clinical legal education or law clinic, traditionally refers to a nonprofit law practice usually serving a public interest or a group in the society that are in a underprivileged or exposed situation and (for various reasons) lack access to legal system.*'¹⁸

He further reasoned that law clinic could involve almost everything of student initiatives accomplished on extracurricular basis that is completely disconnected from the usual school premises to an ordinary part of a university clinical programme.¹⁹

¹⁵ Jeff Giddings, *Promoting Justice through Clinical Legal Education* (Justice Press, 2013) 14

¹⁶ James Marson, Adam Wilson, and Mark Van Hoorebeek, 'The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective' (2005) *International Journal of Clinical Legal Education* 7, 29-43 (2)

¹⁷ Emil Winkler, 'Clinical Legal Education: A report on the concept of law clinics'

<http://law.handels.gu.se/digitalAssets/1500/1500268_law-clinic-rapport.pdf> accessed 10 May 2017

¹⁸ Ibid.

¹⁹ Ibid.

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Winkler's definition is indeed apt, broad-based and has equally captured the historical rationales of CLE by setting a platform for current and future researchers to articulate beyond the ordinary perception of theory, even beyond a practice that has not straddled the area of free legal service delivery to the community. He has certainly severed CLE from a hidebound perspective and projected it in a spectacular forward-looking encircling image of social justice because the non-profit or pro bono aspect of a university CLE is indispensable and lies at the heart of every legal clinic. CLE *per se* is not legal aid, but it is the tool for enhancing legal aid and without which CLE in the twenty-first century onwards would fall short of adequate meaning and relevance across the world.

The European Network of Clinical Legal Education (ENCLE) has offered one of the most embracing and inspiring definitions of CLE. According to it,

*'clinical legal education is a legal teaching method based on experiential learning, which fosters the growth of knowledge, personal skills and values as well as promoting social justice at the same time. As a broad term, it encompasses varieties of formal, non-formal and informal educational programs and projects, which use practical-oriented, student-centered, problem-based, interactive learning methods, including, but not limited to, the practical work of students on real cases and social issues supervised by academics and professionals. These educational activities aim to develop professional attitudes, and foster the growth of the practical skills of students with regard to the modern understanding of the role of the socially oriented professional in promoting the rule of law, providing access to justice and peaceful conflict resolutions, and solving social problems.'*²⁰

²⁰ ENCLE, Definition of a Legal Clinic <<http://encle.org/about-encle/definition-of-a-legal-clinic>> accessed 10 May 2017

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Of all the definitions above, the ENCLE offers what is likely the current broadest meaning of CLE and as such, provides a working definition for this study. The definition captures two roles of CLE: proactive and reactive functions. While the former focuses on activities that equip contemporary student lawyers with theoretical knowledge for offering preventive solutions to societal problems and ensures law students gain advance practical insights of how the law works through learning-by-doing approach especially in understanding justice hurdles and how to defeat them,²¹ the latter is concerned with applying both the knowledge and practical skills gained in responding to the actual prevailing needs of disadvantaged citizens in the society. This is how CLE fosters social justice, legal aid, and increased access to justice for all *via* the engagement of university law student-clinicians on varied justice initiatives. As the historic rationale of CLE has evolved in the United States due to the need for social justice campaign to offer pro bono-based legal services to the poor,²² its use has accordingly transcended the shore of developed nations to becoming a food for thought in developing countries.²³ CLE has morphed into a modern global legal instrument that reveals students desire to stir social change.²⁴ To this extent, it can be

²¹ Orla Drummond and Grainne McKeever, 'Access to Justice through University Law Clinics' (Ulster University Law School 2005) 60. See also Anthony G. Amsterdam, 'Clinical Legal Education-A 21st Century Perspective' (1984) *J. Legal Educ.* 34, 612

²² Judith Dickson, 'Clinical Legal Education in the 21st Century: Still Educating for Service?' (2000) *Int'l J. Clinical Legal Educ.* 1, 33

²³ Philip F. Iya, 'Fighting Africa's poverty and ignorance through clinical legal education: Shared experiences with new initiatives for the 21st Century' (2000) *Journal of Clinical Legal Education* 1, 13-32

²⁴ Richard A. Boswell, 'Keeping the Practice in Clinical Legal Education and Practice' (1992) *Hastings L. J.* 43, 1187. See also Alan A. Stone, 'Legal Education on the Couch' (1971) *Harv. L. Rev.* 85, 392

utilized as an inclusive practical approach to unearth and address a myriad of untold societal problems and proffer solution to them for the betterment of humanity anywhere in the world. Overall, CLE fosters legal aid and increases access to justice for all by engaging university law and law school students on wide-ranging justice initiatives.

