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# ESSAY

## Clinical Legal Education in the Age of Unreason\*

STEPHEN T. MAHER\*\*

### I. INTRODUCTION

To adequately prepare law students for their working lives we must understand what their work world will look like. In *The Age of Unreason*,<sup>1</sup> Charles Handy suggests that technological changes and economic developments are substantially reshaping the way in which our work is organized. Are law schools preparing law students to take their place in this new world?

Handy wrote *The Age of Unreason* to promote an understanding of changes in the workplace and to alert us to the necessity of responding to those changes in “unreasonable” ways. He contends that we are entering an Age of Unreason<sup>2</sup>—a time in which “the status quo will no longer be

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\* *Editor's Note:* This essay is the third in a series on clinical legal education. In an earlier article, Mr. Maher offered a critical analysis of clinical legal education, and defended practice-supervised externships as a necessary and effective educational approach. Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537 (1990). In a subsequent essay, Mr. Maher proposed the development of Centers for Alternative Training (CATs), independent institutions which would assume responsibility for the clinical component of legal education. Stephen T. Maher, *No Easy Walk to Freedom*, 1 D.C. L. REV. 243 (1992). In this piece, Mr. Maher uses Charles Handy's *The Age of Unreason* to refute criticism that CATs face insurmountable obstacles. If Handy's predictions about organizational change are accurate, Mr. Maher contends, organizations such as CATs are not only likely, but inevitable. Mr. Maher concludes that in the Age of Unreason we face, the future of clinical education depends on our receptivity to seemingly “unreasonable” proposals for reform.

\*\* In keeping with the spirit of this essay, Mr. Maher's “work portfolio,” see *infra* note 57, is as follows: he is Director of Attorney Training at the Miami office of Shutts & Bowen, has organized a consulting firm that advises law firms about their inhouse training programs, conducts continuing legal education programs, practices law through his own professional association, and writes about legal education and substantive law.

1. CHARLES HANDY, *THE AGE OF UNREASON* (1989) [hereinafter HANDY].

2. *Id.* at 5. Handy invokes George Bernard Shaw's remark that all progress depends on the

the best way forward,"<sup>3</sup> a time for "bold imaginings,"<sup>4</sup> a time for "thinking the unlikely and doing the unreasonable."<sup>5</sup>

In this Essay, I integrate Handy's insights with an appropriately "unreasonable" proposal for revising clinical legal education. New educational institutions and new approaches to teaching are needed in order to meet the demands of our new work world. Handy's observations and predictions confirm that the types of organizational changes I envision for clinical education are already occurring. Part II outlines the current state of clinical education. In doing so, it discusses the tensions and conflicts that presently divide those in the field, and concludes that innovation in clinical legal education is hindered in large part by clinicians themselves. It then proposes that clinical legal education be removed from the law school and directed by Centers for Alternative Training (CATs). Part III presents Handy's framework for understanding and benefiting from the imminent changes in the workplace. Part IV transports Handy's insights to the field of clinical education and discusses how my proposals for changing clinical education are consistent with the major trends Handy foresees. Finally, Part V suggests that clinicians, law schools and law students would benefit if clinicians abandoned their efforts to improve their positions within the law school, and concentrated instead on creating new institutions that would flourish on the changes that Handy predicts.

## II. CLINICAL LEGAL EDUCATION

### A. *The Clinician-Law School Labor Dispute and the Regulatory Impetus of the ABA*

The law clinic grew from dissatisfaction with traditional legal education; the original goal of clinical legal education<sup>6</sup> was to remake traditional legal education in its image. Where is it today? I believe clinical

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unreasonable man: "the reasonable man adapts himself to the world, while the unreasonable persists in trying to adapt the world to himself. . . ." *Id.* at 4.

3. *Id.* at 4.

4. *Id.* at 5.

5. *Id.*

6. Clinical education in this essay refers to "live-client clinics," clinics in which students are engaged in the supervised practice of law. Clinical education can be divided into two main types, externships and inhouse clinics. The former exists where the school provides clinical training by placing students in off-campus law offices, often in the public sector. The latter exists where the law school establishes a teaching law office on or near the campus and staffs it with supervisors paid by the school. I do not include simulations conducted in the classroom under the rubric of clinical education. For a discussion of the relative strengths and weaknesses of simulations and clinics see

education has failed to transform legal education. Despite the perception that it exists on the cutting edge of legal education, clinical education is characterized by uniformity, not innovation. Clinical education now tries to structure itself in the image of the traditional legal education it was to replace.

In the wake of the movement's failure to transform legal education, clinicians have tried to salvage what they can for themselves. They have attempted to move clinical case supervision<sup>7</sup> into the law school in order to ensure that the clinicians who provide that supervision are conferred the status of law professor and the benefits of tenure. This has resulted in what is essentially a labor dispute between clinicians and law schools, a dispute that is largely responsible for the shape of clinical education today and for the world view of many clinicians.<sup>8</sup>

Clinicians have pursued two objectives in their labor dispute with law schools. First, they have advocated that schools hire increasing numbers of clinicians, regardless of the cost or effect such hiring would have on other academic programs of the law school. Second, they have sought to assure that the clinicians who are hired will have the status and job security of traditional law school faculty.

Law schools have generally refused to acquiesce to clinicians' demands. Their opposition is based on what and how clinicians teach, and on clinicians' non-traditional academic backgrounds. Traditional faculty and clinicians differ, both as academics and as educators. Clinicians often lack traditional academic credentials.<sup>9</sup> Unlike traditional academics, clinicians usually devote considerable time to practicing law or work-

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Stephen T. Maher, *Clinical Education—Past, Present and Future*, FLA. B.J., July/August 1991, at 28, 31, 34.

This Essay also refers to two types of externships: "case supervised" and "practice supervised." "Case supervised" externships rely on supervisors employed by the law school to provide the kind of case supervision characteristic of inhouse programs, but in an off-campus setting. By contrast, "practice supervised" externships rely on attorneys in the placement to provide supervision. For further discussion of these approaches see Stephen T. Maher, *The Praise of Folly: A Defense of Practice Supervision in Clinical Legal Education*, 69 NEB. L. REV. 537, 538-73 (1990) [hereinafter Maher, *The Praise of Folly*].

7. For a definition of the "case supervised" approach to clinical education, see *supra* note 6.

8. For a more detailed description of the ongoing labor dispute between law schools and clinicians, and the role of regulators in that dispute, see Maher, *The Praise of Folly*, *supra* note 6, at 640-61.

9. See Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. REV. 185, 191 (1989). This is neither surprising nor disturbing because clinicians are not hired for their scholarly potential, since their day-to-day responsibilities do not require them to produce scholarship. Clinicians are hired because they are willing to do something most traditional faculty members will not do: run the clinic.

ing closely with students engaged in the supervised practice of law. Often, they are lawyers who come from the type of law office the inhouse clinic emulates or, in the case of an externship, in which the student will be placed.

