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# Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!

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## Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!

Karen Tokarz\*  
Antoinette Sedillo Lopez  
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### I. INTRODUCTION

*As the profession changes, professional legal preparation must change. Nimble law schools innovate.*<sup>1</sup>

Although historically slow to change, law schools are now facing enormous pressure from educators, students, lawyers, judges, clients, and the public to rethink legal education and the lawyer's role in society. Now more than ever, there is robust national debate on the threshold contributions law schools should make to the preparation of law graduates for entry into practice.<sup>2</sup> The clamor for reform in legal education is precipitated by a confluence of factors, including new

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1. Betsy Rogers, *The Changing Law School*, 6 WASH. U. L. MAG., no. 2, Fall 2012, at 1, 4 (quoting Kent Syverud, Dean and Ethan A.H. Shepley Distinguished University Professor, Washington University School of Law in St. Louis).

2. See generally WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUC. LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (2007) [hereinafter BEST PRACTICES].

insights about lawyering competencies and experiential legal education; the shifting nature of legal practice in the United States; a decrease in law jobs; changes in the economics of the legal profession that challenge the current cost of legal education; a dramatic drop in law school applications and admittees; increased competition for students among law schools; increased market demand for “practice-ready” law graduates; and increased numbers of law grads going into solo and small firm practice.<sup>3</sup>

Current concerns about legal education echo long-standing criticism of the upper-level curriculum, particularly the third year of law school, when, as the saying goes, law schools “bore you to death.”<sup>4</sup> As long ago as 1883, Harvard Law Dean Ephraim Gurney lamented in a letter to Harvard President Charles Elliot, one of the inventors of the modern Langdellian law school: “If you[r] LLB at the end of his three years did not feel as helpless on entering an office on the practical side as he is admirably trained on the theoretical, I think he would begrudge his third year less.”<sup>5</sup>

Economic, social, and political conditions make it impossible to ignore the clamor for reform. Today’s climate invites a deeper examination of law school curricula and pedagogy, with a focus on the “sequencing of doctrine, skills and values across the curriculum designed to prepare students for practice . . . .”<sup>6</sup> Legal education is at

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3. See generally JAMES E. MOLITERNO, *THE AMERICAN LEGAL PROFESSION IN CRISIS: RESISTANCE AND RESPONSES TO CHANGE* (2013); RICHARD E. SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (2013); BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010); RICHARD E. SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* (2010); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

4. “In the first year of law school, they scare you to death. In the second year, they work you to death. In the third year, they bore you to death.” Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235, 235 (2001) (quoting an ancient law school proverb).

5. MOLITERNO, *supra* note 3, at 226 (quoting Letter from Ephraim Gurney to Charles Elliot in ARTHUR SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817–1967* 188–89 (1967) (alteration in original)).

6. Dean Mary Lu Bilek et al., *Twenty Years After the MacCrate Report: A Review of the Current State of Legal Education Continuum and the Challenges Facing the Academy, Bar and Judiciary*, 2013 A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. 8 [hereinafter *Twenty Years After the MacCrate Report*]. For a detailed discussion of the need for the integration of experiential and clinical education throughout the curriculum, see Katherine R. Kruse, *Legal Education and*

a crossroads, uniquely ripe for innovative curricular and pedagogical change.

Some suggest abandoning the third year of law school; others urge law schools to accept the challenge from educators, the profession, and the market to impart more educational value throughout the curriculum, including the third year. *Educating Lawyers: Preparation for the Profession of Law*, the influential study produced by the Carnegie Foundation for the Advancement of Teaching in 2007 (commonly referred to as the “*Carnegie Report*”), endorses a three-year curriculum that develops the three lawyering apprenticeships of knowledge/understanding, practice expertise, and professional identity/judgment.<sup>7</sup> In this Article, we recommend an innovative, integrated, pluralistic law school curriculum with expanded experiential education<sup>8</sup> (where students learn in the role of attorney with simulated clients and cases) and required clinical education<sup>9</sup> (where students learn in the role of attorney with real clients and cases).

Courses utilizing the case-dialogue method, especially in the first year, make major contributions to accomplishing *Carnegie’s* knowledge/understanding apprenticeship. Experiential courses taught with simulations and hypothetical problems introduce students to the process of fact development, problem solving, applied legal analysis, legal drafting, litigation, dispute resolution, and ethical decision making, and help foster the practice and professional identity apprenticeships. But only clinical courses, where students learn in

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*Professional Skills: Myths and Misconceptions about Theory and Practice*, MCGEORGE L. REV. 1, 2 (forthcoming 2013).

7. CARNEGIE REPORT, *supra* note 2, at 194.

8. Under our definition, experiential legal education is a broad umbrella that encompasses practice-based courses, in which the law student is in the role of attorney in either simulated or real-life settings, including simulation courses (sometimes referred to as “practical skills” courses) and labs and practicums attached to traditional courses, as well as in-house clinics, hybrid clinics, and externships (sometimes referred to as “field placements”).

9. Under our definition, clinical education specifically refers to in-house clinics, hybrid clinics, and externships, in which the law student engages in the roles and responsibilities of a lawyer with real-life cases and legal matters; performs legal work and provides legal services; receives supervision, feedback, and performance assessment by a faculty member; and engages in contemporaneous reflection on the experience, the values of the profession, and the development of one’s ability to assess one’s performance. Clinical education also includes a classroom instructional component.

role with real clients who have complex, real-world problems, present the indeterminate situations necessary for students to develop judgment; to incorporate professional knowledge, skills, and values; to internalize the attorney role; to comprehend client responsibility; and to learn how to learn from experience. Together, these three approaches to learning develop the three *Carnegie* apprenticeships.

There are significant pedagogical differences between traditional doctrinal courses taught via the case-dialogue method, relying predominantly on a casebook with reported appellate cases; practice-based, experiential courses with simulated clients; and law clinics and externships with real clients.<sup>10</sup> Just as the case-dialogue method was a response to the “perceived narrowness of the apprentice method with its attendant nonanalytic lectures on legal rules,”<sup>11</sup> the arrival of experiential and clinical education also was a corrective intervention in response to perceived deficiencies in the casebook method, “based on a critique that teaching doctrine and theory in isolation from the lived experience of the law (clients) and the lived experience of lawyering (role assumption and client representation) is substantially inadequate.”<sup>12</sup> Each of these complimentary yet distinct teaching methods makes important contributions to legal education, each imparts different skills, and each teaches doctrine and theory differently. Legal education needs all three approaches and needs them intertwined throughout the curriculum. “All three will be strengthened through their integration.”<sup>13</sup>

We conclude in this Article that expanded practice-based, experiential education will provide foundational learning for the successful transition from law student to law practice, and that clinical education (in-house clinics, hybrid clinics, and externships) is crucial to the preparation of competent, ethical law graduates who are

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10. David R. Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 4 *BYU L. REV.* 1025, 1028 (1977).

11. *Id.* at 1027–28.

12. Muneer Ahmad, Address at Boston College of Law Symposium: The Way to Carnegie: Practice, Practice, Practice (Oct. 28, 2011) (unpublished manuscript on file with the authors).

13. CARNEGIE REPORT, *supra* note 2, at 191.

“ready to become professionals.”<sup>14</sup> We urge law schools to require each graduate complete a minimum of twenty-one experiential course credits over the three years of law school, including at least five credits in law clinics or externships. Twenty-one required credits (or roughly 25 percent of the eighty-three required credits for graduation from an American Bar Association (ABA)-approved law school)<sup>15</sup> would bring legal education closer to, although still below, the experiential and clinical education course requirements of other professions.<sup>16</sup>

While the ABA Accreditation Standards require law schools to provide substantial instruction in substantive law, the Standards require only that law students take one course credit in “professional skills”<sup>17</sup> and do not require law students take clinics or externships with real clients in the actual practice of law for graduation from an accredited law school.<sup>18</sup> The ABA has not actively advanced

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14. In our view, discussions of late about curricular reform in legal education too often focus on the goal of graduating law students who are “practice-ready.” While we understand there are various interpretations of this term, we believe that goal is narrow and potentially misleading. Rather, we suggest that the broader goal of legal education should be to graduate law students who are “ready to become professionals.” See John Burwell Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE FORUM L. & SOC. CHANGE 101, 129 (2009) (asserting that law schools should prepare students to succeed as professionals, i.e., “to make students client-ready”).

15. The average credit hours required for law school graduation increased to eighty-nine in 2010. Catherine L. Carpenter, *A Survey of Law School Curricula: 2002–2010*, 2012 A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. 15, available at [http://apps.americanbar.org/abastore/products/books/abstracts/5290104%20exec%20summary\\_abs.pdf](http://apps.americanbar.org/abastore/products/books/abstracts/5290104%20exec%20summary_abs.pdf).

16. See *infra* Part II.A. See also KATHERINE R. KRUSE, CLINICAL LEGAL EDUC. ASS’N, COMMENT ON DRAFT STANDARD 303(A)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(A)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES 3–4 (July 1, 2013).

17. A.B.A., STANDARDS FOR APPROVAL OF LAW SCH. 2013–2014, STANDARD 302(A) 21, available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf) [hereinafter STD. 302(A)]. Standard 302(a) requires law schools to provide students, among other things, instruction in substantive law, a first-year and upper-level writing experience, a professional responsibility course, and “substantial instruction” in “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.” A.B.A., CONSULTANT’S MEMOS 7 (Aug. 2012) (“What is ‘substantial instruction’ in other professional skills? . . . At least one solid credit (or the equivalent) of skills training is necessary.”) (emphasis in original).

18. A.B.A., STANDARDS FOR APPROVAL OF LAW SCH. 2013–2014, STANDARD 302(B) 22, available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2013\\_2014\\_standards\\_chapter3.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf) [hereinafter STD. 302(B)]. Standard 302(b) recommends, but does not require, schools provide live-client or other real-life experiences. Interpretation 302–5 states that “a law school need not offer live-client experiences

accreditation reform related to the practice competency of new lawyers, but state supreme courts and state bar licensing boards recently have taken bold steps regarding bar admission requirements, requiring or endorsing experiential and clinical legal education.<sup>19</sup>

Prominent modern-day educators<sup>20</sup> and commentators<sup>21</sup> have endorsed expanded experiential and clinical education, to impart lawyering skills and values and to better prepare law graduates for practice. In 1992, the ABA Task Force on Law Schools and the Profession, composed of noted educators, lawyers, and judges, published *Legal Education and Professional Development: Narrowing the Gap*,<sup>22</sup> providing a “conceptual blueprint of what lawyers need to know in practice.”<sup>23</sup> This important study, widely referred to as the *MacCrate Report*, identified ten fundamental professional skills and four professional values essential for competent, ethical representation, and emphasized the value of experiential and clinical education.<sup>24</sup> The *Report* concluded that the

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to every student nor must a law school accommodate every student requesting enrollment in any particular live-client or other real-life practice experience.” See *infra* Part II.A.

19. See *infra* Part II.B. See, e.g., STATE BAR CAL., TASK FORCE ON ADMISSION REG. REFORM: PHASE I FINAL REPORT I (June 24, 2013), available at [http://www.calbar.ca.gov/Portals/0/documents/bog/bot\\_ExecDir/](http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/) [hereinafter CAL. TASK FORCE] (proposing a bar admission requirement of fifteen credits of law school practice-based, experiential coursework, not counting the first-year legal writing course); MASS. BAR ASS’N, REPORT OF THE TASK FORCE ON LAW, THE ECON. & UNDEREMPLOYMENT: BEGINNING THE CONVERSATION 5–8 (May 17, 2012) (urging law schools to retool the third year to provide greater opportunities for practical experience and to provide additional training in legal writing); N.Y. COMP. CODES R. & REGS. tit. 22, § 520.3(c)(4) (2012) (amending its rules to allow as many as thirty of the eighty-three required law school credits for the New York Bar to be in clinical courses and externships).

20. See, e.g., CARNEGIE REPORT, *supra* note 2; BEST PRACTICES, *supra* note 2; Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 41–44 (2000).

21. See, e.g., *How to Fix Law School: Six Experts Tell Us What They’d Change*, NEW REPUBLIC, July 23, 2013, at 2–3, 4–5 (quoting Mike Kinsey, Editor-at-Large, *New Republic*, and Dahlia Lithwick, Senior Editor and Legal Correspondent, *Slate*).

22. Robert MacCrate et al., *Legal Education and Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. [hereinafter MACCRATE REPORT].

23. *Twenty Years After the MacCrate Report*, *supra* note 6, at 2.

24. According to the *Report*, competent, ethical lawyers must be able to accomplish successfully: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, client counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas. The study also highlights critical professional values for competent, ethical lawyers:



responsibility of teaching and improving lawyering skills and values for the first three years of legal training belongs to the law schools, where skills can be developed and tested.<sup>25</sup>

The *MacCrate Report*'s identification of critical factors of lawyer effectiveness precipitated wide-spread discussion, prompted reexamination of the ABA Standards, and incentivized some law schools to make curricular and pedagogical changes to improve the preparation of new graduates for practice.<sup>26</sup> However, the tendency of law school faculties to be risk averse when considering curricular reform, combined with the lack of specific prescriptions or methods in the *Report* for measuring the performance of skills and values, may have diminished the transformative effect of the *Report*.

