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New Ideas in Law and Legal Education

Introduction

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The legal profession and law schools have been in the throes of major changes since the financial crisis came to a head in 2008. This volume of the *Journal of Law and Policy*, "New Ideas in Law and Legal Education," primarily focuses on recommendations for and developments in legal education, to respond to the changing legal environment. To put these Articles and Essays in context, it is helpful to consider some of the changes in the legal profession and in law schools over the past five years.

When the financial crisis hit in 2008, conventional wisdom initially held that the downturn in law firm and government hiring of lawyers would be temporary. Many people who lost their jobs and who had been considering law school decided to apply. This initial surge in law school applications resulted in first-year enrollments at American Bar Association (ABA)-accredited law schools rising in 2009 and then topping out at 52,500 for the Fall 2010 entering class.[1] When lawyer hiring did not pick up, news articles began to lament the fact that there appeared to be too many lawyers, too many law schools, and that attending law school was a bad investment.[2] As

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1. *LSAC Volume Summary*, L. SCH. ADMISSIONS COUN., http://www.lsac.org/lsacresources/data/lsac-volume-summary (last visited Oct. 3, 2013).

2. *See, e.g.*, David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1, *available at* http://www.nytimes.com/2011/01/09/business/09law.html?pagewanted=all

hiring remained weak and worries about law school debt rose, the 2011 entering class size fell to 48,700, and the class size fell again to 44,500 students for the 2012 entering class.[3] Although the final numbers for the 2013 entering class are not in, predictions are that the class size will shrink further.[4] This has led commentators to predict that some law schools will close within the next decade.[5]

As law schools face the challenge of declining enrollment, they also face the need of preparing students better for the practice of law today and the legal needs of clients tomorrow. Legal employers and clients are increasingly unhappy with the failure of most law schools to prepare law students better for the practice of law.[6] A 2010 survey by the *American Lawyer* found 47 percent of law firms had clients who demanded that no first- or second-year associates work on their cases.[7] The general counsel of a technology company explained the problem this way: law schools are graduating "lawyers in the sense that they have law degrees, but they aren't ready to be a provider of services."[8]

The crux of the problem has been that law schools do not require the type or quantity of hands-on professional skills development found in other professional schools such as medicine, architecture, nursing, and pharmacy. Other professions typically require that between one-quarter to one-half of the hours required for graduation

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&_r=0 (reporting law school debt loads and poor employment prospects).

3. *LSAC Volume Summary*, *supra* note 1.

4. *See, e.g.*, Ethan Bronner, *Law Schools' Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 31, 2013, at A1, *available at* http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html?pagewanted=all.

5. *See, e.g.*, *id.* (stating that one professor predicts that within the decade, as many as ten law schools will close, and many more will cut class size, faculty, and staff); Nancy B. Rapoport, *Rethinking U.S. Legal Education: No More "Same Old, Same Old,"* 45 CONN. L. REV. 1409, 1414 (2013) (predicting that some law schools will close within the next decade); William D. Henderson, *The Calculus of University Presidents: Many Must Decide Between Two Difficult Paths: Tackle Law School Restructuring or Close Their Law Schools*, NAT'L L.J., May 20, 2013, at 14, *available at* http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202600579767 (advising university presidents that they must restructure their law schools or face devastating deficits and possibly having to close their law schools).

6. 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.

7. *Id.*

8. *Id.* (quoting Jeffrey W. Carr, General Counsel of FMC Technologies).

are spent developing the professional skills and judgment needed for students to become effective practitioners.[9] Instead, most law schools do not require any real-client education through in-house clinics or externship courses, and may require as little as one credit of professional skills education through a classroom course to comply with ABA Accreditation Standards.[10]

The lack of meaningful professional skills development in law schools is compounded by the fact that the practice of law is changing rapidly and so too is the demand for traditional lawyering. Increasingly, businesses are using accounting firms and paralegals for work such as processing documents and employee-benefit counseling, which is work lawyers have traditionally provided.[11] Many potential consumers of traditional legal services are also turning to resources on the Internet to draft contracts and other documents, using services such as LegalZoom, which has been accessed by over two million customers.[12]

Richard Susskind, author of *Tomorrow's Lawyers*, predicts that the demand for traditional lawyers will continue to shrink, and that lawyers will assume new roles in the future.[13] Susskind identifies new employment opportunities such as legal knowledge engineers, who "organize and model huge quantities of complex legal materials and processes,"[14] and legal technologists, "who can bridge the gap

9. *See* Robert R. Kuehn, *Pricing Clinical Legal Education*, SSRN (Aug. 29, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318042.

