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THE COST OF CLINICAL LEGAL EDUCATION

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Abstract: Critics of clinical legal education often malign its expense and look to clinical budget cuts as the primary means of reducing costs in legal education. This narrow focus, however, ignores the important function that clinical legal education plays in training law students to be ready for practice and assumes other legal education expenses are more important. The 1992 *MacCrate Report*, the 2007 *Carnegie Report*, and other studies demonstrate that clinical education is necessary to produce a well-rounded and practice ready law student. Though clinical legal education should not be immune to cost constraints, neither should any other type of law school expenditure. To succeed in economically difficult and demanding times, law schools must put every aspect of legal education through a cost-benefit analysis for cost-saving potential.

INTRODUCTION

When discussing the cost of legal education, few areas receive more attention than in-house clinics—wherein students represent clients under the supervision of faculty, usually in a law office within the law school. In-house clinical courses require low student-to-faculty ratios, with faculty working closely and intensively with students.¹ Some suggest that one way to cut the cost of legal education would be to eliminate in-house clinics because they require more faculty resources than classroom courses.² This suggestion is not new. In 1984, Professor Mark Tushnet observed, “When faculties feel pressure to reduce bud-

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¹ See DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 17 (2008), available at <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>. Survey data from American Bar Association (ABA) accredited law schools show that the most common student-to-faculty ratio for in-house clinical courses is eight to one. See *id.* One hundred and forty five out of 188 ABA fully-accredited law schools completed the survey, a 77% response rate. *Id.* at 1.

² See Mark V. Tushnet, *Scenes from the Metropolitan Underground: A Critical Perspective on the Status of Clinical Education*, 52 GEO. WASH. L. REV. 272, 273 (1984).

ets or to restrain rates of increase, they look first to, and often not beyond, the clinical curriculum.”³

To contain costs, law school administrators should carefully consider budgetary restraint in every aspect of legal education, including in-house clinical courses. Educating law students to become practicing lawyers should be the primary objective of every law school. Anyone serious about defining a quality legal education must consider all allocations of resources within the law school and how to manage costs effectively without compromising law students’ education.

Unfortunately, those who question the cost of in-house clinics usually do not compare its cost to other costs within the law school. Nor do they consider factors like the law school’s mission to prepare students for the effective and ethical practice of law, the role that in-house clinical legal education serves, or student demand for a real-life legal educational experience. Why not?

This Article, consisting of three parts, addresses questions one should consider when examining the cost of legal education, including the cost of clinics. Part I examines the cost increases in legal education generally and some of the forces that have contributed to increased tuition. Part II discusses why in-house clinical legal education exists and situates it in the context of experiential education in law schools. Finally, Part III urges legal educators and administrators to adopt an appropriate methodology before cutting costs. Comparing the costs of various aspects of legal education before budgetary restructuring is crucial to maintaining a balanced law school program. Ultimately, the funding for in-house clinical legal education—like other aspects of legal education—remains a question of priority for law schools to assess before cost-cutting.

I. UNDERSTANDING WHY LAW SCHOOLS INCREASE TUITION

Just as clinical education has to be viewed in the context of legal education, legal education has to be considered in light of university education.⁴ University tuitions have climbed dramatically but, at the same time, many law schools have imposed even steeper tuition increases.⁵ Though schools’ overall educational costs have increased, tui-

³ *Id.*

⁴ See David Segal, *Law School Economics: Ka-Ching!*, N.Y. TIMES, Jul. 17, 2011, at BU 1.

⁵ See *id.*

tion hikes may have less to do with costs and more to do with perception of quality—essentially, supply and demand.⁶

A. *The Market for Prestige*

From 1981 through 2010, tuition and fees at public and private colleges and universities increased sixfold while the consumer price index increased by a factor of 2.5.⁷ Between the 1987–1988 and 2007–2008 academic years, tuition and fees rose an average of 7.4% per year at four-year public institutions and 6.3% per year at private institutions, despite inflation of only 3.1% per year.⁸ What has driven tuition to increase at rates two times or more than that of inflation over thirty years?

Henry Riggs, President Emeritus of Harvey Mudd College and the Keck Graduate Institute, observed that higher education tuition is a “marketing, not a cost accounting, decision.”⁹ Riggs argues that prestige drives tuition: “Tuition in the private higher-education industry is a classic example of price leadership—the ‘top players’ define the sticker price and all others follow suit.”¹⁰ Riggs provides examples of universities that price themselves at or slightly above the tuition charged by universities acknowledged to be the best in an attempt to signal higher quality—a phenomenon he referred to as “wannabe[]” pricing.¹¹

Riggs’ analysis applies equally to law schools, and can extend to a range of law schools regardless of ranking.¹² The *New York Times* explored this phenomenon in an article that focused on one institution ranked among the bottom third of all law schools.¹³ That school increased the size of its entering class in 2009 by 30% and priced its tuition higher than that of Harvard Law School.¹⁴ When asked to explain this apparent disjuncture between price and rank, the law school dean stated, “The answer is that we exist in a market. When there is a de-

⁶ Henry E. Riggs, *The Price of Perception: Cost Has Nothing to Do with Tuition. It’s Economics, Stupid.*, N.Y. TIMES, Apr. 17, 2011, at SS1-33.

