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La reforma curricular en los estudios de Derecho: la integración de la práctica.

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Resumen

La formación de los profesionales del Derecho en los Estados Unidos se encuentra en un momento de crisis. Se enfrenta simultáneamente a severas críticas y a la presión de las fuerzas del mercado, por lo que debe cambiar para poder sobrevivir. La educación experiencial ofrece la posibilidad de incrementar la relevancia del aprendizaje de la práctica del Derecho en la formación de los futuros juristas y un gran número de Escuelas de Derecho han puesto ya en marcha nuevos programas formativos en los que los estudiantes aprenden a través de la experiencia. Este artículo proporciona una visión general de la formación jurídica y explica como surgió

Reforming the legal curriculum: Integration into the practice.

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Abstract

Legal education in the United States is at a crisis point. Simultaneously confronting scathing critiques and mounting market forces, legal education must change to survive. Experiential education offers the hope of increasing the relevance of legal education to the practice of law, and many law schools have adopted new programs where students learn through experience. This article provides an overview of legal education and describes the rise of experiential legal education. The article concludes with a description of an innovative program that integrates the practice in the joint enterprise of educating tomorrow's lawyers.

el enfoque de la educación basada en la experiencia en este sector, concluyendo con la descripción de un programa innovador que integra la práctica en la empresa conjuntamente con la formación de los abogados del mañana.

Palabras clave: educación experiencial, práctica reflexiva, reforma de la formación jurídica, formación jurídica en los Estados Unidos, reflexión, clínica, educación clínica, clínica jurídica, formación jurídica clínica, Programa STEPPS, California Western School of Law, pedagogía, formación jurídica.

Key words: experiential education, reflective practice, legal education reform, United States legal education, reflection, clinic, clinical education, law clinic, clinical legal education, STEPPS Program, California Western School of Law, pedagogy, legal education.

Introduction

Legal education in the United States is in a moment of crisis, simultaneously confronting two difficult issues. The first is a critique that legal education fails to prepare graduates for the practice of law. The second is combination of market forces, including the cost of legal education,¹ the drop in hiring by law firms,² and the precipitous drop in the number of law school applicants.³ While these issues present law schools with difficult challenges, they also open a window of opportunity. The market forces – particularly the drop in applicants to law school – portend a period of rapid change in legal education. The critique of legal education and the negative market forces reveal a deeper problem with American legal education: the failure to identify the goals of legal education, and the corresponding failure to develop a curriculum to meet those goals.

While this might sound simple and uncontroversial, a clear statement of purpose has eluded most law schools. Further, a significant difference exists among faculties as to the purpose of legal education. One camp holds that law schools should provide an extension of the liberal arts education, allowing students to develop thinking through exposure to different theories and disciplines. (E.g., Clark, 2014, p. 235). Another camp holds that law school should be more practical and should train students to be lawyers. Obviously, the choice of purpose at a specific school will affect the curricular choices and

¹ The American Bar Association reported that the average cost for tuition and fees at a private law school in 2012 was \$40,634 (Amer. Bar Assn., Law School tuition 1985-2012, available at http://www.american-bar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/lstuition.authcheckdam.pdf

Last accessed July 31, 2014). Ten years earlier, in 2002, the tuition and fees for private law school cost \$24,193. Public law schools reported a similarly high increase. The average cost for tuition and fees at public law school in 2012 was \$23,214 for residents of the state, and \$36,202 for non-residents. (Public universities are permitted to charge different rates to in-state and out-of-state applicants.) In 2002, the average public law school tuition was \$9,392 for in-state, and \$18,146 for out-of-state applicants. While both public and private tuitions have risen at astounding rates, public law school tuition has increased at a greater rate than private school tuition. See also, Tamanaha, 2013, pp. 174-76.

² According to the National Association for Law Placement (NALP), the employment rate (in jobs requiring a law degree) for law graduates in 2012 was at a record low of 2012 (equal to the rate for 2011). From 2008 to 2012, the employment rate fell 10% from 74.4% to 64.4% for jobs requiring a law degree. Recent trends show some improvement. NALP data indicated large law firms (more than 500 lawyers) hired 3,980 recent graduates in 2013, down from 5,136 recent graduates hired by large firms in 2009, but better than the number from 2011, when it fell below 3,000. Jennifer Smith, *Big Law Firms Resume Hiring*, Wall Street Journal, June 23, 2014, available at <http://online.wsj.com/articles/big-law-firms-resume-hiring-1403477513>

rted that median starting salaries for 2013 rose slightly, to \$62,467 (a 2% increase from 2012), but still lagged behind the 2008 median of \$72,000. (NALP data was based on jobs reported as full time and lasting at least one year). During the same period of 2008 to 2013, starting median salaries at law firms dropped from \$125,000 in 2008 to \$95,000 in 2013. NALP data for government jobs indicated no change since 2009, with a median of \$52,000. NALP, *For Second Year in a Row New Grads find More Jobs, Starting Salaries Rise – But Overall Unemployment Rate Rises with Historically Large Graduating Class*, June 19, 2014, available at http://www.nalp.org/2013_selected_pr (last accessed July 31, 2014).

³ The Law School Admissions Council (LSAC) maintains records of the number of applicants to law schools each year. In 2010, LSAC reported 87,900 applicants, but that number fell to 59,400 in 2013. In contrast, the LSAC reported 98,700 applicants in 2004. (LSAC, *End of Year Summary: ABA Applicants, Applications, Admissions, Enrollment, LSATs, CAS*, available at <http://www.lsac.org/lisacresources/data/lisac-volume-summary> last visited July 31 2014). This decline of nearly 40% over ten years has had severe repercussions on law schools. The crisis has been particularly acute from 2010 to 2013, when LSAC reported declines of at least 10% for three consecutive years. Preliminary data for 2014 indicates another decline of approximately 7.4%. (LSAC, *Three Year Applicant Volume Graphs*, available at <http://www.lsac.org/lisacresources/data/three-year-volume> .Last visited July 31, 2014).

the deployment of resources.

If the goal of law school is to educate lawyers, then practical training should be included in the mandatory curriculum. Recent evidence suggests that law schools in the United States are already in a period of change, particularly with respect to curricular innovation.⁴ (Daniels, Katz & Sullivan, 2014, p. 593). At first blush, clinical legal education seems to provide exactly what the traditional curriculum lacks – practical training. But the term “clinical legal education” has been used to describe such a wide array of courses and learning experiences that it is difficult to define exactly what “clinical legal education” means. Moreover, in some contexts, and among some faculties, the term “clinical legal education” creates divisive factions of supporters and detractors. The broader term “experiential education” has emerged as a more descriptive term for teaching the practical application of law in legal education.

This article provides an overview of legal education in the United States, identifies the major critiques of American legal education, describes the utility of experiential learning in legal education, and presents practical solutions for reforming legal education. The article also describes an innovative experiential learning program at one school. The purpose of the article is to provoke thoughtful dialogue about the process of change and reform in legal education. The specific example is provided not as a transferrable solution, but rather, as a means of examining the details of one particular solution at one particular law school. Hopefully some of the lessons will contribute to the dialogue of reform in the United States, as well as in other common law countries and in continental legal systems.

The first part of the article establishes the context of legal education in the United States. Part I outlines the traditional legal education curriculum, reviews the arguments supporting the traditional curriculum, and summarizes of the critiques of traditional legal education. The traditional law curriculum assumed implicitly that the goal of a legal education was either an extension of liberal arts training, or the acquisition of propositional knowledge pertaining to law, or both. The law graduate under the traditional system left the academy with an understanding of legal principles, a familiarity with general areas of practice such as property, criminal law, contracts and constitutional law, and perhaps, a taste of the theories supporting different approaches to law. All U.S. law schools have a required curriculum with standardized courses in these doctrinal areas. Absent from the traditional curriculum, however, is a focus on the application of legal knowledge. Very few schools impose a requirement that a student obtain practical experience in the application of legal knowledge.

The second part of the article begins with an overview of clinical legal education. In the past twenty-five years, clinical legal education developed from an elective for students interested in public interest to an integral part of legal education. Although few schools require clinics, all schools provide students with the opportunity to take clinical

⁴ In a recent article, discussed in more detail below, Stephen Daniels, Martin Katz and William Sullivan found significant evidence of curricular innovation from 2002 to 2012. Moreover, they found a greater concentration of innovation (defined as new programs, courses, and initiatives) from 2008 to 2010 than in any other period. Stephen Daniels, Martin Katz, William Sullivan, *Analyzing Carnegie’s Reach: The Contingent Nature of Innovation*, 63 J. Legal Educ., No. 4 585, 592 (2014).

