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Editors' Introduction

These are trying times for lawyers-to-be. Student loan debt and tuition costs continue to soar to unprecedented levels, and hiring continues at an anemic pace as the legal market writhes in the midst of the Great Recession. Simply put, the choice to attend law school is a more momentous decision than ever before. Aspiring lawyers are rethinking a career in law and considering other vocations. Those who do take the plunge are intent on capturing a return on their investment.

Law schools, for their part, have found themselves in uncharted territory. Caught flat-footed in the midst of a job market ripe with uncertainty, law schools have been forced to trim class sizes and cut back on resources—faculty positions among them—in an attempt to recalibrate to a changed landscape. At the same time, many schools are pursuing alternate strategies, which have allowed them to change tack without resorting to the drastic measures reported in the headlines. The specifics of these new and innovative strategies may vary, but a common thread runs throughout: the importance of integrating practical experience into the law school curriculum.

It is in this context that Northeastern University School of Law has become a vanguard of the experiential education movement. Our co-operative legal education program (co-op) has been the cornerstone of the Northeastern law school experience for over forty years, and it is garnering national attention for the value it places on learning by doing. It is fitting that the *Northeastern University Law Journal*, in partnership with the Alliance for Experiential Learning in Law, hosted “Experience the Future,” the inaugural National Symposium on Experiential Education in Law.

From October 26–28 of 2012, scholars, practitioners, and students descended on Boston for a series of panels, speeches, discussions, and breakout sessions dedicated to the question of how experiential education can better prepare law students for practice. By all accounts, the symposium was a resounding success. Not only did it succeed in generating interest in the law school community, but it also spawned some innovative proposals, ideas, and approaches as to how law schools can better serve students, employers, and future clients in this dynamic world. With this issue, we are proud to present a representative selection of the work that came out of this

symposium. The articles herein showcase the innovative spirit with which the authors and other symposium participants approached legal education.

In closing, we would be remiss if we did not express our profound appreciation for the hard work of the current and past *Journal* staff, especially our former editorial boards. Over the past several months, *Journal* staffers have worked tirelessly to ensure that this issue, even with a truncated publication schedule, would meet our publication standards. This issue is a testament to the hard work and dedication of our staff, for which we are extremely proud and grateful. We would also like to acknowledge and thank our faculty advisors, the law school community, and the Northeastern University School of Law administration for their valued support of all the *Journal's* activities. The *Journal* has come a long way over the past five years, yet even greater things are in store.

Editorial Board
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July 2013

Introduction: The Inaugural Symposium on Experiential Education in Law

*Luke Bierman**

*Lindsey Smith***

*Patricia Voorhies****

In October 2012, *Northeastern University Law Journal* partnered with the Alliance for Experiential Learning in Law to co-host the inaugural symposium on experiential education in the law.¹ The symposium, titled “Experience the Future” and hosted at Northeastern University School of Law, brought together academics, lawyers, judges, and other legal professionals.

In the symposium’s first plenary session, “Where Are We, Where Are We Going, and How Do We Get There?,” participants explored the current status of reform efforts within the academy in response to the changing landscape of legal education, and offered ways to engage scholars, teachers, and practitioners with common perspectives. This two-part session set out the history of the development of legal education and its peculiar characteristics, providing an analysis of how these characteristics currently serve the profession. By establishing a common understanding of the current state of legal education, the attendees were prepared to discuss innovations in and improvements to legal education that better prepare law students for practice.

* Associate Dean for Experiential Education and Distinguished Professor of Practice of Law, Northeastern University. The contributions to the success of the symposium reported here belong to many, and for that much appreciation and thanks are warranted. The ultimate impact of the symposium, however, belongs to all of us concerned about the continued relevance of the legal profession and legal education to the American experiment in self government, to which we all share responsibility.

** Symposium Editor, *Northeastern University Law Journal*, 2012–2013, and Graduate of Northeastern University School of Law, Class of 2013.

*** Managing Director of Professional Development, Northeastern University School of Law.

1 *Experience the Future*, NORTHEASTERN UNIV. SCH. OF L., <http://www.northeastern.edu/law/academics/conferences/experience-the-future> (last visited Aug. 8, 2013).

The first article published here, *The Progression of Legal Education Models: Everything Old Is New Again...* by Susannah Furnish, describes the current state of legal education, how practitioners and others outside of the legal academy view legal education, and what the academy has done to address criticisms of legal education. Furnish provides an overview of legal education, including the trajectory of legal pedagogies, and identifies particular efforts by the academy to make legal education more effective in providing graduating law students with the skills and knowledge necessary to succeed in practice. A second article by A. Benjamin Spencer, published in the *Washington and Lee Law Review*, discusses criticisms of legal education and contextualizes these criticisms in a broader history of the development of the legal profession in order to identify strategies for transforming legal education to address the current needs of the legal profession.²

In the second plenary session, “Reimagining Competencies in Experiential Education in Law,” participants examined the current characteristics of legal education, including its goals, skills, competencies, and terms. With the goal of creating a common vocabulary to bridge semantic gaps by using familiar concepts from within and without the legal academy, participants discussed redefining these characteristics to accommodate changes in providing legal services. Through the development of a common language, the organizers hoped to facilitate a discussion of educational innovations that could be used to improve and transform legal education beyond this symposium.

Again, two articles provided the substance of this session. The first, by Susan L. Brooks and published in the *Baltimore Law Review*, provides a fundamental framework in which to analyze and discuss the essential characteristics of experiential education. By creating this framework for experiential education, this article provides the reader with ways of identifying opportunities and strategies in legal education to provide substantive guidance to law students.³ The second article, published here, *Shared Visions of Design and Law in Professional Education* by Cody Thornton, takes a different approach to the ‘everything old is new’ concept discussed in the Furnish piece

2 A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1 (2012).

3 Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 BALTIMORE L. REV. 395 (2012).

by introducing a studio model adapted from curricula used in design school. Rather than drawing from the legal academy and critiques from within the profession, Thornton suggests pulling from the established studio methodology employed in professional design education. In Thornton's proposed system, law students would participate in a studio model incorporating intellectual and cognitive elements, research skills, communications skills, organizational skills, conflict resolution, entrepreneurship, collaborative lawyering and character development.

Between the symposium's second and third sessions, the organizers conducted a short innovation demonstration. Practitioners presented some of the educational and professional processes and programs currently being developed and used to bridge the gap between the academy and the profession.⁴ After these demonstrations, participants were split into breakout groups, each of which had attendees from both the academy and the profession. The goal of these demonstrations and breakouts was to facilitate discussion between these groups about how to craft experiential education curricula to improve legal education.

The first breakout session, "Professional Development: Bridging the Academy and the Profession," used the spirit of the Thornton piece to highlight current innovations in the classroom. For example, law school classrooms are incorporating experiential elements into their doctrinal sessions, adding purpose and context to doctrinal abstractions. Many programs offer immersion programs through clinics, incubators and structured externships. Many participants agreed that legal education needs to help students improve their writing and transactional drafting skills through academic or other work. Some suggested that pro bono work could play a role in improving legal skills, social and cultural competencies, and students' understanding of the access to justice problems faced by the country. What was abundantly clear was that law schools are addressing the problems in legal education, but not taking advantage of the academy as a whole

4 The innovation demonstration included presentations on (1) Cooley College by Lori Mason, Of Counsel and Director of Professional Development, Cooley LLP; (2) CUNY Incubator for Justice by Benjamin Flavin, Special Projects Manager, Community Legal Resource Network, CUNY School of Law; and (3) Reinvent Law by Renee Newman Knake, Associate Professor of Law and Co-Director Reinvent Law, Michigan State University College of Law.

to share and cross-pollinate their ideas. Indeed, the symposium was intended to be an initial opportunity for that cross-pollination.⁵

The symposium's third plenary session, "Beyond Carnegie: Experiential Education as an Integrated Curriculum," developed the argument that experiential education represents an essential piece of any strategy connecting legal education to the practice of law. This session was intended to allow the participants to think about what current experiential practices or innovations exist and how to implement these programs into law school curricula as a whole. The goal was to identify opportunities in current legal education to implement experiential education practices.

This session included three articles, all published here, that identify strategies for introducing experiential education in traditional law school curricula. Examining the purpose of first-year doctrinal courses, Jessica Erickson, in *Experiential Education in the Lecture Hall*, argues that doctrinal courses offer a perfect opportunity to implement experiential learning that will expose law students to legal practice from the outset of their legal careers. Second, Margaret B. Kwoka, in *Intersecting Experiential Education and Social Justice Teaching*, applies experiential education methodologies to curricula, focusing on training law students in social justice issues. Third, Emily Zimmerman, in *Should Law Professors have a Continuing Practice Experience (CPE) Requirement?*, explores the pros and cons of establishing a Continuing Practice Experience Requirement for law school faculty and how this might improve the implementation of experiential education techniques in traditional legal education.

The third plenary session was followed by a second innovation demonstration, "Beyond Carnegie: Implementing an Integrated Curriculum," that highlighted specific experiential education programs already in use at law schools,⁶ and a second breakout session. Par-

5 Specific suggestions from the first breakout session included: (1) Identifying skills and competencies necessary for practice, including ethics, professionalism, strategic thinking, writing/communication skills, data management and analysis, and using technology; and (2) Developing a vocabulary for experiential learning by creating partnerships between doctrinal faculty, experiential educators, and the profession.

6 The innovation demonstration included presentations on (1) Simulation Series: A Bridge to Practice and The Global Lawyering Skills Program, both a part of the curriculum at McGeorge School of Law, by Brian Landsberg, Distinguished Professor of Law, McGeorge School of Law, University of the Pacific, and Mary-Beth Moylan, Professor of Lawyering Skills and Director, Global

ticipants again split into groups to discuss strategies for introducing experiential education in the traditional classroom and into the curricula as a whole. Many participants discussed the need to formalize partnerships among faculty, students, and practitioners to facilitate efforts to integrate experiential education into law school curricula. Suggestions ranged from new teaching guides that propose experiential programs and in-class simulations to co-ops, externships, and incubators.⁷

In the fourth plenary, “Assessments: The Right Stuff and Measurement,” participants identified strategies to assess legal education, including traditional curricula and experiential education, that may move beyond the law school rankings to practical assessment of the extent to which legal education prepares law students for practice. The goal was to ensure that no effort at innovation and implementing experiential education in legal education goes forth without thinking about how to measure the success of these efforts and to clearly report those measurements to the academy and the profession. Without considering methods for assessing the effects of innovative teaching methods, the legal academy cannot effectively implement experiential education in order to transform legal education to address the criticisms from the profession.

In the first of two articles presented in this plenary session, William D. Henderson suggests that law schools should tap into their greatest resource, alumni, in order to identify and understand the key skills law students need to succeed in law practice. In the second article, *Professional Learning Communities and Collaborative Teams: Tools to Jump-Start the Learning Outcomes Assessment Process*, Sharon K. Sandeen argues that models such as Henderson’s would allow law schools to

Lawyering Skills Program, McGeorge School of Law, University of the Pacific; (2) Cooperative Legal Education Program by Caitlin Palm, Assistant Dean and Director, Office of Cooperative Legal Education, Northeastern University School of Law; and (3) LawMeets by Karl Okamoto, Professor of Law, Earle Mack School of Law, Drexel University.

7 Specific suggestions from the second breakout included: (1) Formalizing partnership between faculty, practitioners, and students to identify common skills and competencies in an integrated experiential education curriculum, including updated teaching guides and syllabi, problem sets, simulations, practicums, co-ops, incubators, externships, and technology; and (2) Formalizing partnerships among faculty, practitioners, and students to develop methodologies for collaboration to ensure that law students are prepared for practice, including e-law, e-commerce, law firm restructuring, mentoring, and mandatory pro bono work for faculty and students.

ensure their students learn key skills over the course of their legal education. The final innovations demonstration, “Facing Challenges and Creating Opportunities,” and final breakout session related to assessment. The final session provided a moment of reflection on the weekend’s events and a discussion of next steps for building on the substance and findings of the symposium.

The symposium finished with a charge to all participants to continue this discussion and to develop ideas drawing on the findings of the symposium regarding the future of experiential education in law school curricula. The Alliance and its partners plan to convene an annual symposium to continue this discussion and to maintain momentum in the search for innovations and techniques to improve the quality of legal education. If the goal of legal education is to produce lawyers ready to practice effectively and ably from the outset, then it is the hope of all those who attended this symposium to find ways in which experiential education can help achieve this goal. This symposium highlighted the current state of that search, but much more discussion, reflection, and innovation is needed to help law students for the future of the legal profession.

The last two articles in this publication were not presented at the symposium, but were submitted by symposium participants. The first article by Lela P. Love and Brian Farkas, *Silver Linings: Reimagining the Role of ADR Education in the Wake of the Great Recession*, explores the current treatment of alternative dispute resolution (ADR) by legal academia. The second article by Steven I. Friedland, titled *The Rhetoric of Experiential Legal Education: Within the Context of Big Context* was kindly offered to further supplement the materials herein.

The Progression of Legal Education Models: Everything Old is New Again . . .

*Susannah Furnish**

I. Introduction

In the past two decades, a series of critiques, reviews, and studies have challenged the legal academy to improve legal instruction by placing greater emphasis on professional skills, ethics, and competencies. The irony, of course, is that the prevailing approach to legal education, housed in a university setting and employing the case method in large classes, evolved in the late 1800s as a reaction to an apprenticeship model focusing on skills, ethics, and competencies.¹

There is no shortage of criticism reflecting this irony,² and the

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1 ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 16 (The Lawbook Exchange 2004) (1953). *See also* A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1972–73 (2012).

2 JOSEF REDLICH, THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING, Bulletin No. 8, 3–6 (1914) [hereinafter THE REDLICH REPORT]; ALFRED Z. REED, TRAINING FOR THE PUBLIC PROFESSION OF LAW: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING (1921) [hereinafter THE REED REPORT]; SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) [hereinafter THE MACCRATE REPORT]; WILLIAM M. SULLIVAN ET. AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter THE CARNEGIE REPORT]. *See also* AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS 8 (1979) [hereinafter THE CRAMTON REPORT] (“Chief Justice Burger and others have spoken, in recent years, of a serious problem of ‘incompetency’ among those lawyers trying cases before the federal courts and among the trial bar generally.”).

reaction from the legal academy has been decidedly academic.³

Recently, new urgency has invigorated discussion of this long-standing irony within the legal profession and academy about the effect and direction of legal education. The goal of this article is to underscore major turning points in the dialogue on experiential learning in the law school curriculum. These turning points have already been identified by the academy as noteworthy, and have prompted many responses. This article serves as both a summary, offering brief synopses and commentary on major factors in the changing world of legal education, as well as a timeline, presenting this progression chronologically. This summary highlights some milestones in the dialogue regarding experiential learning in legal education.

II. Apprenticeships, Formal Legal Education, and Early Criticisms of Legal Education Models

Prior to the 1870s, the predominant method to prepare lawyers for practice was training through apprenticeships.⁴ However, this model of apprenticeships was criticized for several reasons, including that it could not adequately prepare lawyers for the realities of practice.⁵ By the late 1800s a new and more scientific model of legal instruction was ushered in by Christopher Columbus Langdell, the Dean at Harvard Law School.⁶ Langdell created a system of legal edu-

3 The response of the legal academy to criticism has been largely theoretical. See Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (2007) (“The plain face is that American legal education . . . remains remarkably similar to the curriculum invented at the Harvard Law School by Christopher Columbus Langdell over a century and a quarter ago.”).

4 Brian J. Moline, *Early American Legal Education*, 42 WASHBURN L.J. 775, 779 (2003) (“In the eighteenth century, little existed in the way of formalized training for the would-be lawyer. There were no collegiate lectures on law before 1780 and no law schools before 1784.”).

5 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I, Introduction, Section I (1902).

6 CHARLES WARREN, HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA 361 (1908) (“[Langdell] undertook the task [of Dean], with the conviction that law is not only a science but one of the greatest and noblest of sciences, there is and can be no dispute. That it is a science with which the most vital interests of the public and the State are closely bound up is equally beyond dispute A Law School which does not profess to endeavor to teach law as a science has no reason for existence.”) (quotation omitted).

cation that has remained the predominant model used in law schools since his time, including the ubiquitous case method, and its companion, the Socratic method. “According to Langdell and his pupils, the law . . . should be acquired methodically from the original material of all principles and doctrines of the common law . . . by the individual, purely personal, intellectual labor on the part of the student.”⁷

Langdell’s innovative methodologies were widely embraced by the legal academy. By the end of the nineteenth century, “legal education was available in essentially two forms: the Langdell model prevailing at the academic law schools that were a part of large universities, and the more practice-oriented approach available in smaller schools and informal training programs.”⁸ Although the Langdell model of legal education continues to be the predominant methodology for legal instruction, it has been critiqued almost since its inception as insufficiently practical, divorced from the realities of real life practice.⁹ The current trends toward a more experiential approach to legal education find their roots in these longstanding critiques of Langdell’s models and approaches.¹⁰

7 THE REDLICH REPORT, *supra* note 2, at 12 (“The intellectual labor, namely, of disentangling the facts and the leading train of thought from the report of each decided case is to be performed by the students, quite independently, even although carried on to a certain extent under the guidance of the teacher . . .”).

8 DAVID I. C. THOMSON, *LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE* 61 (2009).

9 Spencer, *supra* note 1, at 1982.

10 Am. Bar. Ass’n., *Report of the Thirteenth Annual Meeting of the American Bar Association* 329, 330 (1890) (“The defects of the present method may be summed up, we think, in one very familiar antithesis: they do not educate, they only instruct.”); THE REDLICH REPORT, *supra* note 2, at 41 (“It is characteristic of the case method that where it has thoroughly established itself, legal education has assumed the form of instruction almost exclusively through analysis of separate cases. The result of this is that the students never obtain a general picture of the law as a whole, not even a picture which includes only its main features.”); THE REED REPORT, *supra* note 2, at 48 (“The general character of the preparation [for legal practice] has been profoundly modified by this shift from office to school. The tradition that a law school education is all-sufficient has survived the partial expulsion of active practitioners from its staff. Furthermore, a law school, even when run by practitioners, cannot as a matter of fact duplicate the work of an office engaged in actual practice. Thus we are in a fair way of losing entirely the practical training secured under a practitioner, that was once assumed to be the only logical means of preparing students in the Anglo-American Law.”).

III. Where Are We Now?: Modern Movements and Critiques of Legal Education

The historical context of the transition from apprenticeship models to classroom models of legal education, as well as the early criticisms of those models, underscores the concept that critiquing the current legal education model is nothing new. Ironically, the arguments that were used to challenge the apprenticeship model—for example, that the economic and social structures of the day required “deeper and wider training of lawyers than the training in rules of thumb and in procedure . . . ”¹¹—are echoed as critiques of the classroom model. Interestingly, the innovations finding their ways into law school curricula, such as broader use of an array of experiential learning integrated with more traditional courses, are inspired by the original apprenticeship models. However, the broader narrative of the modern critique of legal education indicates that the current dialogue is not so much about innovative curriculum reform as it is a return to the basics of how to prepare lawyers to serve clients. Essentially, everything old is new again, but in this case with a twist.

A. The Clinical Movement

One of the earliest responses to the Langdellian formal legal education model was ushered in by Legal Realists in the form of practice-based courses.¹² Early curriculum reflected the Realists’ perspective that Langdellian methods of legal education did not reflect the reality of practice in the real world.¹³ These courses predominantly took the form of providing students with the opportunity to work directly with clients, and rarely followed a predetermined set of guidelines.¹⁴ By the middle of the twentieth century, these courses

11 Roscoe Pound, *The Law School and the Professional Tradition*, 24 MICH. L. REV. 156, 159 (1925).

12 AN ORAL HISTORY OF CLINICAL LEGAL EDUCATION – PART I: SEEDS OF CHANGE (2006).

13 *Id.* See also Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907, 913 (1933).

14 AN ORAL HISTORY, *supra* note 12 (“[Jerome Frank] didn’t see it as skills training, at all, he thought it was legal education, so skills training is a word that was invented much later. He never thought it was about learning to draft contracts or draft motions, he thought it was about the relationship between lawyers and clients, and the role that lawyers could have in society, for good or ill.” Steve Wizner speaking on Jerome Frank and Yale Law School’s Jerome

and this model had developed into an early iteration of the legal clinic and gained a small toe-hold within the legal academy.¹⁵ However, this nascent movement, predicated on teaching students that good practice could be informed by theory, did not fully develop until the social unrest and civil disobedience that accompanied the Civil Rights Era.¹⁶ During this period, students agitated for the right to serve communities and populations in need.¹⁷ These students wanted to be able to practice law while still in law school.¹⁸ As a result, over half of law schools in the United States reported having a clinical program available to students by 1973.¹⁹ However, this rapid development of clinical programs did not immediately lead to a uniform understanding of the definition or purpose of clinical models, nor did it lead to a uniform model of implementation. This changed with the Report of the Committee on the Future of the In-House Clinic, that stated:

Clinical education is first and foremost a method of teaching. Among the principal aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problems in role; the students are required to interact with others in attempts to identify and solve the problems; and, perhaps most critically, the student performance is subjected to intensive critical review.²⁰

The creation of a uniform language around the goals and aims of clinical legal models provided clinical legal education a permanent place in law schools, albeit with continuing challenges over status, funding, program, and pedagogy.

N. Frank Clinic); Quintin Johnstone, *Law School Clinics*, 3 J. LEGAL EDUC. 535 (1951).

15 AN ORAL HISTORY, *supra* note 12.

16 *Id.*

17 *Id.*; Charles E. Ares, *Legal Education and the Problem of the Poor*, 17 J. LEGAL EDUC. 307, 310 (1965).

18 AN ORAL HISTORY, *supra* note 12; Ares, *supra* note 17, at 310.

19 Michael Zander, *Clinical Legal Education*, 123 NEW L. J. 181 (1973).

20 Robert Dinerstein, *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992).

B. The Report of the Task Force on Law Schools and the Profession

By the 1990s, creative pedagogies reflecting new theories of learning were incorporated into legal education. For example, the law clinic movement, with its roots in the activism of the 1960s, was well established, if not universally accepted, as an alternative pedagogy in the legal academy by the 1990s.²¹ Also surfacing at this time was some dissatisfaction with the capabilities of law graduates. Thus the organized bar undertook a substantial review of legal education and the result was *The Report of the Task Force on Law Schools and the Profession*.²² Known colloquially as the “MacCrate Report,” the report marked a watershed in the dialogue regarding legal education models.

The MacCrate Report, undertaken by the American Bar Association (“ABA”) Section of Legal Education and Admission to the Bar, was the beginning of the current explosion of counter-critiques of legal education models. The MacCrate Report describes an almost organic process wherein lawyers become competent during their legal education and their legal practice, stating: “[t]he skills and values of the competent lawyer are developed along a continuum that starts before law school, reaches its most formative and intensive stage during the law school experience, and continues throughout a lawyer’s professional career.”²³ Despite finding that there is no “gap” between the legal academy and law practitioners,²⁴ the MacCrate Report nevertheless highlights and recommends practice-oriented instruction during law school, and beyond. The report suggests that apprenticeships and practice-oriented initiatives, including clinics, externships, simulated court and interviews, and part-time employment (apprenticeships), be added to the law school curriculum.²⁵ Despite these findings and recommendations, the ABA did not adjust its accreditation standards to reflect that students should take these kinds of courses.

The MacCrate Report, without acknowledging that a “gap” existed, did highlight “transition” or “bridge-the-gap” programs for new lawyers in the years following law school.²⁶ Indeed, the report points

21 AN ORAL HISTORY, *supra* note 12.

22 THE MACCRATE REPORT, *supra* note 2.

23 *Id.* at 3.

24 *Id.* at 8.

25 *Id.* at 289–90.

26 *Id.*

out that “some form of transition education program – commonly referred to as ‘bridge-the-gap program’ and directed to new law graduates – can be found in most states.”²⁷ The MacCrate Report does not, however, indicate exactly how these bridge-the-gap programs create legal competence. Additionally, the MacCrate Report encourages the expansion of clinical aspects of legal education, signaling that practice-oriented education has an important place in legal education models. While the MacCrate Report fails to answer the specific question of exactly when and how competence is determined, it did spark concern and interest around legal education.

C. Educating Lawyers: Preparation for the Profession of Law

In 2007, the Carnegie Foundation for the Advancement of Teaching conducted a comparative study of sixteen law schools in the United States and Canada, producing the report, *Educating Lawyers: Preparation for the Profession of Law*, known as the “Carnegie Report.”²⁸ The Carnegie Report finds that the focus in classrooms on the case method teaches students to “think like a lawyer,” but does not teach students to think about social and ethical consequences.²⁹ Essentially, the report concludes that students were unprepared for the reality of practice.³⁰

The Carnegie Report went on with recommendations for amending legal education to prepare students for practice. The report suggests an “integrated approach” to legal education that “addresses the problem of the larger curriculum, particularly what should happen in the third year of law school. In most schools curriculum lacks clear shape or purpose.”³¹ The report proposes that each law student should experience three “apprenticeships:” 1) The Cognitive Apprenticeship—the student participates in the traditional learning model in order to “think like a lawyer;” 2) The Skills Apprenticeship—the student learns to “do like a lawyer;” and 3) The Professional Formation Apprenticeship—the student forms “professional identity and

27 *Id.*

28 THE CARNEGIE REPORT, *supra* note 2.

29 *Id.* at 188.

30 These criticisms echoed the Carnegie Foundation’s reports and recommendations made a century earlier in its Redlich Report and Reed Report. See THE REDLICH REPORT, *supra* note 2. See also THE REED REPORT, *supra* note 2.

31 THE CARNEGIE REPORT, *supra* note 2, at 194.

purpose.”³² Each apprenticeship must be integrated with the others: “[e]ach aspect of the legal apprenticeship—the cognitive, the practical, and the ethical-social—takes on part of its character from the kind of relationship it has with the others.”³³ These apprenticeships work together to create a more practice-oriented legal education, and are essential to the framework recommended by the Carnegie Report.

The Carnegie Report provoked widespread reaction in the legal profession and academy. Coming as it did upon the eve of the greatest economic disruption in a century and amid the transformative effects of the technological and information revolutions, the Carnegie Report encouraged a wide array of introspection.³⁴ A variety of activity intending to examine and assess, and perhaps even change, legal education and the profession proceeded.

D. Best Practices for Legal Education

In the same year as the Carnegie Report, the Clinical Legal Education Association issued *Best Practices for Legal Education*³⁵ (“Best Practices”). Best Practices found that law schools were failing, stating that “[t]here is a compelling need to change legal education in the United States in significant ways” and that this was demonstrated by the fact that “most law school graduates lack minimum competencies required to provide effective and responsible legal services.”³⁶

Best Practices goes on to outline the “Components of a ‘Model’ Best Practices Curriculum:” “[t]he primary goal of legal education should be to develop competence, that is, the ability to resolve legal problems effectively, and responsibly.”³⁷ The Best Practices report encouraged law schools to create goals, and then assess how they are doing at achieving these goals. Moreover, law schools were tasked with teaching students to:

- work with clients to identify their objectives, identify and evaluate the merits and risks of their options, and advise on solutions;

32 *Id.* at 28.

33 *Id.* at 191.

34 *Id.* at 4–5.

35 ROY STUCKEY ET. AL., *BEST PRACTICES FOR LEGAL EDUCATION* (2007).

36 *Id.* at 1, 5.

37 *Id.* at 6.

- progress civil and criminal matters towards resolution using a range of techniques and approaches;
- draft agreements and other documentation to enable actions and transactions to be completed; and
- plan and implement strategies to progress cases and transactions expeditiously and with propriety.³⁸

The best practices outlined in the report underscore the preference for an experiential learning model focused on preparing students for practice. Best Practices is currently being revised and expanded.

E. Shultz-Zedek Report

The main focus in the 2008 study by Professors Shultz and Zedek, *Identification, Development, and Validation of Predictors for Successful Lawyering*³⁹ (“Shultz-Zedek Report”), is to examine the “limits and downsides of current admission practices.”⁴⁰ The focus on law school admissions practices underscores the competencies that current admissions tests predict with an “over-emphasis on academic and cognitive competencies.”⁴¹ The Shultz-Zedek Report addresses the importance of “tools that can reliably identify, assess and predict proto-competencies for professional effectiveness.”⁴² The Shultz-Zedek approach begins by focusing on professional competency prior to admission, underscoring that professional competency can be determined in prospective students and should not be limited to academic ability. The main thrust of this research is that the LSAT model of admissions testing is inadequate, and that testing for academic potential is an important threshold for determining capability of one important aspect of legal education.

The Shultz-Zedek report emphasizes the reality that law students entering practice are not prepared for the realities of practice, nor are all of them capable of learning because they may not have the competency to do so.⁴³ By advocating an approach that tests aspiring law students for identifiable and measurable attributes such as

38 *Id.* at 43–44.

39 MARJORIE M. SHULTZ ET AL., *IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING* (2008).

40 *Id.* at 15.

41 *Id.* at 13.

42 *Id.* at 15.

43 *Id.* at 13.

empathy, the Shultz-Zedeck report advocates for cultivating lawyers who are capable of doing more than just understanding the academic aspects of law school.⁴⁴ Moreover, by articulating the importance of skills beyond theory and doctrine, the academy can help students to develop their potential into effective professional skills that are profoundly necessary to the practice of law. The twenty-six competencies identified by Shultz-Zedeck are an important contribution to the development of alternative or integrated pedagogies in law school. The Shultz-Zedeck report emphasizes an integrated approach to admitting law students with the capacity to become fully competent, not just academically competent.

F. Future Ed Conferences (2010–2011)

Beginning in 2010, New York Law School and Harvard Law School co-hosted a three-part year-long conference titled *Future Ed: New Business Models for U.S. and Global Legal Education Conference* (“FutureEd Conferences”). The stated goal of this extended program was “to come up with operational alternatives to the traditional law school business model and to identify concrete steps for the implementation of new designs.”

The first part of the conference, FutureEd 1, invited educators, employers, and regulators to “identify problems, innovations, and constraints, and to organize working groups to develop designs and strategies for implementation.”⁴⁵ At FutureEd 2, the working groups reconvened to present proposals and “discuss the evolution and future of legal education.”⁴⁶ Finally, of the 30 proposals presented at FutureEd 2, the best were selected, refined, and presented at FutureEd 3.

This year-long conference created an opportunity for dialogue and innovative proposals. The result was a wealth of information and ideas. Proposals ranged from models to address business plans, to implementation of experiential curriculum.⁴⁷ These proposals predominately addressed the “gap” between the academy and legal practice. The Future Ed conference has yet to issue a capstone piece summarizing outcomes, and it remains to be seen what the end result

44 *Id.* at 90.

45 *FutureEd*, HARVARD L. SCH., http://www.law.harvard.edu/programs/plp/pages/future_ed_conference.php (last visited July 27, 2013).

46 *Id.*

47 *Id.*

of the refined proposals will be. The lack of a capstone project reflects the primary challenge in the dialogue on experiential learning: while there is no lack of studying the problems with legal education models, there has been a marked lack in consensus surrounding solutions and implementation.

G. AALS Seattle Conference

The Association of American Law Schools (“AALS”) convened the *Conference of the Future of Law School Curriculum* in 2011. The stated goal of the conference was to provide ideas that participants could take back and use as the basis for change within their own curriculum at their own schools. The Conference Brochure stated:

Forces from outside and inside the academy have generated a powerful impetus for legal educators to reconsider the law school curriculum. Outside the academy, changes in the legal profession driven by the economy, technology, and the law, are unsettling long-held views about the types of intellectual tools and skills our graduates require. We can no longer comfortably assume that students will receive apprenticeships in practice or that their professional endeavors will be confined to a single legal system and culture.⁴⁸

Like the FutureEd Conferences, the outcomes of the AALS *Conference of the Future of Law School Curriculum* are not yet fully realized. The exchange of ideas has certainly fostered communication about the inadequacies of current legal teaching methods. However, tangible results are still difficult to identify, in spite of the attempt to generate concrete recommendations. Like the Future Ed Conferences, the AALS Conference has not produced a capstone project, an example of the trend of the slow progress from examination to analysis to consensus to implementation.

H. Educating Tomorrow’s Lawyers

Educating Tomorrow’s Lawyers (“ETL”) is an Initiative of the Institute for the Advancement of the American Legal System at the University of Denver. This initiative is focused on providing and

48 Association of American Law Schools, *Conference on the Future of Law School Curriculum* (2011), <http://www.aals.org/curriculum2011/CurriculumBrochure2011.pdf>.

implementing the research of the Carnegie Report and “the work of law schools and professors committed to legal education reform to align legal education with the needs of an evolving profession by providing a supported platform for shared learning, experimentation, ongoing measurement and collective implementation.”⁴⁹ ETL showcases curriculum and other activities that reflect the apprenticeships as identified in the Carnegie Report. *Educating Tomorrow’s Lawyers* supports a consortium of over twenty law schools that have been accepted into the program.

I. Popular Media

The popular press has picked up and reported on the “gap” between the legal academy and the legal profession.⁵⁰ Sources such as the *New York Times*, *The Wall Street Journal*, and *The Chronicle of Higher Education* have all used the current dilemma of the disconnect between legal education and legal practice as the basis for articles. These news forums have published an abundance of articles addressing a range of topics concerning legal education, but most focus on perceived problems and solutions. Even without focusing on any particular news outlet or article, it is clear that the press has publicized current challenges facing legal education.

J. Alliance for Experiential Education in Law

Northeastern University School of Law, itself an innovator in legal education through its forty-five year old curriculum requiring four full-time, quarter-long cooperative placements in practice settings, convened a group of forward-looking legal educators committed to experiential learning. The Alliance for Experiential Education in Law (“The Alliance”), founded in 2011, now includes over seventy law schools and is developing through collaborative and inclusive processes a variety of helpful programs, guides and toolkits to encourage transformative approaches in legal education built around a flexible conception of experiential learning. Organizing a symposium on experiential education in law, the Alliance intends to foster influential activities and to effect change reflecting consensus about the

49 *About ETL, EDUCATING TOMORROW’S LAWYERS*, <http://educatingtomorrow-lawyers.du.edu/about-etl/> (last visited June 23, 2013).

50 See, e.g., David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011).

future of legal education by integrating doctrine, analysis, skills, ethics, and professionalism.

IV. Conclusion

There are several viewpoints in the discussion regarding experiential learning in the academy. Each viewpoint reflects those that came before, and affects those that follow. Although the discussion of how best to prepare lawyers to practice law is as old as the practice itself, there is growing attention, and indeed, urgency, paid to these issues over the past twenty years in particular. The milestones discussed in this summary demonstrate the changing nature of the discussion regarding experiential learning. It is noteworthy that legal education is not the only aspect of higher education that has experienced or is experiencing heavy critique of current models, and legal education certainly is not alone in the challenges it faces. Indeed, some academic disciplines, like computer science, must reinvent themselves regularly as technology outpaces curriculum development.

As this summary suggests, there is no shortage of diagnoses for what ails the current approaches of legal professional preparation, although consensus and implementation are more limited. As several of those who have examined the current legal education system have recommended, a modern day revitalization of apprenticeships accomplished through integrated learning and teaching techniques may form the bedrock of implementation. A question also remains as to how to create true collaboration between the legal profession and the legal academy that results in shared responsibility for professional development and identity. Strikingly, a question also remains as to how to take the study and analysis of the current shortcomings of legal education and create a more effective professional preparation. It is the purpose of this summary to underscore that these questions—questions asked by the academy and the practitioners since the apprentice model was *de rigueur*—must be addressed, and that the time has come to move from study to consensus to implementation. This article attempts to encapsulate where we have been in order to encourage movement forward.

Shared Visions of Design and Law in Professional Education

*Cody Thornton**

American legal building in the modern manner strikes me, thus far, as paying altogether inadequate attention to that engineering discipline on which a permanent magnificence of legal architecture must depend: the creation of adequate traditions and machinery for training and holding and continuously breaking in an adequate supply of right personnel.

—Karl N. Llewellyn¹

1. Introduction

Two pressures are pushing law schools into new realms of teaching: the need to evolve beyond the Langdellian case method to transfer lawyering skills combined with a contraction in enrollment and revenue. Introspection and ad hoc solutions have failed to bring large-scale change at the right price.

The academy has long considered adapting other professions' programs, such as medicine and business,² but these changes would require a fundamental restructuring of legal academia, and perhaps

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1 Karl N. Llewellyn, *On the Good, the True, the Beautiful, in Law*, 9 U. CHI. L. REV. 224, 244–45 (1942).

2 The “evolution” of the case method from business school to law school would be a return home, with academics supplanting judges. See Colleen Walsh, *From Law School to Business School—Evolution of the Case Method*, HARV. GAZETTE, Apr. 3, 2008, <http://news.harvard.edu/gazette/story/2008/04/from-law-school-to-business-school-%E2%80%94evolution-of-the-case-method/>; *CaseFile Method*, <http://www.casefilemethod.com> (last visited Oct. 21, 2012) (a problem-based set of teaching materials for law school courses).

part of the legal profession itself. The design professions, however, offer a more evolutionary option.

This article reintroduces the legal academy to the learning environment of professional designers: the contemporary studio. Studio courses could provide the balance of theory and practice that the academy and the profession now seek.

Law and design share creative problem-solving methods. With each task the professionals face, “the initial state, the goal state, and even the permissible operators are not precisely determined.”³ Their common experience is one of imagining multiple effective solutions for people’s problems within physical, political, legal, and economic constraints, pushing back when possible.⁴ Urban planners, landscape architects, engineers, architects, industrial designers, and lawyers all have the power to liberate people and to intervene in systemic problems by removing barriers and shifting resources. Yet the professions teach their crafts in vastly different ways.

The intensive and powerful studio environment teaches students to create and communicate solutions to complex problems. The primary value of a *legal* studio would be to release students’ creativity within *both* the practical and the theoretical realms. The studio inherently fosters almost all of the core lawyering skills and should appeal to social justice activists as much as transactional gurus; a studio could, in fact, ask students to engage in both conversations.

Conceptually, the “legal studio” approach would fall between a clinic and a seminar, with elements of simulations, skills courses, and other teaching variations. The method would allow students to explore, without harm to clients or the students’ own careers. In this setting, professors and students could work together to expand scholarship, to reconnect practicing lawyers to law schools, to practice on an academic schedule (not that of the courts), and to help fund the education received.

3 Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 348 (1995).

4 See Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 767–68 (1989) (“Architecture, too, is judged by standards of effectiveness: if the building is unsteady or does not satisfy the uses to which it is put, the architect has failed. In law—as in architecture—there is a huge variety of ways in which something can be done effectively and an equally huge variety of ways in which it can be done poorly.”).

2. Shared Visions of Design and Law

Lawyers and law students are frequently viewed as, and expected to be, logical or technical thinkers,⁵ not creative beings, but this status may be more a result of the professional acculturation endured in law school than personal capacity and talent.⁶ With this status we sometimes feel doomed to lives of black letter law and risk aversion. Designers, on the contrary, are perceived as daring aesthetes or artistic engineers, the very people who perhaps inspired the cliché of achieving new heights.⁷ A comparison of the legal and design professions requires a basic understanding of what designers really do, removed from the glamorized assumptions about their work. It is easy and unnecessary to expound on the differences, but the similarities are more important in this context.

Karl Llewellyn argued that the similarities between architecture, engineering, and law were based in *use*:

Architecture and engineering strike most closely home—perhaps because both look so directly and so inescapably to use. Indeed, in regard to the rule-structure of a developed legal system, it is fascinating to follow the semi-analogue

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- 5 High LSAT scores, exceptional undergraduate grades, and first-year law school grades—with which the legal community is obsessed—are correlated most strongly with analysis, reasoning, researching law, and writing. William D. Henderson & Rachel M. Zahorsky, *The Pedigree Problem: Are Law School Ties Choking the Profession?*, 98 A.B.A. J. 36, 40 (2012). Other essential lawyering skills are often ignored in assessing student success both before and immediately following law school.
- 6 See Marc Laroche, *Why You Might Hate Law School*, BRAZEN LIFE (Aug. 30, 2011), <http://blog.brazencareerist.com/2011/08/30/why-you-might-hate-law-school/> (“Obviously, this makes for an alarmingly uncreative intellectual environment. This might shock you, but the first year of law school is actually quite similar to being in the military: the least bit of independence is viewed as subversion and is punished.”).
- 7 See Richard K. Neumann, *Comparative Histories of Professional Education: Osler, Langdell, and the Atelier* 10 (Hofstra Univ. Sch. of Law, Legal Studies Research Paper Series, Paper No. 12-10, 2012), available at <http://papers.ssrn.com/abstract=2016462> [hereinafter Neumann, *Comparative Histories*]; see also Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students’ Critical Reflection*, 5 CLINICAL L. REV. 437, 446 (1999) (referencing DONALD A. SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER (1987) [hereinafter SCHÖN, REFLECTIVE PRACTITIONER]) (“[T]he architect’s design studio or the musician’s master class have been described as model ‘practicums’ for teaching professional artistry.”).

of one of those medieval cathedrals whose building reached across the centuries. . . . for structured rules and structured stone alike, one finds unit after unit, set up aforesaid, in a “style” whose reason has lost meaning to the later user, but whose form will bind him still.⁸

People often look fondly upon architecture as a profession lucky enough to revel in beauty and art,⁹ but even that vision is frequently disconnected from the realities of the design professions, which extend beyond building monumental attractions.¹⁰ The view from the outside lacks an essential day-by-day comparison to other professions.

Llewellyn is correct that the professions use building blocks common across centuries, but the similarities of law and design as professions lie more in the process of envisioning a broad goal and then assessing the physical, social, and legal constraints that rise up as obstacles to that goal. This assessment is a pleasant way of saying what MIT professor Donald A. Schön described as “messy, indeterminate situations” with which designers (and lawyers) must converse.¹¹ Although Schön’s work received some attention in the legal world,¹² no in-depth consideration exists of how today’s design education methodologies could be adapted and improved to meet the current needs of the legal academy.

This article focuses on the similarities of analysis that the professions employ to reach their goals. More importantly, it addresses the educational processes that are used to teach professionals how to establish shared goals with clients, communicate the obstacles that await, and activate the professions’ tools to reach the goal.

8 Llewellyn, *supra* note 1, at 230.

9 See, e.g., Neumann, *Comparative Histories*, *supra* note 7, at 10.

10 An idealized vision of design as monumental architecture and architectural process as working with geniuses is similar to a comparison of strategizing with retired Supreme Court Justices prior to arguing and winning a case with national implications before the Court.

11 SCHÖN, REFLECTIVE PRACTITIONER, *supra* note 7, at 4.

12 See Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231 (1995–1996) [hereinafter Schön, *Legal Practitioner*] (“This [article] is an edited version of Professor Schön’s speech at the Mini-Workshop on Theory and Practice: Finding Bridges for the Classroom, held at the 1992 AALS Annual Meeting.”).

2.1 What Is Design and Who Are Designers?

Most people think first of architects when they hear the word *design*, but the *design professions* are much broader. The term means the professions engaging in and studying human manipulation of our environments: i.e., urban planners, urban designers, landscape architects, and architects.¹³ The *built environment* includes not only buildings, but also natural systems within which designers intervene; it is arguably the opposite of the natural environment.¹⁴ Most of the work of designers is not highly visible, and even the physical manifestations of the work may go unnoticed, especially when done right.¹⁵

Some people might assume that the different “output” of design and law logically requires vastly different professional processes to achieve those results. The visibility and tangibility of designed work stand in contrast to the written and verbal advocacy of lawyers, and the terms chosen by these professions lead to a further belief in a divide. Yet, the two are more entangled than first imagined.

2.2 Professional Similarities—Law and Design

In discussing professions, Professor Schön wrote of “indeterminate zones of practice,” including uncertainty, uniqueness, and value conflict, that “escape the canons of technical rationality.”¹⁶ Despite

13 DONALD A. SCHÖN, *THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION* 76–77 (1983).

14 The focus of this article is primarily on the teaching of the design of the built environment; however, the studio as it is used in industrial design education could be equally valuable to the discussion, particularly as an interdisciplinary endeavor with respect to the teaching and analysis of intellectual property law and products liability. See, e.g., James T. O’Reilly, *Dialogue with the Designers: Comparative Influences on Product Design Norms Imposed by Regulators and by the Third Restatement of Products Liability*, 26 N. KY. L. REV. 655, 656 (1999) (“Lawyers need to become safety advocates outside the courtroom, and lawyers should be heard inside the design studio as products are created or modified.”). The division in the design professions between the built environment and movable products is somewhat (perhaps necessarily) arbitrary; it is akin to the distinction between real and personal property in the law. Indeed, finding the line between spatial/environmental design and industrial design can occasionally be as difficult as categorizing fixtures in the law.

15 Consider, for example, a new building or park that you admire and whether you recall how well integrated access for individuals with physical disabilities has been accomplished. A great legal argument likewise seamlessly combines complex arguments with case law.

16 SCHÖN, *REFLECTIVE PRACTITIONER*, *supra* note 7, at 6.

the consistent uncertainty in professional practice, the standard law school curriculum tends to treat the legal profession as a series of evolving but knowable decisions to which lists of facts can be applied after carefully eliminating irrelevant components. Yet the field is often as uncertain as design, with numerous possible solutions to any given problem, even if the goal is somewhat fixed.

More concretely, the fields of both design and law wield power over environments that control and channel human activity. Design is largely about the environments that we can see, hear, and touch, whereas law is more about intangible environments that interact with that physical world.¹⁷ Both create certain barriers and help people overcome others. Both have the power to shift scarce resources and to liberate people from certain confines of everyday living.

The creation and evolution of design is about understanding how far human beings can and should push their environment within natural and political constraints. The practice of design requires knowing where barriers restrain human manipulation of the environment in order to design spaces and to manipulate systems. The regulation of design is accomplished through physics and law, along with trends in art and fashion.

In parallel, the creation of law is a process of designing systems, frameworks, and orders of control to facilitate human cohabitation and relationships—within the same political and natural constraints as design. The practice of law focuses on where the boundaries of control exist so that people can navigate them to achieve desired outcomes. The enforcement of law (when the natural world is not more restrictive than the law itself) is about imposing order based on what our political systems and our communities, at varying scales, perceive. Moreover, legal trends are as disruptive as design trends to the profession. The fields thus share many similar structures.

Because of these structures, problems in both law and design are typically first set within a geographic location (i.e., a site, a jurisdiction, or a community). Professionals in either field must assess the context of that setting, the overlapping power structures, the stakeholders' myriad goals, the resources and tools at hand to accomplish them, and the current state of knowledge surrounding the problem.

The value of studio learning is activated by these commonalities. For the studio to work, proper framing of the question is essential to

17 *Id.* at 41–42.

obtain the right substantive, procedural, and educational outcomes. Posing the question motivates involvement by the instructor, the students, and others in the community and provides a starting point to build knowledge.

These shared elements lead to the conclusion that an adapted legal studio should follow the essential spirit of the design studio. But, at the same time, the physical products that are produced and the clients for whom we might produce them necessitate some variation. Ethical considerations should also guide the framing of studio problems, the implementation of processes within the studio itself, and the extent to which the work product is allowed to leave the safe confines of the studio.

2.3 The Need for Studio-Based Design Education

The design studio provides a unique ecosystem of resources, tools, communications media, and community in which students challenge themselves, starting at the edge of their own knowledge and interests. Today's design studio has a foundation dating back to the same time period as the Langdellian transformation of law school.¹⁸ Yet it has evolved to meet the realities of today's professional design practices. The method has a lot to teach to the legal academy.

Design seeks physical order among complex systems and chaos. Design professionals are tasked with multi-scale problems and may consider contexts ranging from the microscopic to the global. The realm of possibilities requires freedom of thought. No professor could comprehensively teach each student to perceive those possibilities and to draw from a surrounding knowledgebase. Guidance in establishing the questions for the professional's conversation with the problem is the key.

As discussed in greater detail in Section 6, every design studio starts with a defined, but not narrow, problem based on design domain, process, scale, and place. Multiple people may be engaged in its framing. The instructors introduce it and the relevant theory surrounding the profession's understanding(s) of it. As the group begins their task, the studio's people, space, and process become invaluable.

18 Neumann, *Comparative Histories*, *supra* note 7, at 4; *see also* Thomas R. Fisher, Dean, Univ. of Minn. Coll. of Architecture & Landscape Architecture, Remarks from Afternoon Plenary Session: Models from Other Disciplines: What Can We Learn from Them? (Jul. 27, 2001), in 1 J. ASS'N LEGAL WRITING DIRECTORS 165, 167-68 (2002).

With the problem and basic understanding of its context established, instructors lead an initial exploration of possible interventions and solutions. The instructors may divide initial research among the group to examine in greater depth the current state of understanding on the topic. After exploring the broad issues together, with individuals or teams collecting research and initial ideas, the students then choose and explore their own projects. They may work in small teams. The studio regularly reconvenes as a group and with outside professionals at major milestones to critique, and perhaps to celebrate,¹⁹ the substantial work.

The design studio strikes a balance between academic learning and real-world design thinking at a reasonable cost. The setting is essential to allow students the opportunity to explore big ideas and to make mistakes without consequence. The work is experiential with constant engagement with new ideas and outside ideas. Students are allowed to come to their own conclusions based on their research and imagination. At the same time, acculturation takes place, including the transfer of the vocabulary of the profession and the manner in which people collaboratively address problems and opportunities.²⁰

Self-exploration, peer feedback, and frequent instructor critique are the pillars of studio pedagogy. The setting feels loose and uncontrolled at times for people who have never learned in this way. The students in the studio become active learners *and* teachers, acquiring the skills necessary to identify a lack of knowledge and to critique appropriately the work of others. Reality returns during the critiquing process, which pares back some of the big thinking.

As one risk, some students may feel they have not gained core skills because the learning is not neatly packaged and presented to them.²¹ The students soon learn that this anxiety carries over into

19 The experience of presenting one's work to a design jury has been criticized as anything but a celebration, bordering even on a hazing ritual. See Helena Webster, *The Architectural Review—A Study of Ritual, Acculturation and Reproduction in Architectural Education*, 4 ARTS & HUMANANITIES HIGHER EDUC. 265 (2005) [hereinafter Webster, *The Architectural Review*]; see also KATHRYN H. ANTHONY, DESIGN JURIES ON TRIAL: THE RENAISSANCE OF THE DESIGN STUDIO 4–5, 29–32 (1991).

20 Thomas A. Dutton, *Design and Studio Pedagogy*, 41 J. ARCHITECTURAL EDUC. 16, 16–17 (1987) (discussing the “hidden curriculum”).

21 Schön, *Legal Practitioner*, *supra* note 12, at 247–48 (“I noticed something funny about these first-year design studios, which was that all the students were initially confused . . . many of them were very unhappy. . . it turned out that they were confused because although they did not know what design was they

the real world, and finding a way out is a professional's life challenge. Many traditional programs in law schools do not help students to reach even that point in their development.

3. Adapting the Studio Approach to Law School

Like design studios, a legal studio experience could stand out among other pedagogical methods in the transfer of key legal skills. This section addresses several key benefits that a legal studio setting would bring. Later sections discuss how these benefits play out and how the process could specifically be adapted to law.

3.1 Bringing Students to the Edge of Their Own Knowledge and Interests

Metaphorically speaking, most law school courses elevate instructors on platforms from which they reach down and pull students up to each successive level of knowledge. Everyone is expected to fit on the same platform, despite her or his interests and relative level of understanding of the topic. If the academic period ends before the professor can pull everyone up, the schools give the students their below-average grades, and the process begins anew. Contrarily, the studio helps the students to imagine the platforms on which they would like to stand, and the instructors clasp their hands together to give the students a boost up.

This process is perhaps more relevant to law than design. No other profession draws from such a wide variety of academic accomplishments than law. Students arrive with backgrounds ranging from ballet to organizational behavior. Law schools also actively seek diversity in their student bodies, yet the interests, experiences, understandings, and career goals of these students may not be adequately addressed in a rigid syllabus-based course, particularly when many faculties are comprised of predominantly white, heterosexual men.²²

were nevertheless being asked to do it from the very moment of their entry into the design studio.”).

22 The number of faculty members who identify as individuals of color and other minorities is severely limited, even at schools considered to be among the best in the nation. For example, on January 7, 2013, Yale Law School announced the appointment of its *first* Hispanic tenured professor: Christina Rodríguez. *Christina Rodríguez '00 to Join Yale Law School Faculty as Professor of Law*, YALE L. SCH.,

Despite this complexity, the schools funnel everyone through a formulaic professional program that is (strangely) uniform throughout the country. Students are allowed, and indeed desire, to specialize in certain legal topics and to serve specific communities, but the processes used to teach each of those topics vary little, leaving little chance of addressing people's different needs. The uniformity is enforced by American Bar Association requirements and accreditation standards.²³

The increase in demand for specialized programs and perspectives is often counteracted by some students' need to start at a much more basic level in some topics. Schools have responded to this pressure by increasing the number of specialty and skills courses, and yet contracts courses still often contain no contracts.²⁴ A key question is whether teaching specialties and skills as isolated endeavors is beneficial. Legal studios, as integral complements to the rest of the curriculum, would allow students to specialize in areas that interest them, but to begin that educational exploration at their own level of knowledge, rather than at the level of knowledge instructors presume they have upon completion of basic doctrinal courses.

Additionally, if students lack skills in a particular area, they may feel more comfortable reaching out for help from fellow stu-

<http://www.law.yale.edu/news/16422.htm> (Jan. 7, 2013); Daniel Sigoreo, *Law School Aims for Faculty Diversity*, YALE DAILY NEWS, <http://yaledailynews.com/blog/2012/03/01/law-school-aims-for-faculty-diversity/> (Mar. 1, 2012). Meanwhile, Eduardo Peñalver, previously the only Hispanic tenured professor at Cornell Law School, moved to the University of Chicago Law School. Sarah Meyers, *Cornell Law School Seeks Surge in Number of Minority Professors*, CORNELL DAILY SUN, <http://cornellsun.com/node/54163> (Nov. 12, 2012); Marsha Nagorsky, *Property Expert Eduardo Peñalver Joins Law School Faculty*, UNIV. OF CHI. L. SCH., <http://www.law.uchicago.edu/news/property-expert-eduardo-peñalver-joins-law-school-faculty> (Jul. 18, 2012). Note the positive spin the two communities' newspapers place on where the schools are headed, rather than where they are currently. This abysmal state of minority representation on faculties will not change quickly, even if schools continue to make progress towards minority inclusion on their student bodies.

- 23 *A.B.A. Standards and Rules of Procedure for Approval of Law Schools*, ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/resources/standards.html (last visited Feb. 6, 2013).
- 24 When the amount of knowledge is insufficient to meet the needs of a particular field, many schools establish and maintain relationships with other schools and programs, such as dual-degree programs. Students end up with JD/MBAs, JD/MPHs, and JD/MPAs. They also leave with even more educational debt and perhaps still with questionable professional capacities.

dents, with whom they are more likely to grow close in the studio space, rather than an instructor. In that regard, the studio method and space can help to eliminate feelings of isolation²⁵ and inherent student-instructor power dynamics that may keep students out of an instructor's office hours when they need help.

3.2 Going Beyond Theory in Big-Picture Thinking

Studio can teach theory through practice. It provides the opportunity not only to learn different theories, but also to imagine how they affect a specific situation. Moreover, certain studios might also focus on effecting change to implement the proposed legal theories and public policies through, for example, legislative action, political advocacy, or strategic litigation. In this manner studios can help students become "justice-ready."²⁶

3.3 Putting Studio Work to Use

A legal studio offers the opportunity to produce scholarship, but the ideas may emerge in forms unknown or initially strange to the academy. It will not, however, require the transformation of legal scholarship generally, unlike the adoption of the business school case model. Questions will arise as to whether the intermediary findings of studio-based research are "real" scholarship. The knowledge and possible solutions can still be adapted to a traditional academic publishing model if desirable, and studio students could be enlisted in those efforts just as research assistants are today. The extent to which the students' studio work should be attributed to the instructors will become an important debate in the academy. At the same time, because law review-based legal scholarship in the United States is so different from other academic disciplines, law schools may be better equipped to accommodate studio-derived scholarship.

25 It does not, however, eliminate the risk of isolation if cliques form in studios or if students feel farther behind in their knowledge and skill development than the rest of the group.

26 See Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J. L. & Soc. JUST. 231 (2012), available at http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcjsj/32_2/JLSJ_32_2_web.pdf.

3.4 Creating a Safe Space for Mistakes

Unfortunately, law schools primarily assess student progress based on the application of fictitious fact patterns to memorized appellate case law, under both a majority and a minority view, to showcase the students' abilities to address the facts and policy implications from different angles. Even "real" fact patterns picked by appellate court judges to match their decisions are rarely critiqued or examined further. Straying is discouraged, and misstating facts or law or missing analytical connections is openly and publicly admonished (perhaps rightly so), even inappropriately ridiculed.

If law schools should promote "exploration and discovery,"²⁷ then they need learning environments in which students can safely make mistakes, while still forcing students out of their comfort zones when their ideas have evolved to where they can express them comfortably in the language of the profession. Students would spend more time learning about the law, facts, and context and less time dealing with the fear of stumbling in a peer-filled lecture hall.

The studio environment avoids many of the ethical issues that arise directly in other experiential learning environments as well. Students, however, will still confront ethical issues in other areas of learning and practice. Studio instructors will need to be aware of ethical issues as they arise and be prepared to address and discuss them when they have the opportunity.²⁸

3.5 Multi-Disciplinary Teaching

The fact that legal problems are almost always inherently multi-disciplinary makes the studio an excellent forum within which to convey lessons from a variety of critics and areas of law. Studios provide opportunities for instructors to co-teach complex problems. Two people can share the workload. Moreover, when instructors, especially practitioners, are taken away at the last minute due to court hearings or emergency client meetings, other instructors or outside

27 For a discussion on attempts by other rigid disciplines to promote exploration and discipline (in French schools), see Tom Hardy, *De-Schooling Art and Design: Illich Redux*, 31 INT'L J. ART & DESIGN EDUC. 153, 156 (2012).

28 Without actual clients, common conflicts are unlikely to arise in a studio setting. For example, if the courts do not dictate students' deadlines, then issues such as affording opposing counsel extensions or illegal backdating can only be discussed abstractly. Information uncovered or communicated in studios could be the riskiest ethical issue for many of the problems posed.

critics can step in for a day of presentations and critique of the students' work.

The perspectives of non-lawyers also have a place in a studio. For example, a project on criminal law could benefit from a day of critique by someone accused and convicted of a crime and later released, after time served or an overturned conviction. A business law studio would be remiss if the instructor did not invite someone engaged in the non-legal management of an enterprise to speak with the students. Beyond the academic term, the outcomes of the studio's work can further demonstrate to non-lawyers where the law interacts with projects relevant to their work.

3.6 Enhancing Learning to Enhance Practice

The workings of a legal studio could reflect major issues in the practice of law itself. If legal issues are increasingly being worked out through negotiation instead of in a formal legal forum, then learning to develop and communicate creative solutions to complex problems collaboratively will benefit the profession as a whole. Learning to work well with other lawyers and professionals and to better understand the constraints and stresses they are under will enhance collaborative problem-solving and conflict resolution in the legal profession by exposing students to a greater variety of ideas and people prior to their entering the workforce.

4. **Comparison of Teaching and Learning Methods in Legal Academia**

This section explores the current state of the predominant teaching methods and learning styles in law schools. It provides the map on which law schools should consider the integration of studio or studio-like experiences. The methods have been divided into categories to help explain the context within which a studio course would sit.

4.1 Instructor-Centric, Guided-Discussion Models

Law school is known for Socratic discussions in lecture courses and seminars. The format relies on the guidance of the instructor, who delivers a comprehensive syllabus and sits at the center of the discussion for the entire academic period. In the implementation of legal studios, certain knowledge delivered in a lecture or seminar format must precede or accompany a studio project.²⁹

4.1.1 Lecture

Lecture, including the Socratic method employed from a lectern, has been the heart of law school for a century and a half.³⁰ It provides opportunities to learn doctrine, analysis, reasoning, and legal culture (or at least law school culture). Its main benefits include decades of established techniques and relatively low-cost structures. Its drawbacks are sometimes bluntly stated: “[L]ectures are widely regarded among legal educators as the least effective teaching method because they involve passive rather than active learning.”³¹

Lecture is primarily a listening exercise for students, who at times become paralyzed when the lecture morphs into a discussion. This situation can forestall learning for people whose styles diverge from that perceived norm. For others who are comfortable with memorization, the setting can give them a false sense of analytical ability and accomplishment.³² Because of the amount of information that must be conveyed on certain issues, legal studio professors will need to prepare and deliver lectures on occasion, but the intimate setting can relax an otherwise stodgy atmosphere and facilitate better discussions with engagement from more students more frequently.

29 The economist Paul Samuelson predicted in the mid-1970s that, with the ever-increasing amount of information law professors would need to convey to students, law professors would abandon the Socratic method and migrate to lectures. Byron D. Cooper, *The Integration of Theory, Doctrine, and Practice in Legal Education*, 1 J. ASS'N LEGAL WRITING DIRECTORS 50, 54 (2002) (citing Paul A. Samuelson, *The Convergence of the Law School and the University*, 43 AM. SCHOLAR 256, 270 (1974) (“Just imagine teaching topological dynamics by the Socratic method: you would scarcely get past Newton’s second law before the Thanksgiving vacation intervened . . .”).

30 Neumann, *Comparative Histories*, *supra* note 7, at 3.

31 Cooper, *supra* note 29, at 55.

32 *See id.*

4.1.2 Seminar

Seminars serve, in a sense, as scaled-down lectures with greater opportunities for communication among the students and the professor. The intimate setting tends to make students more responsible for the material, particularly in seminars with mandatory participation. Seminars may be seen as a perquisite for senior faculty who prefer to teach topics more in line with their interests than large lecture courses on more mundane topics.

Studios can have some seminar elements. For example, instructors may commence the studio with a discussion on a series of articles or resources in initial meetings. In the weeks that follow, however, students may become more responsible for gathering their own information and research and for presenting their findings in interesting ways that are relevant to the broader questions being asked.

4.2 Individual Practice Models

This category explores the transfer of research and practice skills for use by individual lawyers in their future work. These methods can be contrasted with the collaborative models in Section 4.3 below.

4.2.1 Legal Skills Courses

Legal skills courses teach a variety of topics, often through both individual and group exercises.³³ Common courses include legal writing, trial practice, and client counseling. Legal skills courses may use a similar small-classroom discussion format as seminars, with additional elements of individual or group simulations discussed below.

Legal skills instructors may struggle when choosing between teaching specific skills and framing problems that teach skills indirectly through creative exercises. Finding this balance in the studio overall can be difficult as well. Instructors should identify and teach skills on occasion during the studio process, just as legal skills course instructors may need to address unanticipated student needs.

33 Glenn Cohen, *Harvard Law's Curricular Reform: 3 Years In*, PRAWFSBLAWG (Dec. 8, 2011, 4:50 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/12/harvard-laws-curricular-reform-3-years-in.html> (discussing the types of skills that Harvard Law School seeks to teach its students in their winter-term "Problem Solving Workshop").

4.2.2 *Independent Studies*

Independent studies are a common learning method in law school. The student-driven topics and research, with close guidance and feedback from professors, make them in some respects the most studio-like method. Students may produce more *written* work in some independent studies than in studios, but studios advance the learning environment by introducing an additional element of student-to-student teaching and criticism that is unmatched. The studio also recognizes that not every moment of learning needs to result in a demonstration of that knowledge in a piece of writing with perfect citations.

4.2.3 *Simulations for Individuals*

More schools have begun offering practical simulations.³⁴ They provide an opportunity for students to begin to apply their knowledge to life-like situations, but present numerous issues as well. Creating simulations can be time consuming, and problems occasionally arise if unanticipated, but necessary, facts are left out, documents disappear, laws change, or errors in data surface. Students may also grow frustrated with simulations when they feel that they have learned the lesson but are nonetheless forced to complete the exercise.

The greater issue with simulations is that they are, by definition, not actual problems. They are carefully crafted visions of a legal situation that the professor has developed to advance a pedagogical objective. They do not typically require students to sift through piles of materials or to interview people to garner relevant facts. The simulated problem is carefully crafted to get right to the point the instructor hopes to convey, a benefit in some settings, but problematic in others.³⁵

34 See, e.g., Patrick G. Lee, *Law Schools Get Practical*, WALL ST. J., July 10, 2011, at B5, available at <http://online.wsj.com/article/SB10001424052702304793504576434074172649718.html>.

35 As a point of comparison, consider language-teaching techniques. The benefits of students listening to an actual dialogue in the target language are likely to be greater than listening to a carefully crafted dialogue. The latter lacks the natural speed, intonation, accents, and word choice of an ordinary conversation. The carefully crafted dialogue can, of course, be more useful if the students need to learn vocabulary or sentence structures that do not arise frequently in authentic material. The same can be said for legal simulations.

In formulating legal studios, the problems should more closely represent real-world situations. It is important to create opportunities to investigate a greater variety of possibilities and outcomes and to allow students to explore their own interests. The studio group starts out with a base of information and data, not dissimilar to the simulation, but students must then determine their direction and strike out to gather additional materials, with guidance to prevent straying from the broadly defined problem.

This arrangement poses the risk that students will not acquire, or perhaps even be exposed to, all of the skills or scenarios they might address in a more structured syllabus-based curriculum. Some students' projects also may not interest the critics, so the perception of favorites is an additional risk that can hamper learning.

4.3 Collaborative Practice Models

Law schools struggle to create and implement models that teach students to practice collaboratively to advance the interests of individual and organizational clients. Group writing exercises are a common first step towards this goal used in many schools, and simulations are gaining in popularity as well. Certain clinics provide a setting in which clinic instructors and students collaborate to solve complex problems for clients (a "hybrid" individual/collaborative practice model discussed in the next section). Northeastern University School of Law has been a leader in exploring and teaching skills to address both collaborative practice and individual practice.

4.3.1 *Simulations for Groups*

Simulations for groups are very similar to simulations for individuals, except that students must work collaboratively, at times with peers whom they might find difficult to work with (similar to real-world practice). They may be easier to build for a larger group because individual scenarios are not required for each person, but other risks are magnified. For example, an error in the data can leave the instructor scrambling to get the students back on track. Students may find the process frustrating if the scenario is unrealistic, if they have to

meet with too many different people, or if they are forced to explore an issue that does not interest them.

As discussed in greater depth below, studios can at times incorporate elements of simulations depending on the framing of the studio problem. The same critiques will apply in that setting. Instructors should consider how much time it will take to create these elements of the studio and whether they are detrimental to the goals of employing the studio method.

4.3.2 Organizational Client Project Model

Fifteen years ago, Northeastern University created a collaborative practice model for first-year students.³⁶ It focuses on advancing social justice through a project for an organizational client.³⁷ The team-oriented Social Justice Program is part of a broader program called “Legal Skills in Social Context” (LSSC).³⁸ It complements a parallel course “Legal Research and Writing,” focused on skills transfer to individual students.³⁹

Each year the Social Justice Program divides the incoming class into teams of twelve to fifteen students and assigns them to a project for an organizational client. The teams are referred to as *law offices*. In this model, a secondary learning experience takes place for upper-level students who serve as student instructors, called *lawyering fellows*, who guide the first-year teams through the process and lead seminar-style discussions on social justice topics.

The law offices’ clients range from international human rights groups to local charities. They submit proposals for work they may not be able to carry out themselves or to learn about topics they perceive are forcing their work to evolve. Outputs range from lengthy reports to manuals for laypeople to navigate complex legal issues that affect their lives.⁴⁰

36 Interview with Susan Maze-Rothstein, Dir. of the LSSC Soc. Justice Program, Ne. Univ. Sch. of Law, in Bos., Mass. (Aug. 2, 2012).

37 *Social Justice Program*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/academics/curriculum/lssc/social-justice.html> (last visited Aug. 8, 2012).

38 *Legal Skills in Social Context*, NE. UNIV. SCH. OF LAW, <http://www.northeastern.edu/law/academics/curriculum/lssc/index.html> (last visited Aug. 8, 2012).

39 *Id.*

40 See, e.g., Law Office 15, Ne. Univ. Sch. of Law Legal Skills in Soc. Context Soc. Justice Program, *Planning for Life After Special Education: A Transition Services Online Manual*, DISABILITY L. CTR. (Dec. 2012), http://www.dlc-ma.org/manual/LASE_manual.htm.

The law offices engage in conversations with the clients and other outside professionals to help frame the research and writing that they do on the project issue. The students then set out to learn how to research the relevant legal issues—perhaps through online research services, government publications, international human rights documents, books, and legal treatises.⁴¹ They then work together to write a large, practical document for the client.