Law schools fear that surrendering to clinicians' demands for tenure might transform the law school faculty; much of the clinical faculty, if given tenure, would leave the clinic to teach in the classroom. Clinicians would leave the clinic, if offered the opportunity, for many of the same reasons that the traditional faculty is unwilling to teach in the clinic in the first place.

Close supervision of simple, routine cases, the kind that are good for student learning, tend to have adverse effects on the faculty members that employ them. This work tends to be less challenging than a more diverse law practice would be. The heavy workload and limited time for reflection and scholarship characteristic of many inhouse clinics lead to clinician 'burnout.'<sup>10</sup>

If clinicians retreated to the classroom in large numbers there would be a dramatic effect on law school hiring. Schools would be forced to curtail their hiring of promising new scholars because new slots would be filled by "retiring" clinicians. Over time, the traditional faculty would be transformed into the retired clinical faculty.

Law schools have generally used two principal strategies to deflect clinicians' demands.<sup>11</sup> The first is to limit clinician participation by employing an approach to clinical education, such as the practice supervised model, that requires few clinicians. In a practice supervised clinic, case supervision of student work is provided by attorneys employed in the placement. The school monitors and supports the learning that occurs in the placement, but it supervises the practice experience, not students' handling of individual cases.<sup>12</sup> Law schools have also adopted a second approach; they hire clinicians but treat them differently than traditional

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10. Stephen T. Maher, *No Easy Walk To Freedom*, 1 D.C. L. REV. 243, 253 (1992) [hereinafter Maher, *No Easy Walk*].

11. Not all schools have resisted clinical education. Some schools have demonstrated a serious commitment to the clinic. However, "clinical education remains a marginal aspect of the law school curriculum." Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective of the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272, 272 (1984).

12. The job of a faculty member (and there may only be one for the entire program) overseeing a practice supervised program is different from that of an inhouse clinician. Inhouse clinicians teach and supervise student case work. Faculty members supervising a practice supervised clinic may teach the classroom component of the clinic, but they do not supervise student case work. Instead, they serve as administrators, educational innovators, planners and evaluators, and as liaisons with other organizations.

faculty. For this reason, many clinicians in American law schools are denied the status and job security bestowed on regular faculty, and they experience working conditions that are more stressful and less conducive to reflection and scholarship than those enjoyed by their traditional faculty colleagues.

Clinicians have responded by organizing and demanding better terms of employment. The "trade union" for clinicians is the Association of American Law Schools Section on Clinical Legal Education. Through the Section, clinicians have orchestrated criticism of law schools who treat clinicians poorly. Because clinicians have little influence in most law schools, they are often not in a strong position to change their own circumstances. For this reason, clinicians have taken their case outside the law school and have found a powerful patron.

The American Bar Association (ABA), the entity responsible for regulating legal education,<sup>13</sup> has supported clinicians' demands for increased hiring and better terms of employment. The ABA has pressed law schools to drop clinical offerings that rely on practicing lawyers for case supervision. The ABA favors approaches that rely on full-time clinicians employed by the law school to supervise student case work.

The ABA's accreditation inspections are its most effective means for exerting pressure on law schools. During such inspections, the ABA has consistently enforced its interpretation of two ABA accreditation standards to pressure schools to drop practice supervised clinics, hire more inhouse clinicians and give those clinicians better status and job security. ABA Standard 306 has been enforced to discourage schools from operating practice supervised clinics.<sup>14</sup> Standard 405(e)<sup>15</sup> has been enforced to encourage schools to provide clinicians with the status and job security of

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13. The ABA develops and implements its regulatory policies through the law school accreditation process. Maher, *The Praise of Folly*, *supra* note 6, at 605. For a detailed discussion of the ABA's regulatory role see *id.* at 605-40. State courts, as regulators of supervised student practice, also influence the direction of clinical legal education. ABA MODEL RULE III(E) (1969), *reprinted in* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW 43-49 (1973).

14. Section 306 (c) provides:

Each study or activity, and the participation of each student therein, must be conducted or periodically reviewed by a member of the faculty to insure that in its actual operation it is achieving its educational objectives and the credit allowed therefore is, in fact, commensurate with the time and effort expended by, and the educational benefits to, the participating student.

*Standards for the Approval of Law Schools by the American Bar Association*, 98 REP. A.B.A. 355 (1973).

15. Section 405(e) "recommends, if not requires, that clinicians be afforded a measure of job security in the form of tenure or long-term contract eligibility." Kotkin, *supra* note 9, at 191 n.33.

the traditional law faculty. Thus, the trend in clinical education has been to try to make schools treat clinical legal educators more like traditional legal educators, with tenured inhouse case supervisors becoming the norm.

### B. *Consequences of the Regulatory Trend*

There is a good argument that what is needed in clinical education today is not more clinicians that look like traditional faculty members, but rather a less traditional form of clinical education. The costs of the goals being pursued by many clinicians, with the support of the ABA, may well outweigh their benefits. Perhaps most importantly, this strategy, if successful, will harm the students that clinicians like to think they serve so well.

If practice supervised clinics are abandoned, the benefits of that approach may be lost. Practice supervised clinics can prepare students for practice in ways that inhouse clinical programs cannot. The practice supervised approach makes it possible and cost effective for programs to focus on non-traditional educational objectives, such as learning how to learn and learning to take responsibility for one's learning. While these programs may seem out of place in the law school curriculum, they help students develop essential lawyering skills. Practice supervised programs also make it possible to offer students a larger variety of placements and provide greater flexibility in meeting changing student placement demands.<sup>16</sup>

Forcing clinical supervision inhouse and converting clinical supervisors into quasi-tenured law professors also has financial costs. A clinic staffed by faculty-like clinicians can be expected to operate at a significantly lower student-faculty ratio than traditional law school classes. Law schools must also underwrite the cost of inhouse clinics. Thus, it is much more expensive to train a given number of students in an inhouse clinic than in a practice supervised clinic.

Because they are under pressure to convert their practice supervised clinics into inhouse clinics, law schools will need to decide whether to invest scarce resources in establishing or expanding inhouse clinical offerings or whether to invest those resources in preferred academic programs and to scale back inhouse clinical offerings. Law schools are more likely to scale back clinical offerings than to establish costly inhouse clinics,

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16. For a discussion of these and additional benefits to the practice supervised approach, see Maher, *The Praise of Folly*, *supra* note 6, at 562-73.

thus the ABA must assure that schools do not respond to the pressure to convert practice supervised clinics by reducing their commitment to clinics generally.

I predict that the ABA will accomplish this by enforcing yet another standard: Standard 302. This accreditation standard will either be interpreted or amended to require schools to provide students with more clinical training.<sup>17</sup> Standard 302 will be used to secure financial support from reluctant law schools for the more expensive clinical programs promoted by the ABA via its enforcement of Standard 306 and Standard 405(e).