The most common type of new initiative was a lawyering program, with an astounding 96% of law schools reporting new lawyering initiatives (118 of 195 schools reporting). The development of new clinics was second with 81% of schools reporting an expansion of clinical programs. Stephen Daniels, Martin Katz, William Sullivan, *Analyzing Carnegie’s Reach: The Contingent Nature of Innovation*, 63 J. Legal Educ., No. 4 585, 594 (2014).

electives. Indeed, the ABA accreditation standards require that they do so. Clinical education has expanded in the U.S. law curriculum, and many schools have opened new clinics in recent years. Legal educators have seen the value of the experiential pedagogy, and transferred the pedagogy of learning through experience from the law clinic to other courses and programs. The law clinic is only one of several types of experiential learning. Law schools are providing more experiential education, with many schools creating a decanal level position to coordinate experiential learning programs. In some instances, the term “clinic” has been used synonymously with experiential education. A clarification of terms is necessary, and the second section includes a helpful glossary to describe the different forms of experiential legal education.

Part III of the article examines an example of an innovative experiential education program –the STEPPS Program⁵ - at California Western School of Law, an independent California law school that emphasizes a “practice-ready” curriculum. The third part includes a series of proposals for reform in legal education viewed through the lens of the experience at one school. These proposals assume that the purpose of legal education is the training of new lawyers. The first proposal describes a sequential curriculum in practical training. The sequenced curriculum includes training in legal methods, legal analysis and legal writing, as well as acquisition of knowledge in general areas of law and legal process.⁶ In the sequenced curriculum, the traditional first-year curriculum remains largely unchanged. In the second year, students apply legal knowledge in a controlled, simulated environment. Simulations allow professors to control the learning environment and allow students to apply the knowledge they have gained in the first year without risk to clients. The simulations permit the student to assume the role of attorney, and assist in the development of professional identity. In the third year, students enroll in clinical and other experiential courses where they work with real clients and real legal issues under an ordered system of supervision.

Under this sequential curricular structure, each year builds on the student’s experience in the previous year, and each successive year exposes the student to higher levels of complexity, uncertainty, and indeterminacy. The first year provides a controlled learning environment. In the second year, the student encounters variables in the application of legal knowledge and skills through controlled simulations. In the third year, the student works with real clients on real cases, which contain a higher level of

⁵ The STEPPS Program acronym stands for Skills Training for Ethical Practice and Professional Satisfaction. <https://www.cwsl.edu/stepps>

⁶ The sequential curriculum follows a path familiar to educators in other disciplines: acquisition of foundational knowledge, application of knowledge, then use of applied knowledge in practice. But see Donald Schön, *Educating the Reflective Legal Practitioner*, 2 Clin. L. Rev. 231, 235 (1995). Schön criticized this sequence when applied to the “higher” professions. The sequence assumed an underlying body of knowledge, founded in “technical rationality” that could be applied to practice. Schön questioned the “science” of law (and other professions), and hypothesized that the presence of law in the University system was the result of a “Veblenian bargain” where the entry of “‘lower’ schools of the professions” to the “higher” enterprise of the University system was conditioned on the professions “construing their work as the application of systematic scholarly knowledge . . . to the instrumental problems of practice.” (Schön, 1995, 235). Three types of uncertainty frustrated the application of “scholarly knowledge” to the problems of practice: uncertainty in the framing of problems (in colloquial terms the tendency for one with a hammer to view every problem as a nail)(in Dewey’s terms, the difference between creating the problem and solving the problem); uncertainty in the problem of uniqueness (the inapplicability of general rules to individual cases, or, the frequency of the *sui generis*); and uncertainty of conflict (where it is difficult to determine objectives and therefore means or pathways to achieve the objectives). (Schön, 1995, pp. 235-37). Despite Schön’s critique, the sequenced curriculum remains a largely novel and untested concept in legal education.

indeterminacy and uncertainty, but with the safety net of faculty supervision, and with structured opportunities to reflect on the experiences. The next step in the sequence would be serving real clients without faculty supervision (after graduation).

In addition to the sequential curriculum, a practical training program should include several other elements. First, there must be integration with the practice – practitioners must be included in the mission of legal education. Second, there must be an emphasis on reflective practice. Third, there must be a focus on ethics, professional values, and professional identity. Fourth, there must be a focus on pedagogy. Teachers should use a variety of teaching techniques, and students should receive a range of assignments, with a thoughtful discussion of feedback and assessment criteria. The STEPPS Program integrates each of these elements.

The STEPPS Program demonstrates the type of educational programming that is possible. But the Program is not a panacea. It cannot, and should not, be copied and inserted wholesale into other law schools. Rather the Program stands as an example of how one school deployed resources to align with the educational objective of developing new lawyers. Each law school will have to make independent decisions about the purpose of legal education and the best means to achieve those objectives.

The traditional legal education curriculum

Overview of legal education

In the 1800s, legal education in the United States adopted the apprenticeship model. Although a few law schools existed, most new lawyers received their education in the offices of lawyers and the chambers of judges.⁷ (Ogilvy, 2009, p. 3). Legal education changed in the 1870s, when Christopher Columbus Langdell developed the “case method” at Harvard. (Id.) Langdell, a trained botanist, approached legal education as a science, with a high regard for a system of classification of legal doctrines and appellate cases. He utilized extended discussions about the cases and decisions as a process for learning the boundaries of various legal doctrines.⁸

In a relatively short period of time, the university-based system and teaching through the “case method” became the dominant model for legal education.⁹ (Id.) The widespread adoption of both the “case method” and a university-based system created lasting consequences for legal education. Moving law students from courtrooms and law offices to classrooms and lecture halls signaled a separation of the legal academy from the legal practice. (Schön, 1983, pp. 33-38). This separation continued for the

⁷ Sandy Ogilvy, *The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 Clin. L. Rev. 1, 3 (2009). Harvard Law School, established in 1817, is the oldest continuously operating law school in the United States. *Id.*

⁸ The Socratic Method is part of the case method, and refers particularly to the process of inquiry and active engagement of the student, in contrast to the passive learning style of a lecture.

⁹ The shift was neither smooth nor uncontentious. In 1891, a noteworthy debate erupted among the faculty at Columbia Law School, leading to the exodus of Dean Theodore Dwight, who, together with other Columbia professors founded New York Law School. . http://www.nyls.edu/about_the_school/mission_and_history/ (last accessed July 31, 2014).

greater part of the 20th Century.¹⁰

The integration of law into the university system resulted in a bifurcation of legal education. The first part provided a foundation in legal principles and basic areas of law, met basic accreditation requirements, and sorted out those who did not have the intellectual acumen for a career in the law; this part occurred in the law school. The second part occurred in law firms where senior lawyers assigned matters and cases to new lawyers in a way that developed their professional capacity.

This system survived, and indeed flourished for a number of reasons. First, it appealed to the individual interests of those in the legal academy. It allowed for the development of a legal professoriate. Second, it absolved professors from the responsibility to teach the practice, a task for which they would be ill suited as full time professors. Third, it shifted the focus of legal education from teaching students to ranking students. Law students would not have to graduate with an ability to practice law - they would only have to demonstrate an understanding of basic legal principles.

Several key distinctions set the United States apart from other countries with respect to legal education. On a political level, the regulation of lawyers occurs on a state level, rather than on a national level. Thus, each state has its own requirements for admission to the Bar. The regulation of legal education, however, occurs on a national level. The American Bar Association has responsibility for the process of evaluating and accrediting every law school in the U.S.¹¹ Within the university system, law is exclusively a doctoral program – there is no undergraduate degree in law. And unlike other programs (but similar to the M.D. degree), the *juris doctorate* degree does not require the defense of a dissertation. The American Bar Association provides minimum academic standards for JD degree, and current standards require a minimum of 83 credit hours of study.¹² (A.B.A. Standards for Approval of Law Schools, Standard 304, 2013). Each unit of credit comprises the equivalent of 700 minutes of classroom teaching time.