The law office model differs from studios in several important ways that should inform the choice to choose, reject, or modify a basic studio format. First, similar to real-world practice, the students are not given a choice as to whom they represent or the project they build for the client.⁴² Second, the students must work together as a full, large team on a single project; they may do individual research, but the parts must fit together in the end. Third, the law office model introduces students to areas of the law and to populations that they may not otherwise investigate or get to know in law school.

4.4 Hybrid Models

Some teaching and learning methods offer hybrid models of individual and collaborative practice. These models are some of the most powerful and occasionally controversial methods used. It is in this category that legal studios fall.

4.4.1 Clinic

Clinics are currently the preferred experiential model. They provide students with first-chair (direct case management with the guidance of a licensed attorney) experiences working with clients and instructors to formulate solutions to a variety of problems.⁴³ Clinical formulations address a greater variety of topics than at any other

41 The research typically varies from the Legal Research and Writing course, which focuses primarily on case law and brief writing for simulated legal cases.

42 “Choice” in the studio sense should not be confused with having a lack of structure or a defined problem. Students may be allowed to choose to examine a small portion of a greater issue. They may choose to answer a defined legal problem using analyses in a manner similar to particular legal thinkers whom they admire. Or they may choose some of the parameters of a defined problem, such as exploring a topic in a particular jurisdiction or at a particular stage of a legal process.

43 Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C. J. L. & SOC. JUST. 309, 322 (2012), available at http://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bcjsj/32_2/JLSJ_32_2_web.pdf (citing Peter A. Joy &

time in history.⁴⁴ They often involve individual students representing individual clients, but many studios will incorporate collaborative problem solving and even team lawyering.

The most successful clinical experiences involve close mentorship, without which the students may feel isolated, often lacking the skills to provide competent, ethical legal services. As Harriet N. Katz explains, “[i]n the classic model for experienced-based teaching through critique by a mentor, the mentor has direct access to the work that the novice is creating and learning from, and this direct observation has been considered vital to the mentor’s effectiveness.”⁴⁵ This relationship is at the core of the studio experience.

Clinics, however, provide a glimpse into a non-episodic work environment, which a legal studio cannot match, unless configured to do so.⁴⁶ Studio instructors will struggle to replicate the first-chair experiences of clinic.⁴⁷ Even with real-world clients, the students’ output will not likely have immediate implications for their clients’ lives or may need additional attention to make it implementable based largely on the more organic discovery process of the learning method.

Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 494 n.5 (2002)).

- 44 Harvard Law School boasts one of the most extensive clinical offerings, with twenty-eight housed in the lavish new Wasserstein Hall. *A New Building for Teaching, Learning and Serving Communities*, HARV. L. SCH. (Dec. 9, 2011), <http://www.law.harvard.edu/news/spotlight/classroom/a-new-building-for-teaching-learning-and-serving.html>; see also *Clinics*, HARV. L. SCH., <http://www.law.harvard.edu/academics/clinical/clinics/index.html> (last visited Dec. 11, 2012). The scale of investment in this effort will likely go unmatched by all but the wealthiest schools. The studio environment can serve as a high-quality and low-cost alternative to teach many of the necessary skills of lawyering.
- 45 Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students’ Critical Reflection*, 5 CLINICAL L. REV. 437, 446 (1999) (citing Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: the Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 299, 325–28 (1981)).
- 46 Sandra Kaji-O’Grady, *Intensive Studios*, 95 ARCHITECTURE AUSTRAL. 44, 44 (2006) (“No architectural practice tackles just two consecutive projects a year Nor does any practice assume a cumulative and gradual process from conceptualization to a crescendo Yet this is what the requirements of equitable assessment in a semestertized timetable establishes [sic] as a normative design process . . .”).
- 47 See Joy, *supra* note 43.

4.4.2 *Law Incubators and Law Firms*

The academy has long considered implementing medical school models in law schools.⁴⁸ Some schools have begun to take these ideas seriously and are building *law incubators* or *law firms* at their schools.⁴⁹ They provide recent graduates with actual legal experience for actual clients—perhaps low-cost services for individuals or companies who would otherwise not have access to the legal community.

The fact that the students have already graduated makes the relevance of this category somewhat suspect. Moreover, law schools should question whether their purpose should be expending large amounts of capital to create firm-feeding programs when there are so many other unmet legal needs outside of firm practice. Adding to the potential problems with this model, the firms themselves may not be supportive of competition with low-cost services. This contention may not arise if schools focus on under-served populations. Moreover, incubator models that go beyond helping graduates to refine learned legal skills to teach new administrative and marketing skills for lawyer-entrepreneurs could be highly beneficial.

4.5 Comparison of Methods Based on Their Ability to Transfer Legal Skills

Many of the skills necessary for successful lawyering could be addressed in a legal studio setting. Table 4–1 on the following page compares law school pedagogical methods based on the effectiveness factors, within the eight umbrella categories, as outlined by Shultz and Zedeck.⁵⁰ The list is used primarily based on its ubiquity, and the examination of the methods is not objective. A more in-depth compilation and analysis would need to address additional important lawyering skills. For example, in the Northeastern University School of Law collaborative-practice social justice model, the school emphasizes skills such as investigative field research, persua-

48 See generally Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. & AM. L. REG. 907 (1933).

49 See Tierney Plumb, *A Law School-Run Law Firm*, NAT'L JURIST, Feb. 2012, at 22–23 (discussing Pace Law School's establishment of a law firm in the same vein as Chicago-Kent and City University of New York).

50 MARJORIE M. SHULTZ & SHELDON ZEDECK, FINAL REPORT: IDENTIFICATION, DEVELOPMENT, AND VALIDATION OF PREDICTORS FOR SUCCESSFUL LAWYERING, 26–27 (Sept. 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353554.

Table 4–1: Skill Development by Method

ASSESSMENT KEY √ Good method √√ Very good method √√√ Outstanding method ◇ Specifically designed for stated purpose Adapted from Shultz & Zedeck's 26 Effectiveness Factors & 8 Umbrella Categories*	Lecture	Seminar	Legal Skills	Clinic	Law Office	Part-Time	Full-Time	Studio
Intellectual and Cognitive								
Analysis and Reasoning	√√√	√√√	√√	√√√	√√	√√	√√√	√√√
Creativity/Innovation	√	√√	√	√√	√√	√	√√	√√√
Problem Solving	√√	√√	√√	√√√	√√	√√	√√√	√√√
Practical Judgment	√	√√	√√	√√√	√√	√√	√√√	√√
Research and Information Gathering								
Researching the Law	√	√	◇	√√√	√√√	√√	√√√	√√√
Fact Finding	√	√	◇	√√√	√√√	√√√	√√√	√√
Questioning and Interviewing	√	√	◇	√√√	√	√√	√√√	√√
Communications								
Influencing and Advocating	√	√	◇	√√√	√√√	√√	√√√	√√
Writing		√√	◇	√√	√√√	√√	√√√	√√
Speaking	√	√√	◇	√√√	√	√√	√√√	√√√
Listening	√√	√√	◇	√√√	√	√√√	√√√	√√√
Planning and Organizing								
Strategic Planning		√	√√	√√	√√	√√	√√	√√√
Organizing and Managing One's Own Work	√	√√	√√	√√√	√√√	√√	√√√	√√√
Organizing and Managing Others (Staff/ Colleagues)			√	√√	√√√	√√	√√	√√

* SHULTZ & ZEDECK, *supra* note 50, at 26–27.

ASSESSMENT KEY ✓ Good method ✓✓ Very good method ✓✓✓ Outstanding method ◇ Specifically designed for stated purpose Adapted from Shultz & Zedeck's 26 Effectiveness Factors & 8 Umbrella Categories*	Lecture	Seminar	Legal Skills	Clinic	Law Office	Part-Time	Full-Time	Studio
Conflict Resolution								
Negotiation Skills	✓	✓	◇	✓✓✓	✓✓	✓✓	✓✓	✓✓
Able to See the World Through the Eyes of Others	✓✓	✓✓	✓✓	✓✓✓	✓✓✓	✓✓	✓✓	✓✓
Client and Business Relations—Entrepreneurship								
Networking and Business Development			✓	✓✓	✓	✓✓	✓✓✓	✓✓✓
Providing Advice and Counsel & Building Relationships with Clients		✓	◇	✓✓✓	✓	✓✓	✓✓✓	✓✓
Working with Others								
Developing Relationships within the Legal Profession				✓✓	✓	✓✓	✓✓✓	✓✓
Evaluation, Development, and Mentoring			✓✓	✓✓	✓	✓✓	✓✓	✓✓✓
Character								
Passion and Engagement	✓	✓✓	◇	✓✓✓	✓✓	✓✓	✓✓✓	✓✓✓
Diligence	✓	✓✓	✓✓	✓✓✓	✓✓✓	✓	✓✓✓	✓✓
Integrity/Honesty	✓	✓	✓	✓✓✓	✓✓✓	✓	✓✓✓	✓✓
Stress Management	✓✓	✓✓	✓✓	✓✓✓	✓✓✓	✓✓✓	✓✓	✓✓✓
Community Involvement and Service			✓	✓✓✓	✓✓✓	✓	✓✓✓	✓
Self-Development	✓	✓✓	◇	✓✓✓	✓✓	✓✓	✓✓✓	✓✓✓

sion, teamwork, problem-solving, and self-awareness, among others.⁵¹ Variations could very well produce a superior learning medium for any given factor. The assessments are therefore best viewed side by side to reveal the relative strengths of the common forms of each method. The comparison provides a basic understanding of the best role for each method in an integrative law school curriculum.

There are many more practice skills than those included, but this chart is informative for purposes of this article. It expresses that real-world work experience in offices and first-chair experiences in clinic are superior to most other methods in a variety of areas. Where the studio format stands out is in analysis, reasoning, creativity, innovation, problem solving, research, speaking, listening, strategic planning, organizing one's own work (and that of others if the studio is formulated for group work), networking, evaluation, development, mentoring, passion, engagement, stress management (assuming that students will learn to manage stress by experiencing it), and self-development.

Based on this analysis, if the cost of studios is significantly less than clinics, the studio could serve a parallel role to the clinic to address skills transfer in areas in which it has a comparative advantage in terms of efficiency. Clinics should continue to serve their important role of providing first-chair experiences, advancing social justice for individuals, helping students learn to listen and interview, and engaging the students' diligence, integrity, and ability to see the world through the eyes of others. Studios are otherwise an excellent complement to the many other methods of teaching.

5. People, Problem, and Process in the Studio

The studio is a somewhat complex environment in which people, problems, and processes converge to teach students and to advance interesting topics in the field. This section provides an overview of these elements and how they potentially relate to the implementation of the legal studio.

51 Ne. Univ. Sch. of Law, Skills of a Successful LSSC Student 2011–2012 (course material on file with author).

5.1 People Engaged in the Studio Experience

Design studios contain a very specific vocabulary. Some of these concepts could easily be adapted to law school curricula to help distinguish the new type of learning in the academy.

5.1.1 Critics and Students

Critics are the instructors in a design studio for a small group of *students*. Studio critics are as likely to be outside practitioners (essentially adjunct professors, often paid as little as in legal academia) as they are to be associate or tenured professors. They find motivation to teach and lead a studio from a variety of sources. Many outside critics may want to reconnect with their alma mater, to expand their career options, to conduct a semester-long interview of possible employees,⁵² or to explore new design ideas. Associate and tenured professors share the same passion for teaching and research that drives academics in other fields.

Some design schools veer away from other academic programs in that they grant tenure or long-term contracts to some instructors as *professors in practice*,⁵³ a status that may entail teaching studio courses exclusively, or a combination of lecture, seminar, and studio courses. The status removes the traditional requirement of research and writing for academic publications and confers many, if not all, of the same job protections as “regular” tenure. The “academic” contribution of these professors in practice is usually the design projects in which their firms engage and the work they produce with their students in a studio setting, rather than pure written research findings.

Critics often choose to teach a studio based on trends in design or interesting design problems that they want to explore or that they have encountered in their practices. The problem could be based on technology, geographic location, project scale, multi-disciplinary collaboration, or integration of natural systems, among other topics. They take ownership over the studio as if they were the authors

52 In this sense, the critic is able to not only explore intellectual areas of interest, but also to teach potential employees some of their preferred methods of practice.

53 See, e.g., *Martha Schwartz*, HARV. UNIV. GRADUATE SCH. DESIGN, <http://www.gsd.harvard.edu/#/people/martha-schwartz.html> (last visited Dec. 18, 2012); *Peter Eisenman is the first Gwathmey Professor*, YALE NEWS, Jan. 15, 2010, available at <http://news.yale.edu/2010/01/15/peter-eisenman-first-gwathmey-professor> (noting a five-year appointment).

of its outcomes and frame the problem based on their professional interests and connections.⁵⁴

By exploring cutting-edge topics, the studio experience can be very engaging for both the students and the professors. If the issue is framed properly, the critics as well as the students will learn from the experience. The discussions expose the critic to new connections, and the students' research and ideas may be new to everyone involved.⁵⁵ The complexity of the design problems posed in a studio, which can be magnified by the students' choice of design intervention within the framed problem, typically means that students are introduced to complex topics and may need to "backfill" with common or ordinary knowledge or doctrine.

Based on this structure, students in a design studio are actively engaged in their own learning and the learning of their fellow students. They are in charge of uncovering the information that they need to learn and recognizing when to ask their peers for help. The learning moments typically happen at times when the students' interest in the topic is high or when they recognize a need to fill that gap in their understanding. They also unfold when students recognize issues in their peers' work and provide either solutions or feedback on possible processes to find solutions.

In addition to leading a studio, critics may also work with the students or their own firms to produce a publication of their work. Given the graphic nature of the design professions, the studio publications may appear not to contain "scholarship," but they are generally well regarded for their ability to advance conversations in design, to engender solutions to other problems, and to serve as publicity tools for the schools. These publications complement the more rigorous "article scholarship" in academic publications and "book scholarship" by publishers that full-time design professors pursue, similar to their counterparts in other fields.

The role of the critic in a legal studio would be similar, and the output therefrom could include academic articles, but would more

54 See Janine Shinoki Clifford, *PLANNING IN PARADISE II: URBAN REDEVELOPMENT—HONOLULU, HAWAII* (2005) (a studio publication directed and edited by a Honolulu-based practicing urban designer and critic at the Harvard University Graduate School of Design) (on file with author).

55 The author's own experiences in a first-year, studio-like course in law school dealt with educational rights for students with disabilities derived from interwoven federal and state bureaucratic structures, an area of law that none of the students had previously engaged in.

likely amount to shorter works such as research compilations (perhaps for future academic articles), strategic plans, or practice guides.

5.1.2 *Clients*

Clients may or may not play the same role that they would in a legal setting. They often provide a site location, project information, and funds to run the studio—perhaps including funding for travel to the site.⁵⁶ They may be the actual clients of the critics' firms, or the critics may have been assigned by the school to work with a particular client to explore an issue. Occasionally, the critics themselves act in the role of the client, or they may create an imaginary problem—in what could be likened more to a legal simulation course.

Clients participate in a studio for a variety of reasons. Most hope that the students will produce a creative and innovative body of ideas that may influence the clients' own work. Some want to better develop a connection with a school, to network (with professors and possible employees), or to gain charitable tax deductions that may help them explore and advance their other interests.

In adapting the studio method to lawyering, clients who have never been through the studio process before may find that the outcomes are not what they had anticipated. Schools must clearly communicate that the work product is that of students and that the explorations are academic in nature. The work of some students may be very basic if they start with less knowledge, experience, or raw talent relative to the other students; others are just not as committed to the work. Schools should inform the clients that they might not be able to rely on the work at all.

5.1.3 *Juries*

Law and design share at least one common word: *jury*. In design schools, the jury is a panel of practicing professionals, from both the private and public sectors, along with academic professionals in the same or related fields. Juries sit at reviews, typically known as *mid-term* and *final reviews*. Some jury members who sit on a mid-term review may return for a final review. The final review, which is meant

56 The main "client" may not be a funder or may not be the sole funder of a studio. Critics will seek out funding from foundations, professional firms, and corporations with a potential stake in the outcome (e.g., a software company could supply a new tool for the students to explore and critique).

to showcase the final work product from the entire academic period, often attracts even more highly accomplished professionals with a greater variety of interests.

Many of the same benefits and interests that motivate critics and clients also motivate jury members to become involved. In fact, the jury is usually made up of at least one person representing the client. For others, the setting is a great way to connect to exciting learning environments with interesting students and occasionally extraordinary and artful work. It is a great place to debate current topics with other professionals. In fact, many design professionals include sitting on juries as credentials on their curricula vitae. Moreover, academics often see sitting on a jury as a duty to support their colleagues at their own schools or elsewhere, with the expectation that they can later rely on their colleagues to critique their own studios.

If a studio is funded, the school will usually cover the travel expenses of the non-client jury members. Clients may agree to fund their own trips. Given the possible complications of arranging schedules and travel, schools must seek commitments from busy jury members for these important events as early as possible. Final reviews are planned out well in advance, just as final exams are in most disciplines. On the day of the review, given that a mid-term review is often scheduled for four to eight hours and final reviews are often six to eight hours, the schools should additionally expect to provide food, snacks, and breaks.

Law schools could definitely encourage the same jury critique of student work. The caliber of people gathered and the amount of time allotted to the presentation and critique would be very similar. The schools may, however, choose to adapt the critiquing process to meet the needs of a particular studio problem or group of students. Some work simply cannot be packaged into presentations, but will require a greater level of thought and one or two rounds of improvements before the work is considered final. In any event, a presentation to a professional jury will be valuable in almost all cases, whether during or at the end of a studio course.

5.1.4 *Studio Administrators*

The curriculum planning roles of *studio administration* and *support staff* differ slightly from other professional schools, based in part on the fact that studio courses are smaller in size than lecture courses. The popular studio options present a classic allocation problem with

multiple ways of addressing their scarcity. Some schools implement a simple system in which students rank the studios, offering three or more choices. They then fill slots at random from among students who ranked a particular studio highest, stepping down from those who chose the studio as their first choice to those who chose it as a second (and then third) if spots remain.⁵⁷

In law schools, the common method of allowing upper-level students priority in choosing courses is not likely to work well for studios because the option studios are almost never repeated. Administrators must balance these issues with the overall course plan, an issue explored more in-depth below. A secondary problem is that design studios are the dominant pedagogical element in a design school, and other courses are expected to bend around the needs of studio. The fact that studios often meet two or three times per week and typically require four hours per session exacerbates this influence. Administrators will find that interdisciplinary lecture and seminar courses with broad appeal may be difficult to coordinate.

In any event, law school administrators and support staff must be prepared to deal with the anger of students, and perhaps even the low-level injustice that the selection process causes. Schools comprised of more privileged, consumer-driven student bodies will find this process especially challenging.⁵⁸

5.2 Physical Learning Environments and Output

Space in design education can appear to outsiders to be ironically less well thought out than in other professional schools, whose leaders, consultants, and designers obsess over wood finishes, classroom hierarchies, and the technology of the moment—derived from trends that may leave schools trying to maintain the opulence and the

57 This system is flawed because it does not allocate based on the real level of interest students have in a studio. For example, a student who only wants a particular studio because it is in her core interest or geographical area would rank that studio first, while a person who is split between two studios equally will have to pick one of the two to rank first. The latter is equally likely to get the studio.

58 This trend has been decades in the making. See Christine Hurt, *Erasing Lines: Let the LRW Professor Without Lines Throw the First Eraser*, 1 J. ASS'N LEGAL WRITING DIRECTORS 79, 81 (2002) (“Students have become more prone to envisioning law school as a product that they, the consumers, are buying. Students demand classes that fit their schedules and lifestyles.”).

illusion of quality interaction.⁵⁹ The goal of space for design school studios is to recede to allow the students' work to be the center of attention. Fluidity and process in a realm of spatial freedom allow the constant turnover of ideas to reign. Obsession over materials, student-critic interactions, and technology pervade design education, but these media are the message in design school, with the employment of them comprising a core goal of design education and extending students' reach into new areas.⁶⁰

The primary physical output of design education within the studio setting is poster-sized printouts and drawings that can be seen by critics during presentations sitting up to roughly twelve feet away and some physical models (for design domains such as landscape architecture, architecture, and industrial design). Some students employ presentation technology, perhaps simply an overhead projector with slides full of graphics and some text. These resources are generally highly mobile or ubiquitous in the design school to allow them to follow the conversation.

Law students will also benefit from learning to speak graphically and to use their own visual creations to communicate complex issues during potentially high-pressure reviews (discussed more in Section 10.4 *infra*). These graphical representations are a medium, serving as external evidence of a larger problem-solving process. They are not as important as the internal understandings that students develop.⁶¹

Law school instructors may be uneasy with this level of visual engagement, but they should not shy away from challenging students to diagram, map, and even draw out their arguments. For presenta-

59 See *A New Building for Teaching, Learning and Serving Communities*, *supra* note 44.

60 For a discussion on the phrase "the medium is the message" and how we transcend scale by adopting new media, see MARSHALL McLUHAN, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* 7–21 (1964).

61 Gary L. Blasi explains the situation well:

These graphic representations . . . facilitate one person's independent solving of a design problem and serve as a medium of communication through which complex representations can be communicated and learned. It seems clear, however, that it is the *internal* representations of the problem and potential solutions that are key to expertise in architectural design. To use the language of Donald Schön's impressionistic study, the expert practitioner has "built up a *repertoire* of examples, images, understandings, and actions. Experimental findings tend to confirm the importance of structured internal representations."

Blasi, *supra* note 3, at 350 (citations omitted).

tions to be effective in a law school studio, the students should learn to produce informative and interesting presentations projected on an overhead (or plotted on large sheets of paper as in design school). Short sessions on giving effective presentations, designing basic diagrams, mapping data, and employing other technologies will advance students' arguments.

The ability to diagram and map complex ideas and phenomena will set these future lawyers apart from others in the workforce and allow them to solidify their ideas in their audiences' minds. Extraordinary insights often emerge with a visualization or mapping of data and events. The process unveils a range of possibilities and impossibilities, whether as future strategies or uncovered evidence. These insights often emerge during the mid-term and final reviews, discussed more below, when a particularly compelling image sparks an important thought in a critic's mind.

Beyond more graphical presentations, legal studio work will often have a written component. The work may develop over time, rather than having only one or two rounds of edits, as is the norm currently with written work. The critic and students should plan ahead to deliver some longer works to outside critics and jury members to review prior to engaging with the class in person. The ability to get feedback on a work in progress may ultimately save students time and lead to better written work in shorter periods of time.

In general, the quality of the output in a studio evolves throughout the term. Students will advance from very basic outlines and diagrams, as they fill in and rearrange their ideas to responding to the evolving and varied criticism.

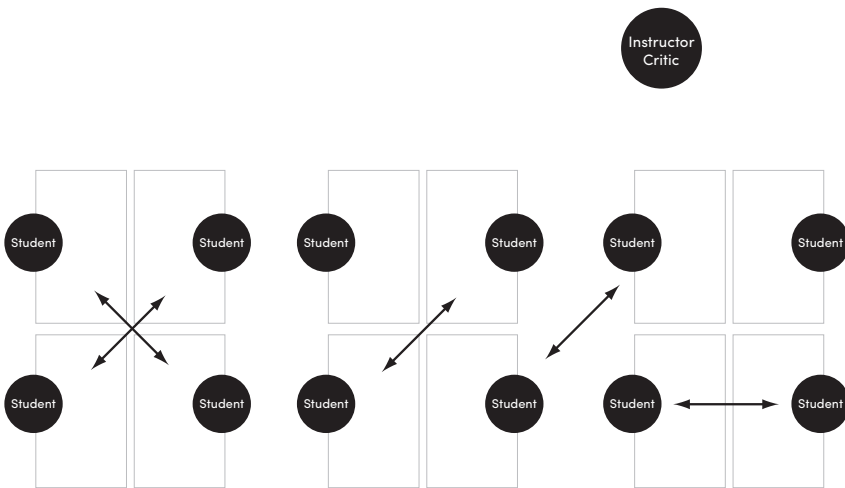
5.2.1 *Studio*

The physical setting is almost as important as the studio's people and its problem definition. *Studio* should be an actual place where students have permanent seating for the academic period. In most if not all design schools, the studio is a place for exploration, with space to pin up drawings almost anywhere fire codes allow. The spaces are used repeatedly, with thousands of pins and mounds of adhesives being stuck to the walls and removed every week. What would appear worn and abused to other departments and schools—particularly those like law and business that prefer an air of untarnished perfection (and even wealth)—is refreshed by the ideas and freshly plotted drawings that may blanket every plane in the building.

The spaces are often available to students twenty-four hours a day and are not infrequently used into the night and morning hours. Given the encouraged abuse of the spaces and the amount of work produced after sunset, the studio space does not need to be prominent or sun-drenched. For better or worse, schools frequently transform basements and back rooms into studio space, using basic drafting desks and stools. While students may find the setting miserable on occasion, primarily due to the workload, they often look back fondly on the long hours they spent together learning their craft.

The diagram on the next page depicts a full studio during an ordinary session in which students are working and discussing issues. The critic is available to the students and may begin making rounds to individual desks to discuss that student’s progress and process. Outside of meeting times, individuals come and go throughout the day and night, working on studio work or projects for other classes in their designated desk space. The hub of learning reaches beyond the studio course itself into other courses, which the students may be taking in unison or may have already taken. It’s a very different model from the “isolated reader” that popular culture depicts law students as.

Figure 5–1: Common Studio Desk Layout and Variety of Interactions Based on Spatial Arrangement



A similar collaborative space would be a core element of a legal studio. The depth of analysis, self-teaching, and peer-teaching will simply not take place without it. Readers may immediately begin to imagine an office environment, perhaps with unbounded and stationary cubicles, but the space can be more organic and less expensive. Very simple desks and stools in a simple classroom would more than suffice, and perhaps be more conducive to learning.⁶²

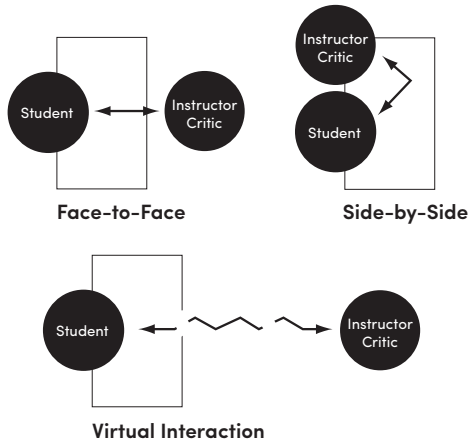
5.2.2 *Desk Crits*

Opportunities for critic interaction are numerous in a studio, but most important during individual critiques or *desk crits*. Critics must manage their time carefully to ensure that they give adequate attention to everyone. They should also be aware of the hierarchy that is created or eliminated simply by their physical proximity to the students.⁶³ Some critics might hold desk crits via teleconferencing using readily available screen-sharing and video chat tools. This offsite model could be especially useful for critics with busy law practices. If using any kind of advanced technology, law schools may need to have staff or a teaching assistant available to ensure that everything is running smoothly when the critic is ready to begin working with students.

62 The risk of theft in the studio space should not go unaddressed. Even schools who have security guards on the premises should take care to encourage students to either lock valuables securely inside their desks (if they have drawers) or to remove them from the studio each night. A classroom converted to a studio space could also have a coded door lock to serve as a simple, although not failsafe, security measure.

63 Most students will find the relationship that develops from one-on-ones beneficial, but law schools may want to have an ombudsperson available to students who have difficulty interacting with critics in this setting. Any number of common social tensions could arise in this setting, and law schools should be ready to deal with pressing interpersonal issues that arise.

Figure 5–2: Desk Crits and Other Student–Instructor Interaction

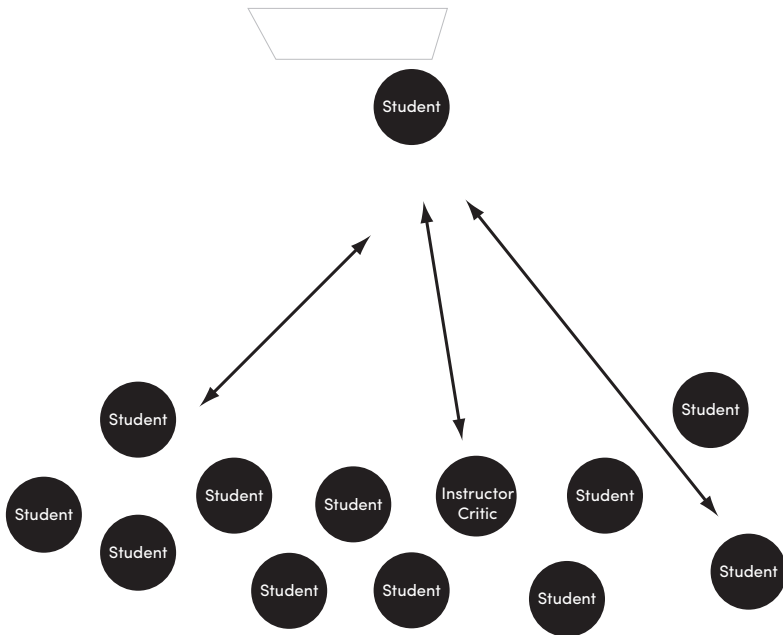


5.2.3 Group Crits and Pin-Ups

Fluidity and loose hierarchies spill over from the studio into other spaces occupied by the studio participants, particularly during *group crits* or *pin-ups*. In this model, students pin up graphical displays of their work that they plotted on large-scale printers, and the critic and other students have a discussion during a brief presentation. An individual's pin-up can last for ten to thirty minutes, depending on how much time has been set aside for each presentation. Pin-ups generally take place every three or four class sessions.⁶⁴

The hierarchy that is created in this pin-up model can be useful, but it can also cause some anxiety among students. At the same time, the frequent presentations help students to improve their speaking and defensive argumentation skills, which will help them manage these skills better when they enter the professional world.

⁶⁴ Pin-ups can be time-consuming, and if students are not well prepared, the conversations can drag for other students.

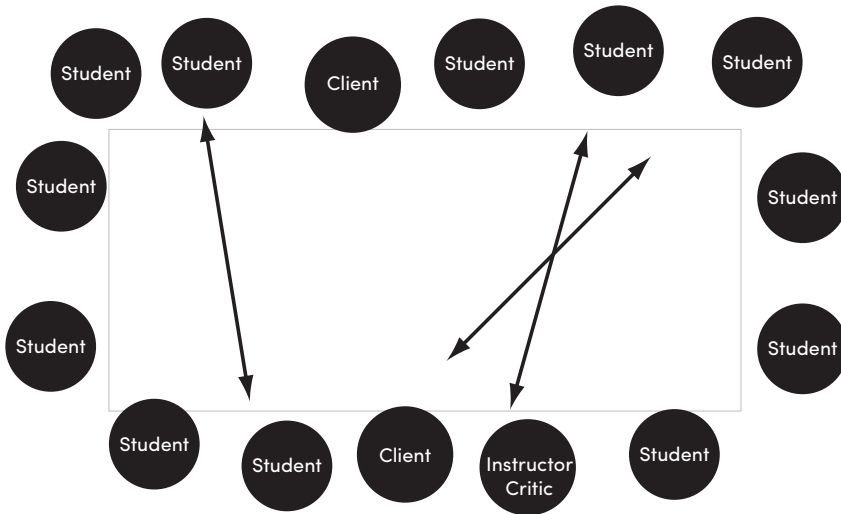
Figure 5–3: Common Hierarchy of Pin-Ups and Group Crits

5.2.4 *Charrettes and Client Meetings*

Charrettes and *client meetings* provide opportunities to collaborate with other people on interesting topics. Students may find themselves competing for client time, but the events are usually planned to be long enough to allow multiple interactions, with time to immediately implement some of the ideas. For traveling studios, the meetings can be an important moment for the critic to show the progress that is being made. They can also serve to manage client expectations if some of the students have taken their projects in directions that no one anticipated, perhaps fortuitously.

The work product during a charrette may be less formal than in a more formal presentation, but students should respect the time and opinions of those present. It may also be a very formal presentation to prominent professionals. The students may bring handouts to spread across a table or send their materials to the client and outside critics beforehand to review more in person.

Figure 5–4: Possible Studio-Client Interaction



Despite the diagram of this interaction as taking place at a table, the setting could also appear more like a pin-up or a final presentation. Students should be ready to adapt their presentations based on whatever setting they are about to enter. Critics should address the amenities available prior to the charrettes so that students can be prepared. A common setting for law students would be a client's conference room.

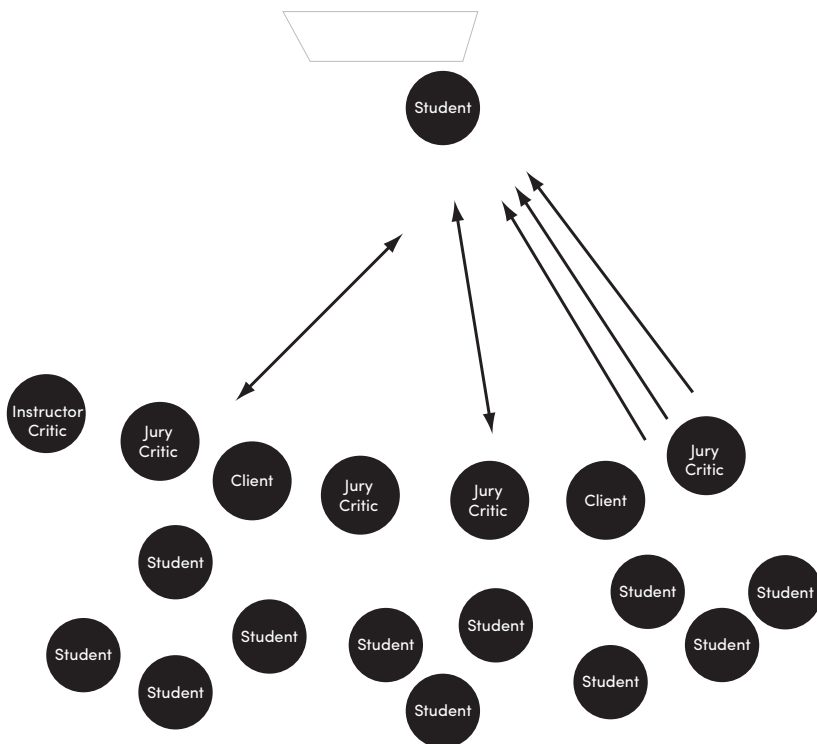
5.2.5 *Final Presentations*

The opportunity to frequently present an evolving project culminating in a final presentation can provide the students with plenty of practice in assembling arguments and defending their work, invaluable skills for a future lawyer. Almost every design studio experience ends in a presentation before a jury, who evaluates months of the students' hard work, sometimes in highly critical ways.

If students work together in small teams, they should also present as a team, at least at the final review. It may be relevant for students to present their own sections of larger projects that are complementary, but this decision will largely depend on the project. The biggest challenges posed in team presentations will be aligning students' working styles and habits and making sure that they give

themselves enough time to establish a uniform message. Critics may grow tired and bored if they are forced to listen to disjointed discussions for hours. The setting has the potential to be exciting and interesting if done right.

Figure 5–5: Common Gathering and Hierarchy of Mid-Term and Final Studio Reviews



This diagram portrays two bi-directional conversations with jury critics and one unidirectional critique with a particularly aggressive jury critic who lobes frequent comments at the student. An in-depth discussion of the beneficial and detrimental aspects of the jury experience is beyond the scope of this article, but discussion of the topic is explored in-depth in academic literature.⁶⁵ The most important lesson for the legal studio is the notion that presenting and defending ideas is very useful for students, but schools must be prepared

65 See generally ANTHONY, *supra* note 19.

to rein in unruly jury critics who use the forum to display their own prowess in the field.

One potential improvement over a common design-school custom would be to have the students revisit and refine their projects after the final review. This process will allow them to fully incorporate the feedback and may also alleviate *some* of the pressure and stress of making the final review as close to perfect as possible. This opportunity will be most important for written works that may be published, distributed, or relied upon in other contexts.

At the end of the term, students should be evaluated on a number of factors. First, a critic should have some sense of the level at which the student started and how well the student's knowledge, analysis, and strategies evolved. Second, the quality and persuasiveness of the student's written work and presentations should be evaluated. Third, a measure of the quality of the student's collaboration with the critic and other students is important to be noted, as is the student's willingness to share ideas, to teach others, and to listen. Finally, some note of the relative state of the student's knowledge in that particular subject matter should be shared at least with the student; this criterion will help the student understand that which she still may need to learn if she intends to practice in a particular area of the law.

6. Lessons for Law Schools from Design Studio Formulation

Critics, clients, administrators, and others will be involved in defining the studio problem. Examples from design studios are illuminating. One or two of the topics below typically frame the primary

studio question; however, it is not uncommon to have secondary or tertiary frames that guide the discussion, particularly during the initial exploration phase of the project. Students may additionally choose to limit the peripheral frame and to narrow the scope of their individual or group projects on those topics.

6.1 Professional Domain

A primary studio frame, often taken for granted, is the primary design domain of the project: e.g., urban planning, urban design, landscape architecture, or architecture.⁶⁶ The term “design domain” is easier to define than “legal domain.” In law school, the more apt term addresses the doctrinal divisions that law schools have been using for the greater part of a century and a half: civil procedure, property, criminal procedure, etc. The utility of migrating these same divisions into a legal studio format is limited, and a pure approach could negate many of the benefits of the legal studio. Ignore them during the formulation, at least at first.

In planning the studio, the goal is not to be ready to teach every substantive issue or skill, but to locate resources from which students can teach themselves. The greatest risk is that critics who do not properly plan to critique, rather than teach, may instead create a mini-lecture course in which the professor spends more time teaching students specific doctrine and less time guiding the students in their own learning.

Teaching students traditional law school topics in a small group or one-on-one can be very beneficial to them personally, but it can be a costly and time-consuming approach. Nevertheless, it will be

66 Some people may not question this design domain frame, but issues may arise if a student from another discipline (even within the same school) wishes to take a particular studio. The program’s students and the critic may perceive that that student took a coveted spot or lacks the necessary skills to engage seriously in the work. Contrarily, some studios offer opportunities for students from multiple disciplines within the school to collaborate. Because the studios make up the core of design education, many design schools do not allow students from other parts of the university to participate in them. Contributing factors to this exclusion include: the difficulty of sharing costs across schools, the need to create a studio-centric academic calendar, and the distribution of even scarcer resources (both physical studio space and the number of students a single critic can meaningfully guide), which hinder schools’ ability to help students achieve their degree requirements. Law school studios may benefit from allowing students from outside disciplines to participate in a legal studio.

impossible for the critics to break entirely from these divisions. At a minimum, studio instructors should resist the temptation to relay substantive, doctrinal, and skills course themes into the studio framework directly. Thinking through these topics cannot be avoided, and they will inject themselves at opportune times in unanticipated ways.

6.1.1 *Traditional Substantive Law and Doctrinal Divisions*

Upon learning about the studio approach, open-minded administrators and instructors may initially think, “Let’s teach an intellectual property or a bankruptcy studio!”⁶⁷ This framing fails to respond to the fact that the practice of law is not so easily divisible into tidy categories. Or, if it is, that the students still need practical skills injected into their common courses.⁶⁸ The studio is an excellent forum in which to overcome these problems.

In the case of a so-called “bankruptcy” studio, what the critic would really be teaching is the situation of a debtor or a creditor seeking help from the court in a non-Article III federal forum for issues that may largely turn on complex issues of state law and federal pre-emption—perhaps even on the local rules of the court. The critic could enrich the studio even more by introducing state-court decisions, choice-of-law questions, and even non-legal analyses (such as finance).

“Bankruptcy” is merely a forum to escape or vindicate property rights. This type of studio is better projected as an adversarial project with the opportunity perhaps to enter a negotiated realm. Such a studio would be remiss if it ended with teaching the process and procedure of bankruptcy without a greater discussion on the impact of debt on society and the morality of the American cultural imperative to pay debts.⁶⁹ This formulation provides an excellent example of how the studio can address both theory and practice.

67 Replace either topic with the name of any common law school course.

68 See, e.g., William R. Slomanson, *Pouring Skills Content into Doctrinal Bottles*, 61 J. LEGAL EDUC. 683, 689 (2011–2012).

69 See, e.g., DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* (2011) (discussing the history of moral imperatives to pay debts).

6.1.2 Professional and Technical Skill Divisions

Establishing a studio theme based on either professional or technical skills could be beneficial. The most important factor will be to place these skills in a real-world, not simulated, context. A better approach would be to have resources available to students who find that their research or project necessitates a new skill.

Critics could either bring in outside instructors to help the students through the process or could provide them with shorter printed materials that they could easily consume.⁷⁰ As mentioned above, the role of the critics should not be to provide mini-lectures to individual or small groups of students.

6.2 Core Studio vs. Option Studio

A studio's designation as a *core studio* or an *option studio* influences the other frames below. Core studios are similar to the first-year doctrinal courses of law school; they aim to introduce students to key concepts of that particular design profession—both theoretical and technical skill frameworks.⁷¹ The instructors may package the transfer of skills within one of the other frames⁷² to acculturate the

70 Business schools frequently provide background notes that describe important topics in fifty pages or fewer. See, e.g., Benjamin C. Esty & Aldo Sesia, *An Overview of Project Finance and Infrastructure Finance—2009 Update*, HARV. BUS. REV. (June 21, 2010) (providing “an introduction to the fields of project finance and infrastructure finance, and gives a statistical overview of project-financed investments”).

71 See, e.g., 4.152 *Architecture Design Core Studio II*, MIT ARCHITECTURE, <http://architecture.mit.edu/architectural-design/course/architecture-design-core-studio-ii> (last visited Dec. 18, 2012) (“The Core 2 studio builds on the Core 1 skills . . . [of] geometry, representation, abstract structural and inhabitation issues . . . and expands the constraints of the architectural problem to include issues of urban site logistics, cultural and programmatic material, and long span structures The site remains the same for both design problems ensuring that the students’ understanding of the urban context (cultural and formal) builds up over the course of the semester.”).

72 For example, the studio is infused with communications skills, starting with learning to ask the right questions during the client interview process and later by realizing what problem areas and possible solutions must be conveyed. Law schools must develop these same skills in students. See Marie A. Monahan, *Towards A Theory of Assimilating Law Students into the Culture of the Legal Profession*, 51 CATH. U. L. REV. 215, 243 (2001–2002) (“Communication skills involve not only the ability to communicate ideas well, whether in writing or orally, but also the ability to assess the audience and adapt the communication

students to what lies ahead in option studios and to make the process more interesting and engaging.⁷³

The skills-based frameworks, scorned somewhat in the preceding section, may play a greater role if the studio format is adapted to core law school courses. A more likely near-term scenario will keep some skills and doctrine in traditional lectures and seminars. These courses could be adapted to better respond to the questions arising in more involved option studios in more complex areas of the law.

6.3 Physical Scale

Each of the design professions embodies inherent conceptions about the scale at which they work. Some professions straddle more than one scale.⁷⁴ Closely related to framing by design domain, many instructors consider carefully the scales across which the students will engage. In fact, the physical scale of the design studio project is often the driving element, but most studios will transcend scale, zooming in and out at least peripherally to answer various questions pertaining to the project site or specific frame. Legal studios should be no different.

When lawyers think of scale, they often think of federalism and the interplay or divisions between governments at various levels of society. They may additionally consider the number of clients in a particular case or the size of an organizational client. The studio environment could provide a more in-depth vision of these scales than simply studying jurisdictional splits in case law, or the nuances of

to a particular individual or setting. The ability to communicate effectively allows lawyers to resolve problems efficiently with minimum stress, misunderstanding, or hostility.”). In a legal studio, students would have even more opportunities to explore and communicate their ideas.

73 Because the professions perceive this knowledge to be core to the profession, schools may repeat core studios from year to year and evolve them slowly. Because the knowledge is indeed common, associate and adjunct professors are perhaps more likely to teach them—unlike in law school where tenured professors often guide first-year doctrinal courses. Option studios, on the other hand, are rarely repeated, and tenured faculty and notable outside professionals tend to lead them more than associate professors. The similarity to law school would be to have judges lecture on major topics and adjuncts teach first-year legal skills courses.

74 For example, landscape architects work at the residential scale and at the regional scale. Urban designers may work on piecing a single urban lot into the greater fabric of the city. Urban planners may work regionally or within a neighborhood.

federal and states courts. The formulation of a project that has complex relationships among various individual and group stakeholders could benefit students.

6.4 Place

The most memorable part of studios for many students is the locations in which they are set, and critics pick them deliberately. The context of the people, infrastructure, architecture, and natural systems of that place inform the design interventions. Being in the “Detroit studio,” the “Battery Park studio,” or the “Senegal studio” becomes shorthand for how students are spending their academic period. These labels convey images of what a studio is about, regardless of the design domain or scale—which could be a regional landscape architecture study in the Detroit metropolitan area or a neighborhood urban design project in Dakar.⁷⁵

Like the design studio, place matters to law. Choosing a jurisdiction, and perhaps switching jurisdictions halfway through the academic period (even the state of residence of one party), will be one of the most powerful teaching methods in the studio. Critics could steer the project away from the familiar realm of the students’ own region to a drastically different place with unique laws that could overturn the entire project. The implications of justice may become especially apparent in a situation like this one. If many of the facts remain the same (e.g., the location of assets), but some other element of jurisdiction changes, the studio gives the students the opportunity to explore intricate multi-jurisdictional issues in ways that memorizing the minority and majority rules that arise in the casebook-driven podium courses do not.⁷⁶

6.5 Systems

The influence and manipulation of natural and human systems (including the legal system) are often as important in the studio problem as are the static design solutions that are proposed at any scale.

75 The labels may signify an option studio if the core studios typically lack exciting locales. They could mean that the students will travel or have traveled to the site, which typically makes the studio even more realistic and memorable.

76 Such a switch could be likened to a design studio in which the city is changed (and thus all of the zoning and other regulatory mechanisms) or some physical element of the site is altered (such as a steep slope on part of the site the students initially explored as a flat space).

Time necessarily becomes a key factor as well with the introduction of systems into the definition of the studio. A regional studio could focus on reconnecting waterways and riparian corridors, and a city-scale studio could focus on transportation needs. The two may even overlap. The temporal analysis of these systems could explore seasonal changes in the systems, what the systems once were and may become, and how they can be repaired over time through integral interventions.

Design and law share systems. The law creates and protects them—both natural and social. Framing a studio based on a system that affects people’s lives could be interesting and beneficial for students and stakeholders. For example, the federalist systems through which people in need seek food, housing, and financial assistance have major implications on law and society. Both the rights and the processes through which people obtain rights have the ability to efficiently and effectively change people’s lives. A studio could explore those processes and envision paths to improve them.⁷⁷ The opportunity to explore constitutional government frameworks and restraints on government power would be ideal. The difference between a “law office” model, like that at Northeastern University, and a studio would be based largely in the choice that students make in exploring a particular system or a particular aspect of a critic-chosen system. Lost in that choice, when no client is present, is the client’s framing of a particular subset of systems to be explored.

6.6 Theoretical and Historical Foundations

Studios often explore even greater time scales through introspective and retrospective analyses of the profession. Like all professions, design follows trends, with new theories and revisited histories cycling through the decades. Studios may seek to explore the implications of one or more of these theoretical approaches. Students studying conflicting theories such as landscape urbanism and new urbanism enter their profession with a clear idea of the political challenges that await them in the real world.⁷⁸ In many ways, theo-

77 Northeastern University School of Law has performed many similar projects over the years in their Social Justice Program. See Social Justice Projects Abstracts by Category, NE. UNIV. SCH. LAW, <http://www.northeastern.edu/law/academics/curriculum/lssc/abstracts.html> (last visited Aug. 10, 2012).

78 See generally Leon Neyfakh, *Green Building: Are Cities the Best Place to Live? Are Suburbs OK? A Fight Grows in Urban Planning, with Harvard at the Center*, Bos.

ries are the history of design and of law, and the remnants of those theories are found scattered throughout our cities, our laws, and our institutions.⁷⁹

Many of the theoretical and historical movements that have shaped law began in other disciplines, particularly the social sciences such as psychology, economics, and public health. Studios that study these same movements and apply them to real-world thinking about the practice of law will meet the goal of teaching theory through practice. An excellent example would be to examine the outcome of a studio project through the lens of a movement, such as law and economics, and then to critique that movement's understanding of the issues.

6.7 Big Thinkers and Leaders

Related to the theoretical and historical frames are studio themes based on the work of famous design professionals and leaders who influenced the fields. The work of these people is occasionally considered to be its own theory or history. As examples, Frank Lloyd Wright, Robert Moses, Frank Gehry, Jane Jacobs, and le Corbusier are famous in their own right, and their work, theories, and legacies continue to affect design dialogue and outcomes. Studios may draw substantially or peripherally on their influence.

Law has its own share of stars. A studio could examine the methods and styles of one or two big thinkers and then apply the same style to the students' practical work.⁸⁰ The studio approach would begin with the exploration of the styles of one legal star; students would then try to advocate in the same manner. A subsequent step in the studio could be to respond to that approach through the eyes of another legal star. Think of David Boies debating Ted Olson on a complex family or election law issue.

GLOBE, Jan. 30, 2011, http://www.boston.com/yourtown/cambridge/articles/2011/01/30/green_building/?page=full.

79 Law contains similar trends (*e.g.*, legal realism and critical legal studies), which larger trends in other professions have influenced.

80 The idea behind this approach is demonstrated in part in a recent legal writing book. *See* ROSS GUBERMAN, POINT MADE (2011). Guberman categorizes writing styles into punchy themes and then provides examples from the briefs of many famous advocates.

6.8 Experiences of People

Design schools are naturally inclined to focus on spatial and temporal explorations. The activities that take place on those sites, which usually address the needs of human beings, are referred to as *program*. By zooming in or out on a site or by exploring a site throughout its history, the focus on actual people can get left behind. The usual lack of a real-world client, whose circumstances are directly and immediately affected by the students' work, further distances students in a studio from the human elements. Urban planning and urban design studios are often more engaged in exploring and addressing the needs of current and future stakeholders.

Far more than the design studios do, law studios must focus on the experiences of people. Studios should investigate injustice, advocate for fairness, and distribute legal knowledge to greater numbers of people in society.

6.9 Examples of Design Studios

Three design studio examples follow. The first provides an idea of the vast scale differences a single studio can address.⁸¹ The second explores a site of historical importance that has experienced an evolution based on its ever-evolving context. The third provides a people-centric studio at several urban scales that is specifically formulated to force the students to grapple with each other's ideas and to collaborate on a solution.

6.9.1 *Example 1: Large-Scale Understanding of a Region Leading to Small-Scale Intervention*

An example of one option studio with possibilities for students to explore multiple scales was called "Tools for Conviviality," led by critics Lionel Devlieger and Lucia Phinney at the University of Virginia School of Architecture in 2011.⁸² The project had a broad theoretical ecological/industrial component and a smaller scale public interest goal. The project "sought to understand the wood industry in

81 Michael Levy Bajar, *The Fluidity of Wood*, UNIV. VA. SCH. ARCHITECTURE LUNCH ONLINE (2011), <http://www.arch.virginia.edu/lunch/print/systems/levy.html> (last visited July 18, 2012). In relation to footnote 14, *supra*, Bajar provides a good example of how architects occasionally endeavor into the realm of industrial design.

82 *Id.*

Virginia and how its waste products might be reused.”⁸³ The studio drew from research on two industries involved in the reuse, recovery, demolition, and processing of wood and “mapped various flows of wood between initial states, used products, and disposed ends.”⁸⁴

The project’s results were surprising in that the team found that the two industries did not discard substantial amounts of wood waste in landfills.⁸⁵ Understanding the regional impact could improve specific materials used in construction and other industrial products, particularly when they are discarded or processed for recycling. Several students put microelements of this new knowledge to specific use by designing and building “a new wheelchair-accessible picnic table and a wood screen that separates the patios from cars approaching the loading dock” for the Mountainside Senior Living facility.⁸⁶

A legal studio along similar lines could explore the exploitation of government-owned natural resources, water rights, public bidding/procurement requirements, environmental law, administrative law, or the regulation of interstate commerce. Students could branch out into an area that interests them most, and then come back together, if the project were so established, to present a more unified vision of the law of renewable natural resources.

6.9.2 *Example 2: Medium-Scale Project on a Cultural and Historical Timescale*

In the Fall of 2012, critics Eelco Hooftman and Bridget Baines at the Harvard University Graduate School of Design led an option studio called “A Parallel Walden: A Landscape of Civil Disobedience.”⁸⁷ The problem definition stemmed from *starchitect* Remment Koolhaas’s recent remarks that he was going to abandon his study of urbanism to focus on countrysides.⁸⁸ The critics of this option studio chose to begin their retro-flection at their “base-camp” at the historic

83 *Id.*

84 *Id.*

85 *Id.*

86 Megan Dierolf, *U.Va. Students Improve Garden Patio at Mountainside Senior Living*, CROZET GAZETTE, June 4, 2011, <http://www.crozetgazette.com/2011/06/uva-students-improve-garden-patio-at-mountainside-senior-living/> (discussing the work of Ryan Ives, Delia Kulukundis, Sophia Lee, and Sydnor Scholer).

87 *GSD Course Bulletin – Fall 2012 – STU-01402-00*, HARVARD UNIV. GRADUATE SCH. DESIGN, <http://www.gsd.harvard.edu/cgi-bin/courses/details.cgi?term=201220&course=STU-01402-00> (last visited Dec. 18, 2012).

88 *Id.*

Walden Pond near Boston, Massachusetts, which was made famous by Henry David Thoreau.⁸⁹ The broad goals to explore de-urbanization and to understand the cultural context at this edge—of not just urbanity/nature but also of time marked by Thoreau’s poetic documentation of a point of no return—are refined further by the specific goals of the project. As the course description states:

After a forensic autopsy of Walden Pond and environs students are invited to produce a new manifesto for a parallel Walden and transform a 35-acre former landfill adjacent to Walden to act as catalyst for change. The intent of the studio is to re-activate the notion of Walden as cultural manifestation and provide expression of new emerging concepts of hyper ecology.⁹⁰

The historical setting was therefore intended to influence the results of the studio, but with the goal of transforming a large landfill nearby to complement the importance of the site.

A legal studio on this topic could discuss nuisance law, historic preservation, environmental remediation (under the federal and state regimes), waste management, takings law, and the various incentives for communities to take up such projects. Students could produce information resources for communities to take action to remediate and improve otherwise unusable land.

6.9.3 *Example 3: Examining Urban Scales to Explore Perceived Edges*

The descriptions of the preceding studios as they are exhibited to the world focus more on substance than studio process and pedagogy, but a legal studio should necessarily draw on the impact of the law on people’s lives to help students understand their own assumptions about the state of society. In the 1980s, Professor Thomas A. Dutton of the Department of Architecture at Miami University developed a studio project that attempted to address the layers of education from substantive design and course content to the “unstated values, attitudes, and norms [that] stem tacitly from the social relations of the school and classroom as well as the content of the course.”⁹¹ His the-

89 *Id.*

90 *Id.*

91 Thomas A. Dutton, *Design and Studio Pedagogy*, 41 J. ARCHITECTURAL EDUC. 16, 16 (1987).

ories examined the ideology of the substantive course knowledge and “the social practices [that] structure the experiences of students and teachers.”⁹² The studio plan is still relevant to pressures faced by communities today.

The studio deals with a mixed-income residential development in a diverse urban neighborhood at the edge of relatively high- and low-income communities.⁹³ Dutton chose housing because of the multiple assumptions that people make “about shelter design and its provision and linkages to the workings of society, but the organization and direction of society itself.”⁹⁴ His hope is that students will realize that they play a role “as active agents in the production of meaning and knowledge.”⁹⁵ He welcomes conflict and deliberation that follows from working on a project on a complicated site with existing development⁹⁶ and gives each student veto power over any decision⁹⁷ so that they must all come to consensus decisions about the future of the site and the residential development.

This particularly studio has the potential to be repeated in subsequent years. A version of it could even be adapted for a law school studio on the topic of real estate development, local governance, state/local regulation, tax incentives, or other topics.

7. Common Elements in Legal Studios

This section briefly lays out some of the common structural elements that would be important for all legal studios. A section on the substantive divergences follows it.

7.1 Collaborative Space

One of the key benefits of studio pedagogy is the environment in which students work. It provides opportunities for them to teach one another, to debate tough issues, and to form bonds. The environment is the antithesis of the quiet reading environments that most people would consider essential for the study of law.

92 *Id.*

93 *Id.* at 19.

94 *Id.* at 20.

95 *Id.*

96 *Id.* at 21.

97 *Id.* at 20.

7.2 Limited Class Size

Studios are necessarily limited in the number of students critics can effectively guide. They can accommodate approximately fifteen students, but to do so would be unrealistic for a single critic. Contrarily, with fewer than six students, the studio may not be able to explore as many issues as the critic would like. A more sensible number of students would be eight to twelve. This figure is based on the critic's ability to address each student's work individually during desk crits and also the ability of the students and juries to respond to presentations by all of the students in a single sitting.

7.3 Outside Expert Engagement

The engagement of outside experts is essential to the studio experience. At a minimum, they should be a part of review presentations to give the students exposure to the opinions of a diverse group of people. A legal studio may choose to avoid the critical jury model of review, but the experts should still play a regular role in the studio.

8. Structural Divergence Among Legal Studios

This section explores some of the common decisions that legal studio critics will need to make to establish a studio project. The first section deals with the continuous and discontinuous relationships that cascade through and direct the work of lawyers, particularly in western society, and that affect the lives of the people they serve.⁹⁸ Section 8.1 portrays a ladder of relationships with four rungs. If a studio problem moves up or down into more than one of the relationship categories, the critic has an opportunity to show students how descending into the lower of the four categories can be damaging to a client, hindering progress made at higher levels. Beyond these relationships, whether the studio has a client, real or imagined, will guide the relationship and learning experience.

98 Lawyers may have continuous relationships with clients, but the particular legal problem posed typically concerns a continuous or discontinuous relationship that the client has with a third party.

8.1 Divisions Based on Continuous and Discontinuous Relationships

Continuous relationships are those “extending beyond the moments when the partners are in face-to-face interaction with each other.”⁹⁹ When clients have, for example, partners or co-litigants, they have continuous relationships. Their goals and methods for achieving them may align, or they may enter into complex negotiations to balance competing aims.

Discontinuous relationships are those that cease after the completion of a necessary interaction. They can be adversarial, with face-to-face conflict,¹⁰⁰ or they can involve a third-party adjudicator or mediator who sorts through the issues and guides a decision before ending the relationship. If law constructs continuous and discontinuous relationships, the studio format can explore those relationships to varying degrees of success.

These designations are used here in place of common terms such as “deal-making,” “transactional work,” “dispute resolution,” “litigation,” and “judgment,” which are both narrower in their topics and broader, in that they encompass greater bundles of skills and norms than simply an understanding of the relationship the client has with the third parties. They also tend to focus, perhaps unnecessarily, on traditional firm models of work, which can impede the students’ understanding of the many ways in which lawyers do or could work.

By framing a studio in part based on the types of relationships that are involved, the instructor can help guide the students through a greater range of outcomes than simply conveying pre-packaged information about how to “win in court” or to “get the deal done.” In fact, the categories that follow can cascade into one another when aligned goals diverge. The parties may fail to reach agreement and enter a dispute-resolution process. An outsider may then need to help resolve the conflict.

99 Stuart J. Sigman, *Handling the Discontinuous Aspects of Continuous Social Relationships: Toward Research on the Persistence of Social Forms*, 1 COMM. THEORY 106, 106 (1991).

100 Joel F. Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270, 1276 (1983).

8.1.1 *Continuous Cooperative Projects*

Continuous-relationship, cooperative projects are those in which parties seek the same larger goal and assemble legal strategies to attain it. No party fixates exclusively on a single way of reaching an agreement (which could end the studio experience if a real-world client insists on that sole path). The goal of the critic is to help students to identify common solutions, to build effective legal strategies, and to communicate and sell the best and highest path forward.

These projects could perhaps be characterized as “aligned-goal” projects, whether a single aim or a comprehensive agenda, often in the realm of advocacy. They could be employment relationships, housing, public benefits, etc. The projects begin to overlap with negotiated projects when the aims of the parties begin to diverge. Politics, resources, leadership succession, law changes, and sufficient sub-goal attainment can all lead to rifts that shift the parties into negotiated roles or end the continuous relationship.

8.1.2 *Continuous Negotiated Projects*

Lawyers help clients develop strategies for the negotiation of projects that are not necessarily adversarial. Continuous-relationship negotiated projects offer some of the best opportunities around which to frame a studio problem. This type of studio would allow students to explore topics and to apply new or unknown strategies to complex problem solving that even the clients may not envision. Critics could help students identify zero-sum scenarios alongside “both/and” options, in which the parties’ needs are assessed together and positive synergistic outcomes are sought.

Because people will have a specific stance that may not be in line with others’ expectations, issues will arise during these types of studios if multiple actual parties are not available to serve in the roles of stakeholders. If their roles are simulated, the same problems discussed above in sections 4.2.3 and 4.3.1 may arise as well.¹⁰¹

Negotiated projects could range from complex business deals to custody/property disputes in families. They could explore the

101 For these types of negotiated simulations, the critic must carefully define what the parties want and what they are willing to give up to receive something in return. The studio version of a negotiated simulation should differ from common negotiation simulation courses in that real-world problems with authentic materials should serve as the basis of the project.

law-making functions as well, in an examination of how multi-part legislation is advocated for, crafted, passed, and approved. These types of studios could also be used to build strategies for stakeholders not directly involved. They could also explore the necessary agreements that must be put in place to allow fiduciary organizations to invest directly with enterprise in the real economy.

8.1.3 *Discontinuous Adversarial Projects*

Discontinuous adversarial projects include cases, disputes, and problems.¹⁰² To build a studio project around these adversarial issues, the project must either be with a real client on an actual problem with a real adversary, or some of the parties must be simulated. Deciding how much control the critic wants a simulated adversary to have will affect the outcomes and may defeat the real-world exploration the studio is meant to engage in. Despite the approach to incorporating parties' interests, the studio becomes a win-lose format, unless at some point the relative bargaining positions of the parties motivate them to re-enter the negotiation stage to end the conflict.

The biggest critique of studio pedagogy as applied to law school will likely be derived from the perception that a studio would be ill-equipped to teach students how to deal with this particular type of adversarial work. Admittedly, disregarding cost, clinics may provide a better first-chair learning setting. Studio, however, may beat out clinics with respect to allowing students to develop strategies outside real-world time pressures and to applying theory to a variety of situations (or a variety of theories to a particular situation).

Studio students can still get "first-chair thinking," even if they do not necessarily get the more procedural "first-chair doing."¹⁰³ The possibility of using studio for these projects is enhanced for civil conflicts, which are more time flexible (within the statute of limitations) than criminal projects, and for projects that require few resources.

Adherents to critical legal theory are perhaps more likely to grasp this fact and the power of the studio for this type of legal work, perceiving that the outcomes of adversarial projects are not pre-ordained,

102 See JOHN M. CONLEY & WILLIAM M. O'BARR, *RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE* 29 (1990) (discussing the need to think about certain legal problems based on their informal or formal inceptions).

103 This point is meant in no way to discount or disparage the real need to understand procedure and its impact on substantive outcomes.

or that, if they are, that there are still strategies that must be taken to evolve the law. The application of the theories of legal thinkers such as Peter Gabel and Paul Harris would be well placed in the studio.

As one example of their ideas that could be explored in a studio, they argue that “the legal system is an important public arena through which the State attempts—through manipulation of symbols, images, and ideas—to legitimize a social order that most people find alienating and inhumane.”¹⁰⁴ The studio would provide an excellent forum in which to explore their outline of “the ways that lawyers can effectively resist [the state’s] efforts in building a movement for fundamental social change.”¹⁰⁵ Students could develop a variety of in-court and out-of-court strategies to reveal injustice in a particular case.

In the studio, students could brainstorm and work with practitioners on pre-trial and trial strategies, perhaps even collaborating with clinics or law firms on a variety of interesting issues, where ethical considerations permit. The studio could even start by examining an adversarial case, dispute, or problem and then zoom out to explore some of the broader implications of that type of conflict.

8.1.4 *Discontinuous Adjudicatory Projects*

Cases, disputes, and problems often involve people, other than client advocates, not directly in conflict with one another.¹⁰⁶ These people can be mediators, arbitrators, judges, and less formal dispute managers. These roles can vary depending on the cultural context and the resources of the clients.

These projects could take on various forms. For example, in Massachusetts, the Supreme Judicial Court is required by statute to examine the entire record of first-degree murder appeals and may raise issues *sua sponte* that the defendant’s counsel did not address.¹⁰⁷ Students could work on a project reviewing these types of cases in

104 Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370 (1982–83).

105 *Id.*

106 *Id.*

107 MASS. GEN. LAWS c. 278, § 33E (“In a capital [first-degree murder] case . . . the entry in the supreme judicial court shall transfer to that court the whole case for its consideration of the law and the evidence. Upon such consideration the court may, if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require (a) order a new trial or (b) direct the entry of a

approximately the same manner as the Supreme Judicial Court does. Such a studio could teach substantive and procedural criminal law, appellate advocacy approaches, evidentiary standards, court rules, complex legal research, and opinion writing. A second or parallel activity in this studio could discuss the impact of the criminal law on social justice.

Critics have an opportunity in these types of projects to address the idea that many interactions in the law are not formally recorded in the judicial system¹⁰⁸ and that clients may seek resolution outside the formal system.¹⁰⁹ Students must grow to understand that, for clients in the judicial system, relevant facts get left out of the record based on the rules of the court, laws of evidence, and the lack of access to full knowledge.

8.2 Client Involvement and Immediacy of the Studio Project

A client-based model could introduce real-world needs into the studio problem. It also has the potential to attract funds to help advance project goals. With real clients and real facts, the studio would avoid the issues of simulations, which will still appear in studio projects without actual clients. The students will also be exposed to more of the ethical issues that may arise during representation.

The legal community's receptiveness to the method may affect how involved the client is or can be in the process. Having actual clients can complicate the formulation of a studio. If the work were not meant to be "legal" work, careful communication and structural barriers would need to be established between the clients and the students. Otherwise, schools may need to deal with malpractice liability and conflicts of interest, a situation no different from many other types of experiential pedagogies.¹¹⁰

Client expectations will need to be carefully managed. Funding of the studio could complicate these expectations. Schools must

verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence.”).

108 CONLEY & O'BARR, *supra* note 102, at 3.

109 *See id.* at 24.

110 Clinics that focus on providing services to people of little financial means can rely on the student-practice rules in many jurisdictions, whereas the studio's work might need to be carefully funneled through the critics and licensed attorneys for studios that are formulated for organizational clients or clients with means. These issues are not insurmountable, and schools like Northeastern have been successfully taking them on for more than a decade.

clearly set out that most of the work done will be that of students and that it should be informative, but not a conclusive answer to the problems they seek to solve. In fact, the projects occasionally veer from the vision of the clients due to the nature of the method.

8.2.1 *Actual Clients with Current Projects*

The formulation would be closest to Northeastern University's law office model discussed in Section 4.3.2 above for organization clients. It would parallel in some ways the clinic model for both individual and organizational clients. The immediacy of the outcomes is the main motivating factor in the framing of these projects. This client-studio formation could be labeled as the "expertise" model.

The key difference of the studio is that it allows the students, as individuals or small groups, to explore multiple options based on the clients' facts, rather than answering a specific legal question and presenting if-then paths. It asks the students to imagine a realm of possibilities, with responses the client may not have considered. The work product is likely to contain more strategic options than a comprehensive vision. This style of project has been particularly successful for first-year students through Northeastern University School of Law's social justice law office model.

Some clients may be willing to fund studios in this realm, but the fact that the students are working on different ideas and at differing levels of competency, clients could feel that they did not receive adequate value for their money. Schools and critics need to manage these expectations.

8.2.2 *Actual Clients with Prospective Projects*

This formulation will probably be the most common for client-based studios. The immediacy is largely removed, and the client can be more forgiving. It is here that the students are allowed to explore and make mistakes. It is also the formulation in which the clients will be most engaged in exploring the outcomes, which might be novel and will help the client move forward with a vision. It is the creativity, coverage, and volume of the work, not necessarily the expertise, which the clients seek out, making this client-studio formation perhaps the "visionary" or the "unforeseen options" model.

8.2.3 *Actual Clients with Past Projects*

Some clients may be willing to provide actual facts, documents, and firsthand knowledge to a studio for a pedagogical exploration, even interviewing with the team during the process. The main benefit of this approach is to avoid the need for a critic to simulate client interactions and desires. A drawback is that the client may be less engaged than she would be in a project with future implications. The client's perception of the past event may also change over time. She may even forget certain aspects of what happened.

This formulation could still be highly useful for the opportunity to hear real stories and assemble actual materials.¹¹¹ The client-studio formulation could perhaps be referred to as the "look back" or the "what if" model.