The pioneering research of Professors Marjorie Shultz and Sheldon Zedeck,<sup>27</sup> begun in 2001 with funding from the Law School Admissions Council, provided important new information about core lawyering competencies that are both measurable and crucial to effective lawyering. Through defining, redefining, and consensus-building discussions, the researchers ultimately identified twenty-six

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provision of competent representation; striving to promote justice, fairness, and morality; striving to improve the profession; and professional self-development. MACCRATE REPORT, *supra* note 22, at 138–48.

25. *Id.* at 233–36.

26. *Twenty Years After the MacCrate Report*, *supra* note 6, at 2–3. While widely acclaimed, the *Carnegie Report* was criticized by some for its narrowness and its failure to address the human aspects of lawyering. See, e.g., Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593 (1994).

27. MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT & VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING (Sept. 2008); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 LAW & SOC. INQUIRY 620 (2011) [hereinafter Shultz & Zedeck]. See also Susan Swain Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795, 821–25 (2012); David E. Van Zandt, *Foundational Competencies: Innovation in Legal Education*, 61 RUTGERS L. REV. 1127, 1136–41 (2009); SALLY KIFT, INTEGRATING THE KNOWING, THE DOING, & THE PRACTISE: AN EARLY AUSTRALIAN CASE STUDY OF CURRICULUM RENEWAL (2008), available at <http://law.gsu.edu/FutureOfLegalEducationConference/Papers/Kift-SS.pdf> (paper presented at the International Conference on the Future of Legal Education, Georgia State University College of Law, Feb. 20–23, 2008).

factors of lawyer effectiveness, including problem solving, creativity, advocacy, judgment, negotiation, and communication skills.<sup>28</sup>

Two recent publications accentuate the need for greater attention to the development of essential lawyering skills and values, such as those identified in the *MacCrate Report* and the Schultz and Zedek study, throughout the three years of law school. The *Carnegie Report*, mentioned above, exhorts law schools to engage in a “careful rethinking of both the existing curriculum and the pedagogies schools employ to produce a more coherent and integrated initiation into a life in the law.”<sup>29</sup> The *Carnegie Report* endorses increased experiential and clinical legal education, noting that “[d]ecades of pedagogical experimentation in clinical-legal teaching, the example of other professional schools, and contemporary learning theory all point toward the value of clinical education as a site for developing not only intellectual understanding and complex skills of practice but also the dispositions crucial for legal professionalism.”<sup>30</sup>

*Best Practices for Legal Education: A Vision and a Road Map*, also published in 2007, advocates expanded experiential legal education throughout the curriculum and required clinical legal education.<sup>31</sup> Motivated by a “concern about the potential harm to consumers of legal services when new lawyers are not adequately prepared for practice,” this study maintains that law school graduates need increased preparation in lawyering competencies to provide

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28. The twenty-six factors identified by Shultz and Zedek as important to lawyer effectiveness include: analysis and reasoning; creativity/innovation; problem solving; practical judgment; researching the law; fact finding; questioning and interviewing; influencing and advocating; writing; speaking; listening; strategic planning; organizing and managing one’s own work; organizing and managing others (staff/colleagues); negotiation skills; ability to see the world through the eyes of others; networking and business development; providing advice and counsel, and building relationships with clients; developing relationships within the legal profession; evaluation, development, and mentoring; passion and engagement; diligence; integrity/honesty; stress management; community involvement and service; and self-development. Shultz & Zedek, *supra* note 27, at 630.

29. CARNEGIE REPORT, *supra* note 2, at 147.

30. *Id.* at 58.

31. BEST PRACTICES, *supra* note 2, at 12 (explicitly endorsing mandatory clinical education for all law graduates, asserting that all students during their third year of law school should be required “to participate in externship courses or in-house clinics in which students represent clients or participate in the work of lawyers and judges, not just observe it”).

effective and responsible legal services.<sup>32</sup> Robert MacCrate observes in a Forward to *Best Practices*:

The central message in both *Best Practices* and in the contemporaneous Carnegie Report is that law schools should broaden the range of lessons they teach, reducing doctrinal education that uses the Socratic dialogue and case method; integrate the teaching of knowledge, skills and values, and not treat them as separate subjects in separate courses; and give greater attention to instruction in professionalism.<sup>33</sup>

*The American Legal Profession in Crisis: Resistance and Responses to Change*,<sup>34</sup> published in 2013, is a thought-provoking postscript to these earlier critiques. In his book, Professor James Moliterno discusses resistance to change in the legal profession and addresses the need to reform legal education in the larger context of the need to reform the legal profession. Moliterno contends that “[t]wo of the key stages to gaining entry to the profession—legal education and the bar exam—have handicapped reform in the profession as a whole.”<sup>35</sup> Noting that “legal education is in the crosshairs of multiple shooters: law firms and other legal employers; law firms’ clients (GCs and business people alike); prospective students; [and] *The New York Times*,” he advocates significant curricular and pedagogical changes in legal education, as well as major changes to state bar exams.<sup>36</sup>

In this Article, we examine the calls for reform from the academy (from both faculty and students) and the legal profession. We discuss initiatives from the ABA, state supreme courts, and state bar licensing boards to address the practice competency of new lawyers and the provision of legal services.<sup>37</sup> We highlight thirty-seven law schools, as well as other professional schools, that require or

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32. *Id.* at 1–2.

33. *Id.* at viii.

34. MOLITERNO, *supra* note 3.

35. *Id.* at 225 (noting David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1).

36. MOLITERNO, *supra* note 3, at 226–28. Moliterno was one of the key implementers of the new third-year Washington & Lee experiential curriculum. *See infra* notes 172–73 and accompanying text.

37. *See infra* Part II.

guarantee clinical education, as well as evidence demonstrating the feasibility of offering expanded experiential education and required clinics and externships.<sup>38</sup>

We explore and propose a curricular and pedagogical model for legal education that we believe would better prepare competent, ethical law graduates who are ready to become professionals, and nurture in law students the three crucial professional apprenticeships of knowledge/understanding, practice expertise, and professional identity/judgment, recommended by the *Carnegie Report's* "vision of legal education."<sup>39</sup> In the end, we urge law schools, the profession, state supreme courts, state licensing boards, and the ABA to work together to seize this opportunity to make needed reforms in legal education, "to prepare future professionals with enough understanding, skill and judgment to support the vast and complicated system of the law."<sup>40</sup>

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38. See *infra* Part IV. See, e.g., *Washington and Lee's New Third Year Reform*, WASH. & LEE U. SCH. L., <http://law.wlu.edu/thirdyear/> (last visited Aug. 22, 2013) (Washington & Lee's revamped third-year curriculum requires students take a minimum of twenty hours of experiential coursework, including a clinic or externship.); *Graduation Requirements*, CUNY SCH. L., <http://www.law.cuny.edu/academics/planning.html> (last visited July 11, 2013) (City University of New York requires all law students take a minimum of twelve credits in clinics or externships.); *School of Law History*, U.D.C., DAVID A. CLARKE SCH. L., <http://www.law.udc.edu/?page=ClinicIntro> (last visited Aug. 22, 2013) (The University of the District of Columbia requires all law students take a minimum of fourteen clinical course credits.); *The Experiential Advantage*, U. DENV. STURM C. L., <http://www.law.du.edu/index.php/experiential-advantage?> (last visited July 17, 2013) (The University of Denver offers an optional full year of experiential courses, including required clinic or externship courses.); *Daniel Webster Scholar Program Curriculum*, U.N.H. SCH. L., <http://law.unh.edu/academics/jd-degree/daniel-webster-scholars/curriculum> (last visited July 18, 2013) (The University of New Hampshire offers an optional full year of experiential courses, including required clinic or externship courses.).

39. See *infra* Part III. See also CARNEGIE REPORT, *supra* note 2, at 13–14.

40. William M. Sullivan, *Carnegie Examines the Education of Lawyers and Calls for Change*, CARNEGIE FOUND. ADVANCEMENT TEACHING (Jan. 2007), available at <http://www.carnegiefoundation.org/press-releases/carnegie-examines-education-lawyers-and-calls-change>.

## II. HOW THE AMERICAN BAR ASSOCIATION, STATE SUPREME COURTS, AND STATE BAR LICENSING BOARDS SHAPE LEGAL EDUCATION AND INFLUENCE THE PREPARATION OF PRACTITIONERS

*The importance of providing new lawyers with opportunities to develop competency skills has been driven . . . by the rapidly changing landscape of the legal profession, where, due to the economic climate and client demands for trained and sophisticated practitioners fresh out of law school, fewer and fewer opportunities are available for new lawyers to gain structured practical skills training early in their careers. Many new lawyers, in fact, are entering the profession as solo practitioners, without the solid practical skills foundation necessary to represent clients in a competent manner and with nowhere to turn to build that foundation. From the standpoint of regulatory policy, this situation presents serious issues of public protection that cannot be ignored.*<sup>41</sup>

### *A. The Limited Role of the American Bar Association in Regulating Legal Education to Address Practice Competency of New Lawyers*

In 1923, the ABA established an accreditation process for legal education with the major purpose of improving the quality of education obtained by lawyers.<sup>42</sup> But, as noted above, the ABA has played a limited role to date in regulating legal education to address the practice competency of new lawyers. The current ABA Accreditation Standards require only that law students take one course credit in “professional skills” for graduation from an ABA-accredited law school;<sup>43</sup> the Standards do not require students take a clinic or externship course with real clients in the actual practice of law, nor do they require schools to provide clinical courses or externships for law students who desire to take them.<sup>44</sup>

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41. CAL. TASK FORCE, *supra* note 19, at 1.

42. MACCRATE REPORT, *supra* note 22, at 260.

43. STD. 302(A), *supra* note 17.

44. STD. 302(B), *supra* note 18.

Law is the only learned profession that sends its graduates into practice without a period of intensive clinical training. Professions such as medicine,<sup>45</sup> veterinary medicine, nursing, dentistry, social work, and pharmacy require one-quarter to more than one-half of a student's pre-licensing education be supervised professional practice.<sup>46</sup> Most medical school programs consist of two years of classes, typically followed by two years devoted to clinical studies.<sup>47</sup> In addition, every state requires at least one year of postgraduate practical training after medical school before a candidate can obtain a license to practice.<sup>48</sup>

The ABA Council of the Section of Legal Education and Admissions to the Bar, the law school accrediting body, has responded slowly to calls for accreditation reform related to lawyer competency, even though a number of ABA reports have endorsed the need for expanded experiential education, including the 1979 *Report and Recommendations of the Task Force on Lawyer Competency: The Role of Law Schools* (the "Cramton Report")<sup>49</sup> and the 1992 *MacCrate Report*.<sup>50</sup> In 2008, the ABA Standards Review

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45. Medical School accreditation is governed by the Liaison Committee on Medical Education, which establishes standards and reviews medical schools in a manner similar to the ABA process of accreditation of law schools in defining the required "academic environment." These standards provide that "medical students should learn in clinical environments where graduate and continuing medical education programs are present," to ensure that medical students are exposed to graduate and continuing practice education activities before they enter the profession. The Accreditation Council for Graduate Medical Education (ACGME), which governs the accreditation of the graduate programs with which undergraduate medical students interact as part of their clinical training, has developed a list of core competencies for medical students, implemented in 2001, as part of the standards for accrediting all residency programs: interpersonal and communication skills, medical knowledge, patient care, practice-based learning and improvement, systems-based practice, and professionalism. See ACCREDITATION COUNCIL GRAD. MED. EDUC., COMMON PROGRAM REQUIREMENTS 7–10 (July 1, 2011), available at [http://www.acgme.org/acgmeweb/Portals/0/dh\\_dutyhoursCommonPR07012007.pdf](http://www.acgme.org/acgmeweb/Portals/0/dh_dutyhoursCommonPR07012007.pdf).

46. Kruse, *supra* note 6, at 3–4 and accompanying text.

47. Molly Cooke, David M. Irby & Bridget C. O'Brien, *A Summary of Educating Physicians: A Call for Reform of Medical School and Residency*, CARNEGIE FOUND. ADVANCEMENT TEACHING (June 2010), available at <http://www.carnegiefoundation.org/elibrary/summary-educating-physicians>.

48. See FED'N STATE MED. BDS., STATE-SPECIFIC REQUIREMENTS FOR INITIAL MEDICAL LICENSURE (updated Aug. 2012), available at [http://www.fsmb.org/usmle\\_eliinitial.html](http://www.fsmb.org/usmle_eliinitial.html).