The ostensible purpose of the ABA's involvement is to provide more students—indeed, some would insist all students—with access to clinical training. This is a noble goal, and one that I strongly support; the strategy of forcing practice supervised clinics inhouse, however, will not achieve this goal. Law schools do not have sufficient resources to give all students access to clinical legal education. Funding even case supervised externships at a level that would permit all students access would require a massive shift of resources out of traditional programs and into the clinic. Given most law schools' lack of receptivity to clinical education, obtaining funding for such a venture is improbable.

It is far more likely that universal access to clinical training is not the real goal of clinicians' and ABA efforts. Rather, clinicians wish to dismantle practice supervised clinics and move clinical case supervision inhouse in order to increase their bargaining power with the law schools.

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17. This development is presaged in the REPORT OF THE A.B.A. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (July 1992) [hereinafter *MACCRATE REPORT*], which discusses Standard 302 at some length.

Standard 302 (a)(iii) presently provides that "the law school shall offer instruction in professional skills," *Id.* at 265. That provision has been interpreted to require "adequate training in professional skills," but to leave to the individual schools the question of which professional skills should be taught. *Id.* at 263 n.42. Standard 302(a)(iii) has not been interpreted to require that any given program or course be made available to all students who wish to enroll. *Id.* at 264 n.42.

The *MacCrate Report* concludes that "[it] is unclear just what part the existing Standard and Interpretations have played in the development and expansion of programs of skills instruction." *Id.* at 265. However, it does note a "growing sense that skills instruction is indeed central to essential legal education." *Id.* at 265-66. The *MacCrate Report* also suggests that Standard 302(a) "need[s] to be clarified" and specifically suggests: "The interaction between core subjects, treated in 302(a)(i), and professional skills, treated in 302(a)(iii), should be revisited and clarified." *Id.* at 267.

Given the *MacCrate Report's* endorsement of the use of the accreditation process to assure that law schools provide adequate instruction in lawyering skills and professional values, *id.* at 334, it seems logical to speculate that Standard 302(a)(iii) will soon be interpreted or revised to require more instruction in professional skills, and that, via the accreditation process, the Standard will be used to create more clinics.



Practice supervised programs diminish inhouse clinician leverage because they provide scab labor in the form of unpaid practitioners willing to supervise student case work. Practice supervised clinics thus permit law schools to avoid dealing with faculty-like clinicians. If practice supervised clinics were abolished, law schools would be forced to deal directly with clinicians because they would need to hire full-time clinicians to provide case supervision in their clinics. Then clinicians could begin to use Standard 302 and Standard 405(e) to pressure schools into hiring more clinicians and according them better treatment.

In sum, the regulatory strategy I have described is less about improving education than about improving working conditions for a group of teachers who have not been granted the privileges enjoyed by traditional law professors.<sup>18</sup> The ABA has supported clinicians' efforts, I believe, because it is committed to the concept of clinical education and because many of its members have confused support for the teachers in the clinic with support for the clinic's benefits. Well-meaning supporters of the clinic have incorrectly assumed that neither the clinic nor the inhouse clinician can exist without the other. The dominant trend, for the reasons I have discussed, is to convert practice supervised programs into case supervised programs. Too few people are thinking about clinical education in new ways.

### C. *A Call for Innovation: Centers for Alternative Training*

I have not strenuously defended practice supervised clinical programs as they are often run today. I believe that schools put little thought into such programs, and operate them as a way to avoid making a stronger commitment to clinical education. Unfortunately, the weaknesses in most practice supervised programs have justified the ABA's action against placement programs in general and practice supervised programs in particular. Because the central criticism of practice supervised programs has been that they do not provide enough careful supervision of student work, law schools generally respond to ABA pressure either by eliminating externship programs entirely, or by increasing the amount of case supervision supplied by law school faculty and converting the program from a practice supervised to a case supervised program.<sup>19</sup>

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18. Few have questioned whether it makes sense to accord the privileges at issue even to the traditional faculty. Perhaps that question will be the focus of greater attention in the Age of Unreason.

19. Thus, it is likely that case supervision will become increasingly common, despite evidence that this approach itself has many flaws. See Maher, *The Praise of Folly*, *supra* note 6, at 549-62.

I have argued that, if more thought and more support were devoted to the design and operation of practice supervised clinical programs, clinical education could be made much more available at a much lower cost.<sup>20</sup> The unavailability of clinical training is the biggest challenge facing clinical education today.<sup>21</sup> However, I do not see forcing clinical education inhouse as a realistic solution to that problem.

I feel we need to improve practice supervised programs without converting them to case supervised programs, so as to preserve the cost-effectiveness and other significant advantages of the practice supervised approach. My suggestion is not to add more clinicians and increase clinical supervision, but rather to divide the responsibilities traditionally carried by a clinical supervisor three ways. In this model, the faculty members who run the program would be responsible for the learning that occurs in the program. In addition, they would monitor the quality of the placement, assure the availability of educational support (readings, discussions, and necessary training) and coordinate the program's logistics. The actual case supervision would be the responsibility of the attorney in the placement. That attorney's qualifications and abilities, but not his or her advice on individual cases, would be subject to the faculty members' review. The students in the placement would have greatly expanded responsibility for their own learning.

Although these changes are needed, they are not enough. I am convinced that, for it to succeed, clinical education must be removed from the law school. This option provides the clinic with its best opportunity to overcome the clinical politics that have driven clinics toward uniformity and stifled creativity. Outside the law school, as an independent institution, the clinic has a better chance to operate free of the obstacles and

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20. *Id.* at 578-83, 598-605.

21. Recent statistics suggest that approximately 80% of ABA-approved law schools offer inhouse clinical programs while almost all schools offer some form of clinical opportunity. Marjorie Anne McDiarmid, *What's Going On Down There In the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 242 nn.15-16 (1990). However, "a live-client clinical experience taught by the faculty of a law school is available on average to only 30% of law students in the schools which offer such courses." *Id.* at 246. What do these statistics mean in context? One example can be found at the University of Florida. There, "two-thirds of the students who applied for a clinical experience for the spring term of 1991 . . . could not be accommodated, and those who were graduating were thus denied this clinical experience." Don Peters, *Learning Low-Visibility Lawyering Skills at the Virgil Hawkins Civil Clinic*, FLA. B.J., July/August 1991, at 45, 48. The University of Florida provides inhouse clinical opportunities for only 21% of each graduating class, and, if externship programs are included with inhouse clinics, only 37% of each year's graduating class are accommodated. *Id.* at 48.

temptations that have prevented clinical education from achieving its potential in many American law schools.

I have suggested that a series of new institutions, Centers for Alternative Training (CATs), be established in the major urban centers of the United States to provide community-based clinical training for law students.<sup>22</sup> Ideally, CATs ultimately would not be part of any law school;<sup>23</sup> they would operate as independent externship clinical programs.

The financial benefits of this model are clear. Externship clinical programs are generally profit centers for the law schools that operate them; they generate more in tuition dollars for the school than they consume in program costs. There are two reasons for this. First, in my opinion, schools do not spend what they should on their externship clinics. Second, externships, if run as practice-supervised clinics, could be operated quite cost-effectively. When CATs take over this function from the law school, they should charge the same tuition as law schools have charged but direct those resources back into the program. That would provide CATs with the financial resources necessary to develop quality academic programs.