8.2.4 *Projects with Imagined Clients*

Studios can use imagined clients as well, but the critic must take care to mitigate some of the issues that arise with simulations. The critic could relay the client information, but should refrain from creating facts without knowing the record or documenting new information that is simulated. Making students stick to an actual record of information is probably far more realistic in many ways, and if there are missing facts, critics can have the students substitute imagined facts that take them down a more interesting or challenging analytical path.

Another option would be to have someone act as the client throughout the academic period. Critics would perhaps unfairly manipulate the students if they withheld that the client was imagined or that this person was a stand-in for an actual person. It might not be in the students' best interest if they fear making mistakes or spend more time worrying about issues such as strict diligence than legal exploration. Clinics and other models are better suited for these necessary learning experiences. To avoid the problems of simulations, the most important aspect for a studio of this nature is to have adequate authentic client materials "on the studio record" to make the work life-like and to force the students to seek out relevant information.

111 An example could be a client who lost her home in foreclosure due to a particularly egregious loan product who wants to contribute to the movement to keep others from going through the same process.

8.2.5 *Critic as Client*

Another possible client exists for legal studios: the critic herself. In this formulation, the critic poses a problem of interest to her and her particular field and uses the studio as a sort of “research seminar.” The studio could produce a publication on their findings, or the critic could take the research and employ it into her own academic scholarship or professional practice. These studios are more likely to be policy or advocacy based, but they could offer the students a chance to delve into important doctrinal and substantive areas of law that they will encounter in their careers. By placing the critic in the role of client in the eyes of the students, she will have authority to make decisions and to guide the group. She can also address various ethical issues that arise or could arise with a real-world client in similar situations.

9. Comparative Cost of Studio Instruction¹¹²

Studios would be neither the most expensive nor the least expensive learning method in a law school, but they would provide good value in the teaching of core skills. Even with the current cost structures, legal studios could be beneficial, but their benefits could carry over into a new realm of sponsorship. For the reasons discussed in the client overview of Section 5.1.2, some organizations and individuals may be willing to sponsor studios to answer complex questions.

In the design professions, funding can range from several thousand dollars per studio to \$50,000 or more, with a median perhaps in the \$10,000 to \$20,000 range. In balancing the need for funds with the academic freedom to use them as the critics and students see fit, the schools will need to track how any sponsorship influences the outcomes of the studio. On the whole, the academy will likely find that the funding mechanisms are beneficial.

The cost of legal studios may reduce the cost of educating students in certain legal skills. The changes in the demands of the

112 This section is not an in-depth quantitative analysis of instructor costs. The figures discussed herein and the methodologies of comparison are far from perfect. The important point to take from the analysis is that a properly structured studio would meet many pedagogical goals and remain cheaper than other forms of teaching. In fact, it goes without saying that a funded studio with little or no cost would certainly be more cost effective than any other method.

instructors during a studio are different and may provide opportunities for low-cost or pro bono teaching. A well-managed studio could reduce or eliminate certain teaching burdens on professors and adjuncts, including traditional exam grading (especially time-consuming final exams, which require written evaluations at some law schools), office hours, and rigid schedules. By reducing these burdens, more professionals could play an active role in teaching students, whether for an entire academic period or simply during major project reviews.

9.1 Cost of Instruction Comparison

Law schools spend a substantial amount on instruction. Erwin Chemerinsky, Dean of the School of Law at the University of California, Irvine, has stated that salaries for his recently established faculty amount to seventy percent of the school's budget.¹¹³ Table 9-1 on the next page explores the range of costs for legal instruction using the predominant teaching models—clinics, lectures, and seminars—and compares them to studios.

The analysis is meant to show that the vast improvements that studios could make in teaching necessary legal skills is worth their relatively low cost. It seeks a common, although admittedly simplified, metric for comparison of key pedagogical methods. It estimates the range of instructor salaries from high to low and assesses the distribution of that cost over the number of students in a particular course based on a common number of credit hours per course. While law schools' structures will vary, a few key lessons emerge.

113 Erwin Chemerinsky, *You Get What You Pay for in Legal Education*, NAT'L L.J. (July 23, 2012), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202564055135> ("At my law school [University of California, Irvine], about 70 percent of the budget is faculty and staff salaries and benefits.").

Table 9–1: Comparative Costs of Key Pedagogical Methods¹¹⁴

Key Inputs	Number of Students per Course			Median Credit Hours per Course	Cost per Instructor per Course		
	Small	Median	Large		Low	Average	High
Clinic	5	8	12	6	\$15,000	\$50,000	\$75,000
Studio	5	12	15	8	1,000	40,000	150,000
Seminar	5	15	25	3	15,000	50,000	75,000
Lecture	5	50	175	3	15,000	50,000	75,000

Small Class Sizes	Cost per Credit per Student			Studio Cost Comparison			Lecture Cost Comparison			Clinic Cost Comparison		
	Low	Average	High	Low	Average	High	Low	Average	High	Low	Average	High
Clinic	\$500	\$1,042	\$2,500	1900%	150%	-33%	-50%	213%	-50%	-95%	-60%	50%
Studio	\$25	\$417	\$3,750				-98%	25%	-25%	100%	7%	100%
Seminar	\$1,000	\$1,111	\$5,000	3900%	167%	33%	0%	233%	0%	100%	-68%	100%
Lecture	\$1,000	\$333	\$5,000	3900%	-20%	33%				100%	-68%	100%

Median Class Sizes	Cost per Credit per Student			Studio Cost Comparison			Lecture Cost Comparison			Clinic Cost Comparison		
	Low	Average	High	Low	Average	High	Low	Average	High	Low	Average	High
Clinic	\$313	\$1,042	\$1,563	2900%	150%	0%	213%	213%	213%	-97%	-60%	0%
Studio	\$10	\$417	\$1,563				-90%	25%	213%	7%	7%	7%
Seminar	\$333	\$1,111	\$1,667	3100%	167%	7%	233%	233%	233%	-68%	-68%	-68%
Lecture	\$100	\$333	\$500	860%	-20%	-68%						

Large Class Sizes	Cost per Credit per Student			Studio Cost Comparison			Lecture Cost Comparison			Clinic Cost Comparison		
	Low	Average	High	Low	Average	High	Low	Average	High	Low	Average	High
Clinic	\$500	\$694	\$1,042	1900%	108%	-17%	-50%	629%	629%	-95%	-52%	20%
Studio	\$25	\$333	\$1,250	0%	0%	0%	-98%	250%	775%	100%	-4%	-4%
Seminar	\$1,000	\$667	\$1,000	3900%	100%	-20%	0%	600%	600%	100%	-86%	-86%
Lecture	\$1,000	\$95	\$143	3900%	-71%	-89%						

114 These data are based on a number of conversations with administration officials at Northeastern University School of Law. The *relative* figures are meant as a baseline discussion point and not a precise understanding of the costs of legal education.

First, lectures are clearly relatively inexpensive when large numbers of students are assembled or when instructor salaries are high. Unfortunately, many students do not learn effectively in lectures, which shifts the cost of educating them into other areas of the law school or onto their future employers.

Second, clinics are expensive, but offer value when schools want to keep class sizes small overall. The most important reasons not to supplant clinics with legal studios include providing a first-chair experience to students and addressing the needs of underserved populations in a community.

Third, studios appear to be more cost effective than all of the other methods except in three areas: (1) lectures with median or large class sizes and average to high salaries; (2) clinics employing the most expensive instructors, who tend to cost less to employ than the most expensive studio instructors; and (3) seminars with large class sizes and high instructor salaries.

As discussed in Section 4, studios would be better than lectures and clinics at teaching several important skills. And studios are a great to teach smaller groups using average to low-cost instructors. Even with the inherent cost savings, the cost of the studios could be reduced further through outside funding, which could make them one of the most attractive options, especially if the funds come attached to a notable critic for the term. The primary detriment is that they may not give students the first-chair client experiences, dealing with immediate real-world legal problems, that a clinic would.

9.2 Facility Cost Comparison

The cost of renovating or constructing studio space—if a school were to choose to provide students with static space for their projects—and the expenses associated with larger instructor-to-student ratios will be the primary hurdles when integrating studio-based curricula into law schools. These expenses could preclude the use of studios as an integrative part of the *core* curriculum, relegating them to an upper-level feature.

Schools that feel pressure to expand their facilities for current law school pedagogies will do so at a cost in excess of building studio space. Clinics will continue to be the most expensive model for instruction and for facilities. Studio provides a cost-effective alternative for some but not all skills taught in clinics.

10. Building Institutional and Cultural Infrastructure for Studios

Law schools have most of the resources they need to implement studios in some form. The real challenge will be in dealing with some of the administrative and cultural aspects of the medium in a law school context.

10.1 Power Dynamics and Professor-Student Hierarchy

Critics will need to be even more aware of the power and control they wield over this small team. Many students will be nervous, especially in the beginning, about presenting their nascent legal knowledge to experts in the field. The instructors and any juries should take great care in discussing topics fairly with students and should help the students to feel safe in an unfamiliar environment without being condescending. Schools should seek out instructors from diverse backgrounds to help students experience and understand how power dynamics affect the practice and learning of law.

The design professions have sometimes struggled more than the legal profession to incorporate women and minority viewpoints. Design schools have worked to increase their faculty diversity, but the use of practitioners as studio critics can pose a problem in that the old power structures that have existed for centuries in the working world may linger longer than in the universities. Drawing from the most well known people in a field for a legal studio may make the field of excellent critics appear smaller than it actually is. There are perhaps more opportunities in the law for exposure to a greater variety of viewpoints, but the schools must actively promote individuals of color, women, sexual minorities, and other marginalized groups in the selection of studio critics, jury members, and outside guests.

10.2 Student Competition

Design studios are known for their competition, which is based in part on the design professions themselves (and some designers' desire to "brand" themselves). Lawyers have some of these problems,

but the types of competition are different. In a studio, competition among law students will likely be greater if the students' projects are too similar. Critics should be careful to allow students enough variation in their own processes and project choices to provide safe places for students to explore their interests at their own pace.

10.3 Jury Selection and Interactions for Presentations

Similar to the instructor issues in the preceding section, schools should take care in selecting jury members and should provide the juries with a handbook on preferred interactions and a general idea of where the students are in their work and their law school careers. Schools may want to consider foregoing the jury presentation process altogether, opting instead for more frequent meetings with outside critics throughout the academic period.

10.4 Teaching Students to Speak Graphically

Most people who have experienced a studio environment would point to the importance of visual and graphical representations of ideas, often resulting from a tactile exploration. While the desire for students to speak graphically should not be overstated for a legal studio,¹¹⁵ teaching law students to communicate better graphically will improve their abilities to think, organize, and communicate.

Lawyers' products may be their words, but lawyers are not forbidden from communicating graphically in most instances (other than in some court briefs and memoranda). In all other instances, conveying visual messages can greatly improve outcomes for clients and help lawyers advance their careers.

To convince law students to want to learn to speak graphically should not be difficult, but to convince law school administrators that it is a valuable skill for lawyers will be. Schools should consider teaching basic graphic design software including, Adobe Creative Suite products, especially InDesign, Illustrator, and Photoshop. These tools can help the students present their written work better, giving

115 See Webster, *The Architectural Review*, *supra* note 19, at 277 ("Architectural drawings are accepted as the central means by which architectural ideas are objectified and communicated through shared readings. However, it was clear from observing the reviews that verbal skills also had a central place in the communication of ideas.").

them a sense of the importance of design to readability and comprehension in briefs.

10.5 Bidding for Studios

Allocating scarce studios can be a difficult problem. A better system than having students rank their choices or letting them race to register would be allowing them to weight their interest in various studios. Many options exist for this type of allocation.¹¹⁶ Naturally, students will seek ways to game any of these systems, and allocation is never perfect.

10.6 Managing Stress and Maintaining Health Can Be Difficult

It cannot be overstated that the studio approach to education is one of the most rigorous, demanding, and rewarding learning environments. Students realize quickly that they may not sit idly or quietly. They must work and engage in conversation about their ideas constantly. The stress in this environment, if not managed well, can cause health problems. In addition to the stress levels, the communal environment within which studio students typically work may increase the spread of communicable illnesses. These public health issues should be part of the dialogue on how to proceed.

10.7 Evaluation Options are Numerous, Subjective, and Rarely Uniform

Opportunities for evaluation are plentiful in a studio environment. They are one of its greatest strengths. Students will evaluate each other in studio throughout the academic period. The instructor

116 In one such system, a “currency” of sorts could be used to allocate studio resources. Students could be given 100 points to allocate among their choices, and the administrators would give the choices to the students at whatever “price” they put down from the largest amount set on down, until the studio is full. Schools offering studios to more than one class year of students would have to choose whether to use the same diminishing basket of points over several years or to renew the basket each year to put students at different year levels on par with one another. The former system would likely disadvantage the students in their final year most because they would have already spent some of their points—at least in the first year the program is implemented. After the system is established, the effect would be to give second-year students priority, but third-years would have already been given that benefit the year prior, unless they bid low and kept their points for third year.

should provide feedback along the way and at the end of the course, after the jury critique is completed. Schools should encourage the development of narrative evaluations, perhaps as part of the students' permanent records.

From the reverse perspective, student evaluation of instructors can cause issues as well because of the small number of people evaluating the instruction at the end of a studio. Anonymity can be difficult to maintain. The weight that schools attribute to the assessments must be examined. Having two bad reviews in a class of 50 students will not seem as surprising as having two bad reviews in a studio of ten students. New methods for evaluating instructors appropriately should also be developed based on a particular law school's culture.

11. Conclusion

The analyses underlying law and design are more common than most people realize. Yet the two professions teach their crafts very differently. While the legal academy has seriously considered adapting other professions' teaching and learning methods, such as medicine and business, design has remained a distant thought. Yet the design studio format could provide an excellent alternative to teach many core lawyering skills. While not a pure replacement for lectures, seminar, and clinics, the studio could serve as an integral component of the broader curriculum. This article has demonstrated that both the greater benefits in certain areas and the lower costs make the studio a viable option. For schools that want to engage students in self-exploration and creativity in a safe zone before they step into a world of obstacles, the studio is an excellent option.

Experiential Education in the Lecture Hall

*Jessica Erickson**

I. Introduction

Legal education today is composed of two separate worlds. The first world includes clinical faculty, law skills faculty, and other related faculty. These faculty members have long embraced experiential education, and they organize and attend conferences like the “Experience the Future” symposium, hosted by Northeastern University School of Law and the Alliance for Experiential Learning in Law. The other world includes people like me—doctrinal faculty members who are still largely teaching the way we always have. As we see it, our role is to teach doctrine and legal analysis, leaving skills training and other experiential teaching to others. Experiential education is simply not a part of our professional conversation.

It is only a slight exaggeration to say that these two worlds never meet. They speak in the hallways and they sit in the same faculty meetings, but they rarely meet as educators to discuss their collective ideas on how to teach their students. As a result, while different models of experiential education have been debated, studied, and critiqued by one group of legal educators, it is largely ignored by the other.

This divide matters when it comes to educating our students. Doctrinal faculty members still comprise a majority of the full-time faculty at most law schools.¹ Most observers of legal education would probably agree that doctrinal faculty still teach a majority of the credit hours at most law schools. And, through sheer numbers if nothing

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1 See ASS'N OF AM. LAW SCH., THE AALS DIRECTORY OF LAW TEACHERS 2011-2012 (2011).

else, they likely still control the curriculum at most law schools.² The move to reform legal education cannot happen without engaging doctrinal faculty. This Symposium Article sets out my own views on the limitations of the current approach to teaching in legal education, as well as possible opportunities for improvements.

In my view, experiential education has not made more headway among doctrinal faculty for at least two reasons. First, many doctrinal faculty members see their role as teaching doctrine, not teaching a broader array of skills. Professors already cannot cover all of the important doctrinal rules in their courses, so they are loathe to sacrifice doctrine to promote other learning goals. Second, many doctrinal faculty believe that there is no need to use experiential methods to teach doctrine. The case method is the norm, and we are rarely pressed to think about other teaching methods.

Curricular innovation requires dismantling both of these beliefs. Experiential learning is not just appropriate for the relatively few skills courses in law schools. It is the best way to teach all material in law schools, including doctrine. To have a deep understanding of the law, students must be able to use the law to craft legal arguments, draft legal documents, and shape legal strategy. A student who has memorized the rules but who cannot apply them in these ways does not know the law in any satisfactory way. Students do not acquire this deep understanding of the law through passive methods of instruction. Students learn by experiencing,³ and doctrine is no exception.

Framing experiential education as good teaching can help increase its appeal for many doctrinal professors. Doctrinal professors may have a hard time understanding why they should bother with experiential learning methods. Without the proper context, these methods can feel gimmicky, raising a concern that professors are sacrificing intellectual rigor for classroom amusement. Encouraging

2 The point here is not that doctrinal faculty *should* control the law school curriculum. That is simply the reality today at most law schools, and the movement for more experiential education must address that reality. See, e.g., Deborah Merritt, *Core Faculty*, LAW SCHOOL CAFE (Mar. 24, 2013, 8:58 PM), <http://www.lawschoolcafe.org/thread/core-faculty/> (noting that “tenured and tenure-track professors form the core of a law school faculty” and that, although clinical faculty may often vote on curricular issues, “their lack of tenure and lower status, however, make them more cautious about their votes and the opinions they voice”).

3 See *infra* Part I.B.

professors to think instead about good teaching may break down some of the mental barriers to experiential methods.

This Essay argues that the push for experiential education in law schools is really a push for better teaching. Part I explains the relationship between experiential education and student learning. Part II explores different ways to use experiential education in traditional doctrinal courses. Part III examines ways to foster a culture of experiential education among doctrinal faculty.

II. Experiential Education as Good Teaching

In my experience, doctrinal professors remain skeptical of experiential learning methods because they have accepted a well-rehearsed narrative. According to this narrative, experiential learning methods are designed to teach skills, not doctrine. We all know that classroom time is precious, so if we teach skills, we sacrifice opportunities to teach doctrine. This trade-off hurts our students because they can learn skills on the job, but law school is their only chance to learn doctrine. As a result, doctrinal professors should focus on teaching doctrine and leave experiential methods to the educational fringes of the curriculum.

This Part dismantles this narrative through three related points. First, the debate about experiential education is really a debate about student learning. Second, even if the goal in the classroom is just to teach doctrine, students learn doctrine better when professors use experiential teaching methods. Third, to the extent that doctrinal professors want their students to leave law school with other higher-order proficiencies, students can best acquire these proficiencies through experiential learning methods.

A. Focusing on Student Learning

The current model in legal education is teacher-oriented.⁴ Doctrinal professors focus primarily on course content. The more content we cover, and the more rigorous our content is, the better we can assume our classes to be. This focus is not surprising. After all, law

4 See, e.g., SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467, 471–72 (2012) (“[L]aw schools still largely abide by a teacher-oriented pedagogy. A teacher-centered pedagogy impedes student success since its main flaw is that ‘it focuses on how teachers teach without taking into account how students learn.’”).

professors are experts in the content—all of our training and research has focused on it. In contrast, many law professors know little or nothing about teaching and learning. Perhaps we have gone to a few workshops on pedagogy, but our knowledge in this area still pales in comparison to our knowledge of content. As a result, when we think about our teaching, we generally think about content.

This focus misses the real goal of education. At the end of the day, professors do not want simply to cover the material. Instead they want to ensure that students are learning the material. If they evaluate themselves honestly, most professors would probably admit that their students are not learning as much as the professors had hoped. Professors often talk with disappointment about their students' exam answers or contributions in class. Yet, they may not be sure how to improve this situation, so they just vow to teach the doctrine more thoroughly the next time around. This strategy never answers the crucial question—if we are quite sure that we taught the material, why do the students not seem to be learning it?

To really improve legal education, professors must focus more directly on student learning. What do we really want students to learn in law school? And, just as importantly, how can we ensure that they are actually learning what we want them to learn? In other words, if the goal of teaching is to facilitate learning, we have to spend as much time (or more) thinking about *how* we teach as we do thinking about *what* we teach.

B. Teaching Doctrine

Even if the only goal of doctrinal courses is to teach doctrine, how can we best accomplish this goal? There are few empirical studies of the effectiveness of different teaching methods in legal education.⁵ Research from other disciplines, however, sheds considerable light on this question.

5 For examples of some of the existing studies, see Andrea A. Curcio et al., *Does Practice Make Perfect? An Empirical Examination of the Impact of Practice Exams on Essay Exam Performance*, 35 FLA. ST. U. L. REV. 271 (2008); Eric A. DeGross, *Training Tomorrow's Lawyers: What Empirical Research Can Tell Us About the Effect of Law School Pedagogy on Law Student Learning Styles*, 36 S. ILL. U. L.J. 251 (2012); Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Development*, 9 U. ST. THOMAS L.J. 325 (2011).

Cognitive scientists have collected data showing that students learn best when they are actively engaged in the material.⁶ The human brain cannot store everything—we simply see and experience too many things in our everyday lives to store everything that we encounter in our long-term memory.⁷ Given this limitation, our brains assume that, if something is important, we will spend time thinking about it. As a result, information gets into our long-term memory only if we spend time thinking about and processing the information.⁸ In other words, memory is not a product of what students want to remember or even what they try to remember. Instead, students remember what they think about.

This observation explains a common frustration of professors. We often wonder why our students fail to remember material that we *know* we covered in class. The answer may be that the information never made it into our students' long-term memory.⁹ The students did not have to think deeply about the information so, as a result, their brains did not think the information was important enough to store in long-term memory.

This research explains why active learning methods are so successful. When we ask students to apply course material in a problem or case study, we are really asking them to think about the material. This process of intellectual engagement is more likely to get the information into students' long-term memory. Accordingly, even if our only goal is to have students remember doctrinal rules, active learn-

6 See, e.g., SUSAN A. AMBROSE ET AL., *HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING* (2010); DAVID A. SOUSA, *HOW THE BRAIN LEARNS* 266 (4th ed. 2011); DANIEL T. WILLINGHAM, *WHY DON'T STUDENTS LIKE SCHOOL: A COGNITIVE SCIENTIST ANSWERS QUESTIONS ABOUT HOW THE MIND WORKS AND WHAT IT MEANS FOR THE CLASSROOM* (2009); JUDY WILLIS, *RESEARCH-BASED STRATEGIES TO IGNITE STUDENT LEARNING: INSIGHTS FROM A NEUROLOGIST AND CLASSROOM TEACHER* (2006).

7 See WILLINGHAM, *supra* note 6, at 42–44.

8 See *id.*

9 See Michelene T.H. Chi et al., *Self-Explanations: How Students Study and Use Examples in Learning to Solve Problems*, 13 *COGNITIVE SCI.* 145, 175 (1989); Fergus I.M. Craik & Robert S. Lockhart, *Levels of Processing: A Framework for Memory Research*, 11 *J. OF VERBAL LEARNING & VERBAL BEHAV.* 671, 678 (1972) (stating that research supports the “general conclusion that memory performance is a positive function of the level of processing required by the orienting task[.]”); Jan C. Rabinowitz & Fergus I. M. Craik, *Specific Enhancement Effects Associated with Word Generation*, 25 *J. MEMORY & LANGUAGE* 226 (1986).

ing methods are preferable to a traditional lecture format because they force the brain to engage with the material.

The research backs up this conclusion. Academics in other disciplines have repeatedly shown the benefits of active learning methods. In 2011, for example, Nobel scientist Carl Wieman and two other researchers studied two sections of an introductory physics class geared to engineering students.¹⁰ These sections, which each included more than 250 students, were originally taught using a traditional lecture format. During one week of the course, however, the researchers arranged for one section to learn through a method of “deliberate practice,” in which they asked students to apply their learning and puzzle out problems during class. The study found that student engagement in the experimental section nearly doubled and attendance increased by twenty percent. Even more importantly, the students in the experimental section did more than twice as well on the test compared to those in the control section. The results prompted one of the researchers to note that “learning only happens when you have this intense engagement . . . It seems to be a property of the human brain.”¹¹

Researchers have reached similar conclusions through research on educational assessments. The traditional view is that students learn by studying, and that the role of testing is simply to measure this learning. Yet, a wealth of studies demonstrates that testing itself enhances student learning.¹² The process of retrieving information that occurs during assessments often produces greater learning and long-term retention than studying alone. In other words, testing and other forms of active learning force the brain to engage with the material on a deeper level than relying on students’ out-of-class studying, helping to ensure learning.

10 Louis Deslauriers et al., *Improved Learning in a Large-Enrollment Physics Class*, 332 *SCI.* 862 (2011).

11 Jeffrey Mervis, *A Better Way to Teach?*, *SCI. NOW* (May 12, 2011, 2:01 PM), available at <http://news.sciencemag.org/sciencenow/2011/05/a-better-way-to-teach.html>.

12 Jeffrey R. Karpicke & Janell R. Blunt, *Retrieval Practice Produces More Learning than Elaborative Studying with Concept Mapping*, 331 *SCI.* 772, 772 (2011); Henry L. Roediger III & Andrew C. Butler, *The Critical Role of Retrieval Practice in Long-Term Retention*, 15 *TRENDS COGNITIVE SCI.* 20, 20 (2011); Henry L. Roediger III & Megan A. Smith, *The “Pure-Study” Learning Curve: The Learning Curve Without Cumulative Testing*, 40 *MEMORY & COGNITION* 889, 889 (2012).

In its ideal form, the Socratic method is itself an active-learning method.¹³ The Socratic method is designed to prompt students to assess the strength of legal arguments through a series of back-and-forth exchanges between the students and the professor. Even students who are not directly in the hot seat must participate in case they are the next target of the professor's questioning. When done well, the Socratic method may well be an effective means of teaching complex legal reasoning to a large class of students.¹⁴

Yet this ideal may bear little resemblance to the methods used in most doctrinal courses today. The Socratic classroom has turned into a "soft Socratic" space. Professor Stephen Bainbridge of the UCLA Law School describes this style in commenting on the teaching of one of his colleagues:

He started today's session by picking up the thread of a discussion from yesterday. After reviewing the material by lecture, he started the new material. As before, he relied on volunteers. He got some participation, but it wasn't particularly interactive. Students made a comment, he made a comment, and went on.¹⁵

This approach, which is likely familiar to many professors, demands far less of the students than the traditional Socratic approach.

Moreover, professors may have a romanticized notion of what is going on in their students' heads during a typical class. From professors' perspectives, the class can feel engaging; they are asking

13 See, e.g., Lon L. Fuller, *On Teaching Law*, 3 STAN. L. REV. 35, 41 (1950) ("If the instructor has laid the foundation for this kind of question, and if his students believe that he genuinely wants their help in solving these problems, the whole atmosphere of the discussion changes. It is as if an electric current had passed through the classroom."); Gary Shaw, *A Heretical View of Teaching: A Contrarian Looks at Teaching, the Carnegie Report, and Best Practices*, 28 TOURO L. REV. 1239 (2012).

14 See, e.g., ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 82 (2007) (stating that, when the Socratic dialogue and case method is "properly used, it is a good tool for developing some skills and understanding in law students"). The Socratic method may still have other costs. For example, Professors Lani Guinier, Michelle Fine, and Jane Balin have argued that the Socratic method is partially responsible for the relative underperformance of female law students. See, e.g., Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 46, 94 (1994).

15 Stephen Bainbridge, *Reflections on Twenty Years of Law Teaching 2* (Apr. 16, 2008) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1122577.

questions, students are responding, and, for professors, the whole process is a great deal of fun. Professors may therefore assume that their students are actively engaged in the material, answering the professor's questions in their heads even if they are not the focus of the professor's attention. The reality may not match this idealized hope. In many classes, students can passively listen to the exchange, waiting for the professor to repeat the correct answer or summarize the most salient points. In-between these moments of typing, students can let their attention drift. If the professor asks them a question, most students can stumble through a passable response without provoking the professor's ire.

The Socratic method may also move too quickly to produce meaningful learning.¹⁶ The rapid-fire questions and answers make it difficult for students to absorb the information in any meaningful way. Students may be so busy trying to follow the dialogue and type the key points into their notes that they do not have time for the mental processing that true learning requires.¹⁷

In short, even if our only goal is to teach doctrine, we need to think about ways to force our students to engage with the doctrine so that it gets into their long-term memory. The Socratic method may lead to this engagement, but it is also relatively easy for students to become passive participants in a Socratic class, especially if the class is the soft-Socratic style more common today. Even if professors only want their students to remember and understand the doctrine, experiential learning methods can help achieve this goal.

C. Teaching Higher-Order Skills and Understanding

Most doctrinal professors would probably say that they do not aim to produce students who can simply recite the rules. Instead, they want their students to be able to *use* the doctrine in the same ways that lawyers and policymakers use the doctrine—to solve problems,

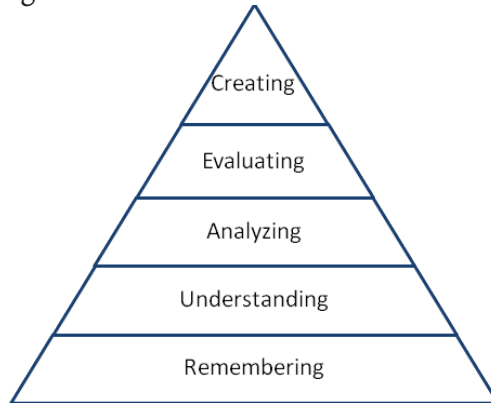
16 As learning experts have noted, the opportunity for reflection is a key part of the learning process. See, e.g., REFLECTION: TURNING EXPERIENCE INTO LEARNING (David J. Boud et al. eds., 1985).

17 Professor Gerald Hess suggests that professors can ameliorate this problem by incorporating opportunities for student reflection into the Socratic dialogue. For example, the professor may “ask the entire class to silently formulate a response in thirty seconds, or to write a brief response in one minute, or to turn to the next person and discuss the question for two minutes.” Gerald F. Hess, *Principle 3: Good Practice Encourages Active Learning*, 49 J. LEGAL EDUC. 401, 407 (1999).

make decisions, and critically evaluate the world. As Dean Edward Rubin of the Vanderbilt Law School has stated:

[E]ducational theory has come to the realization that skills are not only central to the process, but it's how you understand theoretical material You don't have that sort of on-the-ground understanding [without putting the theory into action].¹⁸

Even within doctrinal learning, there are different levels of knowledge. A student who can use the doctrine in a sophisticated way has a higher level of understanding than a student who can simply recite the doctrine. These levels of knowledge are reflected in Bloom's Taxonomy,¹⁹ which provides a framework for understanding educational goals:



As this diagram demonstrates, students encounter and work with knowledge using a range of cognitive processes, ranging from the relatively easy task of remembering information to the much more complex task of being able to create new information.

Most doctrinal professors want their students to be at the higher end of Bloom's Taxonomy, but this higher-level knowledge does not come easily. The challenge of learning to recite legal rules is significantly different than the challenge of learning to solve a problem

18 *Workshop on the Future of the Legal Course Book*, 33 SEATTLE U. L. REV. 292, 302 (2010).

19 The original Bloom's Taxonomy was developed by Benjamin S. Bloom and others in the 1950s. See *TAXONOMY OF EDUCATIONAL OBJECTIVES: THE CLASSIFICATION OF EDUCATIONAL GOALS* (Benjamin S. Bloom et al. eds., 1956); *A TAXONOMY FOR LEARNING, TEACHING, AND ASSESSING: A REVISION OF BLOOM'S TAXONOMY OF EDUCATIONAL OBJECTIVES* (Lorin W. Anderson et al. eds., 2001) (revising Bloom's Taxonomy).

with those rules. The former involves shallow learning of the doctrine, while the latter involves a much deeper form of learning.

So how can professors ensure that their students leave with this higher-level knowledge? Again, cognitive science emphasizes the importance of active or experiential learning.²⁰ If we want students to demonstrate higher-order thinking, we have to shape our classes around activities that require this type of thinking. In other words, if we want our students to have a deep understanding of the material, we cannot teach in a way that emphasizes a more shallow understanding of the rules. Instead, as scientist Daniel Willingham has stated, “experience helps students to see deep structure,” even in doctrinal material.²¹

This research has direct implications for doctrinal professors, forcing professors to think more deeply about the goals for their courses. If we do not want students simply to be able to parrot back the law, we have to think about what we *do* want them to be able to do. How do we expect them to be able to use their knowledge? The answer should then shape our course design. If I want my students to be able to use agency law to advise clients on how to structure their businesses, then I need to ensure that my students practice applying the law in this context. This is not experiential learning for its own sake. Instead, it is experiential learning for the sake of accomplishing the specific learning objectives for the course.

This understanding of learning also challenges the traditional divide between doctrinal teaching and skills teaching. Doctrine is not more important than skills or vice versa. Instead, if we want students to acquire a higher-order understanding of legal doctrine, we must give them plenty of opportunities to practice using the doctrine in these higher-order ways. If we want students to have a deep understanding of the pleading rules applicable in federal court, we should have them draft a complaint that complies with these rules. If we want them to have a deep understanding of the profit sharing rules in partnerships, we should have them draft provisions of a partner-

20 See, e.g., Joel Michael, *Where's the Evidence that Active Learning Works?*, 30 *ADVANCES PHYSIOLOGICAL EDUC.* 159, 160 (2006); Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 *J. ENGINEERING EDUC.* 223 (2004); SOUSA, *supra* note 6 (“Our students would make a quantum leap to higher-order thinking if every teacher in every classroom correctly and regularly used a model such as Bloom’s revised taxonomy.”).

21 WILLINGHAM, *supra* note 6, at 78.

ship agreement that relate to these rules. In other words, skills and doctrine are not a zero-sum game. They reinforce each other, together leading to deeper learning for students.

III. Bringing Experiential Education into the Lecture Hall

It is one thing to say that doctrinal professors should promote deeper learning in their courses by incorporating experiential learning methods. It is quite another thing to incorporate these methods effectively. If we want doctrinal professors to adopt these methods, we must teach them how to do so in a way that is consistent with their broader teaching objectives. This Part presents experiential learning methods as part of a larger discussion about course design. Rather than incorporating experiential opportunities into their courses on an ad hoc basis, professors should think carefully about what they want their students to learn and what teaching methods will best lead to this learning.

A. Determining Learning Objectives

Experiential education is not an end unto itself. Nor do active learning exercises ensure that students will become good lawyers. The key is to link experiential education with the professor's learning objectives for the course. The first step in course design therefore is to identify these learning objectives.

Many professors may never have thought explicitly about their learning objectives. As a result, they may default to the doctrinal subjects in their course books. These course books typically use the case method, even in courses where the subject area could lend itself to a different approach.²² As a result, if professors do not make a conscious decision to determine their learning objectives, they will likely find themselves spending most of their class time marching through doctrinal material.

Yet, as discussed above, professors may have broader learning goals for their students. They may want their students to improve their critical thinking skills and learn how to dissect statutes. They want students to be able to translate their learning into actual law-

22 For example, as a business law professor, I am always surprised that Business Associations course books are typically based around cases, rather than contracts, transactions, and management decisions.

erly tasks like drafting contracts, writing motions, and making evidentiary objections. They also may want their students to think about the social, economic, or political impact of the law. Most professors, if pressed, have grand hopes for their students and for their teaching.

These broader goals relate back to Bloom's Taxonomy, described above. Using this taxonomy, professors can start to identify what they want students to get out of their courses. In some areas of their courses, professors may be happy with shallow knowledge ("remembering" or "understanding" within Bloom's Taxonomy). In other areas, professors may want to devote the time necessary to produce a higher level of knowledge ("analyzing," "evaluating," or "creating").

Professors should also think about whether their goals extend beyond ensuring that students learn the relevant doctrine. In his book, *Creating Significant Learning Experiences*, Dee Fink, an expert on student-centered learning, explains how any course can support multiple kinds of learning objectives.²³ He breaks down possible learning objectives into the following categories:

Foundational Knowledge: knowledge about the phenomena associated with the subject and the conceptual ideas associated with those phenomena

Application: an ability to use and think about the new knowledge in multiple ways, as well as the opportunity to develop important skills

Integration: the ability to connect one body of knowledge with other ideas and bodies of knowledge

Human Dimension: discovering how to interact more effectively with oneself and with others

Caring: the development of new interests, feelings, and values

Learning How to Learn: developing the knowledge, skills, and strategies for continuing one's learning after the course is over²⁴

23 L. DEE FINK, *CREATING SIGNIFICANT LEARNING EXPERIENCES: AN INTEGRATED APPROACH TO DESIGNING COLLEGE COURSES* 74 (2003).

24 *See id.*

These categories are similar to Bloom's Taxonomy, but they support a broader set of learning objectives. And while doctrinal professors may be hesitant to incorporate the teaching of interpersonal and related skills into their courses, it is clear that employers value these skills.²⁵

In determining their learning objectives, professors should resist the urge to simply copy the doctrinal topics traditionally covered in the course.²⁶ Instead they should ask themselves, "a year (or more) after this course is over, what do I want my students to still remember, think, and/or be able to do?" In other words, what will separate a student who has taken this course from a student who has not?

These learning objectives can then provide a foundation for incorporating active learning methods into doctrinal courses. Doctrinal professors may be skeptical about experiential education because they think it will result in a scattershot approach to teaching in which experiential exercises are sprinkled throughout the course without a clear benefit to the students. If experiential methods are matched to the professor's learning objectives, however, this skepticism may be ameliorated.

B. Developing Assessments

The next step is to figure out how to measure whether students are meeting the learning objectives. This step may require many doctrinal professors to rethink their approach to assessments. We typically think of assessments as *summative*—a way to evaluate and sort our students. We use final exams, for example, to determine what our students know so that we can assign them a grade. With learning-oriented teaching, however, the purpose of assessments is first and foremost to aid student learning. In other words, assessments should be *formative*, helping students to assess their own progress in meeting the learning objectives of the course.

25 See, e.g., Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225 (2004); see also Marjorie M. Shultz & Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering* (2008), available at <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

26 This is harder than it sounds. The first time I sat down to figure out the course objectives for my Business Associations course, it took me considerable time to think of any learning objectives beyond "Understand Partnership Law" and "Understand Fiduciary Duties."

Formative assessments have a natural connection to experiential education. If the course has broad and ambitious learning objectives, the assessments themselves must be broad and ambitious, often with an experiential component. For example, one of the learning objectives in my Business Associations course is for the students to learn how to evaluate and draft contractual provisions and other business-related documents. Students cannot measure their progress on this objective unless they are frequently evaluating and drafting contractual provisions and related documents. If I really want my students to meet this goal, I have to devote class time to drafting exercises, giving my students feedback on these exercises.

The prospect of adding assessments may scare doctrinal faculty. In classes with large enrollments, faculty members are simply limited in how much individualized feedback they can give their students. As a result, many faculty members may not give much thought to assessment techniques, relying on a single end-of-semester exam. Yet assessments can take many forms, not all of which must involve individualized feedback by the professor. As long as the purpose is to aid student learning, rather than simply to assign a grade, professors have more flexibility in designing their assessments.

Assessments come in at least three types: instructor assessments, self-assessments, and peer assessments.²⁷



27 See, e.g., MARYELLEN WEIMER, LEARNER-CENTERED TEACHING: FIVE KEY CHANGES TO PRACTICE 119 (2002).

In deciding between these three types of assessments, professors should think about which types will best achieve the learning objectives for their courses.²⁸

Instructor Assessments: As noted above, doctrinal professors are often limited in the amount of individualized feedback they can give their students. A professor teaching ninety students cannot offer weekly writing assignments. This fact, however, does not mean that professors are necessarily limited to a single final exam—there are a range of options between weekly writing assignments and a single exam. Professors can offer one or two graded assignments during the semester. They also can spot-check assignments or provide global feedback to the class.

Self-Assessment: Professors can also encourage students to assess their own learning. Professors can distribute a rubric to allow students to assess their own work. They can also give students a short amount of time to complete an assignment in class and then review it as a class or distribute model answers, encouraging students to compare their answers to the model.

Peer Assessment: Professors can also use peer assessment techniques. Students can work in teams in class to solve a challenging problem. They can also work on assignments individually outside of class and then compare their answers with their classmates in class.

Professors can also use a combination of these methods. I am experimenting with requiring the ninety students in my Business Associations course to keep Google Docs. These web-based documents are accessible to me and the individual students, so I can view and make comments on all ninety Google Docs. Approximately once a week, my students have to complete a short written assignment in their Google Doc. For example, when we study corporate indemnification, my students have to read the corporate charter and bylaws of a public company, find the indemnification provision, compare it to the relevant Delaware statute, and determine if the provision goes to the full extent of the law. At other points during the semester, the

28 In their book *Teaching Law by Design: Engaging Students from the Syllabus to the Final Exam*, Professors Michael Hunter Schwartz, Sophie Sparrow, and Gerald Hess provide a number of different assessment techniques. MICHAEL HUNTER SCHWARTZ ET AL., *TEACHING LAW BY DESIGN: ENGAGING FROM THE SYLLABUS TO THE FINAL EXAM* 135–64 (2009). There are also a multitude of websites from other disciplines that discuss classroom assessment techniques. See, e.g., *Classroom Assessment Tech.*, VAND. UNIV. CTR. FOR TEACHING, <http://cft.vanderbilt.edu/teaching-guides/assessment/cats/> (last visited July 9, 2013).

students draft contractual provisions, write client e-mails, and create flow charts to dissect complicated statutes.

Despite the frequency of these assignments, I spend relatively little time providing individualized feedback. These assignments are not graded, although students will lose points if they do not complete the assignments and I do check to make sure that the students completed the assignments. I also spend approximately an hour prior to class making short comments in a random selection of the Google Docs. Then, in class, I have the students work in pairs to compare their analyses. Where they disagree, I tell them to use the case or statute to resolve the disagreement. I then provide my own analysis of the assignment. This format gives students regular instructor assessment, peer assessment, and self-assessment despite the large size of the class.

The key point is that these assessments must be tied to the learning objectives for the course. We cannot say that we want our students to have a deep applied understanding of the law and then create assessments that only require a shallow understanding. Formative assessments should be an opportunity for students to practice the higher-order proficiencies described in Part I.

C. Creating Learning Activities

The final step in the course design process is to determine the learning activities for the course. These learning activities should again be closely tied to the learning objectives and assessments outlined above. Indeed, the three steps—defining objectives, developing assessments, and creating learning activities—should all be tightly intertwined, such that each class period has students actively engaged in activities that will allow them to assess their progress in meeting the learning activities.

In my experience, doctrinal professors have little training in active learning methods. We may devote class time to problem sets or occasionally ask our students to work in groups, but we may not have a full repertoire of different teaching methods. Some additional active learning methods include the following:

Think-Pair-Share: This exercise asks students to think about a problem for a short amount of time on their own. They then discuss the problem and compare their answer with the student sitting next to them. Finally, the class discusses the problem as a whole.

Concept Mapping: This exercise asks students to create visual maps of doctrine, allowing them to see the relationships between different types of legal rules.

Collaborative Learning Groups: Professors break the class into groups of four to six students to complete tasks. These groups can work on one task in a single class period or they can be assigned to work together throughout the semester on long-term projects.²⁹

Case Studies: This approach is based on the business school method of teaching with case studies. These case studies give students a detailed factual summary about a given problem. The students then work in teams or as a class to think about how to work through the problem.

There is a wealth of resources available to professors who are interested in learning about additional active learning methods.³⁰

Doctrinal professors should look for opportunities to have students use their learning in realistic ways. A Civil Procedure class that is learning about personal jurisdiction can work in teams to interview a mock witness in a personal injury case. A Business Associations class that is learning about fiduciary duties can draft memos to fictitious clients advising them on how to structure a business decision to comply with their fiduciary obligations. The varied ways that the law is applied in practice gives law professors a wealth of options in developing experiential learning exercises.

Professors can also involve real clients in their learning activities. One of my colleagues teaches a Non-Profit Organizations course that works with local non-profits on governance issues. A Public Policy

29 For a helpful discussion of the use of teams in the classroom, see LARRY K. MICHAELSEN ET AL., *TEAM BASED-LEARNING: A TRANSFORMATIVE USE OF SMALL GROUPS IN COLLEGE TEACHING* (2004).

30 See, e.g., LINDA B. NILSON, *TEACHING AT ITS BEST: A RESEARCH-BASED RESOURCE FOR COLLEGE INSTRUCTORS* (3d ed. 2010); Donald R. Paulson & Jennifer L. Faust, *Active Learning for the College Classroom*, CAL. STATE UNIV., L.A., <http://www.calstatela.edu/dept/chem/chem2/Active/> (last visited July 9, 2013); MARILLA SVINICKI & WILBERT J. McKEACHIE, *McKEACHIE'S TEACHING TIPS: STRATEGIES FOR COLLEGE AND UNIVERSITY TEACHERS* 190-234 (13th ed. 2011).

Research & Drafting course at my law school pairs teams of students with local government agencies to draft white papers on legal issues of concern to the agencies. At the University of Oregon School of Law, students can choose add-on lab courses that allow them to work with real clients in a given area of the law.

These opportunities again highlight the connection between good teaching and experiential education. Higher-level knowledge does not occur through passive instructional methods. Instead, we must get students actively engaged in their learning—thinking, analyzing, evaluating, and doing—so that what they learn becomes part of their long-term memory. In other words, the focus in all of these efforts is to use experiential education in ways that improve student learning. Professors should not incorporate experiential education into their courses because it is a popular trend in legal education. Instead, they should think deeply about their learning objectives and use experiential learning methods to help their students to meet these objectives.

IV. Encouraging Doctrinal Faculty to Incorporate Experiential Learning Methods

If we want professors to reshape their pedagogy, we have to give them the tools to do so. This Part explores several different options including: (i) training teachers in experiential learning methods, (ii) fostering a community of teachers, (iii) creating experiential course materials, (iv) reducing class sizes, and (v) reducing scholarship loads in limited circumstances to allow the redesign of courses.

A. Teacher Training

Professors may want to improve their teaching, but may not know how to do so. The good news is that there are far more resources on law teaching than there used to be. The bad news is that, in my experience, most teachers still get no training whatsoever in how to teach.

The legal academy should make teacher training a top priority. The New Law Teachers' Conference sponsored by the American Association of Law Schools (AALS) is a good start,³¹ but professors

31 The AALS is a “non-profit educational association of 176 law schools representing over 10,000 law faculty in the United States.” *What is the AALS?*, ASS'N OF

need continued training in teaching throughout their careers. There are a few organizations that offer such training now,³² but the opportunities remain limited.

The AALS should serve as a leader in this area, making teacher training one of its core missions. For example, it could sponsor an annual conference where professors spend two or three days engaged in focused training on a broad instructional topic. Examples might include course design, assessments, or active learning methods. These conferences could bring together pedagogy experts with professors from a variety of legal areas to discuss how to improve law school teaching.

Law schools should also offer their own training. Many universities have centers devoted to teaching,³³ but these centers rarely seem to make inroads at the law school. Law schools should take greater advantage of these resources. Deans should arrange for intensive workshops in pedagogy and course design for their faculty. These workshops could be aimed at junior faculty members specifically, creating an opportunity for new faculty members to develop and improve their teaching skills, or they could be geared to the law faculty as a whole. Schools should also develop greater opportunities for evaluation and feedback, perhaps by organizing small groups of professors to sit in on each other's classes and offer feedback. Law schools could even offer reading groups on new instructional texts to spark discussions about pedagogy.

As part of this effort, law schools should consider devoting extra attention to teaching course design principles to their new facul-

AM. LAW SCH., <http://www.aals.org/about.php> (last visited July 7, 2013). The New Law Teachers' Conference is an annual conference sponsored by the AALS that "is designed to offer law faculty an introduction to the teaching of legal writing, research, and analysis." *Workshop for Beginning Legal Writing Teachers*, ASS'N OF AM. LAW SCH., <http://www.aals.org/> (follow "Events" hyperlink; then follow "New Law School Teachers Workshops" hyperlink; then follow hyperlink under "Upcoming Workshop") (last visited July 7, 2013).

32 For example, the Institute for Law Teaching and Learning offers an annual conference. Recent topics have included the use of technology in teaching, student assessment, and teaching law practice skills. See INST. FOR LAW TEACHING & LEARNING, <http://lawteaching.org/conferences/index.php> (last visited July 7, 2013).

33 See, e.g., *Center for Teaching and Learning*, STAN. UNIV., <https://teachingcommons.stanford.edu/ctl> (last visited July 14, 2013); *Derek Bok Ctr. for Teaching & Learning*, HARV. UNIV., <http://bokcenter.harvard.edu/icb/icb.do>? (last visited July 14, 2013); VAND. UNIV. CTR. FOR TEACHING, *supra* note 28.

ty members. Many faculty members may not know how to design a new course other than to peruse the bestselling case books and then choose the doctrinal subjects they want to cover. Given this starting point, it is not surprising that so many law school courses focus almost exclusively on doctrine.

The irony of this approach is that there is a wealth of information available on course design. There are books addressing course design as a whole and books written about specific steps in the course design process.³⁴ There is even a book written about course design in law schools specifically.³⁵ There are also universities that hold intensive trainings on this subject and speakers who can come to law schools to conduct this training.³⁶ If law schools want their professors to think more deeply about their course design, there are plenty of resources these schools can use.

B. Fostering a Community of Teachers

Law schools should also work to foster communities of teachers in the same way that they foster communities of scholars. Most law schools have robust programs to encourage faculty scholarship—travel stipends to allow faculty to attend conferences, outside speaker series, half-baked workshops to allow faculty to present early paper ideas, and financial support to hire student research assistants, among others. Many schools also encourage professors to work together to critique scholarly arguments and edit drafts. These efforts can create a community of scholars at law schools who are used to working together in a collaborative way.

In contrast, at least in my experience, any sharing of ideas about teaching often tends to be ad hoc and haphazard. Teaching in many law schools is a fairly isolated enterprise. Professors do not sit in on each other's classes unless they are reviewing a colleague's teaching for promotion purposes. Professors seldom meet in groups to listen to outside speakers on teaching or to discuss their own teaching. In

34 See K. PATRICIA CROSS, *CLASSROOM ASSESSMENT TECHNIQUES: A HANDBOOK FOR COLLEGE TEACHERS* (1993); FINK, *supra* note 23, at 74.

35 See SCHWARTZ ET AL., *supra* note 28.

36 For example, Dee Fink & Associates offer workshops and online courses for professors in higher education. These courses focus on designing courses for greater student learning and engagement. See DEE FINK & ASSOC., <http://www.deefinkandassociates.com/> (last visited July 14, 2013).

short, there are rarely opportunities for professors to work together on teaching in the same way that they work together on scholarship.

Law schools should devote attention and resources to creating a community of teachers.³⁷ For example, law schools can create Faculty Learning Communities that regularly meet in small groups to discuss a discrete teaching topic. Schools can also bring in outside speakers to work with the faculty on various teaching-related subjects. In addition, they should encourage professors to observe each other's classes and offer feedback. These efforts would encourage professors to collaborate on their teaching and explore different teaching methods.

C. Experiential Course Materials

Doctrinal faculty also need course materials that include more opportunities for active learning. Publishers are starting to respond to this need,³⁸ but, for the most part, these materials are separate from the course books themselves. As a result, if I want to use experiential materials in my Business Associations course, my students must buy the traditional case book and statute book, plus the experiential add-on—an expensive set of requirements for students. It also means that I have to assign the traditional cases, plus the experiential exercises, if I want students to understand the doctrine before trying the exercises. Limited class time makes it difficult to give sufficient attention to either. A more integrated set of course materials would provide a better balance for students' wallets and schedules.

There are a few course books that offer this integration,³⁹ but the offerings are still few and far between. Professors who are interested in basing their courses around experiential learning opportunities should encourage publishers to offer course books based on this approach to learning. There are many doctrinal areas, especially in the upper-level curriculum, where the learning does not have to revolve around the case method.⁴⁰ Instead the primary materials in these

37 See Melissa J. Marlow, *Law Faculties: Moving Beyond Operating as Independent Contractors to Form Communities of Teachers*, 38 OHIO N.U. L. REV. 243 (2011).

38 For example, LexisNexis now offers the Skills & Values series in a number of legal areas. See *Skills & Values Series*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/catalog.jsp?id=cat80154> (last visited July 7, 2013).

39 See, e.g., THERESA H. MAYNARD & DANA M. WARREN, *BUSINESS PLANNING: FINANCING THE START-UP BUSINESS AND VENTURE CAPITAL FINANCING* (2010).

40 My own area of business law is one example. A coursebook in this area could teach business law principles by referencing statutes, rules, and other sourc-

areas could include fewer cases and more opportunities for experiential learning.

D. Re-examining Class Sizes

Law schools should also consider reducing class sizes to promote more intensive teaching methods. Large class sizes do not make it impossible to incorporate experiential learning, but they do make it more difficult. In a semester of smaller classes, I can assign more frequent writing assignments and give detailed feedback. I can have the students work in teams on case studies, and I can monitor each team's progress. I can also monitor the learning of individual students, working one-on-one with students who are falling behind.

In semesters in which I am teaching more students, it is much more difficult to use more intensive teaching methods. I still use active learning exercises where I can, but I cannot give nearly as much individual feedback. Nor can I monitor students' learning as closely. As a result, if individual students are floundering, I may not know it. The exercises also feel more chaotic. When a class of fifty students breaks into teams to work on a challenging project, the classroom comes alive with the energy of student learning. When a class of ninety works in teams on the same project, the noise level can overwhelm the room.

If law schools are committed to innovative education, they need to re-examine the class sizes of large doctrinal courses.⁴¹ Not all classes can be limited to twenty students, but large classes in stadium-style classrooms pose real barriers to experiential learning. Schools could experiment with a quid pro quo arrangement: The school will reduce the class size of the largest doctrinal courses to a more manageable number (say forty or fewer students) if the professor agrees in exchange to incorporate more active learning methods into the teaching of the course. This proposal requires supervision

es of law and then giving students opportunities to apply this law, rather than including lengthy cases.

41 I recognize that this proposal raises real financial costs. Reducing the number of students in traditionally large doctrinal courses may require hiring additional faculty members. At a time when legal education is already under strain, many law schools will simply be unable or unwilling to take this route. It is worth examining, however, whether law schools can re-allocate their existing resources. It may be worth trimming some upper-level seminars in favor of smaller foundational courses with hands-on learning opportunities.

by the law school administration, but it gives professors the classroom space to try new teaching methods.

E. Reduced Scholarship Loads

Schools should also consider offering doctrinal faculty members reduced scholarship loads to overhaul their courses. Experiential courses put a much greater demand on professors' time than more traditional courses. If professors stick to a traditional approach, they can use a standard casebook and find plenty of model syllabi. Redesigning an experiential course, however, is much more time-consuming, especially given the lack of available materials in many areas. Given all of the other things on a professor's plate, it may be easy to forego an experiential redesign, sticking instead to the tried and true, but perhaps inadequate, teaching methods.

A professor's scholarly obligations add to this temptation. In my experience, many law schools expect their faculty to publish roughly one article per year, and they give faculty members summer stipends and other financial benefits to support these scholarly efforts. A professor who does not meet the school's publishing efforts will likely find themselves penalized in some way, often through a lower salary. To the extent that a professor must choose how to allocate his or her time, there are many financial and other incentives encouraging professors to write another article rather than redesign one of their courses.

Law schools can support professors who want to redesign their courses by temporarily reducing their scholarship obligations. Schools could, for example, allow professors to spend one summer every four or five years redesigning a course, rather than writing another article. Such policies would reflect the fact that professors will only feel free to spend the necessary time redesigning their courses if they will not be penalized, either through their salary or otherwise, for failing to spend this time working on their scholarship.

Schools will have to police these efforts. A professor should not be able to take advantage of a reduced scholarship load simply because he or she is teaching a new doctrinal course or switching to a new casebook. Instead, the reduced load should be contingent on a course redesign that goes above and beyond a professor's normal teaching obligations, recognizing that we teach new courses or switch casebooks as part of our normal job responsibilities. The school should

tie these reduced loads to innovative and time-intensive efforts in the classroom that are designed to enhance student learning.

V. Conclusion

Reform in legal education must include doctrinal professors. As long as these professors view experiential teaching as something that other people do, there will not be true reform. This Article argues that the push for experiential education in law schools is really a push for better teaching. Once we re-frame the debate to focus on teaching, we can start to promote real innovation in legal education.

Intersecting Experiential Education and Social Justice Teaching

Margaret B. Kwoka*

I. Introduction

Law schools are under ever increasing pressure to fundamentally reform legal education.¹ Chief among criticisms of the current law school model is the failure to produce so-called “practice-ready” graduates.² This critique, however, is not new. In 1992—now more than twenty years ago—the ABA Section on Legal Education issued the MacCrate Report, which stressed the importance of practical legal education opportunities such as clinics, externships, and simulations.³ Fifteen years later, a pair of influential reports echoed the MacCrate Report’s call for greater skills training in law school: the Clinical Legal Education Association’s 2007 “Best Practices for Legal Education,”⁴ (CLEA Best Practices Report) and the contemporaneous

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1 A SURVEY OF LAW SCHOOL CURRICULA: 2002-2010, 14 (Catherine L. Carpenter, ed., 2012) [hereinafter 2010 ABA Survey] (“[L]aw schools have faced a changing legal job market amid an economic downturn and increased competition as the ABA-approved ranks have swelled. Media scrutiny of legal education, and specifically of the law school curriculum, has also fueled the conversation.”).

2 See, e.g., David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1. Apart from critiquing the content of legal education, the other chief criticism of legal education as it exists today centers on tuition costs and debt burdens of graduates. See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, July 16, 2011, at BU1.

3 AM. BAR ASS’N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT: AN EDUCATIONAL CONTINUUM (1992) [hereinafter MacCrate Report]. To be sure, the MacCrate Report itself was hardly the first time this critique had been raised. In fact, criticisms of law schools on this basis were raised as early as the early 20th Century. See Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLINICAL L. REV. 35, 35 (2009) (documenting various critiques, including from a Carnegie Foundation supported study and prominent academics, as early as 1921).

4 ROY STUCKY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (Clinical Legal Educ. Ass’n 2007).

report, “Educating Lawyers” issued by the Carnegie Foundation (Carnegie Report).⁵

This trilogy of reports, along with various commentary, scholarship, and media attention, has had a real effect on law schools’ programs. A recent empirical study suggests schools have increased the experiential components of their curricula.⁶ Individual schools report great success attracting and retaining students based on these initiatives.⁷ Moreover, important collaborative initiatives have begun and continue, including the Experience the Future Symposium, hosted by the Alliance for Experiential Learning in Law at Northeastern University School of Law,⁸ and the various programs coordinated by Educating Tomorrow’s Lawyers, based at the Institute for the Advancement of the American Legal System at the University of Denver Sturm College of Law.⁹

Incorporating skills-based and practical education components into an integrated legal education curriculum, as the law schools participating in these initiatives have done, is a laudable goal. As educators, we should constantly strive to improve our programming to better ready our graduates for the practice of law. As we redesign our courses, programs, and even institutions to meet that challenge, this article contends that a second central goal of new programs should be to teach our students to think critically about the relationship between law and social justice. We should not squander what is an almost unparalleled opportunity to incorporate social justice teaching into our core curricula.

5 WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *Carnegie Report*].

6 The 2010 ABA Survey cites among its major findings that law schools have “increased all aspects of skills instruction, including clinical, simulation, and externships” and that law schools have offered and added courses in various areas concerning professional skills. 2010 ABA SURVEY, *supra* note 1, at 15; Mark Hansen, *Law School Curricula Are Changing, Survey Shows*, ABA JOURNAL.COM, (Aug. 4, 2012 2:30 PM), http://www.abajournal.com/news/article/law_school_curricula_are_changing_survey_shows/.

7 See, e.g., Bill Henderson, *Washington & Lee is Biggest Legal Education Story of 2013*, THE LEGAL WHITEBOARD (Jan. 29, 2013), <http://lawprofessors.typepad.com/legalwhiteboard/2013/01/biggest-legal-education-story-of-2013.html>.

8 *Alliance for Learning and Experiential Education*, NORTHEASTERN UNIV. SCH. OF L., <http://www.northeastern.edu/law/academics/institutes/alliance-exp-learning.html> (last visited July 20, 2013).

9 *About ETL, EDUCATING TOMORROW’S LAWYERS*, <http://educatingtomorrow-slaverys.du.edu/about-etl/> (last visited July 20, 2013).

Following this introduction, Part II describes the historical relationship between the dominant form of experiential education—clinics—and social justice teaching and contends that experiential components of doctrinal courses should naturally continue that tradition. Part III documents why those invested in experiential education should invest in teaching social justice as a benefit to all students and to the profession, not just for those students who self-identify as having public interest career goals. Part IV explains why those committed to social justice teaching should concern themselves with experiential education as a means to support and encourage students to pursue careers in the public interest. Part V concludes by providing a few examples of the natural marriage between experiential education and social justice teaching.

II. Practical Legal Education and Social Justice Are Interrelated

The movement toward an integrated experiential education curriculum is, in large part, a movement to incorporate the kind of teaching and learning that occurs in the clinical setting into the entire law school experience. Clinical programs have not historically focused solely on imparting practical skills to students or on transforming students into mechanically competent lawyers. Rather, experiential education in the clinical setting has long been interwoven with teaching social justice.¹⁰ Examining clinical education, therefore, is instructive as experiential education is expanded in other parts of curricula.

A. The Origins of Clinics

The history of clinical legal education demonstrates the relationship between experiential education and social justice teaching. The first few law school clinics were established in the earlier part of the twentieth century and typically consisted of partnerships with legal aid societies.¹¹ The ubiquity of clinical education, however, began in

10 Stephen Wizner, *Is Social Justice Still Relevant?*, 32 B.C. J.L. & SOC. JUST. 345, 345 (2012) (“From the beginning of clinical legal education, one central goal has been to engage law students in the pursuit of social justice through the provision of legal assistance to the poor and others who lacked access to legal services.”).

11 Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 S.M.U. L. REV. 1461, 1463 (1998).

the 1960s and 1970s.¹² Largely funded by Ford Foundation money administered by the Council on Legal Education and Professional Responsibility, these clinics' missions focused explicitly on teaching social justice principles to students as a central element of professional responsibility.¹³ While law schools' clinics have diversified over the years, inviting some to opine that the social justice mission has been diluted, for many clinics, students, and clients, that mission is no less important today.¹⁴ For example, one scholar has identified law school clinics as one of the "prominent practice setting[s] for cause lawyers in the environmental justice movement."¹⁵

Although clinics may take other forms, the gold standard of clinical education is the in-house, live-client model.¹⁶ Under this model, clinical professors supervise students who work on cases with actual clients, oftentimes representing them in court proceedings, drafting litigation documents, or effectuating transactional matters.¹⁷ Clinical professors use meetings with individual students to review their work and "case rounds," meetings with all students in the clinic, in which the students present their cases and seek feedback and suggestions from the class.¹⁸ Clinical professors also use readings and classroom discussions to teach sets of lawyering skills.¹⁹ Critically, clinics are "uniquely positioned to provide a vantage point from which students can engage in *critical analysis of the justice system*" precisely because clinics usually serve disadvantaged clients.²⁰

12 *Id.* at 1465.

13 *Id.* at 1465–66.

14 Karla Mari McKanders, *Clinical Legal Education at a Generational Crossroads: Shades of Grey*, 17 CLINICAL L. REV. 223, 225–27 (2010); Wizner, *supra* note 10, at 354 (asserting that clinics "should not . . . abandon their social justice roots even as changes in clinical education take place").

15 Anna-Maria Marshall, *Social Movement Strategies*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 164, 176 (Sarat & Scheingold eds., 2006). *See also* Elliott Milstein, *Clinical Legal Education in the United States*, 51 J. LEGAL ED. 375, 376 (2001) (describing typical clinics as focused on a variety of topics, most of which are related to practice areas in the public interest, such as criminal law, international human rights, and community economic development, or underserved clientele, such as the elderly, prisoners, or AIDS patients).

16 Milstein, *supra* note 15, at 376.

17 *Id.*

18 *Id.* at 377.

19 *Id.*

20 *Id.* at 379.

B. Experiential Education in Doctrinal Courses

So how do clinical settings and experiential components of a doctrinal curriculum relate to one another? In fact, they have much more in common than they do differences between them. Though traditional doctrinal courses do not typically provide the live-client experience that clinics do, they nonetheless can incorporate experiential components into the curriculum. Most often, a doctrinal professor will present a simulated exercise or hypothetical case to teach a skill related to the subject matter. Examples are nearly limitless. A civil procedure course might incorporate an exercise to draft a complaint.²¹ Students in an immigration class may analyze possible defenses based on an actual Notice to Appear, the Department of Homeland Security charging document that initiates removal proceedings. An administrative law class may draft comments on a proposed agency rule. Almost any course can incorporate an exercise in legislative drafting or policy analysis related to the underlying subject matter. In a wide variety of settings, students might practice particular oral skills, such as conducting client interviews, jury selection, or settlement negotiations.²²

Experiential components of doctrinal classes thus share many attributes of clinics. These course components are designed to teach a set of skills used by lawyers and to relate the doctrine to the practice of law. They likewise give students a hands-on experience and typically focus on the seemingly messy practice of law at the trial court or pre-litigation stage, rather than the cleaner appellate cases emblematic of Socratic instruction. They allow students to relate doctrine and theory to the work lawyers do in the field while conveying substantive material to students who learn better through hands-on analysis than stand-alone contemplation.

Apart from the intensity of the experience, the biggest difference between these practical components of doctrinal classes and clinics

21 I require a complaint drafting exercise in my own course, and others do as well. See, e.g., Joyce McConnell, *What WVU Teaches Law Students: Lawyering*, W. Va. Law., Oct–Dec. 2011, at 14. (documenting one professor’s exercise at WVU, and noting other examples of experiential components in doctrinal classes, such as a property course in which students are required to conduct a title search).

22 Simulations are, of course, also used within clinics as well. Milstein, *supra* note 15, at 380.

is perhaps the live-client component.²³ Nonetheless, there is a key similarity between live-client experiences and simulations: in both cases, the professor must initially decide what type of case, client, simulation, or exercise should be used. In clinics, the choices made about the subject matter to be handled and the clientele to be served almost compels clinical professors to address issues of social justice with their students. Like clinics, experiential components to doctrinal classes also involve an initial choice.²⁴ The professor must choose the factual basis for the hypothetical case or simulation, the client whose file might be analyzed, the substance of the agency action to be studied, or the legal reform to be pursued.²⁵ Each one of those choices provides an opportunity to broaden students' exposure to situations, problems in society, and clients' interests that may be unfamiliar to students. By choosing these problems carefully, we, as educators, can create a classroom discussion that incorporates ethical considerations and empowers students to think about the ways that law may serve the ends of justice and the law's limitations in doing so. Incorporating social justice teaching into experiential education in doctrinal classes expands the reach of teaching these skills beyond those select students who elect to participate in a clinical experience.

The intersection of improving skills training in law school and teaching social justice offers opportunities for targeted approaches that advance both goals. Given the history of experiential education, occurring primarily in law school clinics, it is natural that expanding experiential opportunities beyond clinics would likewise expand social justice teaching opportunities for our students.

Current calls for legal education reform also recognize the relationship between experiential education and social justice teaching. Tellingly, the Carnegie Report faults, in part, the case method for fail-

23 To be sure, the differences between live client experiences and simulations have other repercussions. See Becky L. Jacobs, *A Lexical Examination and (Unscientific) Survey of Expanded Clinical Experiences*, 75 TENN. L. REV. 343, 362 (2008) ("Participation in a law school clinic instills a sense of professionalism in students that cannot be learned or experienced in a classroom environment or stimulated setting.").

24 See, e.g., Cynthia D. Bond, *The Legal Writing Classroom in the World: Teaching Skills in a Social Context*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER, 163, 169–173 (Soc'y of Am. Law Teachers, et al., eds., 2011) (describing the initial choices that must be made in constructing a problem to be used in a legal research and writing course).

25 *Id.*

ing to develop students' awareness of social justice. It prominently observes that "the task of connecting [doctrinal] conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method."²⁶ The process of learning to "think like a lawyer" simply makes little room for students to explore the law's effect on people, communities, and society. "In their all-consuming first year, students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses."²⁷ As one scholar put it, "[t]ypical law school classes have the effect of teaching students they have little power to affect justice in society."²⁸

Where the case method and traditional doctrinal instruction fail in this regard, experiential instruction has often proven successful. In clinics, students confront the on-the-ground realities and the multi-dimensional problems that their clients face.²⁹ Experiencing the role of a lawyer can encourage students to think outside the box about the potential of the law, rather than merely its constraints.³⁰ Bill Quigley, a professor at Loyola University New Orleans College of Law, reports one of his clinical students, having worked on behalf of victims of Hurricane Katrina, telling him "[y]ou know, the first thing I lost in law school was the reason that I came. This [experience] will help me get back on track."³¹ With the current momentum of reform in legal education toward an integrated experiential model, we are now presented with the greatest opportunity to teach social justice issues since the rise of clinical legal education.

