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Articles

Clinical Practice

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Contributors' guide

Criteria for acceptance of a refereed article

The primary criterion is: is this a work that through description, analysis and critical reflection adds to our understanding of clinical legal education and is of interest to an international audience? Contributions of an interdisciplinary nature that link clinical legal education and the relevant higher education and professional development literature are welcome.

This is a criterion that cuts both ways – very UK-orientated (or US-orientated) pieces might have merit but may be so introverted as to lack the international element – other papers might cover something which is of such interest to an international audience as to be worthy of publication. The best papers will often be rooted in a specific local experience – but will be able to draw that into a larger theoretical context that has wide relevance across jurisdictions.

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Foreword

IJCLE conference July 2009, Western Australia

The 7th International Journal of Clinical Legal Education conference was held in conjunction with the 10th Australian Clinical Legal Education conference on 9th–11th July 2009 in Perth and Fremantle, Western Australia. The host institution was the School of Law, Murdoch University in Perth and the excellent local organisers were the team from SCALES community legal centre led by **Anna Copeland** and **Gai Walker**. The conference title was "***Global, Local Clinical: Clinical Legal Education in a Shrinking World***." It focused on the global reach of clinical legal education and the many ways in which clinical projects cross geographical, social and cultural frontiers

The range of delegates was reflective of the conference theme with contributors from a very wide range of jurisdictions including: Australia, Canada, China, India, Hong Kong, Japan, Malaysia, Nigeria, South Africa, Thailand, United Kingdom and the USA. The conference was held on lands traditionally owned by the Nyoongar people and the conference was graciously welcomed by **Marie Taylor**, Whadjuk Ballardong, Nyoongar Burdiya Yogka, who evoked the image of a conference as a campfire conversation where people gather to relax with friends, share experience and learn. I believe the conference succeeded in achieving these and many other outcomes. Delegates were inspired by the exceptional standard and rich diversity of the papers that were presented.

It is always invidious to select highlights from a conference but special mention must go to the keynote speeches which underpinned perfectly the conference themes and provided ideal plenary focal points throughout the three days of diverse discussion. **Professor Frank Bloch** opened the conference with his paper, *The Global Clinical Movement: Opportunities for Growth in an Ever Shrinking World*. He showed how clinical programmes, although primarily dealing with localised concerns, draw upon universal principles relating to education, social justice and human rights. He suggested there is potential for greater international development as clinicians continue to forge partnerships and organisations such as the IJCLE and the Global Alliance for Justice Education bring clinicians together and raise awareness of opportunities for cross-border collaboration. A significant contribution to international awareness will be the book Frank is currently editing on the Global Clinical Movement. We very much look forward to its publication.

Professor David McQuoid-Mason delighted the conference with his interactive session, *Using Kafka's The Trial to Teach Law Students about Due Process Rights*. Delegates played the parts of prisoner, prison guard, inspector, lawyer and magistrate as Josef K's labyrinthine legal nightmare unfolded. The audience offered insights from their own legal systems as to the rights that were granted and denied by the authorities in Kafka's classic novel. The session provided an excellent illustration of how clinical methodology can be invoked with relatively large groups and using limited resources to raise awareness of human rights norms, contrast levels of protection in different legal systems and focus attention on the importance of due process.

Anna Cody provided an ideal closing keynote with her paper, *"Yes We Can": Teaching Clinical Students about Social Justice and Human Rights*. In it she argued that although law students may be motivated to commence clinical programmes for a multitude of reasons they are almost always

intensely affected and sometimes transformed by the social injustice they encounter and the realisation that they can contribute to the achievement of social justice and human rights on behalf of individual clients and the wider community. Although focusing on the Australian situation, the issues were clearly applicable across most clinical contexts. The paper was followed by a panel discussion involving contributions from **Helen Yandell**, **Jeff Giddings**, **Fran Gibson** and **Anna Copeland** and a lively debate about potential tensions between educational and social justice objectives.

The parallel sessions are the scholarly core of a conference such as this and we were extremely fortunate to present 32 concurrent papers over the course of the conference. We had papers on the interface of law and medicine, international business development, representing children and disabled clients, clinics in conflict zones, new clinics, bi-legal clinics, e-clinics, debt clinics and migration clinics. Papers considered how to assess in clinic, how to select for clinic, clinic survival, the use of psychiatry in clinic, the role of NGOs in clinic, doctrinal law in clinic, gender in clinic and clinical supervision. We learned about clinic development in various jurisdictions including Japan, Hong Kong, Nigeria, Malaysia and the Gulf Region. Overall the parallel sessions revealed the rich diversity of clinical activities and pedagogy that enables this conference to flourish.

Finally, no conference is complete without a social calendar and the IJCLE has always prided itself on making the evening sessions at least as lively as the day. An excellent programme was arranged by the SCALES team including pre conference dinner at a brewery, "sundownder" at the Law School, conference dinner at a Swan Valley winery, a visit to a nature park and an amazing demonstration of Aboriginal culture, music and dance. The generosity, warmth and humour of our hosts will be an enduring memory of this conference and will be hard to equal … But we will try…

... IJCLE conference 2010: Newcastle, England

For the first time the IJCLE conference will come home to Northumbria University in Newcastle upon Tyne, England. The provisional dates for the conference are Weds 7th–Fri 9th July 2010. Home to fine Georgian architecture, the Quayside cultural quarter, unspoilt coastline and the world heritage sites of Durham Cathedral and Hadrian's Wall, the region is a gem and the city is a delightful cosmopolitan centre which embraces visitors from all over the world while retaining a strong regional identity. The conference will be hosted in the new purpose built Law School at Northumbria University and the conference planning group is already busy devising an exciting programme of events. Please check the website www.ijcle.com for further details and the call for papers which will be issued in the autumn term.

In this edition

The opening lines of **Robert Schehr's** article set the scene for a polemical analysis of the state of legal education in the USA and the failure to realise the benefits of clinical methodology:

> *Maintenance of status quo law school curricular design and delivery, along with the continued marginalization of live client clinic programs, and the discordant objectives of law schools as compared to the expectations of Bar passage, serve to stifle the role of juridic practitioners in the service of justice.*

Schehr adopts Dewey's characterisation of the traditional law professor mentality that "the Lord speaks through me" and argues that despite decades of research and debate little has fundamentally altered in law school instruction so that "teachers are the sifters and transmitters of wisdom and knowledge, and they alone serve as the arbiters of truth". Drawing on analyses of the position of Innocence Projects in legal education the article argues that the marginalised position of such schemes is indicative of a more general failure of law schools to appreciate and embrace the more holistic education that clinical method can offer to law students. He applies postmodern and Lacanian insights to law curriculum design and delivery and views the Socratic Method as a "master narrative" that "perpetuates hierarchical political, economic, and cultural relations" creating a "system-reproducing steering mechanism" that will "inhibit truly innovative pedagogical practices". The analysis presents a bleak view of current US legal education; although Schehr reminds us that the recent Carnegie report and Stuckey's Best Practices report also present damning appraisals of the lack of pedagogic ambition in law schools. The article seeks to provide an indication of a way forward by drawing on student development theory research and arguing for integration of clinical methodology so that "no longer would clinics be marginalized, they would become the normative model of effective law school pedagogy."

Victoria Murray and **Tamsin Nelson** ask the intriguing question, "Assessment – are grade descriptors the way forward?" They outline the recent move in their clinic from criteria referenced assessment to the use of grade descriptors and report on the research they conducted into attitudes of staff and students towards the new assessment methodology. These developments are situated in the context of wider issues involved with grading of clinical performance including the debate about the appropriateness of assessing clinical modules at all. The article concludes that the initial research suggests both faculty and students support the use of grade descriptors as a useful benchmark against which to measure existing and potential performance and providing some reassurance of greater transparency and consistency in the grading process.

Antoinette Sedillo Lopez, **Cameron Crandall et al** outline an innovative collaboration between medical and legal clinics at the University of New Mexico. The project adopted a novel amalgamation of the standardised patient, which is a routine teaching tool for medical education and the standardised client, which is a more recent and less widely used method in legal education. This was performed in the context of domestic violence scenarios so that the medical students completed a clinical meeting with an actor playing the part of an abused woman whereas the law students conducted an initial legal interview with the woman as a potential client. Sometimes the link between the medical problem and domestic violence would be overt and in others the relationship was covert, thus presenting students with difficult and realistic situations. The law students completed two simulated meetings followed by a focused "curricular intervention" and then completed a further two simulated meetings. Perhaps surprisingly, the researchers found no statistically significant improvement in student performance pre and post intervention but did find a range of other potential advantages including unanticipated benefits and the project has led to further collaborative activities.

Claire Sparrow appraises the collaborative project between the University of Portsmouth and Portsmouth Citizens Advice Bureau (which is a community legal service). The CAB was in need of high quality volunteers to participate in its advice surgeries for members of the public whereas the law school wished to enable students to improve their skills, enhance their employability and increase the university's engagement with the community. The article outlines how the project

developed from being an extracurricular volunteer scheme to a fully integrated academic module and explains why this was felt to be necessary. The resulting collaboration appears to be a successful meeting of minds and interests and is a good example of how clinical projects can be developed without the need to build a full live client infrastructure in the law school.

Kevin Kerrigan
Editor

"The Lord Speaks Through Me": Moving Beyond Conventional Law School Pedagogy and the Reasons for Doing So

Dr. Robert Schehr*

Abstract

Maintenance of status quo law school curricular design and delivery, along with the continued marginalization of live client clinic programs, and the discordant objectives of law schools as compared to the expectations of Bar passage, serve to stifle the role of juridic practitioners in the service of justice. Decades of careful scholarship regarding the problems associated with the quality of legal education have repeatedly called for curricular revisions that should enhance the knowledge and skill base of graduates, develop their level of preparedness to actually serve in the profession, and demonstrate care for students. And while there has been a commitment on behalf of law schools to establish experiential educational opportunities through participation in live client clinics, far too often these clinics appear as appendages to the core curriculum and are marginalized as a result. This essay has two objectives – to address the serious and well-known shortcomings associated with law school pedagogy, and to stimulate consideration of alternate pedagogical methods that draw upon student development theory to enhance what education scholars know about cognition.

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I. Introduction

Twentieth-century American philosopher, John Dewey, famously suggested that much of what passed for pedagogy was the product of an authoritarian dispensation of instruction meant to maintain control over curriculum and classroom behavior. To facilitate an authoritarian pedagogy, Dewey contended that teachers at all levels of instruction adopted the belief that "the Lord speaks through me." Simply put, teachers are the sifters and transmitters of wisdom and knowledge, and they alone serve as the arbiters of truth.

In this essay I assert that maintenance of status quo law school curricular design and delivery, along with the continued marginalization of live client clinic programs, and the discordant objectives of law schools as compared to the expectations for Bar passage, serve to stifle the role of juridic practitioners in the service of justice. This essay has two objectives: 1) to address the serious and well-known shortcomings associated with law school pedagogy; and 2) to stimulate consideration of alternate pedagogical methods that draw upon student development theory to enhance what education scholars know about cognition. While the substance of this essay may apply to cross-cultural experiences, it is deeply rooted in the pedagogical methods employed by law schools in the United States. Furthermore, while I make reference to them, this is not an essay about innocence project clinics, or wrongful and unlawful conviction per se. The three articles referenced below, as well as discussion of wrongful and unlawful conviction courses, serve to reveal a deeply rooted pedagogical problem existing in the majority of US law schools. They will be used here for illustration purposes only.

Three recently published law review articles advocate for the implementation of live-client law school-based innocence projects as a heuristic tool that offers students interested in careers in criminal law real world legal experience.[1] Two of the articles focus attention on pragmatic considerations required of innocence project clinic directors,[2] while the third moves the discussion further in the direction of desired pedagogical outcomes generated by student participation in innocence project investigation and litigation work.[3] For current and prospective clinic directors each article provides invaluable schematic insight into ways of conceiving innocence projects, and the pedagogical reasons for doing so, from well-known and trusted clinic directors and legal scholars.

1 Keith Findley. *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 Clin. L. Rev. 231 (2006); Jan Stiglitz, Justin Brooks, & Tara Shulman, *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 Cal. W.L. Rev. 413 (2002); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 Neb. L. Rev. 1097 (2003).

2 Jan Stiglitz, Justin Brooks, & Tara Shulman, *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 Cal. W.L. Rev. 413 (2002); Daniel S. Medwed, *Actual Innocents: Considerations in Selecting Cases for a New Innocence Project*, 81 Neb. L. Rev. 1097 (2003).

3 Keith Findley. *The Pedagogy of Innocence: Reflections on the Role of Innocence Projects in Clinical Legal Education*, 13 Clin. L. Rev. 231 (2006)

In order for the good ideas espoused by Keith Findley, Jan Stiglitz, Justin Brooks, Tara Shulman, and Daniel Medwed (as well as the recently published reports encouraging dramatic changes to law school curricula in general) to generate the kind of change I believe is desired by each, a fundamentally different law school curriculum must take shape. At the present time, their good work, and the efforts of hundreds of others who direct and invest in the scholarship of live client innocence projects across the United States[4], exists at the margins of law school curricula.[5]

Why is it that given the relevance of twenty years or more of scholarship regarding the leading causes of wrongful and unlawful conviction, very few law schools offer an elective course on this topic, or better yet, integrate identification and analysis of procedural errors leading to unsafe verdicts across the curriculum? In the realm of criminal law and procedure I view an integrated three-year long discussion of how to identify and avoid errors to be important to a prospective lawyer's training. Why? Because lawyers, both prosecutors and defense attorneys, must understand the multitude of ways cases can go bad in order to avoid them. They must be armed with the critical analytical skills necessary to deconstruct the political, economic, and cultural explanations for why the institutions responsible for investigating, prosecuting, and defending suspects charged with crimes engage in behaviors known to generate wrongful and unlawful convictions.

To the best of my knowledge, these subjects are rarely discussed as part of the core law school curriculum in the US. Rather, students are bombarded with an onslaught of black letter law that they need to memorize. This is particularly the case during the first year of law school with its emphasis on case law, statues, and rules.[6] In short, "the first year experience as a whole, without conscious and systematic efforts at counterbalance, tips the scales, as Llewellyn put it, away from cultivating the humanity of the student and toward the student's re-engineering into a 'legal machine.'"[7] The failure of faculty to generate an integrated curriculum[8] that links legal doctrine from one subject to the next speaks to an overriding concern among pedagogues that law school faculty will not be able to "provide thematic unity, provide comparative insights from other cultures, bring to bear new theoretical critiques, or integrate aspects of their scholarship into their teaching."[9]

Second and third year curricula are likewise burdened by the absence of a coherent integrated curriculum that Stuckey et al. argues represents little more than "a series of unconnected courses on legal doctrine."[10] The problem for Stuckey et al. is that faculty make little effort to integrate

4 Innocence projects now exist in 47 states.

5 A. Amsterdam. "*Clinical Legal Education – A 21st Century Perspective*." 34 J. Legal Educ. 612 (1984). There are law schools that have moved in an earnest way to incorporate clinics and clinic directors in a more wholistic way into the law school curriculum. In general, however, law school clinic directors are not eligible for tenure, and tend to be treated as second class citizens within law school departments. For examples of law schools that have sought to create an integrated curriculum see Gonzaga University School of Law, New York University, CUNY University, Yale Law School, and Southwestern Law School. Three states have recently moved to require new law school graduates to work as apprentices with law firms before commencing their practice (Delaware and Virginia), and to work directly with a mentor (Georgia).

6 Ronald Chester. 1993. "*Reshaping First-Year Legal Doctrine: The Experience in the Law Schools*." 20 Fla. St. U.L. Rev. 599.

7 Sullivan et al *Educating Lawyers: Preparation for the Profession of Law*. The Carnegie Foundation for the Advancement of Teaching: 17.

8 By way of example, Chester proposes combining Contracts, Torts, and Property in a single course he calls Civil Obligation. Civil and Criminal Procedure would be combined into a course on Procedure. Op. cit 19 at 599.

9 Supra note 7 at 17.

10 Roy Stuckey et al. 2007. *Best Practices For Legal Education: A Vision and A Road Map. Clinical Legal Education Association*: 17.

upper-division course themes, concepts, and ideas, nor do they "help students progressively acquire the knowledge, skills, and values needed for law practice."[11]

To be fair, by way of Socratic method law school faculty have attempted to introduce a semblance of dialogicality to classroom instruction. Through intensive questioning, parrying, further questioning, and so on of law school students faculty attempt to probe more deeply the application of theoretical concepts to a set of fact patterns.[12] Application of the Socratic method to classroom pedagogy is designed to teach students to "think like lawyers."[13] At its best, it avoids rote memorization, a practice that would scarcely generate the skill-base required of real world attorneys.[14] Following Jackson[15], the Socratic method is beneficial in three ways "(1) it gives professors the ability to teach large bodies of students in an active manner; (2) it is instrumental in teaching cognitive skill development – to teach students to "think like a lawyer", and (3) it helps students to hone their verbal skills." That said, even those who support the application of the Socratic method have articulated ways to improve it so as to avoid the negative consequences that have been identified as "terrorizing students," "perpetuating gender-based discrimination," "maintains hierarchy," "encourages time wasting," "induces student laziness," and "fails to teach necessary skills."[16] Others have argued that, in recognition of the failure on the part of faculty to effectively apply the method, at least some American law schools have slowly moved away from it.[17] In short, what supporters of the Socratic method appear to be arguing for is a method of dialogical discourse similar to what I will suggest is needed, complete with an emphasis on rigor and competent awareness of the application of abstract principles to real-world fact patterns.

But as I will suggest in the second part of this essay, where application of the Socratic method is privileged it serves as a master narrative that guides discourse in a direction most privileged by faculty. The terms and boundaries of Socratic questioning are determined by faculty. And while this criticism has been acknowledged by supporters of the method,[18] the critique typically centers on whether it biases gendered discourse.[19] This is, of course, a significant consideration but is only one. The point that I will attempt to make throughout this essay is that a discourse that privileges authoritative voices couched in a master narrative perpetuates hierarchical political, economic, and cultural relations that include gender, but reach far beyond it. If I am correct, the institutional positioning of law school training as a system-reproducing steering mechanism will inhibit truly innovative pedagogical practices.

11 Id at 17.

12 My thanks to Keith Findlay and Colin Starger for reminding me of this important pedagogical practice.

13 Susan Sturm and Lani Guinier. 2007. "*The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*." 60 Vand. L. Rev. 515. Jeffrey D. Jackson. 2007. "*Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*" 43 Cal. W. L. Rev. 267.

14 Michael Vitiello. 2005. "*Professor Kingsfield: The Most Misunderstood Character in Literature*." 33 Hofstra L. Rev. 955; David Garner. 2000. "*Socratic Misogyny? – Analyzing Feminist Criticisms of Socratic Teaching in Legal Education*." 2000 B.Y.U.L. Rev. 1597.

15 Jeffrey D. Jackson. 2007. "*Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*" 43 Cal. W. L. Rev., 274.

16 Id at 284–307.

17 Orin S. Kerr. 1999. "*The Decline of the Socratic Method at Harvard*." 78 Neb. L. Rev. 113.

18 See supra note 15 at 299.

19 Lani Guenier, Michele Fine, and Jane Balin, *Becoming Gentlemen: Women, Law School, and Institutional Change*. Boston: Beacon Press (1997); Paula Gaber, "*Just Trying to Be Human in this Place": The Legal Education of Twenty Women*, 10 Yale J.L. & Feminism 165 (1998); Sarah E. Theimann, *Beyond Guiner: A Critique of Legal Pedagogy*, 24 N.Y.U. Rev. L. & Soc. Change 17 (1998).

On the occasions when I have been invited to speak to law schools about the subject of wrongful and unlawful conviction I've been struck by the lack of information students possess, regardless of whether they are 1-L or 3-L, when it comes to police and prosecutorial misconduct, the use of jailhouse informants, junk science, false eyewitness identification, and false confessions. These are the now well-researched known causes of wrongful and unlawful convictions. Add to that list a host of other related reasons wrongful and unlawful convictions occur,[20] and that are seldom if ever discussed during the three years a student spends in law school. When combined with a failure on behalf of law school faculty to educate students about the broader sociological and psychological reasons for institutional behaviors linked to miscarriages of justice, its no surprise why generation after generation we continue to witness replication of those behaviors known to generate unsafe convictions. So while an innocence clinic can right the injustice of wrongful and unlawful convictions through postmortem case analysis and litigation, and may even be able to penetrate young minds alerting them to the potential pitfalls involved in making and defending a case, the fact that discussion of the key structural and institutionally related causes of wrongful and unlawful convictions remain outside the dominant law school curriculum suggests that these ideas, and the faculty who engage the scholarship and teaching of them, will perennially appear as zebra mussels affixed to a large ocean vessel navigating the inland waterways separating "legitimate," from "illegitimate" discourse.

Missing in the three innocence project clinic articles, as well as the bulk of legal scholarship addressing the issue of law school curricula and pedagogy in the United States, is theoretical articulation of the system reproducing function of law school instruction and consequent practice by its graduates. Law school education as it is implemented in most law schools in the United States fails to empower its graduates with the necessary tools to promote critical analysis and comprehension of juridic institutions and their real-world functions, thereby making attainment of justice, conceived here as a the confluence of law and morality, a near impossibility.[21]

My guiding assumptions are by no means novel. Numerous legal scholars, and the American Bar Association's (ABA) Section on Legal Education & Admission to the Bar, the Carnegie Foundation for the Advancement of Teaching, and the recently released report by Stuckey et al.,[22] have painstakingly attempted to affect a change in entrenched law school curricula to promote

20 For example, 1) police interrogation tactics (not necessarily misconduct, but police training in Reid School tactics designed to generate confessions); 2) plea bargaining; 3) pretrial discovery; 4) jury perceptions of defendant guilt based on the fact that they are defendants in a trial; 5) the Direct Connection Doctrine (making it difficult for defendants to introduce evidence of a third party suspect); 6) admissibility of eyewitness identification; 7) factual guilt determinations on appeal; 8) harmless error; and 9) the expansive application of the felony murder rule.

21 See supra note 10 at 18–20. This is by no means a hyperbolic point. Stuckey concludes that poor training and a dearth of commitment to emphasizing and properly training young lawyers to address the problems of the poor and middle classes results in our law schools failing to meet the needs of justice for the poor and middle classes.

22 *An Educational Continuum Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*. (1992) Known colloquially as the "McCrate Report." http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html; R. Stuckey. 2007. *Best Practices for Legal Education: A Vision and A Road Map*. Clinical Legal Education Association. Sullivan et al. 2007. *Educating Lawyers: Preparation for the Profession of Law. The Carnegie Foundation for the Advancement of Teaching*. www.carnegiefoundation.org/files/elibrary/educating lawyers_summary.pdf

teaching styles that are less adversarial in nature,[23] more gender neutral,[24] less race/ethnically and class biased,[25] and more appropriately directed at teaching students using methods conducive to critical thought and analysis of complex legal problems.[26]

In short, "critics of the legal profession, both from within and without, have pointed to a great profession suffering from varying degrees of confusion and demoralization."[27] Concerns over the sinking status of American lawyers in two decades of public polling data generated numerous thoughtful reflections regarding ways to improve ethical conduct and professionalism. As it relates to our concerns here, Bennett claims that law schools should not relinquish a commitment to teaching "rigorous legal analysis," but must make certain such analysis is accompanied by "other lawyerly skills, such as the emerging curricula in alternative dispute resolution [and, I would argue, wrongful and unlawful conviction], while making all of it morally relevant."[28] Sullivan et al. contend that "the challenge for legal education [is] linking the interests of legal educators with the needs of legal practitioners and with the public the profession is pledged to serve."[29] Concern about the quality of legal education in general has confounded legal scholars and practitioners for more than thirty years. For example, in 1983 Gary Bellow sounded the alarm:

> *"Al Saks once said to me: 'Well, it seems to me that what you're saying is that law school is empirically irrelevant, theoretically flawed, pedagogically dysfunctional, and expensive.' And I am, of course, saying just that. When you add to these deficiencies, the incoherence of the second and third-year course offerings, the amount of repetition in the curriculum, the degree to which unacknowledged ideology pervades the entire law school experience and the fact that no graduate of American law school is able to practice when graduated, you have a system of education which, I believe, is simply indefensible."*[30]

23 Lawrence Krieger, *The Inseparability of Professionalism and Personal Satisfaction (or Why the Wrong Values Will Mess Up Your Life)*, Unpublished Paper Presented at the Annual Conference of the AALS Section on Legal Education, Vancouver, B.C. (May 17, 2003); Christophe G. Courchesne, *A Suggestion of a Fundamental Nature: Imagining a Legal Education of Solely Electives Taught as Discussions*, 29 Rutgers L. Rec. 21 (2005).