The “traditional curriculum”

A traditional legal education provides students with an understanding of basic areas of law: civil procedure, contracts, torts, property, trusts and estates, criminal law, criminal procedure, constitutional law, evidence, business organizations, and remedies. In addition to these core areas, students may take courses or seminars in specific subjects such as secured transactions, bankruptcy, immigration, or intellectual property. Supplementing course instruction is a seminar in legal writing, which may be a one-

¹⁰ Donald Schön described the transition of the “professional schools” to the university system as Veblenian bargain. (Schön, 1995, p. 235; see also, *supra*, note 6). Veblen distinguished between “the modern university,” which were concerned with “a life of science and scholarship” and focused on disciplines in pursuit of knowledge, whereas the professional schools merely instilled useful work habits in students. Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* ((1983) at 35, quoting, Thorsten Veblen, *The Higher Learning in America* (1918), at 15-17.

¹¹ The American Bar Association codified the standards for accreditation for American law schools. Each law school is reviewed on a periodic basis (seven years). See, A.B.A. STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2013-14).

¹² The current A.B.A. Standards for Approval of Law Schools have been revised and are currently pending approval of the A.B.A. House of Delegates. The 83 credit hour minimum remains unchanged; however, the revised standards contain a provision requiring 6 credit hours of experiential education (simulation, law clinic or externship) as a prerequisite for the JD degree. (A.B.A. Proposed Standards for Approval of Law Schools, April 2014).

semester, two-credit course, or a more extensive series of courses. At most law schools, the first year curriculum comprises fixed set of courses in the basic areas of law and a legal writing course.

In the United States, the dominant method of teaching doctrinal law is the case method. The case method is a powerful pedagogic method. Students are typically required to read appellate cases before the class meeting. The professor then engages the students in a discussion of the cases. In its best form, the method is truly Socratic – the professor leads the student to a greater level of understanding of the material. But at its worst, the Socratic Method serves as a bully pulpit and as a means of reassuring the hierarchical dominance of insecure professors. The use of fear, intimidation and humiliation serve no meaningful purpose in a Socratic dialogue.¹³

External critiques of legal education

According to the popular press, American legal education is exhaling its final breath. Two general themes emerge from these critiques: first, the cost of legal education is too high,¹⁴ and second, the legal education curriculum must be reformed.¹⁵ In November of 2011, the *New York Times* published a scathing critique of legal education in America.¹⁶ Notably, the article attacked not only the cost of legal education, but also the substance.

What they [law students] did not get, for all that time and money, [spent on legal education] was much practical training. Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England. (Segal, 2011).

Touching many of the same themes as the *New York Times* article, Professor Brian Tamanaha published *Failing Law Schools*, another scathing critique of American legal education. (Tamanaha, 2012). As a legal education insider, Professor Tamanaha exposed not only questionable practices by law school administrations, but also structural defects in the system of legal education. The key structural defect, according to Tamanaha, concerns the absence of any incentive or ability to change because of the vested interests of law faculties. (Tamanaha, 2012).

Critiques of the legal education curriculum arrive every few years. The *New York Times* article was neither the first nor the most exhaustive critique of American legal education. (Edwards, 1992; Frank, 1949, 1933; Rowe, 1917). Other critiques have offered positive direction for the evolution of legal education. In 2007, the Carnegie

¹³ The popular rendition of the Socratic Method in films such as *The Paper Chase* and *Legally Blonde* highlights the worst aspects of the method. The students fear the teachers, and while fear can be an effective motivator, the process of learning requires an openness that fear restricts.

¹⁴ Brian Tamanaha, *Is Law School Worth the Cost?*, 63 J. Legal Educ., 173 (2014); William Henderson and Rachel M. Zahorsky, *The Law School Bubble*, ABA Journal, January 2012, p. 30.

¹⁵ David Segal, *What They Don't Teach Law Students: Lawyering*, New York Times, November 20, 2011, http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=1

¹⁶ *Id.* Segal's attack went further than curricular content; he questioned the value of legal scholarship. Segal's piece received a vociferous and predictable response from the staid legal academy. Critical posts condemning Segal and his article flourished on web logs run by distinguished law professors, such as Brian Leiter's *Law School*. See, e.g., Brian Leiter, "David Segal's hatchet job on law schools..." posted November 20, 2011 5:14 p.m., at <http://leiterlawschool.typepad.com/leiter/2011/11/another-hatchet-job-on-law-schools.html> last accessed July 31, 2014.

Report, a two-year investigation into the teaching and learning at American law schools, recommended specific reforms to the legal education curriculum.¹⁷ (Sullivan, et al, 2007, [hereinafter, Carnegie Report]). Specifically, the Carnegie Report championed a focus on the knowledge, skills and values necessary for professional success. Fifteen years earlier, in 1992, the MacCrate Report defined ten fundamental lawyering skills and four professional values, and included a vision for a continuum of development throughout a lawyer's career.¹⁸ (MacCrate, et al., 1992, [hereinafter MacCrate Report]). The entire purpose of the report was to trigger a discussion of the development of skills and values in the profession, and accordingly, in legal education. (MacCrate Report, 1992).

Are these recent calls for reform simply more entries on a long list? Or is there potential for positive reform to the law school curriculum? A recent study suggests that legal education is in the midst of a period of rapid change. (Daniels, Katz, Sullivan, 2014, p. 593). Daniels, Katz and Sullivan surveyed law schools in 2011 about curricular change over the past decade.¹⁹ They reported that an astounding 96% of law schools had started a new program or initiative in lawyering skills. In addition, 81 % of the law schools had started new clinics. Moreover, the researchers opine that external conditions created an environment ripe for change.²⁰ "The idea of the external environment providing a window of opportunity for innovation appears to apply across tiers." (Daniels, Katz & Sullivan, 2014, p. 598).

Market forces

The most recent round of critiques of legal education arrives at a different time and in a different context than previous critiques. Significantly, the economic downturn of 2008 hit law firms and legal employers several years later. Employment statistics for recent graduates hit a low in 2011, when only 64.4% of recent graduates reported full-time employment requiring a J.D. degree, as compared with a 2009 employment figure of 74.4%. Likewise, hiring at large firms dropped significantly from 2009 to 2011. (NALP, *supra*, note 2).

In addition, the culture at law firms changed, driven by a change in the way clients reviewed and paid legal fees. In essence, clients analyzed the paradigm where law schools prepared law students and law firms trained them, and realized that they – the clients- were subsidizing the training of new lawyers. A survey of corporate counsel by the Wall Street Journal in 2011 found that 20% of 366 legal departments refused to pay fees generated by first or second-year lawyers.²¹ (Palazzo, 2011). More than half of the responding firms noted that the policies had come into effect since 2009. (Id.)

The market forces impact legal education in several ways. First, the perception among clients (and lawyers) that new graduates are unprepared for the practice of law

¹⁷ William .M. Sullivan, Anne Colby, Judith W. Wenger, Lloyd Bond and Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, Jossey-Bass, 2007 [hereinafter, "Carnegie Report"]; see also, Roy Stuckey and Others, *Best Practices for Legal Education: A Vision and a Roadmap*, 2007.

¹⁸ MacCrate Report, at 131-33. In fact, the MacCrate Report warned against the use of the list of skills and values as a "standard for law school curriculum."

¹⁹ The study involved 118 law schools. (Daniels, Katz, Sullivan, 2014, p. 588).

²⁰ A period of rapid change would be consistent with Thomas Kuhn's theory of scientific progress. Thomas Kuhn, *The Structure of Scientific Revolution* (1966).

²¹ The survey targeted firms in the Association of Corporate Counsel. Joseph Palazzolo, *First Year Associates: Are they Worth It?*, Wall Street Journal, Oct. 17, 2011, available at <http://blogs.wsj.com/law/2011/10/17/first-year-associates-are-they-worth-it/> (last accessed July 31, 2014).

has created new incentives for legal education to focus on training lawyers. Second, the practice has become interested in what occurs in legal education; they want to hire a better trained graduate. The A.B.A. has increased its role in overseeing legal education, resulting in a revision of the A.B.A Standards for Approval of Law Schools. Third, the decrease in job prospects may have an effect on the number of applicants to law school. The number of law school applicants declined each year between 2010 and 2013. (LSAC, *supra* note 3). In sum, the combination of the critique of legal education *and* the presence of market forces may be enough to overcome the historic resistance to change.