3. The EBSU LAW Clinic model-An Overview

The EBSU Law Clinic is housed and run under the Faculty of Law of Ebonyi State University, Abakaliki-Ebonyi State, Nigeria. While the Faculty Board approved the Clinic in 2005 for the delivery of CLE programme, it was not until June 2006 that it received EBSU Senate endorsement.²⁵ The Clinic was also registered in the same year as a member of Network of University Legal Aid Institutions (NULAI),²⁶ making it one of the experimental law clinics in Nigeria.²⁷ The EBSU Law Clinic was further raised to a Directorate in 2008 by the University management immediately after one year of the formal approval and given its historic performance in CLE, the Council of Legal Education of Nigerian Law School (NLS) rated it as a center for quality CLE.²⁸ Thus the Clinic within a short period of inception achieved a sharp remarkable

²⁵ Ernest Ojukwu, Odinakaonye Lagi and Mahmud Yusuf, 'Compendium of Campus Based Law Clinics in Nigeria' (2014) NULAI Nigeria, p. 10 < <http://www.nulai.org/index.php/media1/downloads-resources/file/45-compendium-of-campus-based-law-clinics-in-nigeria>> accessed 6 May 2017

²⁶ NULAI is a Nigerian-based not for profit non-political organization poised to fostering CLE, legal education reform, legal aid and access to justice and the nurturing of future public interest lawyers in Nigeria. It was established in 2003 < <http://www.nulai.org>> accessed 12 May 2017

²⁷ Ojukwu, Lagi and Yusuf (n. 24)

²⁸ Ojukwu, Lagi and Yusuf (n. 24).

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ascension into repute. The *status quo* of this fame has remained consistently uncompromised and has been equally marked by steady improvement in attending to diverse justice needs of the disadvantaged people.

One of the primary goals that inspired the establishment of the EBSU Law Clinic was due to inert and depraved justice system, including the need to decongest prisons in Nigeria. With this in mind, the Clinic has since risen to the fore in addressing these concerns particularly within the criminal justice administration in Nigeria by providing access to justice and prison decongestion.²⁹ Consequently, the concern for prison decongestion and the delivery of pro bono oriented legal services have specifically grown remarkably from vision to becoming a conspicuous fundamental priority; areas of focus that have indeed resulted to detectable social achievement and change in the lives of underprivileged Nigerian citizens. The functionality of this vision has, however, become so broad that other objectives enmeshed thereof to include among other things: the training of law students on public interest law and community services and helping them acquire desirable real-life skills that meet legal demands of the present day society while promoting access to justice for deprived citizens by focusing on parts that range from street law programmes or community outreaches, child rights education in primary and secondary schools, freedom of

²⁹ Amari Omaka C, Faiza Haswary and Omar B. Maniar, 'Code of Conduct and Ethical Challenges of Law Students Assisting Prisoners in Nigeria and Pakistan' (2014) A paper presented by the authors at the Sixth International Legal Ethics Conference (ILEC) at the City University London UK, July 10-12 2014 < <http://www.teachinglegalethics.org/assisting-prisoners-nigeria-and-pakistan>> accessed 10 May 2017

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information (FOI), community education and support, to environmental law.³⁰ Specific service areas of the Clinic includes: counseling, legal advice, alternative dispute resolution (ADR), prison pretrial detainee services, public interest law, street law outreaches, case referral on advocacy health and environmental protection, case analysis, writing of legal opinion, filing legal processes, provision of support services that enhance access to justice, et cetera.³¹ This has led to the adoption of different justice initiatives by the Clinic in ensuring that the needs of many underprivileged Nigerians are met uncompromisingly.