24 Supra note 19.

25 Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Education. 591 (1982); Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute, Rethinking Marxism*, 1 (3): 101–129 (1988); Duncan Kennedy, *Legal Education as Training for Hierarchy*, in David Kairys (ed.) *The Politics of Law: A Progressive Critique. New York: Basic Books* (1998): 54–75; Karl Klare, *Critical Legal Politics: Left vs. MPM: The Politics of Duncan Kennedy's Critique*, 22 Cardozo L. Rev. 1073 (2001).

26 See Todd D. Rakoff, *The Harvard First Year Experiment*, 39 J. Legal Educ. 491 (1989); Anthony Amsterdam, *Clinical Legal Education as 21st Century Experience,* 34 J Legal Educ., 612 (1984). John Pray and Byron Lichstein, *The Evolution Through Experience of Criminal Clinics: The Criminal Appeals Project at the University of Wisconsin Law School's Remington Center*, 75 Miss. L.J. 795 (2006); Filippa Marullo Anzalone, *It All Begins With You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection*, 24 Hamline L. Rev. 324 (2001); Laura I Appleman, *The Rise of the Modern American Law School: How Professionalism, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 New Eng. L. Rev. 251 (2005); Keith A. Findley, *ReDiscovering The Lawyer School: Curriculum Reform in Wisconsin*, 24 Wis. Int'l L. J. 295 (2006); Ronald Chester, *Reshaping First-Year Legal Doctrine: The Experience in the Law Schools*, 20 Fla. St. U.L. Rev. 599 (1993); Marie A. Monahan, *Towards a Theory of Assimilating Law Students into the Culture of the Legal Profession*, 51 Cath. U.L. Rev. 215 (2001); David A. Binder & Paul Bergman, *Taking Lawyering Skills Training Seriously, 10 Clinical L. Rev.* 191 (2003).

27 Sullivan et al. 2007. *Educating Lawyers: Preparation for the Profession of Law. The Carnegie Foundation for the Advancement of Teaching.*

28 Cited in Stuckey op cit note 10 at 20.

29 Sullivan et al. op cit note 27 at 2.

30 Cited by Stuckey in supra note 22 at 2.

In the sections that follow I'll attempt to address Bellow's concern with the "unacknowledged ideology" that "pervades the law school experience." It is this ideological influence that shapes Bellows concern that law school is "empirically irrelevant, theoretically flawed" and is "pedagogically dysfunctional." When combined with the current inadequate licensing requirements established by state Bar examinations,[31] it is little wonder that law school graduates are ill prepared to practice.

In making the case that we must move beyond contemporary pedagogical philosophy and methods of training, I share with Dewey the belief that "It is as if no one could be educated in the full sense until everyone is developed beyond the reach of prejudice, stupidity and apathy."[32] During a recently held teaching seminar attendees were asked to think about those pedagogical experiences that had the greatest influence on them.[33] Specifically, "Think of a learning experience in which you felt you were involved, where everything "clicked," a time where you felt empowered as a learner. Or, think of a learning experience where there was a "disconnect," a time when you felt helpless or frustrated as a learner." I dare say that were I to pose this same question to readers of this essay the responses would be similar to those of my colleagues who attended the teaching seminar. Here's what I wrote in response to these questions: "Most of my learning experiences as a student were frustrating because there was no involvement beyond class work. It was dissatisfying because it was too abstract. Alienation from the process is what made the experience a failure." Recognizing that my response to this question had to fit into a small answer box next to it, there are no path-breaking insights. However, it's clear that while I most certainly experienced influential teachers throughout my many years of education, the pedagogy was stultifying. Strangely, what occurred to me as I tried to think about positive learning experiences were those memories I have of playing sports – baseball, soccer, and the martial arts. I was a competitive athlete through college so I can recall with clarity the methods used – orally introduce the skill to be learned, demonstrate the skill to be learned, and finally, execute the skill to be learned. It was a simple path involving the instructor in the first two levels of development, and the player in the third. Once again, it was 1) introduce; 2) demonstrate; and 3) execute.

Einstein draws a similar analogy when discussing his education in the German gymnasium. Upon leaving the gymnasium and entering a cantonal school outside of Zurich, Einstein was exposed to the pedagogical philosophy of Johann Heinrich Pestalozzi. Pestalozzi was an educational reformer who believed that the path to real learning was by having students "visualize images." Sounding much like the Montessori method, Pestalozzi believed that learning "began with hands-on observations and then proceeded to intuitions, conceptual thinking, and visual imagery."[34] For Einstein, this method of teaching and learning was far superior to his experience in the

31 Society of American Law Teachers Statement on the Bar Exam: July 2002, 52 J. Legal Educ. 446; C. Cunningham. 2005. "*The Professionalism Crisis: How Bar Examiners Can Make a Difference*." 74 The Bar Examiner 6; W. Kidder. 2004. "*The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Labor Market Control, and Racial and Ethnic Performance Disparities*." 29 Law and Soc. Inquiry 547; D.J. Merritt, L.L. Hargens and B.F. Reskin. 2000. "*Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*." 69 U. Cinn. L. Rev. 929.

32 Joseph Ratner. 1939. *Intelligence in the Modern World: John Dewey's Philosophy*. New York: Modern Library: 605.

33 Northern Arizona University Teaching Seminar 2008: *Creating Significant Learning Experience for Students in Gateway Classes*. May 13–15, 2008.

34 Walter Isaacson. Einstein: *His Life and Universe. New York: Simon & Schuster*. 2007: 26.

gymnasium, which was based on authoritarian administration of rote drills, memorization, and force-fed facts.[35]

Far too often appearing like the German gymnasium of Einstein's day, law school pedagogy as it manifests in the United States, fails to properly prepare students for real-world practice. In its failure, law schools must accept responsibility for their role in inhibiting the realization of justice. To accept responsibility would mean to acknowledge the shortcomings of current pedagogical practices and to redesign them in accordance with contemporary knowledge of student development theory. If we are truly committed to educating students to their civic and professional responsibility to promote justice we must change our current pedagogical paradigm.

Einstein stated, "The significant problems we face cannot be solved at the same level of thinking we were at when we created them."[36] What is unique with regard to the approach that I bring to this discussion is the application of postmodern and Lacanian insights, and the sociology of social reproduction through education. Contextualizing this discussion through these lenses accomplishes two prevailing goals. First, it theoretically locates the more than a century old law school curriculum within its proper political, economic, and cultural context to view it as a system reproducing steering mechanism designed to maintain status quo institutional arrangements.[37] The second reason for applying postmodern Lacanian analysis, and social reproduction theory to analysis of law school curricula is to offer an alternative. By drawing on the sociology of education and locating analysis of law school curricula within the context of Lacan's master and university discourses I am positioned to better understand the ways in which law schools institutionally construct divided subjects, socialized through a master juridic narrative, who continue to perpetuate behaviors known to generate errors leading to wrongful and unlawful convictions.

II. An Integrated Theory Of Legal Education As Hegemon

For the last two decades sociological and criminological theoreticians have attempted to bridge paradigmatic divides by developing integrated theories that are designed to analyze the full range of micro and macro influences constituting human behavior. For example, in sociology Anthony Giddens[38] proposed his "structuration theory" which consisted of four levels of analysis that would generate an integrated qualitative and quantitative research model – I Hermeneutic Elucidation of Frames of Meaning; II Investigation of Context and Form of Practical

35 Id.

36 http://www.quotedb.com/quotes/11.

37 In times of crisis, institutions can be adjusted to respond to perceived crises in important state sectors. As an autopoitic (self correcting) state strategic selection mechanism, education is an institution that plays an important role in reproducing status quo hegemonic political, economic, and cultural relations. I contend that law school curriculum and pedagogy exist as a master narrative due to its continued role in shaping dominant culturel narratives articulating juridic normativity. The remainder of this essay will ouline the specific manifestations of this process, and the resulting marginalization of alternative or counter-hegemonic narratives such as those generated by live client innocence projects and other clinical programs. For a detailed account of state strategic selection as autopoisis see Bob Jessop, 1990. *State Theory: Putting Capitalist States in their Place*, University Park, PA: Pennsylvania State University Press; Rene B. Bertramsen, Jens Peter Folund Thompsen & Jacob Torfing. 1991. *State Economy & Society*, London: Unwin Hyman; Robert Schehr, *The Criminal Cases Review Commission as State Strategic Selection Mechansim*, 42 Am. Crim. L.R. 1289 (2005).

38 Anthony Giddens. 1984. *The Constitution of Society: Outline of the Theory of Structuration*. Berkeley: University of California Press.

Consciousness (The Unconscious); III Identification of Bounds of Knowledgeability; IV Specification of Institutional Orders. With each level Giddens moved from the level of subjectivity, self-awareness, and interpretation, to an analysis of social systems. By far the most ambitious effort to generate integrated theory has taken place among postmodern criminologists. In 1995, Bruce Arrigo introduced the idea of postmodern theoretical integration.[39] His work was followed in 1997 by Dragon Milovanovic who introduced the idea of theoretical integration as a way to advance postmodern theorizing about crime and crime causality.[40] In 1998, Gregg Barak published his book, *Integrated Criminologies*.[41]

For Arrigo, Milovanovic and Barak, the prevailing motivation for integration is enhanced understanding of the fluidity of social systems and the constitution of meaning. As opposed to engaging analysis of specific topics through the prevailing and necessarily limiting academic disciplines, Barak encourages us to construct a new paradigm of interdisciplinarity that will enable us to be open to new goals.[42] Following Arrigo, postmodern integration refers to, "relational, positional, and provisional function to interpret, reinterpret, validate, and repudiate multiple discourses and their expressions of reality construction in divergent social arrangements."[43] To meaningfully construct an analysis of a social problem "the researcher charts out the relations of the processes of social life that constitute the recursive pathways and tipping points in the integrative field of crime and crime control. In order to locate these social relations, it is argued, criminologists can best achieve this objective by unifying the visions and practices of both modernist and postmodernist criminology."[44] In *Postmodern Criminology*, Milovanovic identifies eight dimensions along which to compare the differences between modernist and postmodernist thought.[45] Through his juxtaposition of these eight dimensions Milovanovic makes an argument for an affirmative postmodernism that is at once critical, and transformative.

There are two related but distinct theoretical paradigms that I believe are relevant to our understanding of education as an institution – Lacanian discourse analysis, and social reproduction theory. From a conventional theoretical perspective it may seem that integrating these paradigms violates disciplinary specializations, levels of analysis, and possibly even the conceptual foundations upon which the theories are based. But as I think will become clearer as I move through this discussion, when presenting an assessment of student learning theory there are actually multiple levels of analysis at play and I am attempting to capture some aspect of each. For example, while Lacan's psychoanalytic semiotics emphasizes the subject's perennial struggle for wholeness, a subjective level of analysis, he locates this process as part of a recursive relationship between hermeneutics and power structures (master and university discourses). Theories of dialogicality and cognitive approaches to student learning also tend to focus on ways of promoting care and hope through authenticity in speech situations. The formative question following Lacanian analysis is whether one can ever achieve "authenticity." While it may be the case that subjects are always searching for ways to complete what may be a perennially illusive puzzle

39 Bruce Arrigo. 1995. "*The Peripheral Core of Law and Criminology: On Postmodern Social Theory and Conceptual Integration*." Justice Quarterly 12(30): 447–559.

40 Dragon Milovanovic. 1997. *Postmodern Criminology*. New York: Garland Press.

41 Gregg Barak. 1998. *Integrating Criminologies*. London: Allyn and Bacon.

42 Id at 14.

43 Id at 226.

44 Id at 231.

45 Supra note 40 at 3–24. The eight dimensions are: (1) society and social structure, (2) social roles, (3) subjectivity/agency, (4) discourse, (5) knowledge, (6) space/time, (7) causality, and (8) social change.

comprising their "true" self, that in no way suggests that subjects are inauthentic. When they speak from their narrative position as signifiers of one of the four Lacanian discourses discussed below, they are clearly speaking with an authentic voice. Whether by acknowledging this we also wish to suggest that authenticity is illusive is another question entirely. I do not believe it is. Subjects process information imperfectly but they do so based on their experiences and cognitive abilities. Through discourse (including speech), dialogical theory seeks to enhance meaning and promote an ethic of care. Finally, social reproduction theory speaks to the sociological aspects of institutional hegemony and its reproduction of class, race/ethnic, gender, religion, and sexual orientation biases.

It is important to avoid the easy "micro" and "macro" dualism so familiar to social science. The issue we are confronting in this paper – whether legal pedagogy enhances or diminishes opportunities for promoting justice – exists on a continuum from subjective interpretations of political, economic, and cultural stimuli, through analysis of education as a system-reproducing steering mechanism. As Marx was fond of saying, "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given, and transmitted from the past."[46] The intention in this section is to integrate three theoretical paradigms toward a more thoughtful exposition of law school pedagogy.

This section proceeds from a discussion of Lacan's four discourses, to dialogical theory, and concludes with the broader structural analysis of education offered through the lens of sociology.

Law School Pedagogy As The Discourse Of The Master

Law schools, like most American educational institutions, ascribe to a pedagogical philosophy based on the privileging of a master narrative. This narrative evolved out of modernist beliefs in the privileging of elite white culture as a way to distinguish it from popular or mass culture.[47] This was particularly true of the emergence of the modern American law school, where pedagogical reform efforts like the introduction of the Langdellian case-study method[48] were driven by the "bar's desire to entrench the status of a white, Protestant, native-born ruling class – a desire exacerbated by the fear the late nineteenth-century influx of immigrants from Sourthern and Eastern Europe would undermine the legal profession… This elite would have boundaries erected by ability and ethnicity – often assumed to be one and the same."[49] Because it failed to take into consideration the political, economic, and cultural aspects of the recursive nature of law as applied to people and institutions, application of the Langdellian model to the study of law significantly divorced law from justice.[50] In an article published in 1943, Laswell and McDougal sought to challenge the positivist approach to the study of law devoid of justice.[51] Their primary emphasis was to teach students how to apply the law to public policy, but the courses they recommended spoke to a far ranging set of issues.

46 Cited in George Ritzer. 1988. *Sociological Theory*. New York: Knopf: 487.

47 Henri Giroux. 1988. "*Postmodernism and the Discourse of Educational Criticism*." Journal of Education. 170 (3): 5.

48 Christopher Columbus Langdell was the first Dean of Harvard Law School, and was responsible for introducing the case law method of instruction. The method was notable for its attempt to discern abstract rules and doctrines from a set of appellate cases that would enable students and practitioners to approach the study of law as a science.

49 Laura Appleman. 2005. "*The Rise of the Modern American Law School: How Professionalism, German Scholarship, and Legal Reform Shaped Our System of Legal Education*." New England Law Rev. 39: 254.

50 Ronald Chester. 1993. "*Reshaping First-year Legal Doctrine: The Experience in the Law Schools*," 20 Fla. St. U.L. Rev. 599: 603.

51 Harold Laswell and Myres McDougal. 1943. "*Legal Education and Public Policy: Professional Training in the Public Interest*." 52 Yale L.J. 203.

Titles for their courses included: "Law and Control," "Law and Intelligence," Law and Distribution," "Law and Community Development."[52] Each course raised questions about the impact of the law on daily life, democracy and power, matters of respect, resource utilization, and the like. In short, theirs was an attempt to generate a counter-hegemonic juridic discourse that would alert students to the political and ideological uses to which law was frequently put. The intervening years, however, have witnessed no appreciable attempt to establish a counter-hegemonic juridic discourse as part of American law school curricula. The reason, I would argue, that there has been no curricular change is due to the dominant cultural interest in retaining hegemonic political and ideological viewpoints consistent with the preservation of advanced capitalist social relations. One way this is accomplished is through the proliferation of law as a master discourse.

The discourse of the master, one of Lacan's four discourses,[53] signifies life-long socialization to the truth claims, core assumptions, and ideological symbols of dominant culture.[54] The discourse of the master commands allegiance to its authoritative voice, it is despotic.[55] With respect to the law, the master discourse is "positive law as associated with the ideas of H.L.A. Hart… The person (or institution) that engages in positive law is a master signifier in the Lacanian sense. The addresser is she who determines the application of the law to the issue at hand by applying the Hartian secondary rules of changing (creating), recognizing, and adjucating the law."[56] In Lacan's schema, the discourse of the master signifies a unidirectional transmission of information to be received by subjects. The second of Lacan's discourses, the discourse of the university, signifies the *knowledge, reason, or expertise* being transmitted.[57] For our purposes the discourse of the master can be viewed as representing the authoritative voice of law school faculty, and the American Bar Association.[58] The discourse of the university is signified in the law school curriculum. Put simply, the discourse of the university consists of law as a body of knowledge.[59] Most important, the "discourse of the university can serve as a sophisticated way of making the master's claims to brute power more palatable through veiling."[60] In short, for Lacan the university discourse is meant to rationalize the motives of the master, something that Schroeder would contend is "hardly news."[61] But to firmly establish her point, Schroeder contends that even Left-wing law professors and students share in the reproduction of the master narrative because they work within a single dominant paradigm, and that even the Critical Legal Studies movement operated within the dominant narrative, thereby legitimating it.[62]

52 Id at 256–261.

53 Jacques Lacan. 1991. *L'Envers de la Psychanalyse. Parais, France: Editions du Seuil*. The four discourses are: the discourse of the master, the discourse of the university, the discourse of the hysteric, and the discourse of the analyst.

54 Stuart Henry and Dragon Milovanovic. 1996. *Constitutive Criminology: Beyond Postmodernism*. London: Sage: 30.

55 Christopher Robert McMahon. "*Hysterical Academies: Lacan's Theory of the Four Discourses*." http://www.educ.utas.edu.au/users/tle/JOURNAL/Articles/McMahon/McMahon.html: 6.

56 Jeanne L. Schroeder. 2000–2001. "*The Four Discourses of Law: A Lacanian Analysis of Legal Practice and Scholarship*." 79 Tex. L. Rev. 15: 47.

57 Id et 54.

58 While not a Lacanian, Pierre Bourdieu makes a similar point with respect to juridical language. According to Bourdieu, juridical language "bears all the marks of a rhetoric of impersonality and of neutrality." The result is to produce "syntactic traits such as the predominance of passive and impersonal constructions. These are designed to mark the impersonality of normative utterances and to establish the speaker as universal subject, at once impartial and objective." Pierre Bourdieu. 1987. "*The Force of Law: Toward a Sociology of the Juridical Field*." 38 Hastings L.J. 820.

59 Supra note 55 at 31–32.

60 See Schroeder op cit note 56 at 55.

61 Id at 60.

62 Id.

The receivers of information, our law school students, are what Lacan referred to as divided or fading subjects. That is, there is always a "left out," or that which is unspoken or marginalized in discourse. The "left out" manifests in at least two ways. First, it manifests as the inability of subjects to challenge the deliverer of the master discourse presented as the authoritative *voice* of the law. Law school faculty disseminate jurisprudence to subjects dialogically positioned as inferior to the master. The second way that the "left out" manifests in discourse is through the marginalization of the "other" in the construction of juridic events. The discourse of the university constructs "defendants" as divided subjects based on definitions of illegality in the law. Definitions of themselves, their lifeworld experiences, and the like, must comport with the ideologically constructed framework of the law. Similarly, law school students may find that their experiences are marginalized in juridic discourse, thereby serving to generate what Lacan referred to as the "not all," the experience of being psychologically and emotionally divided.

The psycho-emotional effects for American law school students and practitioners are real and dramatic. Ogloff et al. address "Problems Arising From Law School." Among the most prevalent are: high levels of stress leading to alienation and dissatisfaction; substance use and abuse; suicide among law students; and psychological problems.[63]

According to Krieger, lawyers "have the highest incidence of depression of any occupation in the United States," and "suffer other forms of emotional distress up to 15 times more frequently than the general population."[64] Krieger attributes this in part to misplaced values that students first encounter in law school. For example, "values like money, power, and an uncompromising drive to win are displacing values like integrity, decency, and mutuality among many lawyers."[65] These misplaced values speak to a failure on the part of law schools to inculcate students with a properly articulated professionalism. Krieger's own analysis of the psycho-emotional effects of law school confirm earlier studies indicating that law school students who are "depressed or unhappy in the first year … remained so throughout law school."[66] He attributes these results to the competitive nature of law school and the values and motives it generates. Moreover, Krieger's data indicates that "despite any efforts at these law schools to teach professionalism in the classroom, orientations, workshops, or other typical formats, the overall law school experience is likely to have an undermining effect on professionalism and career/life satisfaction."[67] Sadly, Krieger concludes by suggesting that the law school experience transforms the entering law school student into a very different person from the time they begin their studies to the time the complete them. In short, "they become more depressed, less service-centered, and more inclined toward undesirable, superficial goals and values."[68] To remedy the problem associated with constructing divided subjects law schools should generate a "framework for analyzing discursive formations which renders the human subject polycentered and polyvocal, where subjects find an abundance of discursive formations within which to embody desire to construct self, others, and society."[69]

63 James R. P. Ogloff, David R. Lyon, Kevin S. Douglas, and V. Gordon Rose. 2000. "*Annual Nebraska Survey & Survey of Legal Education: Article More than "Learning To Think Like A Lawyer:" The Empirical Research on Legal Education.*" 34 Creighton L. Rev. 73.

64 Lawrence Krieger. 2005. "*The Inseparability of Professionalism and Personal Satisfaction: Or Why the Wrong Values Will Mess Up Your Life.*" 11 Clinical L. Rev. 427.

65 Id at 427.

66 Id at 426.

67 Id at 434.

68 Id at 434.

69 Supra note 55 at 34.

Application of a postmodern analysis inspired and informed by Lacan's four discourses to assessment of contemporary law school pedagogy is especially provocative and insightful. When conceived as the discourse of the master, law school pedagogy situates law school faculty as the "master and producer of knowledge as power demanding the recognition of his [sic] autonomy at the expense of the perversity of students' desire."[70] For the master, education "involves an initiation through pain that thereby 'civilizes' the desire of students who would otherwise remain feral."[71] For their part, students are expected to demonstrate noticeable appreciation of the knowledge and power of the master, and to sublimate their desire to challenge or refute the master's knowledge. It is in this way that the discourse of the Master is the 'Tyranny of the all-knowing and exclusion of fantasy [where we experience] the retreat of subjectivity.[72]" The basic law school experience, argues Kennedy, is a "double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system."[73] For example, in his juxtaposition of "cold" and "hot" cases, Kennedy describes the typical first year law school experience as one where students are generally presented with cold cases that are "technical, boring, difficult, [and] obscure legal cases,"[74] along with hot cases that are more factually interesting and constituted by moral and ethical questions of significance, and where judicial decisions are so outrageous that students are compelled to passionately argue. Unfortunately, argues Kennedy, there is little patience in law school pedagogy for passionate argument. In fact, students who are driven by moral and ethical concerns to address the key facts raised in hot cases risk isolation. This is partly due to the fact that the master narrative is designed and administered to delegitimate passionate or emotive responses opting instead for a dispassionate, rational approach. What is needed, argues Kennedy, "is to think about law in a way that will allow one to enter into it, to criticize it without utterly rejecting it, and to manipulate it without self-abandonment to their [the student's] system of thinking and doing."[75] Furthermore, Metz contends that "Law professors, acting as vigilant guardians of the established legal order, patrol the "borders" of these patterns of permissible and impermissible subjects, these privileged forms of rule-based and analogical reasoning," with the resulting effect being "the voices actually heard and silenced in the classroom also reproduce these patterns, forms, and indifferences."[76] It is in this way that students themselves contribute to their own subjugation in law classrooms.