10. The ABA Standards for Approval of Law Schools state: "A law school shall require that each student receive substantial instruction in . . . other professional skills generally regarded as necessary for effective and responsible participation in the legal profession." *A.B.A. Standards and Procedures for Approval of Law Schools*, 2012 A.B.A. SEC. LEGAL EDUC. ADMISSIONS B. 19, *available at* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf. A 2010 ABA Consultant on Legal Education Memorandum explains that "substantial instruction" in professional skills may be accomplished by requiring at least *one credit hour* of skills training where "instruction in (other) professional skills must engage *each* student in skills *performances* that are *assessed* by the instructor." *Id.* at 170 (emphasis in original).

11. BUREAU OF LABOR STATS., U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK (Apr. 26, 2012), http://www.bls.gov/ooh/legal/lawyers.htm#tab-6.

12. RICHARD SUSSKIND, TOMORROW'S LAWYERS: AN INTRODUCTION TO YOUR FUTURE 60 (2013).

13. *Id.* at 128–30.

14. *Id*. at 130.

between law and technology."[15] If Susskind is correct, then law schools should be offering courses and training sufficient to equip law graduates with these skill sets.

Despite the fact that most law schools do not require significant real-life experiential learning, all law schools do offer these opportunities in their clinical and externship courses. Through in-house clinical programs and many externship courses, students are put in roles as lawyers for clients under state student-practice rules. It is no surprise, then, that most of the Articles and Essays in this volume focusing on law and legal education are ones discussing various aspects of clinical education. The authors in this volume discuss changes that have occurred, predictions for the future, and recommendations to improve legal education. The underlying theme is that in this time of change and challenges for law schools, and especially for law students, there are also opportunities for improving legal education. In addition, the two Articles focusing on the practice of law are forward-looking papers, one on the emerging challenges to privacy in cross-border data transfers and the second analyzing the non-economic value of homeownership. In sum, the Articles and Essays in this volume represent a cross-section of new ideas in law and legal education, spurred on by societal changes and challenges that the legal profession and legal education face.

KAREN TOKARZ, ANTOINETTE SEDILLO LOPEZ, PEGGY MAISEL & ROBERT F. SEIBEL—LEGAL EDUCATION AT A CROSSROADS: INNOVATION, INTEGRATION, AND PLURALISM REQUIRED!

Professors Karen Tokarz, Antoinette Sedillo Lopez, Peggy Maisel, and Robert F. Seibel plead their case for law schools to include clinical legal education as a degree requirement. Their Article reviews the considerable number of reports and studies over the years that have urged law schools to prepare students better for the practice of law. They consider these reports in light of recent changes and challenges to the legal profession and legal education.

In arguing that clinical legal education courses, including both in-house clinics and externship courses, should be required, they

15. *Id*. at 131.

contend such courses provide law students with the foundation for learning how to learn through experience. They also contend that the practice experience students gain in clinical courses prepares them to be competent, ethical practitioners.

The authors discuss the roles that the ABA, state supreme courts, and state bar licensing authorities play in influencing the content of legal education. On this point, the authors urge legal educators to engage with the bench and bar, state supreme courts, bar admission authorities, and the ABA to make reforms in legal education to prepare students better for the practice of law. Their proposed curricular and pedagogical changes would require twenty-one credits of experiential coursework over three years, including the first-year legal writing course, and at least five credits of clinic or externship courses in the second and third years. They point out that this would represent roughly one-quarter of the eighty-three required credits for graduation from an ABA-accredited law school. They contend that this represents the minimum experiential coursework to ensure the preparation of competent, ethical law graduates, ready to enter the legal profession successfully.