The EBSU Law Clinic focuses on student-centered learning evinced by hands-on experience designed to meet NULAI syllabus on CLE while both 4th and 5th year students normally take a required course on Law Practice as an academic part of the Clinic's CLE.³² Typically, 5th (final)³³ year law students are assigned to different tasks that are entirely pro bono driven and which also form an assessment criteria of the students for which they are usually graded as a continuous assessment under the supervision of the Clinic's Directorate. Clinicians, however, constitute mainly students working under the directive of a law professor who is always the Clinic's

³⁰ Ojukwu, Lagi and Yusuf (n. 19)

³¹ Ojukwu, Lagi and Yusuf (n. 24).

³² Ibid.

³³ As a requirement for Nigerian universities, the normal standard duration for the study of undergraduate law programme is 5 years. Students are classed and described according to their level of beginning and progress in the course from 1st to 5th year. Those in their 5th year are otherwise regarded as 500 level or final year students. See National Universities Commission, Benchmark Minimum Academic Standards (BMAS) for Undergraduate Programmes in Nigerian Universities, April 2007 < <http://fuwukari.edu.ng/wp-content/uploads/2015/04/BMAS-Law.pdf>> accessed 12 May 2017

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director with the support of assistant clinic director, all of whom are appointed and supported by the University management. Likewise, there is a clinic supervisor supported by three lecturers whereas the clinic director usually appoints a final year student-clinician leader who becomes responsible for all the routine activities of the Clinic through the help of the management team.³⁴

The EBSU Law Clinic generally finances its pro-bono oriented activities or projects through varying funding sources that include: approvals from EBSU management, state government support, individual donors, students' clinic fees, and personal contributions.³⁵ These could be categorized into external and internal sources. Although this is the position, evidence from research tends to show that external development partners like the Open Society Justice Initiative (OSJI),³⁶ and internal development partners such as the Network of University Legal Aid Institutions (NULAI)³⁷ remain key funders of the most previous legal aid activities or projects undertaken so far by the Clinic. Of this, it suffices to note that there is no any statutorily provided funding source that readily supports the Clinic's projects and initiatives either at the Faculty or central University management levels. The internal approval from the University management highlighted above merely stems from a

³⁴ Ojukwu, Lagi and Yusuf (n. 24)

³⁵ These sources of funding are based on the information provided in an email enquiry addressed to Professor Amari Omaka C (SAN), the founder and current Director of the EBSU Law Clinic as well as the presently serving Dean of the Faculty of Law when in the course of writing this article, it was extremely inevitable for adequate and reliable information regarding how the Clinic funds its activities or projects.

³⁶ For information about OSJI, see <https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative>

³⁷ For more information about NULAI, visit <http://www.nulai.org>

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formal application request for funds based on detailed budget to justify the work for which the fund is sought, which may or may not be approved. This raises a great concern on the sustainability of the Clinic since funding is a crucially critical sustainable factor for law clinics.

Consequently, the administration of EBSU Law Clinic is not without issues. Funding and logistics certainly remain key challenges affecting student-clinicians initiatives and particularly in undertaking assigned tasks that commonly result to non-refundable out of pocket expenses. From a student experience and which informs the writing of this article, I have had the rare opportunity of working as a student-clinician of the EBSU Law Clinic in a project tagged, 'Street Lawyering and Access to Justice Programme.' I was singly assigned to a case of an accused murder that had stayed quite long in Abakaliki prison without prompt trial. My experience during the time evinces that the Clinic faces funding and logistics challenges. My colleagues who were equally working under the same programme, but whose place of assignment was far South of Ebonyi State where one of the federal prisons in Nigeria (Afikpo prison) is located suffered the brunt of these challenges as most of them had to transport themselves each time they were going to or returning from the prison.

Despite the foregoing fact, the Clinic has achieved tremendous longstanding success and recognition in the delivery of legal aid through student-clinicians engagement. Since the past decade, the EBSU Law Clinic has truly justified the ultimate goals for which it was established and the evidence of that is clear as highlighted in this study.