49. Roger Cramton et al., *Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools*, 1979 A.B.A. SEC. LEGAL EDUC. ADMISSIONS B.

50. MACCRATE REPORT, *supra* note 22.

Committee was tasked by the ABA Council to undertake a comprehensive review of the ABA accreditation standards.<sup>51</sup> In July 2013, after almost five years of review and under significant pressure due in large part to steps taken by state supreme courts and state bar licensing bodies, the ABA Standards Review Committee forwarded a proposal to the ABA Council to increase the professional skills requirement currently set forth in Accreditation Standard 302(a)(4).<sup>52</sup>

At its meeting held in August 2013, the ABA Council approved and sent out for Notice and Comment proposed Standard 303(a)(3), which would require law schools to provide each student with one or more experiential courses, which could include simulation courses, clinical courses, or field placements, totaling at least *six* credit hours.<sup>53</sup> No changes were proposed for earlier Standard 302(b)(1), which recommends but does not require schools provide clinical courses or externships for law students who desire to take them.<sup>54</sup>

In summer 2012, the ABA created the Task Force on the Future of Legal Education and charged it with making recommendations on how law schools, the ABA, and other groups might take steps to address the preparation of lawyers, the economics of legal education, and the delivery of legal education and its regulation in light of “rapid and substantial changes in the legal profession, legal services, the

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51. See A.B.A., STANDARDS REVIEW COMM., available at [http://www.americanbar.org/groups/legal\\_education/committees/standards\\_review.html](http://www.americanbar.org/groups/legal_education/committees/standards_review.html) (last visited Aug. 22, 2013).

52. A.B.A., STANDARDS REVIEW COMM.: MEETING MATERIALS 54 (July 12–13, 2013), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july\\_2013\\_meeting/201307\\_src\\_meeting\\_materials.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july_2013_meeting/201307_src_meeting_materials.authcheckdam.pdf).

53. *Memorandum: Comprehensive Review of the A.B.A. Standards for Approval of Law School Matters for Notice and Comment*, 2013 A.B.A. SEC. LEGAL EDUC. ADMISSION B., available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20130906\\_notice\\_comment\\_chs\\_1\\_3\\_4\\_s203b\\_s603d.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20130906_notice_comment_chs_1_3_4_s203b_s603d.authcheckdam.pdf). The Council also sent out for Notice and Comment the ABA Standards Review Committee recommendation that law schools be required to “conduct ongoing evaluation of the law school’s academic program, learning outcomes, and assessment methods; and . . . use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes and to make appropriate changes to improve the curriculum.” See PROPOSED A.B.A. STANDARD 314, available at <http://www.cleaweb.org/Resources/Documents/7.13%20Report%20on%20ABA's%20SRC%20Meeting.pdf>. See also Susan Hanley Duncan, *The New Accreditation Standards Are Coming to a Law School Near You—What You Need to Know about Learning Outcomes & Assessment*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 605 (2010).

54. See STD. 302(B), *supra* note 18.

national and global economy, and markets affecting legal education.”<sup>55</sup> The Task Force, which “seems to be taking a more nimble approach to its consideration of several big-picture issues relating to legal education,”<sup>56</sup> posted a draft report in September 2013, to be considered at the February 2014 meeting of the ABA House of Delegates.<sup>57</sup> Among other items, the report calls for more attention to skills training and experiential learning in law school, and concludes that the “balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further toward developing the competencies required by people who will deliver services to clients.”<sup>58</sup>

*B. The Increased Role of State Supreme Courts and Bar Licensing Authorities in Addressing the Practice Competency of New Lawyers*

State supreme courts and their bar admitting authorities shape legal education when they decide the requirements for admittees and “what to test on bar examinations.”<sup>59</sup> The method of licensing attorneys for practice in the United States generally, although not universally, involves passing a state bar examination to establish minimum knowledge of substantive law, as well as a character and fitness determination.<sup>60</sup> Each state’s licensing board decides the requirements for practicing law in that state,<sup>61</sup> but most states require

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55. A.B.A., TASK FORCE ON THE FUTURE OF LEGAL EDUC., *available at* [http://www.americanbar.org/groups/professional\\_responsibility/taskforceonthefuturelegaleducation.html](http://www.americanbar.org/groups/professional_responsibility/taskforceonthefuturelegaleducation.html) (last visited July 19, 2013).

56. Mark Hansen, *Two Different Animals: ABA Entities Pursue Separate Paths in Search of Ways to Improve Legal Education*, 99-July A.B.A. J. 62, 62 (2013) (depicting the Standards Review Committee as a tortoise, while depicting the Task Force as a hare).

57. A.B.A., TASK FORCE ON THE FUTURE OF LEGAL EDUC., DRAFT REPORT & RECOMMENDATIONS, *available at* [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/taskforcecomments/task\\_force\\_on\\_legaleducation\\_draft\\_report\\_september2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/taskforcecomments/task_force_on_legaleducation_draft_report_september2013.authcheckdam.pdf) (last visited Sept. 20, 2013).

58. *Id.* at 2–3.

59. *Id.* at 25.

60. These exams generally are composed of a Multistate Bar Exam (MBE), developed by the National Bar Examiners, and a separate exam covering only state law.

61. In Wisconsin, for example, graduation from a Wisconsin law school is certification by the law school as to the student’s legal competence and certification of the student’s character and fitness by the Board of Bar Examiners. This is known as the “diploma privilege.” *See*



graduation from an ABA-accredited law school.<sup>62</sup> Thirty-eight states require an additional multistate performance examination (MPT) developed by the National Bar Examiners in response to criticism that the Multistate Bar Examination (MBE) does not test for legal skills.<sup>63</sup> States vary greatly in the content of their bar examinations, with some requiring a thorough knowledge of state law and some focusing on the core law school subjects tested on the MBE.<sup>64</sup>

Some commentators criticize state bar and licensing boards for not sufficiently requiring, assessing, and ensuring the practice competency of new lawyers.<sup>65</sup> Some critics argue for the abolition of state bar examinations and the MBE, because they “require applicants to demonstrate only a small amount of the knowledge, skills, and values that are needed for participation in the legal profession”<sup>66</sup> and test material that is “memorized in commercial cram courses and quickly forgotten once bar examinations end.”<sup>67</sup> Moliterno levels a scathing attack on the legal profession and the current bar exam:

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*Admission to the Practice of Law in Wisconsin: Diploma Privilege 2013*, WIS. CT. SYS., <http://www.wicourts.gov/services/attorney/bardiploma.htm> (last visited July 7, 2013).

62. A few states do not require attendance at an ABA-approved law school, but instead approve graduation from state-certified law schools that might be less expensive to attend. In addition, some states permit admission to the bar through routes other than law school graduation. According to the ABA, seven states provide a means whereby an individual can be admitted to the bar despite not having completed a three-year academic program. See *Comprehensive Guide to Bar Admission Requirements, 2013* A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. 10–13, available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_comprehensive\\_guide\\_to\\_bar\\_admissions.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_comprehensive_guide_to_bar_admissions.authcheckdam.pdf).

63. *MPT FAQs*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/multistate-tests/mpt/mpt-faqs/> (last visited July 7, 2013); *UBE*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/multistate-tests/ube/> (last visited Aug. 22, 2013); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 408–15 (2003).

64. MOLITERNO, *supra* note 3, at 23–31.

65. See, e.g., Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69 (2007); Clark D. Cunningham, *Rethinking the Licensing of New Attorneys—An Exploration of Alternatives to the Bar Exam: Introduction*, 20 GA. ST. U. L. REV. vii (2004); Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Should Change*, 81 NEB. L. REV. 363 (2002); Lawrence M. Grosberg, *Should We Test For Interpersonal Lawyering Skills?*, 2 CLINICAL L. REV. 349 (1996); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995).

66. BEST PRACTICES, *supra* note 2, at 12. For a more complete list of criticisms and discussions on alternatives to bar examinations, see *id.* at 12 n.21.

67. *Id.* at 13.

Often justified for its ‘gatekeeper’ function, protecting the public from incompetent lawyers, the profession has lost sight of the function of a gatekeeper. To be a rational gatekeeper, passage through the gate must be related to what is on the other side of the gate—in this instance, the practice of law . . . . Purely testing knowledge of a wide array of topics fails to assure competence as well. The current typical bar exam tests too much and too little.<sup>68</sup>

For these reasons and others, a number of state supreme courts and state bar licensing boards, including some of the largest state bars in the country, have taken steps in recent years to address perceived deficiencies in new lawyer competency and preparation for practice, the lack of pro bono legal services, and related issues that impact legal education. Almost all of these state bar entities have recommended programmatic and curricular changes, including increased experiential and clinical legal education.

In 2005, the New Hampshire Supreme Court, the New Hampshire Board of Bar Examiners, the New Hampshire Bar Association, and the University of New Hampshire initiated the Daniel Webster Scholar Honors Program, a practice-based teaching and bar-licensing program.<sup>69</sup> The program eliminates the two-day bar exam and, in its place, offers an alternative licensing program during the last two years of law school.<sup>70</sup> Up to twenty-four selected University of New Hampshire students per year may bypass the traditional bar exam by enrolling in a minimum of twenty-three upper-level, practice-based, experiential course credits targeted at the *MacCrate Report* skills and values, including a minimum of six clinic or externship credits.<sup>71</sup> Students create portfolios of written work and videos of oral performances, and students are required to demonstrate their ability to practice law by submitting their portfolios to the New Hampshire

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68. MOLITERNO, *supra* note 3, at 232.

69. *Graduating Daniel Webster Scholars Bypass Traditional Exam, Sworn in to NH Bar*, U. N.H. SCH. L. (May 17, 2013), <http://law.unh.edu/news/2013/05/graduating-daniel-webster-scholars-bypass-exam-sworn-in-to-nh-bar>.

70. *Id.*

71. Email from John Garvey, Director, Daniel Webster Scholar Honors Program, University of New Hampshire School of Law (July 9, 2013) (on file with the authors).

Board of Bar Examiners; the Examiners also orally examine the students three times over four semesters prior to graduation.<sup>72</sup>

In 2012, the New York State Board of Law Examiners adopted a fifty-hour pro bono requirement for all New York Bar applicants.<sup>73</sup> Beginning January 2015, all applicants for admission by examination to the New York Bar must perform fifty hours of law-related pro bono service prior to filing their application, a requirement most law students are likely to fulfill through law school-sponsored clinics and externships.<sup>74</sup> The work must be law-related in nature and supervised by an attorney or faculty member, although pro bono is broadly defined; examples of qualifying activities include law school-sponsored clinics that provide legal assistance to those who cannot afford representation; externships or internships with a nonprofit provider of legal services, judge or court system, legal aid office, legal services organization serving low-income clients, public defender, U.S. Attorney, district attorney, or state attorney offices general; private sector pro bono work; law-related law school-sponsored projects or programs that serve the poor or disadvantaged; and law-related work in connection with a faculty member's or instructor's pro bono work.<sup>75</sup> Also, in 2012, the New York Court of Appeals amended its rules to lift the cap on the number of credits of clinical and externship courses a law student may take for admission to the bar.<sup>76</sup> The new rule allows graduates to take up to thirty clinical course credits, more than a third of the law school courses taken, and provides useful standards for clinical courses and externships.<sup>77</sup>

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72. *Id.*

73. *Pro Bono Bar Admission Requirements*, NYCOURTS.GOV (Feb. 20, 2013), <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml> (select Frequently Asked Questions about the Rule).

74. *Id.*

75. *Id.*

76. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013); N.Y. STATE BAR ASS'N, REPORT OF THE TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION 68 (Apr. 2, 2011), available at [http://www.nysba.org/AM/Template.cfm?Section=Task\\_Force\\_on\\_the\\_Future\\_of\\_the\\_Legal\\_Profession\\_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108](http://www.nysba.org/AM/Template.cfm?Section=Task_Force_on_the_Future_of_the_Legal_Profession_Home&Template=/CM/ContentDisplay.cfm&ContentID=48108) [hereinafter N.Y. TASK FORCE].

77. The total number of credit hours granted for law school clinical courses, field placement programs, and externships, including classroom components, may not exceed thirty of the eighty-three credit hours required for graduation. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.3(c)(4) (2012).

