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Measuring the Values and Costs of Experiential Education, Report of the Working Group on Cost and Sustainability

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Law Practicum. A course focused on a discrete area of law that integrates a requirement that students engage in practical fieldwork or complex simulations on the topic of study. Experiential education is an integral part of the class but a secondary method of instruction.

Capstone Course. A course that provides students with the opportunity to apply accumulated learning from across the curriculum, enhancing student learning by integrating doctrinal knowledge with experiential application. Ideally, a capstone course also establishes and cultivates connections within the larger legal community, allowing students to develop strategies for analyzing and addressing legal matters. Although "capstone" implies a culminating experience, capstone courses can be designed to be at the end of any component of legal training.

Experiential Module. A self-contained experiential education activity that can be inserted into any law school course. The activity is used to enhance learning of substantive material and to introduce students to real world lawyering experiences. Examples include role-plays, drafting exercises, and field trips with reflection.

III. Measuring the Values and Costs of Experiential Education

*Report of the Working Group on Cost and Sustainability**

Introduction

What experiential education costs and the value that various types of experiential education models provide provoke much comment within legal education. There is little dispute about the value of experiential education. Experiential education manifestly furthers and deepens the practical skills training that the Carnegie Foundation has identified as one of the three foundational apprenticeships of all pro-

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fessional education, but it also contributes to the other two apprenticeships in "the knowledge and way of thinking of the profession" and in the "purposes and attitudes that are guided by the values for which the professional community is responsible."[57] Studies of recent law school graduates demonstrate the relatively high value they place on practice-based experiences when compared with other classroom-based education they received in law school.[58]

However, experiential education is sometimes written off unthinkingly as being valuable but too costly without a careful assessment of what the costs are.[59] Moreover, different modes of experiential education—simulations, externships, and clinics—are often clumped together, suggesting that they are interchangeable.[60] What is often lacking is a careful analysis of what each mode of experiential education uniquely brings to an integrated lawyering program, which creates a "sequence of required experiential courses or activities integrated into the curriculum and coordinated to progressively teach students lawyering skills and values."[61]

This report seeks to provide a basis for more thoughtful analysis and discussion of both the values and the costs of legal education by breaking those values and costs down into their component parts. The way these component parts are arranged will vary from school to school, and this report does not attempt to catalogue every possible combination. Our aim is to categorize the *types* of value that education adds to experience and the *types* of costs that need to be assessed, providing a basis for more nuanced discussion of the cost and sustainability of experiential educational programming in law schools.

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[57] CARNEGIE REPORT, *supra* note 1, at 28.

[58] NALP FOUND. FOR LAW CAREER RESEARCH & EDUC. & AM. BAR FOUND., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 79–81 (2004) [hereinafter AJD], *available at* http://www.americanbarfoundation.org/uploads/cms/documents/ajd.pdf (ranking employment, clinical courses, legal writing, and internships as the most valuable law school experiences); Margaret Reuter, Experiential Teaching: The Value Proposition for Public and Private Lawyers (Sept. 27, 2014) (unpublished manuscript) (on file with the author).

[59] For examples of recent and careful assessments see Martin J. Katz, *Understanding the Costs of Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 28 (2014); Robert R. Kuehn, *Pricing Clinical Legal Education*, 92 DENVER U. L. REV. 1 (2014).

[60] *See, e.g.*, ABA STAND. & R. P. APPROV. L. SCH. 2014–2015 303(a)(3) (requiring "one or more experiential course(s)" that "must be a simulation course, a law clinic, or a field placement").

[61] *See supra* Part II.B. (defining the Integrated Lawyering Program); Reuter, *supra* note 58, at 5–6.

A. *The Value That Education Brings to Experience*

Everyone learns from experience; hence experience itself has inherent educational value. However, experiential learning is not the same thing as experiential education, in which instructors purposefully engage with learners, providing structure and meaning to the experience and accelerating the learning that occurs through experience.[62] The question for experiential educators is how to *add* value to the education that experience itself provides.

