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### Clinical Legal Education & Access to Justice: Conflicts, Interests, & Evolution

Margaret B. Drew

*University of Massachusetts Dartmouth - University of Massachusetts School of Law,*  
margaret.drew0@gmail.com

Andrew P. Morriss

*Texas A&M University (TAMU) - School of Law*

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THE UNIVERSITY OF  
**ALABAMA**  

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**SCHOOL OF LAW**

**Clinical Legal Education &  
Access to Justice: Conflicts, Interests, &  
Evolution**

Margaret Drew  
Andrew P. Morriss

*BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF  
AVERAGE MEANS (Samuel Estreicher & Joy Radice eds., Cambridge  
University Press, forthcoming, 2014)*

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*Clinical Legal Education & Access to  
Justice: Conflicts, Interests, & Evolution*

Margaret Drew

[ma.drew@neu.edu](mailto:ma.drew@neu.edu)

Visiting Clinical Specialist

Northeastern University School of Law

Andrew P. Morriss

[amorriss@law.ua.edu](mailto:amorriss@law.ua.edu)

D. Paul Jones, Jr. & Charlene A. Jones Chairholder in Law

& Professor of Business

University of Alabama

Forthcoming in *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS* (Samuel Estreicher & Joy Radice eds., Cambridge University Press, forthcoming 2014).

# *Clinical Legal Education & Access to Justice: Conflicts, Interests, & Evolution*

Margaret Drew<sup>\*</sup> & Andrew P. Morriss<sup>\*\*</sup>

## **Abstract**

*The explosive growth in the number of law school clinics over the last 50 years began with an individual client focus as a core component. This contributed to reducing unmet legal needs in substantive areas such as landlord-tenant, family, consumer and other areas. These service clinics accomplished the dual purpose of training students in the day-to-day challenges of practice while reducing the number of unrepresented poor. In recent years, however, the trend has been to broaden the law school clinical experience beyond individual representation and preparation for law firm practice. So-called “impact” clinics typically address systemic change without significant individual client representation. In this chapter from the forthcoming volume, BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE FOR AMERICANS OF AVERAGE MEANS (Samuel Estreicher & Joy Radice eds., Cambridge University Press, forthcoming 2014), the authors argue that the shift from service clinics to impact clinics is partly driven by clinicians’ search for status within the academy. Specifically, status plays an important role in a clinic design that permits clinicians to more easily engage in theoretical and doctrinal scholarship on subject matters that are more respected within the academy. The authors predict that this trend toward development of impact clinics will continue, particularly at higher ranked law schools, with the unfortunate side effect of reducing clinics’ contribution to addressing access to justice issues.*

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<sup>\*</sup> A.B. University of Massachusetts, Boston, J.D. Northeastern University School of Law; LL.M. Boston University. Prof. Drew has ten years of clinical experience including Visiting Clinical Specialist, Northeastern University School of Law; visiting Clinical Instructor with the Alabama School of Law and Professor of Clinical Law and Director of Clinics and Experiential Learning, University of Cincinnati College of Law. The authors thank Philip Gastineau for expert research assistance and the University of Alabama library staff for help in tracking down sources.

<sup>\*\*</sup> D. Paul Jones, Jr. & Charlene A. Jones Chairholder in Law & Professor of Business, University of Alabama, and Senior Scholar at the Mercatus Center at George Mason University. A.B. Princeton University; J.D., M.Pub.Aff., University of Texas; Ph.D. (Economics) Massachusetts Institute of Technology.

Virtually everyone agrees that there are large unmet needs for legal services among people and organizations that cannot afford them. Similarly, there is widespread agreement that law schools do a substantially less than perfect job of preparing students to practice law, a role that could be enhanced by expanding the curriculum beyond traditional doctrinal courses to focus on more practical training for the practice of law.<sup>1</sup> Even though opinions differ on exactly how much more practical training law schools ought to provide and how they ought to provide it,<sup>2</sup> blending the doctrinal and clinical perspectives offers a potential solution to both problems: establish law clinics that would enable students to gain live client experience solving real legal problems in courts, government agencies, and organizations, while simultaneously providing additional legal services for the poor and enhancing the practical training of new lawyers. Both these goals were part of the initial impetus for establishing law school clinics in the late 1960s, when clinical education became the reform *du jour*.<sup>3</sup>

While law school clinics have become an almost universal part of law school course offerings, they have not fulfilled their initial promise to change the face of legal education by making it noticeably more practice-oriented, a result of law schools' separation of clinical training from the rest of the law school curriculum. Rather than incorporating clinical training into a coherent overall curriculum, law schools have largely minimized the effect of clinical education on non-clinical training. As a result, the impact of clinical legal education on legal education generally has been muted. And although clinics have provided many American law students with an opportunity for some practical training while in school, they are unable to serve more than a relatively small portion of the poor's unmet legal needs. In part, this is because there are relatively few clinics relative to the size of the unmet need – even if every law student enrolled in a clinic focused on individual client needs, significant needs would remain unmet. It is also due to the balance clinics must strike between the demands of their educational mission and their ability to serve clients. Since their first priority is to teach legal skills, clinics must

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<sup>1</sup> Among the recent writings on the topic are: Rebecca Sandefur, Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57 (2009); Rachel J. Littman, *Training Lawyers for the Real World Part One*, N.Y. ST. B.J., September 2010; Rachel J. Littman, *Training Lawyers for the Real World Part Two*, N.Y. ST. B.J., October 2010; Lauren Carasik, *Renaissance or Retrenchment: Legal Education at A Crossroads*, 44 IND. L. REV. 735 (2011); Mitchell D. Hiatt, *Why the American Bar Association Should Require Law Schools to Increase and Improve Law Students' Practical Skills Training*, 45 CREIGHTON L. REV. 869 (2012).

<sup>2</sup> Law schools also have a mission to produce legal scholarship. How well they perform that mission is subject to debate. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); Michael J. Saks, Howard Larsen, & Carol J. Hodne, *Is There a Growing Gap Among Law, Law Practice, and Legal Scholarship?: A Systematic Comparison of Law Review Articles One Generation Apart*, 28 SUFFOLK U. L. REV. 1163 (1994). The point of that mission is also debated. On the one hand, legal historian Willard Hurst argued for assigning “a preferred position” in law schools “to promotion of basic research into the nature, functions, and working realities of legal order” as a “cure” for the “complacent and limited world” of legal education. J. Willard Hurst, *Research Responsibilities of University Law Schools*, 10 J. LEGAL EDUC. 147, 161 (1957). On the other, as early as 1936, Fred Rodell, a prominent Yale law professor, was denouncing law reviews as overly similar and useless because “they have all been sucked into a polite little game of follow-the-leader with the Harvard Law Review setting the pace” and academic legal writing because “There are two things wrong with almost all legal writing. One is its style. The other is its content.” Fred Rodell, *Farewell to Law Reviews*, 23 VA. L. REV. 38, 44 (1936-37).

<sup>3</sup> Peter A. Joy, *The Ethics of Law School Clinic Students As Student-Lawyers*, 45 S. TEX. L. REV. 815, 821 (2004).

serve fewer clients than they might if they were focused on the efficient delivery of services. But clinics are not meeting their full potential in this regard because the limited capacity to serve unmet legal needs is exacerbated by the internal politics of legal education.

Part I briefly describes the history of clinical and non-clinical legal education, examining first the goals of the reformers who introduced clinics and how those clinics developed over time. With the rise of the Association of American Law Schools' (AALS) Section on Clinical Legal Education and the Clinical Legal Education Association (CLEA) clinicians have developed national and international platforms for information exchange and advocacy. Much of the discussion centers on status of the clinicians within the academy, partly a function of CLEA as an advocacy organization and partly a function of doctrinal faculty's influence in the hiring and promotion of clinicians, which we suggest pushes clinics in a more "theoretical" direction. Part II of this paper looks at the types of clinics offered at differing types of schools and examines the issues in using clinics to address the needs of the poor. Part III concludes by suggesting ways in which the impact of law school clinics on unmet legal needs might be increased.

Our thesis is that there are three primary tensions within the legal academy that affected how clinics and experiential legal education more generally evolved. First, clinics have been burdened with serving two masters: they are educational institutions, with a responsibility to focus on students' development as lawyers, at the same time they are expected to help meet unmet legal needs for lower income and vulnerable populations. These roles often conflict, and we argue, the conflicts have grown more frequent as clinical legal education evolved, both with respect to the volume of cases and the type of cases accepted into clinics. Second, the 'fit' of clinics within legal education creates its own tensions between clinical and 'doctrinal' faculty. Differences in compensation, status, scholarship demands, and teaching responsibilities as well as the often-physical separation between clinics and the rest of a law school create additional tensions which can interfere with both missions. Third, the current crisis in legal education exacerbates these tensions because clinics are – despite the generally lower pay for clinical faculty relative to doctrinal faculty – more expensive on a per student-credit-hour basis than doctrinal courses.<sup>4</sup> At the same time, student and employer demand for 'practical' training has increased.

## I. Explaining the Evolution of Clinical Legal Education

As Brian Tamanaha notes, "law schools are run *for* law professors."<sup>5</sup> As a result, the evolution of clinical legal education within law schools must be explained by examining the interests and behavior of law school faculties. In this section we focus on faculty (both clinical

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<sup>4</sup> There are many ways of assessing cost, of course. When assessed on professor/student ratios clinics are more expensive because of the smaller numbers of students per faculty member than in doctrinal classes. This is so even after adjusting for lower clinician pay. See Olufunmilayo Arewa, Andrew P. Morriss & William Henderson, *Enduring Hierarchies in American Legal Education*, INDIANA L. J. , \*9 (forthcoming) (on file with authors); Paul D. Carrington, *Hail! Langdell!*, 20 LAW & SOC. INQ. 691, 748-49 (1995). Some argue that, when considering clinical costs from the perspective of a school's overall budget, clinics are not a particularly large proportion of law school costs. See Margaret Martin Barry, Jon C. Dubin and Peter Joy, *Clinical Education for The Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 23-25 (2000). There is no question, however, that traditional clinic classes are comparatively small and from a per capita basis expensive and would be a larger proportion of law school budgets if they were expanded significantly.

<sup>5</sup> Brian Z. Tamanaha, *FAILING LAW SCHOOLS* 8 (2012) (emphasis in original).

and doctrinal) interests to examine this evolution with the goal of predicting how clinics' roles may evolve in the future and the implications of that future evolution for meeting the legal needs of the poor.