In 2012, the Illinois State Bar Association Special Committee on the Impact of Law School Debt on the Delivery of Legal Services urged law schools to prioritize, among other things, “live-client clinics that give students the opportunity to learn and apply legal principles in the context of real life problems.”<sup>78</sup> The Committee, which is continuing to examine the issue, further recommended that law schools transform the second and third year of law school “to help students transition to practice through apprenticeships in practice settings, practical courses, and teaching assistantships, rather than traditional doctrinal courses.”<sup>79</sup>

Also in 2012, the Arizona State Court approved an amended rule allowing third-year students, beginning in Spring 2014, to take the bar exam before they graduate, “in an effort to help move law students from classroom to practice as quickly as possible.”<sup>80</sup> Those who do take the exam early must have already completed 90 percent of their required credits and can have no more than eight credit hours left to take after the exam. The three Arizona law schools are developing a new practice-based, experiential curriculum for the balance of the final semester, after students have taken the bar.<sup>81</sup>

And, most significantly, in 2013, the State Bar of California Task Force on Admissions Regulation Reform unanimously approved new requirements for applicants for the California Bar,<sup>82</sup> the largest bar in

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78. ILL. STATE BAR ASS'N, SPECIAL COMM. ON THE IMPACT OF LAW SCH. DEBT ON THE DELIVERY OF LEGAL SERV.: FINAL REPORT & RECOMMENDATIONS (Mar. 8, 2013), available at <http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%2003-8-13.pdf>.

79. *Id.*

80. Alexis Blue, *Arizona to Let Law Students Take Bar Exam Before Graduation*, U.S. NEWS, Dec. 12, 2012, available at <http://uanews.org/story/arizona-let-law-students-take-bar-exam-graduation>

81. See, e.g., *February 3L Bar Exam in Arizona*, YOUTUBE (Sept. 24, 2013), <http://www.youtube.com/watch?v=godgMI-DIVU>.

82. CAL. TASK FORCE, *supra* note 19, at 1, 15. The Bar of California Board of Trustees Committee on Regulation, Admissions, and Discipline Oversight endorsed the report in late July 2013. Following a comment period, the Committee endorsed it again at its September 2013 meeting. The Committee is expected to appoint an Implementation Committee to explore the next steps.

the country, mandating fifteen practice-based, experiential law school course credits (not counting the first-year legal writing course).<sup>83</sup> Although the report provides limited details, it notes that students also can complete the fifteen-credit course requirement via legal clinic work or in-the-field experience, such as hours devoted to judicial or governmental externships, during or following completion of law school.<sup>84</sup> In addition, California bar applicants also must perform ten required hours of post-admission CLE and fifty required hours of pro bono or modest means legal services, pre- or post-admission.<sup>85</sup> As in New York, many bar applicants in California are likely to fulfill the fifty hours of pro bono through law school-sponsored clinics and externships.

Commentators believe the California Task Force recommendations are likely to pass, and they are scheduled to go into effect sequentially, with the post-admission CLE requirement for 2015 graduates, the pro bono/modest means requirement for 2016 graduates, and the fifteen-credit course requirement for 2017 graduates.<sup>86</sup> If adopted, these new requirements could generate change in law school curricular offerings and bar admission requirements across the country. According to Jon Streeter, the Task

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83. *Id.* at 1–2, 15–16. The report advocates that the courses address the following fundamental lawyer competencies: oral presentation and advocacy; negotiation and alternative dispute resolution (i.e., mediation, arbitration); client counseling, effective client communication, and problem solving for clients in practice settings; witness interviewing and other investigation and fact-gathering techniques; law practice management and the use of technology in law practice; project management, budgeting, and financial reporting; practical writing (i.e., drafting of contracts and other legal instruments, including drafting of pleadings; preparation of cases for trial during the pre-trial phase, including e-discovery; trial practice; basics of the judicial system, including how courts in California are organized and administered, and what responsibilities lawyers have as officers of the court; and professional civility and ethics as applied in practice settings. *Id.* at 16, 10 (referencing the Shultz & Zedek Study and the ABA Core Competencies Study). Similarly, the Ohio Supreme Court appointed a task force to explore whether applicants for the Ohio bar should be required to complete a law clinic or externship. Letter from Maureen O'Connor, Chief Justice, Supreme Court of Ohio, to Patrick Fischer, Ohio State Bar Association (Sept. 26, 2012) (on file with the authors).

84. CAL. TASK FORCE, *supra* note 19, at 1, 24.

85. *Id.* at 1–2.

86. *Id.* at 2.

Force chair and former State Bar president, “California is at the forefront of making changes to its admissions standards that may ripple across to other state bars. What we are doing is profoundly important because of the size of our bar and the statement we’ll be making about better preparation of lawyers as they enter the profession.”<sup>87</sup>

Post-graduate apprenticeship experiences, such as those endorsed by the California Task Force, however, can be challenging to enforce and difficult to administer, particularly in large states.<sup>88</sup> Some commentators assert that “the absence of a [post-graduate] apprenticeship requirement, or of a comparable alternative, has been emphatically linked to incompetence and to the public harm caused by attorneys who know nothing of lawyering when licensed to practice.”<sup>89</sup> But post-graduate apprenticeships have found little support from bar examiners, judges, law school deans, or professors in the United States. Critics raise concerns that practitioners will not agree to supervise clerkships or, if they do, that they will not provide students with meaningful experiences; that the training will lack uniformity; and that supervising attorneys might be specialists, limiting the skills they can impart to the apprentices.<sup>90</sup> Commentators suggest that mandatory clinics and externships during law school are more realistic, effective, and systematic than post-graduate apprenticeships for providing high-quality practice experiences with

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87. Psyche Pascal, *Task Force Finalizes Practical Skills Proposal*, CA. B. J. 1 (July 2013), available at <http://www.calbarjournal.com/July2013/TopHeadlines/TH1.aspx>.

88. See Sally Simpson & Toni M. Massaro, *Students with “CLAS”: An Alternative to Traditional Bar Examinations*, 20 GA. ST. U. L. REV. 813 (2004); cf. Peggy Maisel, *An Alternative Model To United States Bar Examinations: The South African Community Service Experience In Licensing Attorneys*, 20 GA. ST. U. L. REV. 977 (2004).

89. Jeffrey Duban, *The Bar Exam as a Test of Competence: The Idea Whose Time Never Came*, 63-Aug. N.Y. ST. B. J. 34, 39 (1991).

90. Daniel R. Hansen, *supra* note 65, at 1230 (citing George N. Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15 (1977)).

supervision by educators/practitioners skilled at mentoring and assessment.<sup>91</sup> Only Delaware<sup>92</sup> and Vermont<sup>93</sup> currently require a post-graduate apprenticeship for bar admission.<sup>94</sup>

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91. See Stephen Ellmann, *The Clinical Year*, 53 N.Y.L. SCH. L. REV. 877 (2008/2009); Jessica Dopierala, *Bridging The Gap Between Theory And Practice: Why Are Students Falling Off The Bridge and What Are Law Schools Doing to Catch Them?* 85 U. DET. MERCY L. REV. 429 (2008).

92. In Delaware, law graduates are required to perform an aggregate of five months of full-time work at a private or public service law office, government agency, or as a judicial clerk prior to state bar admission. Curcio, *supra* note 65, at 402 (citing Del. Sup. Ct. R. 52 (2002)). This work may be done while in law school and need not be continuous. A list of twenty-seven tasks must be completed during this “apprenticeship”; however, there is no requirement that the tasks be completed “competently,” and a large percentage of the “apprenticeship” reportedly is spent observing rather than doing. *Id.* at 402–03; *Law Clerk Schedule of Legal Activities*, DEL. ST. CT. (revised Aug. 2013), <http://courts.delaware.gov/forms/download.aspx?id=28478>.

93. In Vermont, law graduates are required to complete a three-month period of apprenticeship in the office of a judge or an attorney within two years of passing bar examinations, before being admitted to the bar. VT. R. BAR ADMISSION § 6(i) (2012). The parameters of the apprenticeship are undefined. In evaluating Vermont’s post-admission clerkship requirement, the *MacCrate Report* concluded that “the single most disturbing aspect of clerkships is that there is no guarantee that an applicant will learn, or even be exposed to, the fundamental lawyering skills necessary for minimum competency.” Daniel R. Hansen, *supra* note 65, at 1234 (citing MACCRATE REPORT, *supra* note 22, at 289).

94. “Apprenticeships went out of favor because modern inventions rendered the services of law students of no value to law firms. ‘The general introduction, since 1880, of telephones, stenographers, typewriters, dictating and copying devices, and improvements in printing, in connection with changes in practice already noted, has made students not only unnecessary, but actually undesirable in most of the active law offices. Plainly speaking, they are considered to be a nuisance.’” BEST PRACTICES, *supra* note 2, at 153 n.493 (citing William V. Rowe, *Legal Clinics and Better Trained Lawyers—A Necessity*, 11 ILL. L. REV. 591, 600 (1917)).

### III. USING THREE YEARS OF LEGAL EDUCATION WITH EXPANDED EXPERIENTIAL EDUCATION AND REQUIRED CLINICAL EDUCATION TO DEVELOP CARNEGIE'S THREE PROFESSIONAL APPRENTICESHIPS

*When you haven't changed your curriculum in 150 years, at some point you look around.*<sup>95</sup>

“[S]cores of scholars, judges, and practitioners have written withering critiques of law school, usually focusing on the latter half of school and usually suggesting fairly fundamental changes,” notes Professor Mitu Galati and his co-authors in their provocative empirical research article on the “happy charade” of the third year of law school.<sup>96</sup> Their research demonstrates that “a very large proportion of third-year students at most schools do not regularly attend class . . . [and] [a]mong the third-year students who do attend class, there appears to be little engagement with course work—a complete turnabout, of course, from the intense first year of law school.”<sup>97</sup> On the other hand, their research also reveals that “third-year students have a hunger for applying what they have learned in law school to client problem solving . . . [and] seem to have a definite agenda that links career goals to serving clients and working on real-world problems, and they dismiss the third year of law school because it does not seem very relevant to that agenda.”<sup>98</sup>

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95. Jonathan D. Glater, *Training Law Students for Real-Life Careers*, N.Y. TIMES, Oct. 31, 2007, at B9, available at [http://www.nytimes.com/2007/10/31/education/31lawschool.html?\\_r=0](http://www.nytimes.com/2007/10/31/education/31lawschool.html?_r=0) (quoting Elena Kagan, then-Dean, Harvard Law School). In fall 2006, after a three-year study, Harvard added three new course requirements: each student must take a new course focusing on Legislation and Regulation; one of three specially crafted courses introducing global legal systems and concerns—Public International Law, International Economic Law, or Comparative Law; and a new experiential course, Problems and Theories, focusing on problem solving and dispute resolution, while introducing students to theoretical frameworks illuminating legal doctrines and institutions. Press Release, Harvard Law School (Oct. 6, 2006) (on file with the authors).

96. Gulati et al., *supra* note 4, at 236. See generally Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 90 (1997).

97. Gulati et al., *supra* note 4, at 243–44. The research shows that for a subset of students, in which women and minorities are somewhat overrepresented, “law school fits the oppressive, gloomy picture evoked so often by anecdotes and the narrative literature on legal education.” *Id.* at 266.

98. *Id.* at 259.



Options for redesigning the law school curriculum run the gamut. At one extreme could be abandoning the third year.<sup>99</sup> At the other could be requiring a capstone third-year program, such as the revamped Washington & Lee curriculum, which requires third-year students take a minimum of twenty practice-based, experiential course credits, including five clinic or externship credits.<sup>100</sup> A middle ground that might be more feasible for most law schools could be requiring a “year’s worth” of experiential and clinical courses, presented in an integrated fashion over three years of law school. This approach, which we endorse, would be akin to the new New Hampshire curriculum that provides a minimum of twenty-three practice-based, experiential course credits, including a minimum of six clinic or externship credits.<sup>101</sup>

There are multiple low-cost options for a more integrated, experiential three-year curriculum that would impart the three *Carnegie* apprenticeships and accomplish our proposal of twenty-one experiential course credits—including five clinic or externship credits—such as “ditching” the casebook in upper-level courses,<sup>102</sup> appending skills components or practice labs to core courses, infusing new experiential methodologies across the curriculum, and exploring increased capacity for law clinics and externships through hybrid, community collaboration models.

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99. Some commentators advocate accelerating the final year of law school. About fifteen law schools, including Northwestern, have accelerated their programs in recent years to allow law students to complete eighty-four required credits over two calendar years; the programs do not reduce the cost of law school but allow graduates to begin law practice one year sooner. Also, almost two dozen schools have adopted accelerated “3+3 J.D.” programs (also known as “B.A. to J.D.” programs), in which students earn both undergraduate and law degrees in six rather than seven years. Accelerated combined-degree programs also are gaining popularity; students can now complete three-year J.D./M.B.A. programs in three years at a number of schools, including Duke, Pennsylvania, Northwestern, Washington University in St. Louis, and Yale; in some programs, students still pay additional tuition. Shawn P. O’Connor, *Law Admissions Lowdown: Look for These 3 Law School Trends in 2012*, U.S. NEWS & WORLD REP. (Jan. 2, 2012), available at <http://www.usnews.com/education/blogs/law-admissions-lowdown/2012/01/02/look-for-these-3-law-school-trends-in-2012>.