The rise of experiential learning

Experiential learning is simply the process of creating knowledge through experience. Adult learning theorist David Kolb proposed that adults tend to learn best through experience. (Kolb, Boyatzis & Mainemelis, 2001 [hereinafter, Kolb]). Kolb and his colleagues described a learning style inventory where, for example, some adults learn best through “abstract conceptualization – thinking about, analyzing, or systematically planning,” while others learn best through “reflective observation” – observing the actions of others and reflecting about what happens, still others learn best through “concrete experimentation” or “active experimentation.” (Kolb, 2001). The basic principle is that adults learn through experience and reflection on experience. Professor Frank Bloch applied adult learning theory to clinical legal education, where it explained some of the pedagogical success of the law clinic model.²² (Bloch, 1982). Earlier theorists extolled the virtues of experience as a tool for understanding. (Dewey, 1933, 1938). But experiential legal education did not arise in response to a practical application of the theories of Dewey or Kolb or Bloch. Rather, law clinics emerged in response to an unmet need for legal services.

Proliferation of Legal Clinics

The first law clinics emerged in the early 1900s.²³ (Ogilvy, 2009, p. 3). In 1928, John Bradway established a clinic at the University of Southern California, and later he founded the first “in-house” clinic at Duke University.²⁴ (Ogilvy, 2009, p. 3; Bradway, 1929, 1933, 1939). The University of Tennessee opened a legal aid clinic in 1947. (Ogilvy, 2009, p. 3-4; Joy, 2003, pp. 38-40). By the late 1950s, approximately twenty-eight legal aid clinics were operating at law schools around the country. (Ogilvy, 2009, p. 4). These early clinics, or “dispensaries,” provided necessary legal services to populations that were unable to pay for lawyers.

²² Bloch based his work on the research of Malcolm Knowles, who proposed that adults learn best in self-directed environments with cycles of experience and reflection. Malcolm Knowles, *Self-Directed Learning: A Guide for Learners and Teachers* (1975); Malcolm Knowles, *Andragogy in Action: Applying Modern Principles of Adult Learning* (1984). With respect to the application of adult learning theory to clinical legal education, see, Linda Morton, Janet Weinstein & Mark Weinstein, *Pedagogy: Not Quite Grown Up: the Difficulty of Applying an Adult Education Model to Legal Externs*, 5 Clin. L. Rev. 469, 476-77 (1999), challenging the assumption that law students are ready for adult learning.

²³ For example, Harvard established the Harvard Legal Aid Bureau in 1913. The University of Denver and the University of Pennsylvania opened voluntary legal aid “dispensaries.” (Ogilvy, 2009, p.3).

²⁴ See also, John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S. Cal. L. Rev. 252 (1929); John S. Bradway, *The Classroom Aspects of Legal Aid Clinic Work*, 8 Brook. L. Rev. 373 (1939); John S. Bradway, *Legal Aid Clinic as a Law School Course*, 3 S. Cal. L. Rev. 320 (1929-1930).

Toward the end of the 1950s, several influential institutions coordinated efforts to fund a widespread expansion of clinical legal education. The Ford Foundation, one of the largest charitable organizations in the world, and the National Legal Aid and Defender Association (NLADA), a consortium representing public interest law organizations, developed a project to expand the opportunities for law students to work in legal aid clinics. This led to the formation of the National Council on Legal Clinics (NCLC), an organization funded by Ford, with representatives from the NLADA, the American Association of Law Schools (AALS) and the American Bar Association (ABA).²⁵

The success of NCLC was borne, in part, from the powerful constituencies that joined in the project. Recognized leaders from practice and from the academy joined in an effort to create a new vision of the lawyer's professional responsibility – a vision that explicitly called for lawyers to act in service to the public. Professor Ogilvy explained their idea:

Professional responsibility included the “lawyer’s obligation to aid in law reform; to secure adequate representation of the indigent in both civil and criminal cases; to participate in the work of the organized Bar; and to act as a guardian of the principle of due process It also included the responsibility of the lawyer for community service” . . . and “the responsibility of the lawyer for participation in public affairs . . .”²⁶

From 1959 to 1965, the NCLC distributed \$500,000 to law schools and legal aid clinics. (Ogilvy, 2009, p. 11). In 1965, the success of the initial grant prompted a second wave of funding from the Ford Foundation. (Ogilvy, 2009, p. 12). The name of the funded organization changed to the Council on Education in Professional Responsibility (COEPR), and responsibility administrative responsibilities shifted to the AALS. (Id.) In 1968, the name of the organization changed again, to the Council on Legal Education in Professional Responsibility (CLEPR). (Ogilvy, 2009, p. 12; Joy, 2003, p. 40, n. 20). In this round, Ford allocated \$6 million dollars to the project, and placed the reins of CLEPR in the hands of a newly appointed executive director, William Pincus. (Ogilvy, 2009, pp. 14-16). With Ford money at his disposal, Pincus set out to integrate his vision of legal education. By 1972, CLEPR had made approximately 100 grants totaling \$4 million dollars, and by 1980, nearly every law school in the country had a clinical opportunity, defined as a “lawyer-client experience, under law school supervision, for credit.”²⁷ (Ogilvy, 2009, p. 15).

The legacy of Pincus and CLEPR extended beyond the grants used to seed clinical programs across the country. Pincus created and promoted a culture for clinical legal education by publishing a newsletter describing new programs, and sponsoring a series of conferences and training programs aimed at improving instruction in these new clinical legal education programs. (Ogilvy, 2009, p. 15). Through a CLEPR grant, the first Clinical Legal Education Conference occurred in 1977. Currently, the annual conference

²⁵ In addition, the ABA supported the expansion of clinical education by drafting a Model Student Practice Rule. *Proposed Model Rule Relative to Legal Assistance by Law Students*, 94 Rep. of the A.B.A. 290 (1969); See Peter Joy, *The Law School Clinic as A Model Ethical Law Office*, 30 Wm. Mitchell L. Rev. 35, 40 (2003) at note 22. The Student Practice Rule allowed students to practice, under close supervision, in order to assist in the provision of legal services to those without access to justice. Joy, 30 Wm. Mitchell L. Rev. at 40. Today, every jurisdiction in the United States has adopted a student practice order allowing student to represent clients under close supervision. Id.

²⁶ Ogilvy, 2009, p. 10, quoting Howard R. Sacks, *Education for Professional Responsibility*, 46 A.B.A. J. 1110 (1973).

²⁷ Ogilvy, 2009, p. 15, quoting Pincus, *Oral History Interview* at 6.

for the American Association of Law Schools (AALS) section on Clinical Legal Education boasts the more members than any other section in the AALS, and the Clinical Education Conference attracted over 700 participants in the past two years.²⁸

From 1979 through 1997, the United States Department of Education provided funding in excess of \$85 million “to continue, expand, and establish programs... that provide clinical experience in the practice of law.” (Joy, 2003, p. 41). And in 1996, the ABA amended the Standards for Approval of Law Schools to mandate that every law school “shall offer live-client or other real –life practice experiences.” (Joy, 2003, p. 41; ABA Standards for Approval of Law Schools, § 302(c)(2), 2002).

The early clinics had a specific public service mission. But clinics also employed a powerful pedagogic tool: experiential education. Students learned by doing. The application of law and legal principles in service of a real client developed a wide range of skills and aptitudes in clinical students. They learned to practice law.

For all of the success of CLEPR and the Ford Foundation and the pioneers in clinical legal education, the ultimate objectives have not been achieved.²⁹ While clinical experiences are available at all law schools, the dream of universal clinical legal education remains unrealized. Very few schools have the capacity to offer a clinical experience to each student. Fewer still have a clinical requirement for graduation.

Expansion of experiential learning

Recent evidence demonstrates an expansion of experiential education at law schools in the United States. First, there has been an increase in both the number and the type of experiential learning opportunities available to students. These experiential education programs include law clinics, but also include other courses and opportunities that allow students to learn through experience. Second, the A.B.A has proposed an amendment to the Standards for Approval of Law Schools that would require every student to participate in an experiential learning program. (A.B.A. Proposed Standard 303, April 2014). Third, the number of schools with a requirement that students take a clinic before graduation is increasing. Fourth, the number of schools with a decanal position for experiential learning is on the rise.

A glossary of different types of experiential learning

The term “clinical education,” which had been used synonymously with experiential education, must be separated from a wider range of programs that include learning through experience. While historic conceptions of “clinical education” included externships, in-house clinics, and hybrid clinics, additional experiential learning opportunities are

²⁸ In 2013, the AALS section recorded 701 participants registered for the AALS Clinical Legal Education Conference. In 2014, the number of registrants was 702. Remarks of Conference Organizing Committee, April 28, 2014, AALS Conference on Clinical Legal Education, Chicago, IL.