### A. The Rise of Clinics

Efforts to provide practical training through clinical education have a long history. The earliest clinics were typically volunteer law offices or opportunities for students to earn academic credit while working in legal aid offices.<sup>6</sup> At least as early as the Carnegie Foundation for the Advancement of Teaching's 1921 report on legal education, there have been calls for expanding clinical legal education to enhance skills training.<sup>7</sup> The initial efforts to add practical elements through supervised practice were modest, with the first full-fledged in-house clinical program established at Duke in 1931.<sup>8</sup> Efforts to make more substantial changes were largely rejected. For example, at Yale in the 1930s, Jerome Frank

called for the replacement of the case method by a "clinical lawyer-school" that would embrace clinical legal education, place the law office at the core of the curriculum, and include academics who had practiced law for awhile before they began teaching. The Yale faculty treated him as a brilliant flake, doing nothing to implement his costly program.<sup>9</sup>

Yale's reaction to efforts to refocus legal education on training students to practice law was typical and only a handful of other law schools developed clinics over the next few decades.<sup>10</sup> Instead, law schools focused on following the advice of Alfred Zantzinger Reed in his 1921 analysis of legal education that they acquire a "scholarly law school dean" who would turn the law school into a "'nursery for judges' that will make American law what American law ought to be."<sup>11</sup>

In general, from the early twentieth century, using the ABA and AALS to enforce the rules, legal elites pushed law schools towards an academic model focused on scholarship and theory and away from "practical" training.<sup>12</sup> This evolution suited bar elites (concerned that the "wrong" sort of people, e.g. immigrants and blacks, were becoming lawyers) and helped keep lawyers' incomes high by restricting competition.<sup>13</sup> It also suited law faculty who were able to

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<sup>6</sup> Joy, *The Ethics of Law School Clinic Students As Student-Lawyers* *supra* note 3, at 818.

<sup>7</sup> ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW (1921).

<sup>8</sup> Joy, *supra* note 3, at 820.

<sup>9</sup> LAURA KALMAN, YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS 19-20 (2005).

<sup>10</sup> Joy, *supra* note 3, at 821.

<sup>11</sup> ALFRED ZANTZINGER REED, PRESENT-DAY LAW SCHOOLS IN THE UNITED STATES AND CANADA 418 (William S. Hein reprint 1987, original pub. 1928).

<sup>12</sup> Arewa, Morriss, & Henderson, *supra* note 4, at \*5-\*15.

<sup>13</sup> Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311, 332 (1978) ("Predicted anticompetitive conduct, organized by the AALS, has been rampant for more than seventy years. Finally, restrictions on output, lack of innovation, and uniformity—again predicted by applying our economic model to legal education—have successfully been sought."); Harry First, *Competition in the Legal Education Industry (II)*, 53 N.Y.U. L. REV. 1049, 1072-73 (1979) [hereinafter First, *Competition II*] (similar points) and ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, (The Lawbook Exchange, Ltd. reprint

distinguish themselves as “elite” by separating from practical study and teaching.<sup>14</sup> This also meant that legal education did not focus on the immediate legal needs of the poor but rather on what were perceived as more high status areas of legal thought.<sup>15</sup> For example, constitutional law plays a major role in legal scholarship relative to the frequency with which constitutional issues arise in practice.<sup>16</sup> Thus the structure of legal education exacerbated the problem of access to the legal system for the poor by restricting competition in education that might have led to lower cost education and by restricting the number of lawyers and so increasing the costs of legal services.

Those schools which did establish early clinics developed what has become known as the “service” model for clinical education and “[t]he overall structure and goals of litigation-based clinics have remained the same since the first legal clinics started in the early part of the twentieth century.”<sup>17</sup> Not only did these clinics provide legal services to the poor to generate their case loads, but they also undertook a mission of putting students in what Charles Miller, founder of both Duke’s clinical program in 1931 and the University of Tennessee’s clinical program in 1947, termed the “‘lawyer role’ as an essential step in learning how to become ethical practitioners.”<sup>18</sup> The service clinic as originally conceived thus had two educational roles: teaching legal skills and socializing students into the professional norms of lawyers. The provision of legal services to the poor, while serving the professional goal of providing access to justice, both generated the needed cases for student work and helped instill a professional norm

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2001, original pub. 1983) at 175 (quoting Dean Edward Lee of the-then unaccredited John Marshall Law School in Chicago in 1924 that the cooperative relationship between the ABA and AALS was the product of a “group of educational racketeers.”); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 134 (2003) (“By imposing high costs, the system has closed the legal profession to most people with lower incomes. Because black families have lower incomes and less wealth than most other groups, the high entry price that the ABA imposes is a filter, like the academic accreditation requirements, for eliminating blacks from the legal profession.”); Robert Stevens, *The Nature of a Learned Profession*, 34 J. LEGAL EDUC. 577, 583 (1984) (“The organized bar fell down in the past because some members of the ABA and many State bars used an extended period of education not to produce a broadly based, technically competent, ethical, socially responsible bar, but rather as an opportunity to ensure the maintenance of the Anglo-Saxon male hierarchy.”).

<sup>14</sup> Arewa, Morriss, & Henderson, *supra* note 4, at \*16-\*21.

<sup>15</sup> Of course, the poor sometimes have need for constitutional lawyers. *See, e.g.* *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *Goldberg v. Kelly*, 397 U.S. 254 (1970). But they also have vast needs for lawyers to handle more prosaic matters dealing with landlord tenant issues, criminal law, marital law, bankruptcy, etc. At least some of the time, turning these needs into constitutional issues is less productive than focusing on the immediate problem (although some of the time the reverse is also true). Consider *State v. Shack*, 277 A.2d 369 (N.J. 1971), in which a legal services program litigated a case to the New Jersey Supreme Court against opponents who did not even bother to appear. The resulting precedent, although appearing in casebooks, has had almost no impact on the development of the law. (It is rarely cited and seems not have been followed by any court.) *See* Andrew P. Morriss, *Review of Jesse Dukeminier & James E. Krier, Property (4<sup>th</sup> Ed. 1998)*, 22 Seattle U. L. Rev. 997, 1003-1005 (1999) (describing *State v. Shack*’s irrelevance to law).

<sup>16</sup> *See*, Olufunmilayo Arewa, William D. Henderson, Peter A. Hook & Andrew P. Morriss, *Subject Matter Trends in Legal Scholarship* (Working paper on file with authors).

<sup>17</sup> Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 528 (2003).

<sup>18</sup> Joy, *supra* note 3, at 821 quoting Charles H. Miller, *Living Professional Responsibility—Clinical Approach*, in *Clinical Education for the Law Student: Legal Education in a Service Setting* [CLEPR National Conference, Working Paper, June 6-9, 1973] at 99.



of pro bono efforts that has traditionally been the legal profession's rather weak defense against the charge that its monopoly on legal representation harms the poor.<sup>19</sup> However, from the beginning, clinics were first an educational program rather than a legal services program.

Despite periodic calls for greater practical training over the next few decades, little changed in legal education until the late 1960s. Only just over a quarter of ABA-accredited law schools (35 of 126) had clinics in the late 1950s, for example.<sup>20</sup> As late as 1967, "clinical legal education barely existed."<sup>21</sup> Laura Kalman's description of Yale through the 1960s is also descriptive of legal education more broadly:

Transport a first-year student out of a 1967 Contracts class back to Langdell's, and it would have felt familiar. Langdell would have paid more heed to English law, but the basic diet would have remained the same – "casebooks, large classes, Socratic dialogue, and single written examinations." Transport the same student of 1967 into a Contracts class at another prestigious law school, and he would have felt the same way. Elite legal education was remarkably static and uniform, its structure, style, and content set by Harvard, just as it had been in 1870.<sup>22</sup>

Clinics expanded into the mainstream of American legal education only after Ford Foundation funding fueled the widespread expansion of in-house clinical programs" in law schools nationwide<sup>23</sup> and, in particular, began "to pour cash into proposals to establish clinical programs submitted by elite law schools filled with bored students demanding greater relevance."<sup>24</sup> In addition, student demands for more practice-oriented and more "relevant" courses grew in the late 1960s, pushing schools to seek to find ways to satisfy that demand.<sup>25</sup> By 1978 there were over one hundred clinics at the 167 ABA-accredited law schools.<sup>26</sup> The ABA's development of a Model Student Practice Rule in 1969 also helped prompt states to adopt such rules,<sup>27</sup> making clinics easier to establish within law schools. By end of 1970s, thirty states had adopted student practice rules.<sup>28</sup> U.S. Department of Education (DOE) funding replaced Ford Foundation money and continued to fuel expansion of clinics until 1997.<sup>29</sup>

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<sup>19</sup> See, e.g., Douglas L. Colbert, *Clinical Professors' Professional Responsibility: Preparing Law Students to Embrace Pro Bono*, 18 GEO. J. ON POVERTY L. & POL'Y 309, 312 (2011) (Read together, the Model Rules make clear that "every American lawyer and legal employer has an affirmative responsibility to do her fair share of pro bono work, ensuring access to justice for those unable to pay.")

<sup>20</sup> Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 187 (2008).

<sup>21</sup> KALMAN, *supra* note 9, at 28.

<sup>22</sup> KALMAN, *supra* note 9, at 14.

<sup>23</sup> Joy, *supra* note 3, at 821.

<sup>24</sup> KALMAN, *supra* note 9, at 28.

<sup>25</sup> KALMAN, *supra* note 9, at 80, 152, & 360.

<sup>26</sup> Joy & Kuehn, *supra* note 20, at 187; James P. White, *Law School Enrollment Continues to Level*, 66 A.B.A. J. 724, 724 (1980) (In the fall of 1978, 121,606 students were registered at the 167 ABA-approved law schools).

<sup>27</sup> Joy, *supra* note 3, at 821-822.

<sup>28</sup> Carey, *supra* note 9, at 516.

<sup>29</sup> Joy & Kuehn, *supra* note 20, at 188.

Clinical education's success in the legal academy was thus primarily the result of the combination of student demand for greater practice relevance and the appearance of outside funding. It was not the result of doctrinal faculties' desires to change what they did in the classroom or administrative response to ABA and other criticism and recommendations. Indeed, the primary trends in legal education outside of clinics have been a shift toward more theoretical scholarship and teaching, through "law and ..." courses and writing.<sup>30</sup> As a result, clinical education represented something added on to the existing curriculum, not a reshaping of how law is taught. (Whether it should be or not is, of course, a separate question.)