In Lacan's schema, the discourse of the master is juxtaposed to the unsettling rhizomatic discourse of the hysteric, the student [and sometimes faculty member] who refuses to bend to the will of the discourse of the master or of the university. The discourse of the hysteric is "the challenge to or critique of the other discourses." It is the discourse of the interrogator.[77]

Students who speak through the discourse of the hysteric are more likely to challenge conventional university discourses to engage in real experiential education. These students are divided subjects who recognize and act on what they perceive to be the "left out" in juridic discourse. For Schroeder, following Zizek, the hysteric "constantly asks the Big Other, "Che voui,?" "What do

70 Supra note 40 at 7.

71 Id.

72 Rose and Mitchell, cited in supra note 40 at 8.

73 Duncan Kennedy. 1998. "*Legal Education as Training for Hierarchy.*" In D. Kairys (ed) The Politics of Law. New York: Perseus Books 54–75: 57.

74 Id at 57–58.

75 Id at 62.

76 Brook K. Baker. 2000. "*Language Acculturation Processes and Resistance To In "Doctrin" Ation in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom.*" 34 J. Marshall L. Rev. 131: 137.

77 See Schroeder op cit note 56 at 72.

you want (i.e., from me)?" "What do I lack?," "Just tell me what I need to do, to say, to be, in order that you will desire me back – recognize me as a speaking subject."[78] According to McMahon, "hysterical" law school students would raise questions that are "unrealistic, paranoid, delusional, hypochondriac, unstable, fluxatious, [and] troublesome." Moreover, and most important as it pertains to quality experiential law school education, "hysteria violates textual and disciplinary codes, rules, conventions, modes of production, technologies of knowledge, discursive bounds or limits."[79] In short, the hysterical student (in Lacanian terms) is potentially subversive. Through hysterical discourse, the subject will learn about what it is that she lacks and must procure in order to become a part of dominant culture. She will also learn what is lacking in dominant culture, thereby allowing her to challenge the methods of law school pedagogy with its emphasis on competition, gender, ethnicity, and class marginalization, rote memorization, mind-numbing lecture, and status quo curricula. She will challenge the law school to generate a real-world experiential education that includes lively dialogue among students and faculty who, rather than approach texts as gospel, will engage them with new ideas and fresh perspectives. She will demand that law school faculty make the materials politically, economically, and culturally relevant. She will resist efforts on behalf of law school faculty to quell passionate articulation of key moral and ethical issues arising in hot cases. To conclude, "the hysteric's discourse enables us to identify how the substantive content that has been excluded from the law serves to harm the subjects subjected to the law."[80]

As dogmatism wanes, a counter-hegemonic creativity with regard to problem-solving becomes the primary emphasis. If properly applied Lacan's four discourses can enable us to understand why law school pedagogy operates as it does, and can open up new ways to approach it.

If adopted, a postmodern and Lacanian-inspired law school pedagogy would appear dramatically different. Following Girioux, this is because a postmodern emphasis

refuses forms of knowledge and pedagogy wrapped in the legitimizing discourse of the sacred and the priestly, its rejection of universal reason as a foundation for human affairs, its claim that all narratives are partial, and its call to perform a critical reading on all scientific, cultural, and social texts as historical and political constructions provide the pedagogical grounds for radicalizing the emancipatory possibilities of teaching and learning as part of a wider struggle for democratic public life and critical citizenship.[81]

Long ago, American Pragmatist, John Dewey, made the prescient observation that much of what passed for pedagogy in the United States was really a matter of infusing teachers with the authority necessary to effectively establish control over classroom content and behavior. For it was clear to Dewey that entering a classroom as an "individual" would not be enough to generate the aura of expertise necessary to legitimate the teacher as expert. The teacher needed to enter the classroom wearing the cloak of authority. Or as Dewey suggested, "They clothe themselves with some tradition as a mantle, and henceforth it is not just "I" who speaks, but some Lord speaks through me. The teacher then offers himself [sic] as the organ of the voice of a whole school, of a finished classic tradition, and arrogates to himself [sic] the prestige that comes from what he [sic] is the spokesman for."[82] American law schools approach pedagogy in much the same way and have done

78 Id at 56: 82–83.

79 Supra note 40 at 10.

80 Schroeder op cit note 56 at 86.

81 Supra note 47 at 26.

82 Joseph Ratner. 1939. *Intelligence in the Modern World: John Dewey's Philosophy*. New York, Modern Library: 623.

so for more than a century. Whether they are aware of it or not, contemporary law school faculty continue to channel the pedagogical method established by the law school "Lord," Christopher Columbus Langdell, and his emphasis on learning to become a lawyer through case analysis, memorization, and intensive competition. Through references to the Lacanian discourse of the university appearing as canonical texts, statutes, cases, and rules (each of which is likely to be foreign to most of the students in the room) the teacher's cloak, a master discourse, immediately identifies her as part of a tradition of jurisprudential thought and the authority standing before them. Still, questions may be raised regarding whether there is a real problem with a curriculum designed in this way. For some, they may be wondering, "so what?"

The answer to the question, "So what?," was provided by Dewey who was among the first to identify what contemporary social scientific scholars have subsequently written volumes about, that "Suppression of the emotional and intellectual integrity of the pupil is the result [of an authoritarian pedagogy]; their freedom is repressed and the growth of their own personalities stunted."[83] Rather than an emphasis on the creation of hierarchy leading to docility in the classroom, the teacher must use the skills at her disposal to steer students toward "the conditions that arouse curiosity."[84] For Dewey, as would be the case for many generations of future pedagogues, including a now well established clinical legal pedagogy, the way to true knowledge was through experiential education that is informed by the need for a polycentered, polyvocal discourse.

"Education" Is An Empty Signifier: Social Reproduction

As a concept, "education" is an empty signifier, meaningless without explication. And while politicians, media analysts, and education activists commonly extol the virtues of "quality education," seldom is an effort made to operationalize what is meant by the concept. Perhaps it is presumed that when one speaks of education it is apparent what is meant. But as with all hegemonic institutions, political and ideological influence generates a popular sense of the "matter of fact" to the point where there doesn't appear to be a need for further explanation. It is this aspect of education that imparts to it its greatest hegemonic authority. Law school pedagogy has been notoriously bereft of theoretical articulation of the goals to be achieved, the issues to be addressed, and the best practices for developing legal practitioners skilled at avoiding what Schopenhauer referred to as the "eddies of misunderstanding."[85] Lamenting the dearth of theorizing about law school clinical pedagogy has been ongoing since the 1970s,[86] and continues to the present.[87]

83 Id at 623. This is precisely the point made by Rose and Mitchell cited in note 40 above. Exposure to a "tyrannical" master discourse will, by design and by effect, inhibit subjectivity.

84 Id at 618.

85 Cited in Z. Bauman, 1978. *Hermeneutics and Social Science. New York*: Columbia University Press: 194.

86 G. Bellow. 1973. "*On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*." *In Clinical Education for the Law Student: Legal Education in a Service Setting*. St Paul: West Publishing. W. Sullivan, A. Colby, J. Welch Wegner, L. Bond, and L. Shulman. 2007. *Educating Lawyers: Preparation for the Profession of Law.* The Carnegie Foundation for the Advancement of Teachers. www.carnegiefoundation.org/files/elibrary/educatinglawyers_summary.pdf. R. Stuckey. Supra note 4.

87 R. Voyvodic. 2001. "*Considerable Promise and Troublesome Aspects: The Theory and Methodology of Clinical Legal Education*. 20 Windsor Y.B. Access Just. 111.

Sociological inquiry mandates avoiding easy *prima faci* understanding of important institutions and concepts. To fully understand institutions means adopting a sociological imagination.[88] By adopting the sociological imagination we are better positioned to commence our examination of education and its effects on who we are and what we become. "In the first place," suggests Eric Fromm, "we should ask ourselves what we mean by education."[89] For Fromm, the purpose of education in every society is to prepare its youth to assume roles later in life. Most important, education should "mold his [sic] character, that his [sic] desires coincide with the necessities of his [sic] social role."[90] For theorist Michael Apple, "education was not a neutral enterprise, that by the very nature of the institution, the educator was involved, whether conscious of it or not, in a political act."[91] For Bowles and Gintis,[92] schooling in capitalist America replicates the structural conditions and role expectations necessary to prepare a large percentage of youth for working class jobs. Classrooms in working class communities are structured in such a way that they resemble the power relations that await working class youth upon graduation from high school. Rows of desks are neatly arranged in striated space to face the front of the classroom. Students must raise their hands before speaking (or going to the bathroom, or doing anything else that is not explicitly recognized as being part of the scripted classroom performance). Teachers signify future bosses who demonstrate to youth that their opinion is the only one of consequence, and any indiscretion will produce serious sanctions. These are lessons that working class students must learn if they are to survive in the authoritative and often capricious world of working class jobs.[93] In short, for Bowles and Gintis teaching and education are clearly political acts. While Bowles and Gintis stimulated considerable debate among sociologists and education experts, their theory was criticized as a too narrow economic determinism that did not allow for variations in teachers, school districts, and students' efforts to challenge more conventional pedagogy. Still, as an explanation for social reproduction of class positions their work continues to resonate as one possible explanation among a complex set of institutional practices. Embellishing on the Bowles and Gintis model, but avoiding its economic determinism, was French sociologist, Pierre Bourdieu.

88 Originally coined by C.Wright Mills, the sociological imagination requires people to understand social structures in order to gain greater insight into how their personal lives are affected by them. Mills also stressed the need to place our experience in historical context to better understand who we are. As such, the purpose of sociology is to understand how society works, especially with regard to group behavior. Most important for our purposes is that the sociologist refuses to accept common sense notions of how society works, but rather, seeks to unearth underlying forces that give shape to contemporary institutions. By way of metaphor, sociologists would generally agree to the following: "Most of us are danced by strings about which we are unaware, and over which we have no control." To expose these strings is our sociological mandate. Moreover, the argument I am making here suggests that the educational experience signifies one of the key strings influencing every American. See P. Worsley. 1992. *The New Introducing Sociology*. London: Penguin; C. Wright Mills. Mills, C. W.: 1959, *The Sociological Imagination*, London: Oxford.

89 E. Fromm. 1941. *Escape From Freedom*. New York: Holt, Rhinehart and Winston: 286.

90 Id at 286.

91 Michael Apple. 1990. *Ideology and Curriculum*. New York: Routledge: 1.

92 Samuel Bowles and Herbert Gintis. 1976. *Schooling in Capitalist America: Educational Reform and the Contradictions of Economic Life*. New York: Basic Books.

93 It is important to recognize that the opposite is also true. The educational experiences of upper middle class students prepare them to adopt roles of political, economic, and cultural responsibility that are typically unavailable to working class students. Pedagogical styles typically privilege intellectual freedom, questioning, exploration, and the like.

Like Bowles and Gintis, Bourdieu identified education as the prevailing institution responsible for social reproduction. According to Bourdieu, cultural capital and habitus combine to assure cultural reproduction of one generation after another.[94] Cultural capital is the background, knowledge and skills accumulated during a lifetime. Like financial capital, cultural capital is parlayed in political, economic, and cultural environments to procure access to power, position, status, and the like. Language, humor, taste, wit, art, literature, food, clothing, each is suggestive of one's accumulated cultural capital. Related to cultural capital is habitus. In order to generate a reflexive sense of who we are in relation to others each of us internalizes our lifeworld experiences, that is, our expectations, aspirations, attitudes, and beliefs. These are what constitute our habitus.

Students exposed to those kinds of cultural capital most valued by dominant culture are likely to have a significant cultural advantage relative to those who are not. Together, cultural capital and habitus significantly influence our educational experiences. For Bourdieu, students emanating from culturally devalued class backgrounds experience education as a form of *symbolic violence*. Unlike the more privileged student, working class and poor students, female students, gay and lesbian students, and ethnic minority students tend not to learn much about their experiences, or people who are like them, from their textbooks or classroom lectures. Rather, by way of omission, their experiences are marginalized and thereby devalued. It's not that textbooks berate students with working class backgrounds, the reproduction techniques are far more subtle than that. Rather, they simply ignore them, their parents, their grandparents, their contributions to history, and so on. They are not present for students to recognize, take pride in, or even to criticize. They simply vanish from history. In short, education works to reproduce cultural stratification by valuing dominant cultural capital and marginalizing all others.[95] Mertz speaks directly to this point with respect to law school pedagogy.[96] As if citing directly from Bourdieu, Mertz contends that "If students of color and female students tend to be more silent in these [law school] classrooms, then any differences these students bring with them in experience or background are not given voice in classroom discourse. To the extent that these differences in experience reflect race, gender, class, or other aspects of social identity, we again see aspects of social structure and difference pushed to the margins of legal discourse."

In what was a major contribution to the social reproduction literature, Jay MacLeod argued that when faced with the overwhelming weight of poverty, and class and race/ethnic bias, youth in a low income Chicago housing project *leveled their aspirations*,[97] decidedly acting to withdrawal their

94 Pierre Bourdieu and Jean Claude Passeron. 1977. *Reproduction in Education, Society, and Culture*. London: Sage.

95 Bourdieu applies his theorization of habitus and social reproduction to juridical fields. See supra note 56 at 805.

96 Elizabeth Mertz. 2000. "*Teaching Lawyers the Language of Law: Legal and Anthropological Translations*." 34 J. Marshall L. Rev. 91, 112.

97 MacLeod's recognition of the dialectical interplay between structurally imposed obstacles to success, and his subjects' active participation in psycho-emotionally withdrawing from normative expectations regarding upward mobility and the preparation needed to lay the foundation for it, make his a compelling analysis. With the privileging of "leveled aspirations" MacLeod builds upon the path-breaking work of Paul Willis who, in his 1977 publication of *Learning to Labor,* identified a similar pattern among working class white youth in England. In each case the author's avoid easy linear explanations for social reproduction as imposed through education by revealing the active role played by the students themselves in the construction of a dialogic relationship with teachers, principals, and parents toward a negotiated rendering of the meaning of "education." In each analysis it becomes clear that the students are not naïve about what is happening to them, they understand it well. They are under no illusions that they will in any way benefit from the kind of education being imposed on them. So, they level their aspirations in order to cope with the twin pressures squeezing them

commitment to education and any idea of occupational success.[98] With great clarity, and what some may consider pragmatism, MacLeod's white subjects, the Hallway Hangers, had no illusions about the life that awaited them. Everyone they knew – extended and immediate family, friends, and neighbors – had lived the same basic life of poverty for as long as anyone could remember. What was the point of deferring gratification long enough to complete high school? Education beyond high school was out of the question. These youth had thoroughly internalized their habitus in such a way that when confronted with the requirements and promise of a completed high school education they rebelled. For black youth, The Brothers, the experience was initially different. As the first generation of young black students born to parents who experienced the successes of the 1960s Civil Rights Movement, their lifeworld was constituted by stories of hard work, commitment to social change, improving race/ethnic relationships, and the promise of upward mobility. Initially, then, despite their devalued cultural capital and overt structural barriers, The Brothers were far more hopeful than the Hallway Hangers that things for them would be different. In a more recently published edition, MacLeod writes of revisiting the housing project to check up on the Hallway Hangers and the Brothers.[99] What he found was that, predictably, the Hallway Hangers continued to struggle with a life of poverty. To his surprise, however, he also found The Brothers to have adopted far more critical attitudes toward upward mobility and life chances than he had witnessed in his initial set of interviews. Why? They were shocked to experience structural obstacles to their opportunity to succeed, obstacles that they identified as both race/ethnically and class based.

To wit, education is political, and education is ideological. Regardless of the level (K-12, undergraduate and graduate), education is a hegemonic institution crafted to reproduce dominant political, economic and cultural relations. Law schools, according to Kennedy, are "intensely political places."[100] Despite the apparent "trade school mentality," and attention to "trees at the expense of forests," Kennedy is most concerned that the hidden component of law school is "ideological training for willing service in the hierarchies of the corporate welfare state."[101] Law school is a system reproducing steering mechanism whose curriculum and teaching methods are designed to generate institutional actors who advance the interests of the powerful.

In a provocative underground article by Jerry Farber in the late 1960s,[102] the educational experience for most students in the United States appears analogous to Foucault's articulation of the institutional machinery designated to create docile bodies.[103] For Farber, as for Foucault,

(97 cont.) from below and above – their family and its class position, as well as their race/ethnic composition, and structural impediments to upward mobility. See Paul Willis. 1977. *Learning to Labor: How Working Class Kids Get Working Class Jobs*. New York: Columbia University Press.

98 Jay MacLeod. 1987. *Ain't No Makin' It: Leveled Aspirations in a Low-Income Neighborhood*. Boulder, Colorado: Westview Press.

99 Id at: 155–236.

100 Supra note 67 at 54.

101 Id 73.

102 J. Farber. 1968. *Student as Nigger*. Los Angeles Free Press. http://www.soilandhealth.org/0303critic/030301studentasnigger.html: 1–19.

103 M. Foucault. 1977. *Discipline and Punish: The Birth of the Prison*. Trans. Alan Sheridan. New York: Vintage. More will be said about the generation of docility later on this essay. Briefly, for Foucault, recognition of a new "political anatomy" beginning in the 18th century led to numerous innovations in many dominant institutions across Europe to promote a technology of control. Political anatomony refers to recognition of the myriad ways human beings can be controlled if their bodies can be manipulated by agents representing hegemonic powers. Foucault suggests that "a body is docile that may be subjected, used, transformed and improved" (136). Foucault's discussion of the institutional manufacture of docile bodies emphasizes primary and secondary schooling. Achieving the necessary discipline leading to docility required structural confinement, what Foucault

dominant cultural institutions like education "teach you by pushing you around, by stealing your will and your sense of power, by making timid square apathetic slaves out of you – authority addicts."[104] How is this accomplished? For Farber, and for the dominant thinking surrounding the scholarship of critical pedagogy from the 1970s on, the message is in the method. Regardless of the substantive area being taught, what matters most with regard to establishing and maintaining control over students is the method of instruction used. Beginning in kindergarten and continuing throughout a student's educational experience, the method of instruction and the physical nature of the classroom conspire to produce docility and submissiveness, and above all a pathological commitment to please authorities.[105] This extensive socialization period generates a strong desire on behalf of students to be told what to do. Eighteen or more years of persistent emphasis on rule-following effectively generates docile bodies with a strong desire to please, but terribly ill prepared to take responsibility for their own ideas. So when we receive students into the academy as Masters, Ph.D, and JD candidates, why are we surprised when they tend to demonstrate little in the way of initiative regarding their own learning. By this time in their academic careers students tend to be mercenary about the work and its potential pay-off. Graduates of higher education are technically skilled and intelligent enough to competently address the challenges they face. They are, however, ill equipped with enough fortitude or initiative to question in myriad ways, and for a hundred good reasons, the efficacy of their assignments.[106]

Law schools condition students through participation in a set of rituals designed to enhance performance and competition.[107] In this way, students participate in the complex set of relationships that come to socialize them into the profession. In the United States, the success narrative commences with consideration of law school admission. Peak performance on the Law School Admissions Test (LSAT) is imperative for entrance to all law schools, with only the "best" students acquiring consideration from the top law schools.[108] Whether students are driven by a desire to improve the administration of justice, or by the competition, status, and eventual financial security that may accrue, each must participate in a shared experience of examinations, the pursuit of law review and clerkships, and job searches.[109] In doing so, students participate in their own subjugation to the "cultural understandings of success and the formal and informal metrics that communicate those values."[110] But how could it be otherwise? The success narrative "constrains and structures every aspect of law school activity."[111]

(103 cont.) referred to as a "protected place of disciplinary monotony" (141). Institutions charged with delivering primary and secondary education are referred to as "discreet, but insidious and effective" (141). They are effective in the sense that they manipulate bodies to the point where they are more predictably malleable, easier to control.

104 Supra note 91 at 4.

105 Id at 6. See also, S. Bowles and H. Gintis. 1976. *Schooling in Capitalist America. New York*: Basic Books.

106 This is a recurring them for Farber. See supra 91.

107 Supra note 91 at 13.

108 The LSAT examination serves as the primary obstacle for entrance to most quality law schools. The procedure itself can be cumbersome. Applicants must prepare themselves for a four-hour test addressing Logical Reasoning, Analytical Reasoning, and Reading Comprehension. The test produces a scale from 120 – 180, with 180 being the highest possible score. Upon arrival on testing day, students will be fingerprinted, and they will write a "Certifying Statement" attesting to their authenticity as a test taker. In short, the LSAT examination presents a physical, psychological, intellectual, and emotional test. Since so much is riding on successful completion of the test, to prepare, many students will enroll in LSAT preparation courses that can cost as much as $3,000.00. In short, these students commence the process of competition and willing capitulation to the authority derived from law school admission before they ever enter the front door.

109 See Sturn and Guinier op cit note 13 at 523.

110 Id at 525.

111 Id at 537.

It is in this way that education can be engineered in the service of *necrophily* – a regressive human quality that seeks the "suspension of growth" through continuous mind-numbing repetition and adherence to structures of authority, and an associated avoidance of boundary testing.[112] Constituted by sempiternal psycho-emotional dissonance caused by progressive and regressive impulses that both stimulate and inhibit "man's search for meaning" and clearer understanding of subjective identity, human beings driven by power and the need for control as a way to satisfy their desire for self-awareness turn to necrophilia, narcissism, and what Fromm refers to as incestuous symbiosis. Since his articulation of necrophilia is what is most apropos of our experience with education I'll focus only on it. Fromm suggests that,

> *By necrophilia is meant love for all that is violence and destruction; the desire to kill; the worship of force; attraction to death, to suicide, to sadism; the desire to transform the organic into the inorganic by means of order. The necrophile, lacking the necessary qualities to create, in his impotence finds it easy to destroy because for him it serves only one quality: force.*[113]

Students' survival skills are well honed by the time they enter graduate school. They know what to do and say in order to "get by," to "get the grades," or "to impress that special faculty member" who in some measure can generate the prized grant-funded research, or serve as the conduit for a summer externship. In short, "there is very little shit he [sic] will not eat if there is something to be gained by it."[114] For most students it is the dank suffocating irrelevance of contemporary American education, including legal education, that is indicative of its necrophilia. An obsessive adoration of the status quo squeezes pedagogical and dialogic relationships into a narrow corridor framed by an overly excessive commitment to order, authority, control, teaching to the test, teaching to the Bar, narrowness of mind, and docility. Their education is irrelevant, not because they are disinterested in learning about the world, about their area of substantive interest, about themselves. If left to their own devices these would be the issues and ideas that would likely matter most to students. No, education is irrelevant because it fails to engage students in a dialogical process that leads them to real understanding of the world around them, their substantive interest, and themselves.

Law school education is necrophilic. While the skills that law school students learn are important (rules, issue spotting, case analysis, case holdings, etc.), they are instrumental, technical skills presented to students via a master narrative that presumes priestly omnipotence. Legal rules and holdings, we are to believe, are the product of legal reasoning, rational thought, the *science* of law. This is inherently problematic because, as Kennedy suggests, "rights discourse is internally inconsistent, vacuous, and circular."[115] It's not that discussion of rights is the problem, but by discussing them in the context of a master narrative means that to "speak of rights is precisely *not* to speak of justice between classes, races, or sexes.[116] Moreover, these skills are taught through rote memorization in the static classroom setting devoid of messy real-world experience.