100. See *infra* Part IV.A.

101. See *supra* Part II.B.

102. See Kruse, *supra* note 6, at 32–36.

### A. Abandoning the Third Year of Law School?

Critics ranging from President Barack Obama<sup>103</sup> and Judge Jose Cabranes<sup>104</sup> to Professor Samuel Estreicher<sup>105</sup> and others<sup>106</sup> have resurrected the debate about abandoning a year of law school. In 1969, Stanford Law School instituted an optional two-year degree, and several commentators in the early 1970s recommended the elimination of the third year.<sup>107</sup> However, this initiative reportedly dissipated because of opposition from law school deans (“the immovable rock of opposition”).<sup>108</sup>

Estreicher has proposed that the New York Court of Appeals allow candidates to take the New York bar examination pre-graduation, after sixty credit hours of law school.<sup>109</sup> In a recent article, he argues for changing the requirements for eligibility for the bar exam, rather than changing the law school curriculum or degree requirements, because he doubts the likelihood that law schools will make significant changes “[g]iven the experience of the early 1970s

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103. Ruth Tam, *Obama: Law schools should think about being “two years instead of three,”* WASH. POST, Aug. 23, 2013, available at <http://www.washingtonpost.com/blogs/post-politics/wp/2013/08/23/obama-law-schools-should-think-about-being-two-years-instead-of-three/?wpisrc=nlppol>.

104. The Honorable Jose A. Cabranes, U.S. Court of Appeals for the Second Circuit, Remarks at the Annual Luncheon of the AALS: Legal Education Today and Tomorrow 7–9 (Jan. 6, 2012) (transcript on file with the authors).

105. Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 599 (2012). Cabranes advocates a one-year, post-law school apprenticeship, following two years of law school, which Estreicher does not endorse as he questions the feasibility of apprenticeships. *Id.* at 607.

106. *How to Fix Law School*, *supra* note 21, at 1–2 (quoting Alan Dershowitz); Debra Cassens Weiss, *Two-Year Law School Was a Good Idea in 1970, and It’s a Good Idea Now, Prof Tells ABA Task Force*, A.B.A. J. (Feb. 9, 2013), available at <http://www.abajournal.com/news/article/two-year-law-school-was-a-good-idea-in-1970-and-its-a-good-idea-now> (citing the testimony of Professors Paul Carrington and Jim Chen before the ABA Task Force on the Future of Legal Education).

107. *See, e.g.*, HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION* (1972); Preble Stolz, *The Two-Year Law School: The Day the Music Died*, 25 J. LEGAL EDUC. 37, 39 (1972–1973) (citing ASS’N AM. LAW SCH. PROC., TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: 1971, 1971 pt. I, sec. 2); Robert A. Gorman, *Proposals for Reform of Legal Education*, 119 U. PA. L. REV. 845, 848–50 (1971); Edward H. Levi, *The Place of Professional Education in the Life of the University*, 32 OHIO ST. L.J. 229, 238 (1971).

108. Gulati et al., *supra* note 4, at 236.

109. Estreicher, *supra* note 105, at 606. *See* Karen Sloan, *Experts Debate Two-Year Law School Option*, N.Y. L.J. (Jan. 22, 2013), <http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202585158075>.

and the difficulty any existing law school will have convincing its tenured faculty to change curriculum and basic orientation. . . .”<sup>110</sup> In the end, Estreicher expresses hope the marketplace will force law schools to be more efficient and to tailor their curriculum to one “that makes sense for the third-year student,” “meets the practical needs of students who are likely to practice on their own or in small firms,” and “provides an educational benefit that aspiring lawyers of substance could not afford to pass up.”<sup>111</sup>

Although Gulati and his co-authors admit that the idea to abolish the third year might be “one of the best ways of getting law schools to seriously consider other reform proposals,” they call abolition proposals “non-starters.”<sup>112</sup> Rather, they propose multiple reforms for the third year, including expanding externships, developing hybrid clinics along the medical school model, incorporating new experiential methodologies in traditional courses, and reducing alienation through public interest curricular programming.<sup>113</sup> They suggest, “clinical education may indeed have the potential to fill much of the third-year void, if schools will only invest more in the depth, evaluation, and comparison of these programs.”<sup>114</sup>

While abandoning the third year might save money for some law students, the elimination of a year of law school is not likely to happen in the near future, if at all. And, abandoning the third year will eliminate or diminish important educational and professional opportunities that have significant value in the marketplace, such as summer internships and jobs that might lead to placement after graduation, and crucial experiential and clinical coursework that provides essential preparation for practice.<sup>115</sup> Indeed, the elimination

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110. Estreicher, *supra* note 105, at 606–07.

111. *Id.* at 609–10, 607.

112. Gulati et al., *supra* note 4, at 262.

113. *Id.* at 262–266.

114. *Id.* at 263.

115. See Stephen Gillers, *The Two-Year Degree: Undesirable But Perhaps Unavoidable*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 4 (2013), for a thoughtful discussion of the nuances of adopting a two-year degree. See also Martha C. Nussbaum & Charles Wolf, *Two-Year Law School? Don’t Rush the Paper Chase*, BLOOMBERG NEWS (June 16, 2013), <http://www.bloomberg.com/news/2013-06-16/two-year-degrees-would-impoverish-legal-education.html> (arguing that shortening the law school period also reduces opportunities for students to take interdisciplinary coursework during law school).

of the third year could have the counterproductive effect of reinforcing the notion that the current bar exam actually effectively tests for lawyer competency, a premise contrary to the arguments of many commentators and the findings of Schultz and Zedek.

Should law schools ever move to a two-year model, we would urge the same need for an integrated curriculum with expanded practice-based, experiential education and required clinics or externships. To be sure, it would be more difficult to accomplish in two years, but the need for this educational approach to produce competent, ethical practitioners who are ready to become professionals would be no less essential.

#### B. Using Three Years of Law School to Develop *Carnegie's* Three Professional Apprenticeships

Developing the three crucial apprenticeships of the legal profession, identified in the *Carnegie Report*, requires an amalgam of (1) teaching legal doctrine and analysis, which provides the basis for professional growth; (2) introducing facets of lawyering practice, which leads to acting with responsibility for clients; and (3) inculcating professional identity, values, and dispositions of the legal profession, which fosters ethical practice.<sup>116</sup> According to the *Report*, multiple goals must be accomplished to inculcate these three professional apprenticeships, including: developing an academic knowledge base and research and analytical skills; providing students with the capacity to engage in complex practice; enabling students to learn to make judgments under conditions of uncertainty; teaching students how to learn from experience; introducing students to the disciplines of creating and participating in a responsible and effective professional community; and forming students who are able and willing to join an enterprise of public service.<sup>117</sup>

The integration of these apprenticeships throughout the curriculum has curricular and pedagogical implications for the first and second year, but also addresses what should happen in the third

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116. CARNEGIE REPORT, *supra* note 2, at 194.

117. *Id.* at 22.

year.<sup>118</sup> “The goal of greater integration means that the common core of legal education needs to be expanded in qualitative terms to encompass substantial experience with practice, as well as opportunities to wrestle with the issues of professionalism.”<sup>119</sup>

As do many educators, we reject the “standard model, in which the cognitive apprenticeship as expressed in the Socratic classroom dominates, [and] the other practical and ethical-social apprenticeships are each tacitly thought of and judged as merely adjuncts to the first.”<sup>120</sup> Along the same lines, we reject the separation of theory and practice in legal education, both as to the curriculum and as to pedagogy. We also reject the narrowness of the term “lawyering skills,” or “professional skills,” to refer only to courses taught via the experiential method (such as legal writing courses, simulation courses, clinics, and externships) and as differentiated from doctrinal courses taught via the case-dialogue method. In our view, the term inherently undervalues case-dialogue courses that teach essential analytical skills, as well as experiential courses that teach essential doctrine and theory.

In her post-*MacCrate Report* article of twenty years ago, Professor Carrie Menkel-Meadow criticizes “the false dualism of so-called intellectual rigor in legal ideas and ‘science’ and the presumed ‘weakness’ of skills training,” and asserts that “both theory and skills are ‘legal science’ and rigorous.”<sup>121</sup> Similarly, Professor Kate Kruse in her recent article denounces “the basic myth: that professional education can meaningfully separate theory from practice,” positing that “[t]his myth divides law school education into a series of dichotomies.”<sup>122</sup> In particular, she criticizes the myth because it “views the traditional case method of instruction as teaching ‘doctrine,’ and lumps together all other kinds of instruction—legal writing, simulations, clinics, and externships—as teaching ‘skills.’ It

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118. *Id.* at 194–95.

119. *Id.* at 195.

120. *Id.* at 191.

121. Menkel-Meadow, *supra* note 26, at 595.

122. Kruse, *supra* note 6, at 2; see generally Mark Spiegel, *Theory and Practice in Legal Education: An Essay on Clinical Education*, 34 UCLA L. REV. 577 (1987).

aligns the teaching of doctrine with theory and the teaching of skills with practice.”<sup>123</sup>

### 1. The Knowledge/Understanding Apprenticeship: Teaching Students Legal Doctrine and Analysis

Developing in students the apprenticeship of fundamental knowledge, understanding, and legal analysis has historically been the mission of the first-year curriculum. Most educators believe that law schools generally succeed at this endeavor, primarily through the use of the Socratic case-dialogue method of instruction, imparting a distinctive habit of “thinking like a lawyer” that forms the initial basis for the students’ development as legal professionals.<sup>124</sup>

The case-dialogue “signature pedagogy” is touted for its success in teaching students to “think like lawyers.”<sup>125</sup> In part, this approach is dependent on its repeated use in the curriculum, and even though specific techniques of its implementation may vary, “there are more similarities than differences.”<sup>126</sup> The need for repetition to master the analytical skills involved in understanding appellate cases and synthesizing rules occurs, in part, because this kind of thinking is generally new and different from prior learning experiences of law students.

However, having addressed the first apprenticeship in the first year, there is no evidence that students need more than one year, or two at most, of this form of learning, especially at the cost of not developing the other critical apprenticeships.<sup>127</sup> The first

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123. Kruse, *supra* note 6, at 2.

124. See CARNEGIE REPORT, *supra* note 2, at 47–75. *But see* Kruse, *supra* note 6, at 12 (arguing that the depth of knowledge required for solving real problems with uncertain facts and virtually limitless potential complexity is beyond the scope and aspirations of most classroom courses and those legal issues that arise in the context of facts that are not established or fixed, as in appellate opinions. “The process of factual analysis proceeds in the opposite direction from the process of issue-spotting that is tested repeatedly in traditional law school examinations. Rather than beginning with a set of fixed facts and applying the law to them, factual investigation uses the law as a fixed framework and analyzes how the facts might be developed to meet or frustrate the establishment of legal claims and defenses.”).

125. CARNEGIE REPORT, *supra* note 2, at 50.

126. *Id.* at 52 (citing ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER” (2007)).

127. CARNEGIE REPORT, *supra* note 2, at 74–78.

apprenticeship is advanced through the teaching of knowledge, research skills, and analysis, but a more innovative, integrative, and pluralistic approach to legal education, with expanded experiential and required clinical courses, is needed to nurture the second and third lawyering apprenticeships, thereby providing a bridge “from the academic skill of thinking like a lawyer” to the professional skill of “lawyering.”<sup>128</sup>

## 2. The Practice Expertise Apprenticeship: Introducing Students to Lawyering Practice and Client Responsibility

The effective transition of law students into the legal profession must focus not only on cognitive development but also on development of lawyering practice skills and values, such as problem solving, judgment, client relations and communication, and on professional identity.<sup>129</sup> Case-dialogue courses are neither designed nor equipped, in terms of teaching material or pedagogy, to develop in students the second and third apprenticeships of lawyering practice and professional identity. Students gain some practice experience in simulation courses, but only clinical courses provide students with opportunities to engage in complex practice, to make judgments under conditions of uncertainty, to learn from experience, and to begin to participate in a professional community. Clinical courses provide the rich texture and conceptual framework for the skills that lawyers use day-to-day, analyzing the facts, law, and policy involved in clients’ problems; working through with clients the available options for each part of the development of solutions; choosing appropriate actions and performing them; receiving feedback; and reflecting on the process.<sup>130</sup>

The task of learning from experience is no less challenging or complex than learning legal analysis from the case-dialogue method.

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128. *Id.* at 87.

129. MOLITERNO, *supra* note 3, at 228–29 (urging a third year of experiential courses, including clinical education, to “develop habits of the lawyer’s mind that are not developed in the traditional courses,” to help students “transition to the thought processes of lawyer-problem solver”).

130. Kruse, *supra* note 6, at 22 (citing J.P. OGILVY ET AL., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* (2d ed. 2007)).