3.1 The *Modus Operandi*

The EBSU Law Clinic as a general interest law clinic combines empirical and theoretical approaches in carrying out its varying pro bono projects and the rendering of other free legal services to the penurious and vulnerable Nigerians. The approach the Clinic adopts in a particular project, however, depends heavily on a case-by-case basis, but typically embraces the purpose, type and nature of such project. Most of the Clinic's undertakings deal with empirical studies involving field trips after pre-field trainings. The primary purpose of the pre-field trainings is firstly to acquaint student-clinicians with the knowledge of rules of professional conduct and to imbue them with the spirit of professionalism, as well as to take ethical consideration of the prisons when interviewing client inmates.³⁸ Advocacy visitations to attorney general and commissioner for justice, Nigerian Bar Association (NBA), and Nigerian prison authorities usually follow up this process.³⁹

Since prison congestion has utterly increased to its worst height of attention, including the necessity to attend to unattended underrepresented and vulnerable Nigerians, the Directorate of the EBSU Law Clinic had frequently engaged student-clinicians mainly 4th and final year law students on first-hand empirical studies dealing with the evaluation and inquisition of facts regarding challenges faced by inmates

³⁸ Amari Omaka C. 'Decongesting Prisons in Nigeria: the EBSU Law Clinic model' (2014) *International Journal of Clinical Legal Education*, 20(2) 531-646. The paper was first presented by Prof. Dr. Amari Omaka C at the 8th IJCLE Conference at Northumbria University Newcastle Upon Tyne, England United Kingdom, July 7 2010

³⁹ *Ibid.*

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predominantly in Abakaliki and Afikpo federal prisons in Ebonyi State, Nigeria, which projects captured realities on the inmates well-being, rate of access to justice by the inmates, welfare of the prison's staff, facilities at the prisons, situation of the prisons structures, extent of infrastructures at the prison and with other issues comprising the nature of offences, over age, and children in the prisons.⁴⁰

Administering cross sectional surveys on the inmates for data collection that produces sample result representing a fairly larger population has always inspired the empirical study of the Clinic.

The theoretical aspect of the Clinic's work principally lies in the academic component of its CLE programme, advocacy, and the delivery of other pro bono services that do not involve real fact finding. The EBSU Law Clinic between 2008 and 2009 collaborated with an NGO, Agape Foundation to enlighten quarry workers within Ebonyi State in the specific areas of health law, HIV and AIDS, non-discrimination, and stigmatization,⁴¹ as these could provoke human rights issues.

Accordingly, another investigation carried out by the Clinic on the health implications of quarry operations within Abakaliki Capital City of Ebonyi State revealed a shocking academic knowledge of health and ecological implications of quarry activities in the City. The result of the investigation prompted an immediate recommendation to Ebonyi State government for the repositioning of the entire quarry and blasting operations out of the City, which was given an immediate action. Among

⁴⁰ Amari (n. 37)

⁴¹ Ojukwu, Lagi and Yusu (n. 24)

many other justice initiatives or projects of the Clinic, its outreach activities had covered tenancy disputes, family and domestic disputes, unlawful termination of employment to assault and unlawful detention by police.⁴²

4. Why EBSU Law Clinic as a Bespoke model for Case Study?

While clinical legal education movement is budding in Nigeria, there are currently about 22 campus established law clinics across universities and law schools in the country.⁴³ An in-depth review of activities of those clinics shows one commonality reflecting ambitious objectives to providing law students with rounded skills based on real-life classroom instruction and experimental learning process, training of competent and impassioned lawyers capable of fitting domestically and internationally in law practice, including providing pro bono oriented legal services to the less privileged and vulnerable citizens. Most of the clinics incorporated academic and legal aid service delivery components or either in their CLE curriculum design.⁴⁴ There are usually no taught courses, and of course formal assessments of the student-clinicians for the clinics that have only legal aid service delivery component. The scope of legal aid delivery and instruction of each clinic though shows a seamless resemblance with other clinics activities mostly in the areas of outreach activities or community enlightenment, human rights campaign, prison pre-trial detainee services,

⁴² Ibid.

⁴³ Ojukwu, Lagi and Yusuf (n. 24) 5-41

⁴⁴ Ibid., p. 6-41

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and freedom of information (FOI), yet the methodology applied by all the clinics in fostering CLE is somewhat not commonly analogous in a practical sense.