112 E. Fromm. 1965. *The Heart of Men: It's Genius For Good and Evil*. New York: Harper and Row. First published in English in: E. Fromm, *On Being Human*, ed. by Rainer Funk, New York (Continuum) 1994, pp. 99–105. http://www.erich-fromm.de/e/index.htm

113 Id.

114 Supra note 91 at 11.

115 Supra note 73 at 62.

116 See Schroeder Supra note 56 at 62.

Education is a commodity like any other found in a capitalist state. In order for a commodity to be valuable it must also be subjected to measurable quantifiable scrutiny. Michael Apple's analysis of education reform movements in both the United States and the UK suggests that the management of education has given way to a market driven ideology. This has led to the position that "only that which is measurable is important," or what Apple refers to as an "audit culture."[117] The effects of the auditing or what could really be referred to as an actuarial model of education are significant insofar as they generate a "remarkably rapid erosion of democratically determined collective values and institutions."[118] Transitioning all aspects of dominant culture into market-based economic analysis denigrates civil society by channeling our lifeworld experiences, dreams, and desires into an economic logic governed by "market realities and relations."[119] In short, an audit culture devalues public goods and services like those that potentially may emerge through quality education. Finally, Apple suggests that those administrators responsible for implementing the new auditing approach to education see themselves as "moral crusaders" who are "endlessly responsive to 'clients' and 'consumers' in such a way that they are participating in the creation of a newly reconstituted and more efficient set of institutions that will 'help everyone'…."[120] Most important as it applies to my argument here is the fact that a vigorous competition for credentialing has emerged as part of this process. Stratification via credentialing is beneficial to this new class of academics and managers because it legitimates their place as purveyors of knowledge. But it also means that "the return of high levels of mandatory standardization, more testing more often, and constant auditing of results also provides mechanisms – an insistent logic – that enhance the chances that the children of the professional and managerial new middle class will have less competition from other students."[121] It is in his analysis of education's transition to auditing that Apple joins Bowles and Gintis in their economic analysis of the social reproduction mandate of education.

III. Student Development Theory And Experiential Education

An alternative to conventional law school pedagogy as a way of teaching students how to prepare for the *practice* of law has emerged over the last century in the form of legal clinics. Because this is a now well-established literature I will not repeat it here.[122] Besides, it is my contention that (and this is borne out by the hundreds of articles written over the last decade addressing the subject of clinical legal studies) without substantive changes to the now well ingrained law school pedagogy, legal clinics and the philosophical and pedagogical epistemology that guide them will continue to operate as appendages to more mainstream politically and ideologically driven pedagogy. As such, their relegation to marginalized status in law schools means that live client clinics, including innocence project clinics, while offering a glimmer of dialogical praxis, signify but a ghettoized version of it. In short, the three articles mentioned in the first section of this paper that make the strong claim for the value of live client innocence projects, while noteworthy in their substance and

117 Michael W. Apple, Education, markets, and an audit culture, 47 Crit. Quart. (2005): 11.

118 Id at 13.

119 Id.

120 Id at 21.

121 Id.

122 Douglas Blaze. 1997. "*Déjà vu All Over Again: Reflections on Fifty Years of Clinical Education.*" 64 Tenn. L. Rev. 939. Rose Voyvodic. 2001. "*Considerable Promise and Troublesome Aspects: Theory and Methodology of Clinical Legal Education.*" 20 Windsor Y.B. Access Just.: 111.

commitment to quality experiential education, are, without dramatic alterations to contemporary pedagogical practices, unlikely to succeed in the way the authors intend. It appears that advocates of law school clinics who recognize that there are serious flaws in contemporary pedagogy with regard to preparing students to actually practice law have attempted to graft on to conventional practices a critical heuristic device to at least provide some exposure to real world problems that students are likely to encounter upon graduation. And while laudable in their effort, because the dominant political and ideological driving force behind what constitutes legal pedagogy is the perpetuation of intense competition, exclusion, elitism, and a positivist commitment to viewing law as a science,[123] the effect of clinical programs to emphasize an ethic of care and hope is likely to be minimal. By way of juxtaposition, clinical legal education may bring in to sharper focus the question of whether law is more like science, or like art.[124] It may raise questions about whether doctrinal principles taught by careful reading of appellate materials (Langdellian method) should be the preferred method for preparing practicing lawyers, or whether a method more closely aligned with medical school pedagogy,[125] or one that approximates graduate studies in the social sciences is more efficacious.[126] To truly generate a critical legal pedagogy will require implementation of a non-linear, dialogical pedagogy that privileges *experiential education* where the dominant philosophical and pedagogical emphasis is to expose students to their responsibility for improving the quality of life of those around them.

The structural limitations imposed on law school clinicians tend to generate a clinical pedagogy based on experiential learning. Learning , argues Moliterno, can happen anywhere and does not require

123 While I stand by the suggestion that the contemporary law school curriculum as implemented in most US law schools is consistent with this description, there are law schools, and law school faculty, who readily acknowledge a more nuanced approach to the study of law. One very recent example is the creation of the University of California at Irvine School of Law. The new Dean of this law school, Erwin Chemerinsky, has sought to create a law school faculty constituted by disciplinary diversity. For example, faculty have been drawn from the social and behavioral sciences, and the humanities. Such a move is indicative of a more politically, economically, and culturally nuanced approach to jurisprudence.

124 Morris Bernstein. 1996. "*Learning from Experience: Montaigne, Jerome Frank and the Clinical Habit of Mind*." 25 Cap. U.L. Rev. 517.

125 The medical school model has for a very long time served as a beacon of pedagogical inspiration for clinical legal scholars. With its emphasis on combining analytical and experiential training, legal scholars have argued that a version of the medical school model may be well situated for adoption by law schools to improve professional legal training. See Jerome Frank. 1933. "*Why Not a Clinical Lawyer-School?*" 81 U. PA. L. Rev. 907; Kandis Scott. 2006. "*Non-Analytical Thinking in Law Practice: Blinking in the Forest*." 12 Clinical L. Rev. 687; James Moliterno. 1996. "*Legal Education, Experiential Education, and Professional Responsibility.*" 38 Wm and Mary L. Rev. 71; Morris Bernstein. 1996. "*Learning from Experience: Montaign, Jerome Frank and the Clinical Habit of Mind*." 25 Cap. U.L. Rev. 517.

126 Graduate work in the social sciences is marked by small seminar sessions of roughly fifteen students and a faculty member where in-depth discussion of iconic texts, contemporary scholarship, and data is the norm. Students are encouraged to generate thoughtful reflexive interpretations of each to come to understanding of the current state of the discipline. Typically, while instructors require students to correctly understand the internal theoretical and conceptual claims made by social scientists to make certain students are clear about what the authors' claims are, students are encouraged to place social science scholarship in its broader historical context. In short, students are required to engage in dialogue with the authors of leading scholarship and to generate interpretations of that work based on the student's knowledge of the discipline, and their own subjective understanding of it. Because of the influence of social psychology in the early twentieth-century (and an awareness of the contingent nature of identity construction), and later, postmodern discourse analysis which challenged modernist truth claims, social science faculty have been influenced by a body of theory that encourages approaches to texts as open for interpretation in a way that law school faculty have been slower to adopt.

teachers or mentors.[127] What students need most is experiential *education*. By way of contrast with learning, education "consists of a designed, managed, and guided experience."[128] Quality clinical legal education should expose students to "the real impact of the legal process upon members of society; the vicissitudes of poverty; the complexities between persons occupying various roles within the lawyering process and; the values embedded in the legal process."[129] Citing the influence of Dewey, Moliterno suggests that "experiential education proceeds through the process of synthesis [whereby] students are exposed to the theory of an activity; they experience the activity; they reflect on the relationship between the theory and the experience and synthesize the two; they form a new or modified theory; they test it by experience, and so on."[130] Clinical mentoring programs, summer jobs, unsupervised externships, moot court competitions, and participation on law reviews, for example, do not generate education, but are clearly opportunities to learn.[131] In place of these programs Moliterno suggests that what is needed is a three-year long simulated law practice. The simulations will provide experiential education involving a wide variety of thought processes associated with activities other than the application of law to facts. This simulation will cover the ethics and law of lawyering using a combination of methodologies that address the same thought processes addressed in the cases and materials courses, and the clinical courses.[132]

Despite his acknowledgement of the decades of improvements and innovations introduced by simulation teaching and externships, and his forceful and well-argued recognition of the need for changes in legal education, Moliterno acknowledges that "no widespread, systematic connection between experiential education and professional responsibility law teaching has occurred."[133] Moliterno's recommendation that law schools implement a three-year simulated law practice is reminiscent of the apprenticeship model that predates academic training in the United States, but with clear pedagogical differences. Law office apprenticeship was the prevailing method of legal education prior to the establishment of the first university-based law schools. And while it may be tempting to argue for a return to an apprenticeship model, there are sound pedagogical and professional reasons for not doing so. The bulk of my reasoning will appear in the next section, as I attempt to describe a way forward that is based on insights drawn from dialogical method and student development theory.

Kandis Scott articulates a creative vision for attaining experiential education, one that is similar to Moliterno's, but arrives at it using a different analytical frame constituted by non-linearity, chaos, and rhizomes to make her case for the practical benefits of non-analytical thinking in the practice of law.[134] In challenging the modernist inspired positivist approaches to the study of law, Scott argues that because a client's problems are often multivariate a "less logical approach that embraces

127 James E. Moliterno. 1996. "*Legal Education, Experiential Education, and Professional Responsibility.*" 38 Wm and Mary L. Rev. 71.

128 Id at 78.

129 Rose Voyvodic. 2001. "*Considerable Promise and Troublesome Aspects: Theory and Methodology of Clinical Legal Education.*" 20 Windsor Y.B. Access Just.: 113.

130 Moliterno op cit note 127 at 81.

131 Id at 79.

132 Id at 76.

133 Id at 94. As with so many who write in the clinical legal education tradition, Moliterno's failure to analyze the reasons why there has been no systematic connection between experiential education and professional responsibility law teaching despite a century's worth of scholarly acknowledgement of the value of clinical and apprenticeship opportunities, speaks to the limitations of legal scholarship regarding this issue and has been the primary focus of this essay.

134 Kandis Scott. 2006. "*Non-Analytical Thinking in Law Practice: Blinking in the Forest.*" 12 Clinical L. Rev. 687.

the complexity of clients' problems produces better results."[135] Following a postmodern line of critique characteristic of the work of Deleuze and Guattari,[136] Baudrillard,[137] Derrida,[138] Arrigo,[139] Henry and Milovanovic,[140] Schehr,[141] Arrigo and Schehr,[142] Schehr and Milovanovic,[143] Arrigo, Milovanovic and Schehr,[144] and Brion,[145] Scott flirts around the edges with a now well established attempt to understand social problems, especially socio-legal problems, using affirmative postmodernism and chaos theory. In doing so (albeit incompletely), she argues that "transient, shifting, disconcerting and ambiguous situations are the norm."[146] Given the non-linearity of most cases practitioners will encounter, Scott argues for a method of legal education that will prepare students to "understand the role of intuition in legal representation."[147] Intuition, argues Scott, is applied by the best legal minds when facing difficult cases and emerges unconsciously based on a storehouse of skills and experience honed over time. Intuition does not arise from law school pedagogy, quite to the contrary, it emerges as a result of active engagement with case materials. In short, the typical Langdellian approach taken by law schools, one that emphasizes logical processing of statutes, rules, principles, propositions, and case law transmitted through books will never generate the kind of intuition necessary to effectively problem solve actually existing irrational non-linear cases. Scott admits that there are many obstacles to teaching students how to approach problems in a non-linear way that values intuition,[148] and suggests that more frequent opportunities for students and teachers to work on real cases and be informed by multiple experiences is a good place to start. Scott's method speaks to the heart of dialogicality, and can be improved by including community experts (police officers, prosecutors, public defenders, judges, forensic scientists) as part of the investigation process and/or training.

While I share Scott's emphasis on complexity and a rhizomatic approach to understanding complicated problems, in making her point she replaces one essentialism with another. Intuition doesn't appear tabula rasa, even under the best of apprenticeship circumstances. Even Kennedy, whom I've cited above, recognizes the need for students to generate certain skills (issue spotting, rules of procedure, etc.) that would then enable them the flexibility to apply their accrued

135 Id at 688.

136 Gilles Deleuze and Felix Guattari. 1987. *A Thousand Plateaus*. Minneapolis, MN: University of Minnesota Press.

137 Jean Baudrillard. 1983. *Simulacra and Simulations*. Trans. P. Foss, P. Patton, and P. Beitchman. New York: Semiotext(e).

138 Jacques Derrida. 1981. *Positions*. Chicago. University of Chicago Press.

139 Bruce Arrigo. 1993. *Madness, Language, and the Law*. Albany, NY: Harrow and Heston.

140 Stuart Henry and Dragon Milovanovic. 1996. *Constitutive Criminology: Beyond Postmodernism*. London: Sage.

141 Robert Carl Schehr. 2000. "*From Restoration to Transformation: Victim Offender Mediation as Transformative Justice.*" Mediation Quarterly. 18 (2):151–169; Robert Carl Schehr. 1998. "*Language and the Law: A Critique of Arrigo's Psychoanalytic Semiotics.*" Social Pathology, 4 (1): 39–48.

142 Bruce Arrigo, and Robert Carl Schehr. 1998. "*Juvenile Offenders and Restorative Justice: Toward a Critical Analysis of Victim Offender Mediation.*" Justice Quarterly, 15(4): 629–666.

143 Robert Carl Schehr, and Dragon Milovanovic. 1999. "*Conflict Mediation and the Postmodern: Chaos, Catastrophe, and Psychoanalytic Semiotics.*" Social Justice, 26 (1): 208–232.

144 Bruce Arrigo, Dragon Milovanovic, and Robert Carl Schehr. 2005. *The French Connection in Criminology*. SUNY Press.

145 D Brion. 1995. *The Chaotic Indeterminacy of Tort Law: Between Formalism and Nihilism*." In D. Caudill and S. Gold (eds) *Radical Philosophy of Law*. New Jersey: Humanities Press: 179–199.

146 Supra note 134 at 689.

147 Id at 689.

148 In her analysis of the marginalization of law school clinical education and the faculty hired to teach it, Voyvodic makes it clear that the framing of clinical legal education as "skills training" by law school faculty and administrators makes it difficult to explore more unconventional, non-hierarchical teaching methods. See supra note129 at 126.

experience to complex issues. By recognizing that it's not necessarily the skills that law school students learn, but often how they are taught, that generates the kind of criticism being leveled in this essay, Scott's frame can be rehabilitated.

Scott's emphasis on intuition receives theoretical support from Stuckey who contends that clinical education and mature skill acquisition moves from a distanced manipulation of clearly delineated elements of a situation according to formal rules toward involved behavior based on an accumulation of concrete experience. Over time, the learner gradually develops the ability to see analogies, to recognize new situations as similar to whole remembered patterns, and finally, as an expert to grasp what is important in a situation without proceeding through a long process of formal reasoning.[149]

Stuckey continues by suggesting that in order for students to fully engage in experiential education they must continuously be exposed to a four stage process that includes: experience, reflection, theory, and application.

A Way Forward

In this final section of the paper I will offer two related but distinct assessments of a possible way forward to revised law school pedagogy. First, I will present a discussion of the relevance of dialogicality. Dialogicality is related to the second part of this analysis, an emphasis on student development theory. I will conclude this section with a brief description of a pedagogical model that may be used to replace the more conventional law school teaching method. However, it is my firm belief that by supplying the necessary tools for deliberation over the multiple ways to construct thoughtful and effective pedagogy readers can and should invest their time and energy in crafting one that suits their respective courses. With that in mind, in the sections that follow I provide considerable discussion of those criteria now recognized to be associated with generating good courses. At both an institutional and personal level, American law schools and law school faculty must invest in the resources, time, and energy necessary to dedicate themselves to professional development leading to higher quality pedagogy. None of the innovations in teaching discussed below will happen without earnest commitment at each level.

Dialogical Method

In the context of this essay, the urgency of dialogical interactions speaks to the need for juridic actors in the United States to engage in dialogical relations as a way to come to a more comprehensive understanding of who *we* are, all the while enhancing our understanding of those from distinctively different cultures. In this context I am speaking of dialogue to mean "a willingness to enter conversation about ideas, taking a position in openness that can still be altered given additional information; a commitment to keep relationships affirming, even as disagreements over theory occur; and a willingness to ask value questions about information application."[150] To further clarify the key ingredients necessary to promote dialogical intercourse, Arnett summarizes Rob Anderson's explication of "Presence; Unanticipated consequences; Otherness; Vulnerability; Mutual Implication; Temporal flow; and Authenticity."[151] In short, dialogical interaction means

149 Roy Stuckey. 2007. "*Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses.*" 13 Clinical L. Rev. 811.

150 Ronald Arnett. 1992. *Dialogic Education. Carbondale*, IL: Southern Illinois University Press: 10.

151 Id at 11.

"reaching out to the other in an authentic fashion, willing to try to meet and follow the unpredictable consequences of exchange."[152]

Consistent with points raised earlier in this essay, Arnett acknowledges three primary obstacles to dialogical education fostered by academics themselves – careerism, a misguided focus on students to the exclusion of scholarship, and institutional survival.[153] Briefly, Arnett suggests that a scholar's unhealthy near obsession with career objectives leads to narrow specializations that inhibit a more global awareness of social issues. Moreover, academics who cultivate specialized knowledge are unable to speak to other academics and the larger community. This inhibits our ability to generate ideas that are important for democracy to flourish because it limits students' ability to generate conceptually, empirically and theoretically integrated insights. More broadly trained and aware academics can have a significant influence on the university and college campuses where they teach and conduct research. Next, Arnett suggests that the emphasis on some campuses on being student-centered, often at the expense of scholarship, damages the dialogical process by inhibiting the ability of teachers to keep up with contemporary research. This move has been spawned in part by the national focus on auditing discussed in the previous section, and emphasizes an approach to viewing students as "clients" or "consumers." Finally, over the course of the last thirty years institutional survival has been among the most pressing concerns for university officials. In response to growing domestic and international competition for students and faculty, increasing costs associated with operating high quality educational institutions, and steadily decreasing state and federal funding for education, American universities have turned to faculty to assist with budget crises by procuring federal and state grants. This process has its own internal dynamic in that grant funding initiatives are often not consistent with the more broadly conceived pedagogical and scholarly pursuits characteristic of a liberal arts education. Thus, the internal institutional dynamics generating pressures on faculty to assist with institutional survival necessarily fix our attention on narrowly accepted mechanisms and curricula likely to extend the life and health of the university. To counter what Arnett sees as consistent pressures within academic institutions against generating dialogical encounters, academics must press ahead with a broad-minded approach to a kind of scholarship reminiscent of Renaissance thinkers who were well versed in the humanities and social sciences. This is important not only because diverse scholarly training represents the foundation of true knowledge, it is important because by our efforts we model for students what it means to be invested in and prepare for a life dedicated to deep understanding. As I alluded to earlier in this essay, students arrive in graduate schools and law schools primarily focused on surviving the graduate school experience, getting a job, and making money. Law school curricula, I have suggested, does little to generate an alternative vision for them. Faculty who adopt a dialogical approach to their own scholarly gestalt will symbolize a significant counter-hegemonic approach for their students to emulate and in doing so will stimulate greater awareness of the interconnectedness of law with politics, economics, and culture. At bottom, argues Arnett, "dialogical education views learning as an ongoing discussion of information between persons in hopes of making a difference in the quality of life we live with one another locally and globally."[154] To accomplish this, a dialogically influenced scholar will approach subject matter with an emphasis on care and hope, while recognizing disappointments, and avoiding cynicism.[155] Like Dewey and James,[156] Arnett

152 Id at 11.
153 Id at 87–92.
154 Id at 96–97.
155 Id at 97–112.
156 William James. 1968. "*What Pragmatism Means.*" In John K. Roth (ed). *The Philosophy of William James.* New York: Thomas Y. Corwell Company, Inc.: 275–292.

privileges the practical philosophical pedagogy of learning by doing. By combining the master narratives found in books and journal articles with praxis-oriented experiential education[157] students encounter the twin poles of hope and disappointment and grow accordingly.

Dialogue includes thoughtful engagement with both human beings and texts. As it is relevant to our interests here, that means sincere interaction between law school faculty and students, students and students, local practicing attorneys and judges, legal practitioners, legislators, and the lay public each in the service of enhanced knowledge of the meaning and application of law in the service of justice. In addition to interaction with people, we must also engage in critical deconstruction and analysis of juridic texts. Probing the meaning of statutory and case law is consistent with Sidorkin's First and Second Discourses.[158] The First Discourse signifies the authority of the text, a master narrative that establishes common ground where dialogicality exists to generate a common perception of the text. The Second Discourse provides for "speaking out" about the text. This is an organic process that opens up the Master Narrative for deconstruction and reinterpretation. For our purposes, a shared introduction to jurisprudence gives way to dialogical deconstruction of the merits of that jurisprudence. Since texts are open to interpretation this is inevitably an organic process that will never generate a singular truth, but rather, through the process of engaging the text will likely manifest in a transmogrified set of interpretations expressive of polyvocal and polycentered contingent subject identities, interests, and awareness largely based on demographic factors such as class, race/ethnicity, gender, religious affiliation, age, and the like.

How, for example, might a law school student come to understand the ways Justice Antonin Scalia and Justice Clarence Thomas view stare decisis? It is now well known that despite expressing an originalist view of the constitution, Justice Thomas sees no virtue in adhering to case precedent.[159] And what should students make of the epistemological commitment to originalism shared by Scalia and Thomas? That is, by evoking an originalist constitutional framework for considering contemporary issues appearing before the court aren't we now in the realm of interpretation? How do we know what the Founders intent was? Isn't it possible that thoughtful people will disagree about the Founders original intent? A common problem addressed in any law school course confronting separation of powers issues concerns the question, "Who is the government lawyer's client?"[160] Simply put, "Does a Justice Department attorney advising the White House on a matter of presidential authority represent the United States, the President, the Presidency, the Department of Justice, the people?"[161] Given the controversy generated by the firing of eight US Attorneys during the time when Alberto Gonzales served as the US Attorney General a more timely question would be hard to imagine. The legal framework for allowing the replacement of the eight fired US Attorneys without having to receive Senate approval appeared in the 2005 reauthorization of the USA Patriot Act. Section 502 "eliminates restrictions on the length of service for interim U.S. attorneys and allows future interim attorneys to serve indefinitely without Senate confirmation."[162]

157 The Greek word, praxis, means "doing," and "action." Webster's Ninth New Collegiate Dictionary.

158 A. Sidorkin. 1999. *Beyond Discourse: Education, the Self, and Dialogue*. New York: SUNY Press: 12.

159 J. Toobin. 2007. *The Nine: Inside the Secret World of the Supreme Court*. New York: Doubleday: 102.

160 Peter Shane and Harold Bruff. 2005. *Separation of Powers Law: Cases and Materials*. Carolina Academic Press: 43.

161 Id at 42–44.

162 Will Thomas. 2007. TPM Canned US Attorney Scandal Timeline. Talking Points Memo. http://www.talkingpointsmemo.com/usa-timeline.php.

Is this constitutionally protected? How do we decide who a government lawyer represents? The Constitution is unclear on this point. In addition, is Section 502 of the reauthorized Patriot Act a subversion of the Senate's Constitutional authority to approve US attorneys?