Much of traditional legal education is devoted to helping law students internalize frameworks of doctrinal knowledge that permit them to "spot the legal issues" from a given set a facts.[63] Over time and through experience, professionals develop tacit knowledge—a set of internalized frameworks formed by expertise—that helps them process new information.[64] Legal education is geared toward speeding the process of internalizing the doctrinal frameworks that help lawyers analyze the law and apply it to new factual situations.[65] Legal education's "signature pedagogy" of appellate case dialogue instills the foundational skills of "thinking like a lawyer" through modeling, coaching, and scaffolding, which make explicit the structural elements of the case or doctrine under scrutiny in the classroom.[66]

The explosion of experiential education in law schools is built on the premise that legal educators can similarly speed the natural process of developing other kinds of tacit knowledge by providing a pedagogical structure for students' experiences in real or simulated law practice.[67] In the past forty years, legal education has greatly expanded its reach into teaching lawyering skills other than legal analysis and issue-spotting. Lawyering skills literature articulates the frameworks, structures, and underlying value commitments implicit in a wide range of professional skills, permitting explicit instruction in the theory and practice of lawyering tasks once considered intuitive and unteachable,

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[62] *See supra* Part II.

[63] Katherine R. Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 MCGEORGE L. REV. 7, 13 (2013).

[64] *See generally* Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem-Solving*, 23 VT. L. REV. 1 (1998).

[65] CARNEGIE REPORT, *supra* note 1, at 54–55.

[66] *Id.* at 60–63.

[67] Kruse, *supra* note 63, at 23–28.

such as client interviewing, client counseling, factual investigation, negotiation, problem solving, advocacy, and cross-cultural awareness.[68]

Educators can add value to the students' experiences in several ways, and the opportunities in clinics, externships, and simulation courses to add each type of value are assessed below.

1. Designing the Experience

By choosing a student's practice experiences, educators can focus and sequence students' learning. The extent to which the educator can exercise control over the general content of practice-based experience varies with the learning method. Simulations provide the most direct control over what the students' experience will be. For example, a case file in a Trial Advocacy class will build in certain pre-planned opportunities for students to develop competing theories of a case and to argue evidentiary issues.

During in-house law clinics or real-practice modules, educators choose, limit, and control the cases or practice experiences that students will encounter. Most in-house clinics structure the legal work that students do with the students' educational experience in mind, limiting both the type and number of cases that students will be asked to handle. Because the aim of in-house clinics is to put students into the primary role of attorneys, clinicians look for cases that will be "good clinic cases"—challenging enough to provide students with a good learning experience but not so challenging that they will overwhelm the clinic students.

In externships, the primary control over the type of legal experience that students will get is controlled by on-site field supervisors. Law schools exercise control of on-site field placement work by choosing or vetting the sites that will count as field placements in an externship or co-op program. Well-designed externship programs will set expectations as to the level of supervision and feedback students will receive and will monitor the students' experiences through accompanying classroom components or student reflective journals. Externship teachers will also help students set appropriate learning goals that create a structure to the learning that the students will accomplish in the externship.

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[68] *Id.* at 32.

2. Complexity and Verisimilitude

On the other side of control is the value of student learning in unstructured settings, where students encounter the multiple layers of complexity that inhere in law practice.

Teachers can create simpler or richer simulations that add more or less complexity and uncertainty. Yet simulations are inherently limited in their ability to expose students to the complexities of real practice and lack the verisimilitude of real practice interactions. Canned facts are limited in scope and complexity, and simulated interactions with persons playing the role of clients or judges lack the full emotional and psychological depth of actual lawyering. Largely missing from simulated practice is the richness of how legal issues interact with the non-legal issues that motivate and inhibit clients. Also missing, except from the most complex and sustained simulations, is the uncertainty of how real-life facts develop through investigation and unfold over time. And simulations are often set in generic jurisdictions and do not engage students in learning local law, rules, or practice.

In-house clinics expose students to the complexities of real client interactions in uncertain and evolving factual contexts. Students interact with actual clients, appear in real cases, and investigate facts in the real world. They must learn to navigate the personalities and peculiarities of real clients, judges, and opposing lawyers and are faced with factual and legal uncertainty, ambiguity, and inconsistency. However, the intentionally controlled practice environment shields students from some of the factors that shape real-life law practice, such as time, caseload, and financial pressures.

Externships provide exposure to a more realistic legal practice setting. Students are placed in functioning law offices or agencies and have the opportunity to observe the practice of law in these less sheltered settings. However, the actual legal work assigned to the students may be limited to discrete tasks within a larger case or matter of legal representation, such as writing research memos, preparing documents, or interviewing witnesses.

3. Explicit Instruction on the Conceptual Frameworks Underlying Practice

Law student experiences in legal employment or volunteer opportunities provide inherent opportunities for learning. Through repetition, students gain confidence and facility in the specific tasks they

have undertaken and can transfer that learning fairly easily to experiences that bear surface similarity.[69] By helping students understand and internalize the foundational concepts that underlie generalized lawyering skills, educators "enable students to transfer the concepts, strategies and techniques they begin to use while in clinical courses to the many and varied practice settings they are almost certain to encounter after graduation."[70] Much of legal skills pedagogy involves teaching the basic concepts that underlie legal practice, which combine instruction on *what* to do with an explanation of *why* to do it that way. By making these conceptual frameworks explicit, educators can equip students to transfer their learning from one experience to future experiences.