## B. The Conflict over Status

Although law schools generally welcomed the infusion of Ford Foundation and DOE funds, and the clinics purchased with them, clinics' place in law schools and even the methodology of clinical teaching was "unsettled" at first.<sup>31</sup> Skills training, "the most commonly-cited educational purpose" of clinics,<sup>32</sup> was (and remains) associated with low prestige in the legal academy.<sup>33</sup> This is not surprising in light of the larger evolution of the legal academy, which had an increasing focus on legal scholarship of a more theoretical and interdisciplinary nature at the expense of doctrinal work.<sup>34</sup> Within the established hierarchy of legal education, the schools at the top were those whose non-clinical faculty had begun to focus more on theoretical scholarship and less on doctrinal writing.<sup>35</sup> The parallel expansion of "case" books into "cases and materials" books meant classrooms were also shifting away from doctrinal focus and into

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<sup>30</sup> See Law Schools and Professional Education: Report and Recommendation of the Special Committee for a Study of Legal Education of the American Bar Association 78, n. 191 (1980) (noting that as early as the mid-1960s, "professors at high resource schools tended to support a theoretical orientation to law . . ."). See also Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995); Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471 (2004).

<sup>31</sup> Carey, *supra* note 9, at 517.

<sup>32</sup> Carey, *supra* note 9, at 517-518.

<sup>33</sup> Rose Voyvodic & Mary Medcalf, *Advancing Social Justice Through an Interdisciplinary Approach to Clinical Legal Education: The Case of Legal Assistance of Windsor*, 14 WASH. U. J. L. & POL'Y 101, 106 (2004) ("within legal education, there is a sense of 'academic illegitimacy' associated with clinical legal education when it is perceived as 'skills training,' and therefore lacking in academic rigor.").

<sup>34</sup> See Tom Ginsburg & Thomas J. Miles, *Empiricism and the Rising Incidence of Coauthorship in Law*, 2011 U. ILL. L. REV. 1785, 1795 (2011) (noting "More and more entry-level [legal teaching] candidates have PhDs in social sciences like economics or political science."); Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471 (2004); Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987); Richard A. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113 (1981); Graham C. Lilly, *Law Schools Without Lawyers? Winds of Change in Legal Education*, 81 VA. L. REV. 1421 (1995); George L. Priest, *The Growth of Interdisciplinary Research and the Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards*, 91 MICH. L. REV. 1929 (1993); William M. Landes & Richard A. Posner, *Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993); Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE L.J. 840 (1993).

<sup>35</sup> Arewa, Morriss, & Henderson, *supra* note 4, at \*28.

broader analyses of the law.<sup>36</sup> Thus, as we noted above, the expansion of clinics came at the time when law schools were increasingly turning away from a doctrinal focus. Indeed, the rising student demand for “practical” skills that helped expand clinics may have been partially a result of this same shift, as students who wanted to learn to be lawyers – rather than professors – were getting less of what they sought in “regular” classrooms. Thus clinical legal education filled an important need in the academy for more practically-oriented education. While elite law schools sent a significant number of graduates to large firms that used the “Cravath system” to teach new graduates the skills necessary to practice law, most schools did not do so even during the post-World War II legal education boom.<sup>37</sup>

Clinical faculty were quick to identify the need for “security ... and prestige” to commensurate with their doctrinal colleagues as an important concern, with the issue raised in some of the early clinical faculty meetings.<sup>38</sup> The ABA addressed the status issue for the first time in 1979 in its Crampton Report, in which it pushed for expanding clinical education.<sup>39</sup> Similar reports from other ABA groups and joint ABA-AALS reviews soon followed.<sup>40</sup> The ABA briefly adopted an interpretation of its standard on tenure that included clinical faculty in 1980, but reversed course quickly after “a negative reaction from some law schools.”<sup>41</sup> Clinical faculty in turn reacted negatively to the ABA’s reversal. For example, the director of American University’s clinical program argued that:

law schools treat clinicians with something approaching disdain . . . . [T]he law schools withhold the symbols and perquisites of the profession from us. They deny us promotions and titles. They deny us voting rights and salaries of other faculty members.<sup>42</sup>

The controversy dragged on through the 1980s, with the ABA eventually abandoning a proposed requirement that law schools “shall” provide status equivalent to tenure to clinical faculty, weakening the standard to merely state that they “should” do so.<sup>43</sup>

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<sup>36</sup> Margaret Martin Barry, Jon C. Dubin and Peter Joy, *Clinical Education for The Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 40 (2000)

<sup>37</sup> David Wilkins et. al., *Urban Law School Graduates in Large Law Firms*, 36 SW. U. L. REV. 433, 438-39 (2007) (By the 1960s, the Cravath system of training and hiring mostly from the elite ranks had been picked up by most of the large elite law firms). Also in “1957, 71% of the partners at the twenty largest law firms in New York were graduates of Harvard, Yale, or Columbia law school. Five years later, although the absolute number of partners had increased by over 15%, the percentage of partners from the same three schools remained virtually unchanged.” Erwin O. Smigel, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATIONAL MAN?* 37 (4th ed., Indiana University Press 1969) (1964).

<sup>38</sup> Joy & Kuehn, *supra* note 20, at 189.

<sup>39</sup> Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass’n, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools (1979).

<sup>40</sup> Joy & Kuehn, *supra* note 20, at 191

<sup>41</sup> Joy & Kuehn, *supra* note 20, at 195 (quoting Roy Stuckey, A Short History of Standard 405(e), at 1 (Apr. 1994) (unpublished manuscript)).

<sup>42</sup> Beverly T. Watkins, *Teachers of Clinical Law Seek Recognition, Better Treatment*, CHRON. HIGHER EDUC., Jan. 19, 1983, at 14.

<sup>43</sup> This is described in great detail in Joy & Kuehn, *supra* note 20, at 197-206.

Despite the ongoing conflict over clinical faculty status, clinics got a further boost with the “MacCrate Report”<sup>44</sup> in 1992, in which the bar (once again) criticized law schools for failing to sufficiently train new graduates, giving schools a reason to place a renewed emphasis on clinical opportunities,<sup>45</sup> as well as the addition of simulation and other courses designed to provide practical skills. Responding to the concerns identified in MacCrate Report, the ABA amended its accreditation standards to require “live-client or other real life practice experiences” in 1996<sup>46</sup> and, at the same time, clinicians succeeded in changing the standard to require tenure or its equivalent and equal status for clinical faculty,<sup>47</sup> giving clinics additional legitimacy within law schools. Opposition to equivalent status for clinical faculty has continued, however, spearheaded by the Association of Law Deans of America.<sup>48</sup> One divide in the debate was over the purpose of tenure rights granted to doctrinal faculty and how clinicians’ roles did or did not fit within a similar model.<sup>49</sup> The failure of many doctrinal faculty to treat clinicians’ concerns as

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<sup>44</sup> The “MacCrate Report” is formally the American Bar Association, Section of Legal Education and Admissions to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (July 1992).

<sup>45</sup> Carey, *supra* note 9, at 529 (“The contemporary call to provide clinical opportunities for students is primarily linked to the 1992 McCrate Report.”).

<sup>46</sup> ABA Standard 302(c)(2).

<sup>47</sup> ABA Standard 405(c). *See also* Joy & Kuehn, *supra* note 20, at 210-213.

<sup>48</sup> *See* Joy & Kuehn, *supra* note 20, at 213-223 (detailed description of dispute).

<sup>49</sup> If the purpose of tenure is to allow publishing politically unpopular scholarship in the pursuit of truth, and clinicians as a group generally did not produce scholarship as its primary contribution to the academy, extending it to clinicians would be mere economic rent-seeking. (There is a separate issue about whether tenure is also rent seeking in the context of doctrinal faculty. That is a subject for another day.) Clinicians, however, argued that their work often provoked as much or more threat of retaliation than that of doctrinal faculty and so they needed equivalent job protection. Approximately 50% of clinicians responding to a 2010 survey indicated that scholarship is required as part of their promotion criteria. DAVID A. SANTACROCE & ROBERT R. KUEHN, CENTER FOR THE STUDY OF APPLIED LEGAL EDUCATION: THE 2010-11 SURVEY OF APPLIED LEGAL EDUCATION 30 (2011). Security of position can be a guard against interference by law school administration and alumni. Just as doctrinal faculty sought protection from the consequences of unpopular writings, clinicians struggle against pressure from those who attempt to interfere with student representation of unpopular clients. Clinicians have been subject to demands to withdraw from representation of clients whose interests may conflict with those of a wealthy school donor, for example. Timber interests and their attorneys were successful in persuading the University of Oregon to sever a two-year joint operating agreement for an environmental law clinic with the National Wildlife Federation. Robert R. Kuehn & Bridget M. McCormack, *Lessons from Forty Years of Interference in Law School Clinics*, 24 GEO. J. LEGAL ETHICS 59, 92 (2011). During the dispute, a wealthy timberman threatened to cancel a \$250,000 gift for a new basketball arena unless the University disbanded the clinic. *Id.* at n.45, citing Jerry Kirshenbaum, *Tainted Gift*, Sports Illustrated, Feb. 9, 1981, at 17. Clinicians are sometimes left with the choice of risking an unrenewed contract against modeling professional behavior that bends to pressure while abandoning a client who is unlikely to find successor representation. For example, in family law matters deans are lobbied by alumni to block clinical representation of clients who are married to an alum or a member of the alum’s family. The more “prominent” the donor, the more administrative pressure can be placed on the clinician to decline representation at the request of the alum. This has serious consequences for battered women who may not have access to resources for private representation. Impact clinics do not protect the clinician from external political difficulties but that vulnerability is related to the subject matter of the clinic rather than the individual clients represented. Particularly vulnerable interest clinics such as environmental ones are inherently more controversial, thrusting the clinician into political battle with adverse corporate and legislative interests. Environmental clinics have produced a reaction by interests negatively affected by their activities and that reaction has included numerous efforts to curtail law clinics’ impact work, Carey, *supra* note 9, at 532-535. The Louisiana Supreme Court restricted clinic activities in response to Tulane’s environmental law clinic’s efforts in opposing efforts by Shintech, a Japanese firm, to build a new

valid exacerbated the tension between the two groups. The problem has continued to fester, with the 2007 Carnegie Foundation for the Advancement of Teaching report on legal education emphasizing both the need for clinical education and the problem that having such courses taught by faculty “that has lower academic status” made such courses appear to be “of secondary intellectual value and importance.”<sup>50</sup>

This short history of clinical education’s position in the academy reveals as a consistent theme the clinical faculty’s struggle for status, prestige, and job security within the legal academy. Whether one views this struggle as one by a marginalized group for equality or as rent-seeking, or some of both, the struggle is a central conflict that has consumed considerable time and effort over the last forty years. We argue that one response to this conflict was a shift by clinicians away from lower status service clinics and toward broader law reform and impact clinics that advance more theoretical training. This shift advanced the search for status in two ways. First, “[s]ervice-modeled clinics ... usually involve the litigation of routine cases in areas such as family law, landlord-tenant law, public benefits law, and consumer law.”<sup>51</sup> These are less prestigious areas of legal scholarship and legal practice (at least in the view of most law faculty). Shifting into law reform work allows clinicians to focus on higher-prestige areas of the law.<sup>52</sup> The shift also relieves clinicians of the emotional stress that continuous exposure to the neediest clients can bring. Second, some social critics argued for “political lawyering” in the form of impact litigation as a more appropriate role for clinics.<sup>53</sup> For example, one clinician