Another example appears in Chief Justice Rehnquist's majority opinion upholding *Miranda v. Arizona*[163]. In 2000, the Supreme Court heard *Dickerson v. United States*[164]. The question before the Court in *Dickerson* was whether to uphold the requirement established in *Miranda* that custodial suspects should be informed of their right to remain silent, their right to legal representation, and acknowledgement that anything said while in custody would be used against them. It was well known that Chief Justice Rehnquist had long held that in his view *Miranda* was bad law and should be overturned. However, the Chief Justice, writing for the majority, joined six other justices in reaffirming the value of *Miranda*. He did so because the implementation of *Miranda* had become ubiquitous in American culture, and was now established law. So while part of his support for *Miranda* in *Dickerson* rested easily upon stare decisis, Chief Justice Rehnquist's more nuanced interpretation of the cultural acceptability of the law and its application played heavily on his decision.[165]

Furthermore, an endless array of phrases and concepts continue to perplex legal and social science scholars. For example, what is the meaning of "cruel and unusual punishment?" How do I know when a behavior or item of printed material has "shocked the conscience?" Who, exactly, is the "reasonable man" in the law? These questions point to the need for intensive dialogue among law school faculty, students, the community of practitioners, and the public who are served by them.

Dialogical intercourse is necessary for human beings to realize their humanity. To be truly human is to acknowledge the essence of the other. Without that acknowledgement "I" cannot exist. Said differently, "failure to affirm the being of the other brings myself into non-being."[166] For Buber, "all real living is meeting."[167] When communication breaks down we are prone to view the other with mistrust and misunderstanding. We overly value our own opinions, and devalue those held by our adversaries. Consider Martin Buber's remarks:

> Man is more than ever inclined to see his own principle in its original purity and the opposing one in its present deterioration, especially if the forces of propaganda confirm his instincts in order to make better use of them… He is convinced that his side is in order, the other side fundamentally out of order, that he is concerned with the recognition and realization of the right, his opponent with the masking of his selfish interest. Expressed in modern terminology, he believes that he has ideas, his opponent only ideologies. This obsession feeds the mistrust that incites the two camps.[168]

Polarization of discourse generates misunderstanding. Alternatively, a discourse that is relationship-centered[169] moves us closer to dialogical communication, and requires a commitment on all sides to empathize with the other to come nearer to understanding. By asking questions in the spirit of a dialogical community we come closer to understanding, and we demonstrate a

163 384 U.S. 436 (1966).
164 530 U.S. 428 (2000).
165 Supra note 143 at 124.
166 Supra note 142 at 12.
167 Supra note 142 at 11.
168 Buber cited in Sidorkin. Op. cit 142 at 15.
169 Supra note 142 at 7.

sincere commitment to enhanced awareness of the multifaceted nature of social problems and the psycho-emotional investment subjects have in them. In the space that exists between questioner and listener, and interpretation of foundational texts, emerges the dialogical moment. Through our ability to open up to others we begin to know ourselves more fully.[170] This is precisely what Buber means when he says that all real living is meeting. Through meaningfully shared discourse a process of true awakening unfolds for each interlocutor because each plays the role of questioner and listener. This dialogical process is what moves us nearer to our shared humanity. A really existing dialogic or hermeneutic community would be a place where "partners must cooperate to establish a mutual world in which they may or may not agree. What is important is how partners must coordinate to establish meaning between themselves."[171] Guilar suggests that Gadamer's hermeneutic community is similar to Dewey's "organic community" in that, like Dewey who emphasized praxis as the way to true knowledge, for Gadamer "dialogic conversations about concrete actions and reflections upon them [take] place within a context of historic truths also open to inquiry."[172] Most important for Gadamer is that interpretation of dialogical moments is open-ended. There is no attempt to establish truth once and for all.[173]

The most important lesson for us to draw from the body of literature addressing hermeneutics and dialogue is the potential for attaining real understanding. Despite our differences, which will always be present, a process exists to promote sincere discovery and growth. Through our earnest engagement with the other as listeners and questioners we humanize the other in a way that validates them and ourselves. We learn from them, and they from us. Through dialogue we become more fully realized as human beings. A truly dialogical classroom is by design crafted as a humanistic alternative to the discourse of the master. Where the master privileges priestly dominance over knowledge, dialogical methods open up that knowledge to critique from all interlocutors. It empowers previously marginalized subjects (students) to become integral participants in the construction and interpretation of meaning.

To organize our classrooms as hierarchical fiefdoms by brow-beating our students to the point of disillusionment and illness, or to fail to acknowledge and teach the political, economic, and cultural impact of the implementation of law, or to dismiss the jurisprudential practices and decisions emanating from international courts of law limits *our* ability to grow, just as our refusal to dialogue with our students, the legal community at large, and the public limits *their* ability to

170 The notion that we cannot know ourselves without interaction with the other has a long history in philosophy and sociology that gained prominence in the 1930s with the published works of John Dewey, George Herbert Mead, Charles Horton Cooley, W.I. Thomas, Irving Goffman, and Herbert Bloomer. Dewey's pragmatism emphasized the importance of interaction with the objective world to gain true knowledge. For Mead, there can be no self without the other to interact with. Without someone to respond to our public self (what Mead referred to as "Me") we can have no sense of the "I" – whether we are smart, funny, sad, supportive, in short, we have no feedback with which to determine who we are. For Blumer, perhaps the most radical of the symbolic interactionists, every situation we engage in is created anew. That is, we are not the same person today that we were only days before. Our experiences have changed us and the way we see the world. With each new interaction we recreate our reality. The primary emphasis for all symbolic interactionists is that human beings are perpetually engaged in a process of interaction with the external world of objects and people, and that through that interaction, and our processing and re-acting to it, we evolve our sense of who we are.

171 Pearce and Pearce cited in J. Guilar. 2006. "*Intersubjectivity and Dialogic Instruction*." Radical Pedagogy. Issue 8. http://radicalpedagogy.icaap.org/content/issue8_1/guilar.html.

172 Id.

173 H. G. Gadamer. 1976. *Philosophical Hermeneutics. Berkeley*: University of California Press.

grow. Absent dialogue, we remain enshrouded in Buber's apt description of polarizing discourse resulting in the preservation of status quo hierarchical relationships based on power and ideology that continue to stifle our efforts to truly realize a moral and just application of the law. Happily, plentiful resources now exist for law school faculty to invest in their own professional development regarding best practices associated with high quality course creation and delivery. At bottom is a strong emphasis on multiple modes of dialogicality leading to the generation of knowledge and its long-term retention, as well as a commitment to teaching students how to teach themselves, and an unapologetic dedication to enhancing student well-being.

Student Development Theory

At this point it should be clear that law school pedagogy is devoid of dialogue surrounding the latest scholarship addressing student learning theory. Frankly, this is a problem facing university teaching everywhere in the US, and in most disciplines.[174] Many resources are available to provide guidance to law professors seeking ways to enhance student comprehension and mastery of concepts and legal theory. What I wish to do in this final section is to provide an overview of a few selected best practices. Then, I will offer some suggestions for ways to improve law school pedagogy.

What makes a high quality course? What are the criteria that make learning significant? According to Fink,[175] good courses are those that prioritize the following: they challenge students to important kinds of learning; they use active forms of learning; they involve a caring teacher; there is good student-teacher interaction; and there is a good system of feedback, assessment, and grading. As for the most significant learning criteria, Fink identifies six: foundational knowledge; application; integration; human dimension; caring; and learning how to learn. Finally, but perhaps most importantly, we must know the *situational factors* that combine to constitute the learning environment.

In the paragraphs that follow I will discuss the qualities of good courses, especially the criteria for significant learning, and situational factors. A well-designed course will ideally provide for the realization of each, albeit with course-specific uniqueness.

At the heart of quality teaching is "the attitudes of the teachers, in their faith in their students' abilities to achieve, in their willingness to take their students seriously and to let them assume control of their own education, and in their commitment to let all policies and practices flow from central learning objectives and from a mutual respect and agreement between students and teachers."[176] In his careful analysis of the qualities possessed by the nation's most prolific university teachers, Bain's important insight into how faculty approach the construction and delivery of their classes is invaluable. Foremost among these is awareness of how students learn best. As summarized by Bain, faculty from across the United States recognize that "People learn most effectively (in ways that make a sustained, substantial, and positive influence on the way they act, think, or feel) when (1) they are trying to solve problems (intellectual, physical, artistic, practical, or abstract) that they find intriguing, beautiful, or important; (2) they are able to do so in

174 Derek Bok. 2006. *Our Underachieving Colleges: A Candid Look At How Much Students Learn and Why They Should Be Learning More*. Princeton, NJ: Princeton University Press.

175 L.Dee Fink. 2003. *Creating Significant Learning Experiences*. San Francisco, CA: John Wiley & Sons.

176 Ken Bain. 2004. *What the Best College Teachers Do*. Cambridge, MA, Harvard University Press: 78–79.

a challenging yet supportive environment in which they can feel a sense of control over their own education; (3) they can work collaboratively with other learners to grapple with the problems; (4) they believe that their work will be considered fairly and honestly; and (5) they can try, fail, and receive feedback from expert learners in advance of and separate from any judgment of their efforts."[177]

Following decades of careful scholarship pointing to the ways people learn and retain information, a new paradigm of university teaching has emerged.[178] Following the work of Campbell and Smith, this new paradigm stresses the following: knowledge that is jointly constructed by the teacher and the student; students become actively involved in constructing, discovering, and transforming knowledge; modes of learning that focus more on relating rather than memorizing; where the faculty purpose is to develop students' competencies and talents; student lifelong learning; a personal relationship between students and students and faculty; cooperative learning in the classroom; diversity and personal esteem, cultural diversity, and commonality; students are empowered, power is shared among students and between students and faculty; assessment is criterion-referenced (using rubrics and pre-defined standards), typically use performances and portfolios; ways of knowing are narrative based; epistemology is constructivist, emphasis is placed on invention and inquiry; technology is used for problem solving, communication, collaboration, information access, and expression; and that teaching is a complex skill that requires considerable training.

To facilitate the mandates of the new paradigm there has emerged an impressive array of teaching strategies largely based on the pedagogical commitment to active and experiential learning. Among them are: role-playing, simulation, debate, and case studies; writing to learn; small group learning; assessment as learning; problem-based learning; service learning; and on-line learning.[179] In addition, law school faculty have been encouraged to institute brain storming (group problem solving), buzz groups (brief period of issue discussion in class), demonstrations, free group discussion, group tutorial, individual tutorials dedicated to one student, problem-centered groups, programmed learning (using computer simulations), syndicate method (group work followed by generation of a report), synectics (group brain-storming with special techniques), and T-group method (group and individual awareness therapy).[180] The guiding ethic behind each of these tools is a commitment by quality teachers to generate answers to the following questions: 1) What should my students be able to do intellectually, physically, or emotionally as a result of their learning? 2) How can I best help and encourage them to develop those abilities and the habits of the heart and mind to use them? 3) How can my students and I best understand the nature, quality, and progress of their learning? And 4) How can I evaluate my efforts to foster that learning?[181]

Foundational knowledge is a basic understanding of data, concepts, relationships and perspectives within a given substantive area. Comprehension of case law and statutes, for example, signifies foundational knowledge. Application is the experience of generating useful skills that can be applied toward realization of a project or action of some kind, and that manifests the foundational knowledge. Here the expectation is for the creation of complex high quality projects that require the combination of three modes of thought: practical, critical, and creative. Most law school

177 Id at 108–109.

178 Campbell and Smith, 1997: 275–276, cited in Fink, supra note 175 at 19.

179 Supra 175 at 20–21.

180 See Stuckey supra note 10 at 97,98.

181 Supra note 176 at 49.

projects require practical thinking in that they are focused on issue spotting, problem solving and case methodologies. Enhanced application would also introduce students to critical and creative thinking. Critical thinking is a pedagogical phrase that relatively few can actually define, let alone manifest in a pragmatic way with exercises designed to cultivate it. I am particularly fond of Roger Darlington's articulation of the concept.[182] Darlington's exposition both defines the concept of critical thinking, and describes how one masters it. Critical thinking, he argues, "centres not on answering questions but on questioning answers" through a process of "probing, analyzing, [and] evaluating."[183] While there is certainly some critical thinking that takes place with regard to legal case analysis, the weight of precedent and demand for perpetuation of the status quo limits the students' ability to challenge the authority on which decisions and practices rest. One of the key components of critical thinking is the necessity to think outside the box. Darlington takes that position one step further by contending that we should, "think the unthinkable." Finally, and this is so much more consistent with training in sociology than in law, to think critically is to perpetually ask, "Why?" The question being posed here is, are law school students encouraged to think critically? Are they encouraged to always ask, "Why?" Once one has begun "thinking the unthinkable," one has ventured into the last of the three ways one can manifest thought and that is through creative application and interpretation of existing works. A more specific set of critical thinking criteria has been set out by Arnold Arons.[184] According to Aarons, there are ten reasoning abilities that students must learn.

- Consciously raising the questions "What do we know…? How do we know…? Why do we accept or believe…? What is the evidence for…?"
- Being clearly and explicitly aware of gaps in available information.
- Discriminating between observation and inference, between established fact and subsequent conjecture.
- Recognizing the necessity of using only words of prior definition, rooted in shared experience, in forming a new definition and avoiding being misled by technical jargon.
- Probing for assumptions beyond a line of reasoning.
- Drawing inferences from data, observations, or other evidence and recognizing when firm inferences cannot be drawn.
- Performing hypothetico-deductive reasoning; that is, given a particular situation, applying relevant knowledge of principles and constraints and visualizing, in the abstract, the plausible outcomes that might result from various changes one can imagine to be imposed on the system.
- Discriminating between inductive and deductive reasoning.
- Testing one's own line of reasoning and conclusions for internal consistency.
- Developing self-consciousness concerning one's own thinking and reasoning process.

University professors are keen to emphasize the significance of critical thinking, especially in the study and practice of law. However, rarely if ever are the principles of critical thought clearly articulated by the professor to the students. This kind of reflexivity is necessary if we are to

182 Roger Darlington. 2008. "How To Think Critically." http://www.rogerdarlington.me.uk/thinking.html.

183 Id at 1.

184 Cited in Fink, supra note 175 at 85.

generate the critical analytical skills indispensable to engaging legal scholarship and practice.

Integration is in some ways related to creative thinking in that by engaging in integration a student is required to analyze a problem using two or more disciplines. The idea is expand our knowledge and understanding of complex problems through multiple lenses. By doing so we are less likely to become stultified by disciplinary essentialism. By engaging in a multi-disciplinary approach to problems we are far more likely to generate a more comprehensive, penetrating, and lucid account. We can accomplish integration in a number of ways. We can introduce our students to alternate ways of thinking by having them read in non-juridic disciplines. We can introduce our students to learning communities, associations of professionals, activists, and practitioners who work along side our students to better understand problems we are investigating. Finally, through techniques such as journaling we can have the students think through their course-related problems in thoughtful ways that emphasize integration with other disciplines, occupations, voluntary associations, and the like.

It is important that students understand that their lifelong learning and occupational experiences have a human dimension to them. As I have already attempted to explain in this essay, far too often the human dimension is sorely lacking in law school pedagogy. What is needed is a set of exercises that allow students to come to know themselves better, to know others better, and to generate a stronger sense of self-authorship. In the long run these exercises, along with all that has come before, will enhance the ethical application of the law. Related to the human dimension is the notion of caring. Simply put, we can generate exercises that encourage students to consider the ways in which their interests, feelings, and values have changed over time.

The last of the criteria that will stimulate learning environments is "learning how to learn." This is a significant component of any university-based training because it teaches students how to become lifelong learners. In order to become a better student, faculty must facilitate ways for students to develop their underlying concept of learning or of knowledge; they must develop metacognitive awareness, so that they recognize that a deep approach is required, and metacognative control, so that they can make appropriate meaning making moves; make assessment demands explicit so that students understand that only full understanding will be acceptable as a learning outcome; to combine theoretical and conceptual knowledge with methodological analysis; learn to use concept maps to better integrate what students know; become a self-directed learner; encourage deep-level thinking; increase questioning; develop critical thinking capabilities; enhance reading skills; and enhance comprehensive monitoring of their learning.

Situational factors also affect the quality of course delivery. And while some information that may assist with faculty awareness of a particular factor is hard to know until the class has been formulated, it is important to generate. According to Fink[185] there are six situational factors: 1) the context of the learning situation; 2) Expectations of external groups; 3) the nature of the subject matter; 4) the characteristics of the learners; 5) the characteristics of the teacher; and 6) special pedagogical knowledge. Lets briefly consider each. In order to properly facilitate the kind of learning we've emphasized in this section the teacher needs to know a few things about the learning situation. Specifically, we need to know how many students we'll have, what level they will be (first,

185 Id at 69.

second, or third year law), how often the class will meet, and the format in which the course will be delivered. Next, what are the expectations being held by external groups with respect to the product we produce. That is, what does society at large need and expect in terms of the education of these students? This is a significant question and one that must be repeatedly addressed by law school faculty, and the American Bar Association. Each faculty member should be able to respond to this question with a statement of principle. For example, a criminal procedure professor could say that she recognizes her role in producing thoughtful, intelligent, capable, well-spoken, good writers with a fundamental knowledge of criminal procedure. Is there a curricular emphasis on ethics, or on critical thinking? If so, does the curriculum support the culturally identified expectation? With respect to wrongful and unlawful conviction, for example, what are the broader political, economic, and cultural expectations of law school graduates and their faculty, and how well does the curriculum address those expectations?

What is the nature of the subject matter? Faculty should identify whether the subject matter is convergent, requiring a single answer, or divergent, requiring multiple possible answers. Faculty should also be aware of whether the subject matter is relatively stable over time, or is rapidly changing. Next, we'll want to know more about our students. For example, are they part-time, do they have family responsibilities, work responsibilities, etc. This information will be handy when considering how to use the skill-base of the students to enhance the creation of knowledge in class. Why did the students want to enroll in this class? What are their specific career goals? Finally, if it's possible, we want to know about the students' learning styles. Again, some of this information may not be available until after students convene at the commencement of a new semester. But it may be an important set of variables necessary to construct an optimal learning environment.

The remaining set of situational variables includes the characteristics of the teacher, and special pedagogical knowledge. Here what is required is sincere reflexivity on the part of the teacher. How much knowledge about the topic I'm teaching do I possess? What is my experience in this area? What skills and aptitudes do I bring to bear? By earnestly answering these questions the teacher is better situated to identifying areas of weakness that may require additional focused professional development before embarking on the course.

Special pedagogical knowledge speaks to the need for teachers to understand the limitations they are facing upon entering a new semester. These may be limitations of space, access to technology, place-bound students (making trips off of campus difficult), experience and skill levels of the students, and the level of fear about the material that students bring with them to the classroom. This is clearly an issue for law school faculty who face students who are not only intimidated by the material they are confronting in class, but who are intentionally placed in a highly competitive environment. The combination of these factors makes for a challenging set of pedagogical obstacles to generating true knowledge of the sort that will stay with a student for many years post-graduation.

The final bit of student development theory that I'd like to emphasize is assessment. Of course, American law schools primarily make use of timed examinations, with a few upper division courses assigning research papers. The question is whether the assessment tool used by law schools has ever been thoughtfully discussed within the context of quality pedagogy leading to information and skill retention. Education scholars have been discussing alternative assessment devises for many decades and have argued for what they term *forward looking* assessment.[186] Law

186 Id at 85.

school examinations are backward looking in that they focus on assessing what has been covered in the class up to a certain point. Forward looking assessment focuses more on doing something with the information and skills generated in the course. Some case method analysis certainly gets at the "doing" part of assessment. In general, assessment should be realistic (focused on real-world situations); require judgment and innovation (to solve unstructured problems); active (student has to carry out exploration and work within the discipline); replicate or simulate the contexts in which adults are tested in the workplace (with concomitant contexts, constraints, purposes and audiences); assess the student's ability to use a repertoire of knowledge and skill efficiently and effectively to negotiate a complex task; and allow appropriate opportunities for students to rehearse, practice, consult resources, and get feedback on and refine performances and products.[187]

Application of Student Learning Theory to Law School Pedagogy

Some of our work has been done for us. In two recently published documents – the Carnegie Foundation for the Advancement of Teaching's Educating Lawyers, and Stuckey et.al. Best Practices for Legal Education[188] – there is a wealth of information available to reconstitute law school pedagogy consistent with insights garnered from student development theory. Even the much discussed MacCrate Report, first published in 1992, contained an effort to divine fundamental lawyering skills necessary for an attorney to be successful.[189] These skills form the foundation of a thoughtful approach to developing course-specific goals and bear reading again and again. MacCrate identified ten fundamental skills, and four professional values that were tied to the successful practice of law. Examples include:

- Identify and diagnose a problem;
- Generate alternative solutions and strategies;
- Develop a plan of action;
- Implement the plan;
- Identify and formulate legal issues;
- Formulate relevant legal theories;
- Evaluate legal theory;
- Know the nature of legal rules and institutions;
- Know of and have the ability to use legal research tools;
- Determine the need for factual investigation;
- Plan a factual investigation;
- Implement the investigative strategy;
- Organize information;
- Assess the perspective of the recipient of information;
- Use effective communication techniques;

187 Id at 86.

188 Supra note 10.

189 See McCrate Report supra note 22, Chapter Five, "*The Statement of Fundamental Lawyering Skills and Professional Values.*"

- Prepare for negotiation;
- Conduct negotiation

Each of these course goals emphasizes the identification, analysis, synthesis, and application that was earlier identified as among the most significant mechanisms for promoting long-term knowledge and skill. Once these have been articulated faculty can then move to determination of the specific instruction method to be used (e.g., problem based, team based, or accelerated).

The Carnegie report specifically emphasizes moving to an integrated curriculum that combines an emphasis on legal doctrine and analysis, an active component that focuses on practice as a lawyer, and assuming the values and identity of a practicing attorney.[190] With regard to the active learning-by-doing emphasis found in student development theory, the Carnegie report suggests that law schools must incorporate lawyering, professionalism and legal analysis from the first year on. Law schools are encouraged to support faculty to work across the curriculum, and across institutions. Finally, the Carnegie Report suggests that a primary focus should be on weaving together disparate kinds of knowledge and skill. As was mentioned in the previous section, this is a cornerstone of integration and a necessary component of Fink's significant learning criteria. In short, the Carnegie Report articulates a vision of law school pedagogy that is consistent with best practices. Consider the list of six skills that core legal education should provide:

1. Developing in students fundamental knowledge and skill, especially an academic knowledge base and research.
2. Providing students with the capacity to engage in complex practice.
3. Enabling students to learn to make judgments under conditions of uncertainty.
4. Teaching students how to learn from experience.
5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community.
6. Forming students able and willing to join an enterprise of public service.[191]

Once again, these six skill sets represent core goals for all advanced education regardless of the disciplinary focus.

A more extensive assessment and forward looking treatment of law school pedagogy was published by Stuckey et al. who contend that, "most law schools do not employ the best practices for educating lawyers."[192] So concerned with the current state of law school pedagogy and its failure to properly prepare graduates for the practice of law that the authors titled one section of their report, "The Licensing Process is Not Protecting the Public." Their first invective is directed at the Bar examination process and the failure of the Bar to adequately assess the skills needed to succeed as a professional. But their third key point focuses specifically on law school curriculum and pedagogy, "Law Schools Are Not Fully Committed to Preparing Students for Practice." Specifically, Stuckey et al. contend that, "law schools should expand their educational goals, improve the competence and professionalism of their graduates, and attend to the well-being of their students."[193] Consistent with best practices as they relate to student development theory,

190 See Carnegie Report supra note 22 at 6.
191 Cited in Stuckey, supra note 10, at 14.
192 Id at 8.
193 Id at 13.

Stuckey et al., recommend an overhaul of the law school curriculum. Following the work of Judith Wegner, the first year curriculum should emphasize: intellectual tasks, legal literacy, legal analysis, application, synthesis, evaluation, implicit messages (like how the law interacts with the "outside world"), learning in context (addressing real world profession problems), and notable gaps (understanding law from the perspective of intellectual and social contexts to avoid misimpressions).[194]

The Stuckey et al., report is a comprehensive assessment and set of recommendations for ways to significantly improve law school education consistent with the most recent insight generated by student development theory. As best as I can tell, the authors have attempted to communicate a new way forward that includes each of the points I raised in the student learning theory section. That is, the report focuses on the generation of foundational knowledge, application, integration, the human dimension, and caring. For example, the author's provide important insight into outcomes based course design, and include examples from law professors across the US. They implore faculty to generate clearly articulated learning objectives that include the levels of competency expected by the faculty. Stuckey et al., pay careful attention to the need for developing knowledge, skills and values, and place strong emphasis on the integration of theory, doctrine and practice. Consistent with the situational factors listed above, Stuckey et al., join with Fink in urging faculty to know their subject well, to improve their teaching pedagogy, to create and maintain healthy teaching and learning environments, to do no harm to students, to support student autonomy, to foster student and faculty collaboration, to give regular and prompt feedback, to help students become self-directed learners (a key component of experiential learning – doing something), *reduce reliance on the Socratic method by employing multiple teaching strategies*, employ context-based learning (placing students in the environments they will be working in), integrate practicing attorneys and judges into the learning process, and use technology to enhance access to information. Once again it bears repeating that this thorough report moves nearly in lock step with current best practices regarding student development theory, and provides detailed examples for ways law professors can implement the various recommendations.