26 Carnegie Report, *supra* note 5, at 6.

27 *Id.*

28 Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J.L. & SOC. JUST. 231, 234–35 (2012). Aiken also blames, in part, the case method for the failure to explore the gap between law and justice in doctrinal classes. *Id.* at 235.

29 Jane H. Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1, 30–31 (1997).

30 Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 333–35 (2001) (describing students' innovative solutions to clients' problems in a clinic at Yale).

31 William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 8 (2007–2008).

III. Teaching Social Justice as Part of Experiential Educational Components is Critical for All Law Students

Clinical courses are usually electives in which students enroll based on interest, either in gaining the types of skills taught or in the subject matter of the clinic's work, or both.³² Having a social justice teaching component to clinical courses, therefore, may particularly attract students interested in studying those issues, whether or not they intend to pursue public interest careers. Experiential education components of doctrinal classes, particular those offered in the first year, however, reach a much broader range of students and often do not involve student choice. As a result, we must examine the importance of social justice teaching to all students, not just those with an existing interest in social justice or a plan to pursue public interest work.

It is also important to distinguish between the concepts of social justice teaching and public interest law as I am using them in this article.³³ Teaching "social justice" concepts, as I conceptualize it here, is to empower students to critically examine the way the law operates in society, rather than uncritically accepting legal outcomes—even legally compelled ones—as just outcomes. Social justice teaching is designed to provide students with an understanding of social problems that the law does and does not address and builds a vocabulary for them to discuss morality, ethics, and justice in relation to the law. In contrast, when I use the term "public interest law" in this article, I refer to it as a field of practice that constitutes a potential career choice. In this type of practice, the motivations of a lawyer are not primarily financial, but rather primarily involve the desire to provide legal services to those who cannot access them because of financial

32 Mandatory clinical programs are rare, but do exist. See, e.g., *Clinics and Concentrations*, CUNY LAW SCHOOL, <http://www.law.cuny.edu/academics/clinics.html> (last visited July 15, 2013); *Clinics*, UNIVERSITY OF CALIFORNIA IRVINE SCHOOL OF LAW, <http://www.law.uci.edu/clinics/> (last visited July 15, 2013).

33 I use the terms separately, recognizing that no consensus has emerged defining either term, that some use social justice and public interest to mean the same thing, and that other distinctions between the two terms may be appropriate in contexts other than the one I am discussing here. See Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practice Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. CAL. REV. L. & SOC. JUSTICE 23, 43–44 (2006).

reasons or an unpopular cause or the desire to provide legal services in furtherance of a particular social mission.

First, it is important to recognize that teaching social justice is not merely an add-on to the calls of the MacCrate and Carnegie reports, but rather, falls squarely within their core recommendations. The Carnegie Report not only focused on skills training but also coupled that goal with others, most principally that law schools incorporate greater “values” training, including professionalism and ethics.³⁴ Likewise, the MacCrate Report listed, in addition to essential practice skills, essential values law schools should teach, which included the promotion of justice, fairness, and morality.³⁵ It even elaborates that this should include the lawyer’s own conduct in his or her practice, the obligation to perform pro bono work, and improving the legal system.³⁶

These recommendations reflect the fact that service as a lawyer in the public interest is central to the legal profession’s identity and mission. Indeed, the rules that govern the practice of law call on lawyers to engage in social justice advocacy. The preamble to the Model Rules of Professional Conduct highlights, in its first sentence, that a lawyer is a “public citizen who has a special responsibility to the quality of justice,” and explains that “[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”³⁷ The rules also provide that every lawyer “has a professional responsibility to provide legal services to those unable to pay.”³⁸ This voluntary pro bono service should be given to “persons of limited means” or organizations dedicated to protecting public rights or serving a community.³⁹ Some schools, including Northeastern University School of Law, require pro bono or public interest service as a condition of graduation, and recently the state of New York adopted a fifty-hour pro bono requirement as a condition of bar admission.⁴⁰

34 Carnegie Report, *supra* note 5, at 8.

35 MacCrate Report, *supra* note 3, at 207–21.

36 *Id.* at 213–15.

37 MODEL RULES OF PROF’L CONDUCT Preamble (2011).

38 *Id.* at R. 6.1.

39 *Id.*

40 Samson Habte, *New York Adopts Court Rule Detailing Pro Bono Requirement for Bar Admission*, BLOOMBERG BNA (Sept. 26, 2012), available at <http://www.bna.com/new-yorkadopts-n17179869903/>.

The professional obligations to provide pro bono legal representation and to improve the legal system should not simply be the concern of the bar; they should also be the concern of law schools as well. For one, those future advocates who are expected to “seek the improvement of the law,” as the Model Rules ask, are our current students. Deborah Rhode, a professor at Stanford Law School, has called for legal educators to take advantage of their “unique opportunity and obligation to make access to justice a more central social priority.”⁴¹ Doug Colbert, professor at University of Maryland School of Law and member of the Access to Justice Committee for the Society of American Law Teachers, poses a challenge: “[a]re we doing all we can to instill the profession’s ethical obligation of public service to our students, to members of the bar, and to faculty colleagues?”⁴² Teaching social justice by integrating it into experiential components of doctrinal classes will advance these goals, set not on the fringe of our profession, but at its core.

Teaching social justice is critically important for all students. Like medical students who are required to study “cultural competency” for the provision of medical services no matter what type of practice they choose,⁴³ law students should have basic understandings of the situations a range of clients may face and the problems in society that the law can and, in some cases, cannot solve. While certainly not all law students, or even a majority, will choose public interest careers after law school,⁴⁴ we should offer the same kinds of encouragement, by way of example, to those who do choose to pur-

41 DEBORAH RHODE, ACCESS TO JUSTICE 193 (2004).

42 Douglas Colbert, *It’s Not Funny: Creating a Professional Culture of Pro Bono Commitment*, in VULNERABLE POPULATIONS AND TRANSFORMATION LAW TEACHING: A CRITICAL READER 31, 33 (Soc’y of Am. Law Teachers, et al., eds., 2011).

43 Beverly I. Moran aptly draws the comparison to cultural competency training in medical schools. Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education – A Case for Cultural Competency*, 38 S.U. L. REV. 1, 2 (2010).

44 The most recent survey conducted by the National Association for Law Placement (hereinafter NALP) found that only 7.5% of law graduates worked at public interest organizations, including public defender’s offices, which is up in recent years due to school programs to provide fellowships and grants to work in public interest settings. Another 28% of graduates work in the public service sector, including the military, judicial clerkships, and other government work. *Class of 2011 National Summary Report*, NALP (July 2012) [hereinafter *NALP Summary Report*], available at http://www.nalp.org/uploads/NatlSummChart_Classof2011.pdf.

sue careers in the public interest that we offer to students interested in careers in private, for-profit practice.

Studies suggest, however, that we are failing to do so. First, far more students come to law school with a desire to serve the public interest upon graduation than leave law school with that desire. Various studies over the past thirty years have demonstrated that somewhere around a third of all entering law students want to pursue a public interest career, but more than half abandon those goals during law school, and still fewer actually enter a public interest career, typically constituting less than 5% of law school graduates.⁴⁵

Why does law school transform students with public interest goals into graduates interested in private practice? Empirical work has largely discredited the theory that educational debt is to blame.⁴⁶ Instead, evidence suggests that law school culture and curriculum do not adequately support those goals. Students with public interest career goals often feel “pressured to abandon aspects of their own personalities and values.”⁴⁷ Even those who do not abandon their goals often find the current legal education paradigm largely alienating.⁴⁸ As Kimberlé Crenshaw, a professor at UCLA Law School,

45 Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect on Student's Public Interest Aspirations*, 7 CONN. PUB. INT. L. J. 95, 95 (2008). Only recently has the number of public interest placements risen much above 5%, seemingly due to law schools' grant and fellowship funding of recent grads to do such work. See NALP Summary Report, *supra* note 44; Sarah Valentine, *Leveraging Legal Research*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE TEACHING: A CRITICAL READER 145, 145 (Soc'y of Am. Law Teachers, et al., eds., 2011) (“While incoming law students often cite working with underserved communities as a goal, less than three percent of law graduates pursue public interest work after law school.”).

46 See David L. Chambers, *The Burdens of Educational Loans: The Impacts of Debt on Job Choice and Standards of Living for Students at Nine American Law Schools*, 42 J. LEGAL EDUC. 187, 199 (1992) (noting a weak correlation between educational debt and job choice); Christa McGill, *Educational Debt and Law Student Failure to Enter Public Service Careers: Bringing Empirical Data to Bear*, 31 LAW & SOC. INQUIRY 677, 677–78 (2006) (reporting little connection between debt and choosing a public service career); Robert Granfield & Thomas Koenig, *The Fate of Elite Idealism: Accommodation and Ideological Work at Harvard Law School*, 29 SOC. PROBS. 315, 320 (1992) (reporting no correlation between Harvard Law School graduates' debt and choice of occupation); Nguyen, *supra* note 45, at 98–99 (noting no correlation between the percentage of law grads taking public interest jobs and the median educational debt over time).

47 Valentine, *supra* note 45, at 145.

48 Rachel Anderson, Marc-Tizoc González & Stephen Lee, *Toward a New Student Insurgency: A Critical Epistolary*, 94 CAL. L. REV. 1879, 1900 (2006) (“Instead

has explained, doctrinal case method teaching runs the risk of what she calls “perspectivelessness,” or conveying to students that the law can be treated as objective and neutral, which tends to discount and devalue students’ own subjective experiences.⁴⁹ Angela Harris, a professor at UC Davis School of Law, succinctly crystallized this phenomenon when she wrote, “Justice is the reason why many of my students have come to law school. But justice is not what the law provides.”⁵⁰ That realization, without any discussion of the relationship between law and justice, can easily dissuade students from pursuing public interest careers. Bill Quigley is equally blunt: “We must never confuse law and justice. What is legal is often not just. And what is just is often not legal.”⁵¹ We have an obligation to help our students see the law’s potential and openly acknowledge its limitations. This sort of social justice teaching as part of an experiential curriculum is one step we can take to support those students who do want to enter a public interest career.

For those students who do not enter law school with public interest aspirations, being exposed to social justice concepts and ideas may provide an opportunity to think about options previously not considered. A significant number of lawyers working in public interest fields cite particular “transformative experiences” as the root of their motivation for the work they do.⁵² As educators, we should be

of becoming disabled by the profound alienation that I felt from conventional legal pedagogy or succumbing to the meaningless drive of individualist competition that it can engender, participating in student organizations socialized me to identify with the radical countertradition of organized student activism.”). Indeed, the alienation is not limited to law schools; lawyers working on behalf of a public interest cause often feel marginalized in their own profession. See STUART SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING* (2004); Corey S. Shdaimah, *Intersecting Identities: Cause Lawyers as Legal Professionals and Social Movement Actors*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, 220, 223 (Sarat & Scheingold eds., 2006).

49 Kimberlé Williams Crenshaw, *Forward: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 33, 34–35 (1994).

50 Angela P. Harris, *Teaching the Tensions*, 54 ST. LOUIS UNIV. L.J. 739, 743 (2010).

51 Professor Quigley rightfully points out that 100 years ago many things were perfectly legal that today we would consider patently unjust. For instance, women and African Americans could not vote and businesses could discriminate on any basis at all. “What is the difference between 100 years ago and now? History has not yet judged clearly which laws are terribly unjust.” Quigley, *supra* note 31, at 15–16.

52 Shdaimah, *supra* note 48, at 223.

striving to provide such transformative experiences in the law school curriculum. While acknowledging that students' goals may naturally change over time, we should have a curriculum that encourages just as many students to change their goals toward public interest work as away from it. Broadening experiential education beyond the clinical setting is an opportunity to broaden students' thinking about law and social change. It encourages those students with public interest aspirations to pursue those goals, and opens up the conversation for those who might not have considered it. Perhaps more importantly, it teaches all students that as lawyers, their work will have an impact on society and requires them to think critically and conscientiously about how to form their professional identity and to engage in whatever career they choose.

IV. Experiential Education is Particularly Important for Students Pursuing Public Interest Careers

Producing practice-ready graduates is no easy task.⁵³ As Margaret Barry, a professor at Vermont Law School, points out, truly practice ready graduates are capable of immediately representing clients.⁵⁴ In part because of the difficulty of the enterprise, in part because of the longstanding nature of the current case method of legal education, and in part because of cost, there is some resistance to expanded experiential education opportunities.⁵⁵ One group of law professors, however, should be more easily convinced that experiential education is worth the admittedly not insubstantial costs: those who entered the academy themselves wanting to promote social justice and to support and inspire students who want to pursue public interest careers. In particular, public interest practice settings tend to require newly minted lawyers to hit the ground running more than traditional law firm settings. Increasing opportunities for experiential education can enable recent graduates entering a public interest practice to better meet this challenge.

53 See Margaret Martin Barry, *Practice Ready: Are We There Yet?*, B.C. J. OF L. & SOC. JUST. 247 (2012).

54 *Id.* at 249.

55 *See id.*

A. Challenges Faced by Entry Level Public Interest Lawyers

Unlike students who pursue careers in a traditional law firm setting, students who work full-time in a public interest field after graduation do so in settings, the vast majority of which do not have the resources to conduct extensive on-the-job training. For example, with the exception of an elite few public defender offices, most indigent defense lawyers, both those within state public defender services and those working as appointed counsel, have very little opportunity for mentorship, practical exercises, or lessons from experienced attorneys.⁵⁶ Legal services organizations, likewise, are so overworked and underfunded that they turn away a full fifty percent of eligible clients who walk through their door.⁵⁷ Our graduates who go to work in these environments are going to need to be ready to represent clients from the start and are not going to benefit from years of observation, participation in the lower stakes portions of cases, and mentorship that students in large law firms may.⁵⁸ Moreover, even at comparatively better funded national public interest organizations engaged in impact litigation and policy work, new attorneys are given substantial responsibility from the day they walk in the door, often with their own caseload for which they serve as lead counsel.⁵⁹

In addition to these traditional public interest practice settings, increasing numbers of graduates are hanging out a shingle as solo practitioners or are collaborating to work in small firm settings.⁶⁰

56 Charles J. Ogletree, *An Essay on the New Public Defender for the 21st Century*, 58 *LAW & CONTEMP. PROBS.* 81, 90–92 (1995) (describing the uniquely thorough training at the Public Defender Service in Washington D.C., and the lack of such programs at most other indigent defense services).

57 *LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1* (2009).

58 See, e.g., Bill Ong Hing, *Legal Services Support Centers and Rebellious Advocacy: A Case Study of the Immigrant Legal Resource Center*, 28 *WASH. U. J.L. & POL'Y* 265, 269 (2008) (“[N]orthern California community-based organizations serving immigrants and refugees lacked adequate information, resources, training, and staffing to grapple with the increasingly complex legal and social challenges faced by their clients.”).

59 This was my own experience as a new attorney at Public Citizen Litigation Group in Washington D.C. While there was no shortage of mentorship and help available, I was given primary responsibility for my cases from day one.

60 Deborah Howard, *The Law School Consortium Project: Law Schools Supporting Graduates to Increase Access to Justice for Low and Moderate-Income Individuals and*

These practice settings offer great opportunities to serve the public interest by providing legal services to low and moderate-income individuals who cannot obtain representation through legal services organizations because of limited resources. In fact, seventy-five percent of low-income people who obtain representation do so from private attorneys, not legal services organizations.⁶¹ However, only twenty percent of the legal needs of low-income individuals are met.⁶² The opportunity for small firms and solo practitioners to serve these needs is therefore substantial. In fact, many graduates choose these practice settings precisely because it enables them to serve a community in need.⁶³ These practice settings also provide little opportunity for on-the-job training and require students to enter the workplace with the basic skills necessary to quickly develop into an effective legal counselor.

B. Benefits of Experiential Education in Public Interest Practice Settings

Incorporating more practice-oriented components into the core curriculum would particularly benefit students who enter a public interest practice setting. These students may be among the most in need of a legal education that makes them “practice ready,” and any efforts to expand experiential education will further that goal. In addition, there are several specific skills that might be taught through greater experiential components in doctrinal classes that are particularly important to students who go on to public interest careers.

First, experiential components to doctrinal classes can be used to expose students to a broader set of research and analysis skills than can be fit into legal research and writing courses. For example, many public interest lawyers will not have access to the high cost research services provided in law school, such as Westlaw and Lexis. Whether privately retained or appointed, attorneys representing indigent individuals operate under severe financial constraints. To properly advocate for their clients, they will instead need to “leverage the free or low cost information available on the Internet to support their legal and non-legal research needs.”⁶⁴ Experiential education can easily

Communities, 29 FORDHAM URB. L.J. 1245 (2002).

61 *Id.* at 1246.

62 LEGAL SERVS. CORP., *supra* note 57, at 1.

63 See Howard, *supra* note 60, at 1265.

64 Valentine, *supra* note 45, at 146.

introduce students to these research options by relying on the expertise available in law schools that is almost universally absent from public interest settings: research librarians. These individuals are frequently quite happy to guest lecture in doctrinal courses, especially specialized seminars, about pertinent research sources, and are capable of including information about blogs and other publicly accessible repositories of legal information. More importantly, they and doctrinal professors who are well-versed in a particular subject matter can help students develop criteria for discerning reliable sources from those that should be read more skeptically.

In addition, public interest lawyers often need skills that are not currently taught in core curricula. For instance, most public interest lawyers need skills related to practicing before administrative agencies, including regulatory analysis and administrative law research skills.⁶⁵ Building experiential projects into a doctrinal course on administrative law can much more readily increase students' understanding of the relevant processes and sources of information that govern administrative lawmaking and practice than general research courses that are more focused on teaching research methodology.

None of this is to say we should not simultaneously strive for better training programs and resources for public interest lawyers in all of the settings in which they practice. Given the reality of the constraints on public interest practices, however, experiential education in law school can be a key component both for ensuring our graduates can handle the work they face in these settings and empowering them to take on roles to serve the public interest. We can support their public interest goals and ideals by giving them the tools they need to succeed in a "non-traditional" career path. In this way, experiential education and social justice teaching, again collide.

V. Conclusion: Operationalizing Social Justice Experiential Education

The discussion about experiential education has moved beyond clinics to imagine an "integrated" experiential curriculum. The idea behind an integrated experiential curriculum is that experiential components in law school will not be isolated in a handful of courses, usually electives, but rather will be part of a "dynamic curriculum that

65 *Id.* at 146, 151.

moves [students] back and forth between understanding and enactment, experience and analysis.”⁶⁶ As such, law professors are called on to, among other things, incorporate experiential learning into our core curriculum and doctrinal classes.

This goal can be accomplished in myriad ways. In individual doctrinal courses, a single professor has the ability to make amazing strides in experiential education while simultaneously teaching social justice in the core curriculum. In a common model, a professor in almost any doctrinal class could choose to incorporate a simulated case throughout the semester. For instance, in my own Civil Procedure class, I require students, working in groups, to complete various assignments based on a small case file they receive at the beginning of the semester. Two of the assignments are handed in for written feedback, and several others are done in class and then discussed collectively. Gillian Hatfield, a professor at USC Gould School of Law, reports using a simulated case for similar purposes in her first year Contracts class, requiring students to turn in four written assignments at different points in the semester.⁶⁷ This may be the most common way of giving students practice applying their doctrinal knowledge in a particular context in large lecture classes.

This model is easily amenable to teaching social justice. Any time a professor chooses a simulated exercise, there is an opportunity to choose a simulation that will provoke learning about the operation of law in society to produce just or unjust outcomes. One prominent private practitioner has used, as an example, the teaching of a simulation based on a toxic tort.⁶⁸ Importantly, the toxic tort victims in the hypothetical come from a traditionally disadvantaged community.⁶⁹ Out of this example, he points out opportunities for using the simulation in teaching a wide-range of subject matter, including issues in torts, contracts, labor law, administrative law, constitutional law,

66 WILLIAM M. SULLIVAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW SUMMARY 8 (Carnegie Foundation for the Advancement of Teaching 2007) [hereinafter “Carnegie Report Summary”].

67 Gillian Hatfield, *First-Year Contracts*, EDUCATING TOMORROW’S LAWYERS, <http://educatingtomorrowlawyers.du.edu/course-portfolios/detail/contracts-first-year> (last visited July 20, 2013).

68 Doug Simpson, *The Unseen, Unheard, Unknowledgeable, and Underrepresented—How Can Law Schools Develop Student Interest in Helping Disadvantaged People?*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER 227, 235–43 (Soc’y of Am. Law Teachers et al. eds., 2011).

69 *Id.*

evidence, environmental law, insurance, civil procedure, professional responsibility, corporate law, and criminal law.⁷⁰ As he discusses, not only does using a simulated case like this one provide students with a context-based method of learning how the doctrine operates in practice, but also serves to “sensitiz[e] law students to problems that disadvantaged people face.”⁷¹

Cynthia Bond, a professor at the John Marshall Law School, discusses the importance of constructing a simulation carefully to best capitalize on the opportunity to integrate social and political contexts into learning legal skills.⁷² She considers the importance of the creation of the client character in any simulation, as it will require students to imagine “who a client might be and what their relationship with clients will be like.”⁷³ For example, in her model, the client may have a name that signals the client has a certain background, or often the client will be low income, but in any case, her clients will end up having characteristics that go against the associated stereotypes.⁷⁴ She details other considerations professors should carefully weigh, such as who should have the stronger arguments and therefore “win” in the simulation.⁷⁵

Another, more ambitious, model for experiential learning in doctrinal classes involves a whole-course simulation. This type of course is designed entirely around a simulated exercise, through which the students learn the doctrine. For example, Roberto Corrada, a professor at the University of Denver Sturm College of Law, teaches a course on labor law in which the students organize themselves to form a union and negotiate with the professor about the terms of the course itself, all using the rules and procedures of actual labor lawyers.⁷⁶ As he describes the benefits of teaching labor law in this way,

70 *Id.* at 243–45.

71 *Id.* at 233.

72 Cynthia D. Bond, *The Legal Writing Classroom in the World*, in *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* 163, 166 (Soc’y of Am. Law Teachers et al. eds., 2011). Although Professor Bond discusses her ideas in the context of a problem created for a legal research and writing course, they are just as applicable to a problem created for a doctrinal course.

73 *Id.* at 169.

74 *Id.* at 170.

75 *Id.* at 171–72.

76 Roberto Corrada, *Labor Law*, *EDUCATING TOMORROW’S LAWYERS*, <http://educatingtomorrowlawyers.du.edu/course-portfolios/detail/labor-relationships-law> (last visited July 15, 2013).

it gives students a better idea about the context in which unionization happens and the power dynamic between employers and employees.⁷⁷

In each of these ways, professors have introduced practical skills and real world experiences into their classrooms and simultaneously exposed students to social justice discourse in individual courses. Beyond the confines of a single course, however, relatively moderate systemic changes to curriculum can also be made to simultaneously address the need for experiential education and social justice teaching. There are many current initiatives at various schools to restructure the core curriculum, particularly in the first year. Among them are efforts to add courses that involve vastly different skill sets than courses based on private common law such as torts, property, and contracts. For instance, various schools have added courses on regulatory and administrative law, international or comparative law, legislation, and ethics.⁷⁸

Shifting the emphasis in the first year toward more public law courses presents inherent opportunities for teaching social justice. Rather than the case-law method, which is designed to teach students the constraints of the law as rooted in history and precedent, public law tends to focus on the ways the law is evolving or can evolve. Studying legislation and the administrative implementation of government regulation has the potential to introduce students to areas such as labor, investor protections, consumer protection, civil rights, environmental protection, and other areas, and allows students to see the forward looking potential for law to achieve social goals.⁷⁹ Discussing the civil rights context with which students are often familiar, John Payton, President of the NAACP Legal Defense Fund, explained, “[t]hose rights were *created*. They were created by aggressive lawyers, backed by political action.”⁸⁰ Studying these areas of the law gives students an opportunity to see the law as a vehicle for change, while teaching skill sets most lawyers will need in prac-

77 *Id.*

78 Barry, *supra* note 53, at 256–62 (surveying recent first year curricular changes among law schools).

79 See Edward Rubin, *What’s Wrong with Langell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 654 (2007) (explaining that a first year curriculum that includes more public law “highlights the centrality of social policy in the American legal system”).

80 John Payton, *The Myth of Our Post-Racial Society*, in VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER 7, 17 (2011).

tice, including reading statutes and regulations, agency decisions, and primary documents related to the policy objectives of positive law.⁸¹

These examples are illustrative of the ways in which expanding experiential education in law schools can advance social justice teaching, and why those committed to the social justice mission of law schools should invest in experiential education. Legal education is undergoing a self-reflective assessment and a moment of opportunity for pedagogical change. Experiential education is at the heart of calls for reform. As we move forward with innovations, it is critical to contemplate not only what skills we impart on our students but also to heed the calls of the profession to create an ethical bar and a group of future lawyers committed to their obligation to serve their communities and improve the standard of justice. Using experiential methods to teach not only skills but also expose students to social problems, public law, legal reform, and policy issues goes a long way toward making those students not only practice-ready, but profession-ready.

81 Edward Rubin, *What's Wrong with Langell's Method, and What to Do About It*, 60 VAND. L. REV. 609, 651 (2007) ("If one were to walk into a middle- or large-sized law firm these days (one of the sort that employs the majority of law school graduates) one would find approximately one-third of the lawyers engaged in litigation, only some of which involves common law matters, another one-third engaged in purely transactional work, and the last one-third engaged in regulatory work. An up-to-date first-year curriculum should reflect that basic reality.").

Should Law Professors have a Continuing Practice Experience (CPE) Requirement?

*Emily Zimmerman**

I. Introduction

Legal education is in peril. Fewer students are applying to law school,¹ and the cost of legal education is soaring.² Students are accumulating massive amounts of debt to attend law school³ and then,

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1 BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS 160–61 (2012); *Current Volume—Three-Year Summary*, LAW SCHOOL ADMISSION COUNCIL (LSAC), <http://www.lsac.org/lisacresources/data/three-year-volume.asp> (last visited July 27, 2013). Although most of the authorities cited in this Article are law review articles, the state of legal education has received a fair amount of attention in the popular press as well. *See, e.g.*, Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 14, 2012, <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existentialcrisis-for-law-schools.html>; Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/01/31/education/lawschoolsapplications-fall-as-costs-rise-and-jobs-are-cut.html>.

2 TAMANAHA, *supra* note 1, at xiii, 108–09, 133–34.

3 Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 154 (2010). This debt, moreover, is not dischargeable in bankruptcy. TAMANAHA, *supra* note 1, at 110–11. *But see* Hedlund v. Educ. Res. Inst. Inc., 718 F.3d 848, 849, 851 (9th Cir. 2013)

once they graduate, are not finding jobs,⁴ let alone jobs that will enable them to pay off their loans.⁵ Moreover, students who do obtain

(reversing district court and affirming bankruptcy court's partial discharge of debtor's law school student loans based on a finding of "undue hardship" under 11 U.S.C. § 523(a)(8)) (internal quotation marks omitted).

4 See TAMANAHA, *supra* note 1, at 114; see also Catherine Rampell, *The Toppling of Top-Tier Lawyer Jobs*, *ECONOMIX* (July 16, 2012), <http://economix.blogs.nytimes.com/2012/07/16/the-toppling-of-top-tier-lawyer-jobs/> (noting "the implosion in the legal hiring market").

5 See TAMANAHA, *supra* note 1, at x ("The cost of a legal education today is substantially out of proportion to the economic opportunities obtained by the majority of graduates."); *id.* at 172 ("A law graduate with the average amount of debt cannot get by on the average pay."); Newton, *supra* note 3, at 108 ("In the coming years, hoards of ill-prepared law school graduates with huge debts will be realizing little or no return on their massive law school investments."); see also Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177, 179 (2012) ("The ongoing contraction in the employment market for new lawyers has combined with the continuing increase in the cost of legal education to produce what many now recognize as a genuine crisis for both law schools and the legal profession."); Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598, 599 (2010) ("The recession's effects—rising tuition, scarce student loans, and a poor job market—are pushing legal education to the breaking point."). *But see* Philip G. Schrag, *Failing Law Schools — Brian Tamanaha's Misguided Missile*, 26 GEO. J. LEGAL ETHICS (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2179625 (arguing that Prof. Tamanaha may overstate the debt repayment burden on law graduates who take out loans to fund their legal education). Professor Tamanaha has written a response to Professor Schrag's critique. Brian Z. Tamanaha, *The Problems with Income Based Repayment, and the Charge of Elitism: Responses to Schrag and Chambliss*, 26 GEO. J. LEGAL ETHICS (forthcoming 2013), available at <http://ssrn.com/abstract=2275491> [hereinafter Tamanaha, *Responses to Schrag and Chambliss*].

Although some students receive scholarships to attend law school, these students may not be able to retain those scholarships throughout their entire law school career. See David Segal, *Behind the Curve*, N.Y. TIMES, May 1, 2011, at BU1, available at <http://www.nytimes.com/2011/05/01/business/lawschool-grants.html?ref=davidsegal&pagewanted=all>; see also Debra Cassens Weiss, *Law Schools Would Have to Disclose Scholarship Retention Rates Online Under ABA Section Proposal*, A.B.A. J. (Aug. 30, 2011), http://www.abajournal.com/news/article/law_schools_would_have_to_disclose_scholarship_retention_rates_online_under.

This bleak picture of legal education does not apply to all students. It would be wrong to suggest that all students do not find jobs after graduating from law school. Certainly, some students find jobs—and, moreover, desirable jobs—after graduation. Similarly, there are students who receive scholarships to attend law school and who retain those scholarships throughout law school. However, that does not mean that we should be unconcerned about students

legal jobs may find that they are unprepared for the work that those jobs require.⁶ In fact, law schools have regularly been criticized for failing to adequately prepare students for law practice.⁷

Furthermore, law professors have been criticized for writing scholarship that does not contribute to the legal profession and that is out of touch with the work that practicing lawyers and judges do.⁸

who face much more difficult circumstances in relation to their law school experience. It also does not mean that we should not consider whether there are ways in which the experiences of all law students could be improved. Some law schools and law professors have been engaged in critical reflection about legal education and have taken concrete steps to address concerns with legal education. A CPE requirement offers an additional means for law schools to address some of these concerns.

- 6 See ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 2* (2007) (“[N]umerous groups of leaders of the legal profession and groups of distinguished lawyers, judges, and academics have studied legal education and have universally concluded that most law school graduates lack the minimum competencies required to provide effective and responsible legal services.”); TAMANAHA, *supra* note 1, at 172 (“[T]he bar incessantly complains that graduates are inadequately prepared for the practice of law.”); Newton, *supra* note 3, at 108 (“The recent economic recession, which did not spare the legal profession, has made the complaints about American law schools’ failure to prepare law students to enter the legal profession even more compelling; law firms no longer can afford to hire entry-level attorneys who lack the basic skills required to practice law effectively.”) (footnotes omitted); Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 LEGAL WRITING: J. LEGAL WRITING INST. 329, 356 (2005) (“Many students are dissatisfied with the skill set they are taking with them from law school into the legal marketplace and feel that they are not prepared to tackle much of what will be thrown at them by their employers after graduation.”).
- 7 STUCKEY ET AL., *supra* note 6, at 18 (“[L]aw schools can significantly improve their students’ preparation for their first professional jobs.”); Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLINICAL L. REV. 35, 37 (2009) [hereinafter Chemerinsky, *Why Not Clinical Education?*] (discussing the history of recommendations “for more training in practical skills and more experiential learning” in legal education); Newton, *supra* note 3, at 110–13 (discussing more recent and less recent critiques of legal education and calls for legal education to do a better job of preparing students for law practice); see also Chemerinsky, *supra*, at 35 (“There is a growing recognition that law schools must do a better job of preparing students for the practice of law.”); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1233 (1991) (“Legal educators, with our increasing orientation away from law and the practice of law, are failing to adequately prepare students to practice law.”).
- 8 See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (“[I]t is my impression that

In addition, the priority given to scholarship (by the legal academy generally and law professors individually) creates pressure on law professors to devote more of their time to their own research and less of their time to teaching.⁹ One author has recently argued that the focus on scholarship means that law students' tuition dollars are being used to pay for the non-teaching work of law professors and that the effort to give law professors more time for scholarship means that law students are paying more for law professors who are teaching less.¹⁰

judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.”); *id.* at 36 (“[T]oo few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners. . . .”); *id.* at 42 (“The growing disjunction between legal education and legal practice is most salient with respect to scholarship.”); Seth P. Waxman, *Rebuilding Bridges: The Bar, the Bench, and the Academy*, 150 U. PA. L. REV. 1905, 1906–07 (2002) (“Why does there often seem to be so little connection between the work being done in law schools and published in law reviews and the profession for which law schools prepare their students? Why does the relationship among law schools, judges, and practicing lawyers seem so dysfunctional?”); *id.* at 1907 (“Over time . . . the realms of practice and the academy have drifted farther and farther apart.”); *id.* at 1909 (“[L]aw reviews are less useful to judges and practitioners today than they were in the past.”); *see also* Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 631 (2004) (discussing Edwards, *supra*); Suzanne Rabé & Stephen A. Rosenbaum, *A “Sending Down” Sabbatical: The Benefits of Lawyering in the Legal Services Trenches*, 60 J. LEGAL EDUC. 296, 309 (2010) (“Judges and lawyers express increasing alienation from law review scholarship.”); Newton, *supra* note 3, at 113–25 (discussing the criticisms of law professors’ scholarship for not being useful to practicing lawyers and judges).

9 *See, e.g.*, William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for Its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 213–14 (1996).

10 TAMANAHA, *supra* note 1, at 126–28; *see also* Newton, *supra* note 3, at 154–55. Brian Tamanaha’s criticisms of legal education and proposals for reforming legal education in *Failing Law Schools* have provoked an array of responses from other law professors. *See, e.g.*, Ray Worthy Campbell, *Law School Disruption*, GEO. J. LEGAL ETHICS (forthcoming), available at <http://ssrn.com/abstract=2169859>; Elizabeth Chambliss, *It’s Not About Us: Beyond the Job Market Critique of U.S. Law Schools* (New York Law School Legal Studies, Research Paper Series 12/13 No. 49, 2012), available at <http://ssrn.com/abstract=2189021>; Deborah Jones Merritt & Daniel C. Merritt, *Unleashing Market Forces in Legal Education and the Legal Profession*, 26 GEO. J. LEGAL ETHICS (forthcoming 2013), available at <http://ssrn.com/abstract=2190398>; Schrag, *supra* note 5; Jay Sterling Silver, *The Case Against Tamanaha’s Motel 6 Model of Legal Education*, 60 UCLA L. REV. DISCOURSE 50 (2012); Jennifer S. Bard, Book Review, 33 J.

Numerous suggestions have been made for the reform of law schools. With respect to law schools' role in preparing students for law practice, suggestions include better preparing students for the types of skills that they will use as practicing lawyers and better preparing students for the professional and ethical responsibilities that they will assume as practicing lawyers.¹¹ With respect to law schools' scholarly mission, suggestions include encouraging law professors to engage in scholarship that addresses legal issues faced by judges and practicing lawyers.¹²

Although these suggestions focus on different aspects of a law school's mission, these suggestions emphasize ways in which law schools can strengthen their connections to law practice (and be more relevant to law practice).¹³ However, at the very time when legal education is being challenged to better prepare students for law practice and is focusing on ways in which students can be better prepared for law practice,¹⁴ little attention is being given to whether law faculties

LEGAL MED. 417 (2012). Professor Tamanaha has written a response to some of his critics. Tamanaha, *Responses to Schrag and Chambliss*, *supra* note 5.

Criticisms of legal education and the future of legal education have also been addressed at recent conferences. For example, the subject of a Presidential Program at the 2013 Annual Meeting of the Association of American Law Schools was "Law Schools and Their Critics." ASS'N AM. L. SCH., PROGRAM, AALS 2013 ANNUAL MEETING: GLOBAL ENGAGEMENT AND THE LEGAL ACADEMY 78, XXXVI (2013), available at <http://aals.org/am2013/AM2013%20Program.pdf>.

11 See, e.g., STUCKEY ET AL., *supra* note 6, at 8–9.

12 See, e.g., David Hricik & Victoria S. Salzmann, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 763 (2005). Certainly, not all law professors agree with the premises that underlie these suggestions, and professors who agree with the premises might still not agree with these specific suggestions. Some law professors resist the idea that law school's primary mission is to train law students to be practicing lawyers. Some law professors also resist the call for scholarship that is more immediately useful to judges and practicing lawyers.

13 Given that fewer students are applying to law school generally, a law school that can identify ways in which it is more connected to law practice might be a law school that can attract more and better students. See Thies, *supra* note 5, at 610 (noting that as law schools "compete ferociously for the diminished number of qualified applicants . . . [s]chools will . . . face significant pressure to adjust their programs to be as attractive to students as possible").

14 See, e.g., Martha Neil, *Law Dean at Arizona State Unveils Plan to Create Law Grad "Residency" Program at Nonprofit Law Firm*, ABA JOURNAL (June 5, 2012), http://www.abajournal.com/news/article/Law_Dean_at_Arizona_State_Unveils_

could be better equipped to perform this important function. In the midst of the discussions about how law schools could better prepare students for practice, it is worth exploring whether one of the impediments to law schools becoming more relevant to law practice might be law faculties' lack of connection to law practice.¹⁵

Many law professors did not have extensive practice experience before they became law professors.¹⁶ In fact, individuals who want to become law professors might actually be advised not to spend

Plan_to_Create_Law_Grad_Residency_/. This particular program will also result in the employment of new law school graduates, who might otherwise not be able to obtain legal employment (benefiting the graduates themselves as well as their law school).

- 15 See, e.g., Trail & Underwood, *supra* note 9, at 210–13 (discussing how law professors' lack of connection to law practice might influence their teaching and scholarship); STUCKEY ET AL., *supra* note 6, at 23 (noting how law professors' lack of practice experience might influence their pedagogy) (quoting Judith Wegner, Theory, Practice, and the Course of Study – The Problem of the Elephant 51 (2003) (unpublished manuscript) (draft on file with Roy Stuckey)); Chemerinsky, *Why Not Clinical Education?*, *supra* note 7, at 39 (describing how law faculties' lack of practice experience might impede law schools' commitment to clinical education); see also Rabé & Rosenbaum, *supra* note 8, at 301 & n.18 (noting that “it has become routine for law professors . . . to be removed—sometimes for decades—from the law firm or the courtroom” and suggesting a connection between this situation and the criticism that law schools do not adequately prepare students for law practice).
- 16 Richard E. Redding, “Where Did You Go to Law School?” *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 601 (2003) (studying the biographies of new law professors and noting that most new law professors had practice experience, with an average of 3.7 years in practice); *id.* at 612 (“Those who aim from graduation, or even earlier, at an academic career are probably less inclined to stay in practice for very long before entering academia.”). Of those law professors with practice experience, new law professors at the “top 25 schools” had an average of 1.4 years of practice experience, while new law professors “at all other schools” had an average of 3.8 years of practice experience. *Id.* at 601. Professor Redding notes that “the number of years of legal practice experience and whether the candidate had prior teaching experience were negatively correlated, significantly but modestly, with the quality of the hiring school, with those having prior teaching experience or more years of practice experience less likely to be hired at a highly ranked law school.” *Id.* at 605. Law professors who spent only a short time in practice before becoming law professors may necessarily have experienced a more narrow range of lawyering work. See Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 706, 758 (1998); Nathanson, *supra* note 6, at 339; see also Newton, *supra* note 3, at 126–30 (discussing the limited practice experience of many law professors).

too much time practicing law in order to improve their chances of getting hired.¹⁷ In addition, law professors who did spend a small amount of time in practice may not have actually enjoyed practicing law and may, in fact, have sought to become law professors because they did not like law practice.¹⁸ Moreover, with the increasing interest in interdisciplinarity and hiring law faculty with doctoral degrees (most often in fields other than law), the trend might be towards law professors having even less (if any) practice experience.¹⁹ Now and in the future, given the focus on scholarly productivity, aspiring law professors might be spending more time focusing on getting positions in law schools that enable them to publish scholarship before they go on the full-time teaching market than on spending more time in law practice.²⁰ In fact, Yale Law School has initiated a new Ph.D.

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- 17 See, e.g., Schiltz, *supra* note 16, at 762 n.225 (noting that law practice might be seen as a negative for prospective law professors); see also Newton, *supra* note 3, at 131–35 (discussing trends in law faculty hiring, including the trend away from hiring law professors with practice experience); David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 92 (1999) (“Not so long ago, hiring faculty members with substantial practice experience was fairly common. This is no longer the case at most schools.”); Nathanson, *supra* note 6, at 351 (“Historically, practical experience has been viewed within the legal academy as a negative when assessing faculty candidates.”).
- 18 Cf., e.g., David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 59, 66 (1999) (“The one thing that all nonclinical teachers have in common is that all have chosen teaching over law practice.”); Michael A. Mogill, *Professing Pro Bono: To Walk the Talk*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y 5, 30 (2001) (noting that “some faculty exhibit disdain toward practice”); Cohen, *supra* note 8, at 632 (noting “the apparent disdain many professors feel and perhaps even express towards practice and practitioners”); *id.* at 632–33, 632 n.27; Schiltz, *supra* note 16, at 766 & n.247; Johnson, *supra* note 7, at 1239 (noting that some law professors are “indifferent to the profession”); Wilkins, *supra* note 17, at 77 (noting “the [legal] academy’s persistent inattention to legal practice”); Nathanson, *supra* note 6, at 334 (stating that “traditional legal academics tend to disparage practitioner’s problems”).
- 19 See Waxman, *supra* note 8, at 1909 (“Increasingly, law professors see themselves more as colleagues of sociologists, economists, and philosophers than of judges and lawyers.”); Chemerinsky, *Why Not Clinical Education?*, *supra* note 7, at 39 (“The emphasis on inter-disciplinary study . . . means more law professors with a Ph.D. as well as a law degree, but with no practice experience.”); Edwards, *supra* note 8, at 37 (“[N]ow we see ‘law professors’ hired from graduate schools, wholly lacking in legal experience or training. . . .”).
- 20 See Waxman, *supra* note 8, at 1909–10 (“[I]t has become increasingly difficult for people with significant amounts of experience as practicing attorneys to be hired as law professors. Sadly, the emphasis of most top law schools on publi-

in Law program “to prepare J.D. graduates for careers in legal scholarship through three years of supervised study.”²¹

Furthermore, even those law professors who were hired after spending a substantial amount of time in practice may not have maintained a connection to the world of law practice after they became law professors.²² Especially given the evolving nature of law practice, law professors who practiced law in the past might not be familiar with the current realities of law practice—both the substantive work that is done in law practice and the environment in which that work is done (for example, the business of law practice).²³

cation over teaching ability or practice experience means that many supremely talented law teachers never even try to join, or to interact with, the academy. And their perspectives and wisdom are consequently lost, both to students and professors.”).

- 21 *Ph.D. Program*, YALE LAW SCHOOL, http://www.law.yale.edu/graduate/phd_program.htm (last visited July 25, 2013). The first students in this new program will start in the fall of 2013. *Id.* The program will give aspiring law professors the opportunity to produce scholarship “that candidates can take with them on the job market.” *Id.* Although candidates are required to have a J.D. degree, there is no requirement that candidates have law practice experience. *Frequently Asked Questions*, YALE LAW SCHOOL, http://www.law.yale.edu/graduate/phd_faq.htm (last visited July 30, 2013). Although Yale Law School notes that, “[p]ractice experience can be a useful qualification for admission,” the Law School also states that, “[a]pplicants who have spent more than a couple of years after law school in practice should relate their practice experience to their scholarly agenda or use their personal statements to explain their *change in direction*.” (emphasis added) *Id.*
- 22 See Mogill, *supra* note 18, at 6 (noting that after author became a law professor after practicing law, he “was far removed from the daily toil of practice on the front lines”); Cohen, *supra* note 8, at 623 (“I had left the practice of law after a mere four years. Since that time, I have become increasingly bothered by the fact that I was spending my career preparing students for a world that was more and more removed from my daily existence and memory.”).
- 23 See Campbell, *supra* note 10, at 14 (“[T]he practice of law worldwide is undergoing rapid, fundamental, and irreversible change.”); Cohen, *supra* note 8, at 623–24 (describing the author’s feeling of being out of touch with the current realities of law practice); *id.* at 624 n.3 (stating that even law professors who practiced law in the past “should occasionally refresh their skills and their memories by reconnecting with the world of practice”); Bruce A. Green, *Reflections on the Ethics of Legal Academics: Law Schools as MDPs; Or, Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 302, 330 (2001) (noting the argument could be made that “since law professors’ memories of their pre-academic experience may fade or become increasingly irrelevant as the nature of law practice changes, there may be reason to encourage law professors to dip their toes back in the water from time to time”).

Although some law professors resist the idea that law schools should be training grounds for law practice,²⁴ the reality is that law schools *are* training grounds for law practice.²⁵ The irony is that many of the people who are entrusted with preparing students for law practice are people who may not actually have practiced law, who may only have practiced law for a short amount of time with the goal of not practicing law (in other words, with the goal of becoming law professors), or who may not have practiced law recently.²⁶ That is not to

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- 24 See Trail & Underwood, *supra* note 9, at 223–24 (discussing the perspectives of some legal academics regarding the role of law schools).
- 25 E.g., Mogill, *supra* note 18, at 15 (“We, as law professors, are the gatekeepers for our students’ entry into the legal profession.”); Redding, *supra* note 16, at 611 (“law schools are training grounds for practitioners”); Chemerinsky, *Why Not Clinical Education?*, *supra* note 7, at 41 (“The preeminent purpose of law schools is educating our students to be lawyers.”); Edward D. Re, *Law Office Sabbaticals for Law Professors*, 45 J. LEGAL EDUC. 95, 95 (1995) (stating that “the law school has assumed responsibility for the training of lawyers” and that “the basic goal of the law school is to prepare law students for the legal profession”); Standard 301(a), 2012-2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 17, available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf [hereinafter ABA STANDARDS] (“A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”); Preamble, ABA STANDARDS, *supra*, at ix (“[L]aw schools are the gateway to the legal profession.”); THE ASS’N OF AM. L. SCH., AALS HANDBOOK, STATEMENTS OF GOOD PRACTICES, THE PROPRIETY OF EXAMINATION BY PUBLIC AUTHORITY BEFORE ADMISSION TO PRACTICE, available at http://www.aals.org/about_handbook_sgp_exa.php (“The necessity to train lawyers to represent all members of society is a continual challenge to teachers of law and legal education.”); see also ASS’N OF AM. L. SCH., AALS HANDBOOK, STATEMENTS OF GOOD PRACTICES, STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (2003), available at http://www.aals.org/about_handbook_sgp_eth.php [hereinafter STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS OR STATEMENT] (noting that law professors serve as “mentors” for law students and “can profoundly influence students’ attitudes concerning professional competence and responsibility”); Graham C. Lilly, *Law School Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421, 1465 (1995) (“American law schools have enjoyed a virtual monopoly on entry into the legal profession.”).
- 26 See Cohen, *supra* note 8, at 628 n.17 (“The one thing that all nonclinical teachers have in common is that all have chosen teaching over law practice.”) (quoting Luban, *supra* note 18, at 66–67); Lilly, *supra* note 25, at 1466 (noting that some law professors “occupy the incongruous role of introducing students to a profession that has neither our affection nor our interest”).

say that these individuals do not do an excellent job of helping students develop some of the skills that they will need to be successful lawyers. However, it does raise the question of whether we should identify ways in which law professors might strengthen their connection to the world of law practice and the current realities of that world.²⁷

This Article considers whether law professors should have a continuing practice experience (CPE) requirement,²⁸ just as many practicing lawyers have a continuing legal education (CLE) requirement.²⁹ A CPE requirement would require law professors to spend a

27 See Cohen, *supra* note 8, at 634 (“[I]f law professors continue to distance themselves from practice, they cannot teach students to be better, more ethical lawyers because they are not themselves informed about the world of practice.”).

28 See *id.* at 625 (identifying the issue of “[w]hether law professors have a professional obligation to keep current with the practice of law by actually engaging in such practice on some limited or occasional basis”); *id.* at 634 (noting that author’s experience spending time at a law firm during her sabbatical “persuaded [her] that one way to counter this disdain and cynicism [of law professors for law practice] is to encourage or even require law professors to connect with the world of practice and to see for themselves how lawyers conduct themselves in that world”).

Some professors have focused their discussion of the value of law practice experience on professors who supervise law clinics or teach “skills” courses. See Rabé & Rosenbaum, *supra* note 8, at 313 (suggesting that “clinical and skills professors, and legal writing professors in particular, consider practicing law during some portion of their sabbaticals”); Stacy Caplow, *A Year in Practice: The Journal of a Reflective Clinician*, 3 CLINICAL L. REV. 1, 19 n.31 (1996) (“[C]linical teachers might have a responsibility to return regularly to the real world” [of law practice]); *id.* at 53 (“more law teachers, particularly clinicians, should” [spend a sabbatical practicing law]). *But see infra* note 154 (noting that, in some respects, professors who supervise clinics may have a less pressing need to engage in continuing practice experience). This Article considers whether *all* professors should have a continuing practice experience requirement, regardless of what they teach.

29 See *MCLE Information by Jurisdiction*, AM. BAR ASS’N, http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states.html (last visited July 3, 2013). In many states that have a CLE requirement, law professors who are bar members are subject to the same CLE requirements as all other bar members. See, e.g., ARIZ. SUP. CT. R. 45(a)(1) & (b); VA. CONTINUING LEGAL EDUC. REG. 102(f); see also ILL. SUP. CT. R. 795(d)(6)(i). In other jurisdictions, law professors might not have to take traditional CLE courses because their teaching or scholarship responsibilities as law professors could satisfy their CLE requirements. See, e.g., ALA. MANDATORY CLE REG. 3.4; ALASKA BAR R. 65(g). In yet other jurisdictions (although not many), law professors who are members of the bar are exempt from CLE altogether. See, e.g., CAL.

limited amount of time on a regular basis in the world of law practice. Although law professors could satisfy this requirement by practicing law, law professors would not have to practice law to satisfy this requirement. As this Article will discuss, a range of activities could satisfy a CPE requirement.

To the extent that students are coming to law school to prepare to be practicing lawyers, it would be useful for those doing the preparing (law professors) to have some familiarity with the current world of law practice. Greater familiarity with the current realities of law practice could inform individual professors' pedagogy as well as curricular decisions more broadly.³⁰ In addition, spending time in the world of law practice could help law professors identify ways in which their scholarship relates to issues faced in law practice and could also help law professors identify topics for their scholarship: both legal issues that arise in a practice setting and issues about the context in which law is practiced.³¹ Furthermore, to the extent that law professors choose to satisfy their CPE requirement by performing pro bono service, the CPE requirement could contribute needed legal services for traditionally underserved populations.³²

STATE BAR R. 2.54. Rather than requiring law professors to satisfy traditional CLE requirements (or have no CLE requirements), however, it would be more meaningful for law professors to engage in activities that would give them first-hand exposure to the present realities of law practice. Although individual jurisdictions' CLE rules could be amended to enable law professors to substitute CPE for CLE, the CPE requirement should apply generally to law professors, not only professors who are active bar members subject to a CLE requirement.

- 30 See Gary S. Gildin, *Testing Trial Advocacy: A Law Professor's Brief Life as a Public Defender*, 44 J. LEGAL EDUC. 199, 201–05 (1994) (discussing the pedagogical lessons learned from spending sabbatical in law practice); see also Paul T. Hayden, *Professorial Conflicts of Interest and "Good Practice" in Legal Education*, 50 J. LEGAL EDUC. 358, 367 (2000) (discussing the value of law professors serving as "legal consultant[s] or expert witness[es]" and noting that law professors "who occasionally work collaboratively with real lawyers on real cases" might gain "insights that can be brought to bear on both teaching and scholarship").
- 31 See Cohen, *supra* note 8, at 637–38 (discussing how spending time with practicing lawyers helped author identify issues to write about in her scholarship); Wilkins, *supra* note 17, at 79–80 (discussing the need for more research regarding the legal profession).
- 32 A number of law schools have a pro bono requirement for their students. See *Law School Public Interest and Pro Bono Programs – Summary Chart*, AM. BAR ASS'N, http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html; see also AM. BAR ASS'N SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010* 15 (2012)

Given the changing legal market, and the resultant difficulty that law students face trying to find law practice jobs, it might be more important than ever for law professors to develop connections with the current world of law practice. Law professors both teach and advise students.³³ Law professors would be better-informed advisors if they actually had some exposure to law practice.³⁴ Furthermore, law professors with CPE would be in a better position to inform students about different practice settings.³⁵ Law professors with CPE might also be better able to make connections between their students and

[hereinafter SURVEY] (noting that “18% of law school respondents in 2010 requir[e] an average of 35 hours of pro bono service to graduate”). The New York Court of Appeals recently adopted a pro bono requirement for bar admission. N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2012). To the extent that law schools value pro bono enough to require it of their students, one might ask whether they should also require it of their faculty. See Luban, *supra* note 18 (advocating that law professors have an obligation to perform pro bono service); Erwin Chemerinsky, *A Pro Bono Requirement for Faculty Members*, 37 LOY. L.A. L. REV. 1235 (2004) [hereinafter Chemerinsky, *A Pro Bono Requirement for Faculty Members*] (advocating that law professors should be required to perform pro bono service). There are, in fact, some law schools that do require their professors to engage in pro bono service. See Standing Comm. on Pro Bono and Pub. Serv. & the Ctr. for Pro Bono, *Directory of Law School Public Interest and Pro Bono Programs: Law School Pro Bono Programs – Faculty and Administrative Pro Bono*, AM. BAR ASS'N, http://apps.americanbar.org/legalservices/probono/lawschools/pb_faculty.html (last updated June 29, 2012) [hereinafter *Directory*]. Although the Directory does not include information for every law school, very few of the law schools for which information is included have a faculty pro bono requirement. *Id.* Some law schools encourage, but do not require, faculty pro bono service. *Id.* Pro bono service may be taken into account in tenure and promotion decisions. *Id.* Depending on how a school defines “pro bono service,” not all pro bono service would necessarily constitute CPE; however, pro bono service that involves client representation (and perhaps other forms of pro bono service) would constitute CPE. The types of activity that would (and would not) likely constitute CPE are discussed in Part II.C. of this Article.

33 See Schiltz, *supra* note 16, at 785–87 (discussing the important role that law professors can play regarding law students’ transition into practice).

34 Cf. Paul Horwitz, *What Ails the Law Schools?*, 111 MICH. L. REV. 955, 971 (2013) (noting “the growing ignorance of faculties about the nature and needs of their own regional legal market”).

35 By engaging in different CPE activities, an individual law professor could gain knowledge of different practice settings. Even if an individual law professor did not experience a range of practice settings, a law faculty as a whole would have experience in different practice settings by virtue of engaging in a range of CPE activities.

practicing lawyers because CPE would increase the number of practicing lawyers that law professors know.³⁶

A law school that endorses CPE could distinguish itself as a law school that takes seriously the preparation of students for law practice and the importance of both learning from and contributing to the world of law practice. Law professors who engage in CPE might also send the message to law students about the value of law practice and, thus perhaps, the importance of professionalism in law practice. Rather than being taught by professors who never practiced or who have not maintained a connection with law practice, law students would be taught by professors who have maintained an ongoing connection to law practice, thereby signaling the value of law practice.

Part I of this Article will discuss some of the reasons supporting a CPE requirement. This Part will also address some of the reasons why some law professors might be resistant to having a CPE requirement. Part II of the Article will address the value of requiring CPE and will explore the ways in which a CPE requirement might be implemented. In the context of discussing the implementation of a CPE requirement, this Part will address ways in which the American Bar Association (ABA) Standards for Approval of Law Schools³⁷ and the Association of American Law Schools' (AALS) membership requirements³⁸ and Statement of Good Practices by Law Professors³⁹ could be revised to endorse CPE. Part II will also discuss the types of activities that could satisfy a CPE requirement and the extent to which law professors should have to engage in such activities to satisfy a CPE requirement. Requiring law professors to engage in CPE may be a controversial idea to some, but the time is ripe to consider the value of a CPE requirement and the details surrounding the implementation of such a requirement. As the cost of a legal education

36 See Schiltz, *supra* note 16, at 786–87 (discussing how professors can help their students become members of the legal community); Hayden, *supra* note 30, at 367 (noting that law professors “who occasionally work closely with lawyers on cases may develop ties to the legal community that otherwise they would not have [and that] may benefit students hunting for employment”).

37 See *supra* note 25.

38 See THE ASS'N OF AM. L. SCH., AALS HANDBOOK, MEMBERSHIP REQUIREMENTS, BYLAWS AND EXECUTIVE COMMITTEE REGULATIONS PERTAINING TO THE REQUIREMENTS OF MEMBERSHIP, available at http://www.aals.org/about_handbook_requirements.php [hereinafter MEMBERSHIP REQUIREMENTS].

39 See *supra* note 25.

gets higher and higher, the value of a legal education is being called into question.⁴⁰ Law professors having continuing contact with the world of law practice may be one way in which we can enhance the value of a legal education for students and, more broadly, the value of the legal academy.⁴¹

II. Motivations for—and Arguments Against—a CPE Requirement

Perhaps one of the strongest arguments in favor of a CPE requirement is that law professors should have some current exposure to law practice because law professors participate in preparing students for law practice. Certainly, there has been ongoing debate about the role of law schools—with not all professors agreeing that the law school’s mission is the preparation of students to enter the legal profession.⁴² However, the fact of the matter is that law school is an intrinsic part of students’ preparation for the legal profession.⁴³ Moreover, if anything, the trend is towards identifying ways that law schools can better prepare students for the legal profession, rather than focusing on ways that law schools can orient themselves away from preparing students to be lawyers.⁴⁴

40 See, e.g., TAMANAHA, *supra* note 1, at x–xi.

41 See Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More “Same Old, Same Old,”* 45 CONN. L. REV. 1409, 1412 n.8 [hereinafter Rapoport, *Rethinking U.S. Legal Education*] (“Law schools have to articulate—both inside and outside their own walls—exactly what educational value they are providing to their students. Students deserve some tangible value in exchange for their tuition.”).

42 Law schools can have more than one mission, and law professors may have differing opinions regarding the relative importance of these missions, or whether certain missions are, in fact, more important than others. See Cohen, *supra* note 8, at 627–34 (discussing some of the history and debate regarding the roles of law schools and law professors); see also Trail & Underwood, *supra* note 9, at 223–24 (discussing different views regarding the law school’s role). Moreover, some law professors have questioned whether every law school has to have the same mission. See Tamanaha, *supra* note 1, at 174; Horwitz, *supra* note 34. Discussion about the role of the law school (and law professors) is not new; the question of whether law professors should also engage in law practice is not new either. See Albert M. Kales, *Should the Law Teacher Practice Law?*, 25 HARV. L. REV. 253 (1911–1912) (and accompanying response by Ezra Ripley Thayer).

43 See Trail & Underwood, *supra* note 9, at 225 (“American law schools today enjoy a monopoly on entry into the legal profession.”).

44 See, e.g., STUCKEY, ET AL., *supra* note 6; WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

The heightened focus on ways in which law schools can better prepare students for the legal profession suggests the importance of law professors having ongoing exposure to law practice.⁴⁵ Law professors may well want to better prepare their students for law practice. Law professors may want to connect the legal theory that they are teaching their students with the types of issues that students will confront in law practice. However, it may be difficult for law professors to prepare their students for law practice—and connect theory to practice—when law professors are unfamiliar with what their students will be doing as practicing lawyers.⁴⁶ Law professors without current practice experience may lack knowledge about what their students will face in law practice.⁴⁷ Law professors without current practice experience may also lack the confidence to integrate practice-related information and activities into their courses.⁴⁸

45 See Suellyn Scarnecchia, *Serving the Most Important Constituency: Our Graduates' Clients*, 36 U. Tol. L. Rev. 167, 172 (2004) (“Law faculty members need to create a way to learn about law practice on an ongoing basis and to develop [learning] outcomes that are relevant and useful—this can be done only with very good information about the current state of practice.”).

46 See Edwards, *supra* note 8, at 73 (“[L]egal scholars must have some real understanding of practice before they can usefully address the ethical problems of the profession.”); Nathanson, *supra* note 6, at 344 (“[D]octrinal professors lack the [law practice] expertise to fully appreciate and analyze the issues confronting the practicing bar.”). The ABA Standards require that law schools prepare students for law practice. See Standard 302(a), ABA STANDARDS, *supra* note 25 (“A law school shall require that each student receive substantial instruction in . . . the substantive law generally regarded as necessary to effective and responsible participation in the legal profession [and] professional skills generally regarded as necessary for effective and responsible participation in the legal profession . . .”); Interpretation 302-8, ABA STANDARDS, *supra* note 25 (“A law school shall engage in periodic review of its curriculum to ensure that it prepares the school’s graduates to participate effectively and responsibly in the legal profession.”). Especially given the changing nature of law practice, law professors should maintain an ongoing connection with law practice in order to identify what students need to know (including what students need to know how to do) in order to be prepared for law practice.

47 See Schiltz, *supra* note 16, at 791 n.347 (noting that, especially because of their lack of practice experience, professors may not “feel . . . confident about their ability to train students to practice law ethically”); Rabé & Rosenbaum, *supra* note 8, at 305 (stating that experience in practice made law professor a more confident teacher); Johnson, *supra* note 7, at 1260 (“[I]t is only when we know what practice entails for our students that we can fully perform our role as educators.”).

48 See Mogill, *supra* note 18, at 32 (“Experiential learning outside the tower can also increase the professor’s confidence as she gains insights into the strengths

Certainly, there are skills that law professors know their students will use in practice and that law professors help their students develop in law school. Law professors help their students read and analyze cases, think critically, and communicate their ideas orally and in writing, among other skills. Students, however, will not be using this knowledge in a vacuum. Rather, students will be using these skills in particular practice contexts, and it might be useful for law professors to have some familiarity with these contexts.⁴⁹ Law professors with continuing practice experience may be better able to explain to students the relevance of what they are doing in class to what they will be doing in practice and the ways in which students might use what they are learning in class when they are in practice.⁵⁰

and weaknesses of the legal system. . . ."); *see also* Nathanson, *supra* note 6, at 348 ("[T]he backgrounds of many doctrinal professors likewise render them uncomfortable with many practical topics."). The discussion in this Article raises the question of the relationship between practice experience and how and what law professors teach their students. This would be an interesting area for empirical study; there seems to be a lack of empirical research that explores the relationship between the practice experience of faculty in professional schools and their teaching of students in those schools.

49 *See* Schiltz, *supra* note 16, at 767 ("For the practitioner, law is highly contextual."); *id.* at 770–71 (discussing the value of the perspective of law professors who have had practice experience); Green, *supra* note 23, at 340 ("[W]hen the law professor elaborates on the views that originated in professional work, the resulting lecture or scholarly writing may be richer for having a personal appreciation of the context in which the issues arise."); *see also* Mogill, *supra* note 18, at 30–33 (discussing the pedagogical benefits of law professors having practice experience); Okianer Christian Dark, *Transitioning from Law Teaching to Practice and Back Again: Proposals for Developing Lawyers Within the Law School Program*, 28 J. LEGAL PROF. 17, 38 (2004) (discussing the ways in which author's practice experience influenced his teaching); Schiltz, *supra* note 16, at 708 ("Often, the topic of legal ethics as discussed in law reviews or law school classrooms is far removed from the topic of legal ethics as experienced by practitioners."); Newton, *supra* note 3, at 136 (questioning whether law professors with limited interest or experience in law practice can effectively prepare students to be practicing lawyers); Wilkins, *supra* note 17, at 93 ("Unless scholars *understand* the practitioner's frame of reference . . . they are unlikely to produce work that speaks to the real problems that the profession and those it serves confront."). The concern with professors not having current experience in the field which they are preparing students to enter is not unique to law. *See* ARTHUR LEVINE, *EDUCATING SCHOOL TEACHERS* 45–46 (2006) (describing complaints about education school professors having limited and out-of-date teaching experience).

50 *See* Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1240 ("[M]y work as [a] lawyer has greatly enhanced my ability to relate the

Law professors with continuing practice experience may also be better able to identify what students should be learning (including what students should be learning how to do) in order to be better prepared for practice.⁵¹ The realities of law practice are evolving; having continued exposure to practice settings will help law professors keep abreast of developments in law practice.⁵²

If law professors have continuing practice experience, they will have a better understanding not only of what practicing lawyers do but also of what their own students are doing.⁵³ Law students are being offered an array of experiential education opportunities—and, in some cases, are required to engage in them.⁵⁴ Experiential edu-

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- material in every class to what my students will be doing as lawyers.”); *see also* Dark, *supra* note 49, at 38 (“It is not always as clear to the novice what briefing, case synthesis, or the questions we ask in class have to do with legal analysis, specifically, or, for that matter, the real world of practice. I suggest that we make it less of a mystery and tell students how this activity connects to their eventual ability to practice law. . . .”); Rory K. Little, *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation*, 42 S. TEX. L. REV. 345, 363 (2001) (stating that practicing law “almost certainly contributes to the professor’s understanding of the law and how it really operates [which] mak[es] the professor a better teacher, advisor, and scholar”).
- 51 *See* Rabé & Rosenbaum, *supra* note 8, at 310–11, 312 (noting that professor’s time in practice helped her identify skills that she should be teaching her students); *see also* Scarnecchia, *supra* note 45, at 172 (noting that law professors need to know “about the current state of law practice” in order to determine what students need to learn); Rapoport, *Rethinking U.S. Legal Education*, *supra* note 41, at 1413 n.8 (stating that students “deserve . . . professors who can guide them through some of the complexities that the actual practice of law entails”).
- 52 Ideally, law professors should also be exposed to different practice settings. The context of law practice in a large law firm is likely to be different from the context of law practice in a nonprofit office. Also, even within the same type of law practice, the practice environment can differ.
- 53 Mogill, *supra* note 18, at 6 (noting that when author spent a sabbatical practicing law, he “was able to practice what I had preached in the classroom, *working side-by-side with student interns* in applying what I myself had learned during my years of teaching”) (emphasis added); *see also* Schiltz, *supra* note 16, at 771 (“As the gap between the academy and the practice widens, so does the gap between the academy and its own students.”).
- 54 *See* SURVEY, *supra* note 32, at 15 (“Law schools have increased all aspects of skills instruction, including clinical, simulation, and externships”); DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON SURVEY RESULTS, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION 9 (2011), available at <http://www.csale.org/files/CSALE.Report.on.2010-11.survey.5.16.12.Revised.pdf>; *Schools Requiring Experiential Courses*, ALBANY LAW SCHOOL: CENTER FOR EXCEL-

cation is identified as a key means by which to prepare students for law practice.⁵⁵ As more and more students participate in experiential education in law school,⁵⁶ students might want (or expect) more of a connection between their “traditional” classroom courses and their experiential courses or activities. If law professors do not “keep up” with the world of law practice, then there might be more of a divide between experiential learning opportunities and non-experiential courses.⁵⁷ Students might feel that non-experiential courses are less relevant to their role as practicing lawyers and, thus, might not focus their attention on non-experiential courses. If law professors have continuing experience in practice settings, then they might be better able to make connections between theory and practice, even in courses that are not explicitly experiential. Integrating theory and practice in legal education should not mean that only students have experience with both legal theory and law practice.⁵⁸ Law professors,

LENCE IN TEACHING (CELT), <http://www.albanylaw.edu/celt/reform/Pages/Schools-Requiring-Experiential-Courses.aspx> (last visited June 4, 2013); see also Chemerinsky, *Why Not Clinical Education?*, *supra* note 7, at 37 (“Experiential training is increasingly being emphasized. . . .”); Mogill, *supra* note 18, at 27 (noting that some schools require their students to engage in *pro bono* work). Currently, the ABA Standards require that law students “receive substantial instruction in . . . professional skills.” Standard 302, ABA STANDARDS, *supra* note 25. Proposals have been made to require students to complete minimum numbers of credit hours of experiential-type education. Mark Hansen, *Clinical Law Profs Solicit ABA Legal Ed Council to Require 15 Credit Hours in Practice-Based Courses*, ABAJOURNAL.COM (July 2, 2013, 3:56 PM CDT), http://www.abajournal.com/news/article/CLEA_15_credit_hours_accreditation_aba_section/. The Standards Review Committee of the American Bar Association’s Section of Legal Education and Admissions to the Bar recently voted to recommend that the Standards be revised to require students to complete six credit hours of professional skills instruction. Karen Sloan, *ABA May Ditch Law School Student-to-Faculty Ratio Rule*, THE NATIONAL LAW JOURNAL (July 16, 2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202611159120&thepage=3>. The American Bar Association’s Council on Legal Education and Admissions to the Bar will consider the recommendation of the Standards Review Committee. See *infra* note 100 (discussing the role of the Council and the Standards Review Committee with respect to the ABA Standards).