²⁹ “The goal that Bill Pincus set out for CLEPR, the radical reorganization of the legal education curriculum, has not come to pass, however.” Id, at 19. See also, Erwin Chemerinsky, *Why Not Clinical Education?*, 16 Clin. L. Rev. 35 (2009), and Deborah L. Rhode, *Legal Ethics in Legal Education*, 16 Clin. L. Rev. 43 (2009).

available to law students.³⁰ Recently a group of professors developed a helpful glossary to explain the distinctions between different types of courses and experiential learning programs. (Adcock, et al., 2014). Experiential education includes experiences outside of the curriculum –for example, a student may gain valuable experience volunteering or through pro bono work – as well as simulation-based courses, labs and practicum. The authors distinguish “experiential learning” from “experiential education,” noting that experiential learning is simply learning from experience, while experiential education is “an active method to teaching that ‘integrates theory and practice by combining academic inquiry with actual experience.’” (Adcock, et al, quoting Barnhizer, 2011, and Stuckey, et al, 2007). Experiential education should “purposefully engage with learners in direct experience and focused reflection in order to increase knowledge, develop skills, clarify values, and develop people’s capacity to contribute to their communities.” (Adcock. et al., 2014, p.2, quoting Ass’n for Experiential Educ., www.aee.org/about/whatIsEE).

Law students have access to a wide range of experiential learning opportunities. The most common are *law clinics*, which can be either “*in-house*” clinics, or *external clinics*. The defining feature of the clinic is that the students are supervised directly by a member of the law school faculty, who is the attorney of record in the representation. The location of the clinic may be within the law school (the in-house clinic) or at a site outside of the law school (the external clinic).

In an *externship course* clinic, students provide legal services to clients at a law office outside of the law school. Students are supervised in their case work by the attorneys at the external office (who are not employed by the law school). Externships include separate meetings with law school faculty where students can discuss their work and reflect on their experiences. The central distinction is that the clients (and the cases) are situated outside of the law school, the students receive supervision from the attorney (or judge), and the cases and clients remain outside of the law school.

Hybrid clinics include aspects of both law clinic and externship course models. A *simulation course* provides students with the opportunity to assume the role of attorney in a controlled, simulated environment, where the lawyering activity is designed by the faculty member to achieve specific objectives. A *practicum* describes a course where a portion of the student’s work involves practical fieldwork or a complex simulation within a specific area of law. Similarly, a lab course describes fieldwork or real-world projects that are connected to a separate non-experiential course in the same subject area (which may be a pre-requisite or a co-requisite to for the lab course). An *experiential module* describes an activity or exercise that is used to enhance the teaching and understanding of substantive material. Examples include role-plays or simulated arguments, etc., where the students have an opportunity to apply their legal knowledge. Finally, several schools offer a *capstone experience*, which allow the student to combine knowledge obtained from a number of courses and learning experiences. The capstone course is usually in the final semester of law school, and provides a bridge to practice.

³⁰ For some time, a quiet debate has existed among clinicians about the very definition of clinical legal education. In a series of articles, clinical professors debated the advantages and disadvantages of different forms of “clinical” courses. (Condlin, 1986; Hegland, 1986). Some preferred an “externship” model where students worked on cases in a law office separate from the law school and under the supervision of attorneys who were not full-time professors. (Condlin, 1986) Others extolled the value of the “in-house” clinic, where students worked on cases in a law office situated within the law school and under the supervision of attorneys who were full-time professors. (Hegland, 1986). Further, hybrid clinics developed that combined elements of the externship model, the in-house clinical model, the simulation model, and the hybrid model. In addition, clinical models often employed simulations as a mode of teaching.

ABA accreditation requirements

The ABA Standards for accreditation currently require that law schools provide experiential learning opportunities. ABA Standard 301(a) mandates that law schools prepare students for “effective and responsible participation in the legal profession.” (ABA Accreditation Standard 301(a)). ABA Standard 302(a) requires that law schools provide “substantial instruction” in oral advocacy, problem solving, and “other professional skills generally regarded as necessary for effective and responsible participation in the profession.” (ABA Accreditation Standard 302(a)). Standard 302(b) prescribes “substantial opportunities” for student participation in “live client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence.” (ABA Accreditation Standard 302(b)). A current proposal before the ABA would amend the Accreditation Standards to require that every law student receive at least six credits of experiential instruction.³¹ (ABA Section on Legal Education, Proposed Standard 303, April, 2014). The proposed standard defines “experiential instruction” as “a simulation course, a law clinic, or a field placement.” (ABA Proposed Standard 303, April 2014).

Requirements for graduation

A small, but increasing, percentage of law schools require students to complete a clinic or an externship. A 2010 survey of American law schools (with 163 of 194 schools reporting) found that fewer than 10% of American law schools (16 of 163) require students to complete a clinic or a field placement as a prerequisite for graduation. (Santacrose & Keuhn, *CSALE 2012*, 2012). A more recent study completed in 2013 found 19 schools with a “clinical” requirement for graduation. (Tokarz et al., 11, n. 154). Thus it appears that more law schools are adopting a requirement that students obtain clinical experience before graduation. As noted above, if the A.B.A. proposed standard is adopted, all law students will obtain at least six credit hours of experiential instruction.

Decanal appointments in experiential education

An increasing number of law schools have created decanal positions to oversee the experiential learning curricula. At least eighteen law schools have decanal level positions, typically described as Associate Dean for Experiential Learning.³² An additional fifteen law schools have a director or chair position in the area of experiential learning. Thus, approximately 16% of law schools have a dedicated administrative position in the field of experiential education. These decanal and administrative positions are separate from positions of clinic directors, as most schools with a law clinic will have a director of the

³¹ As of July, 2014, the ABA has not adopted the proposed standard. The ABA House of Delegate will vote on the proposed standard at the ABA annual meeting in August, 2014.

³² Myra Berman, Christine Cerniglia Brown, Christine Cimini, Roberto Corrado, Kate Kruse, *Creative Initiatives at U.S. Law Schools*, (2014)(findings presented June 13, 2014 at Second national Symposium on Experiential Education in Law, Greensboro, NC, 2014)(unpublished manuscript on file with author). The list of schools are: American University, Boston University, California Western School of Law, Case Western Reserve University, Drexel University, Georgetown University, Hamline University, Hofstra University, John Marshall(Chicago) School of Law, Loyola University (Los Angeles), Syracuse University, Touro College, University of California, Los Angeles, University of Connecticut, University of Notre Dame, University of Vermont, University of Wisconsin, Whittier College.

law clinic. The elevation of status provides evidence of the expansion of experiential learning.

Implementing reform in legal education

Q: How many law professors does it take to change a light bulb?

A1: Change?

A2: One professor holds the bulb and then everyone else picks up the house and rotates it around the professor.

Legal education is slow to change. Both the curriculum and the dominant teaching method have remained constant over the 150 years since Langdell introduced the case method at Harvard. The catalog of courses, particularly in the first year curriculum, reflects antiquated distinctions in the forms of pleading a case. And while clinical legal education programs have proliferated and prospered, the model of a university-based law school delivering instruction through lecture and discussion of cases reflects an entrenched paradigm.

Defining learning outcomes

The process of thinking about what a student needs to learn to become a lawyer is not easy. The Carnegie Report suggests we teach “knowledge, skills and attitudes.” (Carnegie Report, 2007, 22). These concepts are intertwined, making it difficult to define where we teach skills and where we impart knowledge. Most doctrinal courses teach students more than just legal rules - they develop skill in modes of thinking, analysis and synthesis that reach beyond mere acquisition of propositional knowledge. But the connections between knowledge, skills and values tend to be implicit, understated or hidden.

For example, many law teachers in the first-year say they teach students to “think like a lawyer.” If we studied their courses, we are confident we would find that they do, by and large, teach more than just a body of factual information. Most first-year courses require students to develop not only critical reading skills, but also the capacity to analyze, to compare, to analogize and distinguish, and to synthesize divergent examples, cases, theories and policies.³³ Our own experience and conversations with our colleagues confirm that these capacities are exactly what a professor looks for when reading exams at the end of the term. But very few syllabi contain explicit descriptions of these learning objectives. And few teachers begin the process of designing a course with a set of defined learning objectives.