Students need the guidance of faculty and repetition with increasing levels of complexity and variations of context, in order to master the skills and develop the habits of reflective practice that are essential to the professional identity of lawyers. As Professor Kruse notes: “It requires sustained intellectual work at the intersection of theory and practice to bring to the surface the structures that underlie expert practice and to articulate them into frameworks that are useful for teaching.”<sup>131</sup>

Clinical courses take learning to another level beyond case-dialogue and simulation courses, because the student is in touch directly with the realities being studied, as compared with learning where the student only reads, hears, or talks about the realities but does not come in contact with them as part of the learning process.<sup>132</sup> The signature pedagogy of clinical education—prepare, perform, reflect—thrusts students into the real world with all the uncertainties and complexities that are not available in classroom learning contexts.<sup>133</sup> A key difference between case-dialogue courses and clinical courses, notes Professor David Barnhizer, is the difference in raw teaching material, between collections of “vicarious legal experiences”—primarily appellate cases that have been “filtered through several sets of perceptions (those of casebook writers, editors, judges, and teachers)”—and “direct, firsthand legal experience as the raw material to be shaped and molded by the law instructor,” “before the above perceptual filtering occurs.”<sup>134</sup>

Students are attracted to obtaining law degrees in no small part by the wide range of activities and careers they can pursue in which their legal training will be valuable.<sup>135</sup> While legal educators rarely know

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131. Kruse, *supra* note 6, at 29.

132. See generally EDWARD CELL, *LEARNING TO LEARN FROM EXPERIENCE* viii (1984). See also Kruse, *supra* note 6, at 32–36, for an excellent discussion of different experiential learning approaches and the importance of sequencing within the range of approaches.

133. The educational theory, which is the foundation of this signature clinical pedagogy, is found in the work of David Kolb and Donald Schoen. DAVID S. KOLB, *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* (1984); DONALD A. SCHOEN, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSIONS* (1987).

134. Barnhizer, *supra* note 10, at 1028, 1028 n.6.

135. DEBORAH L. AARON, *WHAT CAN YOU DO WITH A LAW DEGREE: A LAWYER’S GUIDE TO CAREER ALTERNATIVES INSIDE, OUTSIDE & AROUND THE LAW* (5th ed. 2004); GARY A. MUNNEKE ET AL., *NONLEGAL CAREERS FOR LAWYERS* (5th ed. 2006).



what career choices their students will make, and while many students will go through several changes over the course of their careers, what is certain is that students need to be equipped to learn effectively from any and all lawyering experiences. Professor Roy Stuckey asserts, “Experiential education is the best tool for helping students develop self-directed learning skills.”<sup>136</sup> Professor Edward Cell suggests, “[T]he greatest justification of an experiential component in formal education [is] not in the content of what is learned from those experiences but in what is learned about the process of learning from any experience. An age of rapid change puts a special premium on the ability to learn continually from our transactions.”<sup>137</sup>

Mentorship, supervision, and reflection are essential for preparation for practice. Thus, the first law practice experiences that students have should involve effective faculty supervision. The clinical supervisor can help set the student on a path of lifelong learning. Through the supervisor-student relationship in clinics and externships, students learn how to seek out assistance and mentorship, and how to develop an appropriate and effective relationship with an attorney with more knowledge and experience. The wise supervisor will help the student develop the skill of learning how to learn, and will give feedback that is essential to the students’ improvement and development. The student learns that feedback is to be welcomed, and is important for improving skills and learning the values of the profession. “Clinical [law] courses do this—and should focus on doing it—because their very method is to make the student’s experience the subject of critical review and reflection.”<sup>138</sup>

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136. Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLINICAL L. REV. 807, 822 (2007).

137. CELL, *supra* note 132, at ix.

138. Stuckey, *supra* note 136, at 821 (citing Anthony G. Amsterdam, Remarks at Deans’ Workshop, ABA Section of Legal Education and Admissions to the Bar (Jan. 23, 1982) (unpublished) (copy on file with Roy Stuckey)).

3. The Professional Identity/Judgment Apprenticeship:  
Inculcating Professional Identity, Values, and Dispositions of  
the Legal Profession, and Fostering Ethical Practice

Legal education's failure to provide an integrated education, with emphasis on all three apprenticeships of knowledge, practice, and professional values, results in a failure to help students develop a critical understanding of professional role and identity.<sup>139</sup> Law schools must give "students an understanding of the values, behaviors, attitudes, and ethical requirements of a lawyer and . . . infuse a commitment to them."<sup>140</sup> Law schools must help students comprehend that professional responsibility involves the ongoing duty to evaluate the individual's conscience and balance individual interests with public responsibilities and responsibilities to the client. In doing so, legal education accomplishes the third apprenticeship of professional identity, values, and dispositions.

Case-dialogue and simulation courses introduce students to these issues of professional identity and judgment, but only clinical courses place the learner in the profession, directly in touch with the realities being studied. Law students can learn about professional roles and responsibilities in many ways; however, they cannot fully understand and internalize professional identity without actually seeing law practice first-hand, assuming the roles and responsibilities of an attorney, experiencing the challenges of law practice, and reflecting on the experience of discharging those responsibilities. Reading law school texts and discussing hypothetical problems can lay a foundation but cannot ensure deep understanding nor assist in formulating the sense of professionalism that will inform students' behavior as members of the profession.

Professor Neil Hamilton opines that a clear definition of "professional identity" or "professionalism" is important because a lack of clarity will undermine the public's trust of the profession, lawyers are less likely to pay attention to and comport with notions that are vague and ambiguous, and, of course, law schools cannot assess whether their pedagogies and curriculum are effective or

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139. CARNEGIE REPORT, *supra* note 2, at 12–14.

140. BEST PRACTICES, *supra* note 2, at 79.

assess students' progress toward professional internalization without a clear definition.<sup>141</sup> He suggests that a functional definition of professionalism means that the individual: continues to grow in personal conscience and understanding of the core values of the profession, including ongoing reflection on personal satisfaction in light of the profession's responsibility to the public good and access to justice; complies with and holds other lawyers accountable for the ethics of duty—the minimum standards for professional competence; strives to realize and encourage other lawyers to realize and act toward the ethics of aspiration—the core values and ideals of the profession, including the lawyer's technical and ethical conduct; and acts as a fiduciary where his or her self-interest is overbalanced by devotion to serving the client and the public good, including pro bono representation, support of access to justice for all, and improving the public's understanding of the legal system.<sup>142</sup>

The challenge of learning professional values is complicated by potential confusion between understanding the rules of professional responsibility and understanding professional roles and values. Although some law schools are shifting their approaches,<sup>143</sup> many law schools meet the ABA professional responsibility requirement via a two- or three-credit classroom course that focuses primarily on the Model Rules of Professional Conduct, which provides the limits of acceptable behaviors but might not convey the best practices or even the prevailing norms. In clinical courses, however, students learn that there are multiple acceptable approaches to solving problems with clients, and that they and their clients must live with the consequences of their acts.

Introducing students to the disciplines of creating and participating in a responsible and effective professional community, and forming students who are able and willing to join an enterprise of public service are fundamental tasks of legal education.<sup>144</sup> Judgment and professional responsibility are best learned “by receiving

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141. Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. L. no. 4 (2008) at 4, 10–12.

142. *Id.* at 20–23.

143. See David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Professions*, 49 J. LEGAL. EDUC. 76 (1999).

144. CARNEGIE REPORT, *supra* note 2, at 22.

feedback while approximating the modeling done by an expert . . . ”<sup>145</sup> Professionalism and professional ethical engagement include conscientious decision making, accountability, and character, as well as awareness of the rules of conduct that should govern lawyers’ behavior. Learning this reality “comes to life most vividly, we think, in matters of responsibility for clients, especially as these are taught and experienced in clinical-legal education.”<sup>146</sup>

Most clinical programs serve financially or socially disadvantaged populations, and most clinic and externship courses embody and reinforce a duty to social justice. Inevitably, law students will become community leaders; it is important that they come into these leadership positions with an understanding of the gap in legal services available to poor and moderate-income individuals, so that they can internalize the ABA aspirations of professionalism and be more effective, ethical decision makers.

#### IV. REQUIRING OR GUARANTEEING CLINICAL LEGAL EDUCATION FOR ALL GRADUATES: CAN LAW SCHOOLS DO IT?

*There is no way to learn to be a lawyer except by doing it. . . . [I]t is unthinkable that medical schools could graduate doctors who had never seen patients or that they would declare that they just wanted to teach students to think like doctors.*<sup>147</sup>

Curricular and pedagogical changes have been piecemeal over the past century, but law schools increasingly have taken steps to teach their law graduates not only to *think* like a lawyer but also to *do* and *be* like a lawyer.<sup>148</sup> Law schools have gradually expanded experiential course offerings with simulation courses that run the gamut from pretrial and trial practice to arbitration and mediation, to business and estate planning and drafting.<sup>149</sup> All law schools have

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145. Francis J. Moots III, *Vice’s “Ingenious Method” and Legal Education*, 83 CHI.-KENT L. REV. 1261, 1275 (2008).

146. CARNEGIE REPORT, *supra* note 2, at 129.

147. DEAN ERWIN CHERMERINSKY, FOREWORD: THE BENEFITS OF KNOWLEDGE, LAW SCH. SURVEY OF STUDENT ENGAGEMENT 5 (2012), available at [http://lssse.iub.edu/pdf/2012/LSSSE\\_2012\\_AnnualReport.pdf](http://lssse.iub.edu/pdf/2012/LSSSE_2012_AnnualReport.pdf).

148. Menkel-Meadow, *supra* note 26, at 596.

149. Carpenter, *supra* note 15, at 15–16 (“Law schools offered a wide range of professional

initiated some form of clinical education where students engage with real clients, including in-house clinics,<sup>150</sup> hybrid clinics based in the community or in collaboration with community legal services providers,<sup>151</sup> and externship courses in local, national, and international venues.<sup>152</sup> And, more recently, law schools have begun developing innovative experiential courses, taught as separate courses or attached to courses taught by podium faculty, sometimes referred to as “practicum” or “lab” courses.<sup>153</sup>

A growing number of law schools have adopted clinic/externship course requirements. As of October 2013, twenty-three U.S. law schools reported that they require their law students to complete a credit-bearing clinic or externship before graduation.<sup>154</sup> Another

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skills opportunities, with half the respondents reporting ten or more types of professional skills courses.”).

150. “Over 85 percent of respondents regularly offered in-house, live client clinical opportunities and 30 percent of respondents offered off-site, live client clinical opportunities. . . . Nearly all respondents provided at least one externship opportunity, and without exception, placement opportunities have increased in every externship category since 2002.” *Id.* at 16.

151. See Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 *CLINICAL L. REV.* 333 (2009); Karen Tokarz et al., *Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 *WASH. U. J.L. & POL’Y* 359 (2008).

152. See Sudeb Basu & J.P. “Sandy” Ogilvy, *Externship Demographics Across Two Decades with Lessons for Future Surveys*, 19 *CLINICAL L. REV.* 1 (2012).

153. The structure of an experiential practicum or lab course varies. In some instances, the course is a separate course; in others, the course may be attached to a doctrinal course. The lawyering tasks might include client counseling, legal research and writing, advocacy, mediation, litigation, or legislative drafting. These courses typically include simulated or real-client or real-case components, student supervision and feedback, and opportunities for reflection. See, e.g., Toni M. Fine, *Reflections on U.S. Law Curricular Reform*, 10 *GERMAN L.J.* 717, 738–47 (2009) (describing several innovative developments in experiential learning at law schools).

154. Based on a survey conducted by Karen Tokarz through October 2013, the following U.S. law schools require a credit-bearing clinic or externship for graduation, with dates of adoption (notes on file with the authors):

1. University of Puerto Rico (min. six credits clinic)—1965
2. University of New Mexico (min. six credits clinic)—1970
3. City University of New York (CUNY) (min. twelve credits clinic or externship)—1983
4. University of District of Columbia (UDC-DCSL) (min. fourteen credits clinics)—1986
5. University of Maryland (min. five credits clinic or real-client/case practicum)—1988

fourteen schools reported that they provide explicit clinic/externship course guarantees.<sup>155</sup> The mix of schools includes “private and public

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6. University of Washington (min. two credits clinic or externship)—1993
7. University of Hawaii (min. two credits clinic)—1993
8. University of Montana (min. four credits clinic or externship)—1995
9. Thomas Cooley University (min. three credits clinic or externship)—1996
10. Appalachian (min. three credits externship)—1997
11. University of Dayton (min. four credits clinic or externship)—2007
12. Gonzaga University (min. three credits clinic or externship)—2008
13. University of California—Irvine (min. six credits clinic)—2008
14. Washington & Lee University (min. five credits clinic or externship)—2009
15. University of Detroit Mercy (min. three credits clinic)—2012
16. University of Connecticut (min. three credits clinic or externship)—2013
17. Cleveland State University (min. three credits clinic or externship)—2013
18. John Marshall—Chicago (min. three credits clinic or externship)—2013
19. University of the Pacific—McGeorge (min. three credits clinic or externship)—2013
20. Wayne State University (min. three credits clinic or externship)—2013
21. University of Massachusetts (min. three credits clinic or externship)—2013
22. Drexel University School of Law (min. six credits clinic or co-op/externship)—2013
23. Villanova University School of Law (min. three credits clinic or externship)—2013

155. Based on a survey conducted by Karen Tokarz through August 8, 2013, the following U.S. law schools that explicitly guarantee a credit-bearing clinic or externship, with dates of adoption (notes on file with the authors):

1. Temple University (clinic or externship)—1985
2. Washington University—St. Louis (clinic or externship)—1998
3. Rutgers University—Newark (clinic or externship)—1999
4. Case Western Reserve University (clinic, externship, or real-client/case practicum)—2002
5. University of New Hampshire (clinic or externship)—2005
6. Nova Southeastern University (clinic or externship)—2006
7. University of Alabama (clinic)—2008
8. St. Louis University (clinic or externship)—2009
9. Charlotte (clinic or externship)—2013
10. Roger Williams University (clinic or externship)—2013

schools, schools in urban and rural areas, schools whose graduates work in the school's local region and those who work across the country, schools with part-time programs and those with only full-time students, and schools with significant tuition and those charging among the lowest in the country.”<sup>156</sup> The experience of these schools, some of which have been requiring clinical education for thirty or forty years, dispels the view that barriers to clinical education for all students are insurmountable, as does the experience of other professional schools that require clinical education for all students.