55 See STUCKEY ET AL., *supra* note 6, at 166–67.

56 See SANTACROCE & KUEHN, *supra* note 54, at 11 (discussing “student demand for live-client clinics . . . [and] field placement programs”).

57 Cf. Campos, *supra* note 5, at 191 (noting that the development of law school clinics “has allowed traditional tenure-track faculty to rationalize paying relatively little attention to actual legal practice”).

58 Integrating theory and practice should also not mean that students are exposed to theory in some courses and practice in other courses. Rather, although the

too, should have experience with theory and practice, even if their practice experience is limited.⁵⁹

In addition to having pedagogical benefits, law professors having continued exposure to law practice could foster a closer relationship between the legal academy and the world of law practice.⁶⁰ Along with continuing calls for law schools to better prepare students for law practice, there have also been continuing calls for law schools to be less removed from the world of law practice more broadly.⁶¹ In particular, critics have advocated for scholarship that is more relevant to issues faced in practice.⁶² If law professors spend time with practicing lawyers in a practice environment, law professors might be more likely to identify issues that are of practical significance to the legal profession and might be in a better position to write schol-

balance between theory and practice might vary, both theory and practice should be addressed in individual courses.

59 Mogill, *supra* note 18, at 6 (noting that after author spent a sabbatical practicing law, he “returned to the classroom renewed, able to share experiences of both success and failure with students as part of their learning process”); *id.* at 33 (noting that when professors spend time practicing law, “[t]heory will be connected to practice, as the interaction between teacher and client, other attorneys, and the courts provides for additional learning opportunities once discussed in the classroom.”); Cohen, *supra* note 8, at 636 (noting that author’s experience in a law firm during her sabbatical would “undoubtedly enrich [her] teaching. . . . I have a new appreciation for what kinds of issues arise in practice and how practicing lawyers resolve them.”). Spending time in practice could also help professors identify issues that are of particular importance to practicing lawyers and, thereby, give professors additional information to consider when making decisions about what topics to cover in their courses and how much time to spend on those topics. *See id.* at 637 n.44.

CPE might also provide pedagogical benefits to the extent that law professors are able to involve students in law practice activities. *See Chemerinsky, A Pro Bono Requirement for Faculty Members, supra* note 32, at 1239–40 (discussing the ways in which Dean Chemerinsky has involved students in his pro bono work). Both professors and students might benefit by working together on law practice work—not only with respect to accomplishing the particular legal tasks at hand but also with respect to developing a professional and collaborative relationship as they work together outside of the traditional classroom context.

60 *See* Dark, *supra* note 49, at 34 (“[A] more radical way to stay in touch with the bar and the challenges confronting practitioners is to support faculty who wish to return to practice for a limited period of time.”).

61 *See* Mogill, *supra* note 18, at 30–33.

62 *See, e.g.,* Hricik & Salzmann, *supra* note 12, at 763.

arship that addresses those issues.⁶³ Moreover, law professors who write about issues relating to law practice might have a fuller understanding of those issues (and more credibility) if they have ongoing exposure to law practice.⁶⁴

If nothing else, law professors spending time in a law practice setting will facilitate conversations between law professors and practicing lawyers.⁶⁵ These conversations might result in law professors

63 Mogill, *supra* note 18, at 18 (“[P]ro bono does provide the opportunity to gain insights into the legal process as it affects indigents, revealing the ‘warts’ and shortcomings in our justice system.”) (footnote omitted); Cohen, *supra* note 8, at 636 (noting that during her sabbatical spent at a law firm, author “was able to do research on a number of cutting edge, substantive issues that I might never have realized were of practical significance had I not been there to see how such issues arise in practice”); *id.* at 637–38 (spending time in practice helped author identify topics to write about in her scholarship). Of course, law professors may not necessarily end up writing about issues facing practicing lawyers just because they spend time in law practice. However, spending time in law practice may lead law professors to identify issues that could be topics for exploration in their scholarship. In addition, spending time in practice could give law professors a more well-rounded perspective on legal issues, which could result in some consideration of the practice-related implications of the issues that they address in their scholarship. On the other hand, there may be reasons why law professors do not consider practice-related issues in their scholarship apart from law professors’ lack of practice experience. For example, law professors might be discouraged by their colleagues from addressing practice-related issues in their scholarship, or law professors might feel that scholarship that addresses practice-related issues would be less desired by law reviews. See Hricik & Salzmann, *supra* note 12, at 763 n.7 (“[M]any in academia . . . believe that engaged scholarship . . . is not a worthwhile aspect, let alone an appropriate focus, of a law professor’s career.”); Nathanson, *supra* note 6, at 345 (“The range of topics most likely to be accepted by [the] top journals . . . discourages scholars from addressing issues of relevance to the practicing bar.”).

64 See Green, *supra* note 23, at 334 (“[H]aving experienced the lawyer’s perspective, the professor may have a fuller appreciation of [a] problem when he later analyzes it from a scholarly perspective.”); Newton, *supra* note 3, at 121 (“[T]heoretical scholarship—indeed, any legal scholarship—is more likely to be relevant and useful if its author has a real-world understanding of the context in which the law applies.”). Spending time in practice might also inspire professors who do not currently study the legal profession to examine particular aspects of the profession. Cf. Johnson, *supra* note 7, at 1260 (“The legal academy needs to commit resources to the specialized study of the legal profession.”); Wilkins, *supra* note 17, at 76 (criticizing “law school’s systematic and pervasive failure to study and to teach about the profession”).

65 See Waxman, *supra* note 8, at 1911 (“What we really need are far more venues in which practitioners, scholars, and judges can talk to one another.”); Dark,

having a greater understanding of the work that practicing lawyers do and practicing lawyers having a greater understanding of the work that law professors do.⁶⁶ Practicing lawyers might find that law professors are more interested in the issues faced in practice than they realize, and law professors might find that practicing lawyers can offer ideas to make both their pedagogy and scholarship more relevant.⁶⁷

There is a growing body of literature that examines the pedagogy of legal education and proposes ways in which law schools can better prepare students for law practice.⁶⁸ There is also literature which advocates for a stronger connection between law professors and the world of law practice.⁶⁹ Much of this literature focuses on the need for law professors to write scholarship that is more useful to the issues faced by judges and practicing lawyers.⁷⁰ Some literature addresses the value of law professors having practice experience. Some law pro-

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- supra* note 49, at 33 (“It is critically important that we, individually and institutionally, have ongoing dialogue and involvement with the practicing bar.”). CPE is one way to facilitate interactions between law professors and practicing lawyers. Although there are certainly other valuable ways to facilitate these interactions, many of these ways involve bringing practicing lawyers into the law school. *See id.* at 33–34. One of the values of CPE is that it can enable law professors to enter the environment of practicing lawyers, rather than bringing practicing lawyers into the environment of law professors.
- 66 *See* Rabé & Rosenbaum, *supra* note 8, at 307 (noting that “[i]t is probably fair to say that law professors know far too little about the practice of law, and practitioners know far too little about the changes in legal education” and suggesting that law professors “work periodically among practitioners and judges” as a way to remedy this situation); *id.* at 308 (noting that law professor spending time in practice “probably dispelled a few stereotypes about the academy and bolstered the connections that the practitioners felt with the academy”); Cohen, *supra* note 8, at 641 (“[M]y experience [at a law firm] reminded me of many of the difficult dilemmas that confront those who practice law. . . . Additionally, my experience made me more sensitive to the types of ethical and professionalism issues confronted in practice.”); *id.* at 643 (noting that author’s time spent at a law firm “affected [her] attitude towards the practice of law and towards its practitioners”).
- 67 *Cf.* Wilkins, *supra* note 17, at 89 (discussing “professional responsibility teachers” and commenting that, “[t]hose who come from the academy typically have little understanding of the actual lawyering contexts that give ethical dilemmas their resonance in practice. Those who come from practice frequently have no theoretical context within which to make sense of their practical experience.”).
- 68 *See, e.g.,* STUCKEY ET AL., *supra* note 6; SULLIVAN ET AL., *supra* note 44.
- 69 *See, e.g.,* Waxman, *supra* note 8, at 1911–12; *see also* Cohen, *supra* note 8, at 627 (“Many scholars have written about the gap between law practice and law teaching.”); *id.* at 627 n.14.
- 70 *See, e.g.,* Hricik & Salzmann, *supra* note 12, at 763.

fessors have advocated for law schools to hire professors who have practice experience.⁷¹ Other law professors have written about the value of law professors using their sabbaticals (to the extent they have them) to spend time practicing law.⁷²

While spending an entire semester practicing law would be a valuable way for a law professor to develop a connection with the current world of law practice, this is not necessarily a feasible option for a large number of law professors. Not all professors get sabbaticals, and many law professors who do get sabbaticals might not be interested in spending those sabbaticals practicing law. In addition, some law professors might not be active members of the bar and might not, thus, be able to practice law.⁷³ Even those professors who

71 *E.g.*, Schiltz, *supra* note 16, at 780–81; R Michael Cassidy, *Beyond Practical Skills: Nine Steps for Improving Legal Education Now*, 53 B.C. L. REV. 1515, 1529–30 (2012); *see also* Schiltz, *supra* note 16, at 747 (“[E]very faculty must include a number of people who have substantial experience practicing law or a genuine interest in the work of practitioners and judges.”); *id.* at 756 (discussing the value of law faculty with practice experience); Waxman, *supra* note 8, at 1912 (“Premier law schools . . . need to make affirmative efforts to hire gifted people who have been successful in practice, public and private.”); Wilkins, *supra* note 17, at 92 (advocating for law schools “to hire faculty who have a serious interest in, and experience with, legal practice”); Lilly, *supra* note 25, at 1468 (“The key to realigning the law schools in closer proximity with the profession is to have a significant proportion of the tenured faculty who are of the profession and who address its problems.”); Wm. Reece Smith, Jr., *Foreword: Teaching and Learning Professionalism*, 32 WAKE FOREST L. REV. 613, 617 (1997) (describing a recommendation of the Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar “that law schools overcome ‘[their] apparent reluctance’ to employ lawyers ‘with extensive practice experience’ in tenure track positions”) (quoting PROFESSIONALISM COMM., AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 17 (1996)); *cf.* Newton, *supra* note 3, at 150 (suggesting that law schools include both “research” and “teaching” professors and that each “teaching professor would have a significant amount of meaningful practical experience (typically a decade or more) and would have earned a reputation as a competent, ethical practitioner before joining a law school’s full-time faculty”). Newton also advocates for a law school in which professors continue to practice law. *Id.*

72 Mogill, *supra* note 18; Cohen, *supra* note 8; *see also* Gildin, *supra* note 30; Caplow, *supra* note 28; Rabé & Rosenbaum, *supra* note 8; Re, *supra* note 25, at 97 (“It is for the law professor with no prior practice experience that I propose a new sabbatical—a sabbatical in a law office.”).

73 Moreover, those law professors who are active members of a bar might not be active members in the jurisdiction where they are professors and where they,

have active bar status might not feel equipped to practice law, and it might be difficult for law professors to find work that they could do for a few months. Furthermore, in light of how scarce law practice jobs are for new law graduates, some law professors might be reluctant to take on work responsibilities that might otherwise, at least in theory, be available for a new law graduate looking for full-time employment (or students looking for part-time work). Moreover, it might be more valuable for law professors to have continuing, albeit limited, exposure to law practice consistently over time, rather than spending several months in practice at one point during their teaching career.⁷⁴ Regular exposure to law practice would give law professors the opportunity to experience different types of law practice⁷⁵ and experience law practice as it changes over time.

Although it might not be practical to expect law professors to spend an entire semester working in full-time law practice, it would be valuable for law professors to engage in activity that fosters a connection with law practice. As discussed more fully in Part II of this Article, a CPE requirement would ensure that law professors regularly engaged in law practice activity. This requirement would not mandate that law professors actually practiced law (although practicing law would be one way to satisfy the requirement); there would be a range of ways in which law professors could satisfy a CPE requirement. However, each of the ways in which law professors could satisfy a CPE requirement would promote law professors' ongoing engagement with the world of law practice.⁷⁶

most likely, would seek to practice.

74 *But see* Cohen, *supra* note 8, at 644 (“Every law professor should at some time during his or her teaching career be forced to confront [the] reality”[of law practice]).

75 Experiencing different types of law practice could include different substantive areas of law, different types of practice (e.g., transactional, litigation), and different contexts in which law is practiced (e.g., large firms, solo practices, public interest organizations, government organizations). Some law professors might be interested in having diverse experiences, other professors might prefer to focus their CPE activities more narrowly. Even if a professor chooses to focus more narrowly, he or she will likely have a range of experiences, given the nature of law practice. Moreover, professors will be able to learn from the varied CPE experiences of their colleagues.

76 This author is aware of some concerns that have been expressed (either in conversation or online) in response to the idea described in this Article of having law professors spend a limited amount of time engaged in law practice activity. On the one hand, one concern suggests that such a limited amount of time

Although there are compelling arguments in favor of law professors having continuing practice experience, there are also arguments that could be raised against such a requirement. Some law professors might dispute the importance of their having practice experience. These law professors might believe that it is not their role to prepare students for law practice, or they might believe that they can adequately prepare students for law practice without having practice experience (or current practice experience) themselves. Some law professors might question whether law schools are, in fact, disengaged from law practice. Law professors might question the importance of *all* professors having ongoing engagement with law practice, noting that some law professors already participate in the world of practice (by practicing law or otherwise engaging with the legal community).⁷⁷

is inadequate exposure to law practice; on the other hand, another concern is that law professors may be drawn to practice—and away from the academy—if they spend even a limited amount of time engaged in law practice activity. The purpose of the CPE requirement is not to turn law professors into full-time practicing lawyers. Spending a very limited amount of time engaged in law practice activity is not the same as developing an expertise based upon continuous and intensive law practice work. Moreover, it is unlikely that law professors who spend a limited amount of time in law practice would end up deciding to leave the academy in favor of law practice. Many law professors practiced law (albeit for a short amount of time) and chose to leave law practice in order to become law professors. See Redding, *supra* note 16, at 600–01. Spending time in law practice may make some law professors even more appreciative of their work as law professors. Law professors, who chose to leave law practice, may not want to return to practice, and practicing lawyers may not necessarily want to hire law professors to join their practices. See Peter Toll Hoffman, *Law Schools and the Changing Face of Practice*, 56 N.Y.L. SCH. L. REV. 203, 221 (2011–2012) (noting that the short periods of time that some law professors spent in practice before becoming law professors “is often indicative of a lack of interest in the practice of law”); Campbell, *supra* note 10, at 4 n.13 (noting that law professors may not have some of the skills expected of experienced practitioners). While some law professors may choose to spend more time in practice than the amount required by a CPE requirement, this time may benefit—rather than detract from—their work in the legal academy. See Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1239–40 (discussing the pedagogical value for law students of law professors doing pro bono work). Furthermore, although it seems highly unlikely that a CPE requirement would result in a groundswell of law professors leaving the academy for law practice, the idea that a very limited number of law professors might leave the academy for practice (and then, perhaps, rejoin the academy at a later time) should not necessarily be anathema.

⁷⁷ But see Chemerinsky, *Why Not Clinical Education?*, *supra* note 7, at 39 (“My sense is that over the thirty years that I have been a law professor there has been a

Law professors might also dispute that legal scholarship is disengaged from law practice or, if it is, that this is a problem.⁷⁸ Some law professors might be concerned that time spent on continuing practice activity would take too much time away from other important activities.⁷⁹

Even law professors who agree that it would be valuable for law professors to have practice experience might disagree that it should be *required* of them. Part II of this Article addresses some of the reasons supporting a CPE *requirement*. However, law professors value their autonomy and might resist the imposition of a CPE requirement.

Autonomy concerns might influence law professors' attitudes towards a CPE requirement in different ways. Some law professors might resist a CPE requirement because it is a requirement. They may not be averse to voluntarily choosing to engage in CPE, but they may not want to be required to engage in CPE.⁸⁰ Other law professors might resist engaging in CPE, whether required or not, because they are afraid that it will compromise their intellectual autonomy as law professors.⁸¹ These professors might feel that part of the value of

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- trend against law professors engaged in legal practice.”).
- 78 See Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327–28, 1337–39 (2002) (discussing different perspectives regarding legal scholarship); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993) (“But where is it written that all legal scholarship shall be in the service of the legal profession? Perhaps the ultimate criterion of all scholarship is utility, but it need not be utility to a particular audience.”). Law professors may not all share the same view regarding the relevance of particular types of scholarship; law professors and practitioners might also have different views regarding the relevance of scholarship. See Posner, *supra*, at 1925–27 (discussing the “practical” significance of “interdisciplinary legal scholarship”). A law professor might think that he or she is writing an article that contributes to an issue faced by practitioners, while practitioners may not appreciate the relevance of that article to their practice (or may not be aware of the existence of the article).
- 79 See Cohen, *supra* note 8, at 642 (“Law professors who devote too much time to outside practice may be depriving their students and their schools of important services.”); see also Hayden, *supra* note 30, at 366 (noting that law professors’ outside work “may . . . take away too much time and attention from some or all of the core functions of teaching, scholarship, and service”).
- 80 See Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1236 (“No one likes to be regulated, and law professors in particular are fiercely independent.”).
- 81 See Luban, *supra* note 18, at 61 n.5 (advocating that law faculty have an obligation to perform pro bono legal service but recognizing that, “[s]ome might . . . argue that institutional recognition of a pro bono obligation is

their role as law professors is that they can observe and analyze the law removed from any constraints that client representation might entail.⁸²

In addition, some law professors might feel that they are not qualified to engage in CPE or might be reluctant to engage in CPE because they did not enjoy law practice. Law professors might not feel qualified to engage in CPE because they are not active bar members or, even if they are active bar members, because it has been so

inconsistent with individual teachers' academic freedom"); *see also* Hayden, *supra* note 30, at 360 (noting that academic freedom gives law professors autonomy); Green, *supra* note 23, at 318 ("As scholars law professors have autonomy—that is, 'academic freedom'—to decide what views to espouse."); Cohen, *supra* note 8, at 643 ("[W]orking for paying clients may affect the objectivity with which a law professor approaches teaching and scholarship."); Green, *supra* note 23, at 315–16, 327 (discussing whether a law professor's scholarship on an issue might be affected by a law professor having given advice on that issue and vice versa).

- 82 *See* Green, *supra* note 23, at 331 (discussing the "concern" that "a professor's academic objectivity is diminished when he engages in scholarship on subjects relating to his law practice"); STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25 ("The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues as to which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice."); *see also* Green, *supra* note 23, at 337–43 (discussing some of the issues regarding the scholarship (and teaching) of law professors who also practice law); Hayden, *supra* note 30, at 366–68 (discussing possible conflicts of interest that may arise when law professors do work outside the confines of the law school); Little, *supra* note 50, at 369–71 (discussing benefits and concerns regarding law professors engaging in paid law practice, including implications for law professors' scholarship). Other considerations might also impact the extent to which law professors feel comfortable writing about their own experiences in practice. *See* Caplow, *supra* note 28, at 44 n.60. However, law professors' scholarship can be informed by their experiences in practice without law professors explicitly writing about their experiences in practice. In addition, although doing outside work will not necessarily create a conflict of interest, law professors can disclose when there is a potential conflict created by their outside work. *See* Hayden, *supra* note 30, at 372–73. Rather than writing about their own personal experiences in law practice, law professors could also engage with practicing lawyers for the express purpose of writing scholarly examinations of the legal profession. *See* Wilkins, *supra* note 17, at 93. Although law professors would not be practicing law themselves, this type of scholarly engagement with the legal profession could satisfy a CPE requirement. *See id.* (noting that scholarly examination of law practice "keeps faculty connected to the world of practice in the areas in which they teach [which] enhances both their teaching and their scholarship").

long since they practiced law.⁸³ Law professors who have practiced law might not want to engage in CPE because they did not like practicing law. In fact, their dislike of law practice may have been one of the motivations for their becoming law professors.

In considering whether a CPE requirement would be worth implementing, the ultimate question should not be whether there are any conceivable objections to such a requirement, but whether the merits of a CPE requirement make it worth adopting taking into account the considerations to the contrary. Especially in light of the problems that law schools are facing today,⁸⁴ the time is right to consider the value of a CPE requirement for law professors. Given the fact that law schools are professional schools where law students are introduced to the law and prepared for their professional roles as lawyers, the merits of law faculties having continued experience in practice would seem to outweigh the concerns against such experience. In addition, as law schools try to identify ways to attract students and help their students secure legal employment, finding additional ways to cultivate a connection between the legal academy and the world of law practice is more important than ever. Furthermore, the world of law practice is continually changing.⁸⁵ Law professors spending time in law practice settings can facilitate the identification of changes in law practice and ways in which the legal academy can

83 Erwin Chemerinsky addressed similar concerns in his article advocating for law professors to have a pro bono requirement. Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1242. With respect to the concern that some law professors might not be active bar members, Dean Chemerinsky states that “state bars should admit faculty members who are admitted to practice law in other states.” *Id.* This solution might work for some professors, although it would not work for those law professors who are not members of the bar in any jurisdiction. With respect to law professors who do not believe they are qualified to practice law, Dean Chemerinsky responds, “I find it hard to believe, though, that a person teaching law cannot find some area in which he or she is competent to practice. But if this is true, then it becomes an even more compelling argument for requiring law professors to engage in pro bono work so as to gain that experience.” *Id.* As discussed in Part II, the present Article recommends a broad, flexible standard for the types of activities that constitute CPE in order to accommodate these concerns.

84 *See supra* notes 1–6.

85 *See* Dark, *supra* note 49, at 19–26 (describing changes in law practice that author observed when he returned to law practice from teaching); *see also* Cohen, *supra* note 8, at 638–40 (noting how technology has affected law practice); Dark, *supra* note 49, at 35 (noting changing technology in law practice); Hoffman, *supra* note 76, at 216–19 (describing changes in law practice).

better prepare students for those changes.⁸⁶ Law professors' ongoing engagement with the legal profession can also contribute to an understanding and analysis of changes in law practice through law professors' scholarship.⁸⁷

Some of the concerns that weigh against a CPE requirement may actually point to the very reasons why a CPE requirement would be so valuable. Professors who are reluctant to have a CPE requirement because they feel too removed from the world of law practice might be the law professors who would benefit the most from spending some time in a practice environment. In addition, as law professors, we frequently ask our students to engage in activities that are challenging and unfamiliar, and that take them outside of their comfort zone.⁸⁸ It might be useful for law professors to engage in activity that takes us out of our comfort zone both to better appreciate how our

86 See Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, J. ASS'N LEGAL WRITING DIRECTORS 91, 107 [hereinafter Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*] (noting that law professors may not be up-to-date with respect to the current realities of law practice).

87 See Cohen, *supra* note 8, at 640 ("Knowing of these changes [in law practice] will help me better prepare my students for the world of law practice."); Rabé & Rosenbaum, *supra* note 8, at 305–06 ("The students are facing a legal system far removed from the one that most experienced professors first entered [R]ecent experience with courts, clients, and even 21st century law office technology, can make all the difference in effectively communicating with students."); see also Johnson, *supra* note 7, at 1236 (noting "the failure of law professors to pay close attention to changes in legal practice"); Michael H. Hoeflich & J. Nick Badgerow, *Law School Faculty, LLP: Law Professors as a Law Firm*, 53 U. KAN. L. REV. 853, 864–65 (2005) ("In many fields, where practice and techniques change rapidly and are not described in the scholarly literature . . . law faculty may not be entirely up to date."). Law professors who spend time in law practice might also learn about the current realities of law practice management; this knowledge could help inform discussions about whether—and, if so, how—law schools should help prepare students for this aspect of law practice. See Scarnecchia, *supra* note 45, at 170 (identifying the question of "the place of law practice management in"[the law school curriculum]).

88 For example, first-year students typically have to speak in class (even when they have not necessarily volunteered to speak), read cases, write memos and briefs, and present oral arguments. Upper-level students may also have to do work that takes them outside of their comfort zone. This work might include work that they also had to do as first-year students. Some of this work might be less familiar to them (for example, writing seminar papers or handling actual legal cases).

students feel in law school and to better prepare our students for the law practice environments that they seek to enter.⁸⁹

The considerations weighing against the adoption of a CPE requirement should inform the design of such a requirement. For example, as will be discussed further in the next Part of this Article, the fact that law professors are not necessarily active bar members means that any CPE requirement would have to be flexible and allow for law professors to be exposed to law practice in ways that do not necessarily require law professors to formally practice law. Keeping in mind the benefits and concerns with a CPE requirement, the next Part of this Article will address some of the issues attendant to the development and implementation of a CPE requirement for law professors.

89 See Caplow, *supra* note 28, at 4 (“My first lesson was an appreciation of the onerousness of journal-keeping. I have to confess that I did not live up to the standards I set for my students.”); *id.* at 11 (“If I was nervous and insecure in a new situation despite a clear degree of practical competence acquired from many years of lawyering, my students must experience these feelings to an exponentially higher degree—and for a longer period of time.”); *id.* at 12 (expressing newfound “appreciation” for what students go through when their law clinic performance is critiqued); *id.* at 52 (“Perhaps the most unusual benefit of my year was the role-reversal opportunity that served the dual function of allowing me to assume an alternative professional persona and to discover something about the student’s perspective on experiential learning.”); *id.* at 52 (“The opportunities I had during the year to step into my students’ shoes . . . succeeded in heightening my awareness of their sensitivities and struggles, and should cause me to pause and at least reconsider my attitudes and approaches to them.”). In considering CPE opportunities for law professors, it is certainly important to be sensitive to the distinction between work that is outside of a law professor’s comfort zone but in which a law professor can competently engage, and work that a law professor is not competent to perform. See Hoeflich & Badgerow, *supra* note 87, at 864–65 (noting that there may be some situations in which law professors are not competent to practice law). As discussed in Part II.C. of this Article, CPE should be relatively broadly defined to include a range of different activities, which should account for law professors’ competencies. Moreover, to the extent that law professors engage in law practice to fulfill a CPE requirement, CPE does not require law professors to engage in unsupervised law practice work. As other scholars have discussed, there are professional conduct issues that arise when law professors practice law, of which law professors—and their institutions—need to be mindful. See, e.g., *id.*; Laura L. Rovner, *The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113 (2007); see also Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility*, 59 J. LEGAL EDUC. 97 (2009).

III. Implementing a CPE Requirement

A. Why a Requirement?

There is certainly a difference between recognizing the value of law professors having ongoing engagement with law practice and *requiring* that law professors have ongoing engagement with law practice. Although, as discussed previously, there are reasons why law professors might resist the imposition of a CPE requirement, there are compelling reasons why CPE should be required, rather than discretionary.⁹⁰

The most obvious and overarching advantage of requiring CPE is that more professors will engage in CPE than if it were optional.⁹¹ If CPE were encouraged, but not required, then many law professors would not engage in CPE.⁹²

Some law professors might not engage in CPE because they have no interest in engaging with law practice. Some of these professors might be those professors who have the weakest existing relation-

90 As discussed in Part II.C., many different types of activities could constitute CPE, and law professors should have discretion regarding which CPE activities to engage in.

91 See Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1241 (noting that if law professors were required to engage in pro bono service more law professors would engage in pro bono service).

92 Prior authors have suggested that law professors be encouraged to maintain a connection with law practice. Cohen, *supra* note 8, at 643 (suggesting that, at a minimum “law professors should be encouraged, if not required, to stay connected to the world of practice”); *id.* at 643 n.59 (“Again, I am merely suggesting that professors should be encouraged to gain exposure to the world of practice . . .”); *see also* Luban, *supra* note 18, at 74–75 (discussing ways that law schools could encourage faculty to perform pro bono service). Of course, the extent to which a law school encourages law professors to engage in continuing practice activity could influence the number of faculty members who choose to engage in that activity. For example, law professors might be more apt to engage in continuing practice activity in a law school with a strong culture of law professors engaging in such activity. Similarly, a law professor might be more apt to engage in continuing practice activity if such activity was favorably taken into account in that professor’s performance reviews. In the absence of a CPE requirement, it would be preferable for law professors to be encouraged—rather than not encouraged—to engage in continuing practice activity. While some professors might prefer a model where CPE is encouraged, rather than required, because it retains the autonomy of individual faculty members, the downside of the voluntary approach is that fewer law professors will engage in such activity. In addition, if CPE is voluntary, rather than mandatory, it is less likely that systems will develop to facilitate and support such activity.

ship with law practice and who would, perhaps, benefit the most from developing such a relationship.

Requiring CPE would also benefit those law professors who are interested in engaging in CPE but who have not engaged in CPE because of limits on their time and a lack of institutional support. Law professors are busy and have many demands on their time. In the face of all of their other responsibilities, to the extent that engaging in activity that fosters a relationship with practice is optional, law professors might, understandably, choose not to devote their time to such activity. In addition, those law professors who do currently make time to engage with law practice might feel that they have to engage in such activity “on their own time,” rather than having this work taken into account favorably by their law schools and treated as an integral part of their professorial responsibilities.⁹³ If CPE were required, however, all law professors would have to make time for CPE and law schools would have to recognize CPE as a component of law professors’ responsibilities, not as an optional add-on to be assumed at the discretion of individual professors.⁹⁴

Requiring CPE would signal the importance of law professors having ongoing engagement with the world of law practice.⁹⁵ Requir-

93 Some law practice activities might currently be recognized by a law school as contributing to a law professor’s service obligations. However, the extent to which law practice activity is so recognized and the extent to which service is valued (and encouraged) by a law school likely vary from school to school.

94 If CPE were required, law professors within a law school would be on more even footing because all professors would have to devote a certain minimum number of hours to CPE activity (although some law professors might choose to spend more than the minimum number of hours). Although law professors and, perhaps, particularly, administrators might worry that the time devoted to CPE could detract from time devoted to scholarship, teaching, and service, the limited time that professors would be required to engage in CPE activity should minimize such concern. In addition, as discussed previously, CPE activity can contribute to—rather than detract from—law professors’ scholarship and teaching. *See supra* Part I. Moreover, CPE activity would likely also constitute service activity, because, in continuing to engage with the profession, law professors would, hopefully, be contributing to the profession and, perhaps (although not necessarily) performing pro bono service. Thus, although CPE would require a time commitment, the time spent engaged in CPE activity would, on balance, enhance, rather than diminish, law professors’ fulfillment of their other responsibilities.

95 *See Chemerinsky, A Pro Bono Requirement for Faculty Members, supra* note 32, at 1240–41 (“A requirement that faculty members perform pro bono work conveys the message that such public service is an integral and not an incidental part of a professor’s professional duties.”); *cf. Rapoport, Is “Thinking Like a Law-*

ing CPE would also promote the development of systems that would enable law professors to actually engage in such activity. Some law professors may already have connections with practicing lawyers and might be able to undertake practice-related activity through those connections. However, other law professors might not have connections with practicing lawyers or with practicing lawyers who could make practice-related activity available to those law professors. If a law school had to ensure that its faculty members were engaging in CPE, then the law school would have an incentive to develop opportunities for faculty members to engage in such activity. This infrastructure would make it easier for law professors to identify ways in which they could engage in practice-related activity.⁹⁶

To be sure, requiring—rather than encouraging—law professors to engage in practice-related activity is a much more controversial proposition. However, requiring such activity would send a message regarding its importance and would ensure that law professors engaged in such activity. A requirement to engage in practice-related activity would ensure that law professors who are not otherwise inclined to do so would engage in such activity. Moreover, a CPE requirement would ensure that law professors who are interested in engaging in ongoing practice-related activity but not otherwise motivated to act on that interest would have an incentive to do so. In light of how busy law professors are, even law professors who want to engage in ongoing practice-related activity might understandably not prioritize that activity unless they are required to do so.

Law professors might well be resistant to having a requirement imposed upon them, regardless of the nature of that requirement.⁹⁷ On the other hand, law professors are required to engage in other

yer” *Really What We Want to Teach?*, *supra* note 86, at 94 n.10 (“[T]here’s a world of difference between having an individual professor try something innovative and having the law school itself decide to be innovative.”).

96 To the extent that a law school already has an infrastructure to support students working in the legal community, this infrastructure might also be used to match law professors with CPE opportunities. In fact, professors and students could participate in practice-related experiences together, although this would not necessarily have to be a component of a CPE experience. In addition, having some coordination between law students’ law practice activity opportunities and law professors’ CPE opportunities might help ensure that law professors are not taking law practice opportunities away from law students (although this is unlikely to be the case).

97 Some law professors who support the idea of law professors engaging in practice-related activity might oppose the idea of requiring such activity.

activities that comprise an integral part of their role as professors: scholarship, teaching, and service.⁹⁸ Just as law professors are given great flexibility in how they fulfill these responsibilities, law professors should also be given great flexibility in how they fulfill a CPE requirement.⁹⁹

B. How Would It Happen?

If law professors are going to be required to engage in CPE, the question still remains of how such a requirement should be adopted. A related question is how pervasive this requirement should be. One option would be to leave the choice of whether to adopt a CPE requirement up to individual law schools. Another option would be for the ABA Standards for Approval of Law Schools to be revised to include a CPE requirement for law faculty.¹⁰⁰ Similarly, the AALS could require law faculty to engage in CPE.¹⁰¹ As will be discussed

98 See Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1241–42 (“Faculty members are already required to teach, to write, and to serve on committees. . . . I am simply arguing that pro bono service should be added to this list as a basic part of a faculty member’s duties.”).

99 See *infra* Part II.C. Given the myriad ways in which a CPE requirement could be satisfied, some law professors are undoubtedly already engaging in qualifying practice-related activity. See Cohen, *supra* note 8, at 643 n.59 (“[M]any professors already engage in some outside practice activities. . . .”); see also Little, *supra* note 50, at 366 (discussing responses to author’s request for information about professors who were also “of counsel” at law firms).

100 See ABA STANDARDS, *supra* note 25. The Council of the Section of Legal Education and Admissions to the Bar of the ABA accredits law schools in the United States and adopts the Standards. See *id.* at v, vii; see also Standard 801, ABA STANDARDS, *supra* note 25 (“The Council shall have the authority to adopt, revise, amend or repeal the Standards, Interpretations and Rules.”). The Standards Review Committee of the Section of Legal Education and Admissions to the Bar “is charged with reviewing proposed changes in or additions to [the] Standards, Interpretations, [and] Rules” *Standards Review Committee*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/committees/standards_review.html (last visited July 27, 2013). The Council of the Section of Legal Education and Admissions to the Bar has undertaken “a comprehensive review” of the Standards and “will rely on the work of [the] Standards Review Committee to complete this project.” *Id.* This review process is currently in progress. See *Meeting Drafts*, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/committees/standards_review/meeting_drafts.html (last visited July 27, 2013).

101 The AALS’s membership requirements for law schools could include a CPE requirement for law faculty. See MEMBERSHIP REQUIREMENTS, *supra* note 38. In addition, the AALS’s Statement of Good Practices by Law Professors

more fully below, although each of these options has its advantages and disadvantages, it is likely more realistic—and, in some ways, preferable—to leave the decision of whether to adopt a CPE requirement up to each individual law school.¹⁰² At the same time, both the ABA Standards and the AALS’s membership requirements and Statement of Good Practices by Law Professors could be revised to explicitly endorse CPE.

It is likely more realistic for law schools to decide for themselves whether to adopt a CPE requirement because law schools may be averse to having more requirements imposed on them by the ABA and the AALS. In addition, leaving the decision of whether to adopt a CPE requirement up to each law school would promote law school autonomy, which the ABA and the AALS themselves recognize.¹⁰³ Furthermore, it may be more expeditious for individual law schools to decide whether to adopt a CPE requirement than waiting for such a requirement to be adopted as a result of revisions to the ABA Standards or the AALS’s membership requirements and Statement of Good Practices by Law Professors.

could include a CPE requirement for law faculty. See STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25.

102 See Lilly, *supra* note 25, at 1465 (noting the value of internally-driven educational reform “where new initiatives can be matched with faculty commitments and institutional resources”). Presumably, the decision of whether to adopt a CPE requirement could be made by the dean or the faculty, depending on the law school. See Standard 207, ABA STANDARDS, *supra* note 25 (“The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.”). Concerns with faculty autonomy and faculty buy-in would weigh in favor of this decision being made by a law school’s faculty.

103 See Standard 207, ABA STANDARDS, *supra* note 25 (“The allocation of authority between the dean and the law faculty is a matter for determination by each institution as long as both the dean and the faculty have a significant role in determining educational policy.”); Standard 404(a), ABA STANDARDS, *supra* note 25 (“A law school shall establish policies with respect to a full-time faculty member’s responsibilities”); Interpretation 301-2, ABA STANDARDS, *supra* note 25 (“A law school may offer an educational program designed to emphasize certain aspects of the law or the legal profession.”); Bylaw Section 6-1(a), MEMBERSHIP REQUIREMENTS, *supra* note 38 (“The obligations of [AALS] membership . . . are intended to reflect the Association’s core values and distinctive role as a membership association, while according appropriate respect for the autonomy of its member schools.”); Bylaw Section 6-5(a), MEMBERSHIP REQUIREMENTS, *supra* note 38 (“A member school shall vest in the faculty primary responsibility for determining institutional policy.”).

Leaving the decision up to individual law schools would enable law schools to determine for themselves whether the CPE requirement was enough of a priority to adopt and, hopefully, provoke discussions within (and among) law schools about the value of continuing engagement with the legal profession. This option could also enable law schools to determine for themselves the types of activity and the extent of such activity that would satisfy a CPE requirement. Of course, to the extent that one supports the adoption of a CPE requirement, the downside of law schools individually deciding whether to adopt a CPE requirement is that law schools might choose not to adopt such a requirement. On the other hand, the law schools that adopt a CPE requirement could promote that fact and use it to signal their faculties' engagement with law practice and connections to law practice (and to distinguish themselves from schools that have not adopted a CPE requirement). This information might be particularly useful for potential students as well as employers of students at these law schools. Both potential students and employers might be especially interested to know that the professors at these schools are engaged with practice, value practice, and are interested in staying informed about the current realities of law practice (and, thus, better able to prepare their students for those realities).¹⁰⁴

A more extreme option for creating a CPE requirement would be for the ABA and AALS to adopt a CPE requirement that all law schools subject to their rules (or seeking to be subject to their rules) would have to implement.¹⁰⁵ This option would create a CPE require-

104 Especially in light of the declining number of students who are applying to law school, law schools might value CPE as a way to promote their faculty's connections with law practice and distinguish themselves from other law schools (to the extent that not all schools adopt a CPE requirement). See Thies, *supra* note 5, at 610 (noting that in light of declining numbers of law school applicants, "Schools will . . . face significant pressure to adjust their programs to be as attractive to students as possible."); Hoffman, *supra* note 76, at 225 (noting that "law schools are always seeking ways to differentiate themselves from their competitors" and that one way a law school can distinguish itself is by more effectively preparing students for law practice); cf. TAMANAHA, *supra* note 1, at 174 (advocating for more diversity regarding different types of law schools).

105 Cf. Chemerinsky, *A Pro Bono Requirement for Faculty Members*, *supra* note 32, at 1243 (advocating for law professors to have a pro bono requirement and stating that "Law school faculties could immediately impose such a requirement on themselves [and] [n]ationally, the ABA and the AALS could insist on this requirement.").

ment that would apply to all ABA-accredited law schools and all AALS member schools and would prevent these law schools from failing to adopt a CPE requirement. Including this pervasive CPE requirement would signal the importance of CPE. However, although individual law professors might oppose the imposition of a CPE requirement by their own law schools, it seems likely that more law professors would resist the imposition of a CPE requirement by the ABA and the AALS. In fact, the ABA Standards and the AALS's membership requirements leave a lot of discretion to individual law schools to determine, among other things, the responsibilities of their faculties,¹⁰⁶ so it may not be realistic (or, perhaps, desirable) to expect these documents (or the AALS's Statement of Good Practices by Law Professors) to be revised in a way that would limit this discretion.¹⁰⁷

However, the ABA Standards and the AALS's membership requirements and Statement of Good Practices by Law Professors could, at least, be revised to endorse CPE, highlight the value of law professors engaging in practice-related activities, and encourage law schools to adopt policies regarding professors engaging in such activities. Although there is currently some language in these documents that could be interpreted to support the value of law professors' con-

106 See Standard 404(a), ABA STANDARDS, *supra* note 25.

107 As is clear from the discussion in both this section and the previous section of this Article, there may be a tension between the advantages of having all professors engage in continuing practice activity and maintaining the autonomy of law professors and law schools. This Article tries to balance these factors (and take practical considerations into account), recognizing that there is not one perfect approach that will accommodate all possible interests and concerns. As a result, the approach proposed in this Section (law schools deciding for themselves whether to adopt a CPE requirement) may seem somewhat inconsistent with the discussion of the reasons for requiring CPE in the previous section. While the reasons for requiring CPE (and the benefits of CPE) provide support for why law schools should want to adopt a CPE requirement, it is certainly the case that leaving the decision up to individual law schools may mean that not all professors will be subject to a CPE requirement. However, leaving the decision of whether to adopt a CPE requirement up to each individual law school recognizes the value of law school autonomy and, to the extent a CPE requirement is voted upon by a law school's faculty, the value of law faculty autonomy. An alternative approach would be for the ABA Standards and AALS's membership requirements and Statement of Good Practices by Law Professors to include a general CPE requirement for law faculty but give each school the discretion to determine the specifics of how faculty members could satisfy such a requirement.

tinued engagement with law practice,¹⁰⁸ these documents could more explicitly support continued engagement with law practice.

For example, ABA Standard 404, pertaining to “Responsibilities of Full-time Faculty,” is one specific standard that could be revised to endorse law professors’ continued engagement with law practice.¹⁰⁹ Standard 404 states that, “A law school shall establish policies with respect to a full-time faculty member’s responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school.”¹¹⁰ While “[t]he policies need not seek uniformity among faculty members,” the Standard does specify the categories of activities that the policies “should address.”¹¹¹ Not surprisingly, these activities include teaching, scholarship, and ser-

108 Standard 404(a)(4)’s reference to law professors “working with the practicing bar and judiciary to improve the profession” arguably would encompass a law professor engaging in CPE to better prepare students for law practice (which would “improve the profession”). See Standard 404(a)(4), ABA STANDARDS, *supra* note 25; see also Standard 404(a)(2), ABA STANDARDS, *supra* note 25 (mentioning the “responsibility of faculty members to keep abreast of developments in their specialties”); Standard 404(a)(5), ABA STANDARDS, *supra* note 25 (mentioning faculty members’ “participation in pro bono activities”); Standard 402(b), ABA STANDARDS, *supra* note 25 (stating that “full-time faculty member[s] . . . outside professional activities [should be] limited to those that” [relate to the faculty members’ professional responsibilities]). However, as discussed in this section, it would provide more support for the adoption of a CPE requirement if the Standards were revised to more explicitly endorse CPE. In addition, although the Standards signal the educational value of teachers with practice experience, the Standards do not signal the educational value of full-time professors having continued practice experience. See Standard 403(c), ABA STANDARDS, *supra* note 25 (“A law school should include experienced practicing lawyers and judges as teaching resources to enrich the educational program.”); see also Thies, *supra* note 5, at 619 (advocating for the greater use of adjunct professors in legal education both for financial reasons and because “adjuncts are . . . well-suited to help schools integrate the practical and theoretical aspects of legal education”); Rapoport, *Is “Thinking Like a Lawyer” Really What We Want to Teach?*, *supra* note 86, at 107 (noting the value of “input from lawyers” with respect to law school curricula). As Standard 403(c) suggests, “experienced practicing lawyers and judges” can make valuable contributions to law schools. Standard 403(c), ABA STANDARDS, *supra* note 25. However, their involvement in legal education does not mean that full-time professors—professors whose primary professional responsibility is being law school faculty members—should not have continuing practice experience.

109 Standard 404, ABA STANDARDS, *supra* note 25.

110 Standard 404(a), ABA STANDARDS, *supra* note 25.

111 *Id.*

vice.¹¹² Also, not surprisingly, service is divided into three categories: service “to the law school and university community,” service “to the profession,” and service “to the public.”¹¹³

There are various ways in which Standard 404 could be revised to support a law school’s adoption of a CPE requirement. Standard 404(a)(2) regarding “research and scholarship” encourages the development of policies that address the “responsibility of faculty members to keep abreast of developments in their specialties.”¹¹⁴ This Standard could be revised to clarify that “keep[ing] abreast of developments in their specialties”¹¹⁵ includes issues that are faced by practitioners in those specialties. In addition, Standard 404(a)(4), regarding “[o]bligations to the profession,”¹¹⁶ could be revised so that it explicitly includes not only “working with the practicing bar and judiciary to improve the profession,”¹¹⁷ but also “working with the practicing bar and judiciary to stay abreast of developments in law practice to better prepare students for law practice and produce scholarship that is of value to the profession.”¹¹⁸

Another way in which the Standards could signal the importance of law professors having continuing practice experience is through the revision of Standard 401 regarding the “qualifications” of law school faculties.¹¹⁹ Standard 401 currently states that a law school’s “faculty shall possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.”¹²⁰ Interestingly, the Standards group teaching and practice together, rather than listing

112 *Id.*

113 Standard 404(a)(3)–(5), ABA STANDARDS, *supra* note 25.

114 Standard 404(a)(2), ABA STANDARDS, *supra* note 25.

115 *Id.*

116 Standard 404(a)(4), ABA STANDARDS, *supra* note 25.

117 *Id.*

118 Standard 404(a)(5) which references “[o]bligations to the public” already explicitly mentions “participation in pro bono activities.” Standard 404(a)(5), ABA STANDARDS, *supra* note 25. Even if Standard 404 itself were not revised, an Interpretation could be added to the Standard noting the value of continuing engagement with law practice to law professors’ teaching, scholarship, and service. See Preface, ABA STANDARDS, *supra* note 25, at vii (“Interpretations that follow the Standards provide additional guidance concerning the implementation of a particular Standard and have the same force and effect as a Standard.”).

119 Standard 401, ABA STANDARDS, *supra* note 25.

120 *Id.*

them as separate qualifications, so a law faculty would not necessarily need to have experience in practice to be considered qualified.¹²¹ Standard 401 could be revised to include “engagement with the legal profession” as one of the hallmarks of a competent law faculty. Including “engagement with the legal profession” as one of the qualifications of a competent law faculty would not require that law professors have actually practiced law prior to becoming law professors, but it would endorse the value of law professors having some ongoing connection with the legal profession (other than teaching students who will be entering that profession).¹²²

Similarly, the ABA Standards—or, more precisely, the Interpretations to the Standards—could be revised to recognize that continuing engagement with law practice is one way that law professors can be better prepared to teach students and carry out the law schools’ responsibility to prepare students for “effective and responsible participation in the legal profession.”¹²³ Standard 302 requires that students be prepared for “the legal profession.”¹²⁴ An Interpretation could be added to this Standard noting that law professors’ ongoing engagement with the legal profession is one way to identify what students need to know (including what students need to know how to do) in order to be prepared to be “effective and responsible [members of] the legal profession.”¹²⁵

121 See *id.*; see also Campos, *supra* note 5, at 217 n.149 (“Under the current ABA rules there is nothing barring a school from employing a tenure track faculty made up exclusively of people who have never practiced law. . . .”). Some scholars have advocated for law schools to value a candidate’s practice experience more highly in making hiring decisions. See *supra* note 71.

122 Including “engagement with the legal profession” as a law faculty qualification would also support the service to the profession component of law professors’ responsibilities set forth in Standard 404(a)(4).

123 Standard 301, ABA STANDARDS, *supra* note 25; Standard 302, ABA STANDARDS, *supra* note 25.

124 Standard 302, ABA STANDARDS, *supra* note 25.

125 *Id.* Currently, an Interpretation to Standard 302 notes that “law school[s] should involve members of the bench and bar” to carry out some of the curricular responsibilities set forth in Standard 302. Interpretation 302-6, ABA STANDARDS, *supra* note 25. The Standards should also note that law professors having continued engagement with law practice is one way to facilitate law professors being able to prepare students for the legal profession. There are also other Standards to which a similar Interpretation could be added. See Standard 301(a), ABA STANDARDS, *supra* note 25 (“A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.”); Stan-

The AALS's membership requirements¹²⁶ and Statement of Good Practices by Law Professors could also be revised to explicitly endorse CPE.¹²⁷ Although ongoing engagement with the legal profession could contribute to law professors satisfying the expectations set forth in the AALS's membership requirements, ongoing engagement with law practice is not explicitly identified as one of the AALS's expectations of law professors.¹²⁸ As with the ABA Standards, the Statement sets forth law professors' basic responsibilities with respect to teaching, scholarship, and service.¹²⁹ Moreover, the Statement goes into more detail about law professors' responsibilities than do the AALS's membership requirements, suggesting that the Statement might be the AALS document that would best lend itself to being revised to explicitly endorse the value of CPE. Although the Statement recog-

standard 404(a)(1), ABA STANDARDS, *supra* note 25 (identifying "preparing for class" as one of a faculty member's "teaching responsibilities"). An Interpretation to Standard 301 states that law schools should "prepare . . . students to address current and anticipated legal problems." Interpretation 301-1, ABA STANDARDS, *supra* note 25. The Interpretations to Standard 301 could also note that one way to identify "current and anticipated legal problems" is for law professors to have continuing engagement with the legal profession.

126 The AALS's membership requirements are set forth in bylaws and executive committee regulations. See MEMBERSHIP REQUIREMENTS, *supra* note 38.

127 See Cohen, *supra* note 8, at 625–27.

128 See, e.g., Bylaw Section 6-1, MEMBERSHIP REQUIREMENTS, *supra* note 38 ("The Association values and expects its member schools to value . . . a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community . . ."). The bylaws also indicate the factors that should be considered in assessing a "faculty's competence." Bylaw Section 6-4, MEMBERSHIP REQUIREMENTS, *supra* note 38. Although continuing engagement with law practice is not mentioned as one of these factors, CPE could certainly contribute to law professors' fulfillment of these criteria, which include "[q]uality of teaching" and "[b]readth, depth, and variety of the faculty's training and experience." *Id.* Similarly, CPE could be one way in which faculty members could pursue "the continuous and energetic study of new developments in the faculty members' areas of interest." Bylaw Section 6-6, MEMBERSHIP REQUIREMENTS, *supra* note 38.

129 The Statement of Good Practices by Law Professors is divided up into categories regarding law professors' "responsibilities to students," "responsibilities as scholars," "responsibilities to colleagues," "responsibilities to the law school and university," and "responsibilities to the bar and general public." STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25.

nizes that law professors may engage in law practice,¹³⁰ the Statement does not explicitly identify continuing law practice experience as a responsibility of a law professor.¹³¹

CPE could assist a law professor in carrying out some of the responsibilities identified by the Statement. For example, the Statement notes that law professors should engage in pro bono service and “assist students to recognize the responsibility of lawyers to advance individual and social justice.”¹³² Similarly, the Statement recognizes law professors’ “unique role as a bridge between the bar and students preparing to become members of the bar” and, as such, notes that “[i]t is important that professors accept the responsibilities of professional status.”¹³³ In addition, the Statement states that “[I]aw

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- 130 For example, the Statement says, “If a professor expresses views in class that were espoused in representing a client or in consulting, the professor should make appropriate disclosure.” *Id.* On its face, this statement does not only pertain to a law professor “representing a client or . . . consulting” while a law professor—a law professor could have engaged in such activity before becoming a law professor—but it would at least seem to contemplate that a law professor might engage in these activities while a law professor. *See id.* The Statement also requires a law professor to “disclose the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor,” which also seems to contemplate that a law professor may engage in continuing practice activity. *Id.* The Statement states that law professors must “engage in uncompensated public service or pro bono legal activities.” *Id.* The activities that would satisfy this obligation might—but would not necessarily—constitute continuing practice activities. *See id.* (identifying some of the ways that law professors could satisfy their professional service obligation, “including direct client contact through legal aid or public defender offices . . . , participating in the legal work of public interest organizations, lecturing in continuing legal education programs, educating public school pupils or other groups concerning the legal system, advising local, state and national government officials on legal issues, engaging in legislative drafting, or other law reform activities”); *see also* Cohen, *supra* note 8, at 627.
- 131 *See* Cohen, *supra* note 8, at 626; *id.* at 627 (“[T]he Statement does not encourage law professors to engage in the practice of law or to otherwise stay in touch with the realities of what lawyers do in practice.”).
- 132 STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25; *see also* Green, *supra* note 23, at 306 (noting that law professors “may be encouraged” to perform pro bono work “in order to serve as role models for students”).
- 133 STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25. Given the current difficulty in students finding law-related employment, it might be even more important for law professors to serve as “professional role mod-

professors should be reasonably available to counsel students about academic matters, career choices, and professional interests,” and that, “[i]n performing this function, professors should make every reasonable effort to ensure that the information they transmit is timely and accurate.”¹³⁴

The Statement also recognizes that law professors’ scholarship may benefit from law professors engaging in “activities outside the law school,” although the Statement does not specifically identify law practice experience as the type of outside activity that confers such a benefit on law professors.¹³⁵ In fact, the statement about the benefits of outside activities is actually located in the section about professors’ “responsibilities to the law school and university.”¹³⁶ There is no statement about the benefits of outside activity in the section regarding law professors’ “responsibilities as scholar.”¹³⁷ Moreover, the statement about the benefits of outside activities precedes a qualifying statement that participation in outside activities “tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school” and noting that a “professor thus has a responsibility . . . to assure that outside activities do not significantly diminish the professor’s availability to meet institutional obligations.”¹³⁸ Similarly, the AALS’s bylaws do not explicitly endorse continuing engagement with law practice and also express a concern

els” for students. *See* Schiltz, *supra* note 16, at 723 (referring to law professors as “possibly the only professional role models” law students have); *see also* Smith, *supra* note 71, at 617 (“[L]aw school professors are often students’ first role models for lawyering.”) (describing the content of PROFESSIONALISM COMM., AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *supra* note 71).

134 STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25.

135 *Id.*

136 *Id.*

137 *Id.* The Statement does include law professors’ responsibility to stay current in their areas of interest. *Id.* However, this responsibility seems to be limited to staying current with relevant scholarship. *See id.* As the Statement says, “A law professor . . . has a responsibility to be informed concerning the relevant scholarship of others in the fields in which the professor writes and teaches. To keep current in any field of law requires continuing study. To this extent the professor, as a scholar, must remain a student.” *Id.*; *see also* Cohen, *supra* note 8, at 626.

138 STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25; *see also* Cohen, *supra* note 8, at 626–27.

that law practice activity can detract from—rather than enhance—a law professor’s ability to satisfy his or her responsibilities.¹³⁹

Thus, the ABA Standards and the AALS’s membership requirements and Statement of Good Practices by Law Professors could be revised to explicitly endorse CPE and recognize that continuing engagement with law practice can contribute to, rather than detract from, law professors’ fulfillment of their teaching, scholarship, and service responsibilities.¹⁴⁰ Certainly, law schools could adopt CPE requirements without revisions to these documents. However, revisions to these documents could signal the value of CPE and encourage law schools to consider and adopt CPE requirements.¹⁴¹ The next Part of this Article will address some of the questions regarding the details

139 See Bylaw Section 6-4, MEMBERSHIP REQUIREMENTS, *supra* note 38 (“Professional activities outside the law school are not precluded if limited so as not to divert the faculty member from the primary interest and duty as a legal educator.”). The AALS’s Executive Committee Regulations Pertaining to Bylaw 6-4 shed additional light on the criteria to be used in judging law professors’ outside activities. Executive Committee Regulation 6-4.2, MEMBERSHIP REQUIREMENTS, *supra* note 38. These criteria suggest that law professors’ outside activities can contribute to their responsibilities as a teacher and a scholar, although the focus of the regulations is on determining whether a professor’s outside activities detract from these responsibilities. See Executive Committee Regulation 6-4.2(i), MEMBERSHIP REQUIREMENTS, *supra* note 38 (identifying one criterion as “[t]he extent to which the outside activity coincides with the full-time teacher’s major fields of interest as a teacher and scholar”); Executive Committee Regulation 6-4.2(ii), MEMBERSHIP REQUIREMENTS, *supra* note 38 (identifying one criterion as “[t]he character of the professional activity as a source of novel and enriching experience that can be directly utilized in the person’s capacity as teacher and scholar”).

140 Of course, these documents could be revised to require that law professors engage in CPE. However, as discussed at the beginning of this section of the Article, it is more realistic—and, in some respects, preferable—for law schools to decide for themselves whether to adopt a CPE requirement.

141 Standard 404(b) states that “[a] law school shall evaluate periodically the extent to which each faculty member discharges her or his responsibilities under policies adopted pursuant to Standard 404(a).” Standard 404(b), ABA STANDARDS, *supra* note 25. Just because the ABA Standards highlight a particular type of activity does not mean that it will necessarily be valued by a law school. However, including CPE in the Standards would at least signal that it was deemed worthy of consideration by the ABA (or, more precisely, the Council of the Section of Legal Education and Admissions to the Bar of the ABA). See Preface, ABA STANDARDS, *supra* note 25, at v–vii (discussing the development and revision of the Standards). Not including CPE in the Standards sends the message that it is not a priority of the ABA, much less a priority of law schools.

of a CPE requirement: in particular, what types of activities should “count” as CPE and how much time should law professors have to spend engaged in such activities?

C. What Would It Look Like?

If a CPE requirement were going to be adopted, the question remains of what that requirement would be. Certainly, there are many different options for what a CPE requirement could look like, and law schools could develop their own standards regarding CPE requirements for their faculties. This section will address some of the considerations regarding the design of a CPE requirement. This section’s intent is not to dictate what a CPE requirement would have to look like. Rather the intent of this section is to examine some of the issues regarding the features of a CPE requirement: specifically, what types of activities should constitute CPE and how much of such activities should professors have to engage in?

In order to answer these questions, it is important to consider the purposes underlying CPE. These purposes are really what should inform the contours of a CPE requirement. At bottom, CPE is intended to expose law professors to contemporary law practice. Of course, there are different facets of being exposed to contemporary law practice. One aspect of this exposure involves doing the work that a practicing lawyer does. Another aspect of this exposure involves being in a law practice environment outside of the law school. Every CPE experience might be able to be mapped on a two-axis graph, representing the extent to which it involves doing law practice work and being in a law practice setting outside of the law school.¹⁴²

142 There are some CPE experiences that might involve both of these components (for example, working at a law firm or a legal services organization). There are other types of CPE experiences that might involve more of one component and less of another. For example, shadowing a prosecutor or a defense attorney would involve a law professor being in a law practice setting but would not involve a law professor actually practicing law. A law professor advising a client pro bono from the professor’s law school office would involve the law professor doing the work that a practicing lawyer does, but would not involve the law professor doing that work in a law practice setting outside the law school. As will be discussed *infra*, it would be advisable to maintain a flexible definition of the types of experiences that constitute CPE, recognizing that not all CPE activities will necessarily include all facets of “the complete” CPE experience.

As discussed previously, there are different reasons why it might be important for law professors to have continuing engagement with law practice. First, because law school is “the gateway” to law practice,¹⁴³ law professors are educating future lawyers. As the educators of future lawyers, law professors should be aware of the law practice environments in which their students will be practicing law. This knowledge will help law professors identify the information and skills that will be most valuable to their students. This knowledge may also enable law professors to be better advisors for their students and to have more credibility with their students.¹⁴⁴ Second, gaining first-hand knowledge about law practice might identify issues for law professors to address in their scholarship. Law professors learning more about law practice and using that knowledge to inform their teaching and scholarship could help to reduce the perceived disconnect between the legal academy and the world of law practice. These goals would likely be some of the main considerations in identifying the types of activities that could satisfy a CPE requirement.¹⁴⁵

Beyond these considerations, in order to facilitate law professors engaging in practice-related activities—and recognizing the different backgrounds and interests of law professors—one of the key features of a CPE requirement should be flexibility.¹⁴⁶ On the one hand, CPE is intended to ensure that law professors engage in practice-related activity. On the other hand, not all law professors may be qualified to actually practice law. Law professors may not be active bar mem-

143 Schiltz, *supra* note 16, at 746; *see also* Dark, *supra* note 49, at 17; Preamble, ABA STANDARDS, *supra* note 25, at ix; Luban, *supra* note 18, at 69–70 (“Law schools have become the indispensable gatekeepers of the legal profession.”); *id.* at 69 (“Within the larger law economy, law schools exist primarily as conduits to practice.”).

144 Green, *supra* note 23, at 334 (“Professors who practice may be in a position to offer better, more credible understandings of the law, legal processes, and legal institutions.”).

145 To the extent that law schools define their own CPE requirements, individual law schools could determine their own goals for CPE and use those goals to inform the nature of their CPE requirements. While law schools will likely share many of the same goals for CPE, law schools might prioritize those goals differently or might have some institution-specific goals. For example, a law faculty might decide to spend at least some of its CPE time doing work (or accompanying lawyers doing work) that is more similar to the type of work that recent graduates of the law school are likely to be doing.

146 *See* Cohen, *supra* note 8, at 643 (recommending different ways in which law professors could “stay connected to the world of practice”).

bers, may not be active bar members in the jurisdiction where they would engage in CPE, or may not feel qualified to practice law.¹⁴⁷ For these reasons, although engaging in law practice should be one way to satisfy a CPE requirement, CPE should not require all law professors to engage in law practice.¹⁴⁸

What then are the types of activities that could fulfill the purposes of a CPE requirement while also being realistic and flexible, given law professors' qualifications (and lack thereof), interests, and availability? Certainly, at one end of the continuum would be actual law practice. Professors could engage in private practice, or professors could engage in pro bono representation. Engaging in pro bono practice would have the added benefit of serving the public interest and also modeling a commitment to public service for students.¹⁴⁹ As it currently stands, students may be more likely to be the members of a law school community who model public service, given that stu-

147 See Nathanson, *supra* note 6, at 344 (“[I]t is probably the simple lack of long-term practical experience and the comparatively quick transition from student to professor that results in the feeling that many doctrinal professors have that they are primarily academics rather than lawyers.”).

148 Presumably, a law school could require its law professors to be active bar members in the jurisdiction where the law school is located or require its law professors to engage in some type of limited law practice. These requirements might raise faculty recruiting issues, among other things, but they could send a signal to prospective students and the practicing bar (as well as faculty) about the law school's commitment to maintaining a connection with the world of law practice.

149 See Mogill, *supra* note 18, at 6 (“question[ing] whether those of us in the academy are doing enough to provide for the needs of those who are under-represented” and discussing “the need for greater service by law professors to the indigent”); *id.* at 29 (“Faculty members who perform *pro bono* service help to provide not only assistance for the less fortunate but act as role models for their students.”); *id.* at 29 (“The law professor who performs *pro bono* services for the needy instills his students with professional values of service from the beginning of their educations.”); STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS, *supra* note 25 (stating that “law professors serve as important role models for law students” and stating that law professors have an obligation “to engage in uncompensated public service or pro bono legal activities” because they are “role models for students and . . . members of the legal profession”).

Pro bono representation would give law professors the opportunity to practice law. On the other hand, different types of pro bono representation would expose law professors to law practice settings outside the law school to a greater or lesser extent. Some types of pro bono work might be done within the confines of a law professor's office, while other types of pro bono representation might involve spending more time in law practice settings outside the law school.

dents are the ones who are more likely to be subject to a pro bono requirement.¹⁵⁰

At the other end of the continuum of law-practice activity would be opportunities that expose law professors to law practice without requiring law professors to actually engage in the types of activity that practicing lawyers engage in.¹⁵¹ These types of activities would be largely observational. For example, a law professor could spend a certain amount of time (how much time will be discussed further below) shadowing a practicing lawyer.¹⁵²

Another option on this end of the continuum could be for a law professor to spend time observing the proceedings in a courtroom. By observing court, a professor would be able to see lawyers and judges in a practice setting. However, observing court in and of itself would not afford a law professor the opportunity to actually engage with a practicing lawyer.¹⁵³ If a law professor observed court and then discussed what was observed with one (or more than one) of the lawyers or the judge, this would be a more meaningful CPE experience. Alternatively, a professor could observe a lawyer in court in the course of shadowing that lawyer. The benefit of observing court in this context is that it would give the professor an opportunity to discuss and reflect on the experience with a practitioner.

In addition to client representation and observations of lawyers in practice, there are other types of activities that would provide a law professor with the opportunity to engage in practice-related activity. As with all CPE options, these activities have their pros and cons, but they might at least be a step in the right direction in order to give law professors personal experience with law practice. For example, one option could be for a law professor to work together with students and clinical faculty on a case being handled by a law school

150 See *supra* note 32.

151 These types of activities are described as “at the other end of the continuum” from engaging in law practice because they involve observing practicing lawyers, rather than engaging in activity other than observation. However, in some respects, observing practicing lawyers at work may be closer to law practice than some of the other activities that might qualify as CPE (for example, serving on a bar committee or task force, discussed below).

152 See Cohen, *supra* note 8, at 624 n.4 (noting that author spent most of her sabbatical at a law firm “shadowing” two lawyers at the firm) (internal quotation marks omitted).

153 Observing court would also not afford a law professor the opportunity to actually engage in a law practice activity himself or herself.

clinic.¹⁵⁴ The advantage of this type of activity is that the professor would be exposed to law practice and would be able to work together with a student and a colleague on a case.¹⁵⁵ The disadvantage of this type of activity, to the extent that one goal of CPE is to expose professors to law practice based outside of the law school, is that the professor would not be working with a law practice that was based outside of the law school.¹⁵⁶ Another type of activity that might satisfy a CPE requirement would be work on a bar committee or task force, although this might depend on the type of work being done by the bar committee or task force. This type of work could require a law professor to engage with members of the bar and address issues relevant to the bar. The downside of this type of work is that it is more attenuated from the work that lawyers do when they are engaged in direct client representation.

154 See Luban, *supra* note 18, at 73 (noting that one way in which law professors could perform pro bono service would be “to cosupervise clinical cases with a clinician partner”); see also Rovner, *supra* note 89 (noting the benefits of law professors working with law school clinics and addressing potential issues regarding law professors working with law school clinics). In referencing “law professors” and “clinical faculty,” I do not mean to suggest that clinical faculty are not law professors. I use “clinical faculty” here to describe law professors who supervise students who work in law school clinics. Although clinical faculty might benefit from practice experience outside the law school context, clinical faculty are the law school professors who are likely the least in need of a CPE requirement because they engage in law practice as they supervise students who are engaged in law practice (clinical faculty might also handle certain aspects of cases on their own, rather than in the context of student supervision). *But see* Caplow, *supra* note 28, at 2–3, 19 & n.31 (1996) (distinguishing between a law professor’s work in a law school clinic and law practice outside the law school context and noting that this difference “suggests that clinical teachers might have a responsibility to return regularly to the real world in order to retain an edge and credibility with our students”); Rabé & Rosenbaum, *supra* note 8, at 298–99, 299 n.9 (specifically suggesting that clinical professors (and “skills professors”) “consider practicing law—in real-life, non-clinical settings—during . . . their sabbaticals,” while recognizing that clinical professors who work in environments analogous to law offices are less in need of such experiences).

155 Another benefit of non-clinical faculty working with the clinic might be a greater appreciation for the clinic. See Chemerinsky, *Why Not Clinical Education?*, *supra* note 7, at 40 (“The more academic tenure track faculty are involved in clinics the more they will understand their value and the more invested they will be in supporting them.”).

156 This concern would not exist if the law professor worked with an off-site field clinic at a legal services organization.

While there is merit in having a flexible, broad conception of the types of activities that would satisfy a CPE requirement, there is also value in considering the types of activities that might not constitute CPE. This is not necessarily an easy determination. However, keeping the goals of CPE in mind can inform the consideration of whether a particular type of activity should constitute CPE. One type of activity which would likely not be considered to count as CPE would be teaching or attending a traditional continuing legal education course. Although continuing legal education may expose a law professor to practitioners (as presenters and attendees at a session) and legal issues faced by practitioners, continuing legal education courses typically would not require law professors to enter a law practice environment to the extent anticipated by CPE.¹⁵⁷

A question might be raised about whether a law professor could satisfy a CPE requirement by spending time speaking with a practicing lawyer about practicing law (not in the context of shadowing that lawyer). Certainly, such a conversation could contribute to a law professor's understanding of the issues faced by practicing lawyers and the context within which lawyers practice. However, conversations alone may not be considered sufficient exposure to law practice, unless they are accompanied by the law professor actually observing the practitioner engaged in law practice activities.

Again, the purpose of this discussion is to explore—not dictate—the types of activities that might count—or not count—as CPE. To the extent that adoption of a CPE requirement is left to individual law schools, law schools themselves can decide whether to create specific qualitative standards for the types of activities that count as CPE and, if so, what types of activities should count as CPE.