Simulations are good vehicles for isolating particular aspects of practice and helping tie the choices that you make in practice to the conceptual frameworks that underlie particular lawyering skills. For example, negotiation simulations can be constructed to illustrate the conceptual difference between positions and interests, the influence of parties' best alternatives to a negotiated agreement (BATNAs), or the interplay between distributive and integrative approaches within the parties' zone of possible agreement.

In clinics, professors supervise the students' casework directly; hence, clinicians are well positioned to tie students' case-specific experiences to the general conceptual frameworks that underlie lawyering skills, using the students' clinic work as the raw material for instruction in generalized lessons about lawyering. In-house clinics often teach the conceptual frameworks for lawyering skills like interviewing, counseling, factual investigation, negotiation, and persuasion.

In externships, the ability to tie the conceptual frameworks of practice directly to students' practice experience is more difficult to accomplish due to the shared supervision model that divides responsibility between a law school externship instructor and an on-site field supervisor. While externship faculty can teach practice skills in an accompanying classroom component, they lack full information about the students' field experiences. Field supervisors see the students in the day-to-day interactions in the practice settings, but may lack the time to fully debrief and contextualize the students' practice exper-

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[69] David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously*, 10 CLINICAL L. REV. 191, 197–99 (2003).

[70] *Id.* at 198.

iences. Even expert practitioners may also lack full awareness of the conceptual frameworks that they apply in practice. Expert knowledge is largely tacit; it is largely a teaching function to tease out and generalize what practitioners are actually doing.

4. Feedback on Student Performance

Student learning is accelerated when the students receive specific, individualized, and constructive feedback on their performance.

Simulations provide the easiest settings in which to offer specific and individualized feedback on student performance. The simplicity of simulations allows the instructor to isolate particular points of practice for instruction (e.g., how to appropriately frame questions on direct or cross examination). Simulations also provide the opportunity for replication, allowing students to observe and compare their approach with approaches that other students have chosen in an identical simulated practice problem. Students can measure their performance against the performance of other students.

Clinics provide many opportunities for clear and immediate feedback based on direct observation, as well as more generalized feedback in the form of mid-semester and/or final evaluations of the student's overall clinic work. However, it may be more difficult to isolate a particular aspect of a student's performance because of the multiplicity of factors that come into play in one interaction. Moreover, clinic professors may intentionally remove themselves from some aspects of the direct work of a case, such as client interviews, telephone calls, or case investigations, to enhance student ownership and responsibility for the casework.

In externships, the professor is not able to observe the student's performance on legal work directly and must rely on the field supervisor to provide direct and specific feedback to the student. Externship programs sometimes provide a structure for students to get formalized feedback, such as a mid-semester or final evaluation process. Externship professors may also teach students how to recognize and ask for effective feedback from their field supervisors through building the students' workplace skills. Additionally, externship programs provide guidance to field supervisors on how to give effective feedback, either in written materials or periodic training programs.

5. Level of Responsibility and Engagement

The more responsibility a student has for practice-based work, the more engaged and motivated the student is likely to be and the more the student is likely to be challenged by and learn from the experience.

Simulations can put performance pressure on students, particularly if they are going to be taped and critiqued or perform in front of other students. However, when done as breakout exercises in a large group, it is possible for students to "slide" in their performance and sense of responsibility and not be fully engaged.

The signature features of clinical pedagogy depend on putting students in the primary role of lawyers and coaching them as they fulfill the full range of responsibilities of a lawyer in role. Clinic cases and projects are chosen for their capacity to provide students with this full lawyering experience, so the levels of responsibility and student engagement are very high. The close supervision by the clinic faculty member can be used to ensure that each student's practice experience is appropriately tailored to his or her skill level.

In externships, the level of responsibility and engagement will largely depend on the work that is assigned at the placement site. Student engagement will depend on whether there is a good fit between the assigned work and the student's skill level and learning goals. Many externship programs facilitate this fit by requiring students to articulate their learning goals and communicate these goals to their field supervisor. However, the level of engagement will depend largely on the student's self-direction and the field supervisor's motivation to engage and challenge the student.