#### A. Implementing a Clinic/Externship Requirement for All Law Graduates

Required clinical legal education was pioneered by the University of Puerto Rico, the University of New Mexico, the City University of New York (CUNY), the University of District of Columbia, and the University of Maryland, all of which adopted clinical course requirements in the pre-*MacCrate Report* era, in 1965, 1970, 1983, 1986, and 1988, respectively.<sup>157</sup> These public law schools share a commitment to providing law students with the lawyering skills and values necessary to practice law upon graduation and to instilling in

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11. California Western (externship)—2013

12. University of Denver (clinic or externship)—2013

13. American University (clinic, externship, or real-client/case practicum)—2013

14. Touro (clinic or externship)—2013

Other law schools provide a clinic or externship to all students who wish to take one, but do so without announcing an explicit “guarantee,” and accordingly do not appear in the above list.

156. KATHERINE R. KRUSE, CLINICAL LEGAL EDUC. ASS'N, SECOND COMMENT TO CAL. STATE BAR TASK FORCE ON ADMISSIONS REG. REFORM 4 (May 30, 2013), available at <http://www.cleaweb.org/Resources/Documents/Second%20Comment%20CA%20Bar%20Taskforce%20on%20Admissions%20Reg%20Reform.pdf>.

157. *Supra* note 154. In 1968, Northeastern University Law School initiated its cooperative education program that requires every second- and third-year student to spend four quarters of legal work experiences in law firms, with judges, and in public interest law settings, including government and service organizations. James H. Backman, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 CLINICAL L. REV. 1, 9–10 (2007). However, students do not pay tuition and do not receive academic credit for their “co-op” field experiences, and some students receive stipends. *Plan Your Co-Ops*, N.E. U. SCH. L., <http://www.northeastern.edu/law/experience/co-op/plan/index.html> (last visited July 11, 2013).

students the professional obligation for public service. Perhaps, not coincidentally, all five schools have unitary tenure tracks, in which many members of the faculty teach clinical courses and almost all clinical faculty teach non-clinical courses, an approach that “not only permits a large number of clinical offerings, but also results in a traditional curriculum that is infused with clinical methodology.”<sup>158</sup>

The University of Puerto Rico Law School clinical program initiated its Legal Aid Clinic around 1952.<sup>159</sup> In 1965, the school adopted a requirement that all students take a fixed two-semester, in-house clinic course for six credits.<sup>160</sup>

Beginning in 1955, the University of New Mexico Law School required its students to volunteer with either the legal aid or the public defender’s office prior to graduation.<sup>161</sup> In 1970, the school adopted a requirement that all law students take at least six clinical course credits in the school’s in-house clinic.<sup>162</sup>

CUNY Law School opened its doors in 1983 as a law school designed to integrate clinical pedagogical methods with traditional areas of legal study. Role playing and simulation are integral to teaching in all courses, and faculty coordinate teaching across areas.<sup>163</sup> Students are required to take sixteen to twenty experiential

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158. Barry et al., *supra* note 20, at 44 (discussing the University of New Mexico).

159. Email from Mariluz Jimenez, University of Puerto Rico Law School, to authors (July 27, 2013) (on file with the authors).

160. *Id.*

161. See, e.g., J. Michael Norwood, *Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. REV. 265 (1989) (analyzing the structure and history of the UNM clinical program); J. Michael Norwood, *Scenes from the Continuum: Sustaining the MacCrate Report’s Vision of Law School Education into the Twenty-First Century*, 30 WAKE FOREST L. REV. 293 (1995) (analyzing the impact of clinical education during law school); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307 (2001) (describing the impact of clinic specialization on skills training and social justice).

162. *Degree Requirements*, U.N.M. SCH. L., <http://lawschool.unm.edu/academics/programs/requirements.php> (last visited July 11, 2013).

163. Leonard D. Pertnoy, *Skills is Not a Dirty Word*, 59 MO. L. REV. 169, 178–180 (1994) (citing Eleanor M. Fox, *The Good Law School, The Good Curriculum, and the Mind and the Heart*, 39 J. LEGAL EDUC. 473, 481 (1989)); Kristin Booth Glen, *Haywood Burns: A Commemoration: To Carry It On: A Decade of Deaning After Haywood Burns*, 10 N.Y. CITY L. REV. 7, 58–59 n.256 (2006).



course credits, with a minimum of twelve credits in clinics or externships.<sup>164</sup>

The University of District of Columbia-David Clark Law School (UDC-DCSL) evolved from Antioch School of Law and the District of Columbia School of Law. Antioch, created in 1972, was built around an urban law institute where students represented clients in in-house clinics starting in the first year and during every semester before graduation, with funding from the Legal Services Corporation.<sup>165</sup> Today, UDC-DCSL students must take sixteen experiential course credits, with a minimum of at least two clinical courses (seven credits each), one of which must be a direct client service clinic, and must perform forty hours of pro bono community service.<sup>166</sup>

The Maryland General Assembly adopted the Cardin Requirement for University of Maryland Law School students in 1988, making “experiential education a key component of the law school’s curriculum.”<sup>167</sup> Maryland students who initially enroll as first-year, full-time students must participate in one of the law school’s twenty legal clinics or in a real-client/real-case practicum (referred to as “legal theory and practice courses”) for a minimum of five course credits.<sup>168</sup> The school asserts, “The clinical and legal theory and practice courses encourage students to develop a professional identity valuing service to the poor and other underrepresented persons and communities.”<sup>169</sup>

Four more law schools adopted mandatory clinic/externships for all graduates following the issuance of the *MacCrate Report* in 1992, and twelve more adopted clinic/externship requirements in the post-

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164. *Graduation Requirements*, CUNY SCH. L., <http://www.law.cuny.edu/academics/planning.html> (last visited July 11, 2013).

165. *School of Law History*, U.D.C., DAVID A. CLARKE SCH. L., <http://www.law.udc.edu/?page=History> (last visited July 11, 2013); Jean Camper Cahn, *Antioch’s Fight Against Neutrality in Legal Education*, 1 LEARNING & L. 40 (1974).

166. *Graduation Requirements*, U.D.C., DAVID A. CLARKE SCH. L., <http://www.law.udc.edu/?page=GradRequirements> (last visited July 11, 2013).

167. *The Cardin Requirement*, U. MD. FRANCIS KING CAREY SCH. L., <http://www.law.umaryland.edu/publicservice/cardin.html> (last visited July 11, 2013).

168. *Id.*

169. *Id.* See also Barbara L. Bezdek, *Reflections on the Practice of a Theory: Law, Teaching and Social Change*, 32 LOY. L.A. L. REV. 707 (1999).

*Carnegie Report* period of heightened criticism of legal education.<sup>170</sup> This latter wave includes, for example, the University of California-Irvine, a new law school that opened its doors in Fall 2008, where graduates are required to complete at least six credits in one of the school's core clinics or in a clinical field placement.<sup>171</sup>

Another example is Washington & Lee, mentioned earlier, which launched its revamped third-year curriculum in 2009, requiring students entering in Fall 2011 to take a minimum of twenty experiential course credits, including two two-week skills immersion courses, one focused on litigation and the other on transactions; four problem-based, semester-long simulation courses in a particular law practice setting or specialty; and at least five credits of clinic or externship.<sup>172</sup> On average, to date, about half of the third-year students have taken ten credits over two semesters of in-house clinic or externship, while the remaining half of the class have taken five credits of clinic or externship.<sup>173</sup>

### *B. Implementing a Clinic/Externship Guarantee for All Graduates*

As indicated above, fourteen law schools reported in summer 2013 that they provide a written "guarantee" that all students who choose to take a clinic or externship course (or real-client/real-case practicum) will be provided one.<sup>174</sup> Most of the schools report that the clinic/externship guarantee has led to an increase in clinic and externship offerings, an increase in participation by students, and an increase in other experiential course offerings.

Washington University in St. Louis, for example, adopted a written clinic/externship guarantee in 1998, and has experienced a steady increase in the number of clinic and externship course offerings and the percentage of students enrolling in clinics and

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170. *Supra* note 154.

171. *Juris Doctor (J.D.) Requirements*, SCH. L., U.C. IRVINE, [http://www.law.uci.edu/registrar/jd\\_requirements.html](http://www.law.uci.edu/registrar/jd_requirements.html) (last visited July 11, 2013).

172. *Washington and Lee's New Third Year Reform: Leading the Way in Legal Education Reform*, WASH. & LEE U. SCH. L., <http://law.wlu.edu/thirdyear/> (last visited July 11, 2013).

173. Email from James Moliterno, Vincent Bradford Professor of Law, to Jon Streeter, the Chair of the California State Bar Task Force on Admissions Regulation Reform (May 30, 2013) (on file with authors).

174. *Supra* note 155.

externships.<sup>175</sup> The school currently offers sixteen clinical and externship courses; over 80 percent of the 2013 graduates enrolled in a law clinic or externship course, and almost 30 percent took more than one.<sup>176</sup> Washington University also has developed a robust “theory and practice” curriculum with fifty simulation courses ranging from litigation and dispute resolution to transactional skills courses, and is one of only a handful of schools to require a first-year Negotiation course, which is taught by full-time faculty.<sup>177</sup>

Another example, Case Western Reserve University, adopted the CaseArc Lawyering Skills Program in 2009, designed to integrate legal theory and doctrine, lawyering skills, professional values, clinic, and externship courses.<sup>178</sup> Over the four semesters in the first and second years, students are required to enroll in nine experiential course credits, including an introductory course plus four classes in which they research and write memos and briefs, interview and counsel clients, draft and negotiate contracts and make deals, and give advice to clients and presentations to courts.<sup>179</sup> Many of these courses are co-taught by full-time faculty and adjuncts. Students are guaranteed a clinic, externship, or real-client/real-case practicum in their third year, and approximately 80 percent of the 2013 grads enrolled in a clinical course, and 30 percent enrolled in more than one.<sup>180</sup>

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175. *Clinical Opportunities*, WASH. U. L., <http://law.wustl.edu/clinicaled/pages.aspx?id=6898> (last visited July 11, 2013).

176. E-mail from Robert Kuehn, Associate Dean, Clinical Education, Washington University School of Law (July 21, 2013) (on file with the authors).

177. *Courses Fulfilling the Applied Lawyering/Professional Skills (ALPS) Requirement*, WASH. U. L., <http://law.wustl.edu/academics/documents/Coursesfulfillingappliedlawyerskillsrequirement.pdf> (last visited July 11, 2013); *Negotiation and Dispute Resolution*, WASH. U. L., <http://law.wustl.edu/academics/pages.aspx?id=9384> (last visited July 11, 2013).

178. *Experiential Learning*, CASE W. RES. SCH. L., <http://www.law.case.edu/Academics/ExperientialLearning.aspx> (last visited July 11, 2013).

179. *Id.*

180. E-mail from Kenneth Margolis, Associate Dean for Experimental Education, Case Western Reserve School of Law (July 11, 2013) (on file with the authors).

### C. Is It Feasible for Law Schools to Require or Guarantee Clinics or Externships for All Graduates?

“Most legal educators agree there is no substitute for a learning experience in which a student is ‘in role’ as a lawyer, making professional judgments under the supervision of a faculty member in an environment designed to maximize learning.”<sup>181</sup> But, there is a danger that institutional inertia and/or fears about cost “will inhibit creative thinking about this kind of learning.”<sup>182</sup>

In addition to the more than thirty-five U.S. schools referenced above that currently require or guarantee widespread clinical opportunities, new data suggest that a clinical requirement is both feasible and practical for U.S. law schools. In analyzing data from the ABA-LSAC Official Guide to ABA-Approved Law Schools for 2013, Professor Robert Kuehn finds that most law schools currently have sufficient clinic or externship opportunities for all students who would choose.<sup>183</sup> He reports that “158 law schools (or 79 percent) already have the law clinic or externship course capacity to provide each of their J.D. students with a clinical experience. Another 11 law schools already offer enough law clinic or externship course positions for 90 percent of its students.”<sup>184</sup> Combined, his data suggest that almost 85 percent of law schools already provide, or could easily ensure that all law students are provided, a clinic or externship experience.<sup>185</sup>

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181. *Twenty Years After the MacCrate Report*, *supra* note 6, at 9–10.