With a careful analysis, EBSU law clinic has remarkably stood out amongst the clinics examined in Nigeria. As pointed out in section 3.1 of this article, the Clinic typically involves empirical research approach not utilized by others in providing free legal aid to the society. This methodology has enabled the Clinic produce research outcomes⁴⁵ that have had significant inputs to government policy and decision-making process, administration of criminal justice, and prison reform in Nigeria. This has been clearly evinced by stupendous recorded projects and activities to which student-clinicians have been very instrumental. More interestingly, of all the pilot and non-pilot legal clinics in Nigeria, it is only EBSU Law clinic that has been rated by the Council of Legal Education, Nigerian Law School as an embodiment of quality in CLE delivery just after a short period of its establishment. Generally, the Clinic has been dynamically transformative in social justice education (SJE) mainly by undertaking motley of justice initiatives.

This is why the practicality of EBSU Law Clinic has positioned it as a model in the frontier of legal aid delivery through CLE both in Nigeria and beyond. Some of the key specific achievements of the Clinic extend from mobile clinics on outreach activities carried out in 2009 and 2010 within Abakaliki City that had assisted in resolving approximately 66 cases covering wide-ranging concerns of under-

⁴⁵ Amari (n. 37). See also Amari, Haswary and Manjor (n. 28).

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represented people to a research conducted from 2007 to 2008 on the environmental and health implications of quarry activities in Abakaliki, which also culminated into a crucial report submitted to Ebonyi State government and other development allies. As a result of this, all the blasting activities and quarry sites within the State were immediately relocated from the City to a remote Umuohara Village in Ezza North Local Government of the State.⁴⁶ While the State government received commendations from all quarters for her great decision, the motivating source for such decision is appreciably attributed to the EBSU Law Clinic.

Between 2010 and 2013 alone, verifiable record shows that 77 pre-trial detainees in Abakaliki and Afikpo Federal Prisons (AAFPs) gained access to justice through EBSU Law Clinic prison pre-trial detainee services,⁴⁷ and has consistently secured the discharge of several pretrial detainees.⁴⁸ There is no doubt that the EBSU Law Clinic has not enhanced the four pillars or principles of legal aid through CLE. In the same spirit, it has advanced legal education in a practical way, helped law students hone their practice skills in facing disparate challenges hampering effective criminal justice administration in Nigeria and have equally offered students new opportunities for legal practice and research. Besides professional practice, there has been indeed a new generation of leaders nurtured and produced by the EBSU Law Clinic. Whether these extraordinary clinically trained graduates of law have begun to bear their inspiration

⁴⁶ Ojukwu, Lagi and Yusuf (n. 24).

⁴⁷ Ibid.

⁴⁸ Amari, Haswary and Maniar (n. 28)

and professional expertise in leadership in Nigeria remains a question of time to come. What makes the EBSU Law Clinic a good practice model is certainly determined by the range of its activities and projects and similarly the methodological approaches it uses to actualize them, which approaches have helped to reveal most pressing concerns that mar the efficient working of criminal justice system, more precisely in Ebonyi State of Nigeria.

5. Conclusion

Recognizing the need to augment legal aid delivery through CLE as a cost-effective socio-legal mechanism with which university law clinics can utilize, it is nevertheless important to point out that CLE involves a plethora of justice initiatives that can be focused on 'need, environment, context, time and purpose.'⁴⁹ In effect, the adoption and extent of use of a model law clinic in providing free legal services will depend on the above factors, which could be determined by the historical antecedents of a country in dispensing with its justice system. Generally, this does not dispel the fact that a model law clinic of a particular jurisdiction cannot be practically replicated in another country, but only that it should be tailored to meet targeted needs of the citizens. Thus, the impetus for adopting the EBSU Law Clinic not as a fit for all purposes, though as a bespoke practice model for a case study in this article. The Clinic in this sense is typically essential because the scope and nature of its pro bono based

⁴⁹ Neil Gold, 'Why not an International Journal of Clinical Legal Education?' (2000) *Int'l J. Clinical Legal Educ.* 1, 7

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legal services and projects are considerably encompassing and utilizes both theoretical and empirical research methodologies in fostering CLE. Therefore, it can serve to lead a guide for other countries in enhancing legal aid and access to justice delivery through the engagement of law student-clinicians.