The educational content of clinical education should also improve because full-time clinicians would be employed to operate CATs and to design their educational programs. The quality of supervision should improve because resources would be available to pay field supervisors and to reward the best field supervisors with sabbatical visits to the CAT. Revenue not expended on the educational program should be set aside to establish affordable student housing in the urban area in which the CAT operates and to offset the temporary relocation costs of out-of-town students interested in attending.

Ideally, CATs would admit students from schools all over the country. The location of CATs in major urban centers would offer numerous placement possibilities. CAT clinicians would develop and direct student placements, operate a classroom component, and provide additional supervision to guide students' learning experiences. The CATs would then award credit to students who successfully completed their programs, which would ideally be full-time and last one or two semesters. The students would take the CAT credit back to their respective law schools.

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22. For my earliest published discussion of CATs, see Maher, *No Easy Walk*, *supra* note 10, at 262-67.

23. CATs would probably have to begin as programs of urban law schools and later be spun-off as they develop. After the early pilot programs mature and demonstrate their benefits, the ABA might permit free-standing CATs that have the power to award transferable academic credit.

I recommend that CATs not only use the externship form, but also that they adopt the practice supervised approach. Rejection of the case supervised externship approach would permit CATs to be more responsive to student preference in the choice of placements, and it would allow CATs to minimize their overhead costs. Choosing practice supervision would also free CAT clinicians to focus on their special contribution to the success of the clinic: creating and administering the educational program, and training and monitoring both the CAT students and participating lawyers from the placements. If the placements are properly organized and operated, and if the students are prepared for the placement and appropriately monitored, the details of case supervision can safely be assumed by lawyers in the placement. The CATs' clinicians could spend their time not as practitioners, but rather as administrators, educators and planners.

A common response to my writing in this area has been that these ideas are interesting, but that given the realities of legal education they are not viable. In this piece, I challenge that assessment. While it is true that CATs face significant obstacles, there is hope for my proposals at two levels. First, it is in the long-term best interests of clinicians and traditional faculty to work to implement these ideas. Law schools would benefit from the establishment of CATs because they could finally shed their clinical programs, something that many, if not all, schools would welcome. Clinicians would benefit by leaving the law school because they would gain control of their professional destinies, something that has largely been denied them in law schools today. In addition, they would shed the burden of inhouse case work; they have suffered that burden in order to make themselves indispensable law school personnel, although doing so has stifled their creativity and denied them some of the personal satisfaction that CATs may permit them to realize.

The second reason that the proposals I advance are more likely to succeed than one might expect, is that the world is changing in unexpected ways. Organizations of all kinds will be affected by these changes and though law schools may strongly resist they will not be exempt. If CATs are consistent with these emerging trends, they have a good chance for success, even if all the forces of legal education today oppose them. Thus, the important inquiry is: what does the future hold for organizations?

### III. THE AGE OF UNREASON

In *The Age of Unreason*, Charles Handy predicts that changing tech-

nological and economic conditions "will make the world a different place."<sup>24</sup> Handy argues that these changes can be used to our advantage if we understand and embrace them, rather than adhering to the status quo:<sup>25</sup> "The future we predict today is not inevitable. We can influence it, if we know what we want it to be."<sup>26</sup>

Handy's insights rely on three premises. First, that the changes we face are "discontinuous"; that is, not part of a pattern. This makes them "confusing and disturbing, particularly to those in power."<sup>27</sup> Second, Handy believes that "it is the changes in the way our work is organized which will make the biggest differences to the way we all will live."<sup>28</sup> Moreover, Handy suggests that little changes, even if they go unnoticed, can have the greatest impact on our daily lives.<sup>29</sup> Third, Handy argues that "discontinuous change requires discontinuous upside-down thinking to deal with it, even if both thinkers and thoughts appear absurd at first sight":<sup>30</sup> "If Copernicus could stand the solar system on its head and still be right, nothing should be dismissed out of hand in a time of discontinuity."<sup>31</sup>

The focus of *The Age of Unreason* is the work world: "The changes which we are already seeing in our lives, and which we will see more of, have their origins in the changes in our workplaces. Work has always been the major influence on the way we live."<sup>32</sup> Handy notes several significant workplace and workforce changes. The trend is towards less labor-intensive manufacturing, more knowledge-based organizations, and an expansion of the service industry.<sup>33</sup> He anticipates that soon "less than half of the work force in the industrial world will be in 'proper' full-

24. HANDY, *supra* note 1, at 17.

25. *Id.* at 4.

26. *Id.* at xi.

27. *Id.* at 5. Handy writes:

I believe that discontinuity is not catastrophe, and that it certainly *need* not be catastrophe. Indeed, discontinuous change is the only way forward for a tramlined society, one that has got used to its ruts and its blinkers and prefers its own ways, however dreary, to untrodden paths and new ways of looking at things.

*Id.* at 9.

28. *Id.* at 5 (original emphasis deleted).

29. *Id.* For example, he notes that central heating made it possible to do away with chimneys and skyscrapers and that the telephone made it possible for people to work together without being in the same place. *Id.* at 13, 14.

30. *Id.* at 5-6.

31. *Id.* at 25.

32. *Id.* at XII.

33. *Id.* at 50-54.

time jobs."<sup>34</sup> More jobs will require "cerebral skills,"<sup>35</sup> fewer workers will enter the workforce,<sup>36</sup> more of the population will be older and many will be pensioners.<sup>37</sup>

These changes need and breed new types of organizations.<sup>38</sup> Handy discusses three emerging organizational structures which he terms the shamrock organization, the federal organization and the triple I organization. A shamrock organization<sup>39</sup> may have three or four constituent parts. The first "leaf" of the shamrock represents the professional core of the organization, the second leaf represents organizations that perform under contract some portion of the parent organization's work, and the third leaf represents the flexible labor force, a group which includes people who tend not to fit the mold of the traditional full-time worker. Handy notes a possible fourth leaf, representing the growing practice of requiring customers to do some of the organization's work.<sup>40</sup>

As the shamrock metaphor illustrates, Handy's view is that "the organization of today is made of three very different groups of people, groups with different expectations, managed differently, paid differently, organized differently."<sup>41</sup> Each of these groups have a different kind of commitment to the organization.<sup>42</sup>

Alongside the shamrock organization is the federal organization.<sup>43</sup> Federalism "implies a variety of individual groups allied together under a common flag with some shared identity."<sup>44</sup> Federalism is different than decentralization. "Decentralization implies that the center delegates certain tasks or duties to the outlying bits, while remaining in overall control."<sup>45</sup> In federalism, by contrast, "[t]he center's powers are given to it by the outlying groups, in a sort of reverse delegation. The center, therefore, does not direct or control so much as coordinate, advise, influence,

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34. *Id.* at 31.

35. *Id.* at 34-36.

36. *See generally id.* at 36-40.