Chapter Five of the Stuckey et al. report is dedicated entirely to the construction of high quality experiential courses. Space limitations prevent me from presenting a thorough discussion of this section, so I will simply say that the thorough presentation of best practices and the benefits of experiential course offerings speaks holistically to the criteria established by education theorists Fink, Bain, and others, as well as clinical law professors Findley, Stiglitz, Brooks, Shulman, and Medwed, each of who were cited in the Introduction and have spent their professional careers enhancing the live client clinic experience. In short, by engaging students in the act of doing we create in them the ability to develop life-long learning skills and professionalism. Chapter Six provides faculty with alternatives to the Socratic method, and Chapter Seven speaks to quality assessment.

The Stuckey et al. report is the most comprehensive assessment and proposal for a new and improved law school pedagogy based on student learning theory that I've encountered. It pulls together best practices from across a broad spectrum of learning theorists both within and outside of the law school arena. What is clear from this report is that there are many ways for faculty to approach their teaching to enhance student performance and professionalism. I would even go so

194 Id at 16.

far as to say that the report is a clarion call for law school faculty to engage in their own professional development as it pertains improved pedagogy. If Stuckey et al. are correct in their projections the future of the profession is at stake.

A Pedagogical Alternative

Returning for a moment to Moliterno's recommendation that an integrated law school curriculum would be structured around a three-year long simulated practice is indicative of the recognition of the need to implement the best practices suggested by student development theory. It is also supported by Scott's emphasis on the need for law school students to adopt a sort of legal intuition that can only come from working real cases with real people who have real problems. Because no case has precisely the same components the non-linearity of each case requires students to develop their critical thinking skills. Moreover, it requires laws schools to prepare students for life-long learning. This is where integration comes in. By reconceptualizing the law school curriculum as a three-year long simulated law practice students will be forced to understand and evaluate legal doctrine and theory, know the nature of legal rules and institutions, know how to use legal research tools, know professional ethical responsibilities, know how to conduct factual investigations, organize information, use effective communication techniques, and conduct negotiations. In addition, this commitment to an integrated curriculum emphasizes closer and more respectful relationships with students. Students are required to take greater responsibility for their own education by teaching themselves the information they will need to learn to be effective lawyers. Faculty will guide the entire enterprise by paying special attention to best practices associated with course delivery methods and assessment. Lacanian concerns over divided subjects are minimized because realization of student-centered learning – one that privileges dialogicality, student investment in their own learning process, respect for polyvocality, and experientially based pedagogy – enables subjects to pursue realization of their own authenticity. In short, a comprehensive three-year long integrated curriculum will produce a law school graduate more prepared to engage the unpredictable world of legal practice.

With the proposal for a three-year long integrated curriculum Moliterno's recommendation appears to make a straightforward argument for replacing contemporary law school curricula with a superimposed experiential model. By doing so, the benefits of clinical education would accrue to the full law school student body over the course of their tenure in their respective departments. No longer would clinics be marginalized, they would become the normative model of effective law school pedagogy.

IV Conclusion

If Einstein is correct, that we cannot solve significant problems at the same level of thinking we were at when we created them, then I believe we must not only familiarize ourselves with counter-hegemonic pedagogical discourses to confront entrenched law school curricula, we must also be willing to aggressively act on the principles guiding those discourses. Among other things, this requires headlong engagement with the American Bar Association and the administrations in law schools across the United States. The scholarly ammunition needed to do this has been provided to us. As referenced in the first part of this essay, the McCrate Report, Best Practices for Legal Education: A vision and A Road Map, and the Carnegie Foundation's Educating Lawyers: Preparation for the Profession of Law, each provide us with careful scrutiny of the many problems

facing the legal profession, and the tools for law schools to correct their curricula and pedagogy to appropriately address them. But there are clear pragmatic reasons why they won't.

Despite claims from law school administrators that clinics are too expensive to operate, the real macro-structural reason for their lack of support is that law schools exist to serve the interests of the dominant and the powerful. Their curricula is designed to reproduce status quo political, economic, and cultural relations in such a way that they make the possibility of a truly existing justice virtually impossible to attain. While they may pay lip service to their responsibility for teaching students how to preserve constitutionally protected rights, their graduates are molded in to "legal machines" ill prepared to critically question and analyze the structural variables serving to promote inequitable social relations. And this is by design.

Live client innocence projects can serve a valuable role by articulating the discourse of the hysteric. From within the broader master narrative, the hysteric will reject positivist attempts to view the law as objective, and the training in the law as monolithic. This is important because the dialectical interplay of opposing forces through the expression of competing narratives has the effect of generating institutional instability. Largely because of their participation in clinical education, innocence project graduates are better situated to understand their professional responsibility to serving justice. The results of their work may even generate exonerations and policy changes that serve to fragment dominant cultural expressions of due process. In doing so, opportunities arise to inject alternative discourses – new formerly subjugated narratives seeking more diverse interpretations of behaviors and texts. But until the head of the snake is removed, that is, until status-quo law school curriculum is redesigned in line with the recommendations for greater dialogicality geared toward critical analysis of the confluence of law with political, economic, and cultural factors leading to social justice, I'm afraid that innocence project clinics, like all live client clinics, will continue to be marginalized by a discursive process that separates legitimate from illegitimate discourse. Finally, and most dramatically as it pertains to the activities of innocence project clinicians and wrongful and unlawful conviction scholars teaching in law schools, failure to radically redesign law school curricula will have the effect of perpetuating the proliferation of values and behaviors known to generate wrongful and unlawful convictions. Until the paradigmatic pedagogical shift I've recommended in this manuscript is adopted these clinicians and scholars will be forced to continue shouting their warnings for systemic change from the bleacher seats.

Assessment– Are Grade Descriptors the Way Forward?

*Victoria Murray and Tamsin Nelson**

The debate on how best to assess clinic, or indeed if it should be assessed at all has raged for decades and shows no sign of abating. The passage of time has been unable to resolve the question of assessment, no doubt due in part to the expansion and diversification of clinical legal education. The scope of clinic and its role in both society and as a teaching method is constantly evolving and assessment methods must develop to reflect the ever changing clinical profile. In an attempt to bring its assessment regime up to date, in 2007/2008 Northumbria University's Student Law Office modified its assessment regime, replacing outmoded criteria with grade descriptors. This paper focuses on the use of grade descriptors and criterion referenced assessment in clinical legal education, addressing whether clinic should be assessed and which of the two methods is best suited to clinical legal education. The article draws on the experiences of clinicians and students to determine what issues this change in assessment regime has raised for the assessors and the student body. It concludes that it is appropriate to assess clinic by fully grading and suggests grade descriptors are the way forward.

INTRODUCTION

In 2007/2008 Northumbria University's award winning Student Law Office (SLO)[1] overhauled its assessment regime, replacing an outmoded list of criteria with grade descriptors. This paper provides an evaluation of these two assessment methodologies, with specific reference to their adoption in a clinical setting.[2]

After many years of criterion referenced assessment, grade descriptors were mooted and SLO clinicians agreed they should be adopted for the academic year 2007/2008. This change in assessment regime was welcomed not least because it was anticipated the grade descriptors would remedy what the supervisors perceived to be increasingly problematic assessment criteria. In

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1 In 2008 the Student Law Office was awarded the Attorney General's Pro Bono award for Best Contribution by a Law School.

2 For a full consideration of assessment in the clinical environment see Stuckey, R. & Others. (2007) *Best Practices for Legal Education*. Available at http://cleaweb.org/documents/Best_Practices_For_Legal_Education_7_x_10_pg_10_pt.pdf (accessed on 11 August 2008).

particular, supervisors hoped that the grade descriptors would engender more reliable and consistent marking owing to their explicit detail.

In order to appreciate the findings from the research undertaken in the SLO, it is necessary to provide some contextual background information. The SLO is a year long compulsory clinical module undertaken in the final year of the law school's exempting law degree (ELD).[3] The ELD is fully integrated, combining the undergraduate law degree with a one year post graduate vocational course. Students graduating from the ELD are eligible to commence the training stage necessary to qualify as a solicitor or barrister. In 2007/2008 approximately 130 exempting degree students completed the Student Law Office module and clinical supervisors numbered 17. The SLO counts for 2 full modules, the largest undertaken on the degree and the final year marks contribute 40 per cent towards the student's degree classification. The mark achieved for the SLO module can therefore play a pivotal role in determining a student's overall degree classification.

How Is Clinic Assessed?

Clinic has many guises and consequently the modes of assessment are wide and diverse in order to reflect the particular clinical model in question. Many clinics assess on both a formative and summative basis. The formative aspect of assessment in clinic is intended to provide feedback and give the student direction on how they can improve their performance. The purpose of summative assessment is to formally assess the student's output. Summative assessment may take the form of a numeric or letter grade, or may be on a pass/fail basis. Some modules are not assessed per se but result in award of credits.

It is summative assessment that can cause the most difficulty. The problem with clinic is that as students are usually assessed by their clinical supervisor there can be a large element of subjectivity when assessing. Consequently, it can prove difficult to mark students objectively due to the close (or in some cases challenging) working relationship which has developed between supervisor and student throughout the year. This is known as the halo and horns effect.[4] It is probably a question for another paper as to whether clinical assessment should include an element of subjectivity or if it should be, or is capable of being completely objective. There have been criticisms of having any subjective element in clinical assessment and in order to overcome these concerns, clinic can be assessed in a variety of different ways including obtaining feedback from clients, giving the student a point based score[5] and using standardised clients. In order to assess the skills that a student has obtained whilst in clinic there is invariably a degree of subjectivity particularly if the person assessing is the student's supervisor. One way to counteract this is for all students to write a standardised letter or critique a standard file which is assessed by an independent person. Students can also create a portfolio of work that is accumulated over the course of the year and assessed. Any of these methods of assessment can be marked on a pass/fail basis or graded.

3 Full time students on the freestanding Legal Practice Course and Bar Vocational Course can also participate in the SLO from January to June.

4 Where a positive impression of the student has been formed which can influence the assessor to subconsciously distort information favourably this is known as the halo effect and conversely, where a negative impression has been formed this is referred to as the horns effect. Dunn, L., Morgan, C., O'Reilly, M & Parry, S. (2004). *The Student Assessment Handbook*. London, Routledge Falmer. page 255.

5 Stuckey, R (2006) '*Can We Assess What We Purport To Teach In Clinical Law Courses?*' 9 International Journal Clinical Legal Education 9–28 at page 23.

In the SLO, students submit a portfolio evidencing the live client work they have undertaken throughout the academic year. This will typically comprise draft and final versions of correspondence, attendance notes, research reports, legal pleadings and interview plans. The portfolio contributes 70% toward the mark for the module with the remaining 30% attributed to 3 written pieces reflecting on skills in practice, the law in action and one other optional reflective account selected from a prescribed list of titles. The portfolio and reflective pieces are assessed by the solicitor who has supervised the student during the year and these are moderated by a supervisor who has no connection to the student. The question then is how the portfolio or any other means of assessment is best assessed. Should clinical work be assessed by way of general criteria or formalised grade descriptors?

How Should Clinic Be Assessed – Grade Descriptors Versus Criteria

For many years the Student Law Office assessed student performance utilising a list of criteria. The 13 point list essentially required the clinician to evaluate "to what extent" a student had performed across a range of areas. For example, to what extent did they:

- Participate in and diligently conduct cases
- Begin to develop an ability to manage and analyse factual information
- Begin to develop an ability to plan the conduct of a case
- Demonstrate an ability to critically consider and analyse the development of their legal skills

It can be sen from the above that the criteria were scant in terms of context.

Criterion referenced assessment

The Carnegie Report hits the nail on the head when it identifies the key difficulty with criterion referenced assessment – ensuring consistency when grading.[6] Clinicians have qualities which they look for in students, and they will rank some of those abilities and attributes more highly than others. For example, commercial clinicians might rank drafting skills above those of advocacy, and vice versa for criminal clinicians. Consequently, the question must be posed – using a list of criteria can we ever be entirely confident that we are marking to the same standards? How can we be certain that one clinician's mark of 65 is comparable to another's 65?

Stuckey highlights further issues with criteria based assessment when he states, "when criteria are given to students, they tend to be checklists that cover the entire spectrum of lawyering activities without any description of different levels of proficiency."[7] This quotation highlights two pitfalls of assessing using criteria. The first is that students will see the criteria as an inventory and may simply tick off what they have achieved from the list without perhaps considering to *what extent* that skill has been developed. Furthermore, if the list is exhaustive students may not strive to achieve above and beyond the criteria specified. From a teaching perspective, the use of criteria may therefore stifle ambition to realise full potential and achievement. And what if a student

6 Sullivan, W.M. et al., (2007) *Educating Lawyers: Preparation for the Profession of Law*. San Francisco: Jossey– Bass Inc, page 170.

7 Stuckey, R, *Best Practices*, op. cit at page 238.

displays qualities outside the scope of what is provided for by the criteria; can this be rewarded if those qualities do not explicitly appear within the assessment criteria?

The other problematic aspect which Stuckey identifies is the lack of guidance offered by written criteria. His assertion that they lack any description or meaningful instruction on performance levels is something of which SLO clinicians were acutely aware. The lack of explicit guidance on performance levels resulted in uncertainty that each and every single clinician was marking to the same standard. One might hope that any inconsistencies would be rectified in the moderating process however, it must be extraordinarily difficult for a second marker to evaluate the work without the benefit of having monitored the student's progress throughout the year. For example, two portfolios of work might contain excellent pieces of work. What may not be evident to the second marker is that one student may have produced excellent first attempts requiring little amendment or input from the supervising clinician, whilst the other student may have needed several attempts before achieving the finished product. Furthermore, intangible attributes, such as initiative, will not necessarily be obvious to a second marker from viewing a collection of the student's written work.

Whilst the lack of guidance on the one hand may lead to inconsistent marking, some clinician's may enjoy the room for discretion which this inevitably allows. The flexible nature of assessing via an imprecise list of criteria arguably fits the unpredictable and personal nature of clinic. That is to say, a rigid and static assessment regime may be suited to a controlled form of assessment such as an essay or exam question, but given live client work often takes unexpected turns, clinic should have an assessment method which allows for discretion and flexibility. A list of criteria certainly possesses this quality, but arguably at an unacceptable level.

Furthermore, where criteria are too vague or lacking in detail, it is too tempting to rely on a subjective, rather than objective, assessment of the student performance, and subjectivity promotes inconsistent marking.

It is clear, then, that there are issues with the use of a list of criteria as an assessment method from both student and teaching perspectives. Thus, the decision was taken to abandon the use of criteria and a new assessment regime of grade descriptors was introduced.

Grade Descriptors[8]

As a result of the above concerns, grade descriptors were formulated detailing the level students would have to reach in order to achieve a 2.2 classification (50–59%), a 2.1 classification (60–69%) and a first (70%+). They also profiled a fail student (<50%) and a strong first student (>80%). The grade descriptors were based on discussions with clinical supervisors regarding the factors they concentrated on when assessing students.

The descriptors concentrated on the student's ability to demonstrate autonomous learning. This encompassed the student's ability to identify and apply the law, plan and manage cases, and learn from past performance. The grade descriptors identify the performance indicators which a student has to achieve across all classification levels.

8 The full grade descriptors can be viewed at http://www.northumbria.ac.uk/sd/academic/law/slonew/assessment/

For example:

Fail student	**2.2 student**	**2.1 student**	**First class student**	**Strong first class**
The student demonstrates little commitment or energy to achieving the best resolution for the client.	The student will often demonstrate enthusiasm and empathy but commitment to the client's case may be undermined by failure to do work to a sufficiently high standard.	The student shows commitment to their clients and is able to demonstrate empathy for the client.	There will be a high level of commitment to the client.	The student's communications with the client instil a high level of confidence about their ability to empathise with, understand and serve the client's interests.

A minor failing of the grade descriptors was identified when conducting our research. In some cases a performance indicator was not present across all classifications.[9] This only became apparent when a detailed comparison of the grade descriptors was completed. For example,

Fail student	**2.2 student**	**2.1 student**	**First class student**	**Strong first class**
The student will look to the supervisor for instruction; there is little sense of the student planning how best to progress the case. Case management skills are likely to be weak.	The student will carry out tasks assigned to him or her but will rarely show initiative in planning how best to progress the case.	[No applicable performance indicator provided]	[No applicable performance indicator provided]	The student requires little active supervision and can be trusted to identify tasks and take appropriate action subject to supervisor approval.

Once a relevant performance indicator has been determined, care needs to be taken that it is tracked across the classifications.

9 This anomaly has now been rectified.

Staff Opinions On Assessing Using Criteria And Grade Descriptors

To gather staff opinion on the assessment regimes, SLO clinicians were invited to a focus session at which both the criteria and grade descriptors were discussed. Two staff focus meetings were held; one before and one after assessing using the new grade descriptor regime. Both meetings were attended by clinicians of different subject specialism, and in order to obtain a full spectrum of opinion, new SLO clinicians who had used neither regime also contributed.

The first meeting

At the initial meeting supervisors felt that by assessing using the criteria they were effectively free to grade a student as they wished because of the malleability of the criteria. There was a strong consensus that the most important criteria were the ones that related to a student's proactivity on the file, namely the last two criteria on the list:

- Begin to develop an ability to review case files and to plan the conduct of a case
- Begin to develop an ability to manage and analyse factual information on case files

There was a solid belief that these two criteria were critical in distinguishing between students and in providing a specific grade. Several supervisors confirmed that prior to marking they ranked their students before looking at the portfolios, then they would look at the portfolio to see if their ranking fit the criteria. They paid particular attention to the above two criteria to grade the students, although in most cases they already had the classification in mind. Overall supervisors felt the use of the criteria when marking did not particularly influence them in their assessment as most had a good idea of what the final grade was going to be for a particular student. However, they were concerned about the subjective nature of using criteria to assess students. It was agreed that under the criteria it was difficult for students to truly understand what performance was required to achieve a particular classification. This led one supervisor to state that all students "fear the subjectivity of supervisors". However another supervisor argued that in a non clinical module, markers receive an answer guide but no indication of the level required for each classification, yet this is seen as objective marking..

At this first meeting the grade descriptors were also discussed to ascertain supervisors' views on their use for the up-coming assessment. There was a general feeling that the descriptors would promote greater consistency of marking and that students would have more guidance as to what supervisors were looking for. This did pre-suppose that the students looked at the grade descriptors and worked with them throughout the course of the SLO.[10] Supervisors generally agreed that having the grade descriptors made them feel more confident that their expectation of a 2.2 was the same as other supervisors 2.2; this was particularly the case for first time supervisors in the SLO who had not previously graded clinic. One concern with the descriptors was that they could be used as a 'tick chart' with supervisors simply ticking across the range of classifications with the ticks simply added up to establish what classification the student would achieve. It was, however, felt that this was unlikely to happen and the general consensus prior to marking was that a student would not be given a mark that the supervisor did not think they deserved.

10 One supervisor asked his students whether they had used the grade descriptors whilst in the SLO and the consensus was that they had looked at them at the start of the year however they had not then referred to them again until the mid-year appraisal.

An issue was raised both with the criteria and grade descriptors as to whether the students were graded on the day that the assessment was handed in or were they graded over the course of the year and therefore credit was to be given for improvement. There was a strong sense that the criteria did not address this and that arguably the grade descriptors did not either. One supervisor stated that, "I assess students all the time and what I am doing is developing an impression of them and varying the level of expectation. On the [hand in date] I will come to my final conclusion. That has got to be my assessment otherwise I will prejudice them ... and not give credit for improvement."

The second meeting

After marking using the grade descriptors a second meeting was held with the same supervisors who had attended the initial meeting. They were asked what they felt about the grade descriptors having now utilised them to assess student performance. The initial expectation that the grade descriptors would inform the supervisor's marking habits was confirmed previously using the criteria supervisors felt they graded using an element of gut instinct, due to the criteria being vague. Conversely, the much more informative nature of the grade descriptors promoted objective and consistent marking as everyone was singing off the same explicit hymn sheet. Clinicians felt more confident that they were marking to the same standard as their colleagues using the descriptors than when using the criteria, because there was no need to add flesh to the latter's bones.

It was stated above that the flexibility of written criteria afforded room for discretion when marking, which was, to some extent, a desirable feature. In the second focus group it was felt that as the descriptors were particularly descriptive, when grading there occasionally appeared to be a lack of room for manoeuvre. In particular, two supervisors felt that because of the prescriptive wording of the grade descriptors they felt compelled to award first class marks to students, who under the previous regime, would have received a 2.1 classification. Furthermore, the grade descriptors have not removed weighting issues. For example, one supervisor might attach more importance to one performance indicator over another supervisor and this might affect overall mark. It was also felt that the descriptors were used much more by some supervisors over the course of the year therefore they were not relied on heavily at the time of assessment since the supervisor already had an idea of the grade in mind. The descriptors still did not remove the normative element of assessing the students as it appeared that there was still a tendency for supervisors to rank students prior to finally assessing them and awarding an overall grade. The grade descriptors did not therefore remove all the subjectivity of the assessment but certainly tempered it and since the mark needed to be justified against the descriptor, objectivity was more pronounced.

From the moderation process it was noted that a mix of liberal and strict markers still existed despite moving to a much more explicit marking regime. Overall, staff were satisfied with assessing via the grade descriptors and it has been agreed that they will be used for assessment purposes in the next academic year.

Student Perspectives

Although having no experience of grade descriptors elsewhere on the degree, students appeared equally positive towards them. Student views were obtained though an anonymous questionnaire, which was sent to all 130 full time final year students on the module, prior to being summatively assessed. A total of 45 questionnaires were completed, giving a return rate of 35%.

The questionnaire selected 5 descriptors (commitment, key skills, insight, awareness of development and use of reflection) and reproduced the statement for that descriptor for each classification (fail, lower second class, upper second class, first class and strong first class student). For example, taking the descriptor for "commitment," a failing student would demonstrate "little commitment or energy to achieving the best resolution for the client." At the opposite end of the scale, the strong first class read "the student's communications with the client instil a high level of confidence about their ability to empathise with, understand and serve the client's interests."

The questionnaire then asked whether the student was confident that they understood the grade descriptor, whether they were confident they knew which level they were working at (fail, 2.2, 2.1, first class etc) and whether they were clear on what action was needed to improve to the next classification of descriptor. The responses available to students were: question not clear, strongly disagree, disagree, agree and strongly agree.

The overwhelming majority of students indicated that they understood the descriptors.[11] Interestingly, although not all students were confident they knew their current grade level, the results indicate that on the whole, they were clear about what action they needed to take to reach the next level of classification.