⁷ Robert B. Archibald & David H. Feldman, *Why Does College Cost So Much?*, FORBES (Aug. 11, 2010, 6:00 PM), <http://www.forbes.com/2010/08/01/rising-cost-education-opinions-best-colleges-10-feldman-archibald.html>.

⁸ ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? 6–7 (2011).

⁹ Riggs, *supra* note 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*; Segal, *supra* note 4.

¹³ Segal, *supra* note 4.

¹⁴ *See id.*

mand for education, we, like other law schools, respond.”¹⁵ But is the market a sufficient justification to raise tuition to the highest level law students are willing to pay?

Despite wannabe pricing, some law schools have held down costs more than others.¹⁶ The following data aggregate tuition prices in 2010 from 80 public law schools approved by the American Bar Association (ABA) and 119 ABA-approved private schools. The median tuition and fees at public law schools for residents was \$18,077, while the median tuition and fees at private law schools was \$37,330.¹⁷ Seven public law schools priced annual tuition below \$10,500, six charged between \$10,501 and \$12,500 annually, and nine schools charged between \$12,501 and \$15,000 per annum.¹⁸ These twenty-two law schools represent twenty different jurisdictions, including the District of Columbia, Florida, Georgia, Illinois, New York, and Texas—jurisdictions with large legal markets.¹⁹ If law students solely sought the least expensive legal education available, then applicant numbers would be far greater for these and other lower-tuition schools.²⁰

The second phenomenon Riggs discusses, related to wannabe pricing, is the pressure for a school to raise tuition to keep in step with its competition.²¹ In other words, why charge less than the maximum price the market will accept? Ultimately, as long as students and their parents will pay the tuition, even if it is only possible by incurring huge

¹⁵ *Id.* (quoting Richard A. Matasar, Dean of New York Law School).

¹⁶ Kenneth Williams, ABA Data Specialist, 2010 Full and Part Time Tuition Data (on file with author).

¹⁷ *Id.*

¹⁸ *Id.* Specifically, the City University of New York School of Law charged \$11,952, Florida A&M Law School charged \$10,312, Georgia State University College of Law charged \$13,310, North Carolina Central School of Law charged \$9,961, Southern Illinois Carbon-dale School of Law charged \$14,746, Southern University Law Center charged \$8,478, Texas Southern University Thurgood Marshall School of Law charged \$13,065, University of Arkansas-Fayetteville School of Law charged \$11,367, University of Arkansas-Little Rock Bowen School of Law charged \$11,456, University of the District of Columbia Law School charged \$9,480, University of Idaho College of Law charged \$12,940, University of Memphis Cecil C. Humphrey School of Law charged \$14,298, University of Mississippi School of Law charged \$10,275, University of Montana School of Law charged \$11,062, University of Nebraska College of Law charged \$13,337, University of New Mexico School of Law charged \$13,660, University of North Dakota School of Law charged \$10,163, University of Puerto Rico School of Law charged \$7,611, University of South Dakota School of Law charged \$11,208, University of Tennessee College of Law charged \$14,462, University of Wyoming College of Law charged \$11,264, and West Virginia University College of Law charged \$14,212. *Id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See Riggs, supra* note 6.

student loan debt, universities and law schools will charge what the market can bear.²² If a law school misjudges the market with its tuition pricing, especially in terms of admitting students with the credentials it seeks, scholarships may discount tuition just enough to maintain desired enrollment statistics.²³

Riggs' analysis is useful in understanding how and why both university and law school tuition hikes far outpace the rate of inflation.²⁴ Universities and law schools raise tuition because they can—the dynamics of supply and demand.²⁵ Except for the very wealthy or students with the highest credentials, this phenomenon is only possible through ballooning student loan debt.²⁶

Students may disregard high tuition prices because the law firms that pay the highest salaries typically hire more heavily from higher ranking law schools, regardless of the ranking's subjectivity or efficacy.²⁷ An applicant seeking to land a high paying position would gravitate toward a higher ranking law school.²⁸ So, too, would applicants seeking to have more opportunities for government or law school teaching positions.²⁹

In analyzing how hypothetical applicants may make decisions between differently ranked law schools, Professor Brian Tamanaha explains that the trade-off often becomes whether to pay full tuition at a higher-ranking school or to receive a substantial scholarship at a lower-

