DEFINING EXPERIENTIAL LEGAL EDUCATION

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INTRODUCTION

Legal Education in the United States is undergoing a renaissance. In many ways, that renaissance has been building and growing for the last two decades, but in the last few years it has truly begun to flourish. The Great Recession of 2008 created new and significant pressures on law firms, which previously had absorbed many law school graduates but no longer could at the same rates.[1] Complaints of graduates being insufficiently prepared for practice preceded the post-2008 shift, but reached a fever pitch afterwards. Particularly in the years 2010-12, graduates of law schools had a significantly harder time getting jobs than they had in the past.[2] All of this led to the legal academy being criticized broadly in blogs and in the press for offering a law degree at considerable cost without providing what many considered to be appropriate employment outcomes.[3]

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[1] E. Thomas Sullivan, *The Transformation of the Legal Profession and Legal Education*, 46 IND. L. REV. 145, 146 (2013).

[2] Although this is hard to measure, since prior to 2012 law schools did not report their employment outcomes in the same ways. This changed when the American Bar Association (ABA) required all law schools to report employment outcomes using uniform reporting methods after the 2011 reporting cycle. Http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2012_3_15_updated_statement_regarding_employment_data.authcheckdam.pdf

[3] *E.g.*, BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012); Lincoln Caplan, *An Existential Crisis for Law Schools*, NY TIMES July 15, 2012, at 10; Vincent Carroll, *Many Law School Degrees "Worth Than Worthless": Research Shows Plunge in Those High-Paying Jobs*, DENVER POST, July 28, 2013, at 6D; Paul Campos, *Wall Street Journal Story Implies We May Not Need More Law Schools*, INSIDE THE LAW SCHOOL SCAM (Feb. 1, 2013) http://insidethelawschoolscam.blogspot.com/2013/02/wall-street-journal-story-implies-we.html; Matt Leichter, *Law School Salary Outcomes in One Uninfographic*, THE LAW SCHOOL TUITION BUBBLE (May 19, 2014), http://lawschooltuitionbubble.wordpress.com/2014/05/19/law-school-salary-outcomes-in-one-uninfographic/; Elie Mystal, *10 Non-Economic Benefits of Having a Law Degree*, ABOVE THE LAW (Dec. 19, 2013, 6:16 PM), http://abovethelaw.com/2013/12/10-non-economic-benefits-of-having-a-law-degree/#more-291062; Joe Patrice, *The ATL Markup of Slate's 'Apply to Law School Now' Article*, ABOVE THE LAW (June 26, 2014, 12:14 PM), http://abovethelaw.com/2014/06/the-atl-markup-of-slates-apply-to-law-school-now-article/#more-327187.

But the post-2008 shift only exposed something that had been fairly obvious to many inside legal education for a long time: that mid-20th century legal education - which was still predominantly what was offered at law schools prior to 2008 - was not going to be sufficient to prepare our graduates for the legal practice of the 21st Century. While the exposure of this gap has been concerning to many, the gap can be fixed. Despite the recent dramatic drop in applications to law school,[4] there remains great value to a legal education, and there is room for a diversity of knowledge, expertise, and methods of teaching in the modern legal academy. But there is little doubt that the world in which our students will practice - over the course of their forty-odd years of practice - will be substantially and in some areas dramatically different from the legal world many of us prepared for and entered as we started our legal careers.[5]

Much of the focus of the renaissance has been in practical (sometimes called "practice-based") legal education. Many lawyers and some law professors have long believed that legal education placed too much emphasis on theoretical learning and not enough on practical learning.[6] The charge was made that we were graduating students who could *think* like a lawyer, but were unprepared to *be* a lawyer.[7] Law firms were expected to - and largely did - fill the gap, by offering essentially a training and transition year (or perhaps two), billing some of that time to their clients. As clients - particularly corporate clients - balked at paying for training this became more difficult.

Of course practical training was the only kind available until about 1870, so practical legal education is not new; indeed it has been around for over 100 years.[8] Law schools for decades have included in their standard curricula opportunities for students to apply their theo-

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[4] Karen Sloan, *ABA Releases Details of Law Schools Enrollment Declines*, NAT'L L.J., March 3, 2014; Karen Sloan, *Nation's Law Schools See Lowest Enrollment Since 1975*, NAT'L L.J., Dec. 17, 2013; Karen Sloan, *Law School Enrollment Continues Its Decline*, NAT'L L.J., Nov. 28, 2012.

[5] As this author has previously observed, we must prepare our students "for their future, not our past." DAVID I. C. THOMSON, LAW SCHOOL 2.0: LEGAL EDUCATION FOR A DIGITAL AGE xi (2009).

[6] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8 (2007) ("[O]ne of the less happy legacies of the inherited academic ideology has been a history of unfortunate misunderstandings and even conflict between defenders of theoretical legal learning and champions of a legal education that includes introduction to the practice of law.") For the remainder of this article, this report is simply referred to as the "Carnegie Report."

[7] David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

[8] For example, the law clinic at the University of Denver's Sturm College of Law recently celebrated the 110th year of its founding. *See* LAW SCHOOL CLINICAL PROGRAMS, http://www.law.du.edu/index.php/law-school-clinical-program/the-clinic/110th-anniversary.

retical learning to real clients. Over the last several decades, the widely accepted clinical pedagogy has matured and strengthened,[9] and the status of those who teach this part of the curriculum has improved.[10] Clinical education is a valuable and important part of legal education, and always will be. If the problem with legal education is that students have little or no experience of practice before they graduate, then giving them some of that in a clinic is an obvious improvement. Actually representing a real client while in school is an invaluable learning experience, and important to the formation of our students - just as is the study of Tort law and learning how to read and interpret cases is important. Legal education has long had strength in doctrinal teaching and - for those students who could avail themselves of a clinical experience - some practical teaching as well. The two aspects of the curriculum often did not interact, but at least we had some strength in both areas.

Alas, we have come to understand that legal practice - and thus good legal training - does not operate as a duality but rather involves a rich tapestry with layers of complexity in virtually every day. And thus the best legal education should not operate as a duality either. Purely doctrinal lecture courses (how Property law is often taught, for example) with the addition of a purely clinical experience do not (alone) make for an integrated learning environment that mimics the diversity of skills and experience needed for competent legal practice. As the calls for greater exposure to practical experience in law school has increased, those schools that have merely added an additional

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[9] *See, e.g.*, Anne-Marie Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing the Effectiveness of Student Learning Outcomes*, 40 SW. U. L. REV. 1 (2010); Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 279 (2012); Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489 (2013) (contains extensive footnotes citing classics of clinical pedagogy). *See also*, J.P. Ogilvy, *Clinical Legal Education: An Annotated Bibliography*, 11 CLINICAL L. REV. (SPECIAL ISSUE NO. 2), 10-20 (2005) (annotated bibliography of articles about clinical pedagogy and methodology).