157 A closer call perhaps would be CPE courses taught by practitioners for the express purpose of educating law professors about the current realities of law practice, to the extent such courses were available to law professors. The disadvantage of these courses would be that they would be removed from the real-world context in which law practice occurs and they would not involve law professors engaging in law practice. There are ways that these courses could include observations of law practice, either actual or simulated, but it would likely be a different experience from law professors accompanying lawyers as they engage in practice outside a classroom context. However, these courses could serve a valuable function and might be worth considering as another CPE option.

Another issue regarding a CPE requirement is how much time a law professor should have to spend on practice-related activity.¹⁵⁸ To the extent that the CPE requirement is analogous to the CLE requirements of practicing lawyers, the time that law professors are required to spend on CPE could mirror the amount of time that lawyers are required to spend on CLE.¹⁵⁹ Of course, CLE requirements vary from jurisdiction to jurisdiction.¹⁶⁰ To the extent that individual law schools determine the CPE requirements of their faculties, CPE requirements would likely vary from school to school.¹⁶¹ As a substantive matter, it would be useful to consider the amount of time that would be needed to make CPE meaningful—in other words, to give professors an opportunity to learn from that experience—and use that determination as a guide in setting any time requirements for CPE. From a practical point of view, it might be useful to consider CLE time limits as a guide.

158 An even more fundamental question is whether there should be a specific amount of time that law professors should be required to engage in CPE. There are certainly different models that could be developed regarding the extent of a law professor's CPE. One model could include a quantitative component, setting a specific amount of time (or a minimum amount of time) that a law professor would need to engage in CPE. An alternate model could focus on the qualitative components of CPE, rather than the quantitative component (of course, similar questions could also be raised about qualitative standards). However, some guidance regarding the amount of time that a professor should spend engaged in CPE activities might be useful, even if there is flexibility regarding this standard.

159 See *MCLE Information by Jurisdiction*, AM. BAR ASS'N, http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states.html (last updated July 2, 2013) [hereinafter *MCLE Information by Jurisdiction*] (providing information regarding individual jurisdictions' CLE requirements). Specific amounts of time are also identified in the context of lawyers' pro bono service. For example, the American Bar Association recommends that lawyers should "aspire to render at least (50) hours of pro bono publico legal services per year." MODEL RULES OF PROF'L CONDUCT R. 6.1, available at http://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1.html (last updated Nov. 29, 2006). The Comment to this Rule notes that states may set their own pro bono time requirements and that these requirements can be either higher or lower than the 50 hours per year set forth by the ABA.

160 See *MCLE Information by Jurisdiction*, *supra* note 159.

161 To the extent that the ABA or AALS adopts a CPE requirement for law professors that includes a specific time requirement, there would not be such variation from school to school. However, as discussed in the previous section, this seems less likely.

Although CLE requirements vary from jurisdiction to jurisdiction, an average of ten to fifteen hours of CLE per year is relatively typical.¹⁶² Some jurisdictions require lawyers to complete a certain amount of CLE each year.¹⁶³ Other jurisdictions give attorneys more than one year to complete a prescribed number of CLE hours.¹⁶⁴ This model—setting a certain number of hours that must be fulfilled over the course of a few years—seems like it would make sense for CPE. In this way, law professors would gain regular exposure to the world of law practice but would have greater flexibility in determining when and how they would gain this experience. In addition, enabling law professors to satisfy a CPE requirement over the course of a few years might encourage law professors to engage in more substantive law practice projects because they could accumulate CPE hours as the project developed, rather than having to accumulate a fixed number of hours in a relatively short period of time (one year).¹⁶⁵

While one concern is whether law professors will engage in CPE for a sufficient amount of time (although it might not be entirely clear what constitutes “sufficient” time), the converse concern is that law professors not engage in CPE to an extent that will detract from their other responsibilities.¹⁶⁶ The ABA Standards make clear a concern that law professors devote themselves to their professorial responsibilities and not engage in activities that interfere with their

162 *See id.*

163 *See id.* For example, attorneys in Tennessee have to complete fifteen hours of CLE over the course of one year. *See Tennessee, AM. BAR ASS'N*, http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states/states_p-z/tennessee.html (last updated July 2, 2013).

164 *See MCLE Information by Jurisdiction, supra* note 159. For example, attorneys in Colorado have to complete forty-five hours of CLE over the course of three years. *See Colorado, AM. BAR ASS'N*, http://www.americanbar.org/publications_cle/mandatory_cle/mcle_states/states_a-k/colorado.html (last visited July 2, 2013).

165 Setting a multi-year CPE period, or enabling law professors to carry over their excess CPE hours from one CPE period to the next, could also encourage law professors to engage in projects involving a more intensive amount of work over a shorter period of time because law professors would receive CPE credit for all of the hours spent on the project.

166 *See Cohen, supra* note 8, at 643 n.59 (“Perhaps one way to ensure that such work does not interfere with a professor’s primary responsibilities is to limit the number of hours or any additional compensation that a professor can earn from such endeavors.”).

commitments to their law schools.¹⁶⁷ The ABA's interpretive guidance regarding the Standards explicitly identifies law practice as an activity that calls into doubt a law professor's commitment to his or her professorial responsibilities.¹⁶⁸ In this way, then, the Standards create a tension between being a law professor and being a practicing lawyer, rather than portraying these two roles as having the potential to be complementary and enhancing of one another.¹⁶⁹

Any quantitative standard for CPE should take into account the other responsibilities that law professors have. Given the limited amount of time that would likely be required to satisfy a CPE requirement, a law professor who engaged in law practice to satisfy a CPE requirement would not likely be considered to be practicing law to the extent contemplated by the ABA.¹⁷⁰ Nor should the time required to be spent engaging in CPE interfere with law professors' fulfillment

167 See Standard 402(b), ABA STANDARDS, *supra* note 25. As this Standard states:

A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as a scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.

168 See Interpretation 402-4, ABA STANDARDS, *supra* note 25. This Interpretation states:

Regularly engaging in law practice or having an ongoing relationship with a law firm or other business creates a presumption that a faculty member is not a full-time faculty member under this Standard. This presumption may be rebutted if the law school is able to demonstrate that the individual has a full-time commitment to teaching, research, and public service, is available to students, and is able to participate in the governance of the institution to the same extent expected of full-time faculty. Interpretations of a Standard "have the same force and effect as a Standard." *Id.* at vii.

169 As discussed in the previous section, the ABA Standards could be revised to endorse CPE and to recognize the value of CPE to a professor's teaching, scholarship, and service responsibilities.

170 The goal of CPE is to create more well-rounded law professors who have continuing exposure to the world of law practice. The goal of CPE is not to turn law professors into full-time practicing lawyers. See *supra* note 76; see also Schiltz, *supra* note 16, at 761 n.220 ("[T]here is a large difference between occasionally doing some of the things that a practitioner does and *being* a practitioner . . ."). In fact, as discussed previously in this section, there is a range of activities (including, but not limited to, practicing law) that could satisfy a CPE requirement.

of their other responsibilities, regardless of the activities in which law professors choose to engage to satisfy a CPE requirement. Moreover, the ABA Standards do not prohibit a faculty member from practicing law; rather, the faculty member is still “a full-time faculty member” so long as the law school can demonstrate that the faculty member is able to carry out the responsibilities of a full-time faculty member.¹⁷¹ A CPE standard that is comparable to the amount of time that lawyers have to spend on CLE should not undermine law professors’ ability to fulfill their other responsibilities and should, in fact, promote law professors’ fulfillment of their other responsibilities.

IV. Conclusion

There have been many critiques of legal education and recommendations for legal education reform. Many critiques and recommendations have focused on the pedagogy and goals of legal education. Recently, there have also been questions raised about the cost of legal education and whether it is even worth it for students to pursue a legal education when they will accrue so much debt in the process and not necessarily be able to find a job that enables them to pay off that debt (much less earn a living on top of that).¹⁷² Especially at a time when the utility of a legal education is being questioned—and the utility of law professors’ work generally is being questioned—we should consider how our own experiences influence our students’ education and whether there are ways that we can enhance both our teaching and scholarship. In light of recurring concerns about whether legal education could do a better job of preparing students to be members of the legal profession and whether the scholarship of law professors could be contributing more to the issues faced by practicing lawyers and judges,¹⁷³ it is worth considering whether law professors should have an obligation to regularly

171 Interpretation 402-4, ABA STANDARDS, *supra* note 25. As discussed in Part II.B., the Standards currently recognize that outside activities may fall within the responsibilities of law professors. See Standard 404(a), ABA STANDARDS, *supra* note 25; Standard 402(b), ABA STANDARDS, *supra* note 25. As also discussed in Part II.B., the Standards could be revised to explicitly endorse CPE and recognize the value of CPE to a professor’s teaching, scholarship, and service responsibilities.

172 See, e.g., TAMANAHA, *supra* note 1, at x–xi; Tamanaha, *Responses to Schrag and Chambliss*, *supra* note 5. But see Schrag, *supra* note 5, at 6–19.

173 See *supra* notes 6–8.

engage with the world of law practice and, if so, what the nature of that obligation should be.

This Article identifies the CPE requirement as one way in which law professors might be able to enhance our teaching and scholarship, and strengthen our connection to the legal profession. CPE offers a way in which we can learn about the world of law practice and provides a way to facilitate conversations between law professors and practicing lawyers. In addition, CPE offers other ways in which we might engage with our faculty colleagues and our students.

CPE offers opportunities for law professors individually, and law schools generally, to develop relationships with practicing lawyers and the organizations in which they practice. In engaging in CPE, law professors will spend time with practicing lawyers and speak with practicing lawyers about their work. In so doing, law professors will also likely discuss their own work with practicing lawyers. This exchange will, hopefully, educate both professors about the work of practicing lawyers, and practicing lawyers about the work of law professors. Moreover, as law professors pursue opportunities for CPE, they will develop relationships with individual lawyers and their organizations. Law schools might even work with local bar associations to cultivate CPE opportunities. These connections might benefit not only law professors who are looking for CPE opportunities but also students who are looking to develop their own professional relationships with the legal community.¹⁷⁴ Moreover, to the extent that students are looking for law schools that will best prepare them for law practice and help them in securing employment as law students and lawyers, CPE is one more way in which law schools can demonstrate their commitment to helping students successfully transition from law students to practicing lawyers.

CPE also offers another facet to the exchanges that we can have with our faculty colleagues and with our students.

174 Hopefully, practicing lawyers will also benefit from CPE. For example, by helping law professors identify areas to focus on with students, CPE can help to better prepare students for law practice. CPE might also facilitate scholarship that addresses issues faced by practicing lawyers. To the extent that law professors engage in pro bono representation through public interest organizations to fulfill their CPE requirements, this might benefit the lawyers who work at those organizations or who might otherwise be asked to provide that representation, in addition to benefitting individuals who might not otherwise receive representation.

Part of engaging in CPE should be sharing and reflecting on our experiences with our colleagues.¹⁷⁵ As with discussions of scholarship and teaching, this interchange will likely occur in both informal conversations and in more formal settings.¹⁷⁶ At the end of the year—and, ideally, periodically throughout the year—law professors could meet to discuss their CPE experiences and discuss how those experiences might inform the law school curriculum and pedagogy, as well as scholarship. These discussions would be more likely to occur amongst faculty at the same law school, although faculty at different law schools could also meet to discuss their CPE experiences and reflect on the implications of those experiences for both legal education and scholarship. CPE, thus, offers a way in which law professors can engage not only with the world of practice but also with each other.¹⁷⁷

CPE also offers an opportunity to enhance law professors' interactions with our students. In the classroom, we can use our practice experiences to inform our teaching. We might have more credibility with our students if they know that we have actually spent time recently in the world of practice and are interested in keeping abreast of developments in law practice. CPE might also help us integrate

175 We could also share and reflect on our experiences with our students, many of whom will also have experiences in the world of law practice. Obviously, when discussing matters relating to legal representation, both professors and students have to be sensitive to any applicable confidentiality and privilege issues. See Rovner, *supra* note 89, at 1150–65.

176 See Re, *supra* note 25, at 98 (“What the teacher learns during a law office sabbatical will not only be passed on to students. It can also be shared with faculty colleagues, in informal conversations or even in seminars or colloquia.”); Little, *supra* note 50, at 372 (suggesting that law professors who engage in paid law practice “might be required to share their experiences with the law school community”).

177 Ideally, law professors would be able to reflect on their experiences with both the practicing lawyers with whom they are engaging in CPE and their faculty colleagues. However, practicing lawyers may have more limited amounts of time to engage in these reflective conversations. See Caplow, *supra* note 28, at 3 (law professor who spent sabbatical in law practice noting that her “supervisors [in practice] largely, and undoubtedly correctly, saw their primary role to facilitate my litigation responsibilities, rather than to engage me in critical self-reflection”). Reflective discussions with practicing lawyers would be extremely valuable, and many practicing lawyers might be quite receptive to these discussions, especially if professors made clear that they were interested in having these types of conversations. That said, practicing lawyers might have less flexible schedules and less time at their disposal to engage in such discussions.

theory and practice better in the classroom and in the minds of our students. If we engage in CPE, we might be better able to model the integration of theory and practice for our students. We can demonstrate to our students how our perspectives on the law are informed by our law practice experiences, and how our perspectives on law practice are informed by theory. Outside of the classroom, our continuing experience in practice (albeit limited) might make us better advisors to our students and more effective at counseling our students about successfully joining the legal profession.¹⁷⁸ We will have more first-hand knowledge about the legal environments that our students are seeking to enter, and we will know more practicing lawyers who might be good resources for our students.¹⁷⁹ Also, as more and more of our students participate in clinics and other experiential learning opportunities in law school, CPE will give us the opportunity to have shared experiences with our students—either because we engage in practice experiences with them or because we face some of the same issues during our CPE activities as students face during their experiential learning opportunities.

CPE offers many potential benefits, but, of course, the question still remains of whether CPE should be a requirement for law professors and, if so, what the specific contours of that requirement should be. As discussed previously in this Article, the most realistic (and, perhaps, desirable) scenario is likely for law schools to determine individually whether they are going to adopt a CPE requirement and for each law school to determine the specific nature of its CPE requirement.¹⁸⁰ Nonetheless, the ABA could encourage law schools to adopt CPE policies by revising its Standards to promote the value of law professors engaging in continuing law practice related activi-

178 Engaging with the legal profession could help law professors be better advisors to students both with respect to getting jobs and with respect to being members of the legal profession.

179 These connections might be particularly important to students now, given how difficult it is for so many students to enter the legal job market. In addition, law professors engaging with the profession means that law professors will also have more resources for ourselves, to the extent that we have questions about law practice in the course of our teaching and scholarship.

180 See discussion *supra* Part II.B. While law schools would likely act individually with respect to their CPE requirements, law schools could certainly share information and experiences with each other.

ties, as could the AALS by revising its membership requirements and Statement of Good Practices by Law Professors.¹⁸¹

At the least, the advantages and disadvantages of CPE should be explicitly addressed by law school faculties. These conversations in and of themselves will be valuable, regardless of the ultimate conclusions reached. As the value of a legal education is being called into question and as the legal profession is continuing to evolve in ways that are significant for our students, law professors should continue to examine our role as legal educators and scholars, and determine whether there are ways that we can enhance our ability to carry out these responsibilities.

181 See discussion *supra* Part II.B.

Professional Learning Communities and Collaborative Teams: Tools to Jump-Start the Learning Outcomes Assessment Process

*Sharon K. Sandeen**

I. Introduction

The legal community has talked for years about proposed changes to the American Bar Association's (ABA) standards for the accreditation of law schools to include some form of learning outcomes assessment (LOA).¹ Although it is still unclear if and when comprehensive new standards will take effect and, more importantly, when law schools will be required to fully implement LOA processes, it is never too early to help law students meet their full potential since the essential purpose of LOA is to improve student learning. Moreover, current ABA Standard 203 (Strategic Planning and Assessment) requires law schools to regularly assess their program-level learning objectives. In part, Standard 203 states: "a law school shall demonstrate that it regularly . . . assesses its success in realizing

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1 See AM. BAR ASS'N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT OF THE OUTCOME MEASURES COMMITTEE (2008), available at <http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf>; AM. BAR ASS'N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS REVIEW COMM., CHAPTERS 1 TO 7—POST NOVEMBER 2011 (2011), http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/jan2012/20111222_standards_chapters_1_to_7_post_nov11.authcheckdam.pdf (proposed Standards 206 (Regular Planning and Assessment) and 302 (Learning Outcomes)). See also ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP, 235–63 (2007).

[its] established goals and periodically re-examines and appropriately revises its established goals.”²

As further described below, LOA processes involve a series of steps at both the course-level and program-level that mirror the language of ABA Standard 203. Significantly, the question that LOA asks is not simply whether students have passed their respective courses, but whether the overall course of instruction enables students to learn the knowledge, skills, and values that are required of the educational institution. For law schools, ABA Standard 302 (Curriculum) specifies that at a minimum these requirements must include:

1. the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
2. legal analysis and reasoning, legal research, problem solving, and oral communication;
3. writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
4. other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
5. the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.

As those who have embraced LOA theory and practice—also known as outcomes-based education (OBE)—know, it takes time, often years, to implement a fully-functioning process. One of the impediments to the implementation of LOA is a perception that it is an edict by accreditation authorities and school administrators who do not know the first thing about teaching. Thus, a top-down approach to the implementation of LOA is apt to fail unless there is a significant pre-existing cohort of faculty who are willing to give it a try. In the absence of such a cohort, one must be developed. Typically, this is attempted through the development of university-

2 See AM. BAR ASS'N, 2012–2013 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 10 (2012), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf (Standards 202 and 203).

level “Teaching and Learning Centers” and through the formation of university and program-level committees. Although these efforts are useful, change tends to be incremental and slow because the foregoing strategies are not directly related to what is happening in individual classrooms and tend to be dominated by LOA believers. This article explains how the development of a Professional Learning Community (PLC)³ and the use of collaborative teams can be used to jump-start and speed up LOA processes. It is based both upon relevant literature about PLC’s and my experiences in forming a PLC with a colleague in the fall semester of 2012.

This article begins in Section I with a brief summary of LOA theory and practice, including a discussion of formative and summative assessments and the feedback-loop that is a central feature of LOA. In Section II, the purpose and value of LOA, particularly with respect to law schools, is discussed. Section III then describes some of the practical challenges of implementing LOA processes. Building upon the discussion of the theory, practice, and struggles of LOA, Section IV examines the meaning and purpose of a PLC and how PLC processes can be used to plan for and implement LOA. The article concludes with a summary of the key features of collaborative teams.

II. Learning Outcomes Theory and Practice

Learning outcomes theory and practice is not new. Rather, as one commentator has noted, “assessment has conceptually been occurring for hundreds, and perhaps thousands, of years.”⁴ Amy Driscoll and Swarup Wood date outcomes-based assessment as starting more than thirty-five years ago.⁵ PLCs emerged as a specific LOA strategy

3 Generally, the term “Professional Learning Community” refers to the development within an educational institution of a collaborative culture that is focused on student learning. Richard DuFour defines PLCs as “educators committed to working collaboratively in ongoing processes of collective inquiry and action research to achieve better results for the students they serve.” RICHARD DUFOUR ET AL., REVISITING PROFESSIONAL LEARNING COMMUNITIES 14 (2008). “A PLC is composed of collaborative teams whose members work interdependently to achieve common goals . . .” *Id.* at 15.

4 CATHERINE M. WEHLBURG, PROMOTING INTEGRATED AND TRANSFORMATIVE ASSESSMENT: A DEEPER FOCUS ON STUDENT LEARNING 19 (2008).

5 AMY DRISCOLL & SWARUP WOOD, DEVELOPING OUTCOMES-BASED ASSESSMENT FOR LEARNER-CENTERED EDUCATION 4 (2007).

over fifteen years ago.⁶ What is new, or relatively so, is the development in the middle of the twentieth century of “the concept of a long-term, value-added approach to studying student learning.”⁷ For the past fifty-plus years, numerous scholars have studied student learning at both the K–12 level and within institutions of higher learning, and scores of books, articles, and studies have been written on the topic. Thus, there is no shortage of literature that can provide law schools with useful information on the purpose and meaning of LOA and how best to implement LOA processes.⁸ The following is a summary of some of the most salient points about LOA.

A. A Focus on Student Learning

The first, and perhaps most important, thing to notice about LOA is its student-centeredness. The central purpose of LOA processes is to determine whether students are actually learning what is being taught.⁹ Although the teaching abilities of educators are an obvious part of the equation, the knowledge, skills, and values of the students are also critical factors. For example, if a student is not proficient in reading, the superior teaching abilities of a professor of literature are meaningless. In terms that law professors should appreciate, LOA questions the assumption that “if you teach it, they will

6 See RICHARD DUFOUR & ROBERT EAKER, *PROFESSIONAL LEARNING COMMUNITIES AT WORK* (1998); SHIRLEY M. HORD, *PROFESSIONAL LEARNING COMMUNITIES: COMMUNITIES OF CONTINUOUS INQUIRY AND IMPROVEMENT 2* (1997), available at <http://www.sedl.org/pubs/change34/plc-cha34.pdf> (detailing the history of PLC’s).

7 WEHLBURG, *supra* note 4, at 20–21.

8 See generally SOLUTION TREE, *AHEAD OF THE CURVE: THE POWER OF ASSESSMENT TO TRANSFORM TEACHING AND LEARNING* (2007); MARILEE J. BRESCIANI, *OUTCOMES-BASED ACADEMIC AND CO-CURRICULAR PROGRAM REVIEW* (2006); PEGGY L. MAKI, *ASSESSING FOR LEARNING: BUILDING A SUSTAINABLE COMMITMENT ACROSS THE INSTITUTION* (2004); BARABARA E. WALVOORD, *ASSESSMENT CLEAR AND SIMPLE: A PRACTICAL GUIDE FOR INSTITUTIONS, DEPARTMENTS, AND GENERAL EDUCATION* (2004); MARY E. HUBA & JANN E. FREED, *LEARNER-CENTERED ASSESSMENT ON COLLEGE CAMPUSES: SHIFTING THE FOCUS FROM TEACHING TO LEARNING* (1999).

9 MAKI, *supra* note 8, at xvii. (“Assessing for learning is a systematic and systemic process of inquiry into what and how students learn over the progression of their studies and is driven by intellectual curiosity about the efficacy of collective educational practices.”).

learn” and instead demands empirical evidence that learning is actually occurring.

The essential principle of learning outcomes theory and practice is a shift from a teaching paradigm to a learning paradigm.¹⁰ While traditional methods of teaching law, such as the Socratic or case methods, can still be used, LOA focuses attention on outcomes rather than inputs. Pursuant to LOA theory and practice, it is not just the “final” outcome of a course or program of instruction that matters; LOA is about periodically assessing how students are progressing throughout a course of instruction so that adjustments can be made to ensure that learning is occurring.

As used in LOA circles, “student learning” has a broad meaning that is consistent with the goals of legal education. “Learning . . . encompasses not only knowledge leading to understanding but also abilities, habits of mind, ways of knowing, attitudes, values, and other dispositions that an institution and its programs and services assert they develop.”¹¹

LOA involves the systematic assessment of student learning with the goal of improving such learning over time through the collection and sharing of information that, contrary to the beliefs of some LOA critics, need not be based upon objective or standardized measures.¹²

B. The Feedback Loop and Formative Assessments

A classic way to think about LOA is as a four step feedback loop.¹³ The first step in the loop is for the educational institution (or any program or course of instruction) to identify what it wants to teach or, to use more refined and broader terms, its “learning objectives” or

10 See Robert B. Barr & John Tagg, *From Teaching to Learning—A New Paradigm for Undergraduate Education*, CHANGE, Nov./Dec. 1995, at 12.

11 MAKI, *supra* note 8, at 3. See also Carol Geary Schneider, *Introduction to GEORGE D. KUH, HIGH-IMPACT EDUCATIONAL PRACTICES 2* (2008) (“[T]he long-term ‘college success’ question encompasses not only whether students have earned a degree, but also whether graduates are in fact achieving the level of preparation—in terms of knowledge, capabilities, and personal qualities—that will enable them to both thrive and contribute in a fast-changing economy and in turbulent, highly demanding global, societal, and often personal contexts.”).

12 WALVOORD, *supra* note 8, at 2.

13 The literature includes numerous diagrams of this loop. See, e.g., MAKI, *supra* note 8, at 5 Figure 1.2.

“learning targets.”¹⁴ Importantly, this process does not simply involve identifying the subjects to be taught (e.g., Torts), but requires the educational institution to identify the core knowledge, skills, and values that it wants its students to learn in a given course or program of instruction.¹⁵ For instance, a law school might decide that its first-year Torts course should cover: (1) all of the subjects that are tested on the Torts portion of the Multi-state Bar Exam (the MBE); (2) legal analysis and reasoning; and (3) case briefing.

The second step in the feedback loop requires an assessment of whether the identified learning objectives for each course or program of instruction are being met. While assessments—in the form of tests, quizzes, essay exams, and the like—have long been a part of educational practice, the scope and nature of LOA assessments are different. At the course-level, LOA relies heavily upon the use of “formative assessments” rather than “summative assessments.”¹⁶ One definition of a formative assessment is that “it involves testing students in the midst of an ongoing instructional sequence and then using the test results to improve instruction.”¹⁷ The point of such assessments is to provide timely feedback to teachers and students so that learning can be improved during a course of instruction.

[A]ssessments designed for ranking are generally not good instruments for helping teachers to improve their instruction or modify their approach to individual students. Students take these assessments at the end of the school year, when most instructional activities are near completion. Teachers do not receive the results until many months lat-

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- 14 Learning objectives can be broader than what is taught in a classroom because LOA theory recognizes the role that students play in their own learning, separate and apart from what is actually taught in the classroom. Given the nature of legal education, particularly the fact that law students are required and expected to engage in a lot of self-learning, this is a very important distinction to keep in mind when developing LOA processes.
- 15 HAMLIN UNIVERSITY SCHOOL OF LAW, *LEARNING OUTCOMES FOR LAWYER ACHIEVEMENT* (2008) (reprinted in Appendix).
- 16 Numerous books provide examples of course-level assessment tools. For law schools with experiential learning courses. *See, e.g., ASSESSING OUR STUDENTS, ASSESSING OURSELVES: VOL. 3 IN RETHINKING NEGOTIATION TEACHING SERIES* (Noam Ebner et. al. eds., 2012).
- 17 W. JAMES POPHAM, *TRANSFORMATIVE ASSESSMENT 3* (2008).

er, and by that time their students have usually moved on to other classrooms with different teachers.¹⁸

Formative assessments are not just tests,¹⁹ they are instructional tools.²⁰ As Greg Munro explains, “[a]ssessment is not only a means of determining what and how a student is learning, but is itself a learning tool,”²¹ both for students and their professors. In addition to assessing how students are progressing in their learning, formative assessment tools are also useful for determining whether the teaching techniques of a professor are actually working with a given group of students. An ancillary benefit of such assessments is that they teach students the importance of constant improvement and how to self-reflect about their own work, leading to an appreciation for life-long learning.²²

Formative assessments can take many forms, ranging from the use of exit cards or clicker technology to quickly test student comprehension of important concepts to more formal mid-term exams.²³ Accordingly, there is not one set of preferred formative assessments for any given course, and the number and choice of formative assessment tools can vary from year to year and course to course. The goal of each assessment is simply to determine whether students are progressing as expected and whether there are any deficiencies in their learning to date.

18 Thomas R. Guskey, *Using Assessments to Improve Teaching and Learning*, in *AHEAD OF THE CURVE: THE POWER OF ASSESSMENT TO TRANSFORM TEACHING AND LEARNING*, *supra* note 8, at 15.

19 The term “tests” is used broadly and should not be interpreted to require that formal exams be given. Formative assessments that are designed to measure student learning can take many forms, including the simple act of asking students if they understand certain principles and concepts.

20 POPHAM, *supra* note 17, at 3.

21 GREGORY S. MUNRO, *OUTCOMES ASSESSMENT FOR LAW SCHOOLS* 11 (2000).

22 See Barbara Glesner Fines, *Classroom Assessment Techniques for Law School Teaching*, in *ASSESSMENT, FEEDBACK, AND EVALUATIONS: EIGHTH ANNUAL CONFERENCE OF THE INSTITUTE OF LAW SCHOOL TEACHING I* (2001) (“Frequent assessment can also result in metacognitive gains, as students develop the skills for self-assessment of learning. As awareness of learning motivates further learning, a cycle of success can increase student learning in sometimes dramatic fashion.”).

23 *Id.* For additional information on how to design assessments and examples of formative assessment methods, see MAKI, *supra* note 8, at 85–118.

Once assessments are conducted and the resulting information and data is collected, the third step in the feedback loop is for the information and data to be analyzed to determine whether the courses and programs that were assessed are meeting applicable learning objectives. If not, the fourth step in the process requires that changes in the course of instruction or teaching methods be made to address any gaps in learning. For instance, at the course-level, this may be accomplished by re-teaching material that most students did not understand. At the program-level, it may be necessary to change course offerings, specify more required courses, or clarify the essential material that is to be taught in specific courses.

C. Developing a Culture of Learning

Another way to think about LOA, and a perspective that is important for understanding the purpose and value of a PLC, is that it is a process by which an educational institution develops a culture that is focused on student learning. This may seem like an odd statement since the principal purpose of educational institutions is to advance the knowledge of their students, but it goes back to the point that was made earlier: LOA is about what students learn, not about what teachers teach. Most law schools already have a culture of inquiry and discovery with respect to faculty scholarship. LOA asks that a similar culture of inquiry and discovery be created and applied with respect to student learning; what Driscoll and Wood refer to as a “scholarship of teaching.”²⁴ In a culture that is focused on student learning, the knowledge and scholarship of individual teachers and professors is obviously important for determining what subjects individual professors may be called upon to teach and for honing their abilities to teach those courses, but it does not directly address the question of what students learn. The only way to determine what students learn is to regularly assess their progress.

A criticism or misconception of LOA is that it results in a “dumbing-down” of the curriculum or the content of individual courses. Concerns are also expressed that LOA is a rigid and inflexible process that interferes with academic freedom.²⁵ Neither concern is warranted. Rather, when properly understood and applied, LOA provides

24 DRISCOLL & WOOD, *supra* note 5, at 220.

25 See, e.g., Laurie Fendrich, *A Pedagogical Straitjacket*, CHRONICLE OF HIGHER EDUC., June 7, 2007, http://people.hofstra.edu/laurie_fendrich/pdf/essays/A_Pedagogical_Straitjacket.pdf.

the context for faculty to work together to enrich and deepen the curriculum and the content of individual courses. It also provides additional spaces in which to exercise academic freedom. Instead of working alone to determine what should be taught in a given course, LOA enables faculty to collectively determine the essential content of individual courses—particularly required courses—so that the program-level learning objectives of an institution (e.g., a law school's objectives) are met. In practice, LOA moves the assessments that law professors have been engaging in for years in the privacy of their own homes and offices into collaborative spaces where faculty can learn from one another.²⁶ Among other benefits, LOA processes ensure that all students receive comparable instruction in the core competencies of their chosen field of study and that “grades and credit hours have a commonly agreed-upon meaning and, ultimately, credibility.”²⁷

LOA is the antithesis of a rigid process because, when implemented correctly, it facilitates and rewards changes that are deemed necessary to improve student learning. Driscoll and Wood describe the development of a “culture for faculty learning and empowerment.”

Can you imagine a faculty member admitting that he doesn't know much about the topic of his curriculum? It's just not something we do at universities. The academy, with its policies and practices, has not fostered such trust or intimate sharing among its members. In such a culture, the pressure not to ever admit that you do not know something comes in all forms.²⁸

It is ironic that although law professors live and work in a culture of inquiry, and strive to teach law students to be critical thinkers, there is not a culture of inquiry about student learning within most law schools. Developing a culture that is focused on student learning means that teachers and professors would not be afraid to question the effectiveness of their teaching because such questioning would be valued more than the results of the assessments. In a culture focused on student learning, there is no shame in being a less-than-perfect teacher; the shame is in assuming that there is no room for improvement.²⁹

26 DRISCOLL & WOOD, *supra* note 5, at 38.

27 *Id.* at 18.

28 *Id.* at 24.

29 To fully implement this cultural shift, it will be necessary to alter the way that teaching is evaluated both at the law school level and by the ABA during the

III. Why Learning Outcomes Assessment?

If and when the ABA's standards for the accreditation of law schools are amended to explicitly require LOA processes, the implementation of such processes will not be automatic or easy. Anyone who has worked at an institution of higher learning, particularly a law school, knows that change is difficult.³⁰ There are many reasons for this. Some people simply do not like change, particularly if the current system seems to benefit them. Other people are convinced that the current system is the best, particularly (like law professors) if they were a product of that system.³¹ (Wouldn't advocating for or accepting change in an educational program suggest that there was something deficient about the old system and, therefore, something deficient about me?) Professors are often resistant to changes to the curriculum or to teaching requirements because they have spent years, perhaps decades, perfecting their teaching materials and fear having to re-examine or alter those materials. Ironically, with respect to LOA, some educators are skeptical that they can learn anything from the education professionals who have developed LOA theory and practice. Driscoll and Wood explain: "For many educators, outcomes-based assessment triggers an image of rigid rubrics, behavioral objectives, tightly contained curricula, and reduction to quantitative measures."³²

accreditation process. If LOA marks a shift in focus from teaching to learning, then the evaluation of teacher performance should focus on whether students are learning what the course is designed for them to learn. It should not be based upon common proxies for teaching ability, such as mastery of the Socratic Method or student engagement. More importantly, law professors have to be given the freedom to experiment with new approaches to teaching, even if their experiments result in poor student evaluations.

- 30 See HOWARD GARDNER, *CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS* 1 (2004) (noting as a central premise of the book that minds are hard to change); *id.* at 93–94 (describing the resistance to change in higher education); JOHN O. SONSTENG, *A LEGAL EDUCATION RENAISSANCE: A PRACTICAL APPROACH FOR THE TWENTY-FIRST CENTURY; THE HISTORY AND STATUS OF LEGAL EDUCATION* 35–77 (2008) (describing the "road blocks" to change within the legal academy); see generally JOHN P. KOTTER, *LEADING CHANGE* (1996).
- 31 See DUFOUR ET AL., *supra* note 3, at 21 (quoting Anais Nin for the observation, "we don't see things as they are, we see things as we are.").
- 32 DRISCOLL & WOOD, *supra* note 5, at 9.

A. Solving the “Wicked Problem”

Drawing upon scholarship from other disciplines, Judith Welch Wegner characterizes legal education reform efforts as a “wicked problem.”³³ As she explains:

[A] “wicked problem” is one that cannot be definitively described or understood (since it is differently seen by differing stake-holders, has numerous causes, and is often a symptom of other problems) “Wicked problems” occur when the factors affecting possible resolution are difficult to recognize, contradictory, and changing; the problem is embedded in a complex system with many unclear interdependencies, and possible solutions cannot readily be selected from competing alternatives.

By definition, “wicked problems” cannot be solved in the same ways that “tame problems” can be solved.³⁴ Instead, “intensive attention [must] be devoted to building shared understanding of complex problems, drawing in the full range of shareholders.”³⁵ LOA processes are a means to solve the wicked problem of legal education reform by building shared understanding of: (1) the core elements of a law school’s program of instruction; (2) how to assess and improve student learning; and (3) best practices for teaching. In particular, the development of a PLC and the use of collaborative teams are designed to build shared understanding through a process of discussion and evaluation over an extended period of time.

B. Improving Student Learning

Given the resistance to LOA in many areas of higher education, including law schools, it is worth examining why the ABA and other accrediting bodies think that LOA is important. One obvious answer (or at least obvious to those who believe in LOA theory and

33 Judith Welch Wegner, *Reframing Legal Education’s “Wicked Problems,”* 61 *RUTGERS L. REV.* 867, 870–71 (2009) (citing Horst Rittel & Melvin Webber, *Dilemmas in a General Theory of Planning*, 4 *POL’Y SCIS.* 155–69 (1973).).

34 Wegner, *supra* note 33, at 872–73 (defining “tame problems” as “those that are more readily susceptible to traditional solutions using standard techniques: defining the problem, understanding it, gathering information, crafting and evaluating solutions, choosing a solution and assessing the result.”).

35 *Id.* at 873 (citing E. Jeffrey Conklin, *Wicked Problems & Social Complexity*, in *DIALOGUE MAPPING: BUILDING SHARED UNDERSTANDING OF WICKED PROBLEMS* 3 (2006).).

practice) is that LOA improves student learning. Among other findings, studies by experts in the field of student learning have found that students achieve “deeper learning” when they are told up-front what they are expected to learn.³⁶ The reason is simple: If students understand what they are expected to learn, they will focus on learning those topics and will not become distracted by irrelevant matter.

If you don’t know what is important to focus on . . . you skim, you cram, and you stay on the surface. If you have a priority or focus, you are able to dig, to expand, and to achieve depth of understanding.³⁷

Thus, the simple act of specifying anticipated learning outcomes for a program, course, or individual class session (the first step in the LOA process) has been shown to improve student learning.³⁸ But, as noted above, LOA theory and practice goes beyond the simple act of specifying anticipated learning outcomes to inquire whether students are actually learning what is being taught, known as course-level and program-level assessment.

As law professors, it is impossible for us to teach our students everything about the law. If we pause to think about the essence of a legal education, it is to provide our students with the knowledge and skills they need to find, understand, and apply relevant legal theories and principles to solve problems. LOA broadens and deepens the educational experiences of students in ways that are fully consistent with the goals of legal education.

Our tendency is to focus on what learners do while they are with us—in classes, in a major program of courses, or on the campus. That tendency keeps our focus on our pedagogy (teaching and learning approaches) and keeps us in the teaching paradigm. Instead, authentic outcomes push us to think differently, to describe those departures skills, understandings, and so on, and then to focus our planning on how to promote them during our time with the learners.³⁹

36 JOHN BIGGS, *TEACHING FOR QUALITY LEARNING AT UNIVERSITY: WHAT THE STUDENT DOES* 26–31 (1999).

37 DRISCOLL & WOOD, *supra* note 5, at 13.

38 For an example of a casebook that uses this strategy by specifying anticipated learning outcomes at the beginning of every chapter, see ELIZABETH A. ROWE & SHARON K. SANDEEN, *CASES AND MATERIALS ON TRADE SECRET LAW* (2012).

39 DRISCOLL & WOOD, *supra* note 5, at 6.

LOA provides a framework for identifying “the bigger picture” and enables us to be intentional about the departure skills and understandings that we want law students to learn before they graduate.

C. Meeting Accreditation Requirements

The less obvious answer to the question posed—Why LOA?—is that LOA is important to accrediting bodies (such as the ABA) and it is important to accrediting bodies because it is important to the U.S. Department of Education (DOE).⁴⁰ In this regard, it is important to understand that the educational programs of most law schools are subject to review by two accreditors: the ABA and the entity that is responsible for the accreditation of the university with which the law school is affiliated. Thus, even if ABA accreditation standards are not amended to require LOA processes, the various university accreditors (such as the Higher Learning Commission in Hamline University’s case) are likely to demand program-level assessment data from law schools.

The U.S. DOE has taken an interest in LOA, not only because a central part of its mission is to improve education in the United States, but also because, with respect to post-secondary education, there are concerns that some educational institutions misrepresent the nature and quality of the education they provide. Among other reasons, the DOE wants to make sure that the vast amounts of federal subsidies for higher education (in the form of student loans and grants) are being spent on worthwhile programs.⁴¹ Although not stated this bluntly, if a federally-subsidized institution of higher learning promises to educate students in a particular field, the U.S. government has an interest in making sure it is getting its money’s worth. Since DOE does not directly accredit institutions of higher learning, one way to ensure the quality of post-secondary education is to nudge the various accrediting bodies to institute effective evaluative processes such as LOA.

The foregoing observations regarding the interests of accrediting bodies and the DOE in LOA processes inevitably leads to the assertion that law schools know what they are doing and cannot, and

40 See 20 U.S.C. § 1099(b) (2006); 34 C.F.R. § 602.10–602.28 (2010). See also U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION 20–25 (2006) (frequently referred to as “the Spellings Report”).

41 U.S. DEPARTMENT OF EDUCATION, *supra* note 40, at 20–25.

should not, be accused of breaking their promises to educate students. After all, most law students who graduate from ABA-accredited institutions pass a Bar Exam and go on to successful professional careers. There are, however, two responses to this refrain: (1) How do law schools know that they are not breaking their promises to their students if they do not periodically assess student learning outcomes?; and (2) Is the Bar Exam the most legitimate, or the only legitimate, means of measuring the effectiveness of a law school's educational programs? Given that many in legal education lament a curriculum that appears to "teach to the Bar Exam," it is ironic that the Bar Exam is often cited as a reason why LOA processes are not needed in law schools.

It is precisely because law schools do not merely teach to the Bar Exam that LOA processes are needed to assess whether law schools are meeting the "extra-Bar Exam objectives" of their curriculum and programs. In his ground-breaking book,⁴² Greg Munro explains:

[C]entral to the assessment program for legal education and critical to the achievement of a law school's mission is the identification of goals and objectives which can be stated in terms of student outcomes and institutional outcomes for assessment purposes. Student outcomes are the abilities, knowledge base, skills, perspective, and personal attributes which the school desires the students to exhibit on graduation Institutional outcomes are those goals and objectives which a law school has set for itself in serving the people it has chosen to serve.

LOA provides law schools with the means to: (1) clearly identify the core knowledge, skills, and values that they seek to teach; and (2) assess whether their students are actually meeting those objectives.

D. Refining the Measures of Success

Ultimately, the establishment of goals and objectives and the use of LOA processes can lead to a shift in the way students are taught and how student progress is measured. Education becomes less about sorting students into groups according to their performance on summative exams, and more about improving student learning throughout a given course of instruction.⁴³

42 MUNRO, *supra* note 21, at 17–18.

43 Guskey, *supra* note 18, at 15, 21. See also MUNRO, *supra* note 21, at 33 The need for effective assessment in law schools is masked by a set of unchallenged

The fundamental premise of this new vision is a rejection of the determinism inherent in the bell curve and the embrace of the essential truth that teachers and school leaders make a difference. When we take this perspective, we stand on the shoulders of giants . . . who believe that teaching is not merely the act of transmitting knowledge, but an inherently collaborative, interactive, and relationship-based enterprise.⁴⁴

Thus, for the legal academy and legal employers, LOA means that where a student attends law school or where he is ranked in his class will mean less than what he learned and achieved when he was there.

Admittedly, law schools are in a much better position than K–12 institutions, or even colleges, to assume that their students possess the basic knowledge and skills to get the most out of their legal education. After all, with rare exceptions, every law school student graduated from college and usually earned a grade point average of 3.5 or above.⁴⁵ The more selective law schools are, the stronger the assumption is that their students are learning what they need to know to become effective entry-level lawyers because their students are “smart enough” to figure it out on their own. This air of superiority may explain some of the negative discourse surrounding LOA in legal education; if some law students are not learning what they need to know, it must be because some law schools are letting in unqualified students. In my opinion, this sentiment misses the point. There is no question that law schools should have high admissions stan-

presumptions about the success of law school teaching and institutional effectiveness. There is no system of assessment but, instead, nearly universal reliance on a final examination system whose real purpose is not to evaluate student competence but to sort and rank students by assigning grades.”)

44 Douglas Reeves, *From Bell Curve to the Mountain: a New Vision for Achievement and Equity, in AHEAD OF THE CURVE: THE POWER OF ASSESSMENT TO TRANSFORM TEACHING AND LEARNING*, *supra* note 8, at 2. A “giant” to which the author refers is undoubtedly John Dewey who championed collaborative learning methodologies and student learning communities as a means to improve student learning. See JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916). See also, LAUREL N. TANNER, *DEWEY’S LABORATORY SCHOOL: LESSONS FOR TODAY* (1997).

45 This is an estimate of the median GPA of admitted law students based upon the GPAs of entering students as reported to U.S. News and World Reports and as detailed in the Law School Admission Council (LSAC), U.S. National Decision Profiles.

dards. The point is that not all law students (no matter how smart or skilled) come to law school with the same prior knowledge, skills, or experience. For law students to get the most out of their legal education, a program of legal education must be able to adapt to the actual needs of its students. The best way to do this is by embracing LOA.

IV. Challenges to Implementing LOA

There are many challenges to the implementation of LOA processes that will vary depending upon the existing culture and personalities of a law school. One common challenge is a general reluctance to change, particularly among members of the faculty who have been teaching for many years. There are also the challenges of learning a new vocabulary and developing and implementing new assessment tools. The following steps in the LOA process provide a framework for addressing the challenges that arise.

A. Developing a Law School's Program-level Learning Objectives

When embarking on the implementation of LOA processes, the logical approach is to mirror the feedback loop described above. The first thing to determine is the learning objectives for a given program of instruction, such as a law school. This can be a lengthy, drawn-out, and draining process. Not only might law schools encounter stiff resistance to LOA generally, individual faculty members are bound to have disparate views on the goals of a law school. Often, these views will align with their own scholarship and reflect an understandable desire to honor their work and interests. The only way to overcome this resistance is to work collaboratively, and as long as it may take, to develop a collective vision of the core knowledge, skills, and values that the law school wants to instill in its students. In doing so, it is important to involve both LOA believers and LOA skeptics in the process. Because LOA believers may be bloodied in the process, it is also important for there to be a strong institutional commitment to LOA. An occasional pat on the back, and timely intervention, would help too.

Proposed ABA Standard 302 provides some basic guidelines for law school learning objectives that can be copied and tweaked to

provide the foundation for a good list of objectives.⁴⁶ In addition, as Greg Munro emphasizes, law schools should feel free to tailor their learning objectives to the particular needs of the community in which the law school is located and to the particular mission of the law school.⁴⁷ For instance, if a law school sees its mission as preparing its students for careers as law professors or as advancing understanding of the field of law and economics, learning objectives should be drafted to reflect those goals. At Hamline University School of Law, we place great importance on the role of lawyers as problem-solvers and emphasize in our course of instruction the myriad ways that problems can be solved both inside and outside the judicial system. Thus, a key feature of our learning objectives is its emphasis on dispute resolution skills.⁴⁸

B. Developing Assessment Tools

Once a law school determines what its learning objectives are, the next step in the LOA process is to assess whether those objectives are being met. Not every course has to satisfy each of an institution's program-level objectives; rather, the entire program of instruction (particularly the required courses, but potentially including extra-curricular activities) should be designed to meet all the program-level objectives.⁴⁹ In contrast, course-level assessments are designed to ascertain whether students are attaining the learning objectives of individual courses. Thus, full-implementation of LOA processes requires the development of both course-level (described above) and program-level assessment tools, but not necessarily all at once or across the curriculum.

46 See Proposed Standard 302, AM. BAR ASS'N., SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, STANDARDS REVIEW COMM., CHAPTERS 1 TO 7 – POST NOVEMBER 2011, *supra* note 1.

47 MUNRO, *supra* note 21, at 15–16.

48 See Bobbi McAdoo, Sharon Press & Chelsea Griffin, *It's Time to Get it Right: Problem-Solving in the First-Year Curriculum*, 39 WASH. U. J. L. & POL'Y 39, 60 (2012).

49 It is also important to note that what is taught in individual courses is never limited to the designated learning objectives. Rather, the learning objectives are simply the core of the program or course and students should always be challenged to learn more. A focus on specific “core” or “essential” objectives will provide students the foundational knowledge and skills that they need to achieve deeper learning.

Program-level assessments are what accrediting bodies are most interested in and are intended to measure whether students—usually graduating students—have acquired the knowledge, skills, and values that are specified in the institution’s learning objectives.⁵⁰ For instance, program-level assessments would examine whether students have acquired sufficient legal writing skills, not whether they did well in their first-year legal writing course. As such, the best program-level assessments are devised by a group of faculty (and perhaps administrators) who work collectively to determine both what should be assessed and how best to conduct the assessments. At its core, program-level assessment is not just the collection of data; it is a collaborative process to reach “consensus about shared expectations for student learning, followed by collaborative strategies that explore the curricular and co-curricular coherence that contributes to these expectations.”⁵¹

Although the development of assessment tools tends not to be as contentious as the initial development of learning objectives, there is a steep learning-curve that makes the creation, adoption, and implementation of course-level and program-level assessments difficult and time-consuming. The first challenge is to get law faculty used to a new vocabulary that includes such terms as “formative and summative assessment”⁵² and “rubrics.”⁵³ In the same way that first-year law students become disoriented and confused by the vocabulary

50 MAKI, *supra* note 8, at 31–58 (describing the role and processes of program-level assessment).

51 *Id.* at 31.

52 In the book, *Transformative Assessment*, W. James Popham describes the transformative power of formative assessments, noting that the terminology is drawn from a 1967 essay by Michael Scriven. “According to Scriven, if the quality of an early-version educational program is evaluated while the program is still malleable—capable of being improved because of an evaluation’s results—this constitutes *formative* evaluation. In contrast, when a mature, final-version educational program is evaluated in order to make a decision about its continuation or termination, this constitutes *summative* evaluation.” For student evaluations, Popham states that the “by and large” definition of formative assessment is that “it involves testing students in the midst of an ongoing instructional sequence and then using the test results to improve instruction.” POPHAM, *supra* note 17, at 3.

53 As with formative and summative assessments, rubrics can take many forms but are generally defined as tools for assessing student work that include descriptions and expectations for the work as well as of the levels of performance for each component. DRISCOLL & WOOD, *supra* note 5, at 107. “Rubrics clarify how to appraise a student’s performances, and they can be

of the law, law professors are often uncomfortable with having to learn new and unfamiliar vocabulary. The fact that LOA is perceived as being a time-consuming process imposed from on high does not make the task any easier. The only way to overcome this challenge is to be patient and to infuse the ordinary and normal discourse with talk of LOA.

The second challenge is to overcome decades of tradition that favors summative over formative assessment and that views the purpose of grades as the sorting of students. Law schools, like other institutions of higher learning, have a long history of assessing student learning. As noted above, however, the summative nature of the typical law school exam makes them ineffective assessment tools for LOA purposes because they do not provide timely feedback to students and faculty alike. Although many law professors take the time to write written comments on exam answers, students do not always receive that feedback. Part of this may be blamed upon students who are too busy or too lazy to pick-up their exam answers or otherwise request feedback, but I suspect that a large part of the problem stems from a culture that does not value feedback. Policies that require mandatory-curves and anonymous grading are likely to blame for giving law students the sense that there is little value in obtaining feedback. Without timely feedback, law students may conclude that the principal purpose of law school exams is to identify law clerk and big firm worthy students, not as a means to improve their learning.

In order to overcome the natural resistance to new forms of assessment, the process of developing new assessment tools should take a two-pronged (or multi-pronged) approach. Most directly, individual professors should be encouraged to implement formative assessment tools in their individual courses. Second, program-level or institution-level assessments must be devised and implemented. The development of program-level assessments generally requires the input of multiple professors and administrative staff. It might take the form of simply collecting and analyzing assessments and data that already exists (like the essay exam answers from all Torts professors), or involve the development of new assessment tools (such as a survey of graduating students). In either case, the work that is required to develop and implement assessments is likely to require the time and attention of law professors who would rather be researching and

remarkably useful in helping students understand the nature of the curricular aim being sought." POPHAM, *supra* note 17, at 80.

writing. Although a common observation among LOA participants is that it makes the job of teaching easier and more rewarding, admittedly there is the proverbial “hump” that must be ascended before the benefits of LOA can be reaped.

C. Analyzing and Using LOA Data

The third and fourth steps in the LOA process require the collection and analysis of information and data for the purpose of determining how student learning can be improved.⁵⁴ One part of this process is to assess whether there are any gaps in the curriculum or in the subject matter that is taught in individual courses. For instance, if proficiency in oral advocacy is a learning objective of a law school, then it should identify all the places where oral advocacy skills are taught and determine whether all or most students receive such instruction. If gaps are found, steps should be taken to fill those gaps, or the learning objectives should be modified.

With respect to gaps in the curriculum, the principal challenge is the strong preference for the status quo. Although the curriculum at most law schools was probably developed over decades through a process of accretion rather than planning, fear of change means there is a reluctance to carefully examine the curriculum anew to determine if it meets the learning needs of current students. With respect to the failure of individual courses to teach expected subject matter, vociferous cries of academic freedom are likely to be heard from those individuals who do not appreciate that specifying the basic subject matter to be taught in a course is different from specifying how the course will be taught.⁵⁵

Where there are no gaps in a program or course of instruction when compared to an institution’s learning objectives, but there is evidence that students are not learning the required material, then an examination must be made into possible impediments to student learning. This can be a difficult process because it necessarily involves an examination of teaching effectiveness, and some teachers are reluctant to admit that they might be deficient in some areas. Too often in institutions of higher learning like a law school (and sadly K–12 institutions), the tendency is for the teachers to blame the stu-

54 See MAKI, *supra* note 8, at 4–5 Figures 4 & 5.

55 See DRISCOLL & WOOD, *supra* note 5, at 5 (noting that learning outcomes “do not specify teaching strategies, learning activities, assignments, readings and resources, or assessment” or otherwise interfere with faculty creativity).

dents for any deficiencies. Who among us has not heard colleagues complain about the inability of law students to write well? If students are not learning then it must be because they did not study hard enough or they do not know how to express themselves in writing. The challenge here is (1) to convince law professors that they have to take personal responsibility for student learning and (2) to create a culture in which intelligent, hard-working, and accomplished legal scholars are comfortable enough to acknowledge that their teaching can be improved. This involves a process of trust-building.⁵⁶

D. Strategies for Overcoming the Challenges of Implementing LOA

There are a number of ways that institutions of higher learning (and K-12 districts) have attempted to meet the above-described challenges and help their faculty to learn and implement LOA processes.⁵⁷ This includes educational efforts in the form of internal and external lectures, seminars, and workshops. It may include the hiring of consultants and the establishment of centers for teaching and learning, including the hiring of staff whose sole responsibility is to assist faculty to learn and implement LOA processes. Both negative and positive incentives may also be used. For instance, faculty may be required to report in their annual self-evaluations the steps they have taken to implement LOA processes or be given extra compensation or a course release in exchange for a promise to develop a new assessment tool. While all of these efforts advance LOA, anyone who has engaged in them knows that unless they are mandatory, they tend to always involve the same group of LOA believers. The challenge is in how to convert the non-believers.

Driscoll and Wood describe the resistance to LOA in painstaking detail from the perspective of a newly formed institution of higher-learning that had the benefit of starting fresh.⁵⁸ Even within an institution that was not required to change decades of entrenched

56 “There is no easy way to overcome the obstacle of mythology when engaged in school improvement. It involves making thinking explicit and calling upon people to engage in the difficult task of articulating and examining their assumptions. It calls for building shared knowledge and learning by doing.” DUFOUR ET AL., *supra* note 3, at 24.

57 See, e.g., DRISCOLL & WOOD, *supra* note 5 (detailing a variety of LOA efforts instituted by California State University, Monterey Bay).

58 See generally *id.*

policies, and which had dedicated sufficient staff and financial resources to its Teaching, Learning and Assessment Center, it was difficult for LOA to gain traction. What they discovered is that resistance to LOA is largely the result of intrinsic factors: namely, faculty who are afraid of what they do not know.⁵⁹ The problem is that institution-level (top-down) LOA training programs are usually not enough to overcome this fear of the unknown. For one reason, they take time to attend and may be scheduled at times when professors are not available. For another reason, what is learned at LOA training programs must still be implemented, and lack of confidence or time constraints can make implementation difficult.

After several years of frustration trying to impose LOA using a top-down approach, I believe that the key to implementing LOA processes in law schools involves a bottom-up approach that leads to “a culture for faculty learning and empowerment.”⁶⁰ The development of a PLC, including the formation of collaborative teams, is a promising means for developing such a culture because it is a way to develop a shared understanding of the problems facing legal education and the challenges of law student learning. As collaborative teams are formed around specific courses or groupings of courses, and more and more law faculty learn the vocabulary of LOA and the benefits of sharing ideas about student learning, the conversations about student learning that once took place only at meetings of collaborative teams (such as the one I formed with my colleague concerning the teaching of Torts) will begin to occur informally at faculty meetings, in individual faculty offices, and near water coolers. A PLC will have been created.

V. Professional Learning Communities

A. Why develop a PLC?

Before getting into the details of what a PLC is and how PLC processes can be used to jump-start and speed-up LOA processes, it is worth considering why PLCs are a promising means for developing a culture of inquiry regarding student-learning. In their book, *Revisiting Professional Learning Communities*, the authors advocate for PLCs by first detailing the history of educational reform at the K–12 level

59 *Id.* at 2.

60 *Id.* at 24.

and then identifying various reasons why such reforms—including No Child Left Behind—failed.⁶¹ In their opinion, K–12 reform efforts did not fail due to substantive deficiencies in the theories underlying such reforms. Rather, they failed because of: (1) unrealistic expectations; (2) the complexity of the task; (3) misplaced focus; (4) a lack of clarity on intended results; (5) a lack of perseverance; and (6) a failure to appreciate and attend to the change process. A common feature of all of the stated reasons is the lack of teacher buy-in. This is most clearly expressed in the following narrative regarding the last of the stated reasons for failure:

Most educators have not been trained in initiating, implementing and sustaining change They have neglected the process of creating a “critical mass” of support or have failed to proceed because of the mistaken notion that they needed unanimous support before launching an initiative. They have regarded conflict as a problem to avoid rather than an inevitable and valuable byproduct of substantive change. They have failed to anchor the change within the culture of the school. They have considered a change initiative as a task to complete rather than an ongoing process.⁶²

The authors conclude that if real educational reform is to occur, “educators must break from the industrial model upon which they were created and embrace a model that enables them to function as professional learning communities.”⁶³ By the “industrial model” they mean the assumption—prevalent in the late 19th and early 20th centuries—that there is “one best system” for completing any task or solving any problem.⁶⁴ Studies of learning have shown that there is no one “best way” to teach or to learn.⁶⁵

Although legal education does not suffer from the magnitude of challenges faced by K–12, there are similarities between the calls for reform in K–12 education and the legal education reform movement. As with the K–12 system, there have been frequent and repeated

61 DuFOUR ET AL., *supra* note 3, at 31–66.

62 *Id.* at 66.

63 *Id.*

64 *Id.* at 32.

65 See generally BENJAMIN S. BLOOM, HUMAN CHARACTERISTICS AND SCHOOL LEARNING (1976) (challenging the prevailing teaching and learning constructs and advocating for more learner-specific approaches).

calls for the reform of legal education.⁶⁶ In the past five years, these calls have taken the form of a Carnegie Foundation Report, *Educating Lawyers*,⁶⁷ and the book, *Best Practices for Legal Education: A Vision and Road Map*.⁶⁸ More recently, it has also taken the form of scathing critiques of legal education, including the recent book *Failing Law Schools*.⁶⁹ A general point of all of these critiques is that law schools can and should do a better job of preparing law graduates for the jobs of the twenty-first century.⁷⁰ In response, many law schools have engaged in efforts to refine and improve their programs, curriculum, and teaching, but the bulk of legal education remains as Christopher Columbus Langdell envisioned it over 140 years ago.⁷¹ As with efforts to reform K–12 education, the problem seems to be the failure to build a critical mass of support for a fundamental reform of legal education.

The literature about organizational change supports the notion that fundamental change can only occur if there is buy-in from key stakeholders.⁷² As Shirley Hord has noted, advocates of educational reform have realized that “educators must come to an intimate understanding of the process of change in order for implementation to be successful and for the promises of new [educational] practices to be realized.”⁷³ To achieve buy-in requires time, education, and dialogue. The establishment of a PLC and the use of collaborative teams provides a bottom-up and faculty-centered framework in which this

66 Previous work of the Carnegie Foundation dating from 1914 and other criticisms of legal education are detailed in WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 18–20, 189–91* (2007).

67 *Id.*

68 STUCKEY ET AL., *supra* note 1.

69 BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); *see also* JAMES C. STROUSE, *LEGAL EDUCATION MALPRACTICE: THE LAW SCHOOL EDUCATION SCAM* (2003).

70 *See, e.g.*, STUCKEY ET AL., *supra* note 1, at 18 (“The unfortunate reality is that law schools are simply not committed to making their best efforts to prepare all of their students to enter the practice settings that await them.”).

71 *See generally*, LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 463–482 (3rd ed. 2005) (describing the history of legal education in the United States); SONSTENG, *supra* note 30, at 17–34 (describing Langdell’s reforms of legal education).

72 *See, e.g.*, JOHN P. KOTTER & LORNE A. WHITEHEAD, *BUY-IN: SAVING YOUR GOOD IDEA FROM GETTING SHOT DOWN* (2010) (describing strategies for obtaining buy-in for an idea).

73 HORD, *supra* note 6, at 2.

education and dialogue can occur. In this regard, DuFour defines professional learning communities as:

Educators committed to working collaboratively in ongoing processes of collective inquiry and action research to achieve better results for the students they serve. Professional learning communities operate under the assumption that the key to improved learning for students is continuous, job-embedded learning for educators.⁷⁴

Similarly, Thomas Angelo states that “[Learning communities work] collaboratively toward shared, significant academic goals in environments in which competition . . . is . . . de-emphasized [E]veryone has both the opportunity and the responsibility to learn from and help teach everyone else.”⁷⁵

Although the original vision of a PLC is as an agent for change in K–12 education, my suggestion for the establishment of a PLC within law schools is more modest. I suggest that the processes that underlie PLCs—particularly the establishment of collaborative teams—be used to facilitate discussions about student learning and the development of both course-level and program-level assessments. If the establishment of a PLC also results in fundamental changes to the traditional law school curriculum, so be it, but this is not the “hidden agenda” of either PLCs or LOA. The principal purpose of PLCs is to foster a culture that is focused on student learning. If this is accomplished, use of the specific features of LOA (*e.g.*, learning objectives, formative assessments, and data collection and review) will naturally follow.

B. An Overview of PLCs

The idea of learning communities is not new to the field of education. In the early part of the twentieth century, the scholarship of John Dewey and others led to the idea that student learning communities could be used to improve student learning.⁷⁶ The belief that learning could be improved through the use of collaborative group activities has since expanded to include a variety of possible learning communities, including faculty and student communities,

74 DUFOUR ET AL., *supra* note 3, at 14.

75 Thomas A. Angelo, *Seven Powerful Shifts and Seven Powerful Levers, Developing More Productive Learning Communities*, 6 NAT’L TEACHING & LEARNING FORUM 1 (1996).

76 See DEWEY, *supra* note 44.

faculty-centered learning communities, stakeholder communities, and professional learning communities.⁷⁷ As used herein, the term “professional learning communities” refers to a learning community that is designed to bring together the faculty, administrators, and staff of a law school (also known as an all-staff learning community). However, the establishment faculty-only learning communities (also known as Faculty Learning Communities or FLCs) or learning communities that are built around specific educational goals, such as experiential learning objectives, can also serve to jump-start LOA processes.

Among PLC professionals and experts, it is generally understood that there are six characteristics of successful PLCs and four critical questions that PLCs should routinely explore. The six characteristics of successful PLCs are:

1. Shared mission, vision, values, and goals—all focused on student learning;
2. A collaborative culture with a focus on learning;
3. Collective inquiry into best practices and current reality;
4. An action orientation based upon principles of learning by doing;
5. A commitment to continuous improvement; and
6. Results orientation.⁷⁸

The four questions that PLCs should routinely explore with respect to student learning are summarized as: (1) What do we want our students to learn?; (2) How will we know if each student is learning the essential skills, concepts, and dispositions?; (3) How will we respond when some students do not learn?; and (4) How will we enrich and extend learning for students who are already proficient?⁷⁹ In short, PLCs exist for the purpose of attaining a shared understanding of common problems and common solutions, thereby solving the “wicked problems” of education reform.

77 HORD, *supra* note 6, at 6 (citing T.A. ASTUTO ET AL., *ROOTS OF REFORM: CHALLENGING THE ASSUMPTIONS THAT CONTROL EDUCATION REFORM* (1993)).

78 DUFOUR ET AL., *supra* note 3, at 15–17.

79 *Id.* at 183–87.

C. The Key Features of PLCs

1. Collaborative Teams

While it would be great for all administrators, faculty, and staff of a law school to simply agree to form a PLC for the purpose of improving student learning, the impediments to educational reform that were referenced earlier make this dream improbable. However, it is not unrealistic for law schools to begin a dialogue that is focused on the foregoing questions, particularly among faculty who are either committed to or interested in LOA theory and practice, by forming one or more collaborative teams. As explained by the authors of *Revisiting PLCs*, “[w]e believe that the first step in breaking free of the traditional norm of educators working in isolation is to establish a new image of the fundamental structure of the school, one that is based on a communal gathering of high-performing collaborative teams that share collective responsibility for the learning of their students.”⁸⁰

The essence of a collaborative team is that of a group of two or more teachers (or professors) who meet regularly to discuss teaching and learning and who commit to “working together interdependently to achieve a common goal for which they are mutually accountable.”⁸¹ Collaborative teams can be configured in myriad ways, involving collaboration of faculty either vertically or horizontally. For instance, they can be built vertically around a specific required course (such as all first-year Torts sections) or horizontally around a broader grouping of courses (such as all experiential learning courses). As Driscoll and Wood note, they might even have a cross-disciplinary focus, involving professors from different disciplines within a law school or a university.⁸² The collaboration that already occurs at many law schools among clinicians and legal writing instructors, albeit not necessarily labeled as “collaborative teams,” provide ready examples for how the same approach can be used for doctrinal courses.

The work of collaborative teams need not be complicated or time-consuming and, in fact, is likely to lead to a sharing of workload.⁸³ Members of a team can begin the process simply by meeting

80 *Id.* at 178–80.

81 *Id.* at 179–80.

82 DRISCOLL & WOOD, *supra* note 5, at 23–26.

83 “Working in a PLC means you never again have to face the challenges of teaching alone.” DUFOR ET AL., *supra* note 3, at 169 (quoting a member of

regularly to talk about their courses, their approaches to teaching, the required materials, and student progress. The weekly meetings can be scheduled around normal coffee or lunch breaks so as not to interfere with time normally devoted to writing. Initially, the purpose of such meetings is simply to share information, but such discussions can lead to specific ideas that each member of the collaborative team agrees to implement, such as formative assessments.

2. *Learning Objectives*

Consistent with the LOA processes that were described earlier, a priority of every collaborative team should be to identify the learning objectives for a given course or program of instruction. While each professor is free to dictate the outer parameters of each course they teach and to determine their preferred methods of instruction, the members of the collaborative team should be able to reach agreement on the “essential” or “common core” knowledge, skills, and values that students must learn in a given course. Ideally, such objectives will be consistent with the program-level objectives of the law school and the skills, knowledge, and values that graduating law students need to possess to be successful first-year attorneys.

Once the core learning objectives of a course are determined, the work of a collaborative team should focus on how to ensure that students are learning those core objectives. In large part, discussions regarding the progress of student learning will focus on the content of instruction, but invariably members of a collaborative team (at least those that are open to learning themselves) will begin to discuss the approaches and methods they use to teach the objectives. In this way, each member of the collaborative team will learn from their colleagues and a variety of “best practices” for teaching different content will emerge over time. As these discussions occur, adjustments can be made to the learning objectives for specific class sessions and for courses as a whole.

3. *Common Formative Assessments*

Given the important role that formative assessments play in the LOA process, one of the functions of a collaborative team, and by extension the broader PLC, is to share ideas and methods for

assessing students learning. A benefit of a collaborative approach to formative assessment, as opposed to a singular approach, is that the members of a collaborative team can (and should) develop “common formative assessments” that are designed to ensure that students are achieving identified learning objectives.⁸⁴ In this regard, although legal educators are not always explicit in describing the “scaling-up” of learning about the law, the typical progression of the law school curriculum from foundational courses such as Torts and Contracts to elective courses, as well as the progression of content within a single course, involves a process of building a strong foundation of basic concepts and then driving students toward deeper learning. The collaborative team process and discussions concerning common formative assessments provide an ideal forum in which to explore the proper sequencing and depth of instruction. The formative assessments themselves allow law professors to assess their students on a periodic basis to determine if the necessary foundational knowledge has been achieved before moving on to other topics.

4. *Collective Improvement*

Ultimately, the purpose of a PLC is to share ideas and information so that student learning can be improved. The more collaborative teams that are created within a law school and the more information that is shared among faculty, the greater the benefits of the process. As collaborative teams begin to form and faculty share ideas, each collaborative team will naturally want to learn about what other professors are doing and information will begin to be shared among members of different collaborative teams.⁸⁵ As an example, if during

84 Common formative assessment is defined as:

An assessment typically created collaboratively by a team of teachers responsible for the same grade level or course. Common formative assessments are used frequently throughout the year to identify (1) individual students who need additional time and support for learning, (2) the teaching strategies most effective in helping students acquire the intended knowledge and skills, (3) program concerns—areas in which students generally are having difficulty achieving the intended standard—and (4) improvement goals for individual teachers and the team.