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chemical plant in that state. (There are multiple sides to these stories, of course. Compare Oliver A. Houck, *Save Ourselves: The Environmental Case that Changed Louisiana*, 72 La. L. Rev. 409 (2012) (arguing impact of case was positive) and Henry Payne, *Green Redlining*, REASON (Oct. 1998) and Jonathan H. Adler, *The EPA’s Latest Injustice*, Competitive Enterprise Institute (May 1, 1998) (arguing that plant would have benefited community and that anti-Shintech efforts were harmful to the community). Other clinics’ cases have also been controversial as well. One University of Maryland clinic sued Perdue, a local employer, for environmental violations. Jim Perdue, the defendant’s CEO, sought legislative help in curbing the clinic’s ability to sue. Again, opinions differed on the merits of the action. See, e.g., Dan Flynn, *Maryland Chicken Case Goes to Trial Smaller than When It Started*, Food Safety News (Oct. 10, 2012) (describing controversy); David A. Fahrenthold, *Md. Legislature scrutinizing law clinic over chicken farm suit*, Wash. Post (March 28, 2010) (same). Separately, the New Jersey Supreme Court held that law school clinic records were not “public records” under the state open records law. The suit arose when a developer involved in a dispute with two non-profit organizations over the developer’s plan to build an outlet mall sought funding and time records and documents sent to the clinic by the NGOs’ officers in connection with the clinic’s representation of the NGOs. *Sussex Commons Associates, LLC v. Rutgers*, 46 A.3d 536 (N.J. 2012).

<sup>50</sup> William M. Sullivan et al., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 88 (2007).

<sup>51</sup> Carey, *supra* note 9, at 530.

<sup>52</sup> For example, see Harvard’s Health Law and Policy Clinic where students “will participate in a broad range of national and state law and policy initiatives aimed at increasing access to quality, comprehensive health care for poor and low-income individuals and families—especially those living with chronic medical conditions; or New York University’s Constitutional Transitions Clinic and Colloquium where the “mission is to support sustainable democratic change by providing comparative knowledge, and assisting in democratic reform, and influencing policies and politics” in the Middle East; and the many policy and legislative advocacy clinics at schools such University of California, Berkeley, NYU, University of Pennsylvania, Loyola, and the University of Kansas.

<sup>53</sup> Peter Margulies, 3 MICH. J. GENDER & L. 493 (1996). Voyvodic & Medcalf, *supra* note 33, at 108-109, quoting Mosher (“[C]linical legal education, so history reveals, neither necessarily nor naturally facilitates transformative practice. In practice, clinical legal education has often been (and continues to be) permeated by the same vision of law and lawyering that informs classroom instruction. Indeed, many authors have critiqued law school clinics for their failure to reflect critically about justice or about practice norms, and for the control and manipulation to which they routinely subject clients.”); 106, 108 (“While the goal of integrating social values into legal education has long

described environmental law clinics' legal reform efforts as "lawsuits filed to protect the sanctity of the environment or to protect people and animals from the adverse effects of environmental abuse."<sup>54</sup> Others argue that global initiatives are an important avenue of expanding access to justice regimes.<sup>55</sup> Regardless of the merits of such an educational mission – and it certainly seems like a different one from that embodied in the periodic calls for greater skills training evidenced in the MacCrate Report and the Carnegie Foundation report – such a mission is different in type from the focus of service clinics on "help[ing] ordinary people with their common legal problems such as divorces and other family law disputes, consumer and immigration issues, landlord/tenant matters, and bankruptcies."<sup>56</sup> It is also a mission with higher status within the academy than assisting individuals in sorting out a child support problem, addressing a misdemeanor charge, or solving a dispute with a landlord.<sup>57</sup>

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been central to the clinical legal education movement, this aspect of legal education has also been critically examined (and found wanting) in respect of legal education's ability to effectively advance a social justice agenda. These proponents of impact clinics argued that service work was insufficiently "transformative," helped to perpetuate idealized notions of fairness that fail to accord with the realities of poverty and discrimination," and failed to adequately politicize the law. If students were to learn "to appreciate the context in which the [client's] problems arise; this requires an understanding of the social realities in which clients live." Voyvodic & Medcalf, *supra* note 33, at 128. One individual's "understanding of social realities" is another's ideological indoctrination, of course, and the introduction of such efforts into clinics created at least a perception that clinics had a definite political view. As a result of this criticism, "a faction of clinics has gone from representing individual clients in conventional types of cases to engaging in mass litigation efforts where legal and societal reform are the primary goals". Carey, *supra* note 9, at 531. Clinicians can then use clinics as a vehicle for "numerous possibilities for advancing a social justice agenda in both professional education and practice." Voyvodic & Medcalf, *supra* note 33, at 101. In these clinics, students would receive "exposure to a social justice mission within a guided practice setting" which will provide them "not only with a key linkage between their legal education and their practice competence, but also with the intellectual foundation for a long-term engagement with the advancement of social justice." Voyvodic & Medcalf, *supra* note 33, at 114.

<sup>54</sup> Carey, *supra* note 9, at 536.

<sup>55</sup> For example, Frank Bloch argues that

There might also be a sort of inherent denial of access to justice where the only available legal regime does not allow for access to its institutions or provide effective remedies. Access-to-justice initiatives then must seek to reform the law and the legal system itself, which of course also requires access to legal talent. This kind of access-to-justice work challenges the legal status quo (as opposed to providing representation in the existing system or education about existing legal rights) and therefore must rely on outside support. Various Rule of Law projects currently underway in China and the countries of the former Soviet Union are examples of this sort of initiative.

Frank S. Bloch, [Access to Justice and the Global Clinical Movement](#), 28 Wash. U. J.L. & Pol'y 111, 120 (2008)

<sup>56</sup> Carey, *supra* note 9, at 530-532.

<sup>57</sup> We note that broader social change may result from service clinics as well as from impact clinics. For example, encouraging students to appeal adverse decisions can change court practices that harm low-income clients, clearing the way for systems change as well as changing the living conditions for the individual client. For example, a common complaint of domestic violence survivors is that courts fail to award child support or custody under a civil protection order petition even though both remedies are authorized by statute. Author Drew's clinical students successfully appealed the court's failure to award child support in protection order judgments providing needed income to the client while the addressing the broader systemic issue. *Hayes v. Gibbs*, 2008-Ohio-1115 (Ohio Ct. App. Mar. 14, 2008) ("The refusal of the trial court in this case to consider an award of child support on the basis that another forum was "more appropriate" constituted an error"). Significant change can result from persistent and competent client representation over time on particular issues. See for example *Lenehan (Gonzales) v. United States*

Students learn from both these types of experiences, although they may be learning different lessons. Students who practice in controversial areas of law are introduced to broader forces that might oppose legal actions. Students can explore what positions might be legally weak and assess which clients are likely to follow through with protracted litigation. The student then is provided a vehicle for assessing what may be theoretically ideal but impractical remedies while encouraging the client to consider at what point the client wishes to settle. Further, these cases can be useful for teaching students negotiating strategy in a context where the client may be merely symbolic.<sup>58</sup>

More recently, clinics have added a new focus beyond traditional social change-oriented activities. A recent development in clinical education is the creation of transactional clinics. For example, a business clinic at George Washington University serves “clients that are best described as ‘microbusinesses’ employing from one to five persons with less than \$5,000 in start-up capital.”<sup>59</sup> Similarly, the University of Pennsylvania’s Small Business Clinic’s mission is to both “educate students through practice so that they may acquire the skills and ethical consciousness necessary to become highly competent transactional law practitioners, and ... to provide legal services to small businesses and nonprofit organizations that cannot afford to purchase these services in the commercial market.”<sup>60</sup> Such work fits readily into the service model while offering a chance to deliver services in higher prestige areas of the law and without the same political overtones that disturb some critics of issue clinics. Transactional clinics also acknowledge the needs and interests of students who are not drawn to more traditional litigation clinics and provide an avenue of skills training in a broader range of areas.

Clinics of all sorts provide necessary opportunities to teach students to sort through ethical issues and strategic planning. Many clinicians we know view themselves as teachers first and practitioners second,<sup>61</sup> and so view doctrinal faculties as their peers rather than the members of the broader legal community (even if the doctrinal faculty do not always acknowledge this).

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of America, Case 12.626. Inter-Am. Comm’n. H.R. Report No. 80/11(2011) available at [www.oas.org/en/iachr/decisions/2011USPU12626EN.doc](http://www.oas.org/en/iachr/decisions/2011USPU12626EN.doc). Additionally, students in service clinics learn that if an individual is unable to afford counsel, then s/he is not likely to successfully support a legal claim or otherwise successfully navigate the legal system. Students are exposed not only to the clients’ legal needs, but also to the day-to-day difficulties of the clients’ lives. For some students, this is their first exposure to the impact of economic and educational differences and the clinical experience may result in the student’s increased empathy and awareness of the legal needs of the poor. Despite some criticism that service clinics promote the “left” agenda of the individual clinicians, some clinicians argue that the student transformation into empathetic advocates occurs unprompted upon exposure to clients whose life circumstances make “fairness” and “justice” largely inaccessible. While we give varying amounts of credibility to this argument, both recognize that exposure to the lives and legal problems of the poor is a valuable experience for many law students. Our point, however, is that change resulting from long term service representation is less prestigious within the academy than broader impact litigation.

<sup>58</sup> Exposure to clients is less frequent in interest clinics than in service clinics, as the client typically is representative of the problem to be addressed and resolution may consider factors far beyond what is favorable for the individual client. This structure can provide endless fodder for ethical discussion but does avoid the “social context” offered through individual client representation.

<sup>59</sup> Eric J. Gouvin, *Learning Business Law by Doing It*, BUS. L. TODAY (Sept/Oct 2004), 14-OCT BUSLT 53, 55.

<sup>60</sup> Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J. L. & POL’Y 195, 195 (2003).

<sup>61</sup> This is a potential distinction between clinical faculty and externship supervisors, although externship supervisors may also see themselves as having a broader role.

For people primarily identifying themselves as teachers, the goals of clinical education development centers on defining teaching goals.