The questionnaire also included two further statements which were intended to shed light on student motivation. The first statement was "the grade descriptors influence how I carry out my live client work;" the second "I try to perform well because I'm working for a real person, rather than because I am being assessed." The same responses were available to students and they were also able to comment on the statements. There was an even split: 21 students disagreed or strongly disagreed that the grade descriptors influenced their clinical work and 22 students agreed or strongly agreed with the contrary proposition. The additional comments also reflected the divided opinion. One student commented, "You're thinking about doing best [sic] for client rather than what grade band you'll fit into." Another student remarked that they tried, "to treat SLO like practice and strive to achieve my best, therefore [I] will meet…the grade descriptors."

Opinions about the second statement were much more uniform with 37 respondents agreeing or strongly agreeing that they were client rather than assessment driven. Some students further commented that they were motivated by a "combination of the two" and felt it was a matter of balancing the two competing interests as they were not mutually exclusive. One candid student noted "I'd be a liar if I said the SLO grade is not always at the back of my mind." Similarly one of the cohort thought it was "unavoidable" that their performance was assessment driven due to the impact the SLO can have on degree classification. Whereas Rice[12] views assessment driven motivation negatively, one student observed that, "in striving to get a good mark the client benefits from [a] high standard of work."

11 For commitment students voted as follows: strongly agree 15, agree 26, disagree 3, strongly disagree 0 and question not clear 0. For key skills: strongly agree, 10, agree 32, disagree 2, strongly disagree 1 and question not clear 0. For insight: strongly agree 6, agree 35, disagree 4, strongly disagree 0 and question not clear 0. For awareness of development: strongly agree 9, agree 35, disagree 1, strongly disagree 0 and question not clear 0. Finally, use of reflection: strongly agree 8, agree 30, disagree 7, strongly disagree 0 and question not clear 0.

12 Rice, S. (2007) '*Assessing – but not grading – clinical legal education*' Macquarie Law Working Paper No. 2007-16 available to download at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1061622

How The Regimes Compare – The Statistics

In 2006/2007, using the list of criteria, the average mark awarded for the portfolio was 65.6%, compared to 67.3% when applying the grade descriptors the following year. This is by no means a dramatic rise, although a closer inspection of further statistics highlights some interesting results. In particular there was a significant increase in the highest overall mark – 76% in 2006/2007 rising to 85% in 2007/2008. Similarly, the number of first class marks jumped from 36 to 51. There are notable disparities in the year to year results, but what conclusions can be drawn from this data and how do the results compare to non clinical modules?

It is possible that the higher results are a direct consequence of the explicitness of the grade descriptors. That is to say, students have a clear understanding of what is required to achieve the highest level and can therefore strive to reach those said levels. This cannot be said of the former criteria which lacked any meaningful guidance of what levels of proficiency were needed to achieve a particular classification. An alternative supposition is that the grade descriptors are too generously worded resulting in additional students scoring more highly than they ought. This is reinforced by the view, as stated above, of at least two clinicians who would have bestowed 2.1 classifications under the old regime, but for the wording of the grade descriptors compelling the award of a first class mark.

This latter explanation for the increase in marks also draws support when one views the results of the same group of students in non clinical subjects. Take for example the performance in a taught, classroom based year long module which would typically be assessed by the student sitting an end of year exam and submitting a piece of coursework. Whilst the pedagogy will be vastly different, the two modules are of the same duration and both assessed, so the much touted notion of the "assessment driven student" is still omni-present. It is interesting to note therefore that in 2007/2008 the average mark for the clinical module was 68%, compared to 61% for non clinical subjects. What is perhaps more telling is the comparison of the marks awarded for the students' dissertation, which, like clinic, is completed over an academic year with formative feedback. Also, not dissimilar to clinic, the student has relative autonomy over the subject area to be studied.[13] One might therefore suspect that the results would be relatively similar. However, this is not entirely reflected in the results; the average mark in 2007/2008 for dissertations being 64%.

Should Clinic Be Assessed At All?

In the staff focus sessions, whilst looking at how the SLO approaches assessment of clinical work the question was raised whether we should move away from grading clinic and assess clinic on a pass/fail basis, or whether we should assess clinic at all.

Given that the aims and format of clinic are incredibly diverse it is not uncommon for clinical modules to lack any form of summative assessment. The trend for not assessing clinic generally attaches to voluntary or optional clinical modules. Where law schools do formally assess clinic, again the practices vary. The module may be fully graded, marked on a pass fail basis or the student may be awarded a credit. If we take as a starting point Stuckey's comment that "the current

13 In the SLO students select a first and second choice area of law from a list of criminal appeals, employment, civil, business, housing, education and welfare benefits. The overwhelming majority if students are successfully placed according to their stated preference.

assessment practices used by most law teachers are abominable,"[14] we might well question whether no assessment is indeed good assessment.

There are a variety of reasons why performance should be assessed, perhaps the most common being that it recognises the efforts displayed by students and it motivates them to achieve. This is supported by Brustin and Chavkin's findings that numerical grading had a "significant positive impact" on clinical students' motivation.[15]

Whereas Rice[16] is wholeheartedly in favour of assessing clinic, that is where his support for assessment comes to a halt. He suggests that clinicians "take for granted"[17] that clinic should be fully graded and advocates a pass/fail assessment regime as an alternative.

In his working paper, Rice presents a robust attack on grading, arguing that it is "simple and simplistic mechanism. I suspect that it is attractive to teachers precisely because it is unspecific and impersonal."[18] Whilst it may be true to say that a number or letter in isolation can be perceived as impersonal or that it is not particularly helpful to the student in terms of highlighting where they have (under)achieved, Rice apparently disregards the vast amount of feedback students receive when undertaking clinical work. Unlike other classroom based modules, clinical students will invariably have each piece of work formatively assessed and often appraisals, together with regular supervisor contact, are a feature of the unit. Therefore throughout the clinical experience, students should have developed a clear understanding of their strengths, weaknesses and how they are performing generally. Their final grade is therefore unlikely to be a surprise given the extensive feedback with which they ought to have been furnished.

Taking this into consideration Rice's supposition that grading is impersonal and unspecific can be rebutted. It can further be argued that clinic is perhaps the most time intensive element of any law degree in terms of providing feedback and assessment. It should also be remembered that unlike traditional assessment methods, for example essays or problem based questions, with clinic there are no right answers. Consequently, it is arguably simpler to grade non clinical modules where you have the joy of an answer guide. It is extremely doubtful that students receive anywhere near the level of feedback outside of clinic and Rice's implication that teachers grade because it is an 'easy option' is perhaps more than a little harsh.

Regarding the assertion that a tangible grade will motivate students, Rice argues that the "clinical experience transcends students' need for incentive."[19] He goes on to say that to "rely on grading as incentive for clinical students does either both of: patronising the students, as incapable of pursuing learning for its and their own sakes, and condemning the teachers, as incapable of inspiring students to do just that."[20] Whilst clinic can be the most invigorating and stimulating component of a degree, and may well be the sole motivator for some, it is difficult to suppose that this is true of all students. Perhaps where Rice goes awry is his submission that we rely on grading as a motivator. Is it not more accurate to say that it is a by-product of fully grading a module?

When put into context and looking at the demands and constraints on today's students, Rice's

14 Stuckey, R, *Best Practices*, op. cit page 239

15 Brustin, S. L & Chavkin, D. F. (1997) '*Testing the Grades: Evaluating Grading Models in Clinical Legal Education*,' 3 Clinical Law Review 299 – 336 at page 314.

16 Rice, S. op. cit.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

views may be criticised for being idealistic. Take for instance the notion that students might be incentivised and motivated by an actual grade, be it numerical or a letter grade, as opposed to a mere pass or fail credit. This argument seems feasible given the highly competitive and somewhat limited availability of training contracts or pupillages on graduation.

By way of illustration, in order to qualify as a solicitor in the UK, the traditional route, having undertaken the academic stage of qualification, would be to complete a training contract of 2 years duration. In the UK in 2007 a total of 9,850 students had enrolled on the post graduate Legal Practice Course, the final stage academic requirement which renders a student eligible to undertake a training contract.[21] However, in the year up to 31 July 2007 only 6,012 training contracts were registered with the Law Society.[22] There is a clear shortfall in the number of training contracts available and the statistics are rendered yet more depressing when you take into account that graduates from previous years who have not been successful in securing a training contract will also be competing with the latest exiting cohort. If this were not competition enough, in 2007 of those who successfully completed the LPC, over one fifth of students were awarded a distinction and in excess of one quarter achieved a commendation, (the remaining students receiving a pass).[23]

For a student looking to enter a career in law in a climate where there are a disproportionately more candidates for training contracts than places, can we blame students for being assessment focussed? Arguably something has to act as a motivating factor for the student; if assessment promotes student engagement with the learning process is this so deplorable? We also have to consider that in clinic there is often a client involved and if students engage with that client's problem but also work to the best of their ability, or beyond, to get the grade then that is preferable to a student who does not engage or achieve because it will not be recognised by a grade.

Rice also claims that grading encourages surface learning as it places "greater value on learned skills and retained knowledge than on new thinking and awareness."[24] Whilst this may be true of traditionally taught subjects, clinical students do not have the opportunity to score highly from memorising and regurgitating lecture notes; the clinical pedagogy defies the surface learning approach. Furthermore, if the assessment incorporates a reflective element, then, on the contrary, this can be said to promote deep learning as the student will have considered their performance and the role of law from several perspectives.

Another rationale for grading has its roots in the historical view that clinic is inferior to academic subjects and that to be elevated to the same stature, it must be graded.[25] It has often been thought that clinic teaches skills rather than robust legal knowledge and consequently has not always been perceived as equal to non clinical subjects. Therefore assessing and fully grading students provides clinic with the same integrity as other degree subjects. Whilst this argument may at one time have

21 Trends in the Solicitors' Profession, Annual Statistical Report 2007, The Law Society at page 37. Available at http://www.lawsociety.org.uk/secure/file/174971/e:/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/asr2007report.pdf. (accessed 12 August 2008).

22 Ibid, at page 37.

23 Ibid, at page 35.

24 Rice, op. cit at page 13.

25 Brustin, S. L & Chavkin, D. F. op. cit at page 301.

been significant, the authors feel that given the increasing popularity of clinic, it is perhaps no longer a key concern as it may have been decades ago.[26]

Given the criticisms of assessment, discussed above, the SLO focus group was asked whether students should be assessed on a pass/fail basis. There was no support for this suggestion for several reasons. These included the notion that since students would graduate with both a law degree and postgraduate professional qualification, it was more befitting to award a mark as opposed to a pass/fail credit. It was also accepted that assessment can incentivise students to perform better, and since the supervisor's practising certificate is potentially at stake, not to mention the client's interests, it was thought that this was somewhat desirable.

Conclusion

It would seem overall that supervisors and students alike prefer the grade descriptors to the list of criteria. For supervisors it was felt that the grade descriptors afforded them some measure of the level that students should be achieving for a particular classification. For students the descriptors provided a solid base to work from and informed them of how they could achieve a better grade in the SLO. The grade descriptors also went someway to dispelling the fear held by some students that their grade was subjectively decided by a supervisor. It was agreed that the grade descriptors still required some further amendments and discussion but that they were a welcome move away from the criteria previously used, however the argument to retain an element of subjectivity in what is an individual assessment is still strong.

The debate regarding the grading of clinic seems set to rumble on. For the SLO, due to the fact that it is a year long, compulsory subject that accounts for 40% of the students fourth year mark, it is our view that it has to be graded. This allows the student to demonstrate in tangible and meaningful terms their achievement in clinic. For clinics that are voluntary and/or not as intensive then there may be a more appropriate way to assess or recognise the student's contribution.

It would seem that there is still a long way to go in the debate over how to grade clinic and whether clinic should be graded. Overall our research indicated that, certainly for the SLO, grading using grade descriptors meant greater transparency and consistency and made grading less of an ambiguous art and more of a consistent science.

26 In 2006 of the 95 law schools surveyed in the UK, 53% were involved with pro bono activity, 12% intended to become involved in the following academic year and 8% were considering undertaking pro bono activity. This is a noticeable increase on the figures obtained in a similar survey in 2003. See *Law Works Students Project Pro Bono – The Next Generation* at page 3. Available at http://www.probonogroup.org.uk/lawworks/docs/Student%20report%20Final.pdf

Clinical Practice

A Medical/Legal Teaching and Assessment Collaboration on Domestic Violence: Assessment Using Standardized Patients/Standardized Clients

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Introduction

Assessment of skills is an important, emerging topic in law school education. Two recent and influential books, *Educating Lawyers*[3] published by the Carnegie Foundation and *Best Practices in Legal Education*,[4] published by the Clinical Legal Education Association have both suggested dramatic reform of legal education. Among other reforms, these studies urge law schools to use "outcome-based" assessments, *i.e.*, using learning objectives [5] and assessing knowledge and skills in standardized situations based on specific criteria, rather than simply comparing students' performances to each other. [6]

According to *Best Practices*, England, Wales, Scotland and Australia are transitioning to outcome based legal education.[7] The American Bar Association (ABA) Council on Legal Education has formed a special committee to study law school outcome measures in connection with its role as the accrediting agency in the United States.[8] The Committee report specifically mentions the outcome based accreditation standards used in medical education that include objective structured clinical examinations (OSCE).[9] The OSCEs use standardized patients (SPs) to simulate medical problems in order to teach and to assess learners' clinical skills in simulated, "real world" situations.

Since the 1970's medical schools in the United States have used standardized patients to teach and assess patient evaluation skills. These assessments provide feedback to both learners and educational programs. Learners use feedback to focus their learning efforts and programs use feedback to guide curricular changes.[10] In 2004, the National Board of Medical Examiners incorporated standardized patient assessments into physician licensing requirements.[11] The use of standardized clients in law schools has been much more limited.[12]

3 William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007) (hereinafter Educating Lawyers or the Carnegie Report).

4 Roy Stuckey and others, *Best Practices for Legal Education: A Vision and a Road Map* (2007) (hereinafter Best Practices). Mary Lynch and Albany Law School have created a blog: "1) to create a useful web-based source of information on current reforms in legal education arising from the publication of Roy Stuckey's *Best Practices for Legal Education and the Carnegie Foundation's Educating Lawyers*; and 2) to create a place where those interested in the future of legal education can freely exchange ideas, concerns, and opinions." http://bestpracticeslegaled .albanylawblogs.org/ (visited 9/14/08).

5 Roy Stuckey, *Teaching with Purpose: Defining and Achieving Outcomes in Clinical Courses*, 13 Clinical L. Rev. 807 (2007).

6 Antoinette Sedillo Lopez, *Leading Change In Legal Education – Educating Lawyers and Best Practices: Good News for Diversity*, 31 Seattle L. Rev. (forthcoming). Greg S. Munro, *How Do We Know if We are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation*, 1 J. Ass'n L. Writing Directors 229 (2002).

7 *Best Practices*, op. cit at 45. See also, Roy Stuckey, *The Evolution of Legal Education in the United States and the United Kingdom: How one system became more faculty-oriented while the other became more consumer-oriented*, (2004) IJCLE 101.

8 The committee is chaired by Randy Hertz. A copy of the committee report is posted on the ABA web site. American Bar Association, Section of Legal Education and Admissions to the Bar, Report of the Outcome Measures Committee, http://www.abanet.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf

9 Id.

10 Greg S. Munro, *How Do We Know if We are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation*, 1 J. Ass'n L. Writing Directors 229 (2002).

11 Howard S. Barrows, *An Overview of the Uses of Standardizd Patients for Teaching and Evaluating Clinical Skills*, 68 Acad. Med. 443 (1993).

12 Professor Grosberg developed a pilot project to evaluate their effectiveness at New York Law School. See Lawrence M. Grosberg, *Medical Education Again Provides a Model for Law Schools: The Standardized Patient Becomes the Standardized Client*, 51 J. Legal Educ. 212 (2001). (noting the uniqueness of the model

The social problem of domestic violence (DV) has created a need for increased professional awareness and expertise.[13] Two of the key systems that identify and offer assistance to victims of DV include the legal system (*e.g.*, judges, law enforcement, family law lawyers, legal aid) and the medical system (*e.g.*, first responders, physicians and nurses, particularly in emergency departments and primary care clinics, dentists). As in most professional schools, the DV curricula in our law and medical schools are underdeveloped and they were not integrated. In the summer, 2007 a public interest lawyer (GC) and a faculty member (CC) from the Department of Emergency Medicine at the University of New Mexico approached the Law School about collaborating on a joint DV training program. Professor Sedillo Lopez teaches family law, and she was very interested in leveraging resources and in new approaches to addressing DV.[14] Thus, the DV Medical/Legal Collaboration was born.

Educational Foundation

Learning theory indicates students learn best when they are engaged, when they have an immediate "need to know"; when learning is active; [15] and, when they receive timely, constructive feedback.[16] Problem based learning can help teachers identify students' misconceptions and can help students build on their prior knowledge.[17] A goal was to use best practices in education to boost knowledge about DV and interviewing and counseling skills in DV among law students and medical

(12 cont) for legal education); Karen Barton, Clark Cunningham, Gregory Todd Jones & Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 Clinical L. Rev. 1 (2006) (measuring effectiveness of use of standardized client in a Scottish law school); Paul Maharg, *Transforming Legal Education: Learning and Teaching the Law in the Early 21st Century* (2007) (describing vision for reform of legal education in Scotland, including the unique use of standardized client).

13 Lenora Olson, Carolyn L. Anctil, Fullerton, Judith Brillman, Justin Arbuckle, David Sklar. *Increasing emergency physician recognition of domestic violence.* 27(6): Ann Emerg. Med. 741 (1996) Justin Arbuckle, Lenora Olson, Mike Howard, Judith Brillman, Carolyn Anctil, David Sklar, *Safe at Home? Domestic Violence and other homicides about women in New Mexico*. Ann. Emerg. Med. 1996 Feb.27;(2): 210–5. Jennifer Brokaw, Lynne Fullerton-Gleason Lenora Olson L, Cameron Crandall, Steven McLaughlin S, David Sklar D. *Health status and intimate partner violence: a cross-sectional study*. 31 Ann Emerg Med. 8 (2002).

14 Although Family Law is taught at the University of New Mexico (UNM) School of Law as a substantive course and not a clinical course, this project was an example of using clinical methodology in a traditional substantive course. The University of New Mexico requires all law students to complete a six credit required client-service clinical course. See Michael Norwood, *Requiring a Live Client, In-House Clinical Course: A Report on the University of New Mexico Law School Experience*, 19 N.M. L. Rev. 265 (1989) (analyzing the structure and history of the UNM clinical program); Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 Clinical L. Rev. 307 (2001) (describing UNM's required clinical law program).

15 Julie Macfarlane and John Manwaring, *Using Problem-Based Learning to Teach First Year Contracts*, 16 J. Professional L. Educ. 271 (1998); Susan Bryant & Elliot Millstein, *Rounds: Signature Pedagogy for Clinical Legal Education?* 14 Clinical L. Rev. 195(2007); Myron Moskovitz, *Beyond the Case Method, It's Time to Teach with Problems*, 42 J. L. Educ. 241 (1992).

16 Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 Vand. L. Rev. 321 (1982); *Amy Zielgler, Developing a System of Evaluation in Clinical Legal Teaching*, 42 J. Legal Educ. 575 (1992).

17 Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self Awareness and Intercultural Communication in a Client Service Clinic*, 28 Wash. U. J. L. & Pol'y (forthcoming); Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 Antioch L. J. 301 (1986); Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self Awareness in Performance,* 13 Clinical L. Rev. 1213 (2006) (describing how to use feedback sessions to teach students to self-critique and emphasizing the value of feedback); Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y. 21 N.Y.U. Rev. L.& Soc. Change 109, 146–49 (1993–94); Richard K. Neumann, *A Preliminary Inquiry into the Art of Critique*, 40 Hastings L.J. 725 (1989) (discussing methods of critiquing simulation).

residents.[18] Best Practices includes the use of formative assessment, which is ungraded feedback about students' performance.[19] It is a valuable way to help students learn, because it gives students interim feedback so that they can improve their skills. Students can reflect on the formative assessment to enhance their learning. Particularly in the area of domestic violence, students presented with situations to address can become more aware of their attitudes toward the issues and the clients. [20] Focusing on effective communication skills can help students develop the ability to establish rapport and demonstrate empathy.[21] Giving students feedback on their performance in a realistic environment can help them improve their performance.[22] The problems were used in a pre-test and a post-test to evaluate the effectiveness of our training sessions. [23] The paper will discuss the law-medicine collaboration process in the development and use of a standardized patient/ client as part of training and assessment about domestic violence.

Method

The Collaboration

In order to implement the educational principles described above, a collaborative team was formed. Team members included emergency medicine professors from the medical school, formative assessment specialists, SP training specialists, a community attorney who specializes in domestic violence, professors and a teaching assistant from the law school. The team members met to design the teaching (curricular intervention) and assessment plan (pre- and post-test).

Selected participant learners were 18 emergency medicine residents in their second and third post graduate year and 26 second and third year law students enrolled in a family law course. Once the learning objectives were identified for each group (Table 1), four simulated cases were created with focus on health issues and legal concerns related to DV. SPs (trained actors or community members) portrayed the case, first as a medical patient and then as a legal client. Learners interviewed the patient/client in order to evaluate the presenting problem(s) and make recommendations consistent with best professional practice. Learners interacted with two cases prior to the curricular interventions and another two cases afterward.

Each of the four cases had two dimensions. Each case began with the SP presenting to the emergency department with a medical issue related to domestic violence. In half of the cases, the relationship of the medical complaint to domestic violence was overt[24]; in the other half, the relationship was

18 Susan M. Williams, *Putting Case-Based Instruction Into Context: Examples from Legal and Medical Education*, 2 (4) J. Learning Sciences 367 (1992) .

19 *Best Practices* at 191.

20 Emma Williamson, *Domestic Violence and Health* (2000).

21 Antoinette Sedillo Lopez, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self Awareness and Intercultural Communication in a Client Service Clinic*, 28 Wash. U. J. L. & Pol'y (forthcoming).

22 Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self Awareness in Performance*, 13 Clinical L. Rev. 1213 (2006) (describing how to use feedback sessions to teach students to self-critique).

23 An abstract summarizing the results was published. Cameron Crandall, Antoinette Sedillo Lopez, Steve McLaughlin, Diane Rimple, Gabriel Campos, Teresita McCarty, *Assessment of a Cross-Disciplinary Domestic Violence Training for Emergency Medicine Residents and Law Students*, 15 Academic Emergency Medicine Issue S1 p S225-S225 Published Online: May 1 2008 12:00AM DOI: 10.1111/j.1553-2712.2008.00130_4.x.

24 An overt relationship involved injury that was caused by the domestic violence.

more covert[25]. Following the medical assessment, the patient was then "referred" to a family law student for legal counseling.[26] The individuals who portrayed the patients/clients had ten hours of training per case led by training specialists and case content experts. Although there was more than one SP who portrayed a role in the case, the training methodology helped assure a higher level of consistency and standardization within and across portrayals. The SPs were also trained to score the learner's interview skills in a consistent and reliable manner using team developed, case specific checklists.[27] The learners' communication skills were assessed on a behaviorally anchored global rating scale developed at the UNM School of Medicine. The medical interview lasted 15 minutes and the law student interview lasted 30 minutes. Interviews were videotaped so the learners could watch and learn from observing themselves in action. Learners documented their interview as they would for the medical record or the client intake memo respectively.

Finally, learners completed surveys that elicited information about their attitudes toward DV, the learning methods used in this intervention, and perceived preparedness and competence for working with DV victims. The interview and communication skills scores were calculated and provided to the learners, as was access to a video recording of their interview.

The Curricular Intervention

The learners received lectures from DV experts including a legal aid attorney, emergency medicine physicians, a tribal attorney, and a domestic violence hearing commissioner. Academic and community resource materials were distributed, a first person account was shared, and there was a session for interdisciplinary case discussion between the residents and the law students.