182. *Id.* at 10. We do not address the debate about the cost of clinical education in this Article. For more analysis of this issue, *see, e.g.*, Robert R. Kuehn, *Pricing Clinical Legal Education*, SSRN (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318042](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318042); Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B. C. J.L. & SOC. JUST. 309, 322 (2012); Nancy M. Maurer & Liz Ryan Cole, *Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses*, 19 CLINICAL L. REV. 115, 155-58 (2012); Richard K. Neumann, Jr., *Distorted Resource Allocations in Legal Education*, Address at Boston College of Law Symposium: The Way to Carnegie: Practice, Practice, Practice (Oct. 28, 2011) (unpublished manuscript on file with the authors); Ed Rubin, *Should Law Schools Support Faculty Research?*, 17 J. OF CONTEMP. LEGAL ISSUES 139 (2008).

183. Kuehn, *supra* note 182, at 29–34.

184. *Id.* at 31. Kuehn reaches his conclusions by comparing the number of positions in faculty supervised clinical courses and field placement positions filled with J.D. first-year enrollment.

185. *Id.*

Kuehn's research also suggests that the argument that clinical education is too expensive to be feasible might not be accurate. His preliminary research demonstrates that tuition is not statistically higher at schools that require or guarantee a clinic or externship course than those that do not.<sup>186</sup> According to Professor Moliterno, this is consistent with the recent experience at Washington & Lee, where the new third-year experiential and clinical education curriculum "is not more expensive to run from the prior third year curriculum, nor the current first or second year curricula."<sup>187</sup>

#### V. CONCLUSION

Today's concerns about legal education, which prompt our recommendation of an integrated curriculum with expanded experiential legal education and required clinical education, echo many earlier critiques. In 1928, John Bradway advocated for clinical education as an integral part of law school education, and started the first in-house legal clinic in a modern law school.<sup>188</sup> In 1933, eighty years ago this year, the legal realist Jerome Frank posited that "the trouble with much law school teaching is that, confining its attention to a study of upper court opinions, it is hopelessly simplified," and queried, "why not a clinical lawyer-school?"<sup>189</sup> In a 1969 address to the ABA, Chief Justice Warren E. Burger lamented that "[t]he shortcomings of today's law graduate . . . [is] that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made."<sup>190</sup> Professor Gary Bellow asserted in 1983 that, given "the incoherence of the second- and third-year course offerings, the amount of repetition in the curriculum, . . . and the fact that no graduate of an American law school is able to practice when

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186. *Id.* at 29–36.

187. Email from James Moliterno, *supra* note 173.

188. In 1928, John Bradway initiated the first in-house legal clinic at the University of Southern California Law School. John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. CAL. L. REV. 252 (1929).

189. Jerome Frank, *Why Not a Clinical-Lawyer School?* 81 U. PA. L. REV. 907, 913 (1933); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

190. William P. Quigley, *Introduction to Clinical Teaching for the Clinical Law Professor: A View from the First Floor*, 28 AKRON L. REV. 463, 469–470 (1995) (citing Chief Justice Warren Burger, Address Before the A.B.A. Convention Prayer Breakfast (Aug. 10, 1969)).

graduated, you have a system of education which . . . is simply indefensible.”<sup>191</sup> And, in his highly publicized article in 1992, Judge Harry T. Edwards criticized the disjunction between legal education and the practice of law.<sup>192</sup>

A lot has happened since these critiques, yet many of the concerns remain, and these concerns are sharply intensified by serious economic, social, and political forces. Much more needs to be learned about how potential, current, and past law students assess the contributions that legal education makes toward preparation for practice. There is minimal empirical data beyond that in the Gulati study.<sup>193</sup>

In a recent Law School Admission Council (LSAC) survey, law school applicants ranked “clinics/internships” as the third most important factor, behind location and employment of recent grads, and as important as bar success, in choosing which law school to attend.<sup>194</sup> Admitted applicants identified “clinics/internships” second only to location as the most important factors influencing their decision to select a particular school.<sup>195</sup> The proliferation of clinic news in law school bulletins and webpages might suggest that law schools also believe law students gain substantially from experiential and clinical legal education and should consider the same in selecting their law schools.

The *Law School Survey of Student Engagement* (LSSSE), a national study of how law students spend their time, including how often they engage with faculty, staff, and their peers, also provides some information.<sup>196</sup> Underlying this survey is the educational principle that engaged students are better learners, and that measuring this variable offers some indication of both the effectiveness of the education being provided as well as the students’ level of satisfaction

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191. Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 J. LEGAL EDUC. 619, 622–623 (1983).

192. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

193. Gulati et al., *supra* note 4.

194. LAW SCH. ADMISSION COUNCIL, LAW SCH. APPLICANT STUDY 9 (2012).

195. *Id.* at 46.

196. See LSSSE REPORTS, LAW SCH. SURVEY OF STUDENT ENGAGEMENT 79 (2004), available at <http://lssse.iub.edu/reports.cfm> (last visited July 12, 2013).

with their overall law school experience.<sup>197</sup> Washington & Lee utilized the LSSSE and found increased satisfaction among their 2012 graduates with the new third-year experiential and clinical curriculum.<sup>198</sup> The LSSSE evidence suggests that the new Washington & Lee curriculum is a substantial improvement over their 2004 and 2008 curricula, as well as a substantial improvement over their peer schools, and that 3Ls are coming to class more often, working more hours, writing more, and collaborating more.<sup>199</sup>

*After the JD*, a study of a large national cohort of new lawyers two years after being admitted to practice, jointly sponsored by the American Bar Foundation and the National Association for Law Placement (NALP) Foundation for Law Career Research and Education, indicates that recent law graduates appreciate the impact of experiential and clinical education on their later success as attorneys.<sup>200</sup> The first survey in this study, answered by over 3,500 respondents (71 percent of those surveyed), asked new lawyers to assess how they evaluated their legal education and its effectiveness in making the transition to practice.<sup>201</sup> Respondents rated clinical courses the third most helpful experiences, after summer legal

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197. Carole Silver & Lindsay Watkins, *The Law School Survey of Student Engagement: Helping Law Schools Understand What's Working (and What's Not)*, 81 B. EXAMINER 2, June 2012, at 14.

198. During 2010–11, the Washington & Lee faculty engaged in a thorough review of the opening years of their new experiential and clinical curriculum, using the Law School Survey of Student Engagement (LSSSE). The materials included course evaluations from students enrolled in the new courses, focus group analysis, questionnaires on goals, accomplishments, and challenges completed by teachers of the new practicum-style courses, and analysis of the cost of the new curriculum. William Henderson, *Washington & Lee is Biggest Legal Education Story of 2013*, LEGAL WHITEBOARD (Jan. 28, 2013), <http://www.jdsupra.com/legalnews/washington-lee-is-the-best-legal-educa-09038/>.

199. Washington & Lee is “now offering a better educational experience than its peer schools.” *Id.* at 11.

200. NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., A.B.A., *AFTER THE JD: FIRST RESULTS OF A NAT'L STUDY OF LEGAL CAREERS* (2004) [hereinafter *AFTER THE JD STUDY*].

201. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 81 (2009) (reviewing the *AFTER THE JD STUDY*). The purpose of the study was to obtain a “nationally representative picture of lawyer career trajectories and an in-depth portrait of the careers of women and racial and ethnic minority lawyers.” *Id.* at 82. The study, which was conducted in 2002, followed the career of new lawyers over the first ten years after graduation. Those surveyed come from eighteen different legal services markets in the United States, including large metropolitan cities, smaller urban cities and some rural areas. Study participants graduated from “a full range of law schools and worked in a wide variety of legal and non-legal jobs.” *Id.*

employment and employment during the year.<sup>202</sup> Legal writing and internships ranked after clinical courses, followed by upper-level lecture courses, course concentrations, and the first-year curriculum.<sup>203</sup>

Legal education is at a crossroads. Much more remains to be done by law schools to meet the challenge of preparing competent, ethical practitioners who are ready to become professionals.<sup>204</sup> Fortunately, potential reforms are clearer and more attainable, and legal education now has the benefit of emerging research into lawyering competencies, innovative teaching pedagogies, and the various apprenticeships involved in lawyering.

Our proposed curricular and pedagogical model calls for law schools to require twenty-one credits of practice-based, experiential coursework, including five credits of clinic or externship courses, integrated throughout the curriculum,<sup>205</sup> or roughly 25 percent of the

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202. *Id.*

203. *Id.* (Figure 1).

204. In the process of change, law schools must define their goals and implement outcomes measures to determine the success of the various segments of their curricula, from the first year through the third, in developing essential competencies for new lawyers. Northeastern and Denver Universities have developed initiatives, both in nascent stages, to foster experiential education, implement the *Carnegie Report*, and develop tools to teach law faculty and administrators how to define curriculum objectives and assess outcomes of individual courses and the curriculum in general. *Outcomes Assessment Project*, NE U. SCH. L., <http://www.northeastern.edu/law/experience/leadership/oap/index.html> (last visited July 12, 2013); *Alliance for Experiential Learning in Law*, NE U. SCH. L., <http://www.northeastern.edu/law/experience/leadership/alliance.html> (last visited July 12, 2013); *Educating Tomorrow's Lawyers*, U. OF DENVER, <http://online.iaals.du.edu/category/educating-tomorrows-lawyers/> (last visited July 19, 2013). The Clinical Legal Education Best Practices Project provides Best Practices Implementation Committee and a Best Practices Blog, with postings related to experiential and clinical legal education. BEST PRACTICES FOR LEGAL EDUC. BLOG, <http://bestpracticeslegaled.albanylawblogs.org/> (last visited Aug. 23, 2013).

205. Unlike the California Task Force proposal, which requires fifteen upper-level experiential course credits, and the Washington & Lee third-year curriculum, which requires twenty third-year experiential course credits, our proposal envisions twenty-one experiential credits spread across the three years of law school, beginning with first-year, practice-based, experiential courses, such as legal writing, negotiation, problem solving, interviewing and counseling, and other skills courses. Students at many law schools might already be taking twenty-one credits of practice-based, experiential course credits. For example, over 85 percent of the 2013 graduates at Washington University in St. Louis took twenty-one or more experiential course credits over their three years of law school. The median was 24.9 credits; the mean was 25 credits. In addition to the first-year Legal Practice (five credits) and Negotiation (one credit) courses, over 80 percent of graduates took a clinic or externship (four to twelve credits), and over 25 percent took more than one clinic or externship; roughly 75



eighty-three required credits for graduation from an ABA-accredited law school. We believe this proposal provides a minimum threshold to ensure the preparation of competent, ethical law graduates, ready to become professionals, equipped with the three necessary *Carnegie* apprenticeships of knowledge/understanding, practice expertise, and professional identity/judgment.<sup>206</sup> This proposal brings legal education closer in line with, although still below, the experiential and clinical educational requirements of other professions.

“It is time for legal education to break free . . . . The first step is recognizing the substantial professional skills component in the traditional appellate case method of instruction and the substantial theoretical component in [simulation and clinical] education.”<sup>207</sup> We are optimistic that the walls in legal education are coming down and that innovative, integrated, and pluralistic curricular and pedagogical reforms are at hand.<sup>208</sup>

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percent took Pretrial Practice & Settlement (three credits); 50 percent took Trial Practice & Procedure (three credits); 88 percent took Mediation Theory & Practice or another upper-level ADR course (three credits); 80 percent took intellectual property, business estate, tax, or other transactional skills course (three credits); and 50 percent participated in an appellate moot court, trial, or ADR competition (one to two credits).

206. While the roughly twenty-plus credits of first-year doctrinal courses required by most law schools help foster the first *Carnegie* apprenticeship of knowledge/understanding, these twenty-one hours of experiential courses are essential to accomplishing the remaining *Carnegie* apprenticeships of practice expertise and professional identity/judgment.

207. Kruse, *supra* note 6, at 2.

208. *See, e.g.*, DEBORAH MARANVILLE & ANTOINETTE SEDILLO LOPEZ, BUILDING ON BEST PRACTICES: THE WALLS ARE COMING DOWN (forthcoming 2014) (The key themes of this book, a follow-up to *Best Practices*, are that the division of methodologies for teaching knowledge, skills, and values is artificial, and that the walls between skills training, values education, and teaching knowledge and analysis are dissolving.).