Id. at 464.

85 This by-product of collaborative teams is described in Driscoll and Wood’s book about the experiences of faculty at California State University Monterey Bay. DRISCOLL & WOOD, *supra* note 5, at 119–22.

orientation someone lectures students on how to brief a case, the members of a collaborative team may want to learn what was said so that they can reinforce the message. This sharing of information, in turn, is likely to lead to a discussion concerning the essential features of a good case brief.

There are a number of other reasons why collective improvement is likely to occur. First, if a law school has program-level objectives and a particular collaborative team is not teaching to one or more of those objectives, the collaborative team will want to ensure that some other course is covering that content. Second, if a collaborative team has a long list of learning objectives, some of which it determines cannot be covered in their courses, that collaborative team may seek out another collaborative team to cover one or more of those objectives. Third, some learning objectives may be so important and foundational that it is important for the material to be taught in more than one course. Or a collaborative team might decide that it is important to reinforce and re-teach content that was first introduced to law students during orientation, such as how to brief a case.

The process of collective improvement of student learning can and should be enhanced with program-level (administrative) initiatives, such as workshops and programs on teaching methodologies and assessments. Such efforts should prove more fruitful once collaborative teams are created because the members of the collaborative teams will be more familiar with the vocabulary of LOA processes and will better understand the purpose and value of LOA.

VI. Conclusion

Legal education reform is not easy, but it is not impossible. The development of a PLC through the use of collaborative teams provides a pathway for creating a culture focused on student learning and it is an effective and relatively painless means of complying with an accreditor's demands for a process of course-level and program-level assessment. For law schools that have not yet adopted a list of learning outcomes, the formation of collaborative teams will also help them to identify and define learning outcomes that are appropriate for their school's curriculum, focus, and culture. An added benefit of collaborative teams is that law faculty will learn from each other, thereby enriching their teaching and their scholarship. Most importantly, however, the development of a PLC will help law students to learn more and more deeply.

APPENDIX:
**HAMLIN UNIVERSITY SCHOOL OF LAW LEARNING
OUTCOMES FOR LAWYER ACHIEVEMENT (LOLA)**

As adopted by the law faculty on May 8, 2008.

GOAL #1 (KNOWLEDGE): Acquire the conceptual frameworks and substantive knowledge needed for competent professional service as a new attorney and as a basis for life-long learning.

HUSL graduates should be able to. . .

1. Demonstrate competence in key foundational areas of U.S. law, including areas of substantive law tested on bar examinations. (University Outcome #6, see below)
2. Demonstrate competence in other student-elected areas of substantive law. (University Outcome #6)
3. Demonstrate knowledge of the structure, components, and functioning of the U.S. legal system, including the markets for legal services. (University Outcome #6).
4. Demonstrate an understanding of the operation of law in a global context. (University Outcome #3)
5. Demonstrate an understanding of the ethical rules that govern the legal profession. (University Outcome #2)

GOAL #2 (SKILLS): Learn, practice, and apply the skills and methods that are essential for effective lawyering.

HUSL graduates should be able to. . .

1. Identify and apply strategies to discover and achieve client objectives. (University Outcome #6)
2. Master appropriate strategies and technologies to retrieve, use, and manage research materials and information effectively and efficiently. (University Outcome #4)
3. Comprehend and synthesize the reasoning and rules contained in legal authorities and apply them to a variety of client situations. (University Outcome #6)
4. Communicate effectively in writing and in speaking with diverse audiences in a variety of formal and informal settings. (University Outcome #5)
5. Demonstrate the capacity to understand and appreciate the diverse backgrounds and perspectives of clients, colleagues,

adversaries, and others while dealing sensitively and effectively with the issues presented. (University Outcome #3)

6. Advocate, collaborate, and problem-solve effectively in formal and informal dispute resolution processes. (University Outcome #2)

GOAL #3 (PROFESSIONALISM): Develop the personal attributes, attitudes, and practices befitting an honorable and respected profession.

HUSL graduates should be able to . . .

1. Acquire the knowledge and skills required to competently represent one's clients (see the lists above).
2. Articulate the roles lawyers play in promoting justice, improving the legal profession, and serving the community. (University Outcome #1)
3. Exercise professional decorum consistent with a lawyer's professional responsibilities and leadership roles. (University Outcome #2)
4. Reflect on one's own work and professional development. (University Outcome #7)
5. Engage in effective time management. (University Outcome #4)

HAMLIN UNIVERSITY LEARNING OUTCOMES

(From Hamline University Initiative 2.2.A):

Implement learning outcomes that ensure a Hamline graduate will be able to . . .

1. Serve, collaborate, and lead in a community
2. Solve problems in innovative, integrative, analytical, and ethical ways
3. Work and create understanding across cultural differences locally, nationally, and internationally
4. Use information and technology competently and responsibly
5. Communicate effectively in writing and in speaking
6. Apply the theories and methods of a field of expertise
7. Engage independently and reflectively in lifelong learning

Silver Linings: Reimagining the Role of ADR Education in the Wake of the Great Recession

*Lela P. Love**
*Brian Farkas***

“Was I deceiv’d, or did a sable cloud / Turn forth her silver lining on the night?”

—John Milton¹

“Every cloud has its silver lining, but it is sometimes a little difficult to get it to the mint.”

—Don Marquis²

I. Introduction

The past few years have seen widespread condemnation of legal education. Critics charge that there are too many law schools,³ too many law students,⁴ and—not to put too fine a point on it—too many

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1 JOHN MILTON, *COMUS, A MASK PRESENTED AT LUDLOW CASTLE*, 1634 pt. 2, at 37 (1798).

2 *THE COLUMBIA DICTIONARY OF QUOTATIONS* 394 (Robert Andrews ed., 1993).

3 See, e.g., Daniel Luzer, *Too Many Law Schools?*, *WASH. MONTHLY* (Dec. 26, 2012, 2:07 PM), http://www.washingtonmonthly.com/college_guide/blog/too_many_law_schools.php.

4 *Id.*; see also David Segal, *What They Don’t Teach Law Students: Lawyering*, *N.Y. TIMES*, Nov. 19, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0.

lawyers.⁵ What's worse, many complain that this endless stream of lawyers is almost entirely unprepared for actual modern legal practice.⁶

This final grumble about lawyer preparedness is hardly new.⁷ It has been a common refrain among legal educators and legal recruiters for decades.⁸ But the Great Recession of 2008 has brought it to the fore. With law firms, companies, government agencies, and non-profit organizations now shutting their doors to inexperienced recent graduates, many have asked: Are law schools teaching for this century and this economy? This question has now bubbled out of legal recruiting conferences into the mainstream. Law school anxiety has been covered by *The New York Times*⁹ and *The Wall Street Journal*,¹⁰ as well as by law professors in tell-all books¹¹ and unemployed graduates on acerbic blogs.¹²

American Bar Association leaders, law schools, and practicing attorneys do not agree about the appropriate number of law schools or lawyers. But one proposition *does* enjoy near-universal support: Law schools need to do a better job of teaching practical skills so that

5 Erza Klein, *Too Many Lawyers, Cont'd*, WASH. POST, (June 29, 2011, 2:04 PM), http://www.washingtonpost.com/blogs/wonkblog/post/too-many-lawyers-contd/2011/05/19/AGID6wqH_blog.html.

6 Rhea Hirshman, *Ready, or Not? Reports Say Nation's Law Students are Underprepared to Work as Attorneys*, QUINNIPIAC U. SCH. L. MAG., Summer 2007, at 10, available at http://www.quinnipiac.edu/prebuilt/pdf/magazines/law_summer07/law_summer07_ready.pdf.

7 Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 527–28 (1994) (“[T]here is a gap between legal education and the legal profession While some law schools have seriously reconsidered their curricula in light of the changing demands of the profession, many others seem quite indifferent to those changes and, more fundamentally, to what their students do after graduation.”); see also Segal, *supra* note 4.

8 See generally James R.P. Ogloff et. al., *More Than “Learning to Think Like a Lawyer:” The Empirical Research on Legal Education*, 34 CREIGHTON L. REV. 73 *passim* (2000); John C. Weistart, *The Law School Curriculum: The Process of Reform*, 36 DUKE L. J. 317 (1987).

9 See, e.g., Lincoln Caplan, Editorial, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, § SR, at 10, available at <http://www.nytimes.com/2012/07/15/opinion/sunday/an-existential-crisis-for-law-schools.html>.

10 See Amir Efrati, *Hard Case: Job Market Wants for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, <http://online.wsj.com/article/SB119040786780835602.html>.

11 See generally BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012) (describing the crisis in the legal market and legal education).

12 See INSIDE THE LAW SCHOOL SCAM, <http://insidethelawschoolscam.blogspot.com> (last updated Jan. 11, 2013).

employers can more confidently hire recent graduates.¹³ Both litigation and transactional attorneys routinely report that young attorneys lack crucial interpersonal, counseling, and problem-solving skills.¹⁴ That complaint should hardly be surprising; law students spend the vast majority of their legal educations learning pure doctrine and focusing largely on federal appellate decisions. The question posed by a fury of recent conferences and studies is: How can we produce professional, practice-ready attorneys?¹⁵

We argue that greater substantive and experiential training in alternative dispute resolution (ADR) is a crucial piece of the puzzle. ADR encompasses three broad, and very different, methods of

13 See generally JULIE MACFARLANE, *THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW* (2008) (providing an understanding of the evolution of the profession towards dealmaking, consulting and problem-solving, in addition to traditional adversarial advocacy).

14 See generally WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf [hereinafter *CARNEGIE REPORT SUMMARY*].

15 In the Fall 2012 semester alone, there were four major conferences examining the future of legal education with particular attention to experiential learning. On October 19, the University of Missouri Law School hosted “Overcoming Barriers in Preparing Law Students for Real-World Practice,” which explored new techniques in light of various constraints faced by law schools. On October 26–28, Northeastern University School of Law hosted “Experiencing the Future: Inaugural National Symposium on Experiential Education in Law,” which explored new methods of integrating clinical and doctrinal pedagogies. On November 9, George Mason University School of Law hosted “Unlocking the Law: Building on the Work of Professor Larry Ribstein,” which explored changing demand for legal services and lawyer competencies. And on November 16, the University of Connecticut hosted “Are Law Schools Passing the Bar?” which explored the sometimes-tense relationship between vocational and academic legal education.

solving human conflict: negotiation,¹⁶ mediation¹⁷ and arbitration.¹⁸ Progressive programs prefer the acronym “ADR” to stand for *appropriate* dispute resolution—that is, the art of solving a particular dispute by applying the process most likely to maximize benefit for the parties, or “fitting the forum to the fuss.”¹⁹ One reason that “alternative” is a somewhat bizarre description is that negotiation, mediation and arbitration are hardly unusual processes for resolving conflict. To the contrary, about ninety-eight percent of all cases filed are settled out of court.²⁰ Jury trials and appellate proceedings, the numbers show, are the processes furthest from the mainstream.²¹ Indeed, binding private arbitration and court-mandated mediation are on the rise both

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- 16 Negotiation is any communication designed to persuade. The formalism of a negotiation can vary, encompassing discussions ranging from an argument with a significant other to a complex corporate merger. See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* xxvii (3d ed. 2011) (“Everyone negotiates something every day . . . Negotiation is a basic means of getting what you want from others.”).
- 17 Mediation has many sub-models, but it can essentially be defined as a negotiation facilitated by a third-party neutral. JOSEPH B. STULBERG & LELA P. LOVE, *THE MIDDLE VOICE: MEDIATING CONFLICT SUCCESSFULLY*, 2D ED. 5 (2013) (“Mediation is a process in which a neutral intervener helps people in a dispute improve their understanding of their situation and one another and then develop solutions that are acceptable to them.”).
- 18 Arbitration is a “procedural model involving binding adjudication of disputes by a private tribunal pursuant to an agreement.” Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427 (2007).
- 19 See generally Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994) (describing the principles of process choice and ADR systems design).
- 20 Richard M. Calkins, *Mediation: A Revolutionary Process That Is Replacing the American Judicial System*, 13 CARDOZO J. CONFLICT RESOL. 1, 2 (2011). See also JOHN R. VAN WINKLE, *MEDIATION: A PATH BACK FOR THE LOST LAWYER* 10–11 (2005) (discussing the disappearance of trials and the work of Professor Marc Galanter which chronicles the “vanishing trial”).
- 21 Marc Galanter & Mia Cahill, *“Most Cases Settle”: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994). A counterpoint can be made, however, that bargaining—whether in legal negotiation or mediation—occurs in the “shadow of the law,” and hence, knowledge of likely court outcomes is critical for attorneys to operate effectively in negotiation and mediation. See Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

domestically²² and internationally.²³ Increasing numbers of civil and criminal cases are settled through out-of-court settlements and plea bargains—which is to say, they are settled in negotiations.

Given these realities, one would think that negotiation, mediation, and arbitration might be, for example, required courses. One would think that, as two scholars have recently noted,

law schools [would] teach students such insights as: “facts are often contested,” “some disputes are not best resolved through litigation,” “not all disputes boil down to money,” “emotions should not necessarily be ignored,” and “other disciplines can be very helpful to attorneys,” [and] lawyers

22 See Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 110–12 (1992) (describing the general rise of private arbitration along with the Supreme Court’s increasing deference towards binding arbitral arrangements).

Lawyers have evolved their views. In a 2010 New York State Bar Association survey of nearly 500 litigators, 90% expressed a positive view of mediation, and 97% reported that they always or sometimes discuss mediation with their clients. More than 65% agreed that mediation produces settlements at earlier points in the litigation process. Richard S. Weil, *Mediation in a Litigation Culture: The Surprising Growth of Mediation in New York*, 17 DISP. RESOL. MAG. 8, 8–9 (2011).

The spread of ADR over the past two decades has both legal and practical dimensions. Courts have given increasing force to arbitration and mediation clauses in contracts, for example. See *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (upholding the enforceability of contractual arbitration clauses that waive a consumer’s right to bring a class action); see also *Rent-A-Ctr., W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (holding that when an agreement delegates the authority to determine the arbitrability of the agreement to the arbitrator, claims which challenge the enforceability and validity of an agreement as a whole will be determined by the arbitrator).

23 Tracking broad trends in global dispute resolution is difficult, but recent country-specific scholarship suggests that international lawyers are increasingly using non-litigation processes. See generally *Financial Crisis Results in a Boom for the Arbitration and Mediation Market in London and the UK*, ADRRESOURCES (Sept. 27, 2010), <http://adrresources.com/adr-news/753/research-indicates-rise-in-arbitration-mediation-activity-in-the-uk>; Michael Henry Martuscello, *The State of the ADR Movement in Italy: The Advancement of Mediation in the Shadows of the Stagnation of Arbitration*, 24 N.Y. INT’L L. REV. 49 (2011); Giuseppe De Palo & Mary B. Trevor, *Cyprus’s Old ADR Schemes, and New Interests*, 30 ALTERNATIVES HIGH COST LITIG. 24 (2012); Randall Peerenboom & Xin He, *Dispute Resolution in China: Patterns, Causes and Prognosis*, 4 E. ASIA L. REV. 1 (2009). However, Italy’s Supreme Court recently struck down a law mandating mediation. Robert Lunghini, *Goodbye Mandatory Mediation*, WEST – WELFARE SOCIAL TERRITORY (Oct. 25, 2012), <http://www.west-info.eu/goodbye-mandatory-mediation/>.

must be able to understand parties' interests, communicate effectively, and develop options that may be acceptable to disputing parties.²⁴

This assumption is not as true as it should be. Yet all of these teaching objectives could be achieved with greater attention to dispute resolution theory and practice.

This paper examines ADR curricula generally and at our home institution, the Benjamin N. Cardozo Law School (Cardozo) to ask both where we are now with respect to such curricula and where law schools might ideally go.

Our purpose here is to suggest that the Great Recession has given the legal academy the opportunity and impetus to reimagine the place of ADR—specifically experiential learning of ADR—in the traditional curriculum. As the legal community reassesses the importance of clinical education more generally in preparing young lawyers, innovative ADR training should be at the forefront of that movement. This will reflect its growth in actual legal practice. In Part II, we examine the evolution of teaching ADR in American law schools. Part III explores a unique impediment to expanding ADR pedagogy—that of negative branding. In Part IV we use the Cardozo experiment with building a dispute resolution program to illustrate one avenue to constructing a comprehensive ADR curriculum. Part V looks at select innovations of note in the expansion of a broad-based ADR awareness among law students. And Part VI concludes that the time is ripe for bold steps forward in terms of integrating process awareness, dispute resolution skills and a problem-solving mindset into the law school curriculum.

II. The Clinic and the Classroom: Where did ADR Come from and How is it Taught?

Since the nineteenth century, legal education has been dominated by the legacy of Christopher Langdell, the first dean of Harvard Law School.²⁵ Initially, Langdell taught his courses “in a style and

24 John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 OHIO ST. J. ON DISP. RESOL. 247, 251 (2010).

25 Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 1–2 (1983). Langdell taught contracts, partnership, and commercial papers. He is embodied, perhaps most famously, in the character of Professor Charles Kingsfield in

with materials common to law schools of the time.”²⁶ He “lectured about rules, cited cases merely to illustrate the rules, and sporadically questioned his students about the assigned reading from a textbook.”²⁷ But around 1870, he began teaching with a very different model. His students would read almost exclusively appellate decisions; he would then aggressively question them on the underlying facts, rules of law, and general doctrinal principles that could be discerned from each opinion. In his view, “the law was contained in the published opinion of the court. Historical background, social context, the identity of the parties, pre-trial skirmishing, and the vagaries of litigation would only distract students from the task of extracting general principles from court opinions.”²⁸ Learning the actual *practice* of law took place “at law firms or other places of employment after law school.”²⁹ This division of responsibility between law schools and the practicing bar continued for most of the nineteenth and twentieth centuries.³⁰

Not surprisingly, this system developed critics. As current scholars of dispute resolution and most practicing lawyers would argue, the Langdellian premise of ignoring identity, history, and underlying issues between parties makes little sense if the goal is to overcome conflict. Clients usually seek professional counsel to get practical guidance about their personal situation and real-world options; they are not concerned about the “vagaries” of appellate interpretation except insofar as such interpretation might affect their result. Under the Langdellian approach, law students do not learn to interview, counsel, or interact with clients until well after their graduation. Moreover, missing entirely from the Langdellian model are the global, transactional, and facilitative dimensions of modern legal practice. These concerns about mainstream pedagogy came to a head in the

the 1973 movie *The Paper Chase*. Professor Kingsfield would aggressively question his first-year students about the facts and doctrine underlying judicial options, answering questions only with more questions. His famous line was that students would enter law school with a “mind full of mush” and through the Socratic process, they would “leave thinking like a lawyer.” See *THE PAPER CHASE* (Twentieth Century Fox 1973).

26 Curtis Nyquist, *Single-Case Research and the History of American Legal Thought*, 45 *NEW ENG. L. REV.* 589, 590 (2011).

27 *Id.*

28 *Id.* at 591–92.

29 Bobbi McAdoo et. al., *It’s Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 *WASH. U. J. L. & POL’Y* 39, 44 (2012).

30 Nyquist, *supra* note 26, at 591–92.

1970s. The period saw significant concerns about the excessive costs of litigation and overcrowded court dockets.³¹ In 1976, Chief Justice Warren Burger convened a conference in St. Paul, Minnesota, commonly called the Pound Conference, asking broad questions about the civil justice system: “[W]hat types of disputes can best be resolved by judicial action and what alternatives [might be] superior? [H]ow can we serve the interests of justice with processes speedier and less expensive?”³²

The Pound Conference sowed the seeds for a vibrant rethinking of the justice system by many academics and practitioners. Most famously, the notion of the multi-door courthouse emerged—the idea that parties could enter a courthouse and “find a rich array of dispute resolution options from which to choose in order to engage in the most effective conflict resolution process for their dispute.”³³ Court systems, particularly in Florida and Texas, responded with experimental mandatory mediation programs.³⁴ Legal scholarship, too, began to appear in law reviews and journals in the 1980s.³⁵ Some would date the true scholarly birth of the movement to the 1981 publication of Roger Fisher and William Ury’s classic book, *Getting to Yes: Negotiating Agreement Without Giving In*.³⁶ As legal practice and at least some legal scholarship grew to embrace dispute resolution techniques in the 1980s, educational initiatives began to take root.

In 1992, the ABA assembled a Task Force on Law Schools and the Profession to “narrow the gap” between legal education and prac-

31 THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE: PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, 67 (A. Leo Levin & Russell R. Wheeler eds., 1979).

32 *Id.* at 68.

33 McAdoo, *supra* note 29, at 45. For a deeper examination of the genesis of the concept of a multi-door courthouse, see generally, *A Dialogue Between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse*, 5 U. ST. THOMAS L.J. 665 (2008).

34 Sharon Press, *Court-Connected Mediation and Minorities: A Report Card*, 39 CAP. U. L. REV. 819, 822 (2011).

35 For a comprehensive review of the early academics surrounding the ADR movement, see Carrie Menkel-Meadow, *Mothers and Fathers of Invention: The Intellectual Founders of ADR*, 16 OHIO ST. J. ON DISP. RESOL. 1 (2000).

36 FISHER, *supra* note 16 *passim* (establishing a classic four-step approach to negotiation: 1) distinguish between interpersonal and substantive negotiation issues, 2) focus on interests rather than positions, 3) create options for mutual gain, and 4) use objective criteria to select among various options).

tice.³⁷ The Task Force's report—known as the MacCrate Report after its director Robert MacCrate—specifically listed “negotiation,” “problem-solving,” “communication,” and “alternative dispute resolution” among the core skills it advocated for legal education.³⁸ Even lawyers who consider themselves to be purely litigators, the report said, “are frequently in a position of having to consider . . . dispute resolution [options] as possible [solutions] to a client's problem, or to counsel a client about these options, or to factor the options into planning for negotiation.”³⁹ In short, the Report asked law schools to do a better job of teaching problem-solving skills, including educating students on process choice,⁴⁰ negotiation techniques, and counseling.⁴¹ Appellate reasoning, employers said, was not enough.⁴² Indeed, the subsequent fifteen years has seen the expansion of skill courses into the curriculum at most law schools.⁴³

Despite this shared history, different schools have embraced ADR to different extents.⁴⁴ Some offer extensive coursework and clinics in all major ADR subject areas.⁴⁵ Others offer only coursework but no clinical opportunities.⁴⁶ Still others incorporate negotiation exercises into first-year legal writing or lawyering skills courses but

37 REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS B. 135 [hereinafter *The MacCrate Report*].

38 *Id.*

39 *Id.*

40 “Process choice” is simply choosing the process most likely to resolve a particular dispute. Legal norms may or may not be an important factor in the process.

41 *The MacCrate Report*, *supra* note 37.

42 *Id.*

43 Lande & Sternlight, *supra* note 24, at 276–77 n.101 (citing a 2004 American Bar Association survey of law school curricula between 1992 and 2002 which revealed that of the 151 law schools in 2002, about 140 offered an ADR course and about 120 offered separate mediation and negotiation courses). The University Of Oregon Law School, on behalf of the ABA Section of Dispute Resolution, keeps an up-to-date listing of law school offerings related to dispute resolution. See *ABA Directory, Appropriate Dispute Resolution Center*, UNIVERSITY OF OREGON SCHOOL OF LAW, <http://adr.uoregon.edu/aba/> (last visited Nov. 28, 2012).

44 See generally Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 OHIO ST. J. ON DISP. RESOL. 25, 26 (2010) (surveying and categorizing the teaching of ADR in American law schools).

45 *Id.*

46 *Id.*

offer few or no advanced courses or clinics.⁴⁷ There are philosophical differences as well. Some schools value the substance of ADR *theory* (e.g., the unique values of consensual, as compared to adversarial dispute resolution), while others emphasize the *skills* that ADR imparts (e.g., the interviewing and listening skills that come from negotiation and mediation training). Some schools value both equally.

Before considering how schools can further bolster ADR education, we should begin by understanding where we are now. The most detailed and data-driven snapshot of the field's recent history within the legal academy comes from Michael Moffitt, Dean of the University of Oregon School of Law, in his 2010 article, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools*.⁴⁸ Moffitt divides law schools into four colorfully-named categories.⁴⁹ First, a handful of schools are "Islands" of ADR: institutions with "much richer curricular and co-curricular offerings than their competitors" that value those offerings as "part of [their] distinctiveness."⁵⁰ Moffitt suggests that there are probably around two-dozen law schools that fit that description.⁵¹ Second, some schools treat ADR as a "vitamin," forcing students to take a certain dosage—usually one "stand-alone [course], consumed outside of the context of the traditional law school curriculum."⁵² Third, some schools treat ADR as "salt," a seasoning to mix into other more "substantive" doctrinal courses.⁵³ This model

47 *Id.*

48 *Id.*

49 Moffitt acknowledges that

[t]hese four models are not, of course, mutually exclusive. One might find variations on each of these themes occurring at a single school. But the theoretical underpinnings of each are distinct enough that examining them separately may shed light on some of the curricular decisions law schools face today about ADR.

Id. at 27.

50 *Id.* at 26.

51 Moffitt uses several metrics to identify the "Island" schools. At least five schools offer LL.M. programs exclusively in dispute resolution: Cardozo, Marquette, Missouri, Pepperdine, and Oregon. At least five law schools publish journals focused on dispute resolution: Cardozo, Harvard, Missouri, Ohio State, and Pepperdine. And finally, seventeen law schools list themselves as offering certificates in dispute resolution (courses of study undertaken alongside the J.D.): Appalachian, Baltimore, Cardozo, Capital, Cincinnati, Drake, Maryland, Nebraska, Ohio State, Oklahoma City, Oregon, Penn State, Pepperdine, Quinnipiac, Texas, Washington, and William Mitchell. *Id.* at 55

52 *Id.* at 26.

53 *Id.*

“incorporate[s] small doses of ADR throughout the curriculum” but does not generally have students take independent courses in negotiation, mediation, and arbitration.⁵⁴ Fourth, some law schools treat ADR as a “germ” that individual professors incorporate into a handful of courses “[a]cting not as part of a concerted, school-wide effort but rather from an individual conviction about ADR’s importance.”⁵⁵

Although there are only a handful of “Island-level” schools, data seems to suggest that ADR faculty and course offerings have been generally spreading over the past two decades.⁵⁶ Analyzing 2007–2008 American Association of Law Schools (AALS) data, Moffitt notes that 569 faculty members (tenure track and non-tenure track) self-identify as teaching dispute resolution. When compared to most sub-disciplines, this number places ADR as “average in size, perhaps somewhat above average.”⁵⁷ Moffitt observes that just a few decades ago, only a “tiny number of law schools offered even one course in materials that would today be characterized as ADR.”⁵⁸ The Pound Conference clearly resulted in something of a “big bang” for the legal academy, catapulting dispute resolution from “virtually nothing to an average-sized area of legal study” over the 1980s and 1990s.

But despite the proliferation and institutionalization of ADR in law schools (albeit to varying degrees), the ABA and practicing attorneys remained unsatisfied with the problem-solving abilities of young graduates. The 2007 Carnegie Foundation Report on Educating Lawyers confirmed that much work was still left to be done.⁵⁹ The Report

54 *Id.* at 27.

55 *Id.* at 28.

56 *Id.* at 26. Moffitt admits that data in this area is tricky. Short of examining course descriptions, syllabi, and enrollment numbers at the roughly 200 American law schools, the best information comes from faculty self-reporting to AALS on whether they consider themselves to be ADR instructors. The problem with self-reported data in this area is that each individual might measure ADR differently; some who teach Commercial Arbitration or Representation in Mediation, for example, may or may not include themselves.

57 *Id.* at 30.

58 *Id.* at 30.

59 The Carnegie Report detailed a two-year study of legal education. The fieldwork for the study was conducted at sixteen law schools in the United States and Canada during the 1999–2000 academic year. The law schools, which varied in their selectivity and student diversity, included both public and private institutions and were selected for geographical diversity. SULLIVAN ET AL., *supra* note 14, at 3. The Carnegie Report Summary was used for its conciseness and reliability in summarizing the Carnegie Report’s most important points.

noted that “most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice.”⁶⁰ Unlike other professional schools,

legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.⁶¹

Note that this Report was released the year *before* the Great Recession began. Its critiques were only magnified when legal employers slashed their hiring and major clients began to complain about footing the bill to train young associates.⁶² So if employers desire the skills associated with ADR training—an observation made in the MacCrate Report, Carnegie Report, and through overwhelming anecdotal information⁶³—then what exactly is the hold up? Why has emphasis on teaching ADR been limited to only a handful of “Islands,” and how can we give these invaluable and marketable skill sets to more law students?

III. The Challenge of Branding

One of the problems with advancing ADR education may be branding. The 2012 ABA Section on Dispute Resolution Annual Conference hosted a session on careers in legal academia moderated by Jennifer Reynolds, an assistant professor of law at the University of Oregon.⁶⁴ Reynolds recounted a mentor early in her career cautioning

60 *Id.* at 6.

61 *Id.*

62 Ashby Jones & Joseph Palazzolo, *What's a First-Year Lawyer Worth?*, WALL STREET JOURNAL, Oct. 17, 2011, <http://online.wsj.com/article/SB100014240529702047746045766313609889675324.html>.

63 Such anecdotes were central to the discussion at the “Experiencing the Future” conference hosted by the Alliance for Experiential Learning in Law and the *Northeastern University Law Journal* on October 26–28, 2012. Particularly relevant were the comments of Ariel Cudkowitz (Boston Managing Partner, Seyfarth Shaw LLP), Stephen Rosales (Partner, Rosales & Rosales), and Gabriel Cheong (Partner, Infinity Law Group).

64 The ABA Section of Dispute Resolution Fourteenth Annual Spring Conference was held in Washington, DC, on April 19–21, 2012. See *ABA Section of Dispute Resolution*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/dispute_resolution.html (last visited Nov. 30, 2012).

her about the lowly place of dispute resolution in the academy: “In the castle of legal academia, the kings and queens are Constitutional Law and Jurisprudence; the earls and dukes, Copyright and Antitrust; below those are Evidence and Civil Procedure, as they do all the real work; and way, way below those are legal writing . . . clinics . . . and ADR.”⁶⁵ So too for young lawyers who identify themselves with ADR, Reynolds suggested.⁶⁶

In an article in the *Cardozo Journal of Conflict Resolution* titled *The Lawyer with the ADR Tattoo*, Reynolds dissects stigmas and stereotypes about having dispute resolution on one’s resume as an aspiring attorney or aspiring law professor. She presents the fundamental question of the ADR brand as follows:

Should newly graduated lawyers list ADR-related credentials on their resumes when looking for jobs? In today’s highly competitive market for legal talent, does highlighting alternative competencies help young lawyers distinguish themselves, or does it actually harm their chances of getting an interview?⁶⁷

Thus Reynolds extends Moffitt’s inquiry about the current place of ADR in law school curricula, scrutinizing the relationship between ADR and marketability. She finds that students are surprised to learn of the paucity of jobs available in wholly ADR-related endeavors immediately following law school.⁶⁸ Moreover, although the skills encompassed by ADR are desired by clients and legal employers, particularly negotiation and dealmaking,⁶⁹ the brand itself (“ADR”) is seemingly not so desirable. Advertising oneself as ADR-identified—as practitioner, sympathizer, or even scholar—may turn off employers who “may wrongly assume that ADR-identified people are part of an

65 Jennifer Reynolds, *The Lawyer with the ADR Tattoo*, 14 CARDOZO J. CONFLICT RESOL. 395, 397 n.13 (2013).

66 *Id. passim*.

67 *Id.* at 397.

68 “[T]here is no doubt that even the most traditional lawyers use ADR techniques and processes all the time, from client counseling to negotiation to mediation to arbitration—even if those same lawyers profess no need for ADR.” *Id.*

69 *See, e.g.*, ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES (2000) (reworking interest-based negotiation precepts in modern legal dispute resolution and dealmaking).

undesirable counterculture of non-competitive, non-assertive, passive, anti-law types.”⁷⁰

A survey of her classmates from Harvard Law School (currently practicing successfully in a range of legal careers) showed that a resume focused on solely ADR-related endeavors could eliminate a candidate from consideration.⁷¹ Most respondents agreed that having a dispute resolution certificate or credential did not *hurt* an applicant’s chances, so long as that applicant *also* demonstrated traditionally elite credentials such as journal or moot court participation. Our own experience confirms this observation. Anecdotal reports from graduates of Cardozo’s Mediation Clinic suggest that traditional law firm employers value ADR credentials as indicative of emotional intelligence and real world savvy, though such graduates were generally able to get in the door because of the so-called “elite credentials” on top of ADR competency.

Reynolds posits a few potential solutions to this ADR branding challenge. Citing Nancy Welsh, she proposes literally changing the field’s name to “procedural law.”⁷² Since the major areas of ADR “are taught in law school as part of a lawyer’s toolset when engaging in procedure, [Welsh] advises including them in the broad umbrella of procedural law, which also includes civil and criminal procedure.”⁷³ This approach situates ADR within recognized, and already valued, legal disciplines. Additionally, Reynolds argues, “for those who suspect that ADR is code for ‘not good at/interested in regular law,’ removing the ADR label and replacing it with a more law-like label may alleviate that concern.”⁷⁴

Strategically re-naming a discipline might seem an extreme, perhaps crude fix. But the overall branding challenge may be important in properly elevating the place of ADR in the law school curriculum. The economy is demanding better prepared young lawyers, and there seems to be consensus that the skills taught in dispute resolution programs are desirable in applicants for legal jobs. At the same time, as Reynolds points out, “alternative dispute resolution” feels

70 Reynolds, *supra* note 65, at 397.

71 *Id.*

72 *Id.* at 414 n.58 (citing Professor Nancy Welsh, The ADR Brand, Roundtable at the International Law & Society Annual Meeting (June 8, 2012).).

73 *Id.* at 414–15.

74 *Id.* at 415.

somehow “unsavory” or “soft” to many who do legal hiring—both in academia and in practice.⁷⁵ While we take no position on a name change for the field,⁷⁶ we sympathize with the underlying issue. One way or another, as the place of ADR is reconsidered, so too must practitioners and academics rethink stereotypes and branding. In some ways, the shift that Reynolds advocates is slowly happening through the morphing of the tag “ADR,” standing for *alternative* dispute resolution, to *appropriate* dispute resolution, or to just dispute resolution dropping of the “A” altogether. At the same time, new labels for aspects of ADR like “problem-solving,”⁷⁷ “deal-making”⁷⁸ and “dispute system design” are gaining currency. Such terms may be appealing to the traditional lawyer and may enhance the field’s acceptance and growth.

IV. Characteristics of an “Island” School: Cardozo as a Case Study

Given the genesis and current state of clinical and classroom ADR teaching, as well as the reputational issues that ADR faces, how can more schools become “Islands”? What are the characteristics of a school in this category? We examine Cardozo’s Kukin Program for Conflict Resolution in this Section to offer a case study of the offer-

75 *Id.*

76 In some ways, “alternative dispute resolution” is a useful moniker, since it does effectively remind parties that it represents an alternative to traditional litigation. In some forms, it can also represent a unique theory of justice emphasizing party collaboration and self-determination. A title such as “procedural law” does not quite get at those connotations.

77 For example, the ABA Section of Dispute Resolution gives the annual Lawyer as Problem Solver Award. The Award “recognizes individuals and organizations that use their problem-solving skills to forge creative solutions [and have] exhibited extraordinary skill in either promoting the concept of the lawyer as problem-solver or resolving individual, institutional, community, state, national, or international problems.” *Lawyer as Problem Solver Award*, AM. BAR ASS’N, http://www.americanbar.org/groups/dispute_resolution/awards_competitions/lawyer_as_problem_solver_award.html (last visited Jan. 14, 2013).

78 See generally, Kathy A. Bryan, *Why Should Businesses Hire Settlement Counsel?*, 2008 J. DISP. RESOL. 195 (2008); Scott R. Peppet, *Contract Formation in Imperfect Markets: Should We Use Mediators in Deals?*, 19 OHIO ST. J. ON DISP. RESOL. 283 (2004).

ings, pedagogy, and culture of one institution deeply committed to experiential learning through ADR.⁷⁹

The core of any academic program is the courses offered to students. Each semester students at Cardozo can choose from courses in negotiation, mediation, arbitration, and dispute resolution processes.⁸⁰ Additionally, specialty courses are regularly offered in, for example: bioethics mediation, collaborative family law, divorce and family mediation, international dispute resolution, labor and employment ADR, international commercial arbitration, and representation in mediation.⁸¹ These courses are open to 2L and 3L JD and all LL.M. students.

At the heart of the school's dispute resolution program are three clinics: a Mediation Clinic (full year), a Divorce Mediation Clinic (one semester, offered in both fall and spring), and a Securities Arbitration Clinic (full year). These clinics keep Cardozo students vitally connected to the challenges and opportunities in the real world. This includes building relationships with alumni in these fields, ultimately resulting in jobs—to provide one example of taking a “silver lining” to the mint (referring to the opening quotation).⁸² The mediation clinics provide students with the additional professional identity of being knowledgeable about the role of a neutral, and in fact, some students move on to practice as mediators directly after law school.⁸³

An ADR Competition Team and an Arbitration Practicum at Cardozo, which involve coursework, writing, and extensive moot-ing, take students to various competitions in the United States and

79 We hope readers will forgive the fact that we have chosen our own institution for this overview. We know this institution best and felt a snapshot of the ADR program here would be helpful.

80 See *Current Course Offerings*, CARDOZO SCHOOL OF LAW, <http://www.cardozo.yu.edu/academics/course-catalog> (last visited July 23, 2013).

81 *Id.*

82 See Marquis, *supra* note 2.

83 While it is notoriously difficult to become a mediator right out of law school, it is possible with proper preparation. For example, a number of Cardozo alumni have developed successful practices in the family and divorce area. Adam Berner (MEDIATION OFFICES, <http://www.mediationoffices.com/> (last visited Dec. 18, 2012)), Catherine Hannibal (MEDIATION WORKS, <http://mediationworksny.com/> (last visited De. 18, 2012)), and Pamela Zivari (Pamela Zivari, LINKEDIN.COM, <http://www.linkedin.com/pub/pamelazivari/14/a04/193> (last visited Jul. 14, 2012)) provide three models. Cardozo alumnus Jed Melnick (Melnick, JAMSADR.COM, <http://www.jamsadr.com/melnick/> (last visited Jan. 14, 2013)) is the youngest mediator practicing at JAMS.

abroad (Paris, Toronto, Hong Kong and Vienna).⁸⁴ Such competitions (and congratulatory notices on school bulletin boards for competition winners) raise the profile of the dispute resolution program, as it offers a sister program to Moot Court, allowing for travel, résumé-building opportunities, and—most importantly—the refining of key lawyering skills.

Students can also compete to participate on the *Cardozo Journal of Conflict Resolution*. Founded in 1998, the *Journal* publishes three issues per year and also hosts a major annual symposium.⁸⁵ Through its symposium and other events, the *Journal* brings ABR professors and practitioners to Cardozo and helps build the field by offering a conduit for scholarship to become widely disseminated.⁸⁶

Cardozo offers both a Certificate in Dispute Resolution for J.D. candidates, as well as an LL.M in Dispute Resolution & Advocacy.⁸⁷ Both of these programs require substantial credits for coursework covering competency areas of negotiation, mediation, arbitration, counseling, and dispute resolution processes, together with a scholarly paper and an externship or clinic.

Cardozo's faculty sees two broad pedagogical values to ADR. First, courses on negotiation, mediation, and arbitration are increasingly important areas of practice, and thus increasingly relevant, arguably necessary, areas of study for law students. Instances illustrating this growing relevance in specific arenas include: an increasing number

84 Cardozo students regularly participate in the American Bar Association (ABA) Negotiation Competition, the ABA Representation in Mediation Competition, the ABA Client Counseling Competition, the ICC International Commercial Mediation Competition (Paris), the International Competition for Mediation Advocacy (Toronto), Jeffrey S. Abrams National Mediator Competition (Houston, TX), Robert R. Merhige, Jr. National Environmental Negotiation Competition (Richmond, VA), St. John's Annual Securities Dispute Resolution Triathlon (New York, NY), and the Vis Moot Court Arbitral Competitions (Vienna and Hong Kong). See *Competitions*, CARDOZO SCHOOL OF LAW, <http://cardozo.yu.edu/programs-centers/kukin-program-conflict-resolution/competitions> (last visited Jul. 23, 2013).

85 See *CARDOZO J. CONFLICT RESOL.*, <http://cardozojcr.com/> (last visited Jul. 14, 2013).

86 *Id.*

87 *Certificate in Dispute Resolution*, CARDOZO SCHOOL OF LAW (Oct. 23, 2012), <http://www.cardozo.yu.edu/programs-centers/kukin-program-conflict-resolution/certificate-dispute-resolution> (last visited July 23, 2013); *Dispute Resolution and Advocacy LL.M.*, CARDOZO SCHOOL OF LAW, <http://www.cardozo.yu.edu/academics/llm-degree/programs-and-curriculum/dispute-resolution-and-advocacy-llm> (last visited July 23, 2013).

of courts are referring complex probate matters to mediation;⁸⁸ an increasing number of commercial negotiations are the result of online bargaining;⁸⁹ and the management of the e-discovery process, a ballooning aspect of all types of civil litigation, has led to courts and parties employing neutral e-discovery arbitrators.⁹⁰ Suffice it to say, negotiation, mediation and arbitration are no longer “sideshows” to the American legal regime, if they ever were. It should now be commonly accepted that a working knowledge of the dispute resolution spectrum is crucial for lawyers representing businesses and individuals.⁹¹ This relevance alone justifies more related coursework.

But the faculty also acknowledges a second value to ADR offerings beyond the *substance* of those courses. Training in counseling, negotiation, and mediation provide crucially important *skills* that are applicable to virtually every area of legal practice. A centerpiece of Cardozo’s ADR program—the year-long eight-credit Mediation Clinic—is a perfect example of these twin goals of ADR: specific substance and transferable skills. By way of background, the Mediation Clinic has three essential components: an intensive training program⁹² prior to the start of the school year, a four-hour weekly mediation session, and a three-hour weekly classroom seminar. Mediations occur through partnerships with the New York Peace Institute, which

88 See Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH. & LEE L. REV. 539 (2008).

89 Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in A Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 288 (2005); see also Noam Ebner et al., *You’ve Got Agreement: Negoti@ting Via Email*, 31 HAMLIN J. PUB. L. & POL’Y 427, 428 (2009–2010).

90 Allison O. Skinner, *Alternative Dispute Resolution Expands into Pre-Trial Practice: An Introduction to the Role of E-Neutrals*, 13 CARDOZO J. CONFLICT RESOL. 113 (2011–2012); see also Daniel B. Garrie & Edwin A. Machuca, *E-Discovery Mediation & the Art of Keyword Search*, 13 CARDOZO J. CONFLICT RESOL. 467 (2012).

91 See David C. Albalah & Jesse D. Steele, *For Business Dispute Solutions, Process Matters*, 11 CARDOZO J. CONFLICT RESOL. 385 (2009–2010).

92 The training program is co-taught by Professors Lela Love and Joseph Stulberg. The trainers, and hence the program, are certified by the NYS Court Unified Court System ADR Office, qualifying students to become community mediators (after the completion of an apprentice program). At the end of the twenty-four-hour training, students lead mock mediations and are observed and critiqued by various outside mediators. See *Mediation Clinic*, CARDOZO LAW (Dec. 7, 2007), <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=10402>.

operates in New York's Civil Court and Small Claims Court⁹³ and in community dispute resolution centers in Manhattan and Brooklyn.⁹⁴ The Clinic also mediates cases for the Equal Employment Opportunity Commission.⁹⁵

In the weekly seminar portion of the clinic, the work is varied. Students engage with scholarship on issues related to the full spectrum of dispute resolution models and processes. Academics and practitioners often give guest lectures, and the class remains engaged with dispute resolution events around the city, for example, by taking class trips to such places as the New York City Bar Association Mediation Settlement Day,⁹⁶ JAMS,⁹⁷ and the Red Hook Community Justice Center.⁹⁸ Importantly, a number of the seminar's specific topics of study are particularly relevant to young lawyers. These include training in representation in mediation, domestic violence awareness in family disputes, and legal negotiation. To train students in a current problem negotiating attorneys face—special considerations for executing successful online negotiations—students participate

93 In New York State, the Civil Court has jurisdiction over claims up to \$25,000. Small Claims Court has jurisdiction over claims up to \$5000. In Small Claims, both parties are generally unrepresented by counsel; in Civil Court, representation varies. See SMALL CLAIMS <http://www.nycourts.gov/courts/nyc/smallclaims/> (last visited July 14., 2013).

94 The New York Peace Institute, formerly Safe Horizon Mediation Program, has been offering community and court-annexed mediation services for more than thirty years. *What's New at New York Peace Institute?*, NEW YORK PEACE INSTITUTE, <http://nypeace.org/> (last visited Jan. 14, 2013).

95 Cardozo's Mediation Clinic has partnered with the EEOC for more than a decade mediating cases referred by Administrative Law Judges at the federal EEOC. See *Mediation Clinic*, CARDOZO SCHOOL OF LAW, <http://cardozo.yu.edu/clinics-professional-skills/clinics/mediation-clinic> (last visited July 23, 2013).

96 See *Mediation Settlement Day*, NEW YORK STATE UNIFIED COURT SYSTEM, <http://www.nycourts.gov/ip/adr/MSD.shtml> (last updated Nov. 19, 2012).

97 JAMS is one of the largest private providers of dispute resolution services in the world. See *About the JAMS Foundation*, JAMS ARBITRATION, MEDIATION, & ADR SERVICES, <http://www.jamsadr.com/jamsfoundation/xpqGC.aspx?xpST=JAMSFoundation> (last visited Jan. 13, 2013).

98 The Red Hook Community Justice Center, located in Brooklyn, is an example of restorative and traditional justice initiatives operating side-by-side. See *Red Hook Community Justice Center*, CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/project/red-hook-community-justice-center> (last visited Jan. 13, 2013).

in complex Internet-based negotiations with counterparts from other law schools.⁹⁹

The philosophy of the Clinic and seminar is clear: Mediation is a “distinct paradigm” of justice, fundamentally different from litigation.¹⁰⁰ Students are taught to place a high value on parties’ self-determination and ability to collaboratively problem-solve.¹⁰¹ The resulting mind-set that is developed is one of lawyers as problem-solvers—a mindset that, for many students, has a romantic appeal comparable to that of lawyers as zealous advocates.

From the student perspective, the Clinic is about much more than learning to mediate. Sitting in the mediator’s chair grants exposure to raw human conflict. For many students, mediating presents the first opportunity to interact *directly* and *deeply* with “clients,” that is, people ensnared in conflict who require professional assistance. Unlike many law school clinics where students might get hands-on experience in legal work but never (or rarely) interact with the individuals they serve, student mediators dig deep. Mediation allows students to directly engage with parties’ business models, family structures, attributes, emotions, and human strengths and weaknesses. The process allows students a unique window into the ways that communication can break down and mistrust, bitterness, and anger can fester. Some might see all of this as tangential to training students to provide legal services. To the contrary, close insight into the practical problems that affect clients, to clients’ interests and the issues they become embroiled with, is bedrock upon which all professional and legal counsel is based. Participants in the Mediation Clinic leave the experience with broad exposure to varieties of conflicts and solutions, as well as an appreciation of the dynamics of conflict and conflict resolution for disputing parties. Seeing conflict from the neutral’s perspective also has the advantage of injecting, early on, the perspective that there tend to be two sides to controversies—a helpful lesson for attorneys.

In their second semester of the Clinic, students write scholarly papers connected with their study of dispute resolution and give

99 For an overview of the increasing importance of and attention to digital negotiations in pedagogy, see generally Melissa Nelken, *Evaluating Email Negotiations*, 3 RETHINKING NEGOTIATION 205 (2012).

100 Lela Porter Love, *Mediation: The Romantic Days Continue*, 38 S. TEX. L. REV. 735, 742–43 (1997).

101 *Id.* at 739.

community presentations. The development of a scholarly paper and the construction of an engaging presentation mean that students pull together what they have learned in the spring semester of the year-long program and, essentially, give it back to others. Publishing the paper and getting an audience that can benefit from a presentation are stressed.

In sum, the Mediation Clinic is an intensive academic and practical experience that exemplifies the twin aims of Cardozo's approach to ADR generally. Students learn the substance of dispute resolution processes (e.g., the difference between arbitration and mediation, and how choice of process affects available outcomes), and also learn wholly transferable skills (e.g., how to glean information from parties, how to present ideas in a way that maximizes the other's receptivity to the message, how to negotiate and how, at the same time, to develop trust and rapport).

Lela Love, who teaches the Clinic, stresses that students should pay attention to four "Ps" to succeed in the Clinic—and the field generally. First, the importance of *Practice* to success as a professional; second, the importance of *Participation* in the life of our times (e.g., engagement with local and national dispute resolution personalities, programs, and initiatives); third, the importance of writing and scholarship—*Papers* assigned by the Clinic reflect this goal; and finally, the importance of *Presentations*—hence the course requirement that students make a presentation to a community group or a class in the second semester.¹⁰²

Since clinics cannot service the larger population of students, the fact that all ADR courses at Cardozo incorporate significant experiential components is helpful. One example is "ADR in the Workplace," a simulation-based course that examines the use of arbitration and mediation in labor and employment disputes. In addition to a doctrinal introduction focused on the substantive areas involved, there are in-class exercises through which students learn to analyze fact patterns, make arguments, and issue arbitral rulings. Later in the semester, students conduct two simulated arbitration hearings, two simulated mediations, and also write an arbitral decision based on

102 For example, students regularly make presentations on mediation and alternative dispute resolution processes to high school and college students, religious congregations, law student classes and groups, lawyers (often lunch-time programs in firms), and other community groups, such as mediators, the police, gay organizations, and the like.

an assigned fact pattern. The simulation format allows students to learn and apply case analysis and presentation skills in a safe and controlled environment.¹⁰³

Additionally, a curriculum that embraces dispute resolution leads to students taking initiatives on their own to simultaneously contribute to the field and build their résumés. The Cardozo Dispute Resolution Society (CDRS) is an extraordinarily active student group that is a student chapter of the American Bar Association Dispute Resolution Section. CDRS broadens educational and professional opportunities for students by creating programs that complement the curriculum, including skill-developing workshops, film festivals, brown bag lunches, and panels with experts who explore specialized areas or respond to current events. Beyond Cardozo, the CDRS is active in the greater ADR community, working closely with such organizations as Mediators Beyond Borders (MBB), the New York State Bar Association, and the New York City Bar Association to help with initiatives where student research can make a difference.

Importantly, this ADR program does not exist in a vacuum. This brings us to one final point about what makes “Island” schools special: a cultural recognition of dispute resolution. Schools educate not just through their clinical and curricular offerings, but also through subtle clues they give to their students. What do we mean by clues? No administrator at Cardozo, or at most institutions we suspect, specifically instructs students on the importance of law journal participation. Yet somehow, through the grapevine, first-year students quickly realize that they should take their writing competition seriously. Students modify their behavior and priorities to the institution’s culture and values. “Island” schools effectively communicate ADR’s tremendous value. Cardozo, for example, boasts its ADR offerings in its admissions materials and alumni communications. It hosts numerous events on dispute resolution each year and those are publicized vigorously through the school’s communications office. In addition to standard lectures and panel discussions, events include the *Journal’s* annual day-long symposium¹⁰⁴ and the annual presentation of the International Advocate for Peace Award.¹⁰⁵ That Award has

103 Course information on file with the instructor, Professor David Weisenfeld.

104 *Symposia*, CARDOZO J. CONFLICT RESOL., <http://cardozojcr.com/symposia/> (last visited Jan. 14, 2013).

105 *International Advocate for Peace Award*, CARDOZO J. CONFLICT RESOL., <http://cardozojcr.com/iap-award/> (last visited Jan. 14, 2013).

typically been given to a high-profile figures, such as former Presidents Bill Clinton and Jimmy Carter.¹⁰⁶ and Desmond Tutu,¹⁰⁷ and the ceremony is a major yearly event for the entire school to rally around a peacemaker.¹⁰⁸ Cardozo and other “Island” schools not only implement the twin aims of ADR education, but also foster a *culture* that encourages the study of dispute resolution. That culture rejects the stereotypes that Reynolds identifies, which cast ADR as an “anti-law” tattoo, marking a student like a scarlet letter.¹⁰⁹ A student at an “Island” school who tells her friends that she plans to take a negotiation course will be in good company.¹¹⁰

As law schools consider best practices in experiential learning, deans and faculty should give experiential ADR a closer look. As Cardozo’s program demonstrates, these offerings expose students to both increasingly important areas of law *and* to problem-solving skills that are useful in a myriad of legal settings.

V. Merging Islands into Mainland

If every law school offered ADR programs on par with the so-called Island schools, young lawyers would be far better prepared for real-world practice. But an even grander vision is to reimagine the landscape entirely. Here we propose more radical alterations to

106 *Id.*

107 *International Advocate for Peace Award 2003*, THE CARDOZO JOURNAL OF CONFLICT RESOLUTION, <http://cardozojcr.com/iap-award/international-advocate-for-peace-award-2003/> (last visited Jan. 14, 2013).

108 Other distinguished recipients include: Documentarian Abigail Disney, Knesset Member and General Amira Dotan, Ambassador Stuart E. Eizenstat, Playwright Eve Ensler, Ambassador Richard C. Holbrooke, Journalist John Marks, Senator George Mitchell and Seeds of Peace, Attorney Betty Kaari Murungi, Ambassador Dennis Ross, and Professor Jeffrey Sachs. *International Advocate for Peace Award*, *supra* note 105.

109 Reynolds, *supra* note 65, at 397.

110 The Cardozo Dispute Resolution Society (CDRS), a student club dedicated to ADR, is one of the largest of the 55 student organizations at Cardozo. In 2011–2012, CDRS hosted a dozen events, organizing speaker and event series to supplement the academic program. See <http://www.cardozo.yu.edu/student-life/student-organizations/cardozo-dispute-resolution-society> (last visited July 13, 2013).

traditional law school curricula.¹¹¹ Again, we believe that the Great Recession has created the context for dramatic reform.

For nearly 150 years, despite great innovation in advanced coursework, the foundational first-year curriculum has gone largely unchanged.¹¹² Students at nearly every law school in the country take Civil Procedure, Contracts, Constitutional Law, Criminal Law, Legal Writing, Property, and Torts.¹¹³ Though much has been written about various amendments to this core, it has escaped most efforts at reform. We propose a new required course focused on dispute resolution processes and skills.

Practically speaking, the addition of a new course would require credit hour reductions in two or three of the other required first-year courses. Different schools might approach this juggling of credits differently, reducing the number of credits allocated to the other doctrinal courses. But the result would be the same: a new course in the curriculum to show students that lawyering is about more than appellate decisions and doctrine. Students would, *from the get-go*, view their study of law as an exercise in learning to solve problems. This would directly address the concerns articulated in the 2007 Carnegie Report, which strongly recommended that “doctrinal instruction [should not] be the exclusive content of the beginner’s curriculum.”¹¹⁴ Rather, lawyering, professionalism, and legal analysis should be joined from the start.¹¹⁵

111 For a comprehensive bibliography of scholarship efforts to inject ADR into law school curricula, see Trevor C.W. Farrow, *Dispute Resolution and Legal Education: A Bibliography*, 7 CARDOZO J. CONFLICT RESOL. 119 (2005). See also James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLINICAL L. REV. 457 (1996).

112 This general assertion is subject to creative tinkering at various schools. At Cardozo, for example, Legal Research and Writing and Elements of Law are part of the first-year curriculum. The latter class is a half-semester overview of the canons of construction and the basic hierarchy of legal authorities. There is a negotiation exercise in the Legal Writing course, and, depending on the teacher, some ADR may be introduced in Elements of Law.

113 See, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 275 n.79 (Lawbook Exch., LTD ed., 2001) (1983) (discussing evolution of law school curriculum in the year); Jean R. Sternlight, *Symbiotic Legal Theory and Legal Practice: Advocating a Common Sense Jurisprudence of Law and Practical Applications*, 50 U. MIAMI L. REV. 707, 719–26 (1996) (providing a brief history of legal education in the United States).

114 CARNEGIE REPORT SUMMARY, *supra* note 14, at 9.

115 SULLIVAN ET AL., *supra* note 14.

This proposal is not entirely new; it has been tried and suggested before in various forms at a handful of institutions, but has yet to achieve widespread implementation. Now is the moment to push for such implementation. There are two directions such a course could take. The first was attempted at the University of Missouri–Columbia School of Law in the late 1980s and 1990s, and the second began in 2010 at Hamline School of Law, located in Saint Paul, Minnesota. Both are “Island” schools in Moffitt’s terminology, offering robust clinical and academic opportunities in ADR.¹¹⁶ Both schools have experimented with slightly different versions of this sort of first-year course.¹¹⁷

An early and innovative model was pioneered at Missouri-Columbia in 1985. The so-called Missouri Plan called for ADR concepts and training to be thoroughly integrated into first-year courses.¹¹⁸ For example, contracts students practiced model contract negotiations.¹¹⁹ Property students were required to interview and counsel clients on an estate matter.¹²⁰ In criminal law, students acted as the prosecutor or defense counsel to negotiate a plea bargain based on the facts and legal circumstances.¹²¹ Professor Leonard Riskin developed this Plan, and wrote about its implementation in a 1989 article:

We teach dispute resolution in all first-year courses, so we can show students the applicability of a dispute resolution perspective in virtually any area of law . . . We decided that the various dispute resolution activities should be conducted primarily by the professors assigned to these first-year

116 Both are consistently ranked in the top ten dispute resolution programs in the United States by *U.S. News and World Report*. See Moffitt, *supra* note 42.

117 A more limited version of this idea is to integrate ADR into the civil procedure course and “break down the artificial walls” between the two areas. Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 722 (2005). Our concern with this proposal, compared to the Missouri and Hamline models, is that the already stuffed Civil Procedure curricula seem likely to crowd-out any focus on ADR. The result of integration might turn into a standard Civil Procedure course with a few days of ADR basics tacked on, leaving no time for either depth or creative, problem-solving role-plays.

118 Leonard L. Riskin, *Disseminating the Missouri Plan to Integrate Dispute Resolution into Standard Law School Courses: A Report on a Collaboration with Six Law Schools*, 50 FLA. L. REV. 589, 592–93 (1998).

119 *Id.* at 592.

120 *Id.* at 593.

121 *Id.*

courses, rather than by specialists, because we wanted our entire first-year faculty to become familiar with dispute resolution knowledge, skills, and perspectives.¹²²

Through a two-year grant from the Fund for the Improvement of Post-Secondary Education (FIPSE) that lasted from 1995–1997, Missouri partnered with six other law schools—DePaul, Hamline, Ohio State, Inter-American, Tulane, and the University of Washington—to see whether they could “export” the so-called Missouri Plan. Riskin, who until 2006 served on the faculty at Missouri-Columbia, led the effort and created customized videos,¹²³ textbooks,¹²⁴ and instructor’s manuals.¹²⁵ The project was innovative but faced challenges. Riskin admitted that “the adapting schools showed varying levels of preparation for and commitment to this project.”¹²⁶ Each presented unique circumstances, budgets, and faculty resources. Importantly, neither Missouri nor the six schools could sustain faculty support for the project once the grant money expired. Riskin himself left the University in 2006, and the full-integration scheme was no longer sustainable.¹²⁷ Nevertheless, Missouri did continue in another direction. The Law School began requiring a one-semester course for first-year students entitled “Lawyering: Problem Solving and Dispute Resolution.”¹²⁸ This course added to the traditionally sacrosanct

122 *Id.* at 596.

123 Videotape: Dispute Resolution and Lawyers Videotape Series (Leonard L. Riskin, Deborah J. Doxsee & Catherine L. Holmes 1991) (on file with the New York University School of Law Library).

124 LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* (1987 & Supp. 1993).

125 LEONARD L. RISKIN & JAMES E. WESTBROOK, *INSTRUCTOR’S MANUAL WITH SIMULATION AND PROBLEM MATERIALS TO ACCOMPANY DISPUTE RESOLUTION AND LAWYERS* (West Publishing Company ed., 1987).

126 Riskin, *supra* note 118, at 598.

127 For an analysis of the Missouri experiment, see, for example, Ronald M. Pipkin, *Teaching Dispute Resolution in the First Year of Law School: An Evaluation of the Program at the University of Missouri–Columbia*, 50 FLA. L. REV. 609 (1998); Lea B. Vaughn, *Integrating Alternative Dispute Resolution (ADR) into the Curriculum at the University of Washington School of Law: A Report and Reflections*, 50 FLA. L. REV. 679 (1998).

128 “This course is designed to provide students an introduction to critical lawyering skills; to give students an overview of the alternative processes that a lawyer can employ to resolve a client’s problem; and to offer students an understanding of the lawyer’s role as a problem solver. It includes an introduction to Interviewing, Counseling, Negotiation, Mediation, Arbitration, mixed dispute resolution processes and ways to choose or build a dispute resolution

first-year curriculum, broadening the conceptions of justice and problem-solving that students confront.

In 2010, Hamline University School of Law began to require a similarly innovative one-semester course entitled “Practice, Problem-Solving, and Professionalism,” or “P3” as students refer to it, in the first year curriculum.¹²⁹ As the course descriptions show, the Hamline course is substantively similar to the required first-year course currently in place at Missouri. A crucial difference, however, is in the branding. Three professors leading this course—Bobbi McAdoo, Sharon Press, and Chelsea Griffin—believe that the title “dispute resolution” is toxic, “contributing to the mindset that ADR is different (read: less important) than real lawyering work.”¹³⁰ Hamline rejects the Missouri model of the 1990s for the same reasons that Missouri itself eventually rejected it:

First, we believe that model is viable only for law schools with someone on the faculty as singularly focused as Riskin, and with grant money available to implement the model. Second, the pedagogies of using simulations and even “adventure learning”¹³¹ appropriate to a problem-solving course are not a good fit for most doctrinal professors. Third, the amount of coordination among and between very

process.” *Academics*, UNIVERSITY OF MISSOURI SCHOOL OF LAW, <http://law.missouri.edu/academics/curriculum.shtml#5095> (last revised Dec. 3, 2012).

129 “Lawyers assume many leadership roles as professionals in today’s society, all of them grounded in problem-solving: advocate, counselor, negotiator, transactional architect, and many others. This course will foster an understanding of the lawyer’s role as a problem-solving professional and provide an overview of the range of dispute resolution processes lawyers use to resolve client problems, such as negotiation, mediation and arbitration. Law students will be introduced to the key skills of effective communication and negotiation; and will explore the breadth of career possibilities available for lawyers. Student learning will be enriched throughout the course by a variety of experiential strategies to promote practical skill development.” *First Year Course Descriptions*, HAMLINE SCHOOL OF LAW, http://law.hamline.edu/course_descriptions.html (last visited Dec. 18, 2012).

130 McAdoo, *supra* note 29, at 43.

131 Adventure learning emerged as a response to a perceived over-reliance on fictional in-class simulations. Adventure-style assignments force students to utilize negotiation skills in real-world settings, reporting back to the class in the form of papers or presentations. See generally Sharon Press, Noam Ebner & Lynn P. Cohen, *Assessing the Adventure*, ASSESSING OUR STUDENTS, ASSESSING OURSELVES (2012).

independent law faculty members required by a fully integrated model is simply too overwhelming.¹³²

Despite these critiques of the Missouri Plan, McAdoo does believe that “First-year students in particular need a framework for the rest of their law school education that can also serve them well in practice.” Problem-solving, she argues, can serve as that framework.¹³³

The P3 course is still being developed, with amendments each semester based on student and faculty feedback. As it currently stands, the course meets three times per week and is co-taught by a tenured or tenure-track professor and an alum adjunct professor. The intent was to create “a small class feel by dividing the class into two groups: one led by the professor, and one by the adjunct.”¹³⁴ The syllabus includes a variety of topics in pre-litigation advocacy and dispute resolution models.¹³⁵ Negotiation, mediation, arbitration, and process choice generally are all introduced through articles, book chapters and role-plays throughout the semester. Students engage in “adventure learning,”¹³⁶ which “take[s] place outside traditional classroom settings, involve[s] some element of real or perceived risk, and involve[s] the whole person (not just the cognitive).”¹³⁷ There is also a significant alumni-practitioner component to the course. Alumni participate in role-plays, discussions, and activities with students. As stated, sections are co-taught by an alum who “[provides] practice perspective” to issues discussed.¹³⁸

The course emphasizes very real-world examples of how lawyers approach problems. Many of the negotiation assignments in the first iterations of the course were based on the collapse of a Minnesota bridge in 2007—an event with which many of the Minnesotan students were familiar.¹³⁹ The situation highlights the many different

132 McAdoo, *supra* note 29, at 43 (internal citations omitted).

133 *Id.* at 50.

134 *Id.* at 60.

135 *Id.* at 68.

136 Press, Ebner & Cohen, *supra* note 131.

137 Melissa Manwaring, Bobbi McAdoo & Sandra Cheldelin, *Orientation and Disorientation: Two Approaches to Designing “Authentic” Negotiation Learning Activities*, 31 *HAMLIN J. PUB. L. & POL’Y* 483, 485 (2009–2010).

138 McAdoo, *supra* note 29, at 60.

139 The bridge collapsed on August 1, 2007, during rush hour. Matthew L. Wald & Monica Davey, *States Advised to Check for a Bridge Design Flaw*, *N.Y. TIMES*, Jan. 16, 2008, at A17, available at http://www.nytimes.com/2008/01/16/washington/16bridge.html?_r=0.

roles that lawyers play, including: counseling clients, negotiating with opposing counsel and local officials, working on legislation, serving as special masters, and, of course, litigation. Hamline alumni—who were particularly involved in this bridge case—allow students to hear directly from the attorneys who worked in these various capacities.

What separates the Hamline model of this course from Missouri is, again, branding. The course is “sold” to students not as “alternative” dispute resolution or dispute resolution, but rather as an introduction to law practice and problem solving. The substance—with the exception of the heavy alumni involvement—emphasizes the same fundamentals of an upper level general ADR introductory course or the current Missouri first-year course. The difference is in marketing and philosophy. The Hamline faculty argue that “separate [introductory] ‘ADR’ courses may have contributed to the undesirable impression that the lawyer who practices the skills taught in ADR courses is doing something other than the work of a ‘real lawyer’ . . . [which] is false.”¹⁴⁰

Certainly a one- or two-credit introductory course in dispute resolution for first-year students will not provide the skills or depth of advanced clinics and coursework. But it would provide a theoretical foundation, within the exalted first year of law school, for the wider range of dispute resolution processes with which twenty-first-century lawyers engage. It is difficult to know the importance of the name or marketing of the course—whether it would be billed as a course in dispute resolution or a course on legal practice and counseling. That decision could be left to individual institutions. The bigger picture is that such a first-year course is surely a step in the right direction, particularly if added in conjunction with the “Islandizing” suggested in Section IV. From their first months in law school, students will understand the broad array of activities that lawyers confront, particularly process choice and counseling. Students will also engage in role-plays, solving detailed real-world problems with clients and adversaries. *Beginning* law school in this way (rather than tacking on an optional course in the second or third year) gives students an extraordinarily different framing for their professional lives. Additionally, for students who become excited about the field of dispute resolution, learning early on about the subject gives them much longer to explore related courses, clinics, competitions, and extracur-

140 McAdoo, *supra* note 29, at 90.

ricular activities. In this way, problem solving would be merged into the law school mainland.

VI. Conclusion: Finding the Silver Lining

The Mediation Clinic training at Cardozo begins with John F. Kennedy's famous observation: "The Chinese use two brush strokes to write the word 'crisis.' One brush stroke stands for danger, the other for opportunity. In a crisis, be aware of the danger—but recognize the opportunity."¹⁴¹ That is a valuable reminder in the context of heated negotiations and mediations. Warring parties are in turmoil, but by virtue of their sitting across the table from one another, they have the opportunity to address their dispute in a constructive manner. The same lesson applies to the current crisis in legal education. The Great Recession has revealed dangerous cracks in the system that many academic and industry leaders have long recognized.¹⁴² This is an opportunity to address them head on, forging a stronger system of legal education than existed before the recession began.

Most academics probably agree on a number of the problems, as well as some solutions to the current crisis in legal education. Three of the most frequently discussed (though largely unimplemented) reforms might include: 1) a decrease in resources allocated to redundant or overly-specialized law journals;¹⁴³ 2) an increase in the resources allocated to clinics to supplement doctrinal courses;¹⁴⁴ 3) and a decrease in the size of entering law school classes, both to

141 WIT AND WISDOM OF THE AMERICAN PRESIDENTS: A BOOK OF QUOTATIONS 65 (Joslyn Pine, Ed., Courier Dover Publications 2000).