Case Scenarios

The following are brief synopses of the case scenarios prepared by the team.

Case 1

Medical: Gabriela, a 30 year old woman, presents to the Emergency Department because of cramping and vaginal bleeding. Her live in boyfriend kicked her in the abdomen yesterday. The cramping and bleeding began after the assault.

Legal: Gabriela and John have been together for about 1 year and for the past 6 months they have had an increasingly violent relationship. Gabriela was born in Mexico and she is not a US citizen. John has become more controlling and often threatens to "deport" her while keeping their child.

Case 2

Medical: Maggie, 35 years old, presents to the Emergency Department because of a headache. She is worried about her blood pressure. Maggie is recently homeless and cannot afford her blood pressure medication. She and her two children are living in her car in a parking lot.

25 A covert relationship involved a tenuous relationship between the reason for the emergency room visit and the incidence of domestic violence.

26 This is similar to what would happen as a part of the Clinical Law Program's Med/Law Alliance started by Professor Mike Norwood. http://bestpracticeslegaled.albanylawblogs.org/2008/02/19/learning-from-medical-school%E2%80%94resident-and-law-student-interaction/ See also, J. Michael Norwood and Alan Paterson, *Problem Solving in a Multidisciplinary Environment: Must Ethics get in the Way of Holistic Service*, 9 Clinical L. Rev. 337 (2002).

27 A sample from the checklists is in the appendix.

Legal: Maggie divorced her husband, about 6 months ago. There was a history of physical and emotional abuse. He is supposed to pay $550 per month in child support but has not paid for several months. They have joint custody. Maggie is concerned about finances, housing, John's behavior and is worried about losing the kids. While she has not wanted to go to a shelter in previous encounters, with professionals, at this time, she is ready.

Case 3

Medical: Lucinda, 30 years old, presents to the Emergency Department complaining of a sore throat. She wears a scarf around her neck to hide strangulation impression marks sustained during an argument with her fiancé (Glen). She was encouraged to go to the ED by her sister.

Legal: Lucinda and Glen have been together for about 2 years. For the past 6 months, they have had an increasingly violent relationship. She works as an accountant. She is referred to the legal clinic to explore her legal options. She is resistant to an order of protection. She talks about the planning that has gone into her upcoming wedding.

Case 4

Medical: Charlene, a 40 year old American Indian woman, presents to the Emergency Department because her blood sugar has been high. The insulin she uses to control her diabetes went "bad" when her electricity was turned off because she could not afford to pay her utility bill. She is living in her apartment her two teenage children. She has mild thirst and frequent urination and no other symptoms of her elevated blood sugar.

Legal: Charlene legally separated from her husband, Mike about 6 months ago. Because there was physical and emotional abuse, she obtained a legal tribal order of protection. Charlene wants to know if the protection order is good off the tribal reservation. Although Charlene has custody of the two kids, Mike is not paying the mandated child support. Mike has been harassing Charlene for several weeks and she is concerned about money, housing, and safety.

Results

Eighteen (78%) emergency medicine residents and 26 (93%) family law students completed both the pre- and post-test portions of the study. Pre-intervention, emergency medicine residents scored 63% (8% standard deviation (SD)) on communication skills and gathered 71% (13%) of the pre-specified critical historical elements. Law students scored 62% (8%) on communication skills and gathered 66% (8%) of critical historical elements. Emergency medicine residents (64% (6%)) and family law students (63% (6%)) showed similar post-intervention communication skills scores. Both residents (77% (10%), improvement 6%, $p = 0.13$) and law students (71% (14%), improvement 8%, $p = .15$) showed modest but non-significant improvement in critical historical element gathering.

While there were no statistically significant changes in communication skills or critical history gathering by either the residents or the law students, post assessment surveys indicated the experience provided opportunities to learn new information and skills and review prior knowledge; learners indicated they felt more confident, most indicated an interest in learning more about DV. Law students indicated that they would have liked to have general interviewing skills training prior to the pre-test, the first two SP cases, so that they would have been more prepared

to interact with clients. In contrast, the emergency medicine residents have had substantial practice with general interviewing skills in their training program and in medical school. In addition, OSCE/SP interviews are relatively frequently used amongst medical trainees.

The law students were unfamiliar with the concept of a formative pre-test and did not trust that the pretest was really formative (not graded). Despite having an orientation to the SP interview and viewing a videotape of an example interview, law students did not like feeling "un-prepared" for the pre-test. Following the pre-test for the law students, the assessment truly demonstrated the powerful effect of formative techniques, as their level of interest in the material and their engagement of the material after the pre-test was very high.

Additionally, it was the law professor's impression on reviewing of a sample of the video-tapes that the law students demonstrated more confidence and empathy in the post test. Family law student comments about the experience were generally quite positive in the course evaluations. Finally, performance on the traditional law school exam was very good. All but one student identified the domestic violence issue on the exam and the discussion of the issue was quite comprehensive.

Following the intervention, the emergency medicine faculty noted an increased awareness of legal issues among the emergency medicine residents in their clinical assessments of patients in the emergency department. One emergency medicine resident stated that he had recognized important legal issues in several patients with a history of domestic violence in the first week after the intervention.

An unanticipated result of this collaborative project was the critical review of assessment practices occasioned by the impact of the criterion-referenced assessment culture of the medical school on the norm referenced law school assessment culture. Performance assessment, interview simulation, formative assessment, and scores that do not result in grades were new concepts to most of the law students.[28]

The collaborative group produced a synergy that has resulted in a number of related projects that are impacting the community (Table 3) and the curricula of both the law and medical school.

Conclusion

A brief cross-disciplinary training between medical and legal learners demonstrated low baseline scores in domestic violence assessment for both learning groups with modest, but non-significant improvements in gathering of critical historical elements following intervention. Longer didactic training or more focused skill building might improve skills. Results from this project were instrumental in promoting a critical evaluation of domestic violence training at both the law and medical schools at our university.

The team recently received a second grant from the Scholarship in Education Allocations Committee of the School of Medicine. The School of Law also contributed to the funding of the second phase of this project. We will use the grant to redesign the training to include skills training and role play exercises to enhance the law students' and residents' communication skills. We will be able to compare the effectiveness of the skills training to the didactic training we provided in 2007.

28 *Best Practices for Legal Education blog*: http://bestpracticeslegaled.albanylawblogs.org/2008/02/06/learning-from-medical-school-about-assessment/

Appendices

Table 1: Student Learning and Performance Objectives

Medical residents will:

- obtain appropriate and focused medical history
- recognize Domestic Violence as contributing factor to medical and social problems
- perform assessment and appropriate referral
- document patient findings in the medical record in a manner that is useful for legal follow-up
- develop evidence informed attitudes about how and why people end up in DV situations

Law students will:

- conduct an interview and establish rapport with a client who has experienced domestic violence
- work with the client to identify legal options and resources;
- provide information to client about legal options including civil and criminal remedies;
- provide information and counseling regarding safety planning;
- write an intake memo about the encounter that includes relevant case facts, identification of legal and social resources as well as client's desired outcomes.

Table 2: Sample critical action checklists for legal and medical legal learners for case 2, "Maggie"

Legal checklist for case 2

Law Students

1. Did student establish that interview is confidential?
2. Did student elicit/do a safe way to contact the client?
3. Did student elicit/do complete contact information for the perpetrator?
4. Did student elicit/do the current safety of the client?
5. Did student elicit/do safety planning with the client?
6. Did student discover if client is ready file order of protection?
7. Did the student explain legal options available to client pertaining to restraining orders?
8. Did the student elicit information from client regarding custody?
9. Did the student elicit information from client regarding child support?
10. Did student provide information for social service assistance (e.g. shelters, food banks)?
11. Did student elicit pattern of Domestic Violence including the number of incidents or the dates of incidents?
12. Did student elicit severity of abuse?
13. Did student elicit if there were any witnesses to the incidences of abuse?

Emergency medicine checklist

1. Did student discover when the headache started?
2. Did student elicit how bad the headache was?
3. Did the student elicit the associated symptom of dizziness?
4. Did student obtain medical history?
5. Did student elicit and address domestic violence as a contributing factor to the patient's presenting complaint?
6. Did student provide patient with information to contact at least 1 of the 4 following methods for people with low incomes to receive financial assistance for medication needs: Healthcare for the Homeless, UNM Care Program (for residents of Bernallio County), applying for public assistance or low cost drugs ($4) available through Wal-Mart?
7. Did student elicit current safety of the patient and her children?
8. Did student make a legal referral for patient?
9. Did student provide a medical follow up plan for patient?

Table 3

Med-Law Clinical Education Collaboration Interim Outcomes:

1. Best Practices for Legal Education blog entries: http://bestpracticeslegaled .albanylawblogs.org/2008/02/06/learning-from-medical-school-about-assessment/
2. Project presentation made to the New Mexico Domestic Violence Leadership Commission, Sharon Pino, New Mexico Domestic Violence Czar, Office of the Governor, Barbara Richardson, honorary chair. May 8, 2008.
3. Peer reviewed abstract accepted and poster presented at the Society for Academic Emergency Medicine. Washington, DC, May 31–June, 2008:

   Crandall C., Sedillo-Lopez A., McLaughlin S., Rimple D., Campos G., McCarty T., Assessment of a cross-disciplinary domestic violence training for emergency medicine residents and law students. Academic Emergency Medicine. 2008;15(1);S225-S225.
4. Peer reviewed abstract accepted and poster presented at Association of Standardized Patient Educators (ASPE) 2008 Conference: Scholarship and Simulation: Progress & Promise. San Antonio, Texas, June 29–July 2, 2008
5. Problem-based teaching case with DV related clinical content developed for SOM Phase I Human Structure Function & Development (HSF&D) Course. Block leader, Paul McGuire PhD.
6. Peer reviewed abstract accepted and oral presentation given at the 6th International Journal of Clinical Legal Education Conference, Cork, Ireland, July 14–15, 2008.
7. Peer reviewed abstract accepted and oral presentation planned for the Mid-West Clinical Education Conference, Bloomington, IN, November 13–15, 2008.
8. Anticipate submitting standardized patient cases for publication in AAMC's Med-Ed Portal.

Reflective Student Practitioner – an example integrating clinical experience into the curriculum

*Claire Sparrow**

Abstract

This project began in 2004 and involves LLB students training (in year two) and then acting as Citizens Advice Bureau ('CAB') advisers for 120 hours (in year three).

We have been able to incorporate this work into the existing course structure fully in third year (40 credit 'Reflective Student Practitioner' unit) and partially in second year (as part of a 10 credit Careers and Research Management unit), so that students undertake a substantial proportion of this work for credit. This has been possible by creating a parallel and alternative route to the existing 40 credit Legal Dissertation. Assessment in third year is by way of a 3,000 word legal essay (based on a legal topic raised in client interviews); a 3,000 word reflective analysis of their experience, a journal and three letters that they have drafted in their CAB work. This is produced through one-to-one supervision – in much the same way as one would supervise a dissertation.

Our aims in this project were to give students the opportunity to learn skills which would be of benefit in their professional lives, improve their employability and allow them to become more engaged in their local community. Portsmouth CAB was in need of more advisers and was interested in recruiting younger volunteers to establish a broader mix of advisers. The guarantee of 120 hours was a valuable commitment to them.

I propose to offer an explanation of how we manage our relationship with Portsmouth CAB and how we share responsibilities between us (for example, in training and recruitment). I also seek to evaluate what has worked well and what has been problematic in working with CAB.

*University of Portsmouth

Introduction

The University of Portsmouth CAB project was first piloted in 2004 by our now Head of Law School, Caroline Strevens. It sprang from a good contact within CAB, Eileen Higham, who had recently been appointed as the Service Manager of the Portsmouth CAB. This CAB was experiencing problems in recruiting and keeping a sufficiently large group of volunteers to staff the Bureau. One of the chief reasons for this was that the most ready source of volunteers – retired people – were choosing to use their time differently. Many more people are finding that they need to continue in paid employment – or that they simply want to travel and enjoy their leisure time in other ways. In 2004, Portsmouth CAB had a small core of advisers, some of whom were wishing to reduce their commitment to the Bureau as they got older.

Law students at the University were obvious candidates to fill some of these vacancies. The benefits to them, in terms of seeing the law in context and developing skills valuable to lawyers is so obvious that it hardly needs to be explained at length. What may be of interest is how we made use of this opportunity and the practical challenges and decisions that we had to make in incorporating volunteering into the curriculum.

What is the project?

Presently, students who wish to take the CAB route will choose to do so at the beginning of their second year. The CAB is bound by its own internal audit requirements and so every potential adviser must submit an application form and be interviewed to check suitability. This happens in the first few weeks of semester one in year two. CAB staff come into the University and spend a few days interviewing the students and making decisions.

Once accepted as trainee advisers, students have to complete the same CAB training process that all volunteer advisers must undertake. They complete a series of 'training packs' produced by CAB and record their progress in Records of Learning ('RLs'). The training packs cover matters as diverse as 'Aims, policies and principles' and 'Calculating Benefits'. There are four RLs in total before the trainee can become fully fledged as an adviser. The first two are completed using mostly paper training packs. The last two focus more on practice as an adviser and demonstrating competence in early interviews.

Each trainee must have a Guidance Tutor appointed by the Bureau. In our case, two members of staff have undertaken training to become advisers themselves and have been appointed the Guidance Tutors to the students. They initially supervise the completion of the first two RLs in weekly workshops held throughout the students' second year.

There are various training courses that students must also attend. The longest is four days and introduces students to the skills that they will need when advising. They undertake role plays and discuss their concerns with the leader of the course and fellow student trainees. When this course is completed, they are able to progress into the third RL and supervised interviews. From this point in the training, CAB staff rather than University tutors, act as Guidance Tutors. Once they have conducted three observed interviews, the CAB Guidance Tutor will decide if the student is ready to start interviewing alone and to start the final RL. To complete this, the student must undertake a case in a certain number of different areas of advice, such as housing, debt, etc.

Once the fourth RL has been completed, then the student is a fully qualified CAB Generalist

Adviser. We expect this stage to be reached either during the summer before they begin their third year or early on in the third year.

Once qualified, students are able to begin their 120 hours of advising in Bureau, which they will need to complete by the end of their third year.

Why have we integrated this into the curriculum?

As is apparent from the description of the process above, CAB training is time consuming. We had first asked for volunteers from the LLB courses to undertake the CAB training alongside other trainee volunteers. This would be extra-curricular and not for credit. Two volunteers, both mature students, decided to go ahead with this. However, CAB training was scheduled throughout teaching weeks and often clashed with the students' other classes. CAB was unhappy with their attendance and the students struggled. Following discussions with CAB, one way forward was to find a way of fitting the training and volunteering into the curriculum so that the students gained space in their timetables and also received credit for what they were doing. It also had the benefit of allowing University resources to be set aside – not least staff time to train as advisers and to act as Guidance Tutors.

How have we integrated it into the curriculum?

A student taking the CAB route proceeds as follows:

Second Year

Careers and Research Management Unit

This unit is a second semester unit only. For most students, this unit covers careers guidance and also the preparation and submission of a research proposal for the Legal Project or Legal Dissertation in their final year. 90% of the unit mark attaches to the proposal. For students on the CAB route, they do not undertake the research proposal. Instead, they give a 15 minute group presentation reflecting on their experience of training to become a CAB Adviser. 90% of the unit mark then attaches to this presentation.

Workshops are timetabled throughout the year for the CAB students, where they can come and complete the RLs and have them signed off by the University Guidance Tutors. This means that they will still work harder than non-CAB students who will only have lectures and seminars in this unit in semester two.

CAB students also need to get into the Bureau so that they can observe interviews and other Bureau procedures. They also attend the four day skills course at the beginning of semester two.

If students find that they have made a wrong decision and do not wish to proceed with the CAB route, then they are able to switch back to the non-CAB route simply by rejoining those students who are preparing their research proposals.

Third Year

CAB students taking this unit for credit will go on to take the *Reflective Student Practitioner* unit in year three. This is an alternative to the 40 credit Legal Dissertation.

By the end of this year, students are required to have completed their 120 hours of advising in Bureau. They have the flexibility to complete these hours over the summer before their third year if they live locally – or to work on it throughout third year. The Bureau monitors and counts the hours that the student attends. Some students have the opportunity to specialise further – whether in debt work or supporting the CAB Court Desk at Portsmouth County Court.

Assessment in the Reflective Student Practitioner unit

As in placements, students keep a diary of what happened and what they thought about these events. They have to produce examples of documents drafted on behalf of clients which demonstrate their 'lawyering skills'. However, we also wanted students to produce something law-related (not all advice areas in the CAB are primarily based on law) so that it could be more effectively moderated by an external examiner. We also wanted a piece of work which demonstrated genuine depth of reflection. We decided on two 3,000 word essays which would between them attract 80% of the overall unit mark.

The first piece is a 3,000 word essay which evaluates an area of law (chosen by the student) using the student's experience within CAB. For example, the student may have advised clients who came into the Bureau with problems with bailiffs. The student would then identify that there was a problem with the law in this area and begin to research it and explore reform. This is much like a normal analytical law essay – the difference being that it is stimulated by the student's experience and his or her awareness of how the law is affecting members of the local community. Another benefit of this assessment artefact is that it allows students to engage in more traditional self-directed legal research. Students also identify a broader range of topics than one might see, for example, in the Legal Project or Dissertation.

In terms of reflection, while trainee advisers are encouraged to assess their skills and progress as they complete their training, this self assessment and structured reflection stops once they are qualified advisers. We therefore asked for a 3,000 word reflective critique of the student's experience as part of the assessment in this unit. As teaching and assessing reflection is an area of interest to Caroline Strevens and myself, we set out to teach the students how to write reflectively. This involved workshops where we explained what we were looking for and also an introduction to the work of academics in the field such as Donald Schon, David Kolb, Georgina Ledvinka and Jenny Moon. This year we were also able to show students excerpts from past reflective critiques to highlight good practice. What we wanted to achieve was something beyond the student identifying how he or she felt and what needed to be done to improve his or her performance as a CAB adviser. The best pieces of reflective writing went through stages where they reflected on how they felt at the time of the event, how they felt after some time had passed and then finally on what this whole process told them about themselves as learners. We wanted them to identify how they improved their performance in Bureau, but also to look at what they had learned that would be of benefit outside that context – such as greater confidence or independence of thought. The reflective critiques would also demonstrate some understanding of the academic theories about learning from experience and the value of reflection.

Other than workshops (of which there were about two per semester) students were assigned a supervisor (one of the members of staff who had previously acted as a Guidance Tutor in year two). In producing the two 3,000 word essays, students used these supervisors in the same way that

they would a Dissertation supervisor – meeting regularly to discuss drafts and improvement of work. One of the most enjoyable aspects of teaching on this unit is the ability to talk to students in depth about their experiences and seeing them become more questioning and actively engaged with making sense of those experiences.

Student Feedback on reflective writing

There has been much positive feedback for the learning from experience units although it is clear that students do find reflective writing very difficult since it is so unlike any assessment task they have previously undertaken. They comment:

The best part of the unit was:

> *Hands on experience, improving career prospects. Reflective method of assessment has really helped me identify what I've learnt/ how I've improved.*
>
> *Doing practical experience, I have gained an insight how the law works in practice.*

Generally:

> *This unit has probably been the most important, valuable unit I have undertaken at uni. It has helped me identify key areas of law I would like to work in and also, particularly, taught me how to cope in stressful situations.*
>
> *A great way to develop and acquire new skills through experience – for me it was a great opportunity to familiarise myself with community issues.*

The negative comments mostly concerned the amount of work involved and how it would have compared to the workload involved in taking the dissertation unit.

It seems clear that while these students have had to work harder than traditional Legal Project or Dissertation students, they have gained something far more.

Other fringe benefits

We have benefited up to this year from inclusion in the Millennium Volunteers Scheme being run by the Government. This recognizes the achievement of volunteers under the age of 25 by awarding certificates for 100 and 200 hours of service. Of perhaps more practical benefit for the CAB, it also attracts some funding for each eligible volunteer.

A recent welcome development has been confirmation that our student CAB volunteers will also receive a Certificate of Advisory Practice from the Institute of Paralegals. They will also receive a year's membership of the Institute, joining at Associate level. This will allow them to use the letters A.Inst.Pa after their names and the professional designation 'Associate Paralegal'. Their hours spent doing CAB work will count as qualifying employment, fast-tracking them for Fellowship/Certified Paralegal status.

Both of these certificates are awarded in separate ceremonies on the day of Graduation.

Challenges

This project has worked so far because both sides gain benefits. The Bureau has a regular supply of trained advisers all committed to 120 hours at least. They also have University Guidance Tutors

to take some of the weight of constant training of new volunteers from them. The University benefits from the opportunity to have students gaining such valuable experience in advice work and, not least, from the welcome publicity that this generates. Continuing this successful relationship requires that both sides continue to benefit.

We have reached the present stage through a few years of trial and adjustment. It has been essential to maintain a good working relationship with the staff who work in the Bureau. They deal with the students when they are there and make decisions about their readiness to interview. Keeping this good relationship has been possible in part because University staff teaching on the CAB route have had to train as CAB advisers themselves and attend the Bureau. This makes good communication easier and helps us to respond to problems more quickly.

One challenge has been the inflexibility of the CAB training programme. It is designed to fit all volunteers, whatever their backgrounds. Members of staff who were qualified solicitors and barristers were barely allowed to have any prior learning accredited to reduce the training and this added to the burden on staff when getting the project up and running. Students likewise found the early stages of the training rather dull and repetitive – for example, covering the Legal Framework training pack. The volume of the training has made it difficult for students to fit in around other second year subjects.

Another major issue that we struggle with is getting the second year students sufficient time in the Bureau. It is hard to find blocks of time clear in the timetables and the Bureau can only cope with a small number coming in at a time. With restricted access to the Bureau, this has held some students back in completing assessed interviews or simply observing other interviews. We have tried to rota this ourselves in past years, but next year we will experiment with having students sign themselves up to Bureau sessions for a whole semester.

Student attendance at the Bureau can be a problem in some cases, although the involvement of University tutors makes it easier to chase up attendance. Another issue for CAB is that the qualified students tend to disappear at holiday and exam times, so they sometimes lack consistency in their rotas. Local students, however, do tend to come in where they can over the summer vacation. At least one local student has even continued her advising after completing her 120 hours in Bureau.

Our lack of specialist knowledge on areas such as debt and benefits can prove a problem when we are training students. We address this by having short courses and, next year, specialist training from the Bureau on benefits.

One recent challenge for the Portsmouth CAB is that it has now become part of a CLAC (Community Legal Advice Centre). It has had to move premises and learn to work with a new CLAC partner (another charity which gives advice). When change like this happens, we at the University need to keep in close touch with CAB to ensure that we can continue to work with them and that we are not forgotten among other pressing worries in Bureau.

Some pleasant surprises

We had anticipated that the established advisers, many of whom were retired, might have some issues with our students arriving in Bureau. While some students have settled in better than others,

they report no real problems with the existing advisers. In fact, some of the less IT-minded advisers have appreciated having our students on hand to help with databases and word-processing.

We did have a concern about students failing to complete their 120 hours in time – however, to date, no student has failed to do this.

One final pleasant surprise has been seeing some very shy and withdrawn students develop into much more confident individuals over the course of their time at CAB. By the time they get to the end of their third year, you can actually see that most of these students are ready for the next step of their legal training.

Conclusion

To anyone wishing to set up a similar project, or to work with the CAB, good contact and communication with a forward-looking CAB manager is essential. There must be clear benefits to the Bureau (which will compensate for the extra administration they will have to do) and to the students. University staff also have to be prepared to get involved with the training and workings of the Bureau – it is impossible to integrate into the curriculum otherwise. We have found, however, that the rewards for both teachers and students in this project have been significant, while the University has made a practical contribution to the Portsmouth community.

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