6. Facilitation of Student Reflection

Reflection is a key component for experiential learning and can be facilitated to different degrees in various experiential learning environments. Many real-practice experiential learning programs include developing students' capacity for self-reflective lawyering as an explicit goal to help the student develop the habit of life-long learning from experience. In simulations, students can be assigned to reflect on the experience of role-playing a lawyering task. However, the relative simplicity of the simulation may provide limited material for reflection.

In clinics, student reflection is facilitated in a variety of ways. Because the clinic professor supervises the students' legal work, he or she

has the opportunity to target shared experiences from the case and to draw out and deepen students' reflection on those experiences by pointing out aspects that the student has not chosen to highlight. Clinic professors also have the opportunity to observe common experiences that clinic students are having in their casework and develop them as topics for group reflection and discussion in case rounds. Most clinics also have a component of formalized reflective writing in journals or in a mid-semester or final evaluation process.

Student reflection is a key pedagogical component of externship programs. Because the externship professor is removed from the placement, he or she must often rely on student reflective writing as a primary source of information about what the student is learning from the placement. Externship classroom components bring together students in a variety of placement sites, which provides opportunities for students to bring in a range of different types of experiences to reflect on common themes relating to legal practice.

7. Opportunities to Integrate Skills with Professional Values

In addition to teaching practical skills, experiential education provides opportunities for students to internalize values of the profession and to develop a sense of professional identity. In particular, experiential education can expose students to issues of access to justice and intercultural experience and help them develop an understanding of their unique professional role in society.

Simulations can be specifically designed to incorporate issues of access to justice or intercultural interaction. However, simulations most often rely on students, instructors, or other actors to play the roles of clients, witnesses, or opposing parties. To the extent that role-playing actors are drawn from a similar cultural background, the opportunities for deeply intercultural encounters will be limited. Being asked to play the role of a client or party in poverty or from another racial, ethnic, or socioeconomic background can help students gain empathy toward others who are situated differently in society. However, if the persons playing the roles do not fully appreciate the culture they are simulating, the opportunities to gain deep understanding of issues of poverty or cultural difference—or even the gap between professional culture and layperson perspective—may be lacking.

Clinics are very often structured to provide free legal services to indigent or otherwise disadvantaged clients and thus provide natural opportunities for students to confront issues of access to justice and

unmet legal needs, as well as to experience interactions with persons from a different racial, ethnic, or socioeconomic background. However, without opportunities to reflect on these experiences, students may simply reinforce their preexisting biases. Clinic instruction can counteract these tendencies by providing explicit instruction on systemic issues of poverty, the frameworks that shape cultural identity, and techniques for promoting intercultural understanding. Clinic professors can also coach students in one-on-one supervision or in case rounds to uncover their own culturally shaped biases and challenge their assumptions about persons from other backgrounds or cultures.

In externships, students may be placed in a variety of settings, including government, public interest, judicial, business, or private practice. Externship programs can promote exposure to access to justice and intercultural lawyering by choosing placements that are likely to present those types of experiences for students. Externships can also promote reflection on the access to justice and intercultural issues that do arise through reflective writing assignments or in-class instruction and discussion. Externship classes also provide a venue for students to compare their experiences across placement sites, providing a broader view on the systemic issues of access to justice from a variety of different perspectives.

As the foregoing analysis suggests, there are many ways that teaching adds value to the natural learning that is inherent as students engage in professional experience. Most involve the careful design of an experience ahead of time, the explicit articulation of the theory and underlying framework of the skills being performed, and guided reflection following the student experience.

B. *The Costs of Experiential Education*

Does experiential legal education cost more than traditional legal education? The math is familiar. If we focus on live-client clinics and we assume that clinical and doctrinal faculty earn equal salaries, it is clear that a full-time teacher responsible for eight students in a clinic costs more per student credit hour than a full-time teacher responsible for 150 students in a Socratic class on securities law.[71] At the same time, it now seems clear that schools can offer extensive clinical educa-

[71] For careful calculation of the actual differences, and of the changes in those differences depending on factors such as class size, credit hours, and teacher salary, see Katz, *supra* note 59.

tion programs without actually raising their tuition levels compared to otherwise comparable schools[72]—no doubt at least partly because the schools have made choices about where to spend their resources.[73]

This report will not retrace that ground. Instead, it will undertake two tasks: first, to highlight what is missing in the cost-per-credit hour analysis and how what is missing might be measured; second, to explore in several ways the cost implications of considering clinical and experiential education as a program, rather than focusing on a hypothetical single course.