As the scope of activities with which law student-clinicians can turn justiciable societal problems into real-life solutions are increasingly intensifying, the EBSU Law Clinic standard provides insights to that effect. It remains an epitome of excellence with global relevance and will always be a reference source for possible replication anywhere in the world whenever the need for a good workable model law clinic that delivers a complete and efficient legal aid arises. In this context, it is hoped that the Clinic will rouse the consciousness of law schools and universities around the world to practically engage their students on different approaches in ensuring legal representation and access to justice is provided at no cost to indigent and vulnerable citizens. Accordingly, governments, non-governmental organisations, law schools, universities, academics, judicial bodies, legal practitioners, and students alike will largely find this study very useful.

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EBSU is a multi-disciplinary State University created by Ebonyi State University Law No. 7 1999, with its Faculty of Law located at the former College of Agricultural Science (CAS) Campus in Abakaliki, the Capital City of Ebonyi State. The EBSU Law Clinic, founded by the former and current Dean of the Law Faculty Professor Amari Omaka C. (SAN) is a general interest legal clinic for law students of the University's Law Faculty accessed 6 May 2017.

For information about OSJI, see <https://www.opensocietyfoundations.org/about/programs/open-society-justice-initiative>

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See for examples, the provisions of the 1999 Constitution of the Federal Republic of Nigeria (as amended) particularly section 36 and article 7 of the UDHR 1948.

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USING A REAL CONTRACT TO TEACH LAW HOLISTICALLY

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Abstract

A globally used industry-standard contract proved to be of great use in teaching a few aspects of law and putting a few others in context. The practical exercise of analysing the provisions of an actual contract facilitated active learning. The use of contract provisions to manage risk and the use of standardised contracts to reduce legal costs and achieve efficiencies also emerged. Students learned about different aspects of law and the legislative process, as well as seeing how national legislation can come into being and how it can support, or fail to support, a particular business sector.

Introduction

There is an increased emphasis in Ireland on teaching law in a manner which explains its context to students and in a manner which involves an element of clinical legal education. All law students in my University spend approximately 6 months working with a law firm, or in a similar setting, as part of the degree programme. This happens during the students' third year. Final year law students at University of xxx also take "lawyering" modules where they work on projects in small groups and are guided by a member of faculty. The projects vary from studies of sentencing patterns in criminal cases to employment law clinics. Some of the projects are capable of being described as clinical legal education insofar as they involve live-client situations. Others are practical, involve looking at law in context and build on the 6 month clinical experience the students had.

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Having spent some time working in-house in the capital markets section of a bank , and using the International Swaps and Derivatives Association's (ISDA) pro forma master agreements, I decided to base my project on those. There are significant levels of commercial and financial activity in the financial products used to manage currency and interest rate risk. The high levels of risk management and investment by our banks with other financial institutions makes the area ripe for learning. Furthermore, all commercial lawyers have clients who avail of these risk management services provided by banks and other financial institutions. The group of students who selected this project above others were law students with an interest in securing professional traineeships in Ireland's top law firms and they had an interest in commercial law. Being able to outline to them the future relevance of this knowledge and learning helped to further arouse their interest, which assisted the learning greatly.¹

The aim of the exercise was to allow the students engage in deep learning. This was achieved on the one hand by building on their previous study of contract law and also by taking them back to their earlier study of the stimuli for legislation and the varied purposes of, and motivations for, legislation on a particular aspect of law. These are what Ramsden describes as attributes of deep learning.² While the final year students had studied contract law and the legislative process in previous years, the project

¹ *Learning to teach in higher education*, Ramsden, 2nd ed. , Routledge Falmer, p.93

² *Ibid.* p.47

drew those two modules together, added company law familiarity and gave them a holistic view of these areas of law. In many senses the exercise operated as a capstone module which wove together different strands of legal knowledge and 'placed' their knowledge in a real-world setting.

Contract law in context

(i) *Understanding the client's need for the financial transaction*

One of the reasons I chose the ISDA Master Agreement contract as a base for the project was that the Business School in University of Limerick has a replica trading floor and faculty with expertise in derivatives and similar financial products. The group of students who selected the ISDA Master Agreement project first attended a talk on the products typically traded under that master agreement, or contract. The students were introduced to over the counter (OTC) derivatives like interest rate swaps and foreign exchange products. The students learned how banks entered into those transactions with each other and how companies benefit from these risk management financial products. Our discussion after the seminar in the Business School revolved around purposes a commercial and corporate client might have for an interest rate swap or for foreign exchange products depending on their business. However, as the range of financial products is so wide and because they were new to the students, the next time I supervise the project I will provide notes on the financial products. Some of the students indicated in their feedback that this would be helpful.