[10] *See* Bryan L. Adamson et al., *Clinical Faculty in the Legal Academy: Hiring, Promotion and Retention*, 62 J. LEGAL EDUC. 115, 131 (2012) (report of AALS Task Force on the Status of Clinicians and the Legal Academy finding, as one of several core principles, that "[t]he legal academy and profession benefit from full inclusion of clinical faculty on all matters affecting the mission, function, and direction of law schools. . . ."); Todd Berger, *Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for "Practice-Ready" Graduates Will Impact the Faculty Status of Clinical Law Professors*, 43 WASH. U. J.L. & POL'Y 129, 132 (2014) (arguing that "the growing importance of clinical education increases the likelihood clinical law professors will achieve equality with non-clinical faculty.").

clinic or two and thought their work was done will soon learn that their approach was incomplete.[11]

Most law schools have known this, and have already made some adjustments. Every law school has trial practice classes, for example. These courses do not involve a live client matter but they simulate the trial experience well and most students who have taken such a course and happen to appear in court soon after graduation feel at least somewhat prepared to do so. Further, an enterprising professor of employment law[12] has applied the simulation model to teach employment law transactions in a similar way, so that graduates who might join a corporate firm will be familiar with - and even somewhat skilled at - identifying the key aspects of an employment contract or an employee handbook, and assisting with negotiation and drafting of a new one. What is needed is an even greater variety of experiential opportunities that speaks to the strengths of our faculty and the needs of our students, and that is nuanced in its delivery by subject matter or specialty area of law.

Experience-based learning of this sort finds its roots in the work of the early 20th Century philosopher John Dewey, who addressed himself in some of his work to extolling the benefits of experience-based learning. Dewey believed that the central dilemma of education is to acquaint the young "with the past in such a way that the acquaintance is a potent agent in appreciation of a living present,"[13] and that one of the best ways to do this was to expose students to the experience of the working world of which they were soon going to be a part. Dewey noted that "the central problem of an education based upon experience is to select the kind of present experiences that live fruitfully and creatively in subsequent experiences."[14]

"Experiential Learning," as it came to be known, became quite popular in secondary education in the middle of the 20th Century, and its influence is still quite profound there over fifty years later. Throughout public and private secondary schools, teachers introduce contextual learning exercises, field trips, and immersive lab experiences in nearly every subject. But it is only fairly recently that these principles have been applied to a developing spectrum of courses that law schools are now making available to their students, and this new

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[11] It may also be impractical for reasons of cost. *See* Martin J. Katz, *Understanding the Costs of Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 28 (2014).

[12] Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447 (2009).

[13] JOHN DEWEY, EXPERIENCE AND EDUCATION, 23 (1938).

[14] *Id.* at 27-28.

Journal seeks to bring together the best thinking and developmental work as the field expands and grows.

This discussion has become all the more important recently. In early August of 2014 the American Bar Association, which accredits law schools, passed a resolution that requires all law students to take 6 credits of experiential courses as part of their course of study.[15] This decision was made after much discussion around making that requirement as many as 15 credits. In California, a Task Force on Admissions Regulation Reform of the Bar Association has passed a new requirement for admission in California that either a candidate for admission has completed 15 units of "practice-based experiential course work" in law school or a bar-approved apprenticeship or clerkship post-graduation.[16] The New York Bar Association is considering a requirement of 12 hours of practice-based course work for admission in that state.[17]

As with many such periods of significant growth and change, however, some classification and a deeper understanding of the types and methods of experiential learning in law schools would be helpful. This article seeks to provide that definitional understanding, with the goal of speeding up this good work, not putting it in a box. It provides a definition of experiential learning for legal education, as well as a method for application of the definition to courses currently in the law school curriculum and considered for inclusion in the curriculum of the future.

Definitions and methods for classification are important because they provide a foundation for understanding and clear communication. The Chinese philosopher Confucius believed that "If names be not correct, language is not in accordance with the truth of things. If language be not in accordance with the truth of things, affairs cannot be carried on to success."[18] The Renaissance of the 15th Century relied on communication methods that were new at the time - as this journal does – and it flourished when those methods allowed communication in roughly the same terms, and this facilitated learning about

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[15] AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard § 303(a)(3) (Aug. 2014), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf.

[16] *See* Task Force on Admissions Regulation Reform, THE STATE BAR OF CALIFORNIA, *available at* http://www.calbar.ca.gov/AboutUs/BoardofTrustees/TaskForceonAdmissionsRegulationReform.aspx.

[17] *See Committee on Legal Education and Admissions to the Bar Informational Report to New York State Bar Association Executive Committee,* NEW YORK STATE BAR ASSOCIATION, *available at* https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=46440.

[18] CONFUCIUS, ANALECTS, Book XIII, Chapter 3, verses 4-6.

each other's advances. The same can be true of the Experiential Learning movement in legal education.

This article offers in Part I the major sources for a possible new definition of experiential learning, and describes the limitations of the definitional elements that we currently have. Part II argues that the definitions we currently have are not only limited but their limitations are being further exposed by the growth and variety in experiential learning opportunities currently being offered in many law schools. Part III offers a new definition for experiential learning in law, together with a series of questions that can be used in applying the definition. Finally, Part IV offers application of the new definition to examples of course work that are currently being offered in law schools around the country, so that the reader can see the definition at work.

I.
DEFINITIONAL SOURCES

The current blossoming of experiential learning in legal education was guided and emboldened over the last 20 years by four primary sources, The MacCrate Report, The Carnegie Report, The Best Practices Report, and the American Bar Association's law school Accreditation Committee. Each of these reports - and the Committee - have influenced the formation of experiential learning in law over the last 20 years, and so a review of those reports (and accreditation provisions) and their influence provides an appropriate foundation.