37. *Id.* at 40.

38. *Id.* at 53-54.

39. *See id.* at 87-115.

40. *Id.* at 101. This practice is probably most clearly demonstrated by the rise of self-service gasoline stations. *Id.*

41. *Id.* at 90.

42. *Id.* at 94.

43. For a discussion of the federal organization see *id.* at 117-40. A given organization could have features of both a shamrock organization and a federal organization, and, for that matter, a triple I organization; they are not mutually exclusive categories.

44. *Id.* at 117.

45. *Id.* at 118.

and suggest. . . ."<sup>46</sup> In the federal organization, the center "has to be a place of persuasion, of argument leading to consensus. Leadership is required, but it is the leadership of ideas not of personality."<sup>47</sup>

Not surprisingly, changes in individual jobs are occurring simultaneously with these structural organizational changes. Just as organizations are acquiring different structures, so too the jobs of individuals within these organizations are changing form. Handy describes the job of an employee in the evolving organization as an "inverted doughnut."<sup>48</sup> The center of this inverted doughnut is filled, and represents the employee's explicitly defined job description. Surrounding this core of the worker's job is empty space which represents the area the worker fills when he or she uses his or her discretion or initiative to improve upon the job as it has been defined. This space is bounded by an outer rim, which represents the outer limits of the worker's discretion.

Emerging organizations must manage their employees by clearly defining the parameters of the "inverted doughnut." Employers must specify the essential core of their employees' jobs, mark the boundaries of discretion, and clarify the results to be achieved—"the criteria for successful initiative."<sup>49</sup> Handy describes this management style as a major discontinuity.

Most managers feel more comfortable when the cores are large as well as closely defined, when they can control the methods and therefore the results, the means and not the ends. To let go, to specify success criteria, to trust people to use their own methods to achieve your ends—this can be uncomfortable. It is particularly uncomfortable when we realize that after-the-event-controls, or management-by-results, means that mistakes can and will be made. It may be true that we learn more from our mistakes than from our successes, but organizations have been reluctant to put this theory into practice.<sup>50</sup>

Managers must also be able to applaud success and forgive failure, because only when failure is forgiven can it be turned into a lesson.<sup>51</sup>

Handy also describes what he calls the triple I organization, which combines Intelligence, Information and Ideas to form a "corporate uni-

46. *Id.* at 118. According to Handy, the evolution of the federal organization occurred "because the reduced core of the organization cannot deal with the flood of information coming in from the decentralized operations." *Id.* at 120.

47. *Id.* at 123-24.

48. *Id.* at 129-32.

49. *Id.* at 131.

50. *Id.* Handy also points out that the "federal organization will not work unless those in the center not only *have* to let go of some of their power but actually *want* to do so . . . ." *Id.* at 126.

51. *Id.* at 132.

versity.”<sup>52</sup> “In a competitive information society, brains on their own are not good enough, they need good information to work with and ideas to build on if they are going to make value out of knowledge.”<sup>53</sup> Not every level of an organization must be a “triple I concern,” but certainly the organizational core must be one.<sup>54</sup>

To succeed, triple I organizations must create working environments that will support those efforts. Triple I organizations must find ways to govern intelligent people by consensus rather than by command, they must aspire to quality, and they must use smart machines to aid their intelligent people.

The effective organization, today, is learning fast to come to terms with the new machines, the people it needs, and with the new culture of consent. It is a new kind of organization in style and temperament, not an easy one to manage or to lead but one which will be increasingly necessary in the competitive knowledge-based world of the future.<sup>55</sup>

Handy suggests that the hard facts of economic life will force organizations to invest in smart machines and smart people and, since there will be a shortage of smart people, organizations will need to pay them more and try to have as few of them as possible. “It all puts pressure on the core, a pressure which could be summed up by the new equation of half the people, paid twice as much, working three times as effectively, an equation which, once you start believing it, has built-in momentum.”<sup>56</sup>

Given the types of organizational changes Handy observes, it is evident that employees’ working lives must also change. Handy foresees that few people will have jobs in an organization’s core. Organizations will accomplish their objectives using more contract and temporary workers.<sup>57</sup> Handy points out that not only will this be more economical

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52. *Id.* at 149.

53. *Id.* at 141.

54. *Id.* at 142.

55. *Id.* at 145.

56. *Id.* at 149-50.

57. In the possible future that Handy prefers, most workers will have work portfolios, rather than full-time jobs at the core. He uses the term “work portfolio” to describe “how the different bits of work in our life fit together to form a balanced whole.” *Id.* at 183. The categories of work for the portfolio include: wage work, money paid for time given; fee work, money paid for results delivered; homework, work done for home and family; gift work, work done for free outside the home; and study work, training and learning done seriously. *Id.* at 184. The portfolio life may prove less financially rewarding, but it may be more rewarding in other ways. It is an improvement over a full-time job at the core for those who value having control over what they do, who like having a variety of tasks to do, and who enjoy spending their time on other parts of the portfolio, such as homework. *Id.* at 206.



for the organization, but it also may be better for those who work outside the core.

By taking the job, physically, outside the organization, we make it more our own. We have more control over when and how we do it. If we go one step further and take it contractually outside the organization, becoming in some way self-employed, we make it even more our own. The organization has retreated. It is less dominant, more a helper now than an owner. Jobs do not necessarily belong in organizations any more. It is, when one thinks about it, a significant discontinuity, a change which makes a difference.<sup>58</sup>

Although he is certain that this shift to jobs outside the core is inevitable, Handy acknowledges that we as individuals may not take advantage of this opportunity "to shape our work to suit the way we want to live instead of always living to fit in with our work."<sup>59</sup>

Handy envisions that in the world of the future institutions will be less important and people will be more important. "The successful organization will be built around John and Peter, Mary and Catherine, not around anonymous human resources, while in the world outside the organization there will be no collective lump to hide under. We shall have to stand each behind our own name tag."<sup>60</sup> The forces that Handy describes all "seem designed to set the individual free to be more truly himself or herself."<sup>61</sup> Handy admits that this will create a world of greater opportunities, but also of uncertain results. How can we seize the opportunities this new world offers and ensure the best training of new lawyers?

#### IV. CLINICAL LEGAL EDUCATION IN THE AGE OF UNREASON

##### A. *Rethinking Education*

In his epilogue, Handy summarizes his vision for the future with the following warning: "We live in an Age of Unreason when we can no longer assume that what worked well once will work well again, when most assumptions can legitimately be challenged."<sup>62</sup> Because education is critical to the success of Handy's vision, he is particularly interested in educational reform; according to Handy, "[e]ducation needs to be reinvented."<sup>63</sup> Handy identifies several areas within education that need

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58. *Id.* at 178.

59. *Id.* at 179.

60. *Id.* at 258.

61. *Id.* at 259.

62. *Id.* at 257.

63. *Id.* at 211.

rethinking, and then describes organizational changes that might ensue.