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Attending the talk on the financial transactions/derivatives in the xxxxx Business School's trading room meant the students had become *operationally engaged*.³ The students were pleased to see the replica trading floor and gain an understanding of the financial products traded between financial institutions as tools of diversification and management of risk. In addition ,they learned how large trading companies manage their interest rate and currency exchange risks using these financial products. That was the first step in the journey and showed the students what the subject matter of the contract would be.

(ii) Understanding the merits of a master agreement

The ISDA Master Agreement is one of many pro-forma and template documents produced by the Association for its members. The contracts between counterparties are built using a series of different documents. In the first instance there is the master agreement which contains definitions, events of default and representations. The documents were developed and adopted by the participants in this sector of financial activity. Various bank representatives and lawyers, both in-house and from firms, had combined their expertise to create the standard documents. That of course has the advantage of reducing legal costs for companies and financial institutions who use them. It also creates efficiencies due to the familiarity of all with the provisions of the standard form contracts.

³ Engaging the curriculum in Higher Education, Barnett and Coate, The Society for Research into Higher Education and open University Press, p.138

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The second document which contributes to the contract is a Schedule to the ISDA Master Agreement in which parties can vary terms of the contract, agree financial thresholds which will trigger an Event of Default, select a governing law and many other contractual terms can be varied. The students saw how these documents worked in tandem and learned that typically a final piece of the contractual jigsaw is a "Confirmation" for each individual financial transaction, or product. The Confirmation contains specific transaction dates, settlement / payment dates, applicable rates such as EURIBOR and the signature of authorised personnel.

Introducing the students to the various clauses of the Master Agreement had many benefits, not least the fact that there are many boiler-plate clauses with which the students became familiar for the purposes of reviewing any contract. Our discussions helped them to revise issues around Events of Default, waiver terms and representations and warranties, all of which they had studied in Contract law modules.

Furthermore, the terms of the Agreement are so widely used that familiarity with them could only benefit anyone starting a career in a commercial firm, or other commercial law environment.

Finally, the discussion of ISDA's work brought us to considering the future of lawyers and law firms. The very fact of this achievement by ISDA in developing the Master Agreement and other documents opened their eyes to what might be required of lawyers more in the future. Sir Richard Susskind has opined that lawyers of the future

will be expected to assist in achieving more of these efficient mechanisms of standardised contracts intra industry. ⁴

(iii) Understanding the risk management aspect ;" close-out netting"

One of the key provisions within the ISDA Master Agreement is a mechanism for close-out netting. This is particularly important for banks trading with other banks, where the volumes of trade can be significant and the monetary amounts staggering. The contractual intent of close-out netting is that if a bank in another jurisdiction should fail, all transactions are valued and a contractual set-off is used to produce a net amount owed to, or from, the failed bank which is a party to the agreement. With wholesale financial transactions involving significant amounts, no bank wants to trade with a risk that, upon the liquidation of the counterparty bank, amounts owing may have to be paid out by the bank, while amounts owed to it might have to be proven by it as an unsecured creditor of that counterparty bank. This aspect of the Master agreement was particularly suitable for those final year students as they were also studying company law provisions on insolvency, restructuring (examinership/administration) and liquidation. The students were able to link this knowledge to their other course material and appreciated the context.

(iv) A real and widely used contract

⁴ Tomorrow's Lawyers, Susskind R. , Oxford University Press p.26

While students study Contract law for at least a year, they do not always see and hold a contract. Bespoke contracts are not widely available and books of precedent did not form part of the University library's materials and subscriptions, so using the ISDA Master Agreement appealed to me as it offered the students something tangible and actual. I wanted them to see, and review, a document widely used internationally by large companies and financial institutions.