At many law schools the goal of legal education remains undefined. As noted above, the debate over legal education as an extension of the liberal arts training versus legal education as practical training continues within faculty lounges across the

³³ Many of Bloom’s levels of cognitive development are apparent in the legal education curriculum. Benjamin Bloom, *Taxonomy of Educational Objectives*, (1956); see also, Linda Nilson, *Teaching at its Best* (2nd Ed.)(2003), at 17-26. Bloom’s stages proceed as follows: recollection, comprehension, analysis and synthesis, application and evaluation.

country.³⁴ (Clark, 2014, 235). Although the external critics and the accrediting body have jointly decreed that the purpose of legal education should be the training of lawyers, the academy has been slow to change.

In a prescient article, Professor Anthony Amsterdam predicted the rise of clinical education based not only on the need to teach practical skills, but also the need to teach different modes of critical thinking. (Amsterdam, 1984). But Amsterdam noted a deeper flaw: traditional legal education fell for a fatal assumption that the purpose of legal education was the mere transfer of a body of knowledge.

[T]he criticism was often voiced that legal education was too narrow because it failed to teach students how to practice law, failed to developing them practical skills necessary for the competent performance of lawyer's work....[T]his criticism – while valid to some extent - concealed a deeper, more important one. Legal education ... was too narrow because it failed to develop in students ways of thinking within and about the role of lawyers – methods of critical analysis, planning, and decision-making which are not themselves practical skills but rather form the conceptual foundations for practical skills and for much else.

[A]n even more basic shortcoming of legal education ... was the assumption that the job of law schools was to impart to students a self-contained body of instruction in the law. ...[W]e realize [now] that a major function of law schools is to give students systematic training in effective techniques for learning law from the experience of practicing law. (Amsterdam, 1984, p. 613-14.)

As early as 1917, critics called for legal education to move to a more experience-based, practical training. (Rowe, 1917, Bradway, 1929, Frank, 1933). Several scholars created lists of lawyer competencies. (Hough, 1984; Baird, et al, 1979).³⁵ Notably, Professors Marjorie Shultz and Sheldon Zedeck conducted a multi-year empirical study involving 3000 law graduates to determine whether additional factors (aside from undergraduate grades and law school admission test scores) could predict success for lawyers. (Shultz & Zedeck, 2011). The Zedeck & Shultz criteria included traditional legal competencies, such a “researching the law” and “analysis and reasoning,” as well as competencies outside of the traditional framework, such as “creativity and innovation,”

³⁴ In a recent article, Professor Sherman J. Clark defended the conception legal education as an extension of the liberal arts tradition. Professor Clark asks readers to “consider a set of ways in which law school, like a liberal arts undergraduate education, might be valuable to a thoughtful person apart from its instrumental value in qualifying and preparing one for work.” (Clark, 2014, p. 235). He notes, however, that “the dichotomy between practical training and the development of deeper capacities is a false one.” (Clark, 2014, p. 236).

³⁵ Hough derived a list of competencies from an analysis of government lawyers at the Federal Trade Commission. The list included: 1. Technical knowledge, 2. Reaserach and investigation, 3. Application of knowledge, 4. Organization and planning, 5. Writing, 6. Oral communication, 7. Collegiality and teamwork, 8. Advocacy, 9. Independence, 10. Dedication and hard work, 11. Professionalism. (Hough, 1984). In a different study, Baird arrived at the following list: 1.Ability to work well with clients; 2. I n d u s t r y , initiative, independence, and effort; 3. Relationships within the firm or organization; 4. Speed, efficiency, and timeliness; 5. Research; 6.General writing ability; 7.Responsibility, dependability, and reliability; 8. Analysis; 9. Judgment and common sense; 10. Creativity and adaptability; 11. Organization; 12. Knowledge of the law; 13. Oral presentation and communication skill; 14. Attitude and willingness to work hard; 15. Supervisory ability; 16. Legal drafting; 17. Relations with external groups and the community; 18. Thoroughness; 19. Quantity of work and results; and 20.Ability to accept and learn from supervision. (Baird, 1979).

and “self-development.”³⁶ These criteria could easily form the basis of a set of learning outcomes, but they have not been adopted by the law faculty.³⁷

The MacCrate Report, issued by a task force of the ABA Section on Legal Education and Admission to the Bar, concluded that legal education must be more integrated with the practice of law. (MacCrate Report, 1992). The MacCrate Report defined ten essential skills and four professional values for lawyers. (Id, p. 7-12). The skills include: 1. Problem solving, 2. Legal analysis and reasoning, 3. Legal research, 4. Factual investigation, 5. Communication, 6. Counseling, 7. Negotiation, 8. Litigation and alternative dispute resolution, 9. Organization and management of work, and 10. Recognizing and resolving ethical dilemmas. The MacCrate Report identified the following professional values: 1. Provision of competent representation, 2. Striving to promote justice, fairness, and morality, 3. Striving to improve the profession, 4. professional self-development. (Id.).

The Carnegie Report, issued in 2007, defined both lawyering skills, and learning objectives for legal education. (Carnegie Report, 2007). The Carnegie Report provides a list of learning objectives that would apply to any professional education. The six tasks for educators are: Developing in students the fundamental knowledge and skill, especially in an academic knowledge base and research; Providing students with the capacity to engage in complex practice; Enabling students to learn to make judgments under conditions of uncertainty; Teaching students to learn from experience; Introducing students to the disciplines of creating and participating in a responsible and effective professional community; Forming students able and willing to join an enterprise of public service. (Carnegie Report, 2007, p. 22).

Surely the task of legal education comprises more than merely imparting a “self-contained body of instruction in the law.” As conscientious legal educators we bear the responsibility to thoughtfully develop a set of learning outcomes and objectives. Each faculty at each law school should retain the freedom to develop learning objectives consistent with the needs and capacities of the students and faculty. But the definition of learning outcomes is a critical step and must precede any serious effort at curricular reform.

Sequential curriculum

Once the learning objectives are defined, a curriculum can be constructed to achieve the objectives. In most law schools, the first-year curriculum is fixed, and is not significantly different from one law school to another. After the first year, students may have additional required courses, such as Evidence, Criminal Procedure, Business Organizations, and Wills and Trusts, that they can take at any point over the next two years. In addition, students can take seminars in specific fields such as Telecommunications Law, Health Law, or Intellectual Property. Each course exists as a self contained unit without reference to other courses. Even where a particular course has a prerequisite of another course, there is no examination or comparison of the content of the two courses. In essence, there is no order and no structure to the second and third years of the curriculum.

³⁶ The full list of the Zedeck & Shultz effectiveness factors is available at http://www.albanylaw.edu/media/user/faculty_scholarship/wkshops/Presentation_Materials/Lawyering_Effectiveness.pdf

³⁷ It should be noted that the purpose of the Shultz and Zedeck study was to find criteria to guide the admissions process, and not to form a set of learning outcomes. In an attempt to examine a broader set of factors for admissions, their research looked at whether the traditional admissions criteria (GPA and LSAT score) were connected to lawyer effectiveness. (Shultz & Zedeck, 2011).

The idea of a sequential curriculum holds that courses should be ordered and structured so the learning from one course leads into the next course. This concept requires an understanding of the relationship between different areas of law. It also challenges another paradigm of legal education: the silo effect. The silo effect describes the isolation that each professor achieves from other professors. It's common that professors teaching the same course will not discuss approaches or share teaching materials. The sequential curriculum requires open communication between professors.

The sequential curriculum begins with the foundational understanding of legal doctrine. A basic understanding of legal process and institutions is necessary before the development of professional skills and values. The sequential curriculum should be viewed in light of developing competencies, rather than master of a specific body of law.

Example of curricular reform: the STEPPS Program

The STEPPS Program is a required, six-credit, two-trimester, second-year course that replaced two courses - a lecture course in Professional Responsibility and a required course in Advanced Legal Skills. Students in the STEPPS Program meet twice each week, once in a large classroom, and once in a small, simulated law office. The large classroom setting is designed to facilitate understanding of the ethical rules, and the law office provides the student with an opportunity to apply the ethical rules in the context of simulated cases. Members of the local bar, serving as adjunct professors, supervise the small law offices. Local professional actors play the role of clients in video-recorded interactions with students.