1. The Basic Measure: Cost-per-Credit Hour or Cost-per-Something Else?

This report is about both values and costs, and clearly what law schools should be doing is measuring the cost against the value. But cost-per-credit hour is at best an imperfect way of doing that. The attraction of this more or less quantifiable measure may be irresistible, but in addition to declaring that counting credit hours does not fully account for value, law schools should think about what measures might actually reflect value better. Here are three possible alternatives, presented not as ideal substitutes but as the starting point for reconceptualizing the measurement of cost:

Contact hours per student: Small clinics obviously feature more actual contact with each individual student in any given class hour than large doctrinal classes can manage. More importantly, clinics feature a lot of out-of-class contact. Other forms of experiential education may not feature as much one-on-one contact with students as clinics, but most surely feature more than large doctrinal classes. One could plausibly guess that each clinic teacher spends an hour with each student each week outside of class, while the teacher of 150 students in two large doctrinal classes might well spend an average of no more than one minute with each of her students outside of class per week. Measured by contact hours per student, it seems likely that clinical teachers are considerably less costly than the teachers of large doctrinal courses.

Student engagement hours: Schools might also compare the number of hours per week that experiential and nonexperiential courses engage students' effort. How many hours do students put in to carry out their work as clinical/experiential students, compared to how many

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[72] *See* Kuehn, *supra* note 59, at 6–7.

[73] Katz, *supra* note 59, at 32–33.

hours they put in to carry out their work as students in doctrinal classrooms? There is good reason to think that many upper-year students pay painfully little attention to their classroom courses.[74] On the other hand, students in experiential courses, probably clinical students most of all, often throw themselves into the work, and it might well be expected that experiential courses in fact elicit more intense student engagement and, with that engagement, more learning.

Faculty hours spent in teaching or preparation for teaching. It seems quite likely that credit for credit, clinical/experiential teachers expend more time on teaching. As already noted, clinical teachers have more weekly contact hours with students outside of class. Doctrinal teachers can spend a lot of time preparing to teach a class for the first time, but class preparation time diminishes with repetition, making classroom teaching more efficient over time. The nature of clinical teaching does not similarly diminish with repetition, as each semester brings a fresh slate of clinic supervision and casework, which require a relatively stable investment of time. Doctrinal professors see a similarly stable demand on their time grading assignments and exams. Whether, in aggregate, clinical and experiential teachers devote more time to teaching than their doctrinal colleagues do is a question that deserves exploration, since it would measure an aspect of the value that clinical teachers are providing.

There may well be other measures that could be imagined and even implemented. The basic point is a straightforward one: if cost and value are to be effectively compared, it cannot simply be assumed that comparing cost and credit hours has told us all we need to know.

2. Considering the Cost of Experiential Programs as Programs

The reality of experiential programs is far more complex than the hypothetical single clinic with which cost comparisons often begin.[75] To understand costs one must consider those complexities. This report focuses on four: (1) who actually teaches what; (2) where they teach and with what administrative support; (3) what the countervailing revenue implications of experiential programs may be; and (4)

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[74] Mitu Gulati et al., *The Happy Charade: An Empirical Examination of the Third Year of Law School*, 51 J. LEGAL EDUC. 235 (2001).

[75] Katz focuses on this question, too. He introduces his cost measurements with the observation that "[i]f other schools want to try to increase their experiential offerings, what are the trade-offs they must make to avoid significant cost increases?" Katz, *supra* note 59, at 33.

what the impact of experiential programs is on the curricular choices students make.

Who teaches what:

It is somewhat artificial to divide faculties into doctrinal and experiential categories. Many clinical faculty members teach more than one course per semester, and some teach large-section doctrinal courses. Some experiential teachers also teach quite large classes, such as simulation courses. A simulation course can provide individualized instruction to quite a large number of students if it employs adjunct faculty to teach small sections as part of the course, and adjunct faculty are not expensive. Meanwhile, some doctrinal teachers in fact teach experiential courses as part of their load. Moreover, as is well known, doctrinal teachers do not exclusively teach large classes; some may teach a ten-person, two-credit seminar, for instance, or a twenty-five person, three-credit course.[76]

Teachers, to be sure, are not fungible. It may not be desirable to have teachers "crossover" willy-nilly, and it should be expected that making such transitions effective would call for collegial training and feedback. But one lesson of thinking about experiential programs is to remind institutions and their stakeholders that all of law school is about preparing students for their years to come, and so in principle this kind of cross-fertilization of the faculty seems desirable. The more it takes place, the more the difference in the number of student credits per faculty member between experiential teachers and doctrinal teachers must be less than the dramatic contrast that is sometimes imagined.

In addition, many experiential teachers are not full-time faculty members but adjuncts. Adjunct faculty salaries generally are very small; some adjuncts, in fact, may literally work for no cash at all, though they potentially get something of monetary value from the Continuing Legal Education (CLE) credits that their teaching earns them. A major concern raised by critics of requiring expanded experiential education is that administrations will be tempted to use low-cost adjuncts even more than is proper. That temptation may well exist, but it should not be overstated—at least not if the "proper" domain of adjunct faculty members may be quite substantial.

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[76] *See, e.g., id.* at 33 (critiquing the assumption "that doctrinal teachers teach only one type of course (for example, seminars or large lecture courses), as opposed to a mix of courses").

If adjunct faculty can rightly play a larger role in experiential education than in doctrinal teaching—"rightly," that is, in terms of their educational value and impact—then the relative cost of well-designed experiential education vis-à-vis well-designed doctrinal teaching is further decreased. The same is true to the extent that "fellows" or other short-term contract employees may play a larger role in experiential education than in classroom teaching, though classroom teaching has its "visiting assistant professors" occupying similar impermanent niches.

It is worth pausing on the question of *why* it might be proper to use adjuncts more in experiential education than in doctrinal teaching. The answer would be that, broadly speaking, what practitioners are experts at is practice, or skills. Some practicing lawyers are also experts in specific areas of law that full-time faculty may lack knowledge or time to teach, and there are, of course, adjunct faculty members teaching specialized doctrinal courses. Yet it seems plausible to think that the main advantage adjuncts have compared to regular faculty is that the adjuncts possess knowledge and skill in the practice of law. Along with that comes a related advantage: since adjuncts are in fact in practice, they can teach and supervise students in their own practice settings.

But the use of adjunct faculty, or non-faculty members, to provide supervision and instruction also has potential educational costs. The more a program relies on adjuncts, or non-faculty members, the more full-time faculty members must take on training, mentoring, and supervision roles for these other instructors. Even with this safeguard in place, it seems likely that practitioner-faculty, though they may bring many benefits in terms of areas of expertise and ability to expose students to real practice settings, will not be as skilled in teaching as full-time faculty become over time. Designing a program that takes these considerations into account requires care, but the possibilities of programs embracing the expertise that practicing lawyers offer make the effort potentially well worth undertaking.[77]

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[77] Katz observes that programs of this sort "essentially split the work of educating students between faculty members and members of the community" and have "the potential to provide not just lower cost, but also added value." *Id.* at 136.

Where they teach and with what support:

There are costs to mounting a program of experiential education that doctrinal teaching does not generate. A comprehensive experiential program will need resources such as the following:

- Classrooms configured, or configurable, to serve as courtrooms for trial simulations
- Classrooms to be used for other simulations, such as negotiations or interviews
- Information Technology (IT) resources to enable recording of simulations and easy access to the recordings for students and faculty
- In programs using actors to role-play in simulations, fees for the actors
- Spaces for meeting with clients (these may be the same spaces as those used for small-group simulations—but even so those spaces are likely to be unutilized a lot of the time)
- Clinic workrooms with access limited to clinic students
- Computer networks with confidentiality assurances
- Malpractice insurance
- Case handling costs, some of them minimal, some not (such as discovery costs or expert witness fees)
- Administrative staff: in particular, for handling of simulations, which can involve the scheduled movement of many students and actors (in programs using them)

These costs should not be ignored—and a program that did so would suffer as a result.

At the same time, it is a mistake to take the costs of nonexperiential education as automatic and to see the costs of experiential teaching as simply add-ons. A space designed to accommodate 125 person classes is a space that will not work well for smaller classes—several of which might have taken place in rooms located in the square footage now committed, more or less permanently (that is, short of major renovation work), to large-class functions. Similarly, the costs of actors may be unique to experiential courses—but the many costs of exam administration are largely unique to nonexperiential ones.

Countervailing revenue implications:

This point will not be explored at length, but it should not go unmade. One of the striking comparative insights generated at the Second National Symposium on Experiential Education in Law held during the summer of 2014 at Elon University School of Law was that medical education is largely funded from the revenues earned through patient care delivered by medical school faculty. Law schools should not forget the possibility of similar revenues being generated by clinical programs.[78] Quite aside from the possibility that clinics and experiential courses may contribute powerfully to a school's ability to recruit and retain students, clinics may directly generate revenue as a result of their operations. Clinics may win attorneys' fee awards for successful representation. They may be funded by government grants meant to generate representation for people who could not afford to pay for it. It is possible to imagine clinics that are largely or entirely self-sustaining; it is not likely that doctrinal courses will generate comparable income.

3. Experiential Programs and Students' Curricular Choices

For ease of discussion, assume that law schools choose to require of their students the number of experiential credits that the Clinical Legal Education Association proposal to the American Bar Association (ABA) had urged: fifteen credits in the upper years of each student's education.[79] There are many benefits that such a requirement could generate for students and many creative ways that experiential components might be integrated into the overall educational program of each school. Indeed, conceiving experiential courses as components of integrated programs is an essential step towards maximizing the benefits such courses can produce. But what costs would be incurred?

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[78] Simulation courses, to be sure, do not have this potential. Nor do externships, though it remains possible that ABA accreditation rules will be revised to allow students to be paid by their externship placements for their work. That change would not add to law school revenues, but it would add to law *student* revenues and, in effect, reduce the net cost of their education. Whether this change should be made, however, involves a number of profound pedagogical design issues that are beyond the scope of this report.

[79] CLINICAL LEGAL EDUC. ASS'N, CLINICAL LEGAL EDUCATION ASSOCIATION (CLEA) COMMENT ON DRAFT STANDARD 303(A)(3) & PROPOSAL FOR AMENDMENT TO EXISTING STANDARD 302(A)(4) TO REQUIRE 15 CREDITS IN EXPERIENTIAL COURSES 1 (2013) [hereinafter CLEA COMMENT ON DRAFT STANDARDS], *available at* http://www.cleaweb.org/Resources/Documents/2013-01-07%20CLEA%2015%20credits.pdf.

First, it seems likely that less time would be available for students to study doctrinal subjects. Certainly those courses that are purely skills-focused, such as courses in trial advocacy or in interviewing and counseling, would not be likely to enhance substantially the students' doctrinal knowledge. Even courses that systematically combine skills with doctrine—clinics, above all, but also practice-oriented courses in substantive law fields such as, say, corporate finance—will need to reduce the amount of time devoted to substantive law instruction to make room for skills instruction. A six-credit Securities Arbitration clinic quite likely will not provide as much instruction in securities law doctrine as a three-credit doctrinal course on that subject.

There is reason to believe, however, that students will learn the doctrinal law they do encounter more deeply when they engage with it in the context of real cases or even simulated ones rather than only through books and classroom study. Similarly, students may well learn more profoundly how to *use* law in general, how to work with ambiguous law and uncertain facts as lawyers often must, from the experience of employing some particular bits of law in experiential contexts, and so in the end students may learn legal reasoning more deeply as a result of experiential education. It must be acknowledged, however, that these points are not easy to prove.

Even if experiential courses actually propel students' understanding of doctrine, a number of costs may result if students simply have less time or fewer credits to allot to doctrinal study. One such possible consequence is that students will have less opportunity to explore the curriculum, either by taking a broad range of substantive courses (arguably helpful to them as they contemplate an uncertain practice future) or by doing advanced study in particular areas (also arguably helpful to them as they prepare for a challenging job market). These costs, however, may not be great; few students can acquire true doctrinal expertise on any subject from law school classes, and students who understand how to study law can pick up new areas of doctrine in practice as they need to (and as they almost inevitably will have to, anyway). And even these modest costs may not actually be incurred if students, in fact, do not take their classroom courses very seriously by the third year anyway—the loss of a few of these courses may then be no loss at all, especially if students are instead taking experiential classes that engage their attention.

A second possible consequence might be more serious: that students who need additional training simply to pass the bar exam may

not be able to get it. The bar exam, of course, is a fact, and it is a fact that most of it tests the ability to memorize and utilize legal doctrine and to express one's understanding cogently in exam formats. Students who have not learned how to do those things well will face grave difficulty entering the profession, however valuable they could be as practitioners. Again, one might doubt that students really need more than five semesters out of their six to be in classroom study, and one might wonder whether students would actually do better with a semester's worth of credits in which they use law in a different way than in the artificial context of the classroom. But this worry remains. One response to it is to try to modify the "fact" of the bar exam—and the recent proposal in New York to adopt the Uniform Bar Examination, and in the process substantially cut back on examining students on distinctive New York law subjects—suggests the potential of this response.[80] But another is to think carefully about what students actually need in order to prepare for this exam; one result of such thinking might be the offering of courses that are designed and taught as bar preparation courses (courses that might look quite different from traditional Socratic courses in the same subjects). The need to think through issues like this serves again as a reminder that the whole law school curriculum should be one curriculum, not several.

A third possible consequence might be limitation on student choice. In principle, choice is probably good, and something is lost by each restriction on it. Put so abstractly, however, this concern does not seem terribly powerful, since law school restricts choice in a range of ways already (beginning with the first-year curriculum, largely prescribed at perhaps almost every school in the nation). But there may be more concrete costs. *Some* students will wind up taking experiential courses not because they want to but because they are compelled to take them. It is reasonable to anticipate that part of what makes many experiential courses, particularly clinics, special will be lost if some of the students enrolled in them do not want to be there. And some other students may be required to take particular prerequisite courses that do not deeply engage them rather than being allowed to throw themselves into a clinic that they are passionate about and from which they might best learn.

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[80] Joel Stashenko, *Court System Seeks Comment on Adopting Uniform Bar Exam*, N.Y. L.J. (Oct. 7, 2014), http://www.newyorklawjournal.com/id=1202672451929/Court-System-Seeks-Comment-on-Adopting-Uniform-Bar-Exam?slreturn=20141009195054.

As that last example reflects, a fourth possible consequence, quite paradoxically, might be a solidification of experiential opportunities. If students must take fifteen credits of experiential coursework,[81] the obvious next question is: which fifteen credits? There may be many creative and fruitful answers to this question. One answer might be "any fifteen," and that might indeed be a good answer, at least if it is accompanied by careful and accessible advice to students as they make their choices. But that also might not be the best answer or at least might not be seen as the best answer at some schools.

Another plausible approach would be to create a structured experiential curriculum. Naturally this could take many forms, but it is useful to consider the pitfalls that might arise from fully embracing one possible model, in which students' progress from simpler, introductory tasks to more intensive simulation study followed at the end by the comprehensive experience of a clinic, can be illustrated. There is a lot to recommend such a program, even though developing it and taking advantage of its potential for step-by-step, cumulative learning will certainly entail some real coordination costs, as faculty in different classes try to ensure that their approaches complement each other over time.

Yet there is also something potentially lost: if it really is true that the best time for a student to take a clinic is after substantial preparatory class work, then it would arguably make sense to block students from taking clinics before they have had those preparatory classes. But then students with a passion for practice in a particular substantive area might have to slog through the preparatory classes when what would be best for them educationally would be to pursue their passion in a clinic as quickly as possible.

Of course, this might not be the best model. Even if it is the best model, it could be administered with more individualized sensitivity than the above illustration imagined. But there are important issues to be reckoned with here. A program that is too inflexible will in some ways interfere with students' learning; a program that relies extensively on individualized sensitivity will take time from faculty or administrators; and a program that simply says "any fifteen" will run the risk that some students will use their fifteen poorly.

A fifth possible consequence is a ripple effect on the rest of the curriculum. To take fifteen credits in the upper years and assign them

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[81] *See* CLEA COMMENT ON DRAFT STANDARDS, *supra* note 79, at 1.

to experiential coursework will inevitably and proportionally reduce the enrollment in nonexperiential classes and credit-bearing extracurricular activities. To do the math, assuming a law school with a three year JD program, rather than a four year evening program takes fifteen credits, or about one-fourth of the upper-year total, and assigns them to experiential courses will diminish the nonexperiential courses' enrollment, on average, by about the same one-fourth. Some faculty teaching nonexperiential courses may be delighted, but some may find that their courses, for example their small seminars, become too small to be offered. Programs such as Law Review may be affected, if students see the time commitments for those programs as hard to meet while doing their experiential work. In practice, of course, some nonexperiential courses will likely remain very popular, but to the extent that some courses avoid losing enrollment, the remaining nonexperiential classes will lose even more.

To lose a course, even a course on a relatively obscure doctrinal subject, is a loss—to its teacher and to the students who might have taken it and perhaps to others who would have benefited from the generation of knowledge that the school's attention to that subject would have fostered. This loss should be acknowledged but not overestimated; no law school remotely approaches teaching every subject, and choices of coverage have always been part of curriculum design. Moreover, there are ways that these effects can be mitigated; ideally, experiential courses and components will be married with nonexperiential classes and components to the ultimate benefit of both. That may not always be possible and will involve costs as faculty reshape their courses and learn new approaches, but the results may often be very positive.

Conclusion

In the end, our response to the costs question boils down to this: clinical and experiential education entails costs. The most important issue, however, is not the hypothetical comparison of one clinic and one doctrinal course, but the shaping of programs in which the benefits of experiential education can be realized as fully as possible while the costs are recognized and effectively managed.