If the clinicians or the law schools incorporate service to the poor as part of clinical education<sup>62</sup>, the school may benefit from providing a needed community service. For example, the University of Alabama clinic played an important role in post-tornado relief by quickly responding to the legal needs created by the disaster that struck Tuscaloosa and other parts of Alabama in April 2011.<sup>63</sup> Incorporation of the law school into the local community becomes secondary, if not lost entirely with many non-service clinics. For example, in 2001 students from the International Human Rights Law Clinic at American University,

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advised the Framework Convention Alliance (FCA), a coalition of non-governmental organizations involved in negotiations on the Framework Convention on Tobacco Control (FCTC), on appropriate enforcement mechanisms for the treaty. Clinic students conducted extensive research and drafted detailed recommendations and proposed language regarding reporting obligations, monitoring requirements and dispute settlement procedures under the FCTC. In November 2001 the students traveled to Geneva to brief the FCA during the third round of FCTC negotiations.<sup>64</sup>

While this no doubt was a worthwhile and exciting endeavor for the students, there was little benefit to the local D.C. community in which the clinics are located.<sup>65</sup> Whether or not the law school desires to benefit the local community, and engender the goodwill that typically follows, is one of the considerations faculty should consider when approving new clinics. Schools of means may pay less attention to this factor since they have sufficient resources to fund both service and interest clinics. Of course, this is not to say that alliance with doctrinal faculty concepts of intellectually valid work is the only motivation for interest clinics. After years of supervising students in service clinics clinicians may become weary of doing the same types of cases over and over or decide that their political preferences require a more systemic assault on existing legal rules.

Our conclusion from this brief review of the development of clinical legal education is that clinicians' search for equivalent status and/or rents within the academy played an important role in the shift to diversify away from the service clinic model. Particularly as legal scholarship has grown more interdisciplinary and theoretical, doctrinal scholarship has declined in value, and JD/Ph.Ds (and just plain Ph.Ds) have grown in number in the legal academy, the status gap between practitioners within law schools and "regular" faculty has grown, intensifying pressure

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<sup>62</sup> State student practice rules require that students represent those who could not otherwise afford legal services. See for example, Massachusetts Supreme Court Rule 3:03 Legal Assistance to the Commonwealth and to Indigent Criminal Defendants, and to Indigent Parties in Civil Proceedings.

<sup>63</sup> See *Alabama Law Wins 2012 CLEA Award for Excellence in a Public Interest Project* (May 1, 2012) available at <http://www.law.ua.edu/blog/news/alabama-law-wins-2012-clea-award-for-excellence-in-a-public-interest-project/> (describing clinic's response).

<sup>64</sup> Richard J. Wilson, et al., *The Work of the International Human Rights Law Clinic at American University: 12 Years of Operation*, (May 2002) available at [https://www.wcl.american.edu/clinical/annual\\_2002.pdf?rd=1](https://www.wcl.american.edu/clinical/annual_2002.pdf?rd=1).

<sup>65</sup> American University has sustained its service clinics while expanding into interest clinics. Service clinics include domestic violence, tax and civil litigation. <http://www.wcl.american.edu/registrar/clinics.cfm>



to close the gap by awarding tenure and elevating clinical faculty's role in governance. Resolving those issues is well beyond the scope of this chapter; the crucial point is that these forces are likely to continue to push clinics away from what is perceived as "low status" service work even if clinicians achieve formal equality in tenure and governance. The appearance of transactional clinics in higher prestige areas may offer a partial means of alleviating such pressures while still providing service opportunities, but will not be sufficient to resolve the underlying tension.

### C. Stress in the Market for Legal Education

One way to understand legal education is as a business that must generate sufficient revenue to cover its costs.<sup>66</sup> Indeed, law schools must often do more than cover their costs – for many universities, law schools have been major sources of revenue for universities for a long time. The adoption of the case method made law schools “the university cash cow[s]”<sup>67</sup> by allowing schools to teach large numbers of students with minimal capital investment in classrooms and relatively few faculty. Compared to sciences that required expensive laboratories or humanities or social sciences, where large classes were hard to sustain in the face of student preferences for smaller classes, law schools were able to limit competition by restricting the number of schools and so play the role of an oligopolist<sup>68</sup> and extract economic rents from their students both in the form of tuition and improved faculty working conditions derived from pedagogically unsound teaching methods (e.g. large classes, virtually no feedback during the semester, grades based on single examinations.) This played a major role in shaping U.S. legal education.<sup>69</sup> Indeed, from the 1940s to the 1970s, law schools were dominated by faculty who were, according to Thomas Bergin, “a man divided against himself.”

When feeling a “raw lusting for academic respectability,” the law professor found himself “deploring the case method, establishing research centers, loving the social sciences, aching to reform the law, and secretly wishing to be named to a modest federal post such as Secretary of State.” ... When his “Hessian trainer side appeared,” and he put students “feet to the fire of the cases,” however, the professor “did not want all the courses to be required – only the grim ones” and identified himself as a “lawyer.”<sup>70</sup>

For the most part, American law schools are staffed by doctrinal subject, full-time faculty with relatively light teaching loads (compared to other sectors of higher education) who place

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<sup>66</sup> See Richard A. Matasar, *The Two Professionalisms of Legal Education*, 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y 99, 103 (2001) (business and legal education “are inextricably linked. Simply put: [the dean’s] job is running a business.”).

<sup>67</sup> KALMAN, *supra* note 9, at 24

<sup>68</sup> Evidence of the oligopoly status of American law schools is the remarkable lack of diversity of approaches among law schools. See, e.g., Lawrence C. Foster, *The Impact of the Close Relationship Between American Law Schools and the Practicing Bar*, 51 J. LEGAL EDU. 346, 347 (2001) (“The first-year curriculum is nearly identical at all American law schools: legal writing and research, contract law, property law, criminal law, torts, and civil procedure, with some law schools also introducing aspects of constitutional law. In the second and third year, most courses are elective.”) On the oligopolistic nature of law schools, see First, *Competition (I)* and *Competition (II)*, *supra* note 13.

<sup>69</sup> Tamanaha, *supra* note 5, at 39-53; Arewa, Morriss, & Henderson, *supra* note 4, at \*5-\*27.

<sup>70</sup> KALMAN, *supra* note 9, at 23 (quoting Bergin).

great emphasis on faculty scholarship for a professional school.<sup>71</sup> Full-time study by students dominates the field. All this redounds to the benefit of the faculty. As Deborah Rhode noted, “In a *New York Times Magazine* profile, one faculty member put the point bluntly: whatever its other faults, ‘law school works pretty well for us.’ On average, legal academics earn the highest salaries of all university faculty. And the accreditation process protects key aspects of their quality of life, such as tenure, teaching loads, and research support.”<sup>72</sup> This is nothing new. In 1924 Dean Edward Lee of the-then unaccredited John Marshall Law School in Chicago alleged in that the cooperative relationship between the ABA and the American Association of Law Schools (AALS) had produced a “group of educational racketeers”<sup>73</sup> and a reasonable case could be made (and has been made) that this potent combination has continued to dominate legal education and to enable law schools to engage in considerable rent seeking.<sup>74</sup> The result is, as Prof. George Shepherd has argued, that “[t]he ABA forces one style of law training, at Rolls-Royce prices.”<sup>75</sup> Moreover As Prof. Harry First noted in the 1970s, “restrictions on output, lack of innovation, and uniformity—again predicted by applying our economic model to legal education—have successfully been sought.”<sup>76</sup>

Law school administrations and law faculties thus share considerable economic rents derived from the potent combination of a stranglehold on admission to the bar through the requirement of graduation from an ABA accredited law school as a condition of taking the bar in many states;<sup>77</sup> inexpensive and non-capital-intensive methods of instruction; and control of the ABA-accreditation process by legal education insiders.<sup>78</sup> The faculty and administration’s enjoyment of these rents are challenged by clinicians and clinical programs in two ways. On a per student basis, clinics are costly to operate, much more costly than large section courses.<sup>79</sup> Supervising students practicing law takes more attention per student than asking questions in a classroom: even a “small” section in a doctrinal course at most law schools exceeds the size of a

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<sup>71</sup> Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 373 (1990) (“It is currently the common wisdom that tenure and promotion are attainable at most law schools by faculty who have compiled a record of solid published scholarship coupled with classroom teaching that does not provoke active complaints from students”).

<sup>72</sup> See Deborah L. Rhode, *Legal Education: Professional Interests and Public Values*, 34 IND. L. REV. 23, 26 (2000) (citations omitted).

<sup>73</sup> Quoted in ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 175 (1983).

<sup>74</sup> First, *Competition (I)*, *supra* note 13, at 332.

<sup>75</sup> George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEG. EDUC. 103, 105 (2003).

<sup>76</sup> First, *Competition (I)*, *supra* note 74, at 331.

<sup>77</sup> Herb D. Vest, *Felling the Giant: Breaking the ABA’s Stranglehold on Legal Education in America*, 50 J. LEGAL EDU. 494, 496 (2000) (“In response to the swelling ranks of lawyers and the perceived competition from new schools, the ABA teamed up with the Association of American Law Schools to lobby state legislatures and supreme courts to begin requiring graduation from an ABA-approved law school in order to gain admission to the state bars.”)

<sup>78</sup> Tamanaha, *supra* note 5, at 12-19.

<sup>79</sup> Tamanaha, *supra* note 5, at 59-60; see also, Peter A. Joy, *The Cost of Clinical Legal Education*, 32 B.C.J.L. & SOC. JUST. 309, 327 (2012) (section on “Comparing Costs Before Cutting Them”).

clinic. Expanding clinics thus threatens to introduce a thirsty new competitor for the stream of milk from the “cash cow.”

Second, as the mainstream of the legal academy become more theoretical and interdisciplinary, many clinics remained largely practical (which was, after all, an important original point of clinical education) and focused in many cases on non-prestigious areas of the law such as consumer protection, landlord-tenant, and family law. Clinicians’ efforts to gain a larger share of the economic rents generated by the larger enterprise are thus resisted by doctrinal faculty, who may hold the same disdain for direct service clinical practice areas as they have for many practicing lawyers.<sup>80</sup>

To aid in their efforts to obtain what might be either a larger share of those rents or a more equitable share of the resources, we predict that clinicians will gravitate toward higher prestige clinics, production of scholarship, and impact litigation and away from service work. By conforming to the expectations of the “regular” faculty and meeting promotion standards that reflect the desires of doctrinal faculty rather than reflect the realities of clinical teaching, they hope to gain a greater share of the benefits of the enterprise. In other words, the key to acceptance by doctrinal faculty is (rightly or wrongly) perceived as the need to “look” more like doctrinal faculty.<sup>81</sup> How much long term benefit to students will be sacrificed with this shift remains to be seen. For example, making time for increased scholarship production may require a school to offer fewer clinic slots per clinician, reducing student and client access.<sup>82</sup> While there may be sound business reasons for developing or expanding interest clinics to teach particular skills, to prepare students for large and mid-size firm practice, or to meet student demands as part of a student retention strategy, the economics of which types of clinics will attract students to the law school may ultimately determine the type of clinic offerings.