Throughout the academic year, students represent three clients in extended simulations. The simulated cases require the student to produce four written assignments and video-record four lawyering performances. The written assignments comprise varied forms of legal writing, such as a client advice letter, a motion to a court, and a contract. The performance assignments develop focus on attorney-client communication, counseling, advocacy, and negotiation techniques. In addition, students must manage time, plan long-term projects, analyze facts, and develop case strategies. Each assignment contains a reflective component, and the reflective component is graded separately from the performance itself. One of the goals of the course is to develop reflective practitioners. (Schön, 1985; Casey, 2014).

Integrating students with practitioners

The educational environment in the small law offices approaches Schön's idea of a "reflective practicum," which Schön describes as follows:

First, you learn by doing, in Dewey's phrase. In other words, you do the thing before you know what it is. Second, you begin to do it in the presence of a senior practitioner who is good at doing it and whose business is to try help you learn how to do it. Third, you are doing it with other people who are also trying to learn to do it. Fourth, you do it in what I call a virtual world which represents the practice. (Schön, 1995, p. 248).

The simulated cases allow the students to learn by doing. In an early assignment, students meet with a complete stranger – an actor playing the role of client – and conduct

a client interview. The “standardized client” model is based on the “standardized patient” training in medical schools.³⁸

The Program relies heavily on the expertise of practicing lawyers who serve as adjunct faculty. Most of the adjunct professors have more than twenty years of experience in practice. A few have more than thirty years’ experience. The team is highly diverse, not only professionally and personally, but also experientially. In Schön’s words, the adjunct professors are “good at doing it” and their “business is to help you learn to do it.” (Id.).

The simulated law office provides the key to the learning environment. Students are placed in role as lawyers from the first law office meeting. The adjunct faculty are trained to develop a “law-office” learning environment, and to avoid similarities to classroom teaching. The classes meet in small seminar-size rooms with a conference table. Some of the law offices sections meet in the actual office of the adjunct professor. A dress code ensures that students appear in professional attire. Each of these measures is designed to create a close relationship between teacher and learner, to foster a professional environment, and to “create a virtual world which represents the practice.” (Id.).

The structure of the program enables the practicing lawyers to assist in the programmatic development of the Program. The members of the adjunct faculty meet weekly with the Program Director in a “Team Meeting.” The weekly team meetings provide a dynamic opportunity for full-time teachers to discuss teaching strategies with the adjuncts, as well as an opportunity for full-time practitioners to discuss the skills and values necessary for success in the real world. This two-way street serves two critical functions. First, it ensures that the adjunct faculty receives the appropriate level of training, supervision and evaluation for their instruction. But it also ensures that the Program curriculum is pertinent, relevant and appropriate for the practice of law.

Using a thoughtful approach to assignments and assessment

Assignments

In one assignment the student must prepare a legal memorandum on the legal issues presented in a videotaped client interview. The student is placed in role as an associate working for the partner who conducted the interview. The student must separate relevant from irrelevant information, identify the legal issue, form and execute a research plan, organize the research, and prepare a written memorandum. The students do not receive direction about what the legal issue is, or what questions their research must answer. Thus a key aspect of the assignment is the discovery and definition and construction of the problem. In the language of Schön and Dewey, the first part of the assignment is “constructing the technical problem.” (Schön, 1995, p. 237-8). Once the student has constructed the problem – created the legal question to which they must then find the answer – the student can respond to the technical problem.

The assignment has several objectives. First, the student must review the skills learned in the first-year legal research and writing course. The assignment is designed

³⁸ One significant difference between the STEPPS Program standardized client model and the typical standardized patient models is the absence of evaluation by the client. Because the interactions are video recorded, the utility of client evaluation is lessened, as the professor will have an opportunity to debrief and evaluate the performance with the student.

so that most students will succeed and in the process build their confidence in their capability to conduct legal research. Second, the student is exposed to the difficulty in acquiring information from a fluid event – a video recording of a client interview.³⁹ Instead of a working from a statement of facts or a written summary of the interview, the student must derive the facts from a conversation. This method of developing the facts is different from their experience in first year, where they worked primarily from appellate decisions, where the statement of facts contained all of the necessary and relevant information. In the client interview, some information is deliberately missing or incomplete. At times there are inconsistencies in the client's narrative, and supporting documents are mentioned but not provided to the student. Third, the substance of the research assignment provides the student with the essential knowledge they will need for later assignments. All of the assignments for the year will revolve around the same legal issue presented in the first legal memorandum.

The first assignment is divided into two parts, the legal memorandum, and the reflective memorandum. In the reflective memorandum, the students are asked to first define the standard of competence in the performance of a research memorandum, and then to evaluate whether they met that standard. The goal of the reflective part of the assignment is to define a standard for professional performance. By focusing on a singular standard – the legal definition for competence – students are exposed to a very basic level of self-evaluation.

In the second assignment, students must interview a new client. Actors play the role of the client and the interviews are video-recorded. Students are asked to describe their preparation for the interview and then identify six to eight events: three examples of success in their performance, two instances where their performance needs improvement, and one to three places where they have questions about their performance. In addition, students must prepare a separate reflective essay describing their overall performance. For this reflection, they are asked whether they were aware of the choices made during the performance. In addition, they are asked to describe what they would do the same and what they would do differently if they were given another opportunity to perform the same task.

As with the first assignment there are a number of goals for this project. The student is placed in role as an attorney, and must assume a professional identity as a lawyer. The assignment is designed to introduce this new context and identity in a safe environment. For many, this is both difficult and scary, especially for those with little prior work history and with little experience in public speaking. Another goal of the assignment is to present the student with ethical issues in the context of a fluid event. The actor's script contains several ethical issues, and the student must react to the issue contemporaneously. For example, in one scenario, the client was referred to the lawyer by the lawyer's former client. The client begins to ask the lawyer about the former client's case in a manner that could either build the lawyer's rapport with the new client or boost the lawyer's professional credibility with the new client. Of course, confidentiality rules prohibit the lawyer from discussing the case of the former client. The student must recognize the ethical issue in context.

The interview assignment presents the student with a wonderful opportunity to review her demeanor and presence in the video. Students are able to self-correct the

³⁹ The video recording is a middle ground between the written summary and the live event. In the live event there is no ability to rewind and replay the scene.

majority of presentation issues when they see and hear themselves in the video. Students are frequently shocked to hear the “ums,” or to see the hair twirling or slouching, or even to notice the lack of eye contact. There is a very high degree of self-correction from the student’s self-evaluation. Another goal of the assignment is to reinforce student’s understanding of the structural elements of a client interview. Students receive a list of the component parts of the interview and they are asked to identify the parts in their own performance. While it is important for the student to understand the basic guidelines for a client interview, it is equally important for the student to see that there is no single way to conduct a client interview.

As part of the debriefing process, each student must watch the interview of another student. The goals of this task are to promote collegiality, by providing an opportunity for students to learn from each other, and to provide the student with a concrete example of an interview different from their own. The exposure to a different performance allows the student to move to the second stage of reflection: Difference and choice. (Casey, 2014, p. 338). In this stage, the student must recognize that in a lawyering performance, such as a client interview, an infinite set of correct solutions exists. By watching at least two other performances (the client interview from Case 1 conducted by a supervising attorney, and the interview of Client 2 by another student), the student is able to see and experience difference.

The opportunity for students to observe as well as perform the task accommodates different learning styles. Under Kolb’s “Learning Style Inventory,” some students will learn better through “reflective observation,” and some will learn through “active experimentation,” while others may learn best through “abstract conceptualization.” (Kolb, 2001). Moreover, the repetition through cycles of action and reflection is consistent with Knowlesian concept of learning cycles. (Knowles; Bloch, 1982).

Assessment

The STEPPS Program adds several twists to the necessary task of grading. Standard forms of assessment, such as closed-book examinations are only one of several forms of assessment in the Program. The approach to assessment differs from most law school courses in three ways: the use of formative assessment, the separation of feedback from grading, and the use of peer review.

First, the course includes formative assessment. In the group discussion (lecture) session, students are given two mid-term quizzes. The quiz provides the student with the same type of question she will see on the final exam (and on the MPRE). But the quizzes are designed as formative assessments. The quiz is an on-line, open-book assessment, where the students can take as much time as needed – the quiz is due a week after it is assigned. Students can retake the quiz until they are satisfied with the score. Moreover, the mid-term quizzes provide student and teacher with an idea of how they are progressing. If a large majority of the class misses a specific question, the teacher can identify points he needs to review. Likewise students can review areas they missed before the final examination.