A. The MacCrate Report

The first is a report issued in 1992 by a panel of experts – practicing lawyers and legal educators working together – brought together in 1989 by the Council of the Section of Legal Education at the American Bar Association.[19] The colloquial name for this report comes from the Chair of that panel, Robert MacCrate, a prominent attorney in New York. The MacCrate Report offered a list of 10 Skills and 4 Values that it concluded were fundamental to proper training for the practice of law. This list became a guideline for curricular reform at many law schools in the 1990s, and in particular was the

[19] AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, *Legal Education and Professional Development – An Educational Continuum* (1992). Throughout the remainder of this article, the abbreviated term "MacCrate Report" will be used to refer to this report.

genesis of significant growth in the clinical legal education movement.[20]

The 10 fundamental lawyering skills that MacCrate listed and endorsed were:

1) Problem Solving
2) Legal Analysis and Reasoning
3) Legal Research
4) Factual Investigation
5) Communications (in writing, and orally)[21]
6) Counseling (a client)
7) Negotiation (with opposing counsel)
8) Litigation and Alternative Dispute-Resolution Procedures
9) Organization and Management of Legal Work
10) Recognizing and Resolving Ethical Dilemmas

The MacCrate Report also endorsed four Fundamental Values of the Profession:

1) Provision of Competent Representation
2) Striving to Promote Justice, Fairness, and Morality
3) Striving to Improve the Profession
4) Professional Self-Development

The MacCrate Report listed these fundamental skills and values of the profession, described each in some detail, and then issued its recommendations, the first of which was "Disseminating and Discussing the Statement of Skills And Values."[22] While the purpose of the list of skills and values in the MacCrate Report was not to provide a definition of experiential learning, any educator who applied him or herself to achieving such learning outcomes with their students quickly discovered that embedded in this list was an assumption that students should learn by working in the role of the attorney, and that this imperative would lead to the need for more experiential learning opportunities. This was quite obviously true of the first year course in legal writing and advocacy, which includes fundamental skills training in at least 7 and as many as 9 of these skills and values, and over the 1990s the experiential nature of the teaching of this course matured and expanded, influenced in part by the MacCrate list. But the most significant development that ensued after the MacCrate Report in the

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[20] Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 14 J. LEGAL WRITING 261, 264 (2011).

[21] These parenthetical additions to the list are offered for the sake of clarity – they were not part of the original list.

[22] MACCRATE REPORT, *supra* note 19, at 327.

15 years that followed was significant growth in clinical legal education in the legal academy, since arguably and in most cases clinical education addresses, in some way, every one of the 10 Skills and 4 Values listed in the MacCrate Report.

As a result, it is fair to consider the MacCrate report a document that provides guidance for a definition of experiential learning. As such, it offers support for several important concepts. First, that students will, as part of their law studies, be given opportunities to work in the role of attorneys, doing what lawyers do, including meet with real or simulated clients, conduct legal research, and write documents that lawyers write. Second, that students will learn about both litigation and non-litigation work that lawyers do. Third, that they will be challenged enough to have practice in managing their work. Fourth, that they will be exposed to ethical dilemmas that lawyers face. Fifth, that they will be inculcated in the values of the profession, such as competent representation, promoting justice and fairness, and serving the profession. Finally, the list of skills and values expressly includes the value of professional self-development and growth in the profession.

B. The Carnegie Report

Starting in the late 1990s, The Carnegie Foundation for the Advancement of Teaching initiated a wide-ranging study of professional education in several fields. The project, called Preparation for the Professions, included studies of medical, nursing, clergy, engineering, and legal education, and each project issued an extensive report. The report on legal education, entitled *Educating Lawyers: Preparation for the Profession of Law*, was published in 2007.[23] Bryant Garth, then Dean of Southwestern Law School and former Director of the American Bar Foundation, offered this prediction in his blurb for the back of the book: ". . .I believe that [this report] will be a landmark in the history of legal education."[24] While it might be somewhat early to confirm that prediction, there is little doubt that just seven years later the influence of this report has already been significant, with numerous conferences dedicated to study and discussion of the report, significant adjustments being made throughout legal education that were obviously influenced by the report, and at

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[23] CARNEGIE REPORT, *supra* note 6.

[24] CARNEGIE REPORT, *supra* note 6 (back cover).

least three initiatives dedicated to promoting one or more of the principles described in the report.[25]

The three principle contributions of the Carnegie Report were first that it identified the "three apprenticeships" of effective legal training, second that it argued persuasively in favor of the integration of all three apprenticeships throughout legal education, and third that it brought attention to the role of professional identity formation. The three apprenticeships it identified in the report were: 1) the cognitive, 2) the practical, and 3) the ethical-social. The cognitive apprenticeship focuses on what has long been referred to as "thinking like a lawyer." The practical apprenticeship focuses on practical lawyering skills, and harkens back to the list of skills in the MacCrate Report. And the ethical-social apprenticeship focuses on the ethical formation of the student as a professional attorney.

In its study of legal education, the Carnegie Report found that law schools were generally effective, particularly in the first year, in inculcating students in the principles of the first apprenticeship through the case method of study, which it called the "signature pedagogy" in law school.[26] Concerning the practical apprenticeship, the report expressed concern that there was not enough teaching of legal doctrine in the context of practice[27] noting that "with little or no direct exposure to the experience of practice, students have a slight basis on which to distinguish between the demands of actual practice and the peculiar requirements of law school."[28] In this way, the Carnegie report refocused attention on skills needed for practice, as the MacCrate report did before it.

However, the Carnegie Report reserved its strongest criticism of legal education for the lack of intentional development of its students in the third apprenticeship, the ethical-social, which it also referred to as the students' formation of professional identity as a lawyer. The apprenticeship of professional identity. . .also include(s) conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession. . ..[I]f law schools would take [this] apprenticeship seriously, they could have a

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[25] The three initiatives are: Educating Tomorrow's Lawyers, an initiative of the Institute for the Advancement of the American Legal System at the University of Denver (http://etl.du.edu), The Holloran Center for Ethical Leadership in the Professions (https://www.stthomas.edu/hollorancenter/), and the Alliance for Experiential Learning in Law (http://www.elon.edu/e-web/law/aell_symposium/aboutaell.xhtml).

[26] CARNEGIE REPORT, *supra* note 6, at 23.

[27] *Id.* at 95, 100, 115, and 145 (citing favorably to the BEST PRACTICES report, discussed *infra* at notes 36-42).

[28] *Id.* at 95.

significant and lasting impact."[29] In recent years, conferences and commentators have begun to focus on this apprenticeship; what it means, and how to teach it.[30] Bryant Garth has suggested that it may have even more of a profound impact on legal education than the MacCrate Report did.[31]

Among the Carnegie Report's most important recommendations was that the three apprenticeships should be integrated throughout the law school course of study. It criticized the typical law school curriculum as being too separated between doctrine and skills, and recommended that the law school curriculum as a whole should make an effort to integrate all three apprenticeships. Thus, the Report recommends that more courses be designed to provide learning of doctrine in the context of practice, and that the legal principles and rules be presented in such a way that students would be exposed to situations that allowed them to begin to form their identities as legal professionals.[32] Achieving this rather lofty goal would require law faculties - and law schools - to quite profoundly reengineer their courses, programs, and course of study; not something easily done or certainly not done overnight. It was not a recommendation limited to the clinic, where the three apprenticeships are often taught in an integrated way, and it was not a suggestion that more clinical opportunities be given to law students. It was a "throughout the curriculum" recommendation.[33] It encouraged that more simulation courses be offered, since many of those allow for the integration of the apprenticeships in the same course.[34] And it encouraged more intentional use of externship opportunities, for the same reason.[35]

When the recommendation on the third apprenticeship in the Carnegie Report is studied closely, especially when taken together with its recommendation for integration, it becomes clear that the report – taken as a whole – is a strong proponent of experiential learning. This is because one of the best ways to offer students oppor-

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[29] *Id.* at 132-33.