142 As noted in Part II, the legal education reform movement—which has roughly coincided with the period since the Pound Conference—has elicited fierce critiques of the Langdellian model. The 1992 MacCrate Report and 2007 Carnegie Report got the attention of many academics. But there is broad agreement that much more work still needs to be done. *See generally*, Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109 (2001).

143 *See* Richard A. Posner, *Against the Law Reviews*, LEGAL AFFAIRS, Nov.–Dec. 2004, available at http://www.legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp; but *see* Brian Farkas, "Fixing Law Review Critics," INSIDE HIGHER ED (Nov. 30, 2012, 3:00 AM), <http://www.insidehighered.com/views/2012/11/30/student-run-law-reviews-have-much-contribute-legal-education-essay>.

144 *See, e.g.*, Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1 (2000).

improve student-faculty ratios and to ease the flood into the job market.¹⁴⁵

We suggest that another area ripe for reimagining is the place of ADR in the curriculum.¹⁴⁶ A familiarity with the broad range of dispute resolution processes can no longer be cast aside as “soft” or “secondary”—or optional. Lawyers *must* enter the profession ready to engage with negotiations, mediations, and arbitrations. Litigators will likely encounter all three broad areas well before setting foot in a traditional courtroom. Law school curricula need to reflect that reality. Looking at the current curricular landscape, we argue that this can be achieved in two ways.

First, per Part IV, schools should closely examine and replicate the work of the “Island” schools. This means a commitment to advanced coursework in ADR subjects. And it means offering clinics in mediation and arbitration. Mediation clinics in particular have enormous potential to expose students to a tremendous range of conflicts that future clients will face. Such clinics offer invaluable experience in developing interpersonal skills, interviewing, counseling, and negotiation—to say nothing of the specific skill of mediating. Clinics in Representation in Mediation are also a promising direction, insofar as the student learns representation in mediation but also learns to appreciate the mediator’s role and potential contribution.¹⁴⁷

Second, law schools should boldly rethink the seminal first-year curriculum by inserting a course on dispute resolution and problem solving. As Leonard Riskin noted in his reflections on the imple-

145 See Steven I. Friedland, *Outcomes and the Ownership Conception of Law School Courses*, 38 WM. MITCHELL L. REV. 947 (2012), available at <http://www.wmitchell.edu/lawreview/Volume38/documents/2.Friedland.pdf>.

146 One promising resource is available to educators by the Legal Education, ADR, and Practical Problem-Solving (LEAPS) Project. This endeavor of the ABA Section of Dispute Resolution’s Law Schools Committee was begun in 2010 to address the range of issues raised in this paper. Educators wanting new teaching techniques, coaching from ADR faculty veterans, curriculum models, or subject area resources can now go to the website maintained by the University of Oregon School of Law for a cornucopia of material. University of Oregon, LEGAL EDUCATION, ADR AND PRACTICAL PROBLEM SOLVING (LEAPS) PROJECT, <http://leaps.uoregon.edu/> (last visited July 13, 2013).

147 Professor David White teaches a Representation in Mediation Practicum through Seton Hall School of Law, as well as a course on Representation in Mediation at Cardozo. David M. White, SETON HALL UNIVERSITY SCHOOL OF LAW, http://law.shu.edu/Faculty/fulltime_faculty/David-White.cfm (last visited July 23, 2012).

mentation of the Missouri Plan, “[d]uring the first year, students are highly impressionable and form their visions of what it means to be a lawyer.”¹⁴⁸ Integrating bits and pieces of ADR into the traditional doctrinal courses, as Missouri attempted in the 1980s and 1990s, is certainly one possible path. However, as their 1995–1997 experiment with six other law schools revealed, this sort of change is arduous, since it requires both a rethinking of all syllabi and the agreement of all instructors. Moreover, Missouri had a large grant that allowed it to pay doctrinal faculty to develop appropriate simulations in their courses.¹⁴⁹ A more practicable solution is to add an additional first-year course on dispute resolution processes and skills by reducing the credits allocated to the doctrinal courses. This model has been successfully implemented, most recently at Hamline University School of Law. We believe it would bolster students’ foundational understanding of lawyers as problem solvers, giving them comfort with the broad spectrum of dispute resolution processes and techniques. Undoubtedly, adding such a course to the sacrosanct first-year curriculum would be a large change, even for most of the “Island” schools. But it would be a change for the better.¹⁵⁰

Together, these two moves would produce more practice-ready young lawyers. We would be using the crisis of the Recession as an opportunity to fix what’s broken. Students would benefit, legal employers would benefit, and law schools would benefit. In dispute resolution, we call that a win-win(-win).

148 Riskin, *supra* note 118, at 596.

149 In addition to funding Riskin and Missouri, the grant also gave \$10,000 to each of the six collaborating schools. According to Professor Bobbi McAdoo, who directed the LL.M. program and taught at Missouri from 1998–2000, faculty interest waned once the funding dissipated. In short, the full integration solution was difficult to implement and even more difficult to sustain. McAdoo, *supra* note 29, at 43 n.14.

150 A third, interrelated goal will be to minimize the “tattoo” effect described by Reynolds, wherein ADR is seen as “weak” or “anti-law.” See Reynolds, *supra* note 65. This tattoo would be organically removed as practitioners begin to see the benefits of graduates with better problem-solving and interpersonal skills.

The Rhetoric of Experiential Legal Education: Within the Context of Big Context

*Steven I. Friedland**

I. Introduction

For more than a century, traditional legal education has relied on the appellate case opinion as the primary vehicle by which students are taught critical thinking in core courses. The critical thinking focus, often called “thinking like a lawyer,” and the appellate case opinion became the familiar, deeply embedded rails on which the legal education train still rides. The emphasis on appellate case analysis became so strong, however, that other contexts were minimized, especially in the core curriculum.¹ The marginalized alternative learning structures included experiential modalities and the context of lawyering relationships—between lawyers and clients, witnesses, judges, and the larger community.

Since the millennium, however, several seismic shifts have occurred. These shifts have rattled the primacy of appellate case report analysis. Globalization, advancing technologies, recession, and unprecedented interconnectivity have challenged many well-established features of the world in which we live, including legal education. The rising cost of a legal education, coupled with significant decreases in the numbers of students applying to law school and obtaining full-time legal employment, have led to rethinking many traditional practices, from admissions, to career services, to the sub-

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1 The first year core curriculum often includes Torts, Contracts, Criminal Law, Property Law, and Civil Procedure. Courses required for upper level often include Evidence, Constitutional Law, Business Associations, and Criminal Procedure. Unfortunately, such alternative learning platforms have been cabined in traditional legal education. Instead of being given a position of primacy, the alternatives arrive later in the process, well after intensive drilling with appellate case reports and a laser-like focus on legal analysis.

stantive curriculum in-between.² These challenges have produced a clarion call for a legal education that connects more effectively to law practice.³

Despite calls to revisit the cognitive focus of legal education by such respected sources as the Carnegie Foundation,⁴ meaningful institutional alternatives have been difficult to implement.⁵ There are many reasons for this inertia. As one commentator has noted, “law schools, like most established enterprises, change only when they have to.”⁶ For more than a century, the deep entrenchment of Langdellian⁷ educational orthodoxy has included the cornerstones of casebooks⁸ and the Socratic method.⁹ Also, the reliance on casebooks and coverage-of-material objectives provide continuing benefits,¹⁰

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- 2 For example, who should prepare students for the bar examination? It was traditionally thought that teaching students for law practice was the focus, but with high costs and high loans, it seems students want to be assured that bar passage rates are high at a law school and are transferring more of the responsibility to the school, than that which occurs upon graduation.
 - 3 See e.g., WILLIAM SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).
 - 4 *Id.* at 191 (discussing “An Integrative Strategy for Legal Education”).
 - 5 But see Katherine Mangan, *Law Schools Revamp Their Curricula to Teach Practical Skills*, THE CHRONICLE OF HIGHER EDUC. (Feb. 27, 2011), <http://chronicle.com/article/Law-Schools-Revamp-Their/126512/>); *Washington and Lee’s New Third Year Reform: Leading the Way in Legal Education Reform*, WASH. & LEE UNIV. SCH. OF LAW, <http://law.wlu.edu/thirdyear/> (last visited July 3, 2013) (describing Washington & Lee Law School, which modified its third year curriculum to promote the transition to the practice of law by requiring a clinical experience for most of the third year of law school).
 - 6 Victor Fleischer, *The Shift Toward Law School Specialization*, N.Y. TIMES DEALBOOK (Oct. 25, 2012, 12:22 PM), <http://dealbook.nytimes.com/2012/10/25/the-shift-toward-law-school-specialization/>.
 - 7 See C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* v–vii (1871).
 - 8 The term “casebooks” has become the term denoting the primary course materials for legal education classes, indicating how deeply-rooted the use of cases is as a teaching and learning tool.
 - 9 It is perhaps inertia as well that is responsible for a lack of substantial change, as is the notion that what served the teachers should serve the students as well. One look at the classic law school film, “The Paper Chase,” however, shows that not even legal education has exactly stood still in time.
 - 10 Further, the alignment between the coverage of substantive material and use of appellate case report analysis arguably would be diluted by alternative methodologies.

such as academic versatility.¹¹

While change in legal education might be inevitable due to increasing economic pressures, a gateway obstruction remains—the descriptive rhetoric and narrative of core legal education. The prevailing traditional discourse, such as “rigor,” “coverage” of substantive material, “theoretical analysis,” and the “hard” skill of “thinking like a lawyer,” helps to create a dichotomy of traditional analytical skills and alternative “soft” “relationship” skills.¹² The discourse helped relegate the latter skills to the periphery of the educational process, such as in upper level electives.¹³

If core curriculum is to undergo a meaningful transformation, it will be necessary to modify existing rhetoric, creating instead a new mosaic without the historical baggage. This mosaic should encompass a narrative referencing lawyering relationships and experiential components.

This article offers such a narrative, labeled “big context.” Big context learning is meant to include experiential or active learning modalities such as clinical live-client, externships, field placements, simulation, and even role-playing exercises, envisioning a classroom with greater flexibility and utility.¹⁴ Big context references a variety of lawyering relationships with clients, judges, witnesses, and the larger community, starting on the first day of law school with core courses.¹⁵

11 This idea is reinforced by the lack of a well-defined context to most appellate case reports. The analytical appellate case review also has the advantage of being described in academic terms, as compared to practice-oriented study, which can seem like a step away from academia and a return to apprenticeship. The protocol of knowledge first, then experience and implementation, also is embraced by the traditional form.

12 See generally SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, A.B.A., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 236–38 (1992) (distinguishing between different types of skills). Legal analysis generally is the essential focus of required core courses, and it is considered a “hard” skill, while lawyering relationship skills, such as interviewing, counseling, and negotiation, are taught in upper level electives and are often viewed as “soft” skills. *Id.*

13 The rhetoric associated with other skills like interviewing and counseling offered in experiential upper level elective courses were often considered “practical” and not as academic or theoretical as the array of cognitive thinking skills.

14 The big context would help prepare students for positions outside of traditional law practice, in such areas as government, business, and non-profits.

15 If this new rhetoric is adopted, the Langdellian orthodoxy may eventually turn out to be a “collapsing dominant” (i.e., a transitory aesthetic). See gener-

The big context narrative offers multiple advantages. Rhetorically, it avoids the traditional lexicon that divides academic from trade learning. It provides a more realistic backdrop for the educational process, promotes the qualitative learning that occurs, and offers an easier way to incorporate and measure formative outcomes. The big context still facilitates cognitive development and “thinking like a lawyer,” challenging students with rigor—just not with such an archetypal emphasis.

There are five parts to this article. The Introduction is followed by Section II, a Background section that describes rhetoric, the narrative form, and big context. Section III then outlines the rhetoric and narrative of a big context legal education. Section IV applies the big context conception to a core Evidence course. Section V concludes the article.

II. Background

A. Legal Education in Context

Traditional legal education can be traced back to the 1870s with the adoption of the casebook, particularly Christopher Columbus Langdell’s *Contracts* book in 1871.¹⁶ The appellate casebook facilitated learning law in an entirely academic classroom setting, accommodating a large number of students directed to critical thinking and analysis. The appellate case report context was many steps removed from the prior individualized apprenticeship approach and had a variety of virtues. The use of appellate case reports allowed the analysis to be freed from any one context, whether it was a trial, an appeal, raw facts, or lawyering strategies and tactics. Instead, a professor had the liberty to focus on the judicial opinion’s rationale, selective facts, how the case compared to other cases, or simply the legal issue or outcome. The analysis could be framed in terms of law and how law was constructed or modified, rather than lawyering or its key relationships.

Another advantage was that appellate case reports also could be grouped by substantive law areas, with labels such as *Contracts*,

ally GEORGE W. S. TROW, *WITHIN THE CONTEXT OF NO CONTEXT* 1–41 (1997).

16 See LANGDELL, *supra* note 7.

Torts, Evidence, Civil Procedure, Property, and Constitutional Law.¹⁷ While these demarcations were to some extent artificial, like lines dividing nations, they permitted legal training to resemble other academic programs.

The traditional canvas of edited appellate cases became the staple of the first year of law school and, if only by virtue of primacy, also became the template for teaching its most basic and important lawyering skill: cognitive thinking.¹⁸ Even though the message concerning priorities generally was imparted only implicitly,¹⁹ students became very comfortable with analyzing cases through a methodology loosely described as the “Socratic method.”²⁰ This dialogical method has been employed in varying forms in legal education, in classes of widely disparate sizes.²¹ Alternative methods were offered in a meaningful way only later in the students’ law school careers and then usually as an elective. Experiential learning in law school was one such alternative platform that generally was cabined in certain

17 See LANGDELL, *supra* note 7. For an example of a more modern version of the casebook, see WEAVER, BURKOFF, HANCOCK, HOEFFEL, SINGER & FRIEDLAND, *CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES* (2013). These subjects have formed part of the core of legal education for many decades, reinforced by a Multistate bar examination that tests all of these subjects with the exception of Civil Procedure. That subject, however, will be added to the Multistate Exam in 2015. Debra Cassens Weiss, *Gulp! Civil procedure will be added to the Multistate Bar Exam* (Mar. 8, 2013), http://www.abajournal.com/news/article/gulp_civil_procedure_will_be_added_to_multistate_bar_exam/.

18 See ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 2* (2007).

19 Alternatively, the message could have become so ingrained precisely because it was communicated implicitly as the subject of the prevailing practice of the legal education culture.

20 See, e.g., Max Maxwell, *Introduction to the Socratic Method and its Effect on Critical Thinking*, SOCRATIC METHOD RESEARCH PORTAL, <http://www.socratic-method.net/> (last visited July 27, 2013).

21 Many times, students did not become comfortable with the Socratic method. A law professor, looking back on his law school days, has remarked: “I truly enjoyed most aspects of my first year of law school, especially the intellectual challenge and the camaraderie with my classmates. But viewing my law school classes through a teacher’s eyes, I could not help but question the wisdom of certain first-year law school practices. The Socratic method, for example, seemed calculated to produce student anxiety rather than to teach law.” Ron M. Aizen, *Four Ways to Better 1L Assessments*, 54 DUKE L.J. 765, 765–66 (2004).

courses, such as externships, clinics, and drafting classes,²² and was optional for students, who instead could choose to receive all of their training in the practice of law after they graduated from law school.

The longevity of appellate case report analysis as the central vehicle for law school learning can be attributed in part to its versatile context, or really the lack of a narrowing context altogether.²³ While the immediate context of these judicial opinions is appellate, the written opinion is the outcome of that context and serves as a springboard for many different uses. An instructor teaching from an appellate opinion need not mention the appellate nature of the case, engage in any discussion of procedure, or refer to its salient facts. Instead, the instructor could use the opinion solely for its disembodied rule, rationale, or outcome. This versatility allowed students—young and old, in Miami and Anchorage, and all places in-between—to study from identical cases and books and get equivalent educations. The appellate opinion’s versatility further allowed instructors to teach in their own distinctive ways about the same cases, permitting great deviations in how cases were taught, framing interpretation as a craft and not a science.²⁴

Yet, the versatility of the case report is so great precisely because it is disconnected from real world contexts. Precisely because a case report can be outfitted for duty so quickly in so many contexts, it really rests firmly in none of them. Thus, while an entire class of 100 or

22 See generally, A.B.A., *A SURVEY OF LAW SCHOOL CURRICULA: 2002–2010* (Catherine Carpenter ed., 2012). See also, E. GORDON GEE & DONALD W. JACKSON, *COUNCIL ON LEGAL EDUC. FOR PROF'L RESPONSIBILITY, FOLLOWING THE LEADER?: THE UNEXAMINED CONSENSUS IN LAW SCHOOL CURRICULA* (1975). Existing experiential learning courses include a contracts or wills drafting class, a tax, immigration or legal aid clinic, a class on interviewing, counseling and negotiation, and the family of trial advocacy and pre-trial practice courses.

23 This lack of contextual limitation has allowed legal education to take on the imprimatur of “a good background to have,” regardless of whether a student intended to practice law. In a broad sense, then, legal education became for some people a graduate education of liberal arts in the law.

24 For example, instructors could differ in depth, breadth, and emphasis in their approach to the appellate cases, spending as much or as little time on a case as they saw fit. Some professors will adjust their approaches to a case based on its location and detail in a casebook; other cases are taught because they have become part of the pantheon of “greatest hits,” even to the extent as their location in the course. Some cases are simply located at the beginning, such as *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803) (in Constitutional Law) and *Pierson v. Post*, 3 Cai. R. 175, 2 Am. Dec. 264 (1805) (in Property Law).

more students can be readily taught from a single edited casebook, the enriching, complex, and nuanced experiential contexts students will face upon graduation are importunately omitted.²⁵

The edited appellate case report is even more sanitized, with issues and analysis being omitted at the author's discretion. This further obscures the opinion's connection to reality and creates more of a sound bite than a full commentary; students are handed the advocacy positions, especially if there is a concurrence and a dissent. These positions often are a far cry from the trial arguments, or the arguments of a particular counsel in the case.²⁶

B. Calls for Change

In recent decades, there have been many calls for change in traditional legal education from a variety of sources, especially relating to the emphasis on appellate case report analysis as the major vehicle for teaching cognitive thinking skills. The calls likely have been prompted by the economy, pedagogy, and adaptive ideas for the future.

With the 2008 recession, the typical reliance on practicing attorneys to provide practical training for new lawyers has become less feasible. Noted one commentator: “[I]t is harder for law firms to devote nonbillable time to training entry-level associates. Law grad-

25 The use of appellate cases parallels the contextual transformation wrought by television, which created contexts at whim, and brought the transformation to people who did not have to leave their own living rooms. As George W. S. Trow observed in his seminal book, *Within the Context of No Context*: “The work of television is to establish false contexts and to chronicle the unraveling of existing contexts; finally to establish the context of no-context and to chronicle it.” Trow, *supra* note 15, at 82. Trow argued that this refiguring allowed television to establish a new context: “As television goes into panic, the truth of what it is will rise to the surface. CBS and You. It makes it clear. Nothing else exists. Just CBS and you. No city. No state. All those places where the series take place: It’s *Boulder!* It’s *Chicago!* It’s *Indianapolis: Hoosiers!* All those places are lies.” *Id.* at 84. Trow claimed that “television will re-form around the idea that television itself is a context to which television will grant an access.” *Id.* at 82–83. In effect, Trow described the conflation of culture, aesthetic, and rhetoric as significantly influencing our world view. This conceptualization also can be extended to traditional appellate case report analysis, which provides an appellate context that is highly versatile.

26 Also, in most law textbooks, cases usually have been highly edited by the casebook authors to fit the subject matter and page limitations.

uates are expected to arrive knowing more than how to just ‘think like a lawyer.’”²⁷

The American Bar Association (ABA), which holds the responsibility for accrediting and reaccrediting law schools, offers standards and guidelines for schools. Recently, the ABA has undertaken another study of law schools’ curriculum, and is considering modifying existing standards. In particular, Proposed Standard 302 transforms the section on “Curriculum” into one involving “Outcomes,” a potentially massive rethinking of what law schools administer²⁸ and a shift toward a multiplicity of skills, not just the singular one of critical thinking.²⁹

In the past two decades, there have been several reports from esteemed sources that have advocated change in the delivery of legal education. In the *Best Practices for Legal Education*,³⁰ the authors called for sweeping changes through the adoption of a series of uniform practices to better align the educational process with outcomes in law practice. In the Carnegie Report of 2007,³¹ *Educating Lawyers*, the authors decried the unduly narrow context of traditional legal education, recognizing the importance of critical legal analysis, but not to the exclusion or minimization of other valuable contexts.

A variety of professors also have sounded the call for changing legal education, some in significant ways. Law school deans have directed curriculum reviews and the construction of new classes, and individual professors have created innovative and cutting-edge courses and pedagogies.³² Online courses also were developed so some classes and programs could be offered completely on the Web.

Law schools have adopted institutional changes, perhaps none so dramatic as the City University of New York (CUNY) School of

27 Fleischer, *supra* note 6.

28 For the ABA-proposed changes to law school standards, see Section of Legal Education and Admissions to the Bar, A.B.A., *Draft for July Meeting*, http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_legal_education_clean_copy.authcheckdam.pdf (last visited July 12, 2013).

29 Proposed Standard 303 confirms this conceptualization where it states that “law school shall offer a curriculum that is designed to produce graduates who have attained competency in the learning outcomes identified in Standard 302[.]” *Id.*

30 See STUCKEY ET AL., *supra* note 18, at 1–5.

31 See SULLIVAN ET AL., *supra* note 3, at 186–92.

32 See, e.g., Aizen, *supra* note 21.

Law, which conceived of itself as integrating theory and practice in its course offerings³³ and dedicated itself to law in the public interest.³⁴ This experiment is still a work-in-progress. Northeastern University School of Law carved out a niche with its co-op program, where all students participate in field placements and hold several law jobs by the time they graduate.³⁵ Northeastern has four quarters of co-op integrated into its core curriculum, a significant deviation from traditional in-class education. Recently, Washington & Lee Law School overhauled its third-year curriculum, requiring all students to participate in externships for most of the third year of law school.³⁶

C. The Roles of Rhetoric and Narrative Generally

In this article, the term rhetoric refers to the language used to communicate to others. Narrative, by contrast, refers here to how rhetoric is organized and arranged.

Rhetoric, while descriptive, affects the substantive content it describes as well. This interplay between rhetoric and substance is particularly apparent in the way core legal education courses are delivered. The labels associated with experiential education and the Socratic method, for example, carry numerous connotations, implicating the importance of the type of learning that occurs. In essence, rhetoric can serve to contract or expand the substantive content being discussed.

Rhetoric extends far beyond the “plain meaning”³⁷ of individual words on an isolated basis to create, with other language, a story revealing information about the speaker’s intentionality, values, and

33 The description of the Law School’s curriculum states: “The Law School curriculum combines traditional substantive law courses (like contracts, torts, civil procedure and criminal law) with lawyering skills throughout the three years of legal education.” *Curriculum and Course Descriptions*, CUNY SCHOOL OF LAW, <http://www.law.cuny.edu/academics/courses.html> (last visited July 27, 2013).

34 There have been pressures—such as bar passage rates—on schools with innovative conceptualizations that likely cause them to align with a more traditional delivery.

35 *See Co-op*, NORTHEASTERN UNIV. SCH. OF L. <http://www.northeastern.edu/law/experience/co-op/index.html> (last visited July 18, 2013).

36 *Washington and Lee’s New Third Year Reform*, *supra* note 5.

37 In some ways, there is no “plain meaning” of words, but rather such a meaning is what is readily elicited from interpretation involving a combination of rhetoric, context, and localized factors. *See generally* Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the*

assumptions.³⁸ Rhetoric as a story has a visual value as well as an emotive one, and does not reside simply in the descriptive domain.

Using rhetoric to tell a story is but one form of the narrative. The story becomes a significant rhetorical tool.³⁹ Storytelling used to occur as oral history, but today it is a broader representative prism, including information about the teller, the listeners, and their relationship.⁴⁰ How the listener is listening to the story and how the listener responds to it can provide tell-tale clues about the respect, rapport, and relationship between the parties. For example, Professor Pat Cain describes her theory of learning from the story telling of others:

My theory is that if you can find some slim reed of commonality with the other, you can begin to build understanding. But to find the slim reed, you cannot focus on yourself when listening to the story of the other. Instead, you must so identify with the other that you feel the story being told.⁴¹

An even more expansive perspective envisions the narrative tool as describing a storyteller's beliefs about the world as she knows it. The premise is that it is not a question of whether the world needs interpretation, but how.⁴² In effect, rhetoric and language serve as metaphors of the real world, both describing reality and raising normative issues. Responses to normative questions are not uniform, but instead are socially contingent. As the social aesthetic and cultures change, language helps to construct reality. "Even basic aspects of social life are neither natural nor inevitable, as they may appear

Obvious, What Goes Without Saying and Other Special Cases, 4 CRITICAL INQUIRY 625 passim (1978).

38 For example, Carol Gilligan observed, "[T]he way people talk about their lives is of significance, [in] that the language they use and the connections they make reveal the world that they see and in which they act." CAROL GILLIGAN, IN A DIFFERENT VOICE 2 (1982).

39 See, e.g., Beryl Blaustone, *Teaching Evidence: Storytelling in the Classroom*, 41 AM. U. L. REV. 453, 453–56 (1992).

40 Thus, story-telling is much more than oral history, but an art form for communication. Today, it is present in songs, painting, and even in non-verbal conduct.

41 Patricia A. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL EDUC. 165, 171 (1988) (emphasis in original).

42 The text is therefore not autonomous, but exists only in the eyes of the reader. See Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993).

to members of that society, but rather are culturally and historically contingent and mutable [P]eople are seldom if ever aware of how completely their world is their own creation.”⁴³

Thus, the narrative form provides a way of connecting not only individuals, but concepts and values as well, providing what has been described as “an interior road map of experience[.]”⁴⁴ Mythology is perhaps the best-known form of narrative, providing larger-than-life stories to offer pragmatic values and a “point of wisdom beyond the conflicts of illusion and truth by which lives can be put back together again.”⁴⁵

The narrative is not a neutral entity, judged objectively from one person, culture, or generation to the next. The narrative can be considered intersubjective, dependent on the experiences, interests, and commitments of both the teller and listeners. The presence of contingencies indicates a need for narrative interpretation. In short, context matters greatly to narratives. A successful narrative in one time or place might not communicate well in other times or places. No matter how timeless the message is considered, the values underlying the message and the storyteller are filtered through non-neutral lenses.⁴⁶

The narrative applies to law as well. Legal rules have a historical narrative—precedent—that creates a thread used to describe the initiation, duration, modification, and even termination of that thread. While rules are a type of text, when placed within a narrative they move from abstraction to fact-based. The end result is that “our understanding of the ultimate concerns we have in relation to law is, finally, subjective.”⁴⁷

Under the umbrella of law, judicial opinions are a specialized narrative form, crafted to communicate with and persuade fellow

43 Janet Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: the Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1087–88 (1991) (“[We all are] . . . eternally proceeding from one state of certainty about the nature of reality to another different, incommensurate state of certainty.”).

44 Bill Moyers, *Introduction to JOSEPH CAMPBELL & BILL MOYERS, THE POWER OF MYTH* xvi (Betty Sue Flowers ed., 1991).

45 *Id.* at xviii–xix (quotation omitted).

46 Steven I. Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL’Y REV. 137, 141 (1995) (citing Paul Campos, *That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text*, 77 MINN. L. REV. 1065 (1993).).

47 David O. Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, 40 J. LEGAL EDUC. 3, 18 (1990).

appellate judges on the same court first, then lawyers and non-lawyers alike. Opinions have crafted and entrenched components, such as procedural history, important facts, rationales, issues, and holdings. While the opinion structure is generally formulaic,⁴⁸ it allows judges to individuate in explaining their reasoning, permitting concurrences and dissenting opinions in addition to one speaking for the majority of the court.

Legal education provides a narrative through its curriculum. The narrative, for example, includes what courses students take, the substantive content of the courses, who they take the courses with, where they sit, and what is useful in those courses in the short and long terms.

A legal education class session certainly falls within this narrative conception as well. A classroom narrative “promotes the production of well-crafted stories that express something fundamental and intuitively true about law . . . [and] insists on the active role of the reader or listener in the understanding of what it all means.”⁴⁹ In a sense, a casebook offers a similar narrative, depending on the cases that are included, the notes chosen, and the questions asked of the reader.

When crafted as a narrative, legal education curricula and course content can be seen as a series of value-oriented choices, not a value-neutral and inevitable academic progression. The narrative contextualizes the sequencing and content of courses. In so doing, the narrative can pave the way for a reordered progression and content, exposing the values leading to the seemingly neutral, formalized, and highly textualized approach.

Core legal education courses are rigorous and focused on critical legal analysis, or “thinking like a lawyer,” with a single summative assessment event, a final examination, serving as the proxy for the student’s performance throughout the semester. This cognitive process connotes problem solving, complexity, nuance, theory, and academic rigor. It assumes a learning process without an explicit scaffolding (meaning a particular beginning, middle, or end) as a guide. The legislative thinking process assumes that learning for all students takes place equally and with similitude from the dialogue about the appellate cases. The assumption extends to the view that this process teaches the entire class, from top to bottom. It assumes

48 For example, in Supreme Court opinions, sections are often denoted by Roman numerals, but there are no subheadings accompanying the numerals.

49 Friedrichs, *supra* note 47, at 18.

that learning the substance of the law means similar things from one core course to another, and that students have the tools with which to judge and adjust their own learning processes.

III. Reframing the Narrative of Legal Education

Education is not the filling of a pail, but the lighting of a fire.

—Anonymous⁵⁰

Recasting core courses within a big context would involve a revised narrative resting on changed assumptions and values. It would augur for greater connections to lawyering relationships and for a wider array of methodologies that assist the student in understanding what lawyers do and how they do it from the very beginning of the legal education program. This recasting of the legal education narrative in substance (meaning its text) and context would involve recasting several long-standing metaphors. One metaphor is the notion of “coverage” of material as a learning process by students.⁵¹ Another metaphor is the use of thinking “like” a lawyer as a skill deserving the overwhelming majority of attention during core courses.

Instead of a narrative focusing on the instructor’s coverage of material, often emphasizing particular cases in the casebook, the reframed narrative is about what the students are achieving. Achievement, in turn, can be measured by deliverables, meaning measurable projects or tasks, feedback generative outcomes (meaning events providing opportunities for feedback), or rubrics, defining different levels of performance. A key part of the reframing will be the notion that the context of lawyering relationships, between lawyer and client, lawyer and witness, lawyer and jury, and lawyer and judge, should shape many aspects of the education.

50 While this quote is often attributed to William Butler Yeats, *see, e.g.*, BRAINYQUOTE <http://www.brainyquote.com/quotes/quotes/w/william-but101244.html> (last visited July 25, 2013), it appears to be a misattribution. *The Mind Is Not a Vessel That Needs Filling, But Wood That Needs Igniting: William Butler Yeats? Plutarch? Socrates? Plato? Apocryphal?*, QUOTE INVESTIGATOR (Mar. 28, 2013), <http://quoteinvestigator.com/2013/03/28/mind-fire/>.

51 Of course, some students mutter under their breaths that they have to “learn the subject matter by themselves,” indicating that the metaphor of coverage worked for the professor but not the students.

A. Specific Rhetorical Features

Using specific rhetorical features transforms the substantive content of the education. Rhetorical features can have significant impacts, even causing classrooms to “flip”—with some in-class subjects moved out of the classroom and vice versa.

1. *Lawyering and Lawyering Relationships*

As compared to the traditional course narrative of being taught to “think like a lawyer,” big context strives to reference actual lawyering, including activities other than appellate advocacy that could be the subject of employment when students graduate. In essence, lawyering is part of the calculus right from the beginning of school, whether it involves clients, writing memoranda, taking depositions of potential witnesses, or arguing to a judge. Consequently, students would be asked to “represent clients,” argue for a plaintiff or defendant, or give advice to a party. This framing places school work more explicitly within the context of lawyering, so that the use of appellate cases is more instrumental than intrinsic—such as persuading a judge or opposing counsel.

As an important corollary, lawyering occurs within a set of relationships and skills. The lawyer-judge relationship is a centerpiece of the traditional narrative, and it is a significant one involving appellate case reports, since judges interpret the law and lawyers advocate to try to persuade judges about what the law means. Other relationships, though, are just as important to case outcomes, such as lawyer-client, lawyer-witness, or lawyer-jury relations. How a lawyer interviews a client, asks questions of a potential witness in a deposition, or gives an opening statement to a jury all matter and are important to successful outcomes.⁵² While not as apparent, it is equally as important for a lawyer to be able to influence co-workers, to collaborate with them, and to exhibit the qualities that would allow for advancement in the profession, such as from associate to partner.⁵³ This idea can be

52 While law students learn about these relationships in summer clerkships, such positions are increasingly more difficult to obtain. Without these summer internship opportunities, nor law schools picking up the slack with government or non-profit externships, it is important to determine how students will obtain the necessary exposure to lawyering.

53 This idea of attorney as influencer is gaining traction and the subject of examination. See, e.g., Roland B. Smith, *The Struggle of Lawyer-Leaders and What They*

seen as a transitioning process, important to a student's ultimate success and described more in the next section. The transitioning skills include managerial ones, which might not be acquired or emphasized within a traditional law school environment.

2. Engagement

Tell me and I forget, show me and I remember, involve me and I understand.

—Ancient proverb⁵⁴

An experiential narrative can be seen as part of a larger mosaic of engaged learning. Engaged learning is a catalyst of the learning process, and occurs with many kinds of learning styles and settings. It has existed within legal education for decades; the Socratic Method is considered one type of engaged approach to education.

The objectives of engagement are several. The goal is not simply to create a new process that is more consonant with the real world, whether it is the world of law practice, business, or some other actual environment,⁵⁵ but to provide a diversity of challenges, promote learning for all students—especially those who learn differently from others—and to augment learning quality overall. While students have different learning preferences,⁵⁶ engagement can occur on all levels, ranging from students, to faculty, to institutions.⁵⁷

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- Need to Know*, NY STATE BAR ASS'N J. 38, 39 (Mar./Apr. 2009) (describing what issues lawyer-leaders face and how to deal with those issues effectively).
- 54 This idea has been applied to legal education before. See, e.g., Judith B. Tracy, *"I See and I Remember; I Do and Understand": Teaching Fundamental Structure Through the Use of Samples*, 21 *TOURO L. REV.* 297, 297 (2005).
- 55 This idea of deliverables is consonant with the ABA's move toward developing a focus on outcomes as part of its concept of good practices.
- 56 These differing learning styles include visual learning, auditory learning, kinesthetic learning, and tactile learning. Kinesthetic has been described as "experiential learning" and tactile as "hands-on," such as building or experimentation. See Joy M. Reid, *The Learning Style Preferences of ESL Students*, 21 *TESOL Q.* 87, 89 (1987).
- 57 There are multiple definitions of engaged learning. Most of these definitions share characteristics, such as active, collaborative learning that is task-oriented. See, e.g., *Definition of Engaged Learning*, U. OF ME. AT PRESQUE ISLE, <http://www.umpi.edu/academics/engagedlearning/definition> (last visited July 3, 2013).

The preference for engaged learning lies in its utility.⁵⁸ As has been noted by one group of commentators, “In recent years, researchers have formed a strong consensus on the importance of engaged learning in schools and classrooms.”⁵⁹ Engagement has dual impacts: on the way learning occurs and on the quality of content-learning.⁶⁰ Thus, engagement can be seen as a learning multiplier, not simply a delivery technique.

The rhetoric of engaged education⁶¹ has existed in educational circles for many years and been utilized in widely disparate educational domains, from grade schools to business and medical schools.⁶² The lexicon of engaged learning⁶³ is employed in these diverse settings because, across the board, it equates to enhanced learning opportunities. These learning opportunities occur within individual classes and outside of the classroom through field study and projects as well.⁶⁴

While engaged learning can be a phrase burdened with multiple meanings, it has often revolved around eight factors.⁶⁵ The

58 See, e.g., BEAU FLY JONES ET AL., *DESIGNING LEARNING AND TECHNOLOGY FOR EDUCATIONAL REFORM* (1994) [hereinafter *DESIGNING LEARNING AND TECHNOLOGY*]; see also BEAU FLY JONES ET AL. *PLUGGING IN: CHOOSING AND USING EDUCATIONAL TECHNOLOGY* (1995) [hereinafter *PLUGGING IN*]; Stephen Bowen, *Engaged Learning: Are we all on the same page*, 7 *PEER REVIEW* 4 (2005).

59 *Meaningful, Engaged Learning*, LEARNING POINT ASSOCIATES, NORTH CENTRAL REGIONAL EDUCATIONAL LABORATORY, <http://www.ncrel.org/sdrs/engaged.htm> (last visited July 17, 2013).

60 See Jennifer M. Brill & Yeonjeong Park, *Facilitating Engaged Learning in the Interaction Age: Taking a Pedagogically-Disciplined Approach to Innovation With Emergent Technologies*, 20 *INT'L J. OF TEACHING & LEARNING IN HIGHER EDUC.* 70, 74–75 (2008) (citations omitted).

61 Defining engaged learning precisely is difficult. Many people “know it when they see it,” but cannot articulate a clearly defined process. Yet, engaged learning is easy to throw around as a principle, noting that it is valuable as an end in and of itself and instrumentally, as a means to an end.

62 For example, N.Y.U. Medical School moved to promote engaged learning by adding to its program an opportunity for students to have interaction with actual patients during the first week of school. See Anemona Hartocollis, *In Medical School Shift, Seeing Patients on Day*, *N.Y. TIMES*, Sept. 3, 2010, at A15.

63 See Brill & Park, *supra* note 60, at 75. Engaged learning is really a form of active learning. While it can be used as a catch-all category and be loosely defined, it can be cabined as a discrete type of learning set-off from other forms.

64 To succeed, a new model of learning must have the complete support of the faculty and institution, as well as effective implementation.

65 *DESIGNING LEARNING AND TECHNOLOGY*, *supra* note 58; *PLUGGING IN*, *supra* note 58, at 14.

factors serve as measuring devices, indicating the nature and quality of engagement. The multi-factorial conceptualization is a continuum and not categorical. The eight indicators include: vision of learning;⁶⁶ directed, educational tasks;⁶⁷ assessment;⁶⁸ instructional models;⁶⁹ learning context;⁷⁰ grouping;⁷¹ teacher roles;⁷² and student roles.⁷³

The factors⁷⁴ promote self-regulated collaborative outcomes. Self-regulation advances students' autonomy. Student collaboration varies in the size of the teams and nature of the group. A group of researchers in this area have observed: "Collaborative work that is

66 See *Meaningful, Engaged Learning*, *supra* note 59 ("What does engaged learning look like? Successful, engaged learners are responsible for their own learning . . . [T]heir joy of learning leads to a lifelong passion for solving problems, understanding, and taking the next step in their thinking.").

67 See *id.* ("In order to have engaged learning, tasks need to be challenging, authentic, and multidisciplinary. Such tasks are typically complex and involve sustained amounts of time.").

68 See *id.* ("Assessment of engaged learning involves presenting students with an authentic task, project, or investigation, and then observing, interviewing, and examining their presentations and artifacts to assess what they actually know and can do.").

69 See *id.* ("The most powerful models of instruction are interactive. Students teach others most interactively and interact generatively with their teacher and peers. This allows for co-construction of knowledge, which promotes engaged learning that is problem-, project-, and goal-based."); see also Sharon Gatz & Stephen Meehan, *Investigating Engaged Learning and Best Use of Technology*, LINC ON-LINE (July 19, 2006), http://ed.fnal.gov/lincon/el_invest.shtml.

70 See *Meaningful, Engaged Learning*, *supra* note 59 ("For engaged learning to happen, the classroom must be conceived of as a knowledge-building learning community.").

71 See *id.* ("Collaborative work that is learning-centered often involves small groups or teams of two or more students within a classroom or across classroom boundaries.").

72 See *id.* ("The role of the teacher in the classroom has shifted from the primary role of information giver to that of facilitator . . . The teacher also is required to act as a guide—a role that incorporates mediation, modeling, and coaching.").

73 See *id.* (Student "[i]nteraction with the physical world and with other people allows students to discover concepts and apply skills. Students are then encouraged to reflect upon their discoveries . . .").

74 These factors or indicators have been assembled and elaborated on by others. See, e.g., Regie Stites, *Assessing Lifelong Learning Technology (ALL-Tech): A Guide for Choosing and Using Technology for Adult Learning*, NCAL Report PG98-03, 8 (1998), available at <http://literacyonline.org/products/ncal/pdf/PG9801.pdf>.

learning-centered often involves small groups or teams of two or more students within a classroom or across classroom boundaries.”⁷⁵

Within the engaged learning framework, students are accorded significant responsibility that changes the power relationship between teacher and student. In fact, students are asked to produce multiple results, from continuing projects to singular tasks. These deliverables are assessed and reviewed for maximum student improvement,⁷⁶ setting the engaged learning classroom apart from others that might self-describe as engaged or active. In addition, the learning process can be self-regulated, meaning the student has some decision-making responsibility and discretion over how the learning occurs.⁷⁷ This idea in itself distinguishes it from the power structure in the law school Socratic dialogue, as well as from other linear forms of educational decision-making.

Engagement for students does not refer only to student involvement, but also to directed learning with particular outcomes. As a general rule, engagement deploys more fact-based problem solving and role-playing within the class, and experiential components outside of class, than what occurs within a traditional educational setting.

3. *Feedback Generative Learning*

Feedback generative learning means that the learning process offers generous opportunities for timely and regular feedback, which can be aggregated through performance-tracking, either for students, instructors, or both. An example is a quiz which, when reviewed, provides the student and instructor with opportunities for diagnostic or formative feedback. If a majority of the class answered a question incorrectly using the same reasoning, the professor can correct the inaccuracy. If one student answered it incorrectly, that student has to look at the analysis to see where he or she went wrong.

This type of learning occurs with great frequency in experiential education. By virtue of the experience, students have opportunities

75 HOWARD S. ADELMAN & LINDA TAYLOR, EDs., *THE IMPLEMENTATION GUIDE TO STUDENT LEARNING SUPPORTS IN THE CLASSROOM AND SCHOOLWIDE: NEW DIRECTIONS FOR ADDRESSING BARRIERS TO LEARNING* 65 (2006).

76 *Meaningful, Engaged Learning*, *supra* note 59.

77 *See, e.g., About*, NYU GALLATIN, <http://gallatin.nyu.edu/about.html> (last visited July 3, 2013).

to determine if their own performance is structurally sound, and how it can be improved.

Formative evaluation events are critical to providing meaningful formative feedback. This idea involves different types of feedback—from specific to collective, graded to ungraded—but all types of feedback would be designed to help students create measures for self-improvement of pertinent skills.

4. *Transitioning*

In an economy that does not have the luxury to permit post-graduate apprenticeships—where new lawyers learn how to practice law at their employer's expense—the big context promotes the idea of transitioning: moving from one skill and responsibility level to the next from year-to-year in law school. To create effective transitions, notice must be given about the specific and measurable outcomes for each level. This can occur through rubrics that identify particular skills and how they can be measured. Rubrics can be developed by professors to describe expectations, and schools can develop rubrics that provide collective benchmarks about skill development (e.g., a student who has completed her first year at the school will be expected to be proficient in the following skill areas and grade point average; a student who has a grade point average of 3.0 means that student should be able to perform at a particular level).

The transitioning experience occurs not only during law school, but also from law school to practice, and from novice to expert skill level in any particular area.⁷⁸ This transitioning conception is just beginning to be intentionally added to legal education process.⁷⁹ Until recently, transitioning was generally not considered to be a legitimate academic component of the legal education enterprise.

78 Of course, this idea is consonant with other professional practicums following graduation, such as the residencies employed following medical school.

79 See, e.g., *Transition-To-Practice Program*, UNC SCH. OF L., <http://www.law.unc.edu/academics/transitontopractice/> (last visited July 27, 2013) (housing many courses, such as Advanced Legal Writing, Business Bankruptcy, Business Planning, and Environmental Law Practice and Policy). The program is spearheaded by former dean and co-author of the Carnegie Report, Judith Wegner.

5. *Outcomes*

This narrative emphasizes specific outcomes for students resulting from experiential and active learning components. The idea of outcomes changes the calculus from the process-orientation of “coverage” to the results of specific, articulable tasks that can be the subject of measurement and formative feedback. Outcomes can be defined in terms of skills introduced, such as negotiating or interviewing, answers to specific inquiries, or the quality of participation in different activities. This outcomes rhetoric contrasts with the traditional narrative, where the focus on “coverage” of substantive law topics (e.g., negligence *per se* in Torts or a fee simple subject to a condition subsequent in Property Law, does not provide any measurable indicia of success). This coverage is evaluated in the dominant narrative in a final examination and sometimes a mid-term examination, without other precise outcomes being defined or tested.

6. *Deliverables*

While final examinations purport to ascertain skill levels in students and their accomplishments in a course, “deliverables” (measurable tasks requiring specific skills)⁸⁰ can provide a new framework for a course: a narrative resembling law practice, with multiple measurable events occurring during the formative process, and not just one in summation. These deliverables can be as extensive as semester-long projects, as short as a single paragraph response, and can involve research. Deliverables include blog posts, other out-of-class writing requirements, field-work, and tracking a real trial for the semester, with an accompanying written evaluation. These deliverables can be precisely cabined or intentionally left open-ended. At the very least, deliverables provide an opportunity for feedback generative learning for the purpose of self-assessment and assessment by the instructor.

7. *Collaboration*

The experiential narrative reserves a special space for collaborative engagement because it is so versatile and useful. It can be framed between students, with practicing attorneys, or even with professors,

80 These tasks are also generally complex and challenging.

all to achieve directed and measurable outcomes. Collaborative exercises, just like collaborative lawyering, could become commonplace, merging from many perspectives. Exercises can include developing responses to problems, which can be assigned for work outside the classroom. Collaboration inside a class can include small group work in which each student plays a designated role. Collaboration includes feedback loops, where each student can learn by reading other student responses—or even their notes—to observe different approaches and analyses.

8. *Blending, Conflating, and Compartmentalizing*

The Carnegie Report called for integrating or blending multiple skills into traditional courses, but that is just one way of sprinkling experiential and active learning throughout legal education. Core courses could be retrofitted to offer experiential modules, such as field exercises, simulation, extra-credit,⁸¹ and out-of-class tasks. In addition, an in-class exercise can have an experiential component. An example of such an exercise would be in the area of Property Law, which includes affirmative easements, meaning the right to use another's land. While many hypotheticals can be used in class to determine whether students understand what constitutes an affirmative easement, the class also can be asked to go and find an easement in the real world, to take a photo of it, and to bring the photograph back to class or post it online.⁸² This produces a tangible and visible picture of the students' understanding of the concept they just learned.

B. A New Narrative: Teaching Law within a Big Context

“Big context,” as intended here, is a socially constructed and contingent legal education narrative that creates a story different than that of traditional legal education. The term essentially involves using

81 If students do an experiential project, some amount of extra credit could be awarded.

82 For example, Professor Angela Gilmore, of North Carolina Central University School of Law, would give her Property Law students at Elon Law School in 2010–2011, a piece of paper with two houses and two yards on it. Professor Gilmore would then offer her students a hypothetical and request that the students draw all of the easements described in the hypo on the sheet of paper. This is another way of learning-by-doing.

a variety of backgrounds and tools other than appellate case reports.⁸³ These alternative tools can occur outside of the classroom through activities such as blog posts or field trips, or inside the classroom with activities such as “live-blogging” and using students as experts; for instance, such as in the “jig-saw” exercise.⁸⁴

The narrative contains references and connections to long-term outcomes, such as law practice and professionalism, and occurs from the very beginning of the educational process. The big context accommodates many perspectives and reflects the values of engagement, feedback, and variety. It incorporates experiential learning components, such as clinics, externships, field activities, simulation, and role-play, but it does not utilize a formula for the amount and nature of each.

Contexts can include many types of educational platforms, including lecture, written materials (including scholarly articles, appellate cases, blog posts, specific tasks with deliverables), problem solving, role-playing, simulation, field trips, and live client contact. All of these contexts have instrumental value contingent on the purposes and nature of the educational process. A single course can feature lecture, role-playing, simulation, and a field component in a natural progression.

It is important to emphasize that the use of appellate case reports as a means of learning about the law is not diminished in stature nor excluded, just that the emphasis on it is shared with other modalities. Case reports still can serve as the “library” of information by which legal arguments can be constructed and problems solved.

The big context is not just for special courses or the third year of law school. Big context is designed to be blended into or compartmentalized within basic courses as well. Civil Procedure, for example, can be reconceived as a class in Civil Litigation, focusing on bringing a civil lawsuit, including pleadings, motions, and discovery.⁸⁵ Jurisdic-

83 Big context generally involves a form of engaged education, such as experiential activity, simulation or significant role-playing.

84 In “jig-saw,” the class is divided into groups and each group is asked to develop expertise about a particular point, rule, or principle. The groups are then restructured so the experts from each group can become members of a new group, one in which no group has more than one expert in a particular area. Students learn to collaborate, share expertise, and to recognize that people have different talents and skill sets.

85 See, e.g., S. SUBRIN, M. MINOW, M. BRODIN & T. MAIN, A. LAHAV, *CIVIL PROCEDURE: DOCTRINE, PRACTICE AND CONTEXT* (Aspen Press 4th Ed.

tion and venue become part of the lawsuit, not separate substantive law topics.⁸⁶

C. Rationales for Using Big Context

1. *Pedagogically*

The use of different kinds of contexts has been shown to be pedagogically effective, promoting a deeper understanding of material and greater retention.⁸⁷ It is not the teacher's coverage that matters so much, but what knowledge the students receive, retain, and are able to transfer in confronting problems with differing facts.⁸⁸

2. *Economically*

A big context satisfies the new utilitarian narrative of many constituencies, insofar as it helps a student transition into the world of professional law practice. The utilitarian narrative sees law school as an investment that prepares one for a lifetime career. In the new narrative, students want their investment to take them beyond the first day of law practice or alternative uses of their education. This is all the more important as graduates compete for jobs, sometimes with lawyers who have graduated one or more years before them. Employers want graduates who not only have been introduced to the skills they will need to be successful, but who have an understanding of how to survive and thrive in a business environment that might require adaptation and collaboration.

IV. A Big Context Evidence Course

This section describes how the use of a big context narrative was applied to a core law school course, Evidence Law. While I wish

2012).

86 This organizational scheme might help students better understand courses and areas outside of their current life experience. For example, most students understand at least tangentially about litigation and lawsuits, if only based on experience with multi-media.

87 UNDERSTANDING PEDAGOGY AND ITS IMPACT ON LEARNING 1–19 (Peter Mortimore ed., 1999).

88 The objective abstraction of the coverage goal collapses when students are asked to solve a particular problem necessitating the transfer of classroom knowledge to new facts and analytical steps.

I could say the treatment of Evidence Law as a hybrid substantive and trial advocacy course was done with the intentionality warranted by its myriad advantages, it was rather due to a desire to experiment to find out if such a marriage of Evidence Law and Trial Advocacy would work.

Consequently, I have beta-tested for fifteen years, approaching Evidence as an applied trial advocacy course. That meant including simulation, field activities,⁸⁹ writing exercises, and relying heavily on the courtroom as a source of applied educational material.⁹⁰ The new narrative of the applied trial advocacy class made it a hybrid course in which the agenda was framed around learning statutory rules, often embedded in actual trial techniques.

A. Background

All law schools accredited by the ABA offer their students some type of course in Evidence Law.⁹¹ Evidence courses generally are upper level required courses. Most are three or four credit classes that usually focus on the Federal Rules of Evidence, if only because most state codes are similar to the Federal Rules.⁹²

The course can be taught from many different perspectives.⁹³ Much depends on what the instructor wants to include in the course and how the instructor uses the specific material.

Evidence books revolving around problem-solving have become more popular in the past decade, driving the trend toward problem-oriented Evidence courses. These books use a combination of cases, problems, and other statutory materials, emphasizing cases less and the statutory and contextual materials more.

89 Field activities include class trips to visit a museum, the local jail, the courthouse, or individual activities requesting observations or findings.

90 Reliance on the courtroom meant both physically, where class sometimes was moved into the moot court room, and conceptually, where the class sessions were often treated as courtroom sessions.

91 See A.B.A., *supra* note 22.

92 Another reason is that the Federal Rules of Evidence are tested on the Multi-state Bar Exam.

93 The traditional case perspective can be complemented or supplanted by alternative methodologies, and can focus on the relationship between federal and state rules, on actual trials, and on the policies behind the rules are all alternative approaches.

B. A Big Context Evidence Course: Applied Trial Advocacy

1. Objectives

While embedding the rules of evidence in their natural context of trial practice can be more challenging for students during the semester,⁹⁴ the trial context serves to create relevancy for students and foster deeper learning, both immediately and in the long-term, as well as provide numerous opportunities for feedback. The trial context also promotes broader engagement when there are a greater number of participants.

Further, as described in the section below, the problem-solving context asks students to transfer whatever knowledge they gain to solve problems under the rules with new fact patterns. Because the rules must be interpreted to be applied properly, students also must learn about statutory interpretation.

This transfer of knowledge idea is really the “gold standard” of law school learning.⁹⁵ It is not rote memorization that counts, but whether students can spot issues, apply their knowledge of the rules to the issues, and use the facts of the new problem effectively in doing so.

The trial context has physical implications as well. Students also must be able to respond to issues not simply from the safety of their own seats, but while standing up. Student-attorneys are asked to stand for witness examinations and make objections, just like in some courts. The similitude to trials, while challenging, offers a bridge to law practice within the classroom. Students must be able to make and respond to proper evidentiary objections, often almost instantaneously.

2. Major Contexts of the Course

Some contexts predominate in the course. They include problem-solving, trial practice, and statutory interpretation. In addition, ethics problems are sometimes woven into the evidentiary

94 The trial context is more challenging on a number of levels. The speed of a trial and extended skill sets required for knowledge and technique acquisition regularly stretches and challenges students.

95 See, e.g., Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics* 17 CLINICAL L. REV. 285 (2010).

questions, adding yet another overlap with the real world.

a. Problem-Solving

Students learn on the first day of class that problem-solving is a paramount focus. Students are given an introductory problem that spans the entire course to obtain some idea about the course parameters. The problem handed out in the 2012 class, “The Bad Locker,” concerned a student who sold illegal drugs out of his locker. The hypothetical was packed with a wide range of evidentiary issues.⁹⁶

The course book also assists the problem-solving context. It includes numerous short problems, tailor-made for this kind of approach. Most of the problems are directed at a particular rule or element of a rule. Each chapter has summary problems, requiring more issue identification, and several chapters have summary problems that cover the entire chapter and beyond. This past year, the

96 For example, the problem stated in part: Schmerd was a sophomore at State U. He had a locker in the corner of the locker room area on the second floor of the Student Center, secluded from passersby and most other students Bill, whose locker was nearby, broke into Schmerd’s locker, but did not report the brief sighting of the plastic bags containing something in each. Bill thought it might be marijuana, but could not be sure. In Bill’s opinion, Schmerd was a big-time cocaine dealer who dabbled in marijuana on the side. Wayne, an employee of the school, arrived at work one day and was confronted by an anonymous note. The note stated, “There are drugs in Schmerd’s locker! He is selling stuff and making his tuition between classes. How can he do this in a university?” Wayne went to the locker and started fiddling with it. He was told the locker code by Bill - 0-0-0. Wayne found multiple baggies of marijuana in the locker, put them in his pocket and went to call the police. The police arrived and Schmerd was detained. After Schmerd was read his *Miranda* rights by the police he blurted out, “Look, I don’t know what you are talking about. My locker is used by lots of folks. Even Bill knows my code – 0-0-0 – and could have put stuff in it. Bill and I had a bad argument last semester over \$30 he claims I owe him. Paul, whose last name I don’t know, asked to use it last week and I said sure. No good deed goes unpunished.” A chemist tested the apparent marijuana and confirmed that it indeed was marijuana in a full report. The chemist then promptly left the country. A police expert on marijuana use gave her opinion that “people often use fabric softeners, air fresheners and clove cigarettes to cover up the unique smell of marijuana. None of these efforts completely hide the sticky, sweet odor of marijuana, though.” At trial, the prosecution intends to call several people as witnesses, including Cheryl, Wayne, Bill, the investigator, the police expert, and a chemist who can vouch for the chemist who did the actual analysis of the substance allegedly found in the locker. You are the trial judge. You are asked to rule on any evidentiary issues using the Federal Rules of Evidence.

course book added an ethical dimension, illustrating the confluence of evidence and ethics in several of the assigned problems.

b. Trial Practice

The trial techniques are an integral part of the course, and students are informed that the trial advocacy is a natural encasement for the course, as well as a good introduction to how the courtroom works—whether students want to become trial lawyers or never set foot in a courtroom in their professional lives. Thus, trial practice is blended into and frames the entire class.

In almost every class, students are divided up into small groups of three or four and assigned tasks as judges, advocates, and witnesses. Role-playing also occurs with guests. For example, Elon Law School admissions professionals have “testified” during a class session as records custodians in a mock lawsuit involving the admission of records.⁹⁷ One group of students was asked to lay a business records foundation pursuant to Federal Rule of Evidence 803(6), a hearsay exception, while another group of students was asked to play opposing counsel and object to the records after a brief voir dirè. A third group of students played the role of judges and ruled on objections and the admission of evidence.

c. Ethics and Professionalism

In using the courtroom⁹⁸ for class several times each semester, students are confronted immediately with decorum and professional relationship issues. Where do counsel sit? How and when do they approach the bench? How do counsel address opposing counsel or the judge? Given the ethical components in the course book, students have the opportunity to directly analyze the interrelationship between evidence and ethics. This can be viewed as a diversion from central evidentiary questions or as a complementary exercise, harmonizing the multiplicity of issues likely to arise in law practice. To ensure there is an opportunity for proper analysis of ethical dilem-

97 This exercise is discussed in greater detail in the Sample Class With Visitors section, below.

98 The courtroom at Elon University School of Law is a functioning business law court. This offers a greater degree of realism, but provides for the obvious diminished opportunity for use.

mas, the course book⁹⁹ contains pertinent ethics rules from various state codes. Thus, ethics and evidence are conflated throughout the course, allowing ethical questions to jump traditional boundaries.

A representative illustration in the course book is Problem 4-10, “A Day In the Life.”¹⁰⁰ This problem asks students whether a “day in the life” video of a person severely injured in an accident should be excluded as unfairly prejudicial under Federal Rule of Evidence 403 in a subsequent suit. Part 2 of the problem, titled “Ethics Consideration,” asks if a party’s attorney can cover the costs of creating such a film if the party cannot afford to pay for it herself.¹⁰¹ A state rule of professional conduct is provided in the text¹⁰² for students as a basis for analyzing the question. This helps students see that ethical issues are not compartmentalized, and that professional identity questions are everywhere.

3. *Big Context Components*

The big context components are integrated into the course, as well as dispersed throughout in the form of subcomponents or modules. The integrated or blended parts include the regular use of an “all object” rule, where all students are asked to be ready to make and respond to evidentiary objections; other students act as judges in ruling on the objections. While the classroom generally serves as the courtroom, the actual courtroom—used for real business court cases by a business court judge—is reserved for some of the classes. Trial techniques are regularly performed by the students. These range from openings and closings (although rarely), to directs and crosses (regularly), and special witness examinations, such as laying a foundation for experts.

Separate components of the course include guests, who provide demonstrations of direct and cross examinations; final trials, involving students who engage in a complete one-witness trial, with attorneys playing the role of judges and family and friends acting as jurors; and courtroom observations of actual proceedings.

99 FRIEDLAND & SAHL, EVIDENCE PROBLEMS AND MATERIALS (4th Ed. 2012).

100 *Id.* at 69.

101 *Id.*

102 The text varies the states, so students from different jurisdictions can see how states vary their codes.

4. *The Framework of the Applied Trial Advocacy Course*

The Syllabus lays out what is required of the students and importantly sets the stage for the big context. In effect, it serves as the course roadmap. I use the Syllabus to describe the active learning model and assign the topics to be discussed as well as the problems that will be covered by the class. The problems are not separated from the associated trial technique but rather blend together with the evidentiary analysis.

a. Requirements and Outcomes

The Course Requirements section of the syllabus lays out what will be expected of the students. The requirements included reading, posting answers to problems, observing a trial, and participating in a mock trial.¹⁰³ This latter requirement is designed to illustrate what kind of outcome the students can expect from the course, provide performance-tracking for students and professor, as well as facilitate the students' knowledge of evidence.

The Course Goals and Learning Outcomes section of the Syllabus further elucidate what the course aims to achieve. For example: the learning outcomes focused students on what they should take

103 For example, the Syllabus noted:

COURSE REQUIREMENTS

B. Class Assignments. This is a problem-oriented course in which great emphasis is placed on understanding the rules of evidence through problem solving. Students are therefore required to *write out complete answers* to the problems assigned.

C. Posting. During some of the weeks, you will be required to post a written answer to one of the assigned problems on the course Blackboard site. This requirement will begin in week #2 and conclude well before the completion of the course.

D. Trial Observation Assignment. You are required to observe a trial, hearing or other proceeding in which there is evidence, and then write about your observations in an on-line post of between 1/4 and one page. In lieu of this observation, you can judge one of the Elon undergraduate mock trials.

E. Final Trial. You will be required to participate in a final trial. Those students who do an exemplary job can get extra credit for their performance.

away from the course, and not just what would be covered for a final examination.¹⁰⁴

b. Assignments

A sample assignment for a two-hour class session involved reading the course book, the pertinent Federal Rules of Evidence, the Advisory Committee Notes, and relevant case law. In addition, students were asked to write responses to various problems in the book in advance. A sample assignment in the 2012 course combined the reading of rules, Advisory Committee Notes, problems and cases.¹⁰⁵

While I generally would cover more problems than those assigned, this gave the students the opportunity to practice answering problems that were not familiar to them, but were still written out in front of them.

104 COURSE GOALS and LEARNING OUTCOMES

A. GOALS

1. To understand and apply the rules of evidence.
2. To learn associated trial and lawyering skills.
3. To develop an ethical approach to lawyering.
4. To have fun.

B. LEARNING OUTCOMES

1. To develop a deep understanding of the individual Federal Rules of Evidence
2. To be able to synthesize the rules and use them in the context of a trial or other proceeding.
3. To be able to apply the rules of evidence to a wide variety of fact situations.
4. To use Protocols: (1) Rule/Meaning, Exception/Meaning; and (2) Rule/Application
5. To develop competent advocacy skills relating to evidence issues.

105 CLASS # 6: CHARACTER EVIDENCE CONTINUED

Character In Issue

Rule 404(b) -- Other Acts Evidence

Res Gestae Evidence

Assignment:

1. Read FRE 404(b)*
2. Write answers to Problems 5-13, 5-16, 5-23, 5-28, and 5-32, 5-34
3. Read Huddleston v. United States, and Dowling v. United States

*These and other assigned cases were generally included in the course text book.

c. A Sample Class

1. In the Classroom

I usually plan classes using a scaffolding for each session, dividing up the class into recognizable and explicit parts. The students are informed about the scaffolding, usually explicitly, so they have some predictability in what to expect. The class often opens with a transition—a brief description of where we will be residing for the day and where we have been. This description is often interactive, with students supplying the touchstones of the law as much as my characterizing what area of the course we are in.¹⁰⁶ The class then moves to a typical problem, either from the book, current events, or a hypothetical that could involve witness examination. The goal in reviewing the problem is not to answer it but to create a bridge to the pertinent evidentiary rule or rules. Then, we work through the meaning of the rule to reach a deeper understanding by going through a variety of problems, most of which are in the course book.

I sometimes would confer with students prior to class to create problems for a mock trial proceeding. In one hypothetical trial acted out in class, a student allegedly slipped and fell on the way into the school. She was placed on the witness stand for a mock direct examination.¹⁰⁷ The initial problem is often used to focus the students on the task at hand—understanding a rule or set of rules within the evidence code—and to draw the students in to help determine, like Sherlock Holmes, “who-done-it.” For example, we introduced the high-profile Trayvon Martin/George Zimmerman case in Florida¹⁰⁸ at several junctures during the semester, evaluating the possible evidentiary issues and how those issues might be resolved.

After the initial problem, the class would turn to examining a rule or rules of evidence. This examination incorporates statutory construction of the text—what does the text mean? The subsequent

106 This is the “global” part of the class, where the students make the connections to other classes and course areas, getting and reaffirming the course “GPS.”

107 I discuss the problem with the student prior to class and the student is prepared to play along with the hypothetical problem. Students obtain a new and helpful perspective by playing a witness and having to answer a series of questions. Some students take to the role-playing more than others, and, interestingly, the students with the higher G.P.A.s are not always the best witnesses.

108 Zimmerman was accused of murder after killing Trayvon Martin. Zimmerman claimed self-defense pursuant to Florida’s “Stand Your Ground” law and was acquitted in July 2013.

discussion includes analysis of the text and then turns to the pertinent Advisory Committee Notes, precedent, or other commentary.

We then try to understand the rule in greater depth by applying it to numerous problems in the casebook. It is this part of the class where most of the applied trial advocacy takes place. For example, in the section on experts, students lay a foundation for expert testimony by asking about a hobby or particular expertise of a classmate. In the area of character evidence, students lay a foundation for a character witness, and then another student, as opposing counsel, conducts a brief cross-examination. All students are asked to practice refreshing the recollection of another student-witness, complete with using a document marked for identification as the refresher tool. Students play witnesses in the hearsay arena, laying the foundation for various hearsay exceptions, including excited utterances, prior recollection recorded, and business records. For example, students are asked to produce their driver's licenses or some other form of identification and then to hand the licenses to another student, who proceeds to lay the foundation for introducing the identification as an exhibit.

2. In the Courtroom

In the courtroom, some students would be asked to act as a judge, others as attorneys, one as a witness, and some as jurors. The attorneys would be assigned to provide a quick opening statement, and then to call their first witness. In the interest of time, we would not go through the entire testimony of the witness, but only a particular component of it. The "all-object" rule would remain in place, meaning all students present can object when appropriate. The student judges would rule on objections and on whether evidence should or should not be admitted. I try to make sure the process flows smoothly and interrupt only periodically to add points or support a ruling or attorney. Otherwise, I would try to let the students have the responsibility for carrying their roles.

Most students¹⁰⁹ enjoy moving to the courtroom, although there is hesitation by some, due to the unknown. This is where students further develop their interest in trials and litigation—they can feel

109 Some students seem to prefer the safety and continuity of the classroom and its convenience for taking notes and setting up their computers.

the environment and see it, not just read about it—or confirm they do not wish for a career in litigation. By the simple move to the courtroom, the class is transformed into a theater of the real for a number of the students, suggesting again that the environment can have a profound impact on that which occurs within it.

3. In the Classroom with Visitors

Role-playing also would occur with guests several times a semester. Role-playing classes are, in a sense, hybrids—while we remained in the regularly scheduled classroom, the space would be transformed into a courtroom, with witnesses, judges, and attorneys. To illustrate, during one class, I ask an experienced litigator to provide a mock direct and cross-examination on several students. The students are intrigued and impressed by the attorney's performance and the thoughtful way the attorney explained his tactics and strategies. Students then had the opportunity to conduct examinations with each other.

In another class session, several "experts" would testify, allowing students to develop their understanding of the applicable rules on experts.¹¹⁰ When these examinations occurred in small groups simultaneously, the class would get quite noisy and active, which would be welcomed. There was considerable engagement and, hopefully, equal skill-building. To make sure each group proceeded on task, I would circulate around the room and comment and make additional small-group observations. After all of the students had practiced, I would ask one group to remain standing to demonstrate the task for the entire class. This demonstration maintained the focus on the rules, reaffirmed the important elements of the exercise, and provided an additional opportunity for students to ask questions.

110 After reviewing the rule and its construction, one group of students attempted to lay a business records foundation pursuant to Federal Rule of Evidence 803(6) with one of the admissions professionals. Another group of students was tasked with objecting to the foundation, and a third group of students played the role of judges. Most of the class of forty-seven had been given a role to play; at times, each of the groups was in action concurrently with its own witness.

V. Conclusion

As the cultural anthropologist Clifford Geertz noted, “Law . . . is part of a distinctive manner of imagining the real.”¹¹¹ The same can be said of legal education. In order to modify traditional legal education and blend, conflate, or include experiential components in core legal education courses, a different descriptive rhetoric and narrative must be adopted to create a more inclusive and practical way of imagining the real. This article suggests adopting the rhetoric and narrative of a big context, particularly one framed by lawyering relationships with clients, witnesses, experts, and judges throughout law school. The new narrative will provide a richer educational backdrop, help transition students better to the next phase of their educational journey, and better prepare them for their career in law.

111 CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 184 (1983).