The expanding interests of clinical faculty play a role as well. Direct representation of clients, particularly in volume, can be exhausting over time. This is particularly so if the clinician has been teaching in one topic area over an extended period of time. The need to expand or shift the type of cases undertaken can be important for the clinician’s professional growth. As individuals become more aware and involved in international issues, the clinician’s focus might

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<sup>80</sup> Amy B. Cohen, *The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law*, 50 LOY. L. REV. 623, 632 (2004) (“One of the most unfortunate collateral effects of the tendency for law professors to identify first and foremost as scholars and academicians and to distance themselves from practicing lawyers is the apparent disdain many professors feel and perhaps even express towards practice and practitioners.”).

<sup>81</sup> This has also led to the development of legal fellowship programs that train relatively inexperienced lawyers to be clinical teachers. Fellows are exposed to clinical pedagogy as well as scholarship. The tension that then develops in clinical faculty hiring is whether to favor relatively inexperienced clinicians who may have limited subject matter experience but who are more likely to write versus the more experienced practitioner who may bring a greater depth of knowledge and skill to a particular clinic but who may have little interest in scholarship.

<sup>82</sup> Tamanaha, *supra* note 5, at 34 (noting that extending tenure to clinicians “has an effect that is counter to their function: it prompts clinicians to engage in scholarship, traditionally the sine qua non of tenure. This is odd in several ways. The nature of the position is to train lawyers in a practice context-and clinicians are hired based on criteria tied to this function, primarily including substantial practice experience. Clinicians can be scholars, of course, but that is not what they are mainly selected for, in contrast to doctrinal faculty, for whom scholarly potential is the all-determining criterion for obtaining a position. Clinicians relentlessly criticize the emphasis on scholarship in law schools, yet now they hanker to do it themselves in order to qualify for tenure. To produce enough high-quality scholarship to earn tenure, furthermore, clinicians must be given time away from the clinics they have been hired to teach, thereby increasing the cost of the clinic-someone else must supervise the cases in their absence.”).

begin to change. As clinical teaching has become a long term career, such issues have become more important. Just as the interests of doctrinal faculty expand or shift during the course of an academic career, so does the work of the clinical faculty and staff. A question insufficiently discussed in legal education is thus the degree to which law schools owe clinicians (or tenure-track faculty for that matter) long-term career paths. If they do, schools are likely to face the need to allow teaching interests to evolve within clinics as a faculty retention issue. If schools do not, then the job of teaching clinics (or doctrinal courses) may need to be substantially redefined to focus on shorter-term positions (as has often been the case in legal research and writing courses and is becoming more common in doctrinal areas with contract positions) or with contract terms that specify the courses to be taught.<sup>83</sup> Outside the legal academy, many post-secondary teaching jobs have split into tenure track and short-term contract positions which accommodate both the school's need to meet subject matter needs as well as avoiding the long term financial commitment that tenure brings.<sup>84</sup> Just as doctrinal faculty do not have autonomy in which courses to teach, clinicians may have little control of which clinics they teach depending upon the needs and desires of the students. This becomes more significant in times of economic contraction where students have greater control over which schools to attend depending upon their determination of which schools offer better career preparation.<sup>85</sup>

The demand for greater status, evolving teaching preferences, and job security are colliding with the current economic crisis in legal education, caused by the dramatic drop in applications over the past few years, together with the shrinking job market for law graduates. This puts additional strain on the relationship between clinics and doctrinal education. On the one hand, there is a greater demand for skills-based education to prepare students for a job market in which small firms and solo practice are more likely outcomes. Without the additional training previously provided to some students by large law firms, new graduates are often unable to accomplish even simple legal tasks despite three years of post-graduate education. On the other hand, when the pie is shrinking (or even static), it is harder to resolve conflicts between faculty groups by giving something to both. With some schools facing drops in applications of 20% to 30% or more, and class sizes shrinking in an effort to hold on to existing LSAT and UGPA medians for entering classes, tuition-dependent schools face the prospect of making cuts in programs. From the doctrinal side, clinics may appear an expensive luxury. From the clinical side, subsidizing doctrinal faculty scholarship with low teaching loads that require more hires to cover basic courses also appears like a luxury. The partial integration of clinics into law schools since the 1970s – made possible with few sacrifices by other interest groups with in legal education by the rising revenues during the fat years – has not prepared legal education for a thoughtful resolution of this conflict.

We suggest that the changes to legal education demanded by the shifting marketplace will be delayed, if not hindered, if decision-making is left to traditional faculty processes. Since

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<sup>83</sup> This arrangement still leaves professors free to pursue their special interests through scholarship.

<sup>84</sup> See Tamanaha, *supra* note 5, at 44 (noting that universities “compensated for the lowered teaching loads of its tenure-eligible professors by utilizing cheaper non-tenure-track teachers, adjuncts, and graduate students, who now collectively handle 65 percent of teaching duties.”)

<sup>85</sup> For schools with shrinking economic resources, impact clinics might provide an opportunity to engage a significantly larger number of students in one clinic where the focus is on investigation, research and drafting with limited service work. These clinics will depend less on the interests of the clinician than on a clinic design that will accommodate greater student capacity.

preservation of status and/or attainment of status often drive faculty discussions, many law schools will experience ongoing resistance to change, risking further decline in enrollment and student satisfaction. With the demand for experiential learning increasing, law school existence for all but a handful of schools may rest on the ability to change to satisfy market demand. Faculty of all sorts must adjust their agendas to support the best interests of the law school and the needs of students rather than focus on furthering what may be economically unrealistic individual interests.

For access to justice, these pressures are likely to lead to further subordination of what was already a secondary goal of providing underserved communities with legal services. Faced with the extraordinary revenue pressures on many schools, clinics' clients are far behind internal constituencies in law schools in access to law school resources. Even within clinical budgets, serving clients with low status needs is likely to rank lower than meeting clinicians' desire for greater status and job security. Indeed, the economic pressures heighten the demand for job security (although even traditional tenure cannot protect faculty against cuts for economic reasons). Economics might drive sharing of resources, status and job security in an effort to shift law school culture to one that supports student needs.

Legal education is at a crossroads. As William Henderson, Brian Tamanaha, and others have described, the industry is facing a dramatic decline in revenues that threatens the existing model.<sup>86</sup> Change is coming and addressing it will require addressing, and perhaps resolving, the tensions described above. Law schools must do a much better job of explaining how they deliver skills that produce employment opportunities whose value exceed the cost of attending law school. Whatever the explanation turns out to be at particular schools, it surely will involve a greater skills component than legal education has historically included. Standing alone, the current clinic model is an insufficient answer in part because of these tensions. We now turn to an exploration of the current status and role of clinics.

## II. Clinical Legal Education Today

Peter Joy, associate dean and former director of clinics at the Washington University (St. Louis) School of Law and a thoughtful commentator on clinical legal education calculates that more than a third of law school graduates take an in-house clinical course during law school, a percentage that has been growing in recent years.<sup>87</sup> While calculations based on the data from recent ABA statistics suggest that this number is likely a bit smaller than one third, it is still substantial. In addition, clinical slots are unevenly distributed among law schools, giving some students greater opportunities to participate in a clinic than others while providing nearby residents to larger clinical programs greater access to much needed legal services. Consequently, residents of some areas are provided greater opportunities to have their legal needs met by a clinical program than residents of areas with relatively few clinics.

Moreover, clinics vary considerably from school to school in the type of legal needs they serve. Some clinics concentrate on providing low income clients with access to basic legal assistance for immigration, taxes, divorces, landlord-tenant disputes, and other individual needs,

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<sup>86</sup> William D. Henderson, *A Blueprint for Change*, 40 PEPPERDINE L. REV. 461 (2013); Tamanaha, *supra* note 5, at 160-166.

<sup>87</sup> Peter A. Joy, *The Ethics of Law School Clinic Students as Student-Lawyers*, 45 S. TEX. L. REV. 815, 817 (2004). Joy's calculations are detailed in note 7 of his article. On the growth in clinic enrollments, see Joy at 823-24.

while other clinics focus on broader litigation designed to produce systemic changes in policy through class action or other representative action suits, legal challenges to policies focused on producing policy changes, or assisting with lobbying or other non-courtroom measures designed to achieve policy changes. In a relatively recent development, a growing number of clinics focus their efforts outside the United States. As noted, students from the International Human Rights Law Clinic at American University advised the Framework Convention Alliance on appropriate enforcement procedures under the Framework Convention on Tobacco Control. In a project that combined individual representation with international advocacy, students at Columbia's Human Rights Clinic drafted briefs and framed oral arguments for presentation of a U.S. domestic violence case heard by the Inter-American Human Rights Commission.<sup>88</sup>

These internationally focused clinics illustrate an important tradeoff between clinical work that focuses on providing legal services to the poor, who might not otherwise have access to representation, and clinic work that does not. To some degree, American clinical legal education has shifted away from clinics doing work for individuals who cannot afford legal services and toward clinics doing work that might be described as long-term social impact work. For convenience sake, we will refer to individually-oriented clinics providing legal services in traditional civil and criminal cases or transactions as "service clinics" and social impact clinics as "impact clinics." Whatever the merits of this shift, it also limits the ability of clinics to meet unmet legal individual needs of the poor in the United States, although it may increase access internationally.<sup>89</sup>

Let us first consider the extent and distribution of clinic resources nationally – law schools are not distributed in a way to deliver resources to the areas in greatest need. To the extent that the needs of the poor for access to legal services are larger than can be met by clinical programs (as they are), this may not matter to a clinic's design. Any given law clinic is likely to have a sufficient population of low income individuals to absorb the full capacity of the clinic to provide services. If clinics are to be considered an important part of an overall plan to provide access to legal services, however, these disparities may be worth considering in allocating resources to increase clinical resources in underserved jurisdictions. Funding sources concerned primarily with unmet legal needs generally direct funds to areas of the greatest need making rural areas or others with particular underserved populations, such as immigrants, more likely to benefit from government grants. Private grants might be more focused on substantive area of service, such as entrepreneurial or tax clinics. Moreover, justifications for grant-funded clinical programs in terms of unmet legal needs are typically benchmarked with quantitative measures of the services provided, a demand that can work against clinical teaching as will be discussed below. Further, the geographic mismatch between law clinic slots and poverty populations is likely exacerbated by law schools' distribution *within* states. This may place a greater burden on some law schools to support clinics without any outside funding. This is common where the schools are located in areas where legal service organizations may be the primary beneficiaries

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<sup>88</sup> See decision of the Inter-American Council on Human Rights' decision in *Lenahan (Gonzales) v. United States of America*, Case 12.626, Inter-Am. Comm'n. H.R., Report No. 80/11 (2011).

<sup>89</sup> Defining the parameters of the relevant population is an issue to which relatively little attention has been paid. One of us has argued that a broader conception than national borders is needed in other areas. See Andrew P. Morriss & Roger E. Meiners, *Borders and the Environment*, 39 ENV'T L. 141 (2009).

of government grants. This lack of clinic funding may be relieved where legal service organizations are willing to partner in grant applications but substantial sharing of grant resources in those circumstances may be unrealistic.

In addition to the geographic distribution of clinical slots, the distribution of clinic slots among law schools of different ranks is also relevant. Although the *U.S. News & World Report* rankings of law schools have many imperfections,<sup>90</sup> these rankings nonetheless provide a sorting of law schools into categories that roughly approximate some significant differences. The top 16 ranked schools have remained quite stable (albeit with minor movements) since *U.S. News* began serious efforts at ranking and these schools are clearly distinguished from their competitors in the remainder of the publication's "first tier".<sup>91</sup> Similarly, while there may be quibbles on the margin, there is little doubt that the employment outcomes from a third or fourth tier school are generally quite different from those of a first tier school.

These differences express themselves in clinics in three ways. First, schools with greater numbers of graduates entering directly into solo practice or joining small to medium sized firms may emphasize skills training at the expense of impact work and so focus on service clinics. Second, schools with greater prestige may find service work less worthwhile because it is perceived to not carry with it the intellectual pedigree that impact work does. Third, student demand for clinical experiences is likely to be different at top tier and lower tier law schools. At the top of the hierarchy, where students are generally more secure that they will end up in the high end of the bimodal distribution of new legal jobs,<sup>92</sup> students may look for experiences that they may be unable to replicate in their post-law school experiences. While relief from the tedium of three years of coursework is a common motivation in seeking a clinical experience, the final units of which they perceive as adding little marginal value, students at the lower end of the law school hierarchy may be more motivated by the need to acquire skills that will enable them to earn a living upon graduation.

Table 1 shows the ratio of offered clinic slots to total J.D. student enrollments for two points in the evolution of clinical education. We chose 1998/99 as a benchmark year for the *U.S. News* era. The 2008/09 figures depict schools before the current admissions crisis appeared. A ratio of 0.33 would indicate that there were sufficient clinic slots for each student to take a clinic. Not all clinic slots offered are filled (the median percentage filled using ABA reported data is 87%). Table 2 **Error! Reference source not found.** summarizes this data for different segments of the law school market. Clinical opportunities are unevenly distributed across the market, with much higher ratios of slots to students at the top and in the lower half of the first tier than elsewhere. Growth has also been uneven, with increases at the top 15 and schools ranked 30-50 dwarfing the modest increments at schools ranked between 16 and 29.

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<sup>90</sup> See Andrew P. Morriss & William D. Henderson, *Measuring Outcomes: Post-Graduation Measures of Success in the U.S. News & World Report Law School Rankings*, 83 Ind. L. J. 791 (2008); William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 Ind. L. J. 163 (2006).

<sup>91</sup> Henderson & Morriss, *supra* note 90, at 178.

<sup>92</sup> William D. Henderson, *Are We Selling Results or Resumes?: The Underexplored Linkage Between Human Resource Strategies and Firm-Specific Capital*, Indiana Legal Studies Research Paper No. 105, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1121238](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121238) (2008).

**Table 1 - Law Clinics 1998/99 - 2008/09**

	Median Clinical Slots / Total Students		Total Clinical Slots		Total Clinic Slots / Total Students	
	1998/99	2008/09	1998/99	2008/09	1998/99	2008/09
<i>U.S. News</i> rank						
1-15	15.5%	18.3%	2,609	3,392	0.19	0.23
16-29	16.3%	14.9%	2,269	2,345	0.18	0.18
30-50	15.5%	21.0%	2,040	3,540	0.18	0.23
51-100	10.9%	13.9%	3,673	6,234	0.12	0.15
Tier 3	9.7%	14.7%	3,376	3,367	0.13	0.16
Tier 4	8.0%	10.6%	2,659	3,671	0.11	0.12
All (includes unranked schools)	12.6%	14.3%	17,325	23,108	0.13	0.16

**Table 2 - Change in Clinic Positions 1998/99 - 2008/09**

	$\Delta$ Total Clinical Positions 1998/99-2008/09	$\Delta$ Total Students 1998/99-2008/09	Median $\Delta$ Clinical Positions / Students 1998/99-2008/09
<i>U.S. News</i> rank 1-15	759	796	3.3%
<i>U.S. News</i> rank 16-27	222	256	4.4%
<i>U.S. News</i> rank 30-50	992	798	5.3%
<i>U.S. News</i> rank 51-100	970	1,952	1.4%
<i>U.S. News</i> Tier 3	750	1,199	1.5%
<i>U.S. News</i> Tier 4	1,781	7,216	4.8%
All (includes unranked schools)	5,820	12,217	4.6%

Growth has also been substantial in seats in law schools. The substantial growth in fourth tier schools through 2008 reflects both the increased number of such schools (13 since 1998/99), including Florida Coastal with a total student body of almost 1,400 students in 2008/09, and the



expansion of Thomas Cooley in Michigan, which grew by two thousand total students in the ABA statistics.

The interesting pattern in clinical program growth is in the top tier, where clinics expanded on virtually a one-to-one basis compared to student bodies, increasing the clinic-student ratios, with increases at lower tier schools not keeping pace with expansions in the student body but still outpacing the 1:3 growth rate necessary to offer each new student a chance at a clinic in the second and third tiers.

The types of clinics offered at schools are quite different. Table 3 lists the number of different types of clinics at some schools from each of the top three tiers. The categorization is based on the clinic descriptions on schools' web sites; unfortunately these descriptions do not generally include the number of slots in individual clinics, making it impossible to tell whether some clinics are substantially larger than others.

Two features of clinics from this small sample are of interest. First, while issue clinics exist outside the top tier, they are a smaller proportion of clinics in the lower ranked schools. It thus appears that a greater proportion of clinical legal education resources are being devoted to the provision of access to the legal system at lower ranked schools compared to higher ranked schools. Second, there are a considerable number of issue clinics doing everything from providing "assistance to environmental groups interested in policy reforms" (Yale) to "work[ing] to prevent gentrification on low income neighborhoods" (Harvard) to "travel to Africa to document human rights abuses and strategize human rights initiatives" (Stanford). While the data is lacking to say exactly how

**Table 3 - Sample Clinic Distribution (2008)**

School	2008 <i>U.S. News</i> Rank	Clinic Slots / Students	Number of Clinics			
			Service Clinics	Prosecution, Small Business, Government Agency Clinics	Clients + Issue Clinics	Issue Clinics
Yale	1	88.1%	8	3	4	6
Harvard	2	31.4%	18	6	2	7
Stanford	2	38.8%	3	2	2	3
Geo. Wash.	20	10.1%	7	2	1	5
Boston U	21	27.8%	2	1	2	1
Emory	22	10.9%	1		1	3
Geo. Mason	38	28.7%	3	2		1
U Arizona	38	15.0%	2	1	1	1
UC Hastings	38	15.9%	5	4	2	2
Pepperdine U	59	19.0%	3		1	1
Temple U	59	6.8%	2	1		
U Kentucky	59	6.3%	1			
U Missouri	59	9.7%	3	1		

GA State	77	16.5%	2			
Penn. St. U	77	42.7%	7		2	
Rutgers	77	16.2%	2			
Rutgers	77	24.4%	4	1	1	3
Santa Clara	77	27.1%	1	1	1	1
Stetson U	100	16.1%	2	3		
Syracuse U	100	15.8%	6	1		
Drake U	T3	27.1%	5			1
Franklin Pierce	T3	32.8%	5	2		3
Gonzaga	T3	23.9%	4	2		1

many clinical resources are being devoted to such projects rather than individual service cases, it would appear reasonable to assume that one student traveling to Africa to work on human rights issues would likely cost more to support than a considerable number of students handling landlord-tenant disputes in New Haven. Moreover, while preventing “gentrification on” neighborhoods might involve some aspect of service work, it likely results in resources being devoted to issues outside the scope of individual client goals.<sup>93</sup> Of course, resource-rich schools like Yale and Harvard may offer both types of clinics, but presumably even they could offer more service-oriented clinics if they funded fewer issue-clinics on the margin. Nonetheless, clinical resources are being devoted to programs that, at the least, deemphasize individual client representation in favor of a broader approach to social issues.

More broadly, we examined clinics at all schools by counting those listed on schools’ websites in July 2013.<sup>94</sup> Table 4 gives the average and median (in parentheses) number of clinics for the various tiers of schools by type.

**Table 4 - Clinical Offerings, All Law Schools (2013)**

	Service	Issue	Service + Issue	Prosecutorial, Small Business, or Gov’t Agency
Top 16	8.53 (7)	3.65 (3)	0.88 (0)	1.82 (1)
17-50	6.78 (6)	1.52 (1)	0.37 (0)	1.30 (1)
51-100	5.84 (5)	1.29 (1)	1.14 (1)	1.43 (1)
101-143	5.38 (5)	1.58 (1)	1.00 (1)	1.48 (1)

<sup>93</sup> Some of these measures may be valuable in their own right as well. It may be, for example, that New Haven benefits considerably from prevention of gentrification. (More likely, it seems that some residents of New Haven benefit and others do not.) One of the prime motivating forces for New Haven’s gentrification is Yale’s presence in the community and so using university resources to slow the process might be considered by those opposed to gentrification as an appropriate means of mitigating Yale’s impact. See Rhiannonn Bronstein, et al., *In Expanding Yale Should Avoid Gentrification*, Yale Daily News (Jan. 28, 2008) available at <http://www.yaledailynews.com/articles/view/23182>.

<sup>94</sup> Clinics were classified by having a research assistant examine the name and description from the website. While not perfect, we think the broad trends accurately reflect the current state of clinical education.

Unranked	4.33 (3)	1.07 (1)	1.00 (1)	1.67 (1)
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Not surprisingly, the top tier law schools have both more clinics and more issue clinics. However, issue clinics have expanded into the rest of the law school hierarchy, if in smaller numbers.

We think it is clear that law schools cannot provide enough clinics to solve the problem of access to justice on their own. Nonetheless, at least some commentators believe that law schools do make a meaningful contribution to addressing the legal needs of the poor through clinics, if only because there are so few other resources for the poor. For example, Peter Joy concludes that

The impact of clinical legal education in providing access to the courts for those unable to afford lawyers has been significant .... Many in-house clinic student-lawyers, as well as those students certified as student-lawyers in some externship programs, join the mere 5,000 to 6,000 lawyers representing the forty-five million Americans who are so poor that they qualify for civil legal aid.<sup>95</sup>

Even if they are not sufficient, law school clinics seem to be a necessary part of the provision of access to justice for the poor given the overwhelming amount of unmet needs.

This survey suggests several important facts about clinical legal education and its place in the academy.

- As law schools expanded, clinics expanded with them. There are more accredited law schools and more law school clinics in those law schools today than there have been at any time since the beginning of ABA accreditation. What remains to be seen is whether the current decline in admissions will lead to fewer slots in the future.
- During the boom, higher ranked law schools added clinics and clinic slots more rapidly than lower ranked law schools, with the greatest per-student growth in the top 50.
- The term “clinic” encompasses a wide range of course offerings. There are service-oriented programs aimed at providing direct legal services to individuals unable to afford lawyers, with a goal of generating a caseload on which law students might gain practical training. There are also impact clinics that focus on litigation, treaty negotiation, and other activities designed to address broader social problems while providing law students with opportunities to participate in those forms of lawyering directly or indirectly.
- Service clinics are an important part of the overall solution to access to justice for the poor.
- The reduction in law school applications and class sizes is likely to limit the ability to expand the resources devoted to clinical legal education.

In the next section, we turn to examining the implications of these trends

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<sup>95</sup> Joy, *supra* note 3, at 824.

### III. Clinics, legal education, and legal needs

We have sketched a fairly dire picture of the state of legal education. Law school economics, however, might propel the change toward integrating clinical and doctrinal teaching with a force that professional reports have failed to accomplish in large measure. Let us conclude by offering predictions and recommendation for modest reforms that might ameliorate the problems we have identified.

We identified three tensions in clinics' relationship to the rest of legal education: the status conflict between doctrinal and clinical faculty; the resource conflict between teaching and providing legal services; and the economic tension within law schools. The future is uncertain, but these are our predictions for how the resolution of these tensions will affect the ability of law school clinics to provide legal services for under-served sectors of the population while improving respect for the work of both clinicians and other faculty within the law school community.

We predict that for those schools where faculty are willing to place self-interest aside and respond to market demand, clinical faculty will ultimately prevail in their efforts to gain equal status in law schools, obtaining tenure (or its equivalent), higher pay, sabbaticals, a stronger role in governance, and the other perquisites of full-time tenured faculty status. We believe that they will prevail not because their arguments are necessarily strong on the merits but because their arguments are based on an appeal to fairness.<sup>96</sup> As clinical faculty become more valuable to the law school's marketing and student retention, the fairness argument becomes more palatable to the rest of the faculty. In addition, as clinicians become more influential in faculty decision-making, they will become more persuasive in changing tenure criteria to support enhancement of teaching skills as well as writings on clinical pedagogy in addition to more traditional academic writing.<sup>97</sup>

We predict that the trend toward impact clinics will continue and that service clinics will decline in relative and perhaps absolute number, at least in the upper reaches of the law school hierarchy. So long as schools seek the infusion of outside money, clinical opportunities will be limited by those who believe that clinics cannot be supported or justified due to high faculty-student ratios. With enhanced status for clinicians in schools that favor more interest clinics will come the need to reduce teaching loads to allow more traditional scholarship during the pursuit of tenure, sabbaticals, research leaves, and the like. The cuts will likely come from service clinics that can accept fewer students due to the need for more intensive supervision, rather than the more prestigious impact clinics. As a result, access to justice will be reduced from a combination of three factors. First, the price of status will be greater involvement of doctrinal faculty in selecting and reviewing clinical faculty; this will exert pressure to select clinical faculty with more elite credentials. The elite model of clinics, which is more focused on issue clinics, will thus be transmitted downward in the hierarchy. Second, the pressure for equivalent

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<sup>96</sup> In our experience, law faculties are collectively astonishingly unable to make absolute judgments and instead often rely heavily on fairness arguments in making decisions on everything from hiring to tenure. Even individuals within the legal academy are often unwilling to make absolute judgments of quality. For example, tenured outside reviewers sometimes decline to review a promotion and tenure candidate's work rather than write a negative evaluation letter.

<sup>97</sup> At present, while "clinical tenure" promotion criteria may include service and teaching skills, faculty often overemphasize any criterion for scholarship contribution.

scholarly production will create an incentive for clinical faculty to find ways to teach in areas that reinforce their scholarly interests, just as doctrinal faculty now frequently teach a seminar in their areas of interest. This will push clinical faculty's teaching in more "big picture" directions, as they strive to write articles that will succeed in the marketplace for prestigious placements. Third, the pressure for placement will push clinicians to write (and so teach) more constitutional law and other subjects that dominate in elite journals rather than focusing on family law, landlord-tenant law, and other fields that have largely vanished from the pages of top law reviews.<sup>98</sup>

There is some hope that law schools can play a role in improving access to legal services, should they embrace the changes occurring outside the academy in the market for legal services. As Richard Susskind and William Henderson have both shown, clients' access to the legal system is being dramatically changed by non-traditional legal services providers.<sup>99</sup> Briefly, an entire new industry has sprung up aimed at providing low cost legal services outside the "bespoke tailor" model of legal services. In one such business model, a small number of lawyers create the raw materials for a business process that automates construction of documents through structured interviews.<sup>100</sup> Many of these firms are targeting previously underserved segments of the market for legal services, beginning with the problems of middle class and poor clients.<sup>101</sup>

This model offers law school clinics a possible reconciliation of the high status work they need to maintain clinicians' status within the academy and the demand for high volume legal work among clients. Students working in traditional service clinics might move on to a project constructing the forms, interviews, and other materials necessary to produce a legal process outsourcing solution to particular community problems. The documentation of the process and scholarly analysis of the issues that inform the solution could provide the clinicians with the raw material for substantive scholarship (admittedly not likely constitutional law) while bolstering a clinic's ability to bring large-scale services to a broader population. Particularly if overall enrollments in law schools continue to decline, we think this may be one approach for expanding access to legal services through clinics. The model fails to provide traditionally valued skills such as client centered interviewing but does provide some service experience at low cost to the institution. And if paired with a local court to provide more effective assistance to pro bono litigants, this or similar models could provide student service to the poor while exposing the

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<sup>98</sup> One of us discusses this in Arewa, Henderson, Hook, & Morriss, *supra* note 16; see also CARISSA ALDEN ET AL., TRENDS IN FEDERAL JUDICIAL CITATIONS AND LAW REVIEW ARTICLES, 1 (2007), available at [http://graphics8.nytimes.com/packages/pdf/national/20070319\\_federal\\_citations.pdf](http://graphics8.nytimes.com/packages/pdf/national/20070319_federal_citations.pdf). In a 2007 study, editors of the Cardozo Law Review examined articles published in five of the most cited law reviews (California Law Review, Columbia Law Review, Harvard Law Review, New York University Law Review, and The Yale Law Journal) in 1960, 1980, and 2000. The editors classified the articles as "practical," "theoretical," or "both practical and theoretical." *Id.* at 1-2. Their study found that, in 1960, the five law reviews published a total of 48 "practical" articles, 36 "both practical and theoretical" articles, and 21 "theoretical" articles. *Id.* at app. D. By 2000, the journals published 6 "practical" articles, 45 "both practical and theoretical" articles, and 68 "theoretical" articles. *Id.*

<sup>99</sup> Richard Susskind, THE END OF LAWYERS? (2008); William D. Henderson, *A Blueprint for Change*, 40 PEPPERDINE L. REV. 461, 470-478 (2013).

<sup>100</sup> Susskind, *supra* note 99, at 100-04 which discusses several examples of innovative automated document assembly.

<sup>101</sup> Susskind, *supra* note 99.

students to both legal substance and procedure as well as an introduction to court personnel who may be positive resources for students who enter into practice.

Another route to resolving these tensions is to blur the distinction between “clinical” and “doctrinal” courses by expanding the range of courses law schools offer. It has been observed more than once that there is little justification for the third year of law school beyond the extraction of tuition.<sup>102</sup> Law professors have wonderful jobs and not all of the reasons our work life is so satisfying are related to the receipt of rents. We have the opportunity to interact on a daily basis with students who, for the most part, are smart, engaging, and eager. We are able to work on subjects that interest us, to freely disseminate even the most crackpot ideas, and to teach at prestigious universities with fewer years of graduate study than almost any other discipline while being paid better than most of our university colleagues outside the law schools. Even if we gave up some of the rents we now enjoy, by redoubling our efforts to add value to our students’ careers, we would still enjoy these attributes of our jobs. Adding value is unlikely to be accomplished by offering one more large section class with a three-hour exam. We must find ways to teach our students how to be better lawyers with sharp practical skills and an appreciation of how the ongoing study of the theoretical is essential to best practice lawyering.<sup>103</sup>

One suggestion is to blend the clinical and academic experience. The possibilities are endless. One example would be to combine a clinical experience of representing individuals in appeals of denials of social security claims, while concurrently engaging in a study of both historical development of the current social security scheme and the law surrounding it together with study of how other countries approach the needs of the disabled (or not). Such a course might examine the modern expansion of the disability insurance roles,<sup>104</sup> the problem of review of decisions of administrative law judges,<sup>105</sup> and the administrative challenges of mass programs which require individualized assessments.<sup>106</sup> Simultaneously delving into how the social security system fits into the larger administrative law framework would enrich the educational experience. Creating a capstone course that combined all of these would provide a broader context for the student’s understanding of the legal system generally as well as the problems of the poor. Cooperative teaching in such a context would at least partially eliminate the difference between doctrinal and clinical faculty. In light of the history of clinical legal education, resolving

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<sup>102</sup> See Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case For Bar Eligibility After Two Years of Law School*, 15 NYU J. LEG. & PUB. POL’Y \_ (forthcoming 2013).

<sup>103</sup> Note that this is not a plea for more “practical” courses alone. We are convinced that even extremely theoretical subjects like Law & Economics have the potential to add value if they contribute to a student’s ability to analyze and understand a client’s legal problems.

<sup>104</sup> See David H. Autor & Mark G. Duggan, *The Growth in Social Security Disability Rolls: A Fiscal Crisis Unfolding*, 20 J. ECON. PERSP. 71 (2006) (attributing growth to 1984 changes in statute increasing share of recipients with comparatively low mortality conditions, increasing average duration of disability spells, rise in after-tax DI income replacement rate, and increased coverage due to higher female labor force participation); John Merline, *5.4 Million Join Disability Rolls Under Obama*, INVESTOR’S BUSINESS DAILY (April 20, 2012) (describing fiscal impact of added recipients and attributing some of increase to the recession).

<sup>105</sup> See Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003) (describing problems with efforts to institute review process for ALJ decisions).

<sup>106</sup> See Jerry L. Mashaw, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS* (1985).

existing tensions between clinical and doctrinal faculty is necessary before any significant change in law schools' ability to help resolve the larger problem of access to justice can occur.