JEFFREY J. POKORAK, ILENE SEIDMAN & GERALD M. SLATER—STOP THINKING AND START DOING: THREE-YEAR ACCELERATOR-TO-PRACTICE PROGRAM AS A MARKET-BASED SOLUTION FOR LEGAL EDUCATION

In their Essay, Professors Jeffrey Porkorak, Ilene Seidman, and Assistant Dean Gerald Slater contend that the conventional view that the central mission of law schools is to teach students to think like lawyers is wrong. Instead, they argue that the central mission of law schools should be to prepare students for the practice of law—"to do what lawyers do." They note that while these two goals appear on the surface to be similar, they actually represent the gulf between the concept of the law school as a liberal arts education and a vision of law school as professional education for lawyers.

The authors argue that the emphasis on legal education to teach law students how to think like lawyers has produced a "practice gap" in law students, who do not have the lawyering skills and legal knowledge to practice law competently at graduation. They also note

that this contributes to a "justice gap" between the legal needs of low- and moderate-income people and the availability of affordable lawyers. Finally, they contend that the emphasis on educating students to "think like lawyers" also contributes to a widening "market gap" between the legal academy and the legal profession.

The authors explore this gap, and they propose an accelerator to practice as the solution to closing it. They describe a law school curriculum structured to prepare students to enter the legal profession as effective, successful practitioners at graduation. This curriculum would include an expanded professional development and lawyering skills curriculum, training in law practice technology and innovation, experiential education in clinical and externship courses, and career development and practice support when graduates become legal service providers.

The authors provide an overview of the four components of the accelerator-to-practice curriculum sufficient for the reader to understand their interrelationship and how they are designed to prepare students better for the practice of law. The authors describe how they envision implementing this law practice-focused curriculum at their law school. They hope that the successful implementation of the accelerator-to-practice curriculum will demonstrate how law schools can address the need for better prepared law graduates.

SUSAN R. JONES & JACQUELINE LAINEZ—ENRICHING THE LAW SCHOOL CURRICULUM: THE RISE OF TRANSACTIONAL LEGAL CLINICS IN U.S. LAW SCHOOLS

Professors Susan Jones and Jacqueline Lainez discuss developments in transactional clinical law teaching and practice over the past twenty years and the ways in which transactional clinics enrich legal education. Their thesis is that transactional clinics have evolved from focusing on housing and community economic development issues to addressing entrepreneurship, innovation, and the myriad needs of entrepreneurs and small businesses. In this way, transactional clinics have evolved to meet the needs of the low-income communities that they serve.

In addition to discussing the evolution of transactional clinical law practice, the authors also discuss the evolution of transactional skills training pedagogy and the emerging scholarship in the field. Today, transactional law clinic practice addresses myriad legal problems for clients, including corporate tax, employment, intellectual property, and Uniform Commercial Code issues. Clinic clients include small businesses, nonprofits, community economic development entities, and social entrepreneurs.

Professors Jones and Lainez also review proposed changes to the ABA Accreditation Standards that address issues of outcome measure, assessment, and program evaluation. They identify how these proposed changes may affect transactional clinics and how transactional clinics fit into the landscape of clinical legal education. They urge transactional clinicians to monitor these developments, especially those in the areas of legal education outcomes and assessment.

The authors of this Article conclude with the hope that their analysis of the evolution of transactional clinics will prompt a discussion in the clinical community about best practices, opportunities, and innovations in transactional clinic design and pedagogy. This Article will likely meet that goal.

TODD A. BERGER—THREE GENERATIONS AND TWO TIERS: HOW PARTICIPATION IN LAW SCHOOL CLINICS AND THE DEMAND FOR "PRACTICE-READY" GRADUATES WILL IMPACT THE FACULTY STATUS OF CLINICAL LAW PROFESSORS

In his Essay, Professor Todd Berger predicts that as new generations enter law teaching, there will be greater movement toward improving the status of law faculty teaching clinical courses in those law schools where clinical faculty have less status than faculty teaching non-clinical courses. Professor Berger reaches this conclusion based on the increasing number of Generation X'ers (born between 1965 and 1980) and Millennials (born between 1981 and 2004) who are more likely to have taken a clinical course than Baby Boomers (born between 1946 and 1963).

Professor Berger traces the evolution and expansion of law school clinical programs, which has led to an increasing number of law

students taking clinical courses. He also discusses why status disparities between clinical and non-clinical faculty exist at many law schools, and why many law professors from the Baby Boomer generation have resisted extending equal status to clinical faculty.