Many of Handy's criticisms concerning the way schools have traditionally approached their educational mission coincide with or complement my observations about legal education. For instance, Handy argues that schools unduly emphasize analytical intelligence. This criticism is particularly applicable to legal education. In law schools, analytical intelligence is overvalued and other forms of intelligence are undervalued. Since so much more than analytical intelligence is needed in the portfolio world<sup>64</sup> that the future may bring, legal education must do more than prepare the most analytically intelligent for further advancement.

The fact that law students—our future leaders, counselors and advocates—have not risen up against a system that denies adequate training to many of them, raises fundamental questions about how law students and their teachers think about legal education.<sup>65</sup> Handy suggests that schools train students to accept the unacceptable by the way that they treat them; he argues that, rather than treating students as consumers or workers, schools treat them as products.

Handy discounts the idea that schools see students as consumers because “[students] have no real choice, no consumer power, no right to complain or to be asked for their preference.”<sup>66</sup> While the stereotype that lawyers are aggressive people might lead one to believe that law students take an active role in shaping their education, law students, in my experience, are no more likely than other students to control essential aspects of their legal education. Students have little if any input regarding course offerings, scheduling or enrollment. If students' preferences played an important role in those decisions, one would expect schools to reflect those preferences more often than my experience suggests they do.

Handy also dismisses the idea that schools see their students as workers. While schools may say the students are the workers, they often do not treat them as such.

[W]ho would expose workers to an organization which required them to work for ten different bosses in one week, in three or four different work

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64. See *supra* note 57.

65. One possibility is that law students are indoctrinated to resist change. Handy points out that abdicating personal responsibility to others is an inhibitor of change.

Too many delegate their futures and their questions to some mysterious *they*. *They* will set the syllabus for life just as *they* set the syllabus for our courses at school. *They* know what is best; *they* must know what they are doing. *They* are in charge; leave it to *them*.

HANDY, *supra* note 1, at 72.

66. *Id.* at 217.

groups, to have no work station or desk of their own but be always on the move? What sensible organization would forbid its workers to ask their colleagues for help, would expect them to carry all relevant facts in their heads, would require them to work for 35-minute spells and then move to a different site, would work them in groups of thirty or over, and prohibit any social interaction except at official break times?<sup>67</sup>

In order for students to be treated as workers, especially in professional training, changes need to be made in the way schools operate. Clinical education represents such a change; it has always been more like work than traditional classroom education.

Handy suggests that, rather than conceive of students as workers, schools "see their students as their products."<sup>68</sup>

Products start off as raw material. The material is processed, in batches usually, at different work stations. It is graded and inspected; so are students. The fact that some 40% are below par is regarded mainly as a sign that standards are high. Unfortunately, the inferior batch is not sent back for further processing but is turned out to fend for itself in the world of work.<sup>69</sup>

Unfortunately, this passage aptly describes some students' treatment in law school. Law schools frequently cater to those they consider the best and brightest. For instance, professors often teach classes at a level that is above many students' understanding. Then, when students' understanding is tested through examination and in many cases found to be inadequate, professors give poor marks, rather than offering individualized instruction to improve students' understanding. Simply grading students and then sending them out the door to practice is even less defensible in professional education than it is earlier in school.

Law schools seem to assume that clinical training is not essential because the best students will find jobs after law school with employers, such as large law or business firms, who will take some responsibility for continuing their employees' legal training.<sup>70</sup> It often appears that the

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67. *Id.*

68. *Id.*

69. *Id.*

70. In fact however, the odds are that many graduates will not receive such training. Douglas Carnahan notes this reality:

Look at it this way: A current law school graduate has been trained in law school to do one of three things. He or she can be an associate in a big law firm, a clerk to an appellate judge or a law professor. These jobs, naturally enough, are few and far between. The rest of the graduates are dumped unceremoniously on an unsuspecting public.

Douglas G. Carnahan, *New Attorneys Must Start Receiving the Proper Training for the Job*, L.A. DAILY J., Mar. 2, 1988, at 4.

real purpose of traditional legal education is to determine which students are the brightest of the bright so that these top firms, the intended beneficiaries of this system, can be reasonably assured that the top students they hire are worth the training investment they are about to make.

The flaws in this system were always clear. It never worked well for students who were not near the top of the class, unless they were at the top law schools. Those students would have trouble getting jobs with top firms. Unless they could find a job in which they would receive training, students who were not near the top of their class were left to their own devices to secure the training they would need to become competent lawyers. The problem of inadequate training is particularly acute today because so many lawyers go directly from law school to solo or small practices<sup>71</sup> and do not have the benefit of employer training.<sup>72</sup>

This system worked well for the top firms because students at the top of the class and at the top law schools do tend to be very bright and trainable. Yet while it made sense for these firms in the 1980s, when their demand for law students was at its peak, this system is less defensible today because the big firms have changed their requirements. First, they need fewer graduates.<sup>73</sup> Second, as a result of the high salaries that even beginning associates earn today in top firms, firms are increasingly unwilling to invest resources in training new lawyers and want their lawyers to produce almost from the start. In short, top firms want the law

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71. According to statistics compiled by the National Association for Law Placement (NALP), an increasing percentage of recent law school graduates enter solo or small practices. NALP's figures show that 2.7% of the class of 1989, and 3.3% of the class of 1990 became solo practitioners upon graduation. *MACCRATE REPORT*, *supra* note 17 at 36-37. The percentage of students entering small practices (defined as 2-10 lawyers) increased from 24% in 1989 to 26.6% in 1990. *Id.* at 37.

72. According to the findings of the *MacCrate Report*, graduates entering solo or small practice "seldom have an experienced attorney to whom they may go for advice, nor do they have access to training programs in which to learn on the job." *Id.* at 47. The *MacCrate Report* also observed that "[i]t is not surprising that successive assessments of the profession have found that the smaller the setting in which beginning lawyers practice, the more they rely on their legal education for learning practice competencies." *Id.* at 47 (citing AMERICAN BAR ASSOCIATION TASK FORCE REPORT, at 39 (Nov. 1991)).

Several of Handy's predictions indicate that the need for better training is becoming increasingly critical. Handy believes that larger organizations will tend to shrink, and that only the core will remain. Work that used to be done within the organization will then be contracted out to workers who have become self-employed. If this trend towards self-employment and the breakdown of stable core positions does occur, then better training for the actual practice of law will become even more important than it is today, and sifting the class for the smartest students will become less important. This trend also demonstrates the need for CATs and increases the likelihood of their success.

73. See, e.g., Claudia MacLachlan, *Another Paltry Summer: The Largest Firms Offer Even Fewer Jobs*, NAT'L L.J., June 8, 1992, at 1.

schools to bear more of the training burden.<sup>74</sup> Since law schools are not prepared to supply such training to all of their students, there is an opening for new institutions, such as the CATs described in Part II, to develop and provide those services.

1. *Handy's Organizational Framework and Clinical Education.* In *The Age of Unreason*, Handy applies his organizational models, described in Part III of the Essay, to educational institutions. Handy applies the shamrock concept to education by suggesting that the core activity should remain inhouse and "everything else contracted out or done part-time by a flexible labor force."<sup>75</sup> In Handy's school,

the core activity would be primarily one of educational manager, devising an appropriate educational program for each child and arranging for its delivery. A core curriculum would continue to be taught directly by the school but anything outside the core would be contracted out to independent suppliers, new mini-schools. These independent suppliers would be paid, by the core school, on a per capita basis, probably with an agreed minimum.<sup>76</sup>

Handy's shamrock school could be a model for organizing the CAT. The law school would still teach the core of the law school curriculum. CATs would operate outside the core as new specialized "mini-schools." The educational managers would reside in the mini-school rather than the law school, to avoid the clinical politics that might otherwise stifle the creativity of the mini-school. Attorneys in the placements, not the CAT clinicians, would supervise students' case work. Those case supervisors could constitute the temporary workforce Handy described because they might change from year to year. The fourth leaf of the CAT-as-shamrock is the student himself or herself, who would be called upon to take greater responsibility for his or her own education.

The benefits of this structure should not be underestimated.<sup>77</sup> By

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74. Joel Henning, a leading authority on continuing legal education, made this point more than ten years ago. It is much truer today. "[L]aw firms and other entities employing numbers of lawyers are beginning to question their old methods of making competent lawyers out of intelligent law graduates." Joel Henning, *Socrates, Isaac Stern, and Nadia Boulanger: Legal Education Beyond the J.D.*, 35 PERS. FIN. L. Q. REP. 215, 215 (1981). Some schools are already changing to a more "skills-oriented" educational approach in order to ensure that their students are competent to practice law upon graduation. *2nd Tier Schools Offer the Best Game in Town, But is Anyone Playing?*, OF COUNSEL, June 15, 1992, at 2, 3.

75. HANDY, *supra* note 1, at 213.

76. *Id.*

77. Practice supervised clinics are currently unable to take advantage of the opportunities CATs would have because regulators are pressuring them to set educational objectives for programs rather than for students. Maher, *The Praise of Folly*, *supra* note 6, at 623-25.

placing the hardest work—case supervision—in the hands of temporary workers, the burn-out problem is addressed institutionally. So called “burn-out” is less of a problem with temporary workers because their turn over rate is higher. Also, supervisors in the placement are well suited to this difficult task because they have chosen to work as practicing attorneys and to supervise an intern; indeed, they often bring great enthusiasm to that task. Their only shortcoming may be in their understanding of how and what to teach their students. The CAT clinicians can provide expert assistance on those points without risking the consequences of actual case supervision.<sup>78</sup>

Students would also benefit. CATs would help counteract law schools’ emphasis on analytical intelligence, discussed earlier. In a CAT program, analytically intelligent students would receive nontraditional educational experiences that would round out their education. Students judged less analytically intelligent in the traditional law school forum would have an opportunity to develop other skills in a different learning environment, one in which they might thrive. The students who do well in the clinic are not necessarily the same ones who do well in traditional classes. “Practice supervised clinical programs may provide special benefits for those whose learning styles do not adapt well to the Socratic method or to classroom lectures.”<sup>79</sup>

The CAT could also benefit from being structured as a federal organization and as a triple I organization. If the job of the clinicians running the CAT is the “inverted doughnut” envisioned by Handy, rather than the job of the underpaid and overworked clinician who supervises routine cases until he or she burns out, creative solutions could be found to the traditional concerns about the practice supervised approach. If structured as a federal organization, the CAT

could give each student their own inverted doughnut in the form of an individual contract. In this contract, there would be a core which the school

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78. This division of labor corresponds with another of Handy’s insights, the importance that the need for energy correspond with a worker’s youth and the need for wisdom with older age. Bruce Lloyd, *Careers for the 21st Century*, LONG RANGE PLAN., June 1988, at 90 (interview with Charles Handy). Handy suggests that in the future we are likely to see a greater separation of energy and enthusiasm (youth) from wisdom (old age). Considerable effort will be needed to bring these two elements closer together both within individual lives and within the organizational structure of the corporation. *Id.* The suggested division of labor assigns the portion of supervision requiring the most energy and enthusiasm (case supervision) to the young, committed agency lawyer who has chosen to work in the placement and it assigns the responsibility for the design and implementation of the educational program to the more experienced, and hopefully wiser, clinician, who may have retired from that kind of agency work some years ago.

79. Maher, *The Praise of Folly*, *supra* note 6, at 566.

would undertake to deliver and the individual to study. There would then be an area of discretion, out of which the student could pick a range of options. There would be a clear definition of goals and measures of success for the doughnut as a whole, including the demonstration of capacities, such as interpersonal skills, practical competencies, and organizing abilities which cannot be fully taught in classroom subjects. There would be planned opportunities to review and, if necessary, to revise the contract, on both sides.<sup>80</sup>

If the clinicians in the CAT are part of a triple I organization, combining Intelligence, Information and Ideas to achieve added value, they will bring new technologies to bear in their teaching and supervision of students. Using computers, they will be able to know more about their students' experience, and what the student is learning from that experience, than even the lawyer supervising the student's case work; time and activity reports can be used to create profiles concerning how the student spends his or her time. Structured journals can be used to focus students on particular issues and to guide their reflection on their experiences. Other even more innovative approaches will surely be developed.

In sum, CATs' ultimate success depends—to use Handy's terms—on two things: how well students fill their “inverted doughnut” of responsibility and where both the ABA—as regulator of legal education—and state courts—as regulators of supervised student practice—permit the outer boundaries of that responsibility to be drawn.

2. *Credit and Credit-Plus-Pay.* CATs' success also depends heavily on the ABA's willingness to approve the credit that is earned in the CATs, so that it will be freely transferable back to the law school being attended by the law student enrolled in the CAT. I have argued in favor of awarding credit for nontraditional skills and awarding credit in nontraditional settings.<sup>81</sup> The regulators of legal education have been slower than many educators to accept nontraditional academic credit. Concern about whether nontraditional educational objectives are “creditworthy,” and concern that placement with practitioners is not educational because it provides the same experience as students will have in practice upon graduation, have apparently discouraged regulators from permitting more student choice in this area.<sup>82</sup> That attitude must change if the law school is to serve as the core of legal training, but not as its sole provider.

Handy's work supports a change in the way that regulators view

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80. HANDY, *supra* note 1, at 215.

81. Maher, *The Praise of Folly*, *supra* note 6, at 564-73.

82. *Id.* at 589-95.

academic credit. Handy proposes both a new approach to funding higher education and new approaches to awarding academic credit. He recognizes that work that takes place outside the traditional classroom or institutional setting may also have value that can be expressed in terms of academic credit.

When . . . course credits are more widely accepted in other institutions, we shall be getting closer to the flexi-education we need for our flexi-lives. The credit transfer does not have to be confined to formal colleges or universities. The great bulk of study is now taking place inside organizations. Provided this education is up to standard there is no good reason why it should not earn credits for its participants. We may soon expect to see business organizations seeking validation for their executive courses from business schools.<sup>83</sup>

Similarly, the learning that would occur in the CATs should be accepted as creditworthy. Students should be permitted to earn at least a full semester of credit so they can attend a CAT far from their law school. A semester of credit for a semester in the CAT is necessary so students attending a CAT would not fall behind their classmates who remain at the law school.

Handy also suggests that there will be increasing pressure on professions to require shorter training periods, and that the professions will respond by offering some form of subsidized employment.<sup>84</sup> The CAT approach could provide students with both academic credit and a steady income because placements employing CAT students for credit should also be willing to pay them for their work. After all, the placement will be making an investment in the students' training and supervision and will therefore have confidence in their abilities. In addition, where the students are permitted to practice law under supervision pursuant to state practice laws, their contributions are particularly valuable. Paying CAT students for their work in placements would represent an improvement upon subsidized employment as it is typically conceived, because it would assure both quality control and protection against exploitation while students complete their field study.

The CAT would benefit significantly by offering credit-plus-pay. It would make CATs more attractive when compared with clerking positions or regular academic programs; CATs might eventually supplant regular clerking in cities large enough to support them. Paying students would not significantly increase costs because pay could be provided, at

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83. HANDY, *supra* note 1, at 224.

84. *Id.* at 46.



least in large part, by the placements in which the students performed their supervised practice. The pay might help strengthen the placement's commitment to the student by giving it a financial investment in the student's work.

Credit-plus-pay for clinical field work is an innovation that has generally been stymied by regulators for the political reasons discussed earlier; it has been prohibited because it would disadvantage inhouse clinics.<sup>85</sup> Inhouse clinics would have to draw on school resources to provide the pay, while externships could obtain those resources from the placements. It should be noted, however, that although the opposition to credit-plus-pay remains strong, like other innovations consistent with future trends, it can be expected to become more acceptable with time.<sup>86</sup>

### B. *Time for a New Clinical Vision*

In recognition of the need for improved practical training for lawyers, state bars are trying to convince law schools that they must offer such training to their students. When compared with the drastic changes envisioned by some proposed initiatives, CATs look less improbable than they might at first glance. Some state bars may soon adopt conditional admission out of frustration with the unwillingness of law schools to significantly alter their educational programs. In California and Florida, for example, there has been pressure within the bar to withhold licensure from or grant only conditional licensure to law school graduates lacking certain kinds of training. In California, proposals which would add new requirements for bar admission have been circulated. Under one such proposal, lawyers seeking admission to the bar would be required to serve 600 hours in supervised internships either through an ABA-accredited law school or a post-graduate program conducted in conjunction with a law school.<sup>87</sup> Under another, lawyers would have to participate in a residency program, much like physicians do.<sup>88</sup> According to the *National Law Journal*, such initiatives indicate "tightening in the tension between teaching law as a way of thinking and the wishes of some to turn

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85. See Maher, *The Praise of Folly*, *supra* note 6, at 617-21 (discussing the debate in clinical legal education over credit-plus-pay).

86. Indeed, the President of the ABA recently called for the repeal of the ABA's prohibition on earning both credit and pay for clinical work, thus improving the prospects for change in this area. William B. Powers, *D'Alemberte Proposes Early Bar Exam*, SYLLABUS, Spring 1992, at 1.

87. Michael J. Hall, *Bar Panel Recommends that Lawyers Serve Internships*, L.A. DAILY J., Mar. 7, 1989, at 5.

88. *Id.*

law school into trade schools.”<sup>89</sup>

In Florida there is a similar movement to ensure that lawyers receive practical training. The 1990 All Bar Conference “considered requiring an internship before admission to the bar, and advised the Bar to explore a ‘mentor’ program.”<sup>90</sup> The 1991 All Bar Conference debated the question: “Shall the Florida Bar establish rules which require a six-month conditional admission to the Bar (following passage of the Bar exam), during which time the new admittee must establish fulfillment of minimal practice requirements?”<sup>91</sup> Although the measure was defeated, it has surfaced again in connection with a study being conducted by the state Bench/Bar Commission.<sup>92</sup>

Conditional admission may be all that the state bars can do to force changes in lawyer training, but it will almost certainly hurt law students in the process. How can law students, who often have tens of thousands of dollars in loans, survive if they cannot practice law? Mentor programs, in which a member of the bar assists a new admittee with the basics of practice, may place recent graduates at a distinct disadvantage. Mentors are likely to be more interested in the prospect of free or low cost labor than they are in spending valuable time training a lawyer they do not intend to hire. The bar has neither the resources nor the expertise to design and operate a supervised practice program that both adequately protects the new lawyer from exploitation and assures the educational value of the new lawyer’s supervised practice experience. Without strong institutional support, the benefits of such a program are doubtful and the opportunity for abuse is great.

Even if adoption of a draconian measure such as conditional admission were to incite law schools to increase their clinical offerings, it is doubtful that clinical education would become universally available. The clinical politics described earlier would pit the ABA, which is committed to better working conditions for clinicians, against the state bars, which would be more concerned with making clinical education more available to students and hence more willing to accept practice supervised clinics.

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89. Terry Carter, *California Bar Ponders Adoption of Tough Clinical Requirements*, NAT’L L.J., June 12, 1989, at 4.

90. Benjamin H. Hill III, *Clinical Education Addresses Concerns*, FLA. B.J., July/August 1991, at 26.

91. The proposal provided for four alternative methods for satisfying its requirements: law school clinical programs; commercially available practice experience approved by the National Institute for Trial Advocacy (NITA); mentorship programs; and employer-supervised programs. *Id.*

92. See Memorandum from Judge Gerald T. Wetherington, Circuit Judge, 11th Judicial Circuit of Florida, to the Florida Bench/Bar Commission (Apr. 1992) (on file with author).

In addition, given the history of clinical education, even intense pressure seems unlikely to change the traditional faculty's fundamental opposition to the clinic.

## V. CONCLUSION

Rather than working to develop innovative programs that will benefit from emerging and future trends, clinicians are trying to make the grinding, unsustainable work of the inhouse clinic as indispensable as possible. This may help certain clinicians gain status or job security, but it does little if anything to serve clinical legal education. Many clinicians wish to gain tenure and then abandon the clinic. While this may provide them with some degree of insulation from the trends that Handy predicts will reshape the world around them, such isolation will not enable them to learn and teach about the radical changes in the work world with which their students must learn to cope. It is not the example that a clinical educator should strive to set.

Only the creation of a new institution can capture the opportunities being created by our changing work world. If CATs are established soon, they may provide a measure of stability during the transition that Handy foresees. Handy calls upon us to capitalize on the changes around us:

We need more 'unreasonable people' who want to change their world, not adapt to it, and who want to challenge orthodoxy rather than rationalize away its inconvenient bits. . . . I believe we are the inheritors of a most interesting creation (however it occurred). It is our responsibility to make it better, not just to survive.<sup>93</sup>

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93. HANDY, *supra* note 1, at 253-54.