[30] For example, at the 2014 Conference of the Southeast Association of Law Schools (SEALS) Conference, a three-hour discussion group of ten law faculty addressed itself to a detailed discussion of the third apprenticeship, and prepared short papers on the subject in advance. In addition, Regent School of Law hosted a Symposium on the same topic in October of 2014.

[31] Garth, *supra* note 20, at 262.

[32] CARNEGIE REPORT, *supra* note 6, at 194-197.

[33] *Id.* at 193 ("[T]he common core of legal education needs to be expanded in qualitative terms to encompass substantial experience with practice, as well as opportunities to wrestle with the issues of professionalism.").

[34] *Id.* at 106-07 (simulations in legal writing classes), *Id.* 158-59 (role of simulations in professional identity formation).

[35] *Id.* at 88 (noting also that the ABA has encouraged more use of externships).

tunities for formation of their professional identity is by placing them *in role*, and teaching in an integrated fashion virtually *requires* experiential learning opportunities. Put another way, the Carnegie Report's recommendations provide detailed guidance for what experiential learning should be designed to achieve, and adds significantly to this effort to define it.

C. The Best Practices Report

Initiated in 2001 by the Clinical Legal Education Association (CLEA) the Best Practice project brought together a group of clinical educators of long experience, and Professor Roy Stuckey, a clinical faculty member at the University of South Carolina Law School, was appointed chair of the Steering Committee. The Committee used a collaborative approach over the next six years to develop a statement of best practices for legal education. In the same year that the Carnegie Report was published, CLEA published its own report on legal education, entitled *Best Practices for Legal Education: A Vision and A Road Map*.[36] This report included a forward from Robert MacCrate, and called on law schools "to make a commitment to improve the preparation of their students for practice, clarify and expand their educational objectives, improve and diversify the methods for delivering instruction, and give more attention to evaluating the success of their programs of instruction."[37] Chapter 4 of the Best Practices report provided a comprehensive guide for law teaching generally at its best and most well designed and thoughtfully presented. It is recommended reading, and re-reading, for all law professors who are invested in their teaching (that is, nearly all of them). Like the Carnegie Report, the Best Practices report endorsed context-based instruction to support the integration of doctrine and skills training as being among the best and most effective methods of instruction in law, and described several examples of such methods.[38]

The Best Practices report also supported the concept that experiential learning is an effective method of integrating doctrine, skills, and professional formation. Indeed, Chapter 5 of the report was dedicated to describing and explaining the best practices for experiential education, and it began with a definition of the term: "Experiential courses are those courses that rely on experiential education as a significant or primary method of instruction. In law schools, this involves

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[36] ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (Clinical Legal Education Association, 2007). Throughout the remainder of this article, the abbreviated term "Best Practices" will be used to refer to this report.

[37] *Id*. at 7.

[38] *Id.* at 146-153.

using students' experiences in the roles of lawyers or their observations of practicing lawyers and judges to guide their learning."[39] The report further defined experiential learning as follows: "Experiential education integrates theory and practice by combining academic inquiry with actual experience."[40]

Like the Carnegie Report, the definitions provided in the Best Practices report emphasize the value of putting students "in the roles of lawyers," but it added the concept that the amount of the student work in role must be a "significant or primary method of instruction." It also emphasized, as the Carnegie Report did, the importance of combining theory and practice, but added the term "combining academic inquiry with actual experience." The problem with this part of the definition is that it is not exactly clear what "actual experience" refers to. What is "actual" as opposed to a non-actual experience? This is not clarified. However, the Best Practices report provides, primarily in Chapter 5, a helpful guidance document, including a recommended series of teaching strategies, for effective experiential learning.

An additional contribution of the Best Practices report is that it endorses forms of course design other than the clinical model as being effective to achieve the goals of experiential education.[41] In particular, the report endorses simulation-based courses as an effective method of instruction, and offers suggestions and methods for that form of integrated course design as well. The report also offered the following definition of a simulation course: "Simulation-based courses are courses in which a significant part of the learning relies on students assuming the roles of lawyers and performing law-related tasks in hypothetical situations under supervision and with opportunities for feedback and reflection."[42] This definition of simulation-based courses also emphasized that this form of instruction should be a "significant part of the learning," and the importance of placing students "in role." It also introduced a concept from the pedagogy of clinical legal educa-

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[39] *Id.* at 165.

[40] *Id.* at 165. Recently, the Vocabulary Working Group of Alliance for Experiential Learning in Law issued a "Glossary for Experiential Education in Law Schools" via email. This glossary also offered a definition that tracked and cited the one provided in the BEST PRACTICES report. "Experiential Education is an active method of teaching that "integrates theory and practice by combining academic inquiry with actual experience" (citing BEST PRACTICES, p. 165). It further defined experiential learning as "simply learning from experience."

[41] BEST PRACTICES, *supra* note 36, at 179-86.

[42] *Id.*

tion, that of "opportunities for feedback and reflection."[43] Because this last aspect of the definition of simulation courses can be particularly helpful in offering students opportunities for professional formation (the third Carnegie apprenticeship), it will reappear in the definition of experiential learning offered in this article.

D. American Bar Association Definitions

The American Bar Association's Section on Legal Education and Admission to the Bar accredits law schools under a series of standards for accreditation that address the full panoply of departments and activities in a law school, from the library to the faculty to the curriculum and course of instruction. While the accreditation process for each school happens on a seven-year cycle, each year the ABA sends a questionnaire to law schools to obtain current information on the operations of that law school. In the annual questionnaire that the American Bar Association sends to all accredited law schools, each school is requested to report the number of "seats" in experiential courses in the previous year. For purposes of this reporting, the ABA offers definitions[44] of the types of courses that it wants to know about as follows:

> *Simulation courses* are those courses in which a substantial portion of the instruction is accomplished through the use of role-playing or drafting exercises, e.g., trial advocacy, corporate planning and drafting, negotiations, and estate planning and drafting.
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> *Faculty-supervised clinics* are programs in which students represent actual clients (individuals or organizations), are supervised by an attorney who is employed by the law school (faculty, adjunct, fellow, staff attorney, etc.), and include a classroom component.
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> *Field placements* are externships or internships (typically off-site) that are field supervised by persons not employed by the law school for which students receive credit and which may or may not include a classroom component.

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[43] For an in-depth analysis of the importance and pedagogy of reflection in legal education, *see* Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317 (2014).

[44] These definitions are part of the ABA Accreditation Standards in Chapter 3, "Program of Legal Education." Standard 304 governs simulations and law clinics while Standard 305 sets requirements for field placements and other learning experiences outside of the classroom. Http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/201406_revised_standards_clean_copy.authcheckdam.pdf.

Each of these definitions are problematic and out of step with the growing array of experiential education opportunities that are currently (and increasingly) available in law schools. The definition of *Simulation courses* offered by the ABA does make reference to "role-playing," which is helpful. However, the examples it provides are limited to courses that generally have a low influence of doctrinal instruction (such as trial advocacy or negotiations) while some law schools now offer courses that have transposed what had formerly been fully doctrinal classes into ones that are now taught through simulations. Finally, it does not account for the benefit to students of a course that is a "whole-course" simulation (where the entirety of the course is within the simulation context) as opposed to a course that contains some "substantial" amount of instruction through simulation. Finally, "substantial" is a particularly imprecise term that provides little guidance. Is that a course that includes more than 50% of the instruction in simulation? Or is 35% substantial?

The definition of *Faculty-supervised clinics* does make reference to "actual clients" and attorney supervision, both key aspects of the clinical pedagogy. But it also requires that the supervising attorney be "employed by the law school" but then equates the value of a full-time faculty member with a fellow who is temporarily employed by the law school. Most problematically, it does not define what "employed" means. As a result, a school could "hire" an outside attorney at a very nominal remuneration to supervise a group of students and this would count as the equivalent educational experience that supervision by a full-time clinical faculty member could offer the student.

The definition of *Field placements* (more commonly now called "Internships" or "Externships") requires that the placement be supervised by persons not employed by the law school and that students receive academic credit for their work. It mentions, but does not require, that the externship take place "off-site" (which is not defined or limited) and that there is (or might not be) a classroom component. Today, most externship directors are members of the faculty at their law schools and they supervise the work to a greater or lesser extent. The amount or type of supervision, by either the faculty member or the supervisor on site, likely contributes to the quality of the externship, but this is not accounted for in the definition. Further, it is widely accepted now that externships should have a classroom component, so that students can be well positioned to achieve the greatest learning

out of the externship opportunity; this also is not accounted for in the ABA's definition.[45]

The shortcomings of the definitions in the annual ABA Questionnaire noted above would ordinarily not be problematic on their own. For the last several years, each school has done its best to count the number of seats in their curriculum that fit these definitions; if this is what the ABA wants to know, then schools will give them the data the best they can. However, two developments have made the definitions provided by the ABA more concerning. The first is that outside analysts have used the reported data to draw conclusions about the number and quality of the experiential opportunities available at certain law schools.[46] This is worrisome because the definitions seem to be informed more by a need to collect data than to place a value on types of opportunities available at each school, and yet the data is now being used to estimate the value of these educational opportunities. The second is that experiential education is in such a period of intense growth and expansion that any attempt to count and compare what is going on in each school should be based on a broader understanding of the available options.[47]

Most recently, the ABA has promulgated a definition of an experiential course in the new Accreditation Standard 303(a)(3), which now requires six credits of experiential work for each student beyond the first year lawyering course. This definition requires "one or more experiential course(s) totaling at least six credit hours. An experiential course must be a simulation course, a law clinic, or a field placement." To satisfy this requirement, a course must be primarily experiential in

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[45] James H. Backman, *Where Do Externships Fit? A New Paradigm is Needed: Marshaling Law School Resources to Provide an Externship for Every Student*, 56 J. LEGAL EDUC. 615 (2006) (externships based on clinical models include classroom component); J.P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZ. L. REV. 155, 163 (2003) ("Does the [externship] program include structured opportunities for students to reflect critically on their placement experiences through, for example, a contemporaneous seminar . . . within which faculty and students explore topics related to the educational goals of the program . . . ?"). In 2014, the University of Denver hosted the Externships 7 Conference. DU HOSTS EXTERNSHIPS 7, SCALING NEW HEIGHTS: FIELD PLACEMENTS AND THE REFORM OF LEGAL EDUCATION, http://www.law.du.edu/index.php/news/details/du-hosts-externships-7-scaling-new-heights-field-placements-and-the/ (last visited, Sept. 7, 2014).

[46] Mike Stetz, Best Law Schools for Practical Training, NAT'L JURIST, Mar. 2014, at 22, *available at* http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0314/#/22 (last visited, Sept. 7, 2014); Michelle Weyenberg, *Externships: More Popular Than Ever*, NAT'L JURIST, Sept. 2013, at 20, a*vailable at* http://www.nxtbook.com/nxtbooks/cypress/nationaljurist0913/#/20. (last visited, Sept. 7, 2014).

[47] Such an effort would also want to consider the relative costs of different experiential learning opportunities, a subject addressed in this volume of the journal. *See*, Katz, *supra* n. 11.

nature, and must integrate doctrine, theory, skills, and legal ethics; "develop the concepts underlying the skills being taught; provide multiple opportunities for performance; and provide opportunities for self-evaluation. This definition is more helpful than those found in the Questionnaire, but remains problematic for a number of reasons. First, it is circular — for an experiential course to be experiential, it must "be primarily experiential in nature." Second, it uses the term "develop the concepts" underlying the skills, but makes no mention of what that might mean. Third, it encourages integration, but it focuses on "legal ethics" rather than formation of professional identity. Forth, it requires "multiple opportunities" but leaves open the possibility that just two opportunities, or perhaps three, would be sufficient (rather than something more regular than that). Finally, it requires "self-evaluation" but does not specify what that is. It certainly suggests that students engage in self-reflection, but it does not make clear whether that should be focused on self-grading in the course, or some form of regular reflection that supports ethical formation. In sum, this new definition from the ABA is a forward step beyond the definitions provided with the annual questionnaire, but it unfortunately falls short of the guidance that law schools need to develop and expand their experiential offerings in an effort to meet the new six-credit requirement

II.
The Variety of Experiential Education

For many years, experiential education was thought to be limited to the clinical experience. Embedded in this view was the assumption that experiential education was about exposing students to the experience of representing a "live" client. The term "live client" refers to a client with a real, active legal problem that the student will work – as that client's attorney – to help resolve. But while this form of experiential education is a valuable one it is not the only one. In the last 20 years or so, other forms of experiential education have grown up around clinical education, aimed at grounding a student's legal education in experience, although not necessarily with a live client.

And so, as recently as five or ten years ago, a typical "traditional" faculty member at most law schools would likely - if asked - put experiential education into two (perhaps three) neat boxes: Clinics, Externships, and (perhaps) Simulations. The same faculty member might also be able to describe each in their most common form. A classic example of a clinic might be an immigration clinic that assigns students to represent clients in immigration hearings, with a clinical

faculty member overseeing their work. The faculty member might also be able to describe a classic example of an externship as a judicial externship, arranged by an externship coordinator (typically a member of the staff), where a student spends part of the week in the chambers of a judge, helping with legal research, and occasionally helping during court hearings. Finally, the classic example of a simulation would be Trial Practice, often taught by prominent trial attorneys in the community, almost entirely in the form of a simulated trial, with little lecture and much more "stand up" experience for each student with portions of a typical trial: opening statements, direct and cross examinations, and closing statements. While examples of these sorts still exist in most law schools, part of the current renaissance in experiential education can be found in the hybridization, extension, and broadening of these learning opportunities. The increased variety of experiential learning in legal education is generally a good thing, but it makes this effort to define it more complex.

The first year lawyering class entered the curriculum approximately 30 years ago. Since then, the pedagogy of the course has grown and matured, and a great deal of significant scholarship has been published about how to teach it well, develop its learning outcomes, and conduct effective assessment.[48] While the course is in some schools still titled "Legal Research and Writing," most faculty members who teach in this area consider this to no longer be a representative term for what is now addressed by this course (although it does include both of those subjects). Some schools have changed the name of the course; at the University of Denver it is known as "Lawyering Process." This title, given the course in a pioneering step by the law faculty in 1990, is intentionally descriptive of what the course addresses and how it does so. It is taught almost entirely with simulated client problems, and is designed to introduce first year students broadly to the *process* that *lawyers* go through to do their jobs. This

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[48] *E.g.*, Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOLEDO L. REV. 651 (2007); Paul Brest, *A First-Year Course in the "Lawyering Process,"* 32 J. LEG. EDUC. 344 (1982); Kristen K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 J. LEGAL WRITING 1 (2003); Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 LEGAL WRITING: J. LEGAL WRITING INST. 325 (2011); Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147 (2010); Ellie Margolis and Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93 (2005); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105 (2003); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245 (1996).

process includes client interviewing, statute and case reading, legal analysis, legal research, and several forms of legal expression, including legal writing, contract drafting, and oral advocacy. The course is designed to provide the critical foundational lawyering skills for each student, whatever area of practice they might enter. All lawyers must know how to write and speak about the law they have found relevant to a client matter to different audiences, and this is the foundation upon which most of the rest of law school, and every legal career, rests. Despite being focused on developing these fundamental skills, lawyering faculty may have been caught up short by the Carnegie report's focus on the third apprenticeship. While lawyering faculty regularly address issues of professionalism in their classes, they have not traditionally offered *intentional* opportunities for their students to form their professional identities. This is changing, and increasingly an additional item on the already long list of learning outcomes for the lawyering class is to offer intentional opportunities for professional formation.

Because the lawyering course is taught almost entirely in simulation format, the lawyering faculty at each school has valuable experience in teaching with simulations, a fact that has been overlooked at some schools in the past. As more schools seek to add more simulation courses to their curricula, they should look to their lawyering faculty for help and expertise.

At the University of Denver, we developed a model for upper class simulations that focus on achieving the call in the Carnegie Report for integration of the three apprenticeships within each course.[49] This model, known as Carnegie Integrated Courses,[50] is designed to integrate doctrine, skills, and professional identity formation in any law school course. It can be applied to any legal doctrinal subject, and is typically taught in a simulation format. These courses can often provide necessary skills in a safe environment, and can serve to prepare students to take a clinical course next.

At many law schools, clinical pedagogy is well established and robust. Typically clinics are focused in areas of law – civil or criminal litigation, civil rights litigation, or representation of community organizations. These clinics involve "live" clients with active legal matters. They include a classroom component and close supervision by a

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[49] CARNEGIE REPORT, *supra* note 6, at 12. The Carnegie Report also suggested that models for integration of the apprenticeships existed in most law school curricula in the legal writing program, as well as the clinic. *Id.* at 104, 120.

[50] UNIVERSITY OF DENVER STURM COLLEGE OF LAW CARNEGIE INTEGRATED COURSE REQUIREMENTS, http://www.law.du.edu/index.php/experiential-advantage/course-simulations (last visited, Sept. 7, 2014).

clinical faculty member. Increasingly, however, there are cooperative hybrid clinics emerging in law schools. An example would be a non-clinical doctrinal faculty member entering into a representation agreement with a client for some limited appellate work on a novel case, and managing students through some representational aspects of that work. Another example could be a first year lawyering course representing a "live" client non-profit organization, by conducting legal research and writing that might be helpful to the organization in ongoing litigation in which it is involved.[51]

Externships, where students work for a judge, assistant district attorney, or in a law office, used to be mostly a placement function. Today, accepted externship pedagogy involves faculty instruction in a classroom component to every externship opportunity, and some training for the practitioner supervising attorneys. Further, while externships used to include the equivalent of 3-5 credit hours of work outside the law school, an emerging form of externship involves the student spending the entire semester, and 15 credits, working onsite on an externship assignment.[52] While this seems new, in fact even this is not – Northeastern Law School pioneered the "cooperative" model of legal education many years ago, whereby students alternate semesters between being in school, and working in the "field." While this approach initially seemed to be an outlier approach to legal education, more schools are experimenting with the "Semester-in-Practice" model.

At the University of New Hampshire, the Daniel Webster Scholars program has for several years immersed students in a fully experiential model for the second and third year of their schooling, with involvement of the organized bar and significant amounts of formative feedback provided throughout. The end result of this program is admission to the bar of New Hampshire, in lieu of a requirement to take the bar exam.[53]

The hybridization, extension, and broadening of experiential legal education makes any attempt to define "experiential learning" in the context of law schools complex and problematic. But define it we

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[51] Katz, *supra* note 11, at 127-130.

[52] For example, the University of Denver offers a Semester in Practice, which is a full-immersion, 15-credit externship. *See* SEMESTER IN PRACTICE http://www.law.du.edu/documents/legal-externship-program/types/Semester-in-Practice.pdf (last visited, Sept. 7, 2014).

[53] For more information about the Daniel Webster Scholars program *see* DANIEL WEBSTER SCHOLARS PROGRAM, http://law.unh.edu/academics/jd-degree/daniel-webster-scholars (last visited, Sept. 7, 2014).

must, or we lose the opportunity to communicate clearly about what we are doing, and to advance the discussion among schools.

III.
Definitions and Methods

For the reasons noted above, a new definition of experiential learning is needed, one that is focused on the student experience, that is inclusive of future developments, and that is broad enough to encompass the many forms of experiential learning that are already available in law schools across the country. Accordingly, this article offers the following definition of Experiential Learning[54] opportunities in the context of legal education:

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The term "Experiential Learning" refers to methods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships. Such forms of instruction integrate theory and practice by providing numerous opportunities for students to learn and apply lawyering skills as they are used in legal practice (or similar professional settings). These learning opportunities are also designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional life-long learners of the law.

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This definition has several essential attributes. The first and foremost is that it focuses on the student experience not the faculty function. Second, it has at its core the placement of students *in the role of attorneys*. So any course that places students in role of attorneys doing

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[54] In June of 2013 the University of Denver announced that all incoming first year students that fall would have the opportunity to take one full year of experiential learning courses at their option during their law school careers. This opportunity was called the "Experiential Advantage." More recently, Denver Law has announced a "Live Client Guarantee" under which every student, at their option, is guaranteed to either have at least one clinical or externship opportunity during their law school careers. Because both of these offerings to our students required that some work be done to assure that we could succeed in providing these opportunities, the Dean appointed a Task Force to report to the faculty on what needed to be done. The Task Force took up its work in the Fall of 2013, and quickly discovered that it needed a definition of experiential learning so that it could properly designate those courses students could take, and add courses if necessary, to meet the demand. This article's definition was developed by the author, and refined in discussions with the Task Force and the faculty at Denver Law, as well as in conference presentations given by the author over the last year.

what lawyers do can be an experiential course. Third, it emphasizes the importance of the Carnegie third apprenticeship, the *formation of professional identity*, in the hope that this will become a more intentional aspect of this pedagogy. Finally, it underscores that what we are doing in law school is not merely imparting a closed set of legal principles to our students, but rather foundational concepts upon which they can build their legal careers in the ever changing legal landscape of their future and that a critical part of doing so is becoming life-long learners of the law.[55]

When applying this definition to an existing curriculum, schools might find that faculty members want to use this definition to suggest that their primarily traditional theory course is now an experiential learning course. Faculty members might argue that by means of the traditional "Socratic" method of teaching, they are placing their students "in role" as attorneys by asking many of the questions they typically ask during the regular class time. Including such a course is not the intention of this definition, but because it is not designed to exclude certain types of law teaching, that might not be clear. Further, the definition contains a bias that faculty members should be able to make their own determinations in good faith that their courses are experiential in nature,[56] and will need to be able to do so should they want to gradually transition from a traditional mode of teaching to a more experiential one. So further guidance is necessary to separate those courses that truly belong on the experiential side of the spectrum, and those courses that belong on the other side, while this transition is taking place in many of the courses in a typical law school's curriculum.

Accordingly, this definition includes a set of questions that are designed to sharpen the definition in application to particular courses

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[55] The concept of life-long learning skills being a goal of educational enterprise also finds its roots in the work of John Dewey, who believed that "Collateral learning in the way of formation of enduring attitudes. . .may be and often is much more important that the spelling lesson or lesson in geography or history that is learned. For these attitudes are fundamentally what count in the future. The most important attitude that can be formed is that of desire to go on learning." DEWEY, *supra* note 13, at 48.

[56] This suggestion is made for internal transitional purposes, not for ABA regulatory purposes. So each law school's Associate Dean of Academic Affairs, or Associate Dean of Experiential Learning, would still have to respond to the ABA's annual request for information and make a reasonable determination based on the ABA's definitions. During a transitional period, however, this article suggests that for internal curricular purposes at most law schools, faculty should be able to designate their courses as fitting the definition provided here, and it assumes that they would do this in good faith. Without such an approach, an Associate Dean or Curriculum Committee risks serving as an arbiter of a definitional line that could come too close to threatening traditional notions of academic freedom.

in the curriculum. Those questions, with brief explanations of each, are:

- Other than the question-based format in a mostly lecture-based class, do you place students in the role of attorneys through problems or exercises where they act as attorneys - such as drafting documents or interacting with (for example) either assigned co-counsel or opposing counsel?

The idea behind this question is probably obvious; it intentionally excludes mostly lecture-based classes. However, if a faculty member includes "in role" exercises such as the given examples, the course could be considered experiential, depending on how often such exercises are included, which leads to the next question.

- If so, does your class design use this teaching technique regularly or primarily throughout the course?

The terminology "regularly or primarily" may seem imprecise, of course, but it is intended to convey the idea that an experiential course does not include such exercises rarely or occasionally, and it harkens back to the Best Practices report's use of the terms "significant or primary."[57] But here, "regularly" connotes something that happens in a pattern more than once, and in the Best Practices definition "significant" is less instructive, since what is deemed significant by one faculty member might be considered insignificant by another. Of course, if such exercises are used "primarily" in the course, that course obviously qualifies as experiential learning. The term "regularly" provides some additional guidance over "significant," but it remains imprecise. Some would prefer "substantially" instead of "regularly," but again, what is substantial to one faculty member might not be to another. The thinking behind using "regularly" is that a course where such instruction is regular (as opposed to occasional) is one that is more likely to be experiential in nature. It remains, however, imprecise, but this is by design. This definition (and the questions that follow it) seeks to put considerable discretion in the hands of faculty members, where academic freedom dictates it should reside, while still providing as much guidance as possible.

- Do you include opportunities for student self-reflection (in writing) about the experience of being "in role" so as to help them form their professional identities as lawyers?

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[57] *See* discussion *supra* following note 40. Note that the new ABA Requirement for 6 credits of experiential learning applies to instruction that is "primarily experiential in nature," and includes courses that "integrate doctrine, theory, skills and legal ethics." *See* discussion *supra* after note 47.

This question tests whether there are intentionally designed opportunities for student reflection on the formation of professional identity during the course. This is not a requirement of the definition, but if the answer to this question is affirmative, the course would obviously be more aligned with the definition than if it is not. However, it is possible for a course – such as Trial Practice – where there were no such opportunity for reflection to still be an experiential course. But such opportunities abound in a Trial Practice course, and merely adding some intentional structure around those opportunities for formation of professional identity as a trial lawyer would quickly answer this question in the affirmative.

- Is a substantial portion of the student's grade in the course based on your evaluation of these exercises or learning opportunities?

Finally, this question gets to the heart of the matter, although it still does so with some room for discretion on the part of the faculty member. Without a substantial portion of the grade being at stake in experience-based exercises and reflection, the exercises would seem (to this definition) more of an attempt to "bolt-on" experiential learning, rather than it being an integrated part of the course design. A common phrase among assessment professionals is that "we should measure what we value."[58] It is the intention of this definition that experiential exercises be integrated into the course, and carry grade weight so that students will know that the teacher values these exercises, and that they are an integral part of achieving the learning objectives for the course.

This definition of experiential learning, which includes and should be taken together with the follow-on questions, is intended to help associate deans, curriculum committees, and law faculty members to determine what courses they currently have in the curriculum that qualify as experiential learning opportunities for their students. In applying the definition, they may find that they have more such

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[58] Robert Coe & Carol Taylor Fitz-Gibbon, *School Effectiveness Research: Criticisms and Recommendations*, 24 OXFORD REVIEW OF EDUCATION 421, 433 (2006). For discussions of assessing learning outcomes and student performance in law school, *see generally* CARNEGIE REPORT, *supra* note 6, at 162-84; Andrea A. Curcio, *Assessing Differently and Using Empirical Studies to See If It Makes a Difference: Can Law Schools Do It Better?*, 27 QUINNIPIAC L. REV. 899 (2009); Janet W. Fisher, *Putting Students at the Center of Legal Education: How an Emphasis on Outcome Measures in the ABA Standards for Approval of Law Schools Might Transform the Educational Experience of Law Students*, 35 S. ILL. U. L.J. 225 (2011); Rogelio Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73 (2010); Herbert N. Ramy, *Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School*, 41 CAP. U. L. REV. 837 (2013).

courses than they thought, and faculty members might be encouraged by this definition to add experiential components to their classes.

Having offered this definition of Experiential Learning, being more specific about the various *types* or sub-categories of experiential learning opportunities is more problematic. This is because, as noted, the types of experiential learning are growing and changing and a significant amount of hybridization is underway. In spite of that, the three archetypes of experiential education in law – Simulations, Externships, and Clinics – remain useful for general categorization purposes. Further, attempts to precisely define each sub-category of experiential learning in law schools seems artificial and limiting, and driven more by faculty interests than student needs.

Instead, perhaps the better way to sub-define experiential learning is to focus on the student experience by looking first at the nature of the client contact, second at the form of representation, and finally at the type of supervision being provided.

First, is there client contact? If there is none, it is probably not an experiential course. If the course is designed to expose students to simulated client contact, then it is a simulation. Finally, if there is live client contact (directly or indirectly), then it is probably a clinic or an externship.

Second, what is the nature of the representation being provided by the student? Is there no representation of an actual client? If a simulated client is being represented, then it is a simulation. If it is a live client, is the representation being conducted under a local student practice act? If so, it is probably a clinical experience. If there is a "live" client but the representation is being offered at some remove – such as drafting portions of appellate briefs in the context of a doctrinal class – then it is a hybrid clinical course. If there is a less direct form of representation, then it is probably an externship.

Third, what is the type of supervision the student is receiving? If a full-time faculty member is providing the supervision, then it is either a simulation or a clinic (or it is in course work for an externship). If it is an adjunct, it is likely a simulation. If it is a non-faculty member, it is probably an externship.

IV.
Application of the Definitions

For illustrative purposes, this article offers several examples of some typical courses in the law school curriculum, and applies the definition and methods of analysis offered above.

A typical doctrinal course in Civil Procedure in which primarily appellate cases and rules are discussed in a dialog format in class sessions, and there are few if any opportunities for students to take on the role of attorneys (other than through questioning in class) it is not an experiential course.

A typical legal writing and research course, in which students are regularly placed in the role of a law clerk representing a simulated client, (or, in some cases, representation of "live" clients)[59] and where there are often other opportunities for simulated representation – such as client meetings, negotiations, and oral arguments, this is experiential learning through the simulation or hybrid clinic models.

A typical trial practice class, where students are regularly placed in role to conduct aspects of a simulated trial, taught by an adjunct, is experiential learning primarily conducted through a simulation.

A pre-trial course that is conducted as a whole-course simulation (with attorney and opposing counsel assignments, discovery document drafting and depositions), and which intentionally integrates opportunities for professional formation is experiential learning conducted through a simulation. (It is also a Carnegie Integrated Course).[60]

A contract drafting course where students are given a problem set and a party assignment for their representation, and for which they will negotiate and draft deal documents is an experiential course conducted through simulation.

A doctrinal class in labor law, which regularly places students in the role of employees with the professor acting as management, and asks students to simulate a labor bargaining process with the professor,[61] is experiential learning through simulation.

A legislative drafting course, where students are representing an agency and several interest groups in simulated hearings and recursive drafting exercises, is an experiential course conducted through a simulation.

A student who has been assigned to work part of the semester in the office of a practitioner who has been trained by a member of the law school's externship faculty is engaged in experiential learning through an externship.

A course in which students are writing appellate briefs and litigation documents for a (non-paying) client of their professor, under the

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[59] Nantiya Ruan, *Experiential Learning in the First Year Curriculum: The Public Interest Partnership*, 8 J. ALWD 191 (2011).

[60] *See* discussion of DU's CARNEGIE INTEGRATED COURSES *supra* at note 50.

[61] Roberto Corrada, *Simulation of Union Organizing in a Labor Law Course*, 46 J. LEGAL ED. 445 (1996).

supervision of that professor, is in an experiential learning course conducted through a hybrid clinic model.

A student who is serving a semester in practice under the supervision of a non-faculty member in a law office is in an experiential learning opportunity in the form of an externship.

A student who has been accepted into a civil litigation clinic where students regularly represent clients in court under the supervision of the clinical faculty member is involved in an experiential learning opportunity in the form of a clinic.

Conclusion

While many schools are reducing enrollment in response to the reduction in applications for admission over the last several years,[62] the renaissance in legal education we are currently experiencing indicates that now is an exciting time to be a law student. There is much more to be done, but most law schools today offer a fairly broad array of learning opportunities, although in most schools limited capacity means that not all students are able to take advantage of them. As these learning opportunities increase and hybridize with each other those of us in legal education (or otherwise concerned about legal education) need to know more about what these developments are, where they find their foundation, and how to interpret what is happening. This article provides a background on the foundation of experiential learning in law, and offers a fresh but robust definition of experiential learning, as well as a methodology for examining and understanding the experiential learning opportunities in legal education. It is important that those of us engaged in experiential teaching or law school administration – as well as our regulators and bar associations – understand each other as we communicate about this important series of developments.

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[62] *See* Sloan, *supra* note 4.

APPENDIX

Provided here, for clarity and convenience, is the definition developed in this article, together with the questions that the article suggests should be used with the definition:

Definition of Experiential Learning for Legal Education

The term "Experiential Learning" refers to methods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships. Such forms of instruction integrate theory and practice by providing numerous opportunities for students to learn and apply lawyering skills as they are used in legal practice (or similar professional settings). These learning opportunities are also designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional life-long learners of the law.

Questions to use with the definition:

- Other than the question-based format in a mostly lecture-based class, do you place students in the role of attorneys through problems or exercises where they act as attorneys - such as drafting documents or interacting with (for example) either assigned co-counsel or opposing counsel?
- If so, does your class design use this teaching technique regularly or primarily throughout the course?
- Do you include opportunities for student self-reflection (in writing) about the experience of being "in role" so as to help them form their professional identities as lawyers?
- Is a substantial portion of the student's grade in the course based on your evaluation of these exercises or learning opportunities?[63]

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[63] In case this definition is used separately from the article which offered and explained it, and the reader wants to read the full article, it can be found here: David I. C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1 (2014).