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.*

²⁶ Daniel Indiviglio, *Chart of the Day: Student Loans Have Grown by 511% since 1999*, ATL., (Aug. 18, 2011, 2:15 PM), <http://www.theatlantic.com/business/archive/2011/08/chart-of-the-day-student-loans-have-grown-511-since-1999/243821>; Brian Tamanaha, *How Law Schools are Helping the Elite*, BALKANIZATION (July 12, 2011, 10:19 AM), <http://balkin.blogspot.com/2011/07/how-law-schools-are-helping-elite.html>. In the first quarter of 1999, outstanding student loans totaled \$90 billion. Indiviglio, *supra*. By the second quarter of 2011, outstanding student loans reached \$550 billion—a 511% increase. *Id.*

²⁷ Russell Korobkin, *Harnessing the Positive Power of Rankings: A Response to Posner and Sunstein*, 81 IND. L.J. 35, 42 (2006). Professor Russell Korobkin contends that rankings enable top law students and legal employers to identify each other, thereby increasing “employment opportunities and . . . long-term earning potential” for law school applicants. *Id.* at 41.

²⁸ See *id.* at 42.

²⁹ Tamanaha, *supra* note 26; Sanjiv Laud, Comment to *How Law Schools are Helping the Elite*, BALKANIZATION (11:20 AM), <http://balkin.blogspot.com/2011/07/how-law-schools-are-helping-elite.html>; Jason Mazzone, Comment to *How Law Schools are Helping the Elite*, BALKANIZATION (1:37 PM), <http://balkin.blogspot.com/2011/07/how-law-schools-are-helping-elite.html>.

ranking school seeking to entice desirable students.³⁰ Because of this trade-off, the high cost of law school favors wealthy applicants who can afford to attend the school of their choice, thus permitting them to “further consolidate their grip on elite legal positions.”³¹

It is unclear how many prospective applicants do not consider law school because of its cost.³² A 2009 report from the United States General Accountability Office (GAO) explored issues relating to the cost of law school and access to legal education by people of color.³³ It concluded that, while some law school officials believed that cost is a factor in a prospective applicant’s decision to apply to and enroll in law school, the effect of cost is not clear, especially on minority access to legal education.³⁴ The *GAO Report* does not explore this issue sufficiently, and more research into the effect of tuition on decisions to enter law school is needed.³⁵

The *GAO Report*, however, did find that the availability of lower-interest loans to fully fund legal education declined precipitously because of rising law school tuition.³⁶ In the 1994–1995 academic year, 100% of public law schools had in-state tuition that lower-interest Stafford Loans could fully fund but, by the 2007–2008 academic year, only 80.2% of public law schools priced tuition lower than the Stafford Loan limit.³⁷ The situation for out-of-state tuition at public law schools has shifted more dramatically. In the 1994–1995 academic year, Stafford loans could fully fund out-of-state tuition at 97.4% of public law schools; by the 2007–2008 academic year, however, this held true for only 22.2% of public law schools.³⁸ Predictably, the situation at private law schools is even worse.³⁹ In the 1994–1995 academic year, 80.4% of private law schools had tuition at or below the Stafford Loan limit, but

³⁰ Tamanaha, *supra* note 26.

³¹ *Id.*

³² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-20, HIGHER EDUCATION: ISSUES RELATED TO LAW SCHOOL COST AND ACCESS 37 (2009), available at <http://www.gao.gov/new.items/d1020.pdf> [hereinafter GAO REPORT].

³³ *Id.*

³⁴ *Id.* The GAO also found that since the 1994–1995 academic year, the African-American student population declined from 7.5% of all students to 6.5%. *Id.* at 20. White student enrollment declined from 76.4% to 65.1%. *Id.* at 23. Additionally, Hispanic students increased their enrollment share from 5.2% to 7.5%, and Asian and Pacific Islander students increased their enrollment share from 5.4% to 7.8%. *Id.* at 21–22.

³⁵ *See id.* at 37.

³⁶ *See id.* at 38.

³⁷ GAO REPORT, *supra* note 32, at 38.

³⁸ *Id.*

³⁹ *Id.*

only 10.7% of law schools had tuition below that limit by the 2007–2008 academic year.⁴⁰ As the gap between the ceiling on lower-cost loans and annual law school tuition grows, borrowing becomes more costly for lower-income students.

B. *What Is Driving Up the Cost of Legal Education?*

If the market for prestige drives schools to charge the highest tuition the market will bear, where is the money going? The *GAO Report* also investigated issues related to legal education cost and access.⁴¹ In preparing its study, the GAO sampled both ABA-accredited and non-ABA-accredited law schools and conducted interviews with law school officials and some students.⁴²

Law school officials stated that a “more hands-on, resource-intensive approach to legal education and competition among schools for higher rankings appear[ed] to be the main factors driving law school cost, while ABA accreditation requirements appear[ed] to play a minor role.”⁴³ The law school officials identified three additional resource-intensive aspects of legal education: “increased emphasis on hands-on clinical experiences[] and smaller skills-based courses; increased diversity of course offