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Clinical Legal Education's Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present, and Future

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Clinical Legal Education's Contribution to Building Constitutionalism and Democracy in South Africa: Past, Present, and Future

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I. OVERVIEW

Clinical legal education (CLE) programs were first introduced in South Africa in the early 1970s.¹ Not surprisingly, given the political climate at the time, these programs were established primarily to address the legal injustices perpetrated by an oppressive system.² Eventually, all South African university law schools had a CLE program.³ Today, there are seventeen CLE programs, one at each university, all of which are members of the South African University Law Clinics Association (SAULCA).⁴

In this article, we first analyze the impact that CLE programs have had over the last twenty years, focusing particularly on the role they have played in strengthening South Africa's transition to constitutionalism and democracy. More importantly, we then propose changes we believe CLE programs need to make in the future to maximize their impact in that regard. In Part II of this article, we provide a brief historical overview of the CLE movement in South Africa. Part III describes the present status of CLE programs based on data obtained from responses to a survey the authors conducted with university law clinics at South African law faculties.⁵ The goal of the survey was to determine whether these institutions are (1) undertaking systemic law reform and community representation and (2) teaching South African law students how to think strategically about the larger legal problems confronting both their clients and South African society as a whole. From the survey data, we identify the challenges and barriers that CLE programs experience and propose some ways to overcome them. Specifically, we offer ideas on how to increase the programs' impact by more fully integrating them into the overall law school curriculum and introducing new areas of focus that would promote transformative constitutionalism.⁶ Part IV then discusses the integration of CLE into the *Legum Baccalaureus* (LLB

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1. Shaheda Hassim Mahomed, *Critical Evaluation of the Practical Legal Studies Programme at the University of the Witwatersrand* 73 (July 25, 2013) (unpublished Ph.D. dissertation, University of the Witwatersrand) (on file with authors). CLE refers to the methodology of legal education developed in university-based law clinics. Such clinics are based in the law faculties of universities and provide free legal services. Law students advise clients either on a pro bono or a credit basis under the supervision of clinicians. At most universities, in addition to participating in clinics, students are enrolled simultaneously in a CLE course, often called practical legal studies or legal aid clinical programs. Today, the law clinics generally serve as the sites for teaching law students legal skills while working with clients as part of a formal course. See C.J.R. Dugard, *A Review of South African Legal Education, in LEGAL AID IN SOUTH AFRICA: PROCEEDINGS OF A CONFERENCE HELD IN THE FACULTY OF LAW, UNIVERSITY OF NATAL, DURBAN, FROM 2ND-6TH JULY, 1973*, at 160, 162-65 (1974); Richard Grimes, *Reflections on Clinical Legal Education*, 29 *LAW TCHR.* 169 (1995).
 2. See Shaheda Mahomed & Philippa Kruger, *Teaching Legal Writing at the University of the Witwatersrand Law Clinic*, 3 *J. MARSHALL L.J.* 105, 108-09 (2009).
 3. Willem de Klerk, *University Law Clinics in South Africa*, 122 *SALJ* 929, 931 (2005).
 4. See SAULCA, <http://www.saulca.co.za> (last visited Apr. 9, 2016). SAULCA was formerly known as the Association of University Legal Aid Institutions (AULAI). AULAI was formed in the mid-1980s for the purpose of representing and promoting law clinics in South Africa. See de Klerk, *supra* note 3, at 930.
 5. Peggy Maisel, Shaheda Mahomed & Meetal Jain, 2014 Survey of Clinical Programmes in South Africa (2014) (on file with authors) [hereinafter 2014 Survey].
 6. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 *SAJHR* 146, 146-57 (1998).

degree),⁷ including changes in CLE courses and pedagogy. Part V looks at two ways of transforming current CLE programs: (1) using the Legal Practice Act to require community service for all law students, and (2) integrating CLE programs into the broader public interest legal community. Finally, Part VI summarizes our findings and draws conclusions.

II. HISTORICAL DEVELOPMENT OF CLE IN SOUTH AFRICA

Prior to 1972, formal clinical legal education programs did not exist in South Africa, as law schools concentrated on advancing private law as opposed to public law.⁸ Since most law schools only offered a part-time study program,⁹ their students generally worked during the day and had no time to participate in other activities. Even more significantly, the discriminatory legislation of the apartheid regime sought to deny poor communities access to justice.¹⁰ Nevertheless, as law schools began to introduce full-time legal programs, some progressive academics sought to respond to the systemic problems, thereby planting the seeds for the creation of legal aid clinics.¹¹

The first concrete steps to establish a number of CLE programs at law schools were taken in 1973 after a conference sponsored by the Ford Foundation.¹² The

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7. The *Legum Baccalaureus* degree (LLB) was introduced as a four-year undergraduate degree in South Africa in 1998. See, e.g., Joan Church, *Legal Education in South Africa - An Historical Overview*, 4 *FUNDAMINA* 108, 120 (1998). Currently, the LLB is also offered as a postgraduate program in several law faculties. See, e.g., *Postgraduate LLB Programmes*, STELLENBOSCH U., <http://www0.sun.ac.za/pgstudies/postgraduate-programmes/faculty-of-law/postgraduate-llb-programmes.html> (last visited Apr. 9, 2016).
 8. See Dugard, *supra* note 1, at 161–62. Private law matters historically were distinguished from public law matters in that they concerned areas of law pertaining to relationships between individuals, as opposed to individuals and the state. Under the new Constitution, however, these distinctions have, in theory, collapsed, as the Constitution applies both vertically and horizontally to all relationships—whether with the state or with another individual or corporation—in South Africa. Nevertheless, we use the terminology here because despite the constitutional changes, much of the legal profession, including law faculties, continues to make this distinction. This is, in fact, a symptom of the broader challenge identified in this paper—that the manner in which the legal profession, law curriculum, and pedagogy of CLE have developed has continued to remain somewhat static in relation to the dynamic ways in which the legal framework of the country has changed.
 9. See *id.* at 162.
 10. See, e.g., National Welfare Act 79 of 1965 (prohibiting organizations from receiving funding unless such organizations were registered with the Act).
 11. See F.N. Kentridge, *Lead-in Address*, in *LEGAL AID IN SOUTH AFRICA: PROCEEDINGS OF A CONFERENCE HELD IN THE FACULTY OF LAW, UNIVERSITY OF NATAL, DURBAN, FROM 2ND-6TH JULY, 1973*, *supra* note 1, at 87, 87–89.
 12. See David McQuoid-Mason et al., *Clinical Legal Education in Africa: Legal Education and Community Service*, in *THE GLOBAL CLINICAL MOVEMENT: EDUCATING LAWYERS FOR SOCIAL JUSTICE* 23, 25 (Frank Bloch ed., 2011) (“By 1981, law clinics had been established at fourteen South African universities: Cape Town (1972), the Witwatersrand (1973), Natal (Durban) (1973), Port Elizabeth (1974), Natal ([Pietermaritzburg]) (1974), Western Cape (1975), Stellenbosch (1975), Durban-Westville (1978), Zululand (1978), Rhodes (1979), the North (1980), Pretoria (1980), South Africa (1981), and Rand Afrikaans University (1981).”); see also de Klerk, *supra* note 3, at 929–30; Peggy Maisel, *Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa*, 30 *FORDHAM INT’L L.J.* 374, 380–81 (2007).

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purpose was to increase access to legal services for the poor and vulnerable.¹³ As recounted by the late Professor F.N. Kentridge, the former director of the practical legal training program at the University of the Witwatersrand (“Wits”), the state not surprisingly demonstrated little, if any, commitment to providing legal aid for disadvantaged persons during this period.¹⁴ This meant that progressive faculty and university students, particularly law students, had to take it upon themselves to “bridge the gap.”¹⁵ By 1986, at least sixteen universities had established university law clinics.¹⁶ The end of apartheid and the adoption of the final Constitution in 1996 ushered in many changes impacting CLE: (1) the state legal aid system was restructured to increase overall legal services to disadvantaged persons;¹⁷ (2) the Law Society of South Africa accredited university law clinics;¹⁸ and (3) the Attorneys Fidelity Fund (AFF) increased its funding to university clinical programs.¹⁹ It was during this period that these programs began to integrate their work and improve their practices through the establishment of the organization now called SAULCA.²⁰ Its primary objective was and is to promote clinical programs in South Africa,²¹ and by 1997 every law school in South Africa had a clinic.²²

13. See, e.g., de Klerk, *supra* note 3, at 930.

14. See Kentridge, *supra* note 11, at 87–89.

15. Shaheda Mahomed, *United in Our Challenges — Should the Model Used in Clinical Legal Education Be Reviewed?*, 2008 J. FOR JURID. SCI. (SPECIAL ISSUE) 53, 55.

16. de Klerk, *supra* note 3, at 930.

17. See, e.g., S. AFR. CONST., 1996, §§ 28(1)(h), 35 (obliging the state to provide legal representation to children and detained persons, respectively, in certain circumstances); see also de Klerk, *supra* note 3, at 940–42; Mahomed, *supra* note 15, at 55 (“Since 1994, the South African state legal aid system has undergone intensive transformation with greater commitment towards providing access to justice to the poor and marginalised. In addition, the law societies in various provinces have either implemented or are in the process of implementing policies prescribing *pro bono* commitments from practitioners.”).

18. The Law Society of South Africa is the governing body for all practicing attorneys. This society prescribes rules and regulations about attorneys’ conduct and practices. See *History*, LAW SOC’Y S. AFR., <http://www.lssa.org.za/about-us/history> (last visited Apr. 9, 2016). The Law Society is also responsible for prescribing compliance requirements for law clinics. See *Constitution of the Law Society of South Africa*, LAW SOC’Y S. AFR., § 6.5.10, http://www.lssa.org.za/upload/documents/LSSA_Constitution.pdf (last visited Apr. 9, 2016). Law clinics are accredited according to sections 1 and 3(1)(f) of the Attorneys Act 53 of 1979 and Rule 115A of the Rules of the Law Society of the Northern Provinces.

19. In 2014, for example, the AFF awarded nearly ZAR4 million in grants to law clinics. See ATT’YS FIDELITY FUND, ANNUAL REPORT 24 (2014). The AFF is a statutory body with the primary responsibility of protecting the public from theft of their trust funds by attorneys. See Attorneys Act 53 of 1979; see also *Nature of the Fund*, ATT’YS FIDELITY FUND, <http://www.fidfund.co.za/more/nature-of-the-fund/> (last visited Apr. 9, 2016).

20. See de Klerk, *supra* note 3, at 930; see also SAULCA, *supra* note 4.

21. See Danny Wimpey & Shaheda Mahomed, *The Practise of Freedom – The South African Experience*, Presentation at the Fourth International Journal of Clinical Legal Education Conference in London 1 (June 2006) (on file with authors); see also Mahomed, *supra* note 1, at 75; SAULCA, *supra* note 4.

22. de Klerk, *supra* note 3, at 931.

III. PRESENT STATUS: LAW CLINICS AND TRANSFORMATIVE DEMOCRACY

The main goal of this section is to assess the impact that South African university-based law school clinics are having on transformative constitutionalism twenty years after the transition to democracy and a new constitution. Essentially, we sought to learn whether CLE courses are teaching South African law students how to think strategically about the systemic legal problems confronting their clients and South African society. To answer this question, we conducted a recent survey of the type of CLE courses South African law schools are currently offering and what legal work the students and law clinics are engaged in. As part of this effort, we also inquired as to whether university law clinics would like to engage in more systemic advocacy as opposed to individual case work, and if so, what the barriers were to doing so.

The responses we received revealed somewhat of a mixed picture. Disappointingly, we learned that most clinics are not teaching law students the skills and knowledge needed to engage in systemic change. It was clear from the survey responses that the clinic faculty are aware of the need for transformative law reform and many want to do more. However, they believe for the most part that it is beyond their resources to engage in this work, beyond their capacity to teach the law students the necessary skills, or both.²³

In the past decade, there have been mergers of certain public universities in South Africa so that there are now seventeen.²⁴ All of these public universities have law faculties, and each of those has one or more law clinics.²⁵ However, as was true before the mergers, these clinics differ substantially as to their numbers of faculty members and staff, the nature of the classroom components of their clinical courses, whether participation in the law clinic is required for graduation, and the types of legal work they undertake.²⁶ It is beyond the scope and purpose of this paper to analyze what is currently happening at all of these clinics, in part because we received only eleven responses (representing ten universities) to our recent survey.²⁷ In

23. See 2014 Survey, *supra* note 5, § 5.

24. See *South Africa's Universities*, SOUTHAFRICA.INFO, <http://www.southafrica.info/about/education/universities.htm#VqQTkbf2ZaR> (last visited Apr. 9, 2016); see also S. AFRICAN STUDENT CONG., BEYOND THE BIG BANG MERGERS: A CRITICAL REVIEW OF THE HIGHER EDUCATION MERGERS IN SOUTH AFRICA (2009), www.sasco.org.za/docs/congress/16_congress/he_mergers.pdf (noting the results of the higher education merger plan).

25. See SAULCA, *supra* note 4.

26. See Peggy Maisel, *Clinical Legal Education in South Africa: A Statistical Report* (July 2000) (unpublished manuscript) (on file with authors).

27. North-West University has three campuses and two separate law clinics, one at Potchefstroom and one at Mafikeng. The directors of both law clinics responded separately. North-West University was formed in 2005 from a merger of several universities, including the University of Potchefstroom, a historically white Afrikaans university, and North-West University in Mafikeng, a historically black university. The respondents were from Rhodes, University of the Witwatersrand, University of Pretoria, Stellenbosch University, North-West University Potchefstroom, University of Johannesburg, University of Cape Town, North-West University Mafikeng, University of Limpopo, University of KwaZulu-Natal, and Nelson Mandela Metropolitan University. See 2014 Survey, *supra* note 5.

addition, nine of the eleven law clinics that responded are located in historically white universities that teach in English or Afrikaans and that continue to have significantly more resources than any of the historically black universities. Therefore, the survey responses do not reflect the severity of the issues and barriers facing the latter institutions and their law clinics, five of which sent no response. For example, students who attend these universities are generally less prepared for law school, having come from under-resourced secondary schools, and have fewer faculty members there to teach them because of budget limitations.

The responses to the survey came from law clinic directors or assistant directors who teach at their respective universities and have directed their legal clinics, in some cases, for many years. They generally have been the most stable clinics since they often receive some university support, as well as outside funding. Even so, the survey responses reflect the substantial challenges facing the clinics in both their legal work and the education of their students.

While these clinics have differed on the focus and scope of their legal work, historically they have perceived their mission primarily to be service to the community, providing access to justice²⁸ for individual South Africans who cannot afford an attorney and need legal advice and representation. Educationally, since the students work on matters where they can play a lead role, these clinics provide them with the opportunity to develop new legal skills such as interviewing and counseling clients, developing facts, negotiating with opposing parties, drafting pleadings and motions, and researching and applying the law. These skills are generally not taught in other law school courses.

A. Changes to CLE Since the Transition to Democracy

Three major changes in the past twenty years indicated in the responses to the survey were: (1) legal specialization; (2) changes in service delivery, with the opening

28. For example, according to information provided by fourteen university law clinics in 2011, six clinical models focused exclusively on real-client interaction, while all but one incorporated such interaction at least partially into their programs. See Jobst Bodenstein, Dir., Rhodes Univ. Law Clinic, Presentation at Southern African Law Teachers Conference, Clinical Law Programmes in South Africa: Betwixt a Rock and a Hard Place (Jan. 13, 2014) (on file with authors) [hereinafter 2014 Presentation]. The clinics provided assistance primarily with civil, rather than criminal, cases. The main reason for this is that, since the Interim and then final Constitutions were enacted in 1994 and 1996, the South African Legal Aid Board (LAB), through Legal Aid South Africa (LASA), has worked hard to meet the constitutional mandate of providing legal counsel to unrepresented South Africans accused of serious crimes. Therefore, while some university law clinics handle criminal cases, particularly at the historically black universities, for the most part the law clinics help fill the gap in civil legal services. Indeed, only fifteen per cent of LASA's resources are dedicated to funding legal representation in civil matters, because the government has continuously maintained that section 35 of the Constitution only requires legal representation to be provided in instances where the accused face serious criminal charges. See Jackie Dugard, *Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice*, 24 SAJHR 214, 216–17 (2008); see also Hennie van As, *Taking Legal Aid to the People: Unleashing Local Potential in South Africa*, 26 OBITER 187, 188–89, 192–94 (2005); Yousuf A. Vawda, *Access to Justice: From Legal Representation to Promotion of Equality and Social Justice – Addressing the Legal Isolation of the Poor*, 26 OBITER 234, 236–37 (2005).

of off-campus offices in low-income communities; and (3) more focus on litigation, rather than advice only, in some clinics. The survey included questions about the work undertaken and thematic areas addressed by each clinic, as well as questions about whether the nature of that work had changed in recent years, and if so why.²⁹ We learned that there seems to be a small trend towards more specialization in legal work, with a few law clinics now having specialized units with different supervisors.³⁰ These include: (1) the University of the Witwatersrand law clinic, which has for many years been structured into different units, each with its own supervisor and area of focus;³¹ (2) North-West University-Potchefstroom, which opened a new unit in 2011 after the Children's Act 38 of 2005 was amended in 2010;³² (3) the University of Cape Town, which has developed a specialty in representing refugees and migrants in a separate clinic;³³ (4) the University of Pretoria, which has done extensive policy work in the area of consumer debt, although with specialized staff rather than law students;³⁴ and (5) Stellenbosch University, whose law clinic is the largest provider of legal services to farmworkers in the Western Cape.³⁵ Such specialization may result from either the receipt of grants from funders seeking to bring more resources to particular types of legal problems or from a strategic decision on the part of the law clinic faculty to respond to a particular local need. A substantial benefit that may result from this change is the undertaking of more impact, or law reform, work because of both the expertise that is built by the faculty in a particular subject area

29. See 2014 Survey, *supra* note 5.

30. See *id.*

31. See Willem de Klerk & Shaheda Mahomed, *Specialisation at a University Law Clinic: The Wits Experience*, 39 DE JURE 306 (2006).

32. Children's Act 38 of 2005 § 42 (providing for a Children's Court). The Act further encourages mediation and family conferencing, and its implementation focuses on a child's right to be heard. The object of the Children's Justice Unit (CJU) is to assist with the protection and promotion of children's rights. See NORTH-WEST UNIV. POTCHEFSTROOM CAMPUS, LAW CLINIC, ANNUAL REPORT 2015, at 10 (2015), <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/Regskliniek/Narrative%20Report%20%202015.pdf> ("Children have special needs and therefore the CJU works towards providing skill, means and support to ensure that Children's Courts are accessible to children and have a child-friendly atmosphere. By educating and training the community, children and social workers, and by doing research and advocacy, we strengthen the focus on Children's Rights and the implementation thereof. When children are removed from their families after found to be in need of care and protection, the CJU strives to provide these children with the basic means of life, including clothing and food, to ease the emotional and physical pain. The CJU provides these children with legal representation or advice to prevent further violation of their rights. In July 2011 the CJU signed a co-operation agreement with Legal Aid South Africa pertaining to children's legal assistance in the North West Province. During 2015 the cooperation agreement was extended for a period of three years.").

33. See *Refugee Rights Unit*, U. CAPE TOWN, <http://www.refugeerights.uct.ac.za/> (last visited Apr. 9, 2016).

34. See *Community Service and Projects*, U. PRETORIA, <http://www.up.ac.za/en/up-law-clinic-home-page/article/23705/community-service-and-projects> (last visited Apr. 9, 2016).

35. Interview by Meetal Jain with Stephan van der Merwe, Mathilda Rosslee, Chris Julius & Marion Hattingh, Attorneys, Stellenbosch Univ., Legal Aid, in Stellenbosch, S. Afr. (Dec. 3, 2014) [hereinafter 2014 Stellenbosch Interview].

and the opportunity to see more legal problems of the same type.³⁶ Together these factors often lead to the development of strategies and solutions that can solve a range of similar problems.

A second development since the transition is the opening of off-campus offices in low-income communities.³⁷ This has been particularly important in reaching rural areas where legal services were historically unavailable. An added benefit of this change has been the creation of opportunities to provide training by clinic faculty and students to community-based paralegals, and to attorneys and administrative staff in small law firms or advice offices. Indeed, the SAULCA Trust acts as a funding agency for South Africa's seventeen university law clinics and their associated projects, one of which is the Access to Justice (AJC) program.³⁸ This program "operates through eight AJC clusters attached to eight of the university law clinics."³⁹ These eight AJC clusters comprise a cooperative body of university law clinics, Legal Aid South Africa justice centers, NGOs, community advice offices (CAOs), community-based organizations, faith-based networks, and private practitioners working together to "provide training and back-up legal services to approximately 100 CAOs across the country, enabling qualified lawyers to support paralegals without prescribing or restricting their broad scope of work."⁴⁰ Some of this work was initiated when a particular law school received a grant to provide backup legal services and training to CAOs.⁴¹ For example, the Rhodes University Law School Clinic provides services to some forty-five CAOs in the Eastern Cape and opened an office in Queenstown in 2002 to serve the primarily rural communities in that area, and the North-West University-Potchefstroom services a cluster of paralegal CAOs and trains paralegals, attorneys, and administrative staff working at law firms and offices in the North-West and Mpumalanga Provinces.⁴² According to the faculty at Rhodes, moving legal services off campus and into the community has provided "more meaningful [and] wider impact in providing access to justice."⁴³

A final post-transition development occurred at the University of Johannesburg clinic, which transitioned from a low-budget student initiative to a more fully fledged

36. de Klerk & Mahomed, *supra* note 31.

37. See, e.g., *Community Service and Projects*, *supra* note 34; *Legal Aid Clinic*, U. WESTERN CAPE, <http://www.uwc.ac.za/Faculties/LAW/Pages/Legal-Aid-Clinic.aspx> (last visited Apr. 9, 2016).

38. See generally SAULCA, *supra* note 4.

39. Jackie Dugard & Katherine Drage, 'To Whom Do People Take Their Issues?' *The Contribution of Community-Based Paralegals to Access to Justice in South Africa* 23 (World Bank Just. & Dev., Working Paper No. 21, 2013). These clusters operate from the Universities of the Western Cape, Free State, North-West (Potchefstroom and Mafikeng), Limpopo, Rhodes, and Stellenbosch.

40. *Id.*; see also ANIL NAIDOO & KHANYISILE NTSENGE, INDIBA-AFRICA GROUP, BUSINESS CASE FOR THE COMMUNITY ADVICE OFFICE SECTOR IN SOUTH AFRICA INCORPORATING NATIONAL BASELINE DATA 9–26 (2014).

41. See Dugard & Drage, *supra* note 39.

42. See 2014 Survey, *supra* note 5, § 4.

43. *Id.*

law practice with dedicated faculty.⁴⁴ According to its survey response, “[y]ears ago the focus was not so much in rendering assistance with litigation but more focused on giving advice. The current aim is not only to advise but also [to provide] court representation”⁴⁵

Seven of the eleven law clinics that responded reported no change in the focus of the legal work in their clinics.⁴⁶ The Universities of Pretoria, Johannesburg, Stellenbosch, Cape Town, KwaZulu-Natal, and Limpopo, and the Mafikeng campus of North-West University provide a general practice related to the civil legal needs of individual clients seeking assistance.⁴⁷ Many of these cases are family law matters or evictions, with a large number of private law matters.⁴⁸

B. Law Reform Work

The survey also asked the directors if their clinics engage in law reform work, whether through (1) class action or impact litigation; (2) legislative or media advocacy, such as involving students in drafting parliamentary submissions; or (3) community education and advocacy, such as involving students in educating or representing large communities on mass evictions, mining, or other matters.⁴⁹

1. Impact Litigation

Four of the eleven universities reported doing some impact litigation.⁵⁰ Wits is the most consistent since it commonly engages in impact litigation through its specialty units. Rhodes University, while it responded that it lacks resources to take on class action litigation in its clinic, is nevertheless committed to systemic advocacy and has developed two strategies to maximize its impact.⁵¹ First, it partners with the Grahamstown office of the Legal Resources Centre, a public interest law firm, by providing clients for some class actions and cases involving applications to the Competition Tribunal.⁵² Second, it represents a large group of clients from the Joubertina community who alleged they had been defrauded by a micro-finance

44. *See id.*

45. *Id.*

46. *See id.*

47. *See id.*

48. *See id.*

49. *Id.* § 5.

50. *See id.*

51. *Id.*

52. *Id.* The Competition Tribunal was established in 1998 by the Competition Act, as one of three independent bodies created under the new competition regulation framework. *See* Competition Act 89 of 1998; *see also* *Mandate and Role*, COMPETITION TRIBUNAL, <http://www.comptrib.co.za/about/mandate-and-role/> (last visited Apr. 9, 2016).

company.⁵³ In that instance, the clinic developed the facts and referred the twenty-two clients to the National Credit Regulator (NCR).⁵⁴ This action ultimately resulted in the closing of the business and the arrest of its staff.⁵⁵

A third clinic, at Stellenbosch University, litigated a case before the Constitutional Court, *Hattingh v. Juta*, which involved the security of tenure for farmworker occupants.⁵⁶ In addition, it partnered with a major law firm to obtain a recent victory⁵⁷ in an “unprecedented legal challenge” against the justice and trade ministries, the NCR, thirteen microfinance funders, and a law firm in a case that could put an end to the microfinance lending system that has “crippled thousands of consumers.”⁵⁸ According to its response, the clinic routinely identifies systemic issues in need of advocacy, including gender discrimination against female and minor occupants of farms, as well as in the allocation of Rural Development Programme housing.⁵⁹ Nevertheless, it is clear that while it is interested in pursuing impact litigation on a regular basis, it lacks the resources to do so.⁶⁰ The University of KwaZulu-Natal also reported engaging in some impact litigation.⁶¹

2. *Legislative, Media, or Policy Advocacy*

None of the law schools reported engaging with their law students in legislative advocacy.⁶² Where legislative advocacy has been undertaken, it is clinic staff who lead the efforts. The University of Cape Town director said the clinic used to make parliamentary submissions and use policy and legislative strategy in working with refugees, but this work stopped with the departure of a clinic director.⁶³

The University of Pretoria clinic has done extensive research and policy advocacy in the area of consumer credit, helped draft national consumer legislation,⁶⁴ and

53. See 2014 Survey, *supra* note 5, § 5.

54. *Id.*

55. *Id.*

56. 2013 (3) SA 275 (CC).

57. See Barbara Maregele, *Victory for Consumers as Court Rules Against Salary Deductions*, MAIL & GUARDIAN (July 9, 2015, 8:28 AM), <http://mg.co.za/article/2015-07-09-victory-for-consumers-as-court-rules-against-salary-deductions>.

58. Ann Crotty, *Court Challenge to Dodgy Microlending*, BUS. DAY (Oct. 12, 2014, 10:40 AM), http://cached.newslookup.com/cached.php?ref_id=71&siteid=2060&id=8752672&t=1413106409.

59. 2014 Stellenbosch Interview, *supra* note 35.

60. *Id.*

61. See 2014 Survey, *supra* note 5, § 5.

62. *Id.*

63. See *id.*

64. See *Research and Short Courses*, U. PRETORIA L. CLINIC, <http://www.up.ac.za/en/up-law-clinic-home-page/article/23729/research-and-short-courses> (last visited Apr. 9, 2016) (describing the clinic’s research and policy work, including drafting credit policy that became the policy framework underlying the National Credit Amendment Act 19 of 2014).

trained many people who implement such legislation.⁶⁵ The clinic until recently was “the project leader in a joint venture between the Department of Justice and Constitutional Development [(DOJCD)], the National Youth Services Project and 10 University Law Clinics.”⁶⁶ As part of this project, the DOJCD funded up to one hundred candidate attorneys employed at university law clinics and provided stipends for supervising attorneys and the project administrator.⁶⁷ The law clinic is also an accredited training provider for the NCR, providing training for national debt counsellors.⁶⁸ In addition, candidate attorneys also provide debt counselling services under the supervision of debt counsellors registered with the NCR.⁶⁹ These projects are examples of the important work the law clinics have done for years in educating recently graduated law students serving as candidate attorneys. However, law students themselves are not for the most part engaged in the clinic work.⁷⁰

North-West University-Mafikeng’s clinic was the only clinic that reported engaging law students in media advocacy.⁷¹ The law students discuss human rights issues on community and national radio stations.⁷²

3. *Community Education and Advocacy*

Seven of the eleven clinics that responded reported using community education strategies as a major component of their human rights and social justice advocacy.⁷³ There has been a separate Street Law program in many South African law schools since the 1980s, through which law students teach classes and workshops regarding legal rights and responsibilities in secondary schools, prisons, and meetings with community groups.⁷⁴ Street Law and its approach to community legal education now seems to have been incorporated as a strategy in many of the law clinics representing

65. *See id.* Further, the clinic organized an international conference on consumer indebtedness and has been a leader on ending unfair consumer debt practices. *See International Conference on Over-Indebtedness and Credit Regulation*, U. PRETORIA L. CLINIC, <http://www.up.ac.za/en/up-law-clinic-home-page/article/52625/international-conference-on-over-indebtedness-and-credit-regulation> (last visited Apr. 9, 2016). This work, however, is undertaken by staff and faculty through grants and consultancies from the government and generally does not involve law students.

66. *Community Service and Projects*, *supra* note 34.

67. *Id.*

68. *Id.*

69. *See id.*

70. *See About the UP Law Clinic*, U. PRETORIA L. CLINIC, <http://www.up.ac.za/en/up-law-clinic-home-page/article/23699/about-us> (last visited Apr. 9, 2016).

71. *See* 2014 Survey, *supra* note 5, § 5.

72. *Id.*

73. *See id.*

74. *See* David McQuoid-Mason, *Street Law as a Clinical Program: The South African Experience with Particular Reference to the University of KwaZulu-Natal*, 17 GRIFFITH L. REV. 27, 27 (2008). A review of the websites of law faculties across South Africa reveals that at least eight offer Street Law as an opportunity for law students, with at least three offering it as an elective course for academic credit.

individual clients. Other community education programs, similar to Street Law, have also emerged but are not always affiliated with the university law clinics. For example, the Constitutional Literacy and Service Initiative (CLASI) has chapters in seven law faculties across South Africa and trains law students to facilitate conversations about the Constitution in high schools and in community centers.⁷⁵ In a few instances, students are provided with an incentive to participate in these programs because they qualify towards their mandatory community service requirements.⁷⁶

Other examples of community legal education include Stellenbosch University, which reports teaching local groups about evictions and debt counseling.⁷⁷ The North-West University-Potchefstroom clinic students assist at the local Magistrate's Court in the domestic violence, maintenance, divorce, and small claims court offices by helping clients to complete the necessary application forms.⁷⁸ Rhodes University also has an extensive community education program through which it trains paralegals across the Eastern Cape.⁷⁹ It also offers training in community facilitation skills to students, NGOs, and paralegals so they may successfully organize community education sessions.⁸⁰

C. Challenges to Shifting CLE Programs

The clinical directors were asked to identify barriers to their clinics' work and the changes they would like to make, if any, to further their clinics' impact.⁸¹ Three of the clinics stated they were satisfied with their current work.⁸² The other clinics identified a lack of resources as the major obstacle to change.⁸³ Another challenge cited was a need for professional staff to have time and support to further their academic qualifications and engage in research.⁸⁴ The lack of a career path for clinical faculty, inadequate funding from the universities to hire sufficient clinic staff, and a resistance to properly remunerating the clinic staff were identified as other problems.⁸⁵

75. See Ngwako Raboshakga & Meetal Jain, *Meaningful Constitutional Literacy to Help Build South Africa's Culture of a Participatory and Responsive Democracy* (Nov. 16, 2014) (unpublished working paper) (on file with authors).

76. *Id.* at 7. For example, the University of Cape Town requires law students to complete sixty hours of community service before graduation. The University of Johannesburg requires students to complete ten hours of community service as part of their service in the law clinic, but the community programs need not be affiliated with the law clinic's existing clients or work.

77. 2014 Survey, *supra* note 5, § 5.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* § 6.

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

In an interview with one of the clinics, staff also mentioned their hesitance to involve students in law reform work due to the lack of a student practice rule in South Africa that would allow students to appear in court, the lack of passion with which many students view their clinical experience, and the high stakes of integrating undergraduate law students into high-profile law reform work.⁸⁶

Most of these barriers were identified in an article written about the university law clinics in 2007.⁸⁷ The article outlined the barriers to expanding and sustaining clinical legal education and presented four major obstacles with suggested strategies for change.⁸⁸ The 2014 survey indicates that many of these barriers remain.⁸⁹

Undertaking systemic law reform work is very challenging and resource intensive. As our survey shows, very few clinics are undertaking complex cases or litigation. For the most part, the clinic legal work involves the representation of individual clients. Most clinics are also doing community education work, where students engage with the population in local communities about their legal rights and responsibilities. It is certainly possible for such individual legal work and community education to lead to systemic law reform. For example, the Rhodes Clinic does this through working in partnership with the Legal Resources Centre.⁹⁰ However, the law clinics do not seem to take this next step on a regular basis. The survey indicates that many law school clinical faculty members do not see it as a goal, or as their purpose, to prepare students to undertake systemic law reform. Rather, the clinics currently prioritize individual representation of clients and teaching students limited legal skills needed to advise clients facing similar legal problems.

In order for law school clinics to undertake more law reform work, it is necessary for the clinical program to make this a primary goal, or to at least view law reform as one of its objectives and adapt its clinical courses to accomplish this objective. If there were multiple clinics at a particular law school, such as at Wits, specific clinics might be designated to focus on law reform work. In addition, the clinical law faculty would need to design their classroom components to meet this goal of teaching students how to engage in transformative legal work. The survey shows that classroom components are not, for the most part, designed to accomplish this goal.

Two educational objectives were identified in the 2007 article on South African clinics: (1) teaching students about the legal problems confronting economically disadvantaged citizens and communities, and (2) teaching some of the skills needed to address these problems.⁹¹ The current survey asked if the clinics' classroom components are designed to teach the students about law reform, public interest

86. 2014 Stellenbosch Interview, *supra* note 35.

87. *See* Maisel, *supra* note 12.

88. The obstacles were (1) lack of resources, (2) lack of acceptance for CLE within universities, (3) capacity issues, and (4) balancing service and teaching concerns. *See id.* at 387–419.

89. *See* 2014 Survey, *supra* note 5, § 6.

90. *See id.* § 5.

91. Maisel, *supra* note 12, at 375.

lawyering, human rights, and social justice,⁹² in order to determine whether students are being prepared to undertake work with their clients, including after law school graduation, to help build South African constitutionalism and democracy.

All of the universities that responded now have a mandatory final year clinical course, which is a significant increase since 2005.⁹³ The survey responses indicate that some universities are using the classroom component to focus on issues of public interest lawyering while other universities are focused primarily on teaching legal skills or knowledge, leaving the students primarily to learn and reflect by themselves on public interest lawyering through their work with clients.⁹⁴ For example, the Rhodes University course involves weekly ninety-minute lectures on topics such as public interest lawyering, social justice, and diversity and bias.⁹⁵ Likewise, North-West University-Mafikeng gears its classroom lectures towards public interest lawyering and human rights by inviting lawyers from organizations such as the Human Rights Commission and the Commission for Gender Equality and private attorneys and advocates active in law reform and social justice lawyering to speak to the students.⁹⁶

In contrast, the University of Cape Town reported that it focuses the lecture component on subjects such as civil procedure and asks attorneys from law firms to talk on various topics, such as wills and the Family Advocate's office.⁹⁷ The University of Johannesburg reported that "[t]here is absolutely no time to address [issues such as public interest lawyering, human rights, and social justice], as the course and the Law Clinic is aimed at remedying and enhancing students' basic skills, which [seem] to be decreasing annually."⁹⁸

The classroom components sometimes include an introduction to legal skills such as interviewing and counseling clients. At Wits, students enroll in the course known as Practical Legal Studies and are exposed to trial advocacy and other legal skills in a classroom setting.⁹⁹ Again, these skills may be taught through lectures. The skills practice usually comes from students interviewing clients and then working on their cases.

These classroom components may expose students to some of the problems facing low-income individuals and communities in areas of law not covered in the other parts of the law school curriculum. However, these lecture courses, as currently structured, often cannot accomplish the goal of preparing students to develop strategies for solving complicated individual and group legal problems, nor can they

92. See 2014 Survey, *supra* note 5, § 7.

93. See *id.*

94. See *id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See *id.*

impart the legal skills necessary to implement solutions. The average number of students in a clinical course is 135, with attendance topping at approximately 300 students in some universities where the clinic is a compulsory course.¹⁰⁰ This makes it difficult, if not impossible, to provide the students with opportunities to engage in complex simulations that teach problem solving and other legal skills. It also means that supervision time for the student's casework is very limited. The Stellenbosch University law clinic staff advised that in order for clinics to expose students to more law reform work, law faculties would also need to reevaluate the LLB curriculum, so that students are exposed to law reform strategies in their coursework and the burden does not exclusively fall on clinics to teach.¹⁰¹

IV. TRANSFORMATIVE LEGAL EDUCATION AND CLE

Given the foundational role played by legal education within the continuum of legal training, and the opportunities provided to employ and mentor candidate attorneys in university law clinics, the reform of legal education within the LLB curriculum is key to achieving transformation in the profession.¹⁰² Geo Quinot, a law professor at Stellenbosch University, argues that a theoretical framework of transformative legal education must be established in order to achieve the broader societal objective of transformative constitutionalism.¹⁰³ In this vision of legal education, the new constitutional dispensation requires a shift from the formalistic parameters of legal education and the legal profession to a more substantive framework that considers moral and political values and the social context in which law operates.¹⁰⁴ This model of legal education requires a shift both in terms of what law faculties teach, as well as the methodology by which they teach.¹⁰⁵ Indeed, Quinot notes that Professor Karl Klare¹⁰⁶ has called for the need to radically change our legal culture from "a highly conservative one" to one "that embraces the normative framework put forward by the Constitution in its methodology," and encourages creativity in the national project to use law to achieve social transformation.¹⁰⁷ The role and responsibility of law teachers, in this regard, is critical because their approach to teaching law has great influence on driving students to think about becoming

100. 2014 Presentation, *supra* note 28. In 2011, a total of 1,885 students were enrolled in the final year clinical courses at fourteen universities. The numbers range from fifty-five at Stellenbosch University to 300 at the University of the Witwatersrand. On average, each of the clinic supervisors, many of whom are candidate attorneys, supervises thirty-four students, with a low ratio of one to twelve at Rhodes University, and a high of one to seventy at North-West University-Mafikeng. *Id.*

101. 2014 Stellenbosch Interview, *supra* note 35.

102. *See, e.g.*, Geo Quinot, *Transformative Legal Education*, 129 SALJ 411, 411-12 (2012).

103. *Id.* at 411-13.

104. *Id.* at 412, 415.

105. *Id.* at 413.

106. Karl Klare is a professor at Northeastern University School of Law in Boston.

107. *See* Quinot, *supra* note 102, at 414.

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“innovators under the Constitution.”¹⁰⁸ This contextual approach posits the assimilation of new experiences into students’ existing knowledge framework.¹⁰⁹

We believe the structure and pedagogy of university CLE programs should be examined and expanded, as the programs may teach prospective lawyers how to address the core problems of constitutionalism, as well as prepare lawyers to solve these problems through their emphasis on learning by doing.¹¹⁰ Indeed, clinics play a dual role of providing opportunities for aspirant legal practitioners and candidate attorneys to fulfill community service goals and offering a dynamic pedagogy that will develop more competent law graduates and practitioners. University law clinics engage in a variety of legal services, ranging from legal aid and backup legal services to paralegal advice offices, constitutional and impact litigation, developmental assistance, advocacy, lobbying and reform, and community legal education. Moreover, “[w]hat distinguishes clinical education from any other method of practical skills training is a methodology that uses actual experiences of the legal process as the educational core.”¹¹¹

Clinics can “become a means to improve the quality of the legal profession generally.”¹¹² As Professor David McQuoid-Mason¹¹³ articulates, “[s]tudent activities in legal aid clinics expose them on a regular basis to social justice issues in the new South Africa.”¹¹⁴ Further, these experiences expose students to a high standard of lawyering, as stated by Professor Willem de Klerk: “A good clinical lawyer should . . . practice law in a manner that is conducive to reflection on the values and obligations of legal practitioners in society.”¹¹⁵

Adopting a framework of transformative legal education, however, has certain implications with respect to designing appropriate teaching and learning activities.¹¹⁶ We examine at least three proposed reforms to CLE programs that could align them more with transformative constitutionalism: (1) an integration of CLE into the LLB,

108. *Id.* at 416.

109. See Geo Quinot & Lesley Greenbaum, *The Contours of a Pedagogy of Law in South Africa*, 26 STELLENBOSCH L. REV. 29, 35 (2015).

110. See generally de Klerk, *supra* note 3; Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929 (2001) (noting the benefit that CLE programs provide toward creating competent and responsible lawyers due to their capacity to adapt to ever changing and growing law).

111. de Klerk, *supra* note 3, at 937.

112. ASS’N OF UNIV. LEGAL AID INSTS. OF S. AFR., OPEN SOC’Y JUSTICE INITIATIVE & UNIV. OF NATAL, COMBINING LEARNING AND LEGAL AID: CLINICS IN AFRICA 6 (2003), https://www.opensocietyfoundations.org/sites/default/files/southafrica_20030628.pdf [hereinafter 2003 CLINICS IN AFRICA REPORT].

113. David McQuoid-Mason is Professor of Law at the University of KwaZulu-Natal.

114. 2003 CLINICS IN AFRICA REPORT, *supra* note 112, at 5.

115. Willem de Klerk, *Unity in Adversity: Reflections on the Clinical Movement in South Africa*, 2007 INT’L J. CLINICAL LEGAL EDUC. 95, 99 (2007).

116. See, e.g., Quinot, *supra* note 102, at 430 (identifying challenges to designing learning experiences, such as the risk of alienating certain students by assuming uniform levels of digital knowledge).

(2) mandatory community service for law students, and (3) a public interest focus and pedagogy within CLE courses that teaches students how to address social inequalities.

V. ALIGNING CLE TO TRANSFORMATIVE LEGAL EDUCATION

A. *Embracing Transformative Constitutionalism Within the LLB Curriculum*

The integration of clinical methodology throughout the law school curricula in South Africa can happen at a number of levels and would enhance both the breadth of legal education and the development of more competent law graduates. Indeed, transformative legal education insists that law be presented as a whole, rather than as “an aggregate of distinct branches, fields and skills that can be mastered one after the other.”¹¹⁷ Skills cannot be taught most effectively without students simultaneously engaging in substantive law.¹¹⁸

There are a number of ways in which integration of clinical methodology can be undertaken. First, integration can take the form of introducing simulation exercises into non-clinical courses, beginning in the first year, that help students learn a range of fundamental lawyering skills. Second, integration can take place by engaging the students in externship opportunities, which rarely if ever currently occur in South African law schools. Third, integration can involve students’ engagement in live-client clinics that are tied to a progression of courses and serve as the cornerstone for a student’s legal education.¹¹⁹ These “formulas of integration pose a number of benefits, as well as challenges that a Law School should consider.”¹²⁰ Benefits include financial sustainability for clinical programs, faculty integration, and a sustained programmatic curriculum for student engagement and preparation for practice.¹²¹ Challenges include professional commitment, class sizes, and curriculum design.¹²²

Indeed, one of the most immediate benefits of integration is the cost saving to law schools in general. Standalone clinical programmes can prove to be very costly to sustain. Most clinical programmes receive little or no financial support from the Law School faculty. As a result, many programmes are forced to fundraise in order to sustain cost, diverting scarce teaching and management resources.¹²³

With funding commitments come other obligations, including meeting the needs of the funders. This evolves into a vicious cycle of focusing on funders’ needs at the

117. Quinot & Greenbaum, *supra* note 109, at 38.

118. *Id.* at 40.

119. See Jonny Hall & Kevin Kerrigan, *Clinic and the Wider Law Curriculum*, 16 INT’L J. CLINICAL LEGAL EDUC. 25, 31 (2011).

120. Mahomed, *supra* note 1, at 192.

121. *Id.*; see also Hall & Kerrigan, *supra* note 119, at 30.

122. Additional challenges attached to integration include: (1) overcoming the negative perception attached to clinics held by academics; (2) the requirement to change the curriculum, which could lead to further institutional resistance; and (3) resource constraints. See de Klerk, *supra* note 3, at 948.

123. Mahomed, *supra* note 1, at 192. See generally 2014 Survey, *supra* note 5.

expense of students' needs. Integrating the clinical instructors and methods into the mainstream law school would allow law school budgets to absorb costs and ensure the sustainability of the clinical methodology.¹²⁴ As noted by Professors Jonny Hall and Kevin Kerrigan of Northumbria University, the “[i]ntegration of clinic with the core curriculum reveals its value as a teaching methodology and enhances its prospects of surviving and prospering in the long-term.”¹²⁵

A second benefit is addressing students' educational and professional development needs. As already noted above, integration promotes positive learning along a programmatic curriculum, and therefore addresses a wide range of student needs. To prepare for a future as a successful lawyer, students must learn many skills, including legal research, legal writing, analytical ability, oral communication, client relationships, and practical implementation.¹²⁶

While traditional teaching methodology addresses some of these educational needs (especially legal analysis), a gap remains, particularly in the areas of oral communication, client relationships, and practical skills (including fundamental litigation, legislation, transactional, and administrative practice skills).¹²⁷ CLE as a learning methodology promotes the acquisition of knowledge through a variety of pedagogical methods—the delivery of theory, practical application, and reflection.¹²⁸ Through this process, students' various learning and professional development needs can be addressed. Integral to the methodology is the promotion of life-long learning skills and value orientation.¹²⁹

A third benefit is faculty integration, and thus greater sustainability of clinical programs. To achieve this, clinicians have to be employed as academic staff members—and not in the capacity of administrators or contract workers. To date, a number of

124. Mahomed, *supra* note 15, at 58–59; *see also* Mahomed, *supra* note 1, at 192–93.

125. Hall & Kerrigan, *supra* note 119, at 30.

126. *See* Geo Quinot & S.P. van Tonder, *The Potential of Capstone Learning Experiences in Addressing Perceived Shortcomings in LLB Training in South Africa*, 17 POTCHEFSTROOM ELECTRONIC L.J. 1350, 1361 (2014).

127. *See id.* at 1375.

128. David McQuoid-Mason, Keynote Address at the 2006 Annual Learning in Law Initiative: Using Your Imagination to Light Up Knowledge, Skills and Values for LLB Students: Clinical Legal Education and Effective Lessons (Jan. 5, 2006), <http://clarkcunningham.org/LegalEd/SouthAfrica-McQuoid-Mason-LILI-Pt1.htm>; *see also* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV 1461, 1478 (1998); Roy Stuckey, *Can We Assess What We Purport to Teach in Clinical Law Courses?*, 9 INT'L J. CLINICAL LEGAL EDUC. 9, 14 (2006) (“Optimal learning from experience involves a continuous, circular, four stage sequence of experience, reflection, theory, and application.”). In his keynote address, McQuoid-Mason noted that:

The fact that studies have shown that traditional legal studies result in a “dulling of student motivation and . . . altruistic values” . . . clearly indicates a need to ‘illuminate legal education’. One method of doing this is to introduce clinical legal education methods and the interactive forms of learning associated with it when teaching substantive and procedural law to law students.

McQuoid-Mason, *supra*.

129. *See* Ross Hyams, *On Teaching Students to ‘Act Like a Lawyer’: What Sort of Lawyer?*, 13 INT'L J. CLINICAL LEGAL EDUC. 21, 22–23, 30–32 (2008); Stuckey, *supra* note 128, at 15–17, 19.

university law clinics continue to employ clinicians, including the director, in the capacity of administrative staff as opposed to academic members. Furthermore, salaries for clinical staff are mostly dependent on grant funding received.¹³⁰ As a result, lack of job security poses a major risk to the success of the program.

Clinical staff employed as administrators or contract employees do not receive the same employment benefits as academic staff, particularly in relation to promotions and sabbatical opportunities.¹³¹ Without integration, clinical teachers continue to be considered part of the lower end of the spectrum of academic teaching, particularly because the research output from clinical staff is generally limited.¹³²

Integration will allow for a more unified faculty—benefiting both academics and students. Hall and Kerrigan refer to this form of benefit as creating an environment of inclusivity.¹³³ The benefits discussed are, of course, balanced against a range of challenges, identified above, to the project of integrating CLE into the mainstream of law schools in South Africa.

In terms of professional commitment, finding the right lecturers within a law school to implement clinical methodology can be a challenge. In order to use clinical pedagogy, lecturers across the law school must understand and be motivated to implement the methodology. Without proper training and support, it is often quite daunting for lecturers to enter the domain of clinical pedagogy.

Some may argue that the clinical methodology may be a model suited only for teaching smaller classes, and thus this poses a challenge for the project of integration. Indeed, the teaching of larger classes may actually benefit from the use of more simulation exercises. However, even this method may prove challenging if the class size is too large.

Designing an appropriate curriculum as well as appropriate assessment tools may prove to be challenging, especially if one does not understand the methodology. Over the past few years a number of universities have addressed this challenge by being more explicitly reflective in engaging in a process of curriculum design and increased cooperation between the legal profession and academics in developing graduates' skills.¹³⁴

Finally, many law faculties, particularly in South Africa, prioritize the theoretical objectives of the law curriculum over the practical, stating the post-law school clerkship period of two years is a time for the legal profession to instill in law graduates practical skills. Without institutional buy-in, the project of integration will

130. *See, e.g.*, 2014 Presentation, *supra* note 28 (indicating that only fourteen per cent of clinic funding is received from the universities themselves, while the majority of funding comes from the DOJCD and Attorney Fidelity Fund). The Wits Law Clinic, for example, has only four members of their clinical team employed on the academic track. The remaining six clinicians are employed on a contract basis.

131. *See de Klerk, supra* note 115, at 99–100 (noting that promotion within the ranks of academia is a benefit allocated to permanent academic staff members).

132. *See Mahomed, supra* note 15.

133. *See Hall & Kerrigan, supra* note 119, at 30.

134. *See generally* Lesley Greenbaum, *Current Issues in Legal Education: A Comparative Review*, 23 *STELLENBOSCH L. REV.* 16, 18, 25–26 (2012).

not succeed, as it requires close collaboration between all role-players as well as a commitment of resources.

B. Increasing Skills in the LLB Curriculum

Several South African universities have made their curricula increasingly skills-driven.¹³⁵ At the University of the Western Cape, students are required to take one skills course during each year of the degree. In the first year, the course is Introduction to Legal Studies; in the second year, Critical Legal Analysis; in the third year, Introduction to Advocacy; and in the fourth year, Preparing for Legal Practice.¹³⁶ The goal of these courses is to provide skills training, including analytical and critical thinking, drafting, and advocacy skills. Although these courses are designed as skills courses, they are considered “academically substantive and equivalent to the traditional law courses.”¹³⁷ All other modules are encouraged to incorporate skills teaching.

At the University of Cape Town, the LLB degree teaches generic practical skills “such as problem solving, analysis, research and communication skills, as well as practical legal skills such as drafting of particular kinds of legal documents and legal argumentation, both written and verbal.”¹³⁸ In addition, “[l]aw students are required in the Intermediate Level to make constructive use of the knowledge and skills they acquire by contributing to the community through Legal Aid, Community Service, Shawco, Rape Crisis, Parliamentary Monitoring Group or similar outreach activities.”¹³⁹

At Rhodes University, students participating in their third year are required to enroll in two courses¹⁴⁰: Legal Skills and Legal Practice.¹⁴¹ Legal Skills incorporates the teaching of research skills, legal ethics, writing skills, numeracy skills, applied logic and critical reasoning, and structure and delivery of legal argument. In the

135. For example, in 2012 the University of the Witwatersrand introduced a skills-based curriculum. See *About Us*, U. WITWATERSRAND, <http://www.wits.ac.za/law/about-us/> (last visited Apr. 9, 2016); see also U. KWAZULU-NATAL, <http://law.ukzn.ac.za/> (last visited Apr. 9, 2016); *Handbook*, U. CAPE TOWN (2014), <https://www.uct.ac.za/downloads/uct.ac.za/apply/handbooks/Handbook10Law2014.pdf>.

136. See *Academic Programme—View Programme Modules*, U. WESTERN CAPE, <http://ap.uwc.ac.za/AP/ViewProgrammeModules.aspx?year=2014&faculty=LAW&programme=7161&costtyp=L> (last visited Apr. 9, 2016).

137. E-mail from Raymond Koen, Deputy Dean, Univ. of the Western Cape, to Shaheda Mahomed (May 29, 2012) (on file with authors).

138. *Handbook*, *supra* note 135.

139. *Id.*

140. E-mail from Jobst Bodenstein, Dir., Rhodes Univ. Law Clinic, to Shaheda Mahomed (Feb. 13, 2015) (on file with authors).

141. At Rhodes, Legal Skills and Legal Practice are offered to LLB students in their penultimate year of study. See *Law Degree Structure*, RHODES U., <https://www.ru.ac.za/admissiongateway/application/curriculumselection/law/> (last visited Apr. 9, 2016). While both modules are skills-based, they are taught in quite different settings using different teaching methods. Legal Practice is offered by the clinic and Legal Skills by faculty members, most of whom have been practicing attorneys or advocates. Legal Practice uses a variety of teaching and assessment methods, including client representation, lectures, and simulations. See *Course Outlines 2015*, RHODES U., <http://www.ru.ac.za/law/resources/courseoutlines/2015/> (last visited Apr. 9, 2016).

Legal Practice course, students participate in the law clinic. They engage with real clients and participate in file and case management, consultation interviewing, communication, and drafting skills. The aim of this course is to apply the legal knowledge acquired in academic studies. Other skills-driven courses periodically offered at Rhodes include negotiation and mediation as well as arbitration.¹⁴²

In 2008, Wits decided to review the content of the LLB degree, last revised in 2000. The idea was motivated by several concerns, including the needs of the lecturers, calls from the profession for better prepared graduates,¹⁴³ and the contemporary needs of South African students.¹⁴⁴ The LLB was reviewed, resulting in a more focused curriculum that incorporated skills teaching¹⁴⁵ into the following courses: family law, contract law, jurisprudence, civil procedure, practical legal studies, and the independent research report.

Why then is there a continued disjuncture between legal education and the needs of the profession? Surely if all South African law schools were adequately teaching legal skills, students would be better prepared for the different professional careers they engage in. Is it that law faculties are not articulating the concept of skills teaching clearly, or is it that faculties would like to believe that we are teaching skills when in fact we are not? Of course, an integrated intervention presupposes that law lecturers are coordinated enough to align their teaching methodologies and curriculum content.¹⁴⁶ The question thus becomes: “Does this happen in practice?”

C. Opportunities with the Legal Practice Act

The philosophy of transformative legal education also contemplates a notion of authentic learning, which refers to the importance of learning in a way that corresponds to the world of practice that exists outside the university.¹⁴⁷ Authentic learning is characterized by students participating in real world, complex problem-solving activities located in a learning environment closely simulating a real world context.¹⁴⁸ This form of authentic learning could be served well, we believe, through

142. See *Course Outlines 2014*, RHODES U., <http://www.ru.ac.za/law/resources/courseoutlines/2014/> (last visited Apr. 9, 2016).

143. See, e.g., Quinot & van Tonder, *supra* note 126, at 1350; see also S. AFRICAN LAW DEANS ASS'N (SALDA), REVIEW OF THE LLB DEGREE 3 (Oct. 13, 2005) [hereinafter SALDA REVIEW OF THE LLB DEGREE] (on file with authors) (“Universities cannot merely point to inadequate preparation of students and other possible deficiencies at entry level, and wash their hands of the problems at exit level. Despite such drawbacks, faculties should produce quality graduates at the end of the day, and if the professions indicate that our graduates lack certain skills that the market place needs, then we should address those concerns.”).

144. See SALDA REVIEW OF THE LLB DEGREE, *supra* note 143.

145. The skills incorporated included: working with legal authority; legal problem solving; argumentative critical thinking and essay writing; legal drafting; and legal practice skills incorporating interviewing, statement taking, professional management, professional ethics, trial preparation, trial advocacy, and legal research.

146. See Quinot & Greenbaum, *supra* note 109, at 40–41.

147. *Id.* at 46.

148. *Id.*

a creative implementation of the recent compulsory community service provisions for law graduates in the Legal Practice Act.¹⁴⁹

On September 22, 2014, the Legal Practice Act (“the Act”) was enacted into law.¹⁵⁰ For more than a decade preceding its enactment, various iterations of the draft Legal Practice Bill (the “Bill”) had been considered and debated within the legal profession quite vigorously.¹⁵¹ In the current iteration of the Act, section 3 lays out the purpose of the Act to:

- (a) provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld;
- (b) broaden access to justice by putting in place—
 - (i) a mechanism to determine fees chargeable by legal practitioners for legal services rendered that are within the reach of the citizenry;
 - (ii) measures to provide for the rendering of community service by candidate legal practitioners and practising legal practitioners.¹⁵²

Section 29 of the Act contains compulsory community service provisions.¹⁵³ This section places an obligation on the Minister of Justice and Constitutional Development (the “Minister”) to prescribe requirements for compulsory community service after consultation with the Legal Practice Council (LPC) established by the Act.¹⁵⁴ This may include community service as a part of practical vocational training for candidate legal practitioners or a minimum period of community service for practicing legal practitioners.¹⁵⁵ This section continues to set out where community service could take place but leaves room for community service by legal practitioners to take place in other ways as well.¹⁵⁶

The Act describes the functions of law clinics.¹⁵⁷ Section 6(5)(b) proposes the incorporation of compulsory community service into the broader LLB degree.¹⁵⁸ It gives the LPC the discretion to advise the Council on Higher Education on the

149. Legal Practice Act 28 of 2014.

150. *Id.*

151. See More Matshediso, *Legal Practice Bill Signed*, S. AFR. GOV'T NEWS AGENCY (Sept. 24, 2014), <http://www.sanews.gov.za/south-africa/legal-practice-bill-signed>.

152. Legal Practice Act 28 of 2014 § 3.

153. *Id.* § 29.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* § 34(8).

158. *Id.* § 6(5)(b).

desirability of including a form of community service within the LLB curriculum for all law students.¹⁵⁹ This provision is phrased quite broadly, so it has the potential to be an influential tool for the LPC that could have an enormous impact on the LLB curriculum and broaden access to justice for all South Africans.¹⁶⁰

Clearly, neither the scope of compulsory community service nor decisions on how to implement the foregoing provisions of the Act has yet been determined. Advocates within CLE programs have proposed that the best place for students to engage in community service would be within the clinic.¹⁶¹ They argue that community service should become a mandatory feature of the LLB.¹⁶² Submissions presented on the Bill specifically encourage the inclusion of law students in these provisions.¹⁶³ The National Alliance for the Development of Community Advice Offices (NADCAO) has argued that allowing students to fulfill part of their community service requirement while in school could reduce the financial burden on the state.¹⁶⁴ Aspiring “legal practitioners who engage in community service programmes during the course of their legal studies would not need to be compensated, although they would receive academic credit.”¹⁶⁵

Much has yet to be fleshed out, however, with respect to compulsory community service, as the provisions are not due to come into effect for at least three years from the date of enactment of the Act.¹⁶⁶ Section 94 provides for regulations to be made by the Minister relating to, among other things, legal education and training in section 6(5)(f) and community service in section 29(1).¹⁶⁷ The authors understand that a specialized working group will be established under the auspices of the Council on Higher Education to deal with community service. We submit this is a rich

159. *Id.*

160. *Id.*

161. The Association of University Legal Aid Institutions (AULAI), for example, submitted the following recommendation with respect to section 29(2)(a):

29(2)(a) makes provision for delivery of free legal services to the public, but does not specifically provide for such community service to be administered at a law clinic of a university. AULAI submits that law clinics attached to law faculties are well placed to offer a combination of vocational training and community service to law graduates.

ASS'N OF UNIV. LEGAL AID INSTS., SUBMISSIONS ON THE LEGAL PRACTICE BILL (Feb. 8, 2013) (on file with authors).

162. Advocates include the AULAI, the Constitutional Literacy and Service Initiative (CLASI), and the Wits Law Clinic, among others.

163. *See, e.g., Comments on Legislation*, LAW SOC'Y S. AFR., <http://www.lssa.org.za/our-initiatives/advocacy/comments-on-legislation> (last visited Apr. 9, 2016). Submissions were made to the DOJCD.

164. *See* NADCAO, SUBMISSION TO THE SOUTH AFRICAN PARLIAMENTARY PORTFOLIO COMMITTEE ON JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE LEGAL PRACTICE BILL [B20-2012] § 2.8 (2013).

165. *Id.*

166. Legal Practice Act 28 of 2014 § 120(3).

167. *Id.* § 94.

opportunity for the CLE community within South Africa to provide input into the design of community service in the country.

The Act's vision of a legislated program of community service—with the appropriate built-in mechanisms of supervision and training—has the potential to build a culture of service that can lead to true transformation and the advancement of equality in South Africa within legal education, the legal profession, and beyond.

D. Expanding CLE to Adopt a Public Interest and Social Justice Focus

There is also a need for the existing CLE courses to bring university legal education and training in line with the broader public interest or social justice legal sector.¹⁶⁸ Although law reform units at particular law schools were established with a focus, for example, on HIV/AIDS and land redistribution, university law clinics have mostly not, as of yet, been included within the ambit of the public interest legal services sector.¹⁶⁹ Legal Aid South Africa has a relationship with several university law clinics, but most organizations do not have any such formal relationship with a public interest legal organization.¹⁷⁰ In part, this is due to the fact that university law clinics do not view themselves necessarily as part of the public interest legal services sector. It is also perhaps symptomatic of a public interest legal services sector that views university law clinics as solely engaged in the provision of direct legal services as distinct from public interest work.¹⁷¹

Twenty years into a constitutional democracy, the opportunity is as ripe as ever for this landscape to shift. There are examples of CLE programs moving in this

168. One of the challenges in the South African context, of course, is that the distinctions between the terms “human rights,” “constitutional,” and “public interest” are contested. Some argue that within the ambit of the new Constitution, all areas of law can appropriately be labeled “constitutional” and that unlike many other jurisdictions, many South African constitutional provisions reflect national and international human rights commitments. Indeed, while the authors agree that a university law clinic’s existing work could and should be considered as “human rights” or “constitutional,” we argue that there are different dimensions of this work. One side of the continuum is individually-based work, which traditionally has been referred to as “access to justice” and has historically constituted the bulk of university law clinic work. On the other end of the continuum is group or community-based work, which would be closer to “public interest” work because of its significance to a larger group or community of people. Of course, the lines are often blurred between these categories, but we believe university law clinics should start to move further along the continuum towards group- or community-based work, or on the other hand, impact litigation challenging pervasive patterns or practices.

169. See Quinot & Greenbaum, *supra* note 109, at 49–50.

170. For a discussion of the AJC program, see *supra* notes 38–43 and accompanying text.

171. Interestingly, in the United States, human rights law clinics first appeared in law schools in the early 1990s, and initially (and largely because of the failure of the U.S. government to ratify a number of human rights treaties) focused on systemic human rights violations outside of the borders of the United States. Clinics that focused on systemic violations in the United States were seen as “poverty” clinics, distinct from human rights clinics. More recently, there is more cross-fertilization between these types of clinics, with an increased focus on human rights violations occurring within the United States. See Caroline Bettinger-Lopez, Davida Finger, Meetal Jain, JoNel Newman, Sarah Paoletti & Deborah M. Weissman, *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 *Geo. J. Poverty L. & Pol’y* 337, 338 (2011).

direction, so this proposal is not as radical as it may seem. For example, some years ago, the Wits law clinic entered into a partnership with the Centre for Applied Legal Studies (CALs), a public interest organization also located at Wits, by which the clinic informed CALs about systemic problems emerging in the Johannesburg Maintenance Court. Based on such information, the clinic and CALs formed a maintenance forum in which paralegals, court personnel, gender activists, the law clinic, and public interest lawyers would regularly convene to further discuss the trends observed in routine matters in court.¹⁷²

Given that university law clinics often serve as an entryway into the lives of communities, the opportunities are plenty for systemic issues impacting community members to be identified and pursued by these clinics. For example, the Wits law clinic also has brought many impact litigation cases, some of which have resulted in Constitutional Court judgments.¹⁷³ At Stellenbosch University, the Legal Aid clinic handled the *Hattingsh v. Juta* case concerning the Extension of Security of Tenure Act (ESTA) that went to the Constitutional Court.¹⁷⁴ Although the case may have resulted in an adverse judgment for the Legal Aid clinic's clients,¹⁷⁵ the process of pursuing the case provides a good example of collaborative teaching and learning. When the clinic was handling the case and struggling with capacity issues, academics, public interest legal organizations, and the clinic together convened strategic workshops to explore innovative strategies for utilizing ESTA.¹⁷⁶ More recently, Stellenbosch's Legal Aid clinic has taken on unprecedented class action litigation with respect to unfair micro-lending practices and garnishee orders that has the potential to affect every individual who takes loans from banks in South Africa.¹⁷⁷ Finally, the Rhodes clinic partnership with the Legal Resources Centre has facilitated the pursuit of some class actions and cases involving applications to the Competition Tribunal.¹⁷⁸

Though CLE programs themselves have ventured in the direction of law reform and human rights work, there has not been a concurrent integration of law students into this work. Specialized attorneys or academics are generally brought in to supervise, advise on, or handle the matter themselves, and much of this work is outside the reach of the law student enrolled in the clinic. One way that university law clinics might integrate law students into this work is by developing partnerships with public interest law clinics and firms. For example, at Stellenbosch University, the law clinic teamed up with academics in the law faculty and a large law firm to

172. Interview by Thomas Coggin with Philippa Kruger, Dir., Wits Law Clinic, Univ. of the Witwatersrand, in Johannesburg, S. Afr. (Aug. 14, 2014).

173. *Id.*

174. 2013 (3) SA 275 (CC).

175. *Id.* at paras. 41–45.

176. Interview by Meetal Jain with Sandra Liebenberg, Professor, Stellenbosch Univ., in Stellenbosch, S. Afr. (Aug. 27, 2014) [hereinafter Sandra Liebenberg Interview].

177. Crotty, *supra* note 58.

178. *See supra* notes 51–55 and accompanying text.

brainstorm strategies for the litigation to proceed in the Constitutional Court.¹⁷⁹ In another example, the University of Cape Town ran a Human Rights Lawyering elective course in 2012 in which students were linked to community organizations on specific community campaigns.¹⁸⁰ These kinds of strategic connections are important, for they provide not only the possibility to increase the capacity of university law clinics to handle public interest matters, but also the opportunity for dialogue, funding, and a sharing of information and experiences.

Of course, there are challenges in the form of tensions between client and community interests, pedagogical interests, and educational objectives.¹⁸¹ However, with effective training, these challenges can be transformed into unique opportunities for students to grapple with ethical dilemmas in the legal profession, while promoting in students an interest in public interest lawyering. This will require a shift in the priorities of CLE programs. Whereas currently many university law clinics in South Africa see their primary (and perhaps sole) objective as teaching and pedagogy, a reconfigured public interest law clinic would have the important function of teaching as well as community representation.

Indeed, there is great potential for coordination between the profession and university law clinics, particularly in relation to matters that overburden organizations. Given the pedagogical imperative of university law clinics “to teach from doing,” law students may assist organizations with matters they cannot handle, or perform research or collect statements to assist them with developing matters. Further, course modules could be developed to engage students in this work through proper training and reflection about their public interest legal services work. Indeed, the university law clinic space could become a place to teach these important skills, as well as many other skills inherent to public interest legal work, to the next generation of public interest lawyers. Alternatively, given resource constraints and institutional resistance, closely supervised externship programs at some of these public interest law clinics could expose a greater number of students to clinical experiences without incurring all the costs of developing an in-house clinic.¹⁸²

An example of how the LLB curriculum might incorporate collaboration between a law clinic and a public interest organization is a pilot clinical module that was

179. Sandra Liebenberg Interview, *supra* note 176.

180. Meetali Jain, Introducing a New LLB Course on Public Interest Lawyering: Reflections from a Teaching Perspective 1 (2012) (unpublished manuscript) (on file with authors).

181. See, e.g., Jeff Giddings, *Contemplating the Future of Clinical Legal Education*, 17 GRIFFITH L. REV. 1, 7–12 (2008).

182. See, e.g., Stephen T. Maher, *No Easy Walk to Freedom*, 1 D.C. L. REV. 243, 246–47 (1992) (discussing the potential benefits of taking clinical training out of the law school setting). To date, and to the authors’ knowledge, there have not been formal externship programs between most South African law faculties and public interest law organizations. One of the authors of this paper, in fact, while employed at the Centre for Applied Legal Studies (CALs), developed the Centre’s first internship policy that prioritized local law students from South African universities. Indeed, to the extent that public interest legal organizations do accept interns, most of those intern applicants have been from foreign universities and tend to come to South Africa with funding from their university. Such a culture has not yet developed in South African law faculties.

proposed at Wits. A proposal was put forward to have six students from the Wits Law clinic undertake cases and projects with CALS over the course of a year, in which they worked together with groups or communities of clients and partners. The proposal was for students to engage in law reform, community education, or litigation work with a focus broader than serving one individual. In the proposal, CALS would have supervised the fieldwork for the students and provided readings and assessments for those students that aligned with what they were encountering in their casework. So that the students also learned important basic skills critical for all attorneys, however, the proposal specified that they would continue to attend the clinical seminars on costs calculation, interviewing, and counseling, among other topics. Although unfortunately not adopted, the vision was for the pilot clinic to be an incremental step towards experimentation with a new kind of clinic model that, if successful, could be broadened in future years.¹⁸³

Some of these ideas are now being implemented at the Centre for Human Rights at the University of Pretoria as part of the LLM on Human Rights and Democratisation in Africa.¹⁸⁴ The focus of this program is to equip students from around the world, but primarily from the African continent, to become seasoned academics and practitioners within the African human rights system.¹⁸⁵ In this course, the lecturer facilitates simulations and debates centered on issues such as media advocacy, interviewing and counselling, community engagement or lawyering, and ethics in human rights practice.¹⁸⁶ In the LLM program, students select one of nine clinical groups in which to be based throughout the first semester, within a broad range of human rights issues. Clinical groups meet weekly and work on a variety of projects throughout the semester. Additionally, they conduct fact-finding in various countries within sub-Saharan Africa halfway through the semester. The classroom modules, therefore, aim to equip them with practical skills to work on their projects and assignments.

Integrating university law clinics into the public interest legal sector does not imply only engaging in impact litigation. Indeed, there is opportunity for law students to engage with community legal education and mobilization, media advocacy, and law reform activities. Many possibilities exist for university law clinics to experiment in South Africa, but what is clear is that the time is now ripe for clinics to align themselves with the project of transformative constitutionalism.

183. See generally Concept Note: Pilot “Community Lawyering” Unit in 2014 in Collaboration with CALS, Wits Law Clinic and Wits Law School (2013) (on file with authors). The proposal was not adopted, mostly because of the lack of institutional will between entities to enter into the necessary partnership.

184. See *About the LLM/MPhil*, U. PRETORIA, <http://www.chr.up.ac.za/index.php/llm-hrda.html> (last visited Apr. 9, 2016). One of the co-authors of this article, Meetal Jain, has been involved with Professor Magnus Killander in developing curricula around these human rights clinical topics.

185. *Id.*

186. *Id.*

VI. CONCLUSION

Clinical legal education programs in South Africa have developed and grown since 1994, but a more robust approach is needed if clinical courses are to prepare students for the project of transformative constitutionalism. Many possibilities exist for experimentation. Although CLE programs have ventured in the direction of law reform and human rights work, what has not occurred is the integration of law clinic work and law students with other public interest legal organizations in order to maximize impact. Further, little has been done to integrate clinical pedagogy throughout the curriculum, and little progress has been made to move existing clinical programs from handling individual cases toward utilizing creative means to address more systemic law reform and social justice issues, either through impact litigation or community lawyering. Twenty years after the start of democracy, CLE programs must begin to work more closely with other organizations in the public interest legal community to prepare the current and future generations of law students to address the problems facing South Africa.