Second, there is a strict separation between feedback and grading with the written and performance exercises. The adjunct professors provide qualitative feedback to the students on each of the written and performance exercises, but they do not release a grade at the same time they release feedback. Rather, the students must

review the feedback and engage in a thoughtful communication (one that indicates the student reviewed the feedback) before the grade is released. The goal of this policy is to focus the students' attention on the professional form of evaluation - feedback from the supervising attorney - rather than on the academic form of evaluation - the grade.

Third, students engage in peer review. At several points in the course, students offer critiques of the work of other students. Before these peer reviews occur, the students receive training in both giving and receiving feedback in the workplace. The goal of this effort is to demonstrate the value of collaboration. Students develop a sense of teamwork from working together to improve the work-product. In addition, the new lawyers develop the habit of seeking assistance and review from their peers before going to their supervisors.

Developing reflective practice

The reflection is integral to the professional development. Experienced professionals will naturally think about the action as they perform; they will adjust their actions based on a reservoir of experience that supports the exercise of professional judgment. But experience is precisely what the neophyte professional lacks. Through conscious reflection, the new lawyer is able to de-couple the thought from the action. These initial experiences are critical to the future development of the reflective practitioner because they instill a default preference for reflection.

The STEPPS Program integrates the Stages of Reflection Model, which includes six stages of reflection. (Casey, 2014, pp. 331-47). This model derives from models of cognitive and moral development. (Id., pp. 328). Each stage builds on the previous stage. In the first stage - *competence* - the student compares his performance to the standard of competence (per the Rules of professional Conduct). In the second stage, the student examines issues of *difference and choice* - the reality that there are many ways to successfully complete a lawyering performance. In the third stage, the student should examine *internal context* - the personal preferences, biases, experiences and characteristics that led to certain choices in the performance. In the fourth stage, the student confronts *external context* - the preferences, biases, experiences and characteristics of other parties involved in the lawyering performance. Other parties include clients, opposing counsel, judges, witnesses, etc. In the fifth stage, students look beyond the specific performance or representation to examine *societal context* - the collective preferences, biases, experiences and characteristics of society that shape the interaction between law and social structures. A reflection on societal context might describe narratives of oppression, discrimination, power, wealth, racial and ethnic histories, etc. In the final stage of reflection, students engage in *meta-reflection* - they reflect on the process of reflection.

Each assignment in the STEPPS program includes a reflective component. The reflective essays for the assignments ask the student to think outside their own preferences to the preferences of others. Did the student understand the client's goal? What if the client's goal conflicts with either the student's advice or the student's ethical obligation? How should the student present options to the client? How can the student account for the risk tolerance of the client and what if the client's risk tolerance conflicts with the risk aversion of the student?

The reflective exercises prompt students to develop cognitive capacity - to

expand the way they think about the process of acquiring knowledge. The goal is to facilitate a shift from a dualistic to a multiplistic conception of the lawyering process. (Perry, 1970; Casey, 2014, p. 324, 333). As teachers, we can observe the shift if we examine the questions students ask. Before the client interview, students frequently ask questions in a manner that implies they have a dualistic view. For example, the question, “When should I discuss the issue of client confidentiality?” implies that there is a particular point in the interview where the student must discuss client confidentiality. Once the student has seen and experienced several successful versions of the client interview, a view might emerge that “The lawyer can discuss confidentiality at any point whatsoever.” This can cause an initial sense of frustration because the student now believes there is no right and wrong way to conduct an interview. Because the dualistic paradigm has been destroyed, the student proceeds to a point of absolute relativism – where there are no rules whatsoever. This is exactly the pattern predicted by the various models of cognitive development. The student has entered the phase of multiplicity or extreme relativism. (Perry, 1970; Casey, 2014, 333).

The goal for later reflections is to pull the student from a completely relativistic conception of the lawyering process, where there are no rules and no right answers, to a conception shaped by the lawyer herself, where the best solutions are derived from the lawyer herself. The student-lawyer begins to place the experience in context – the performance is not “a” performance, it is “my” performance. The lawyer’s personal characteristics, preferences, biases and experiences shape the choices the lawyer makes. The goal of these reflections is to help the student gain awareness of what decisions or choices are being made and the personal context that shapes those choices.

The last series of reflective exercises ask the student to examine not only her personal context, but the external context of the performance. The lawyer does not operate in a vacuum, and must be aware of the preferences, biases, experiences and characteristics of other parties in the representation. The other parties could include the supervising attorney, the client, the opposing counsel or the judge. The idea is that the lawyer should develop the capacity to consciously adjust her performance in response to the external context of the representation. For example, in one assignment students must negotiate the terms of a transaction. Before the video-recorded performance, students in the law office discuss different negotiating styles, such as competing, accommodating, compromising, avoiding, etc. Students determine their preferred style. As part of the reflection, students are asked how their own preferred style affected the negotiation, how their perception of their adversary’s preferred style affected the negotiation, and whether they altered their performance based on the adversary’s approach. The purpose of this type of inquiry is to increase the student’s awareness of the internal and external factors that affect the lawyering performance.

The bridge in the sequential curriculum

The STEPPS Program builds on the foundation of the first year curriculum and prepares the student for the challenges of a real world practice experience in the third year. The Program is specifically designed to prepare the student for a law clinic or an externship. Students report gains in competence (the objective ability to perform lawyering work) and confidence (subjective evaluations of their ability to perform lawyering work). The student learns through the experience of framing and solving complex, albeit simulated, problems in the company of other students, and under the guidance to an experienced

professional. The development of a mentor-apprentice relationship creates an ideal environment for both the explicit and implicit transfer of professional values. Moreover the learning environment accommodates multiple learning styles.

Finally, the student has developed a reflective capacity through a progression of increasingly complex prompts in reflective assignments. The student is prepared to take full advantage of the opportunities to reflect on practice in the law clinic or externship course. Because the STEPPS Program is a required course, every student completes the Program in his or her second year. Thus, all third year students in law clinics will have a background of experience in reflection. They will be ready for Stage Five of the Stages of Reflection, where students consider the societal preferences and biases, and the way those preferences or biases affect the law and the legal system. Students in the STEPPS Program have started to develop their professional identity.

The Program represents not only a bridge between the first and third year of law school, but also the bridge between legal education and the legal profession. Students pass the “halfway” point in their legal education midway through the STEPPS Program. Each week they move closer to becoming a lawyer. But the Program also demonstrates the value of a joint education enterprise between the academy and the practice. At the weekly “Team Meetings” practitioners and faculty discuss ways to improve the preparation of students for the practice. The advice for improving student capacity comes hot from the front lines of practice, not from the stale offices of faculty. In this model, the role of faculty shifts: faculty must listen to the expertise of practitioners about how to practice. In turn, practitioners listen to faculty about how to teach. The expertise of both practitioners and faculty is based in their reservoir of experience: practitioners know how to practice, and faculty know how to teach.⁴⁰ This model of experiential education truly integrates the practice into the legal education curriculum.

Conclusion

The relevant question is not whether legal education faces a controversy, but rather, whether legal education has reached a Copernican Moment - whether the institution of legal education is on the verge of a paradigm shift.⁴¹ The recent critiques of legal education, combined with current economic pressures provide a unique moment for change. Although the critique of legal education is not new, the critique combined with economic pressure may create a window of opportunity for significant curricular reform. Evidence suggests that curricular reform is indeed occurring across law schools in the United States, and many of those reforms include additional programs in experiential learning. The guiding principle in these changes will be a focus on developing law students’ ability to practice law, with an emphasis on the skills and values necessary to succeed. The STEPPS Program demonstrates how a simulation-based course can develop the knowledge, skills and values necessary for ethical practice. Moving forward, each institution must examine their own curricular mission and develop learning objectives

⁴⁰ Finally, legal education is released from the “Veblenian bargain.” (Schön, 1995, 235).

⁴¹ Thomas Kuhn, *The Structure of Scientific Revolution* (1966). Kuhn describes the process of scientific as a non-linear progression. Science progresses with brief periods of immense change, followed by long periods of stagnation. The stagnation, caused by the development of paradigms, stall scientific discovery because the paradigm prefers the status quo. Thus, Copernicus may have been right, and he may have had ample evidence to prove his theories. But challenging paradigms is fraught with peril.

consistent with the needs of students, faculty and the profession. In sum, legal education must change fundamentally to meet the challenges of the 21st century, and the future of legal education depends on the success of a joint enterprise between the practice and the academy.

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