Professor Berger's prediction assumes that the positive experience of Generation X'ers and Millennial law students in clinical courses will lead those who become law professors to recognize the important contributions clinical faculty make in their teaching. He also argues that the increasing call for "practice-ready" law graduates will make clinical legal education an essential part of legal education, and that this will contribute to a movement to improve the status of clinical faculty.

Professor Berger concludes by recognizing that the change he predicts will not come about on its own. Rather, he contends that clinical faculty at law schools where they do not have equal status must advocate for change. If his prediction is accurate, those clinical faculty should have a more receptive audience among their younger colleagues teaching non-clinical courses.

W. WARREN H. BINFORD—ENVISIONING A TWENTY-FIRST CENTURY LEGAL EDUCATION

Professor Warren Binford's Essay imagines the law school of the future that takes full advantage of the benefits of digital technologies to tailor teaching for the needs of students. Professor Binford predicts that by 2050, law schools will have fully integrated technological advances such as adaptive learning software, customizable digital textbooks, and online courses, and will fully utilize social networking and online communities. As she works through her thesis, Professor Binford predicts the death of the printed textbook, and she maintains that the march toward integrating digital resources is inescapable.

In predicting the rise of digital legal education, Professor Binford notes how the legal academy has been slow to adapt to and adopt new technologies in the teaching and assessment of students. She discusses some notable exceptions to this lag, and she briefly discusses the use of digital technologies in other professional graduate schools.

Professor Binford concludes her Essay by urging law professors to adapt to the changing technologies and to utilize them to improve legal education. She predicts that current law pedagogy, which has changed little in more than 150 years, will be forced to change regardless of resistance by law professors. Instead of resisting change, she calls upon the legal academy to embrace the inevitable future she envisions.

JULIE D. LAWTON—LIMITED EQUITY COOPERATIVES: THE NON-ECONOMIC VALUE OF HOMEOWNERSHIP

In her Article, Professor Julie Lawton evaluates the meaning of homeownership when wealth creation is not the primary goal. She argues there are non-economic values to homeownership, especially among low- and moderate-income persons, that existing legal scholarship has not explored. Professor Lawton's Article seeks to fill that gap by evaluating these issues in the context of the limited equity cooperative, which is a form of ownership that significantly limits the equity appreciation for the owner.

Professor Lawton traces the history of the federal government's efforts to promote homeownership, particularly for low- and moderate-income individuals. She also explores the different models of homeownership, and describes how housing cooperatives are one of the alternatives to traditional homeownership. In discussing housing cooperatives, she focuses chiefly on limited equity cooperatives.

Professor Lawton challenges conventional thinking that limited equity cooperative homeownership has less value to the homeowner because equity appreciation is restricted. She argues that many Americans strive to become homeowners for reasons other than investment. She identifies and evaluates these non-economic reasons for owning a home and views them through the lens of limited equity cooperative homeownership.

Professor Lawton demonstrates that although limited equity cooperative homeownership has low financial investment returns, like traditional homeownership it provides a higher self-esteem, sense of control, and security for the owner. She concludes by rejecting

claims that limited equity cooperatives are no more than "glorified rentals."

CHRISTOPHER WOLF—DELUSIONS OF ADEQUACY? EXAMINING THE CASE FOR FINDING THE UNITED STATES ADEQUATE FOR CROSS-BORDER EU-U.S. DATA TRANSFERS

Christopher Wolf examines whether the mechanism for assessing cross-border flows of data is adequate. He highlights the similarities and differences between U.S. law and the EU approach to privacy, and he recommends ways that cross-border data flows might be managed better as the United States and European Union contemplate new privacy laws and a new transatlantic trade agreement.

Mr. Wolf discusses how Edward Snowden's revelations about the extent of National Security Agency surveillance prompted the EU to question U.S. commitment to personal privacy. He explains how the EU mechanism for data protection works, and why EU countries view the U.S. privacy framework as inadequate under EU law. He also explains how a new regulation pending in the EU that will conflict more with existing U.S. law might increase the privacy protection gulf between the United States and the EU.

Mr. Wolf notes how U.S. law and EU privacy regimes were more compatible forty years ago, and how they have taken different evolutionary paths. He maintains that they continue to share common goals, and he contends that, though the enforcement mechanisms differ, both approaches continue to achieve the same outcomes. He concludes by arguing for more flexible approaches to cross-border data transfers that could provide greater privacy protections while advancing free trade and the free flow of information.