The link to legal opinions by law firms

ISDA also provides Legal Opinions to its members on the enforceability of close-out netting in various jurisdictions. Typically a leading firm in any given jurisdiction will be instructed by the Association to give a legal opinion on the likelihood that, in that jurisdiction, the courts and national laws would respect and uphold the close-out netting (contractual set-off) provisions in the Master Agreement. Members pay for those Legal Opinions and rely heavily on them when assessing their risk to a counterparty and to a particular jurisdiction. Banks will assess their risk to other financial institutions but the students were interested to learn that banks also assess their risk to countries, especially those which are not long-established, stable democracies. The ability of any country to secure a "clean" Legal Opinion is very important to the financial institutions in that jurisdiction. Counterparties and trading partners are easier to find if they don't bear the risk of your banks insolvency above and beyond the net amount owing between you at any given time. In many

jurisdictions, legislation is passed to specifically uphold these close-out netting provisions in the contract.

Laws and lobbying introduced

Making that link from contract to Legal Opinion to legislation for the students enabled me to explain the genesis of many laws and explain why certain sectors of business have associations and lobby groups. The Irish Banking Federation played a role, for example, in highlighting to the Irish Government of the day the importance of adopting legislation to facilitate the certain application of “close-out netting”. Legislative provisions were deemed necessary to confirm and ensure that the provisions of such a Master Agreement would be upheld and applied by a court in the event of the insolvency or liquidation of any Irish credit institution or Irish registered company.

The students learned how the need to ensure the contractual terms of the ISDA Master Agreement were upheld on insolvency led to the, lobbying for, and passing of legislation. The students also understood how the legislators therefore operated in an economic context and enacted the legislation to ensure the continuation of commerce with Irish financial institutions and large companies.

One of the interesting aspects this highlighted for the students was that the legislative process, which they had studied in first year, did not operate in a vacuum , rather that draft legislation responded often to the needs of individual or corporate citizens.

Legislation which is fit for purpose

So the students scrutinised the Irish legislation - the Netting of Financial Contracts Act, 1995 - and wrote an explanatory memorandum on the need for, and effects of, the sections of that Act. This brought the issues into sharp focus for the students and they displayed a comprehensive understanding of the Netting of Financial Contracts Act, 1995 in the papers submitted by them to me.

Pedagogic Reflections

When seeking to identify a clinical legal education project I considered using my professional experience in this area for a couple of reasons. One reason was that aspiring commercial lawyers learning about financial products and how corporate clients use them is important. In addition, familiarity with the internationally used ISDA master agreement could only be beneficial to the students, the related legal opinion work of law firms and the links to national legislation really put law in context and connected each small financial transaction to the national issue of legislation. There is a chain of events and a series of consequences which becomes visible to the students.

While we tend to teach areas of law as separate and distinct subjects, or modules, in reality they merge and interconnect. The project based on the ISDA master agreement illustrated the connections between the business transaction and the contract. It also linked the contract terms to the issue of the legal opinion. The status of the close-out

netting terms of the contract upon insolvency linked contract law and company law. The financial services sector needed to ensure the enforceability of the terms of the contract, which in turn linked the legislative process to the contract. All of these links were compatible with a deep learning experience.⁵

Using a real contract with the students is not unlike the use made by those teaching civil procedure of real accounts of cases.⁶ The compilation of the materials into a text with accompanying annotations may also be worth considering. That seems to have been done to great effect by Nan D. Hunter using the critical pleadings of the Paula Jones' sexual harassment case against President Clinton.⁷

In addition to giving the students more material on the financial products, I will enhance this project in the future either by including a guest lecture by a lawyer negotiating the master agreements on behalf of a large financial institution or by having the students simulate a negotiation of the terms themselves.⁸

Conclusion

It was satisfying to organise a project in a way which gave the students an opportunity to amalgamate at least three areas of law which they had studied and to see those in a

⁵ *Reflection and assessment in clinical legal education: Do you see what I see?* Ledvinka G., *Journal of Clinical Legal Education* August 2006, p. 35

⁶ *Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution* Oppenheimer D., *Journal of Legal Education*, Vol 65, number 4 (Summer 2016)

⁷ *The Power of Procedure: The litigation of Jones v Clinton*, Aspen Law & Business (2002)

⁸ *'Time to rework the brand' Clinical Legal Education*, Noone M.A., *IJCLE* (19) p. 345

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practical context. At another level the project gave the students a holistic approach to the issue of derivatives contracts in particular. While they could revise many areas of law already studied, they also got a 360° view of the key legal issues in the capital markets – at least, as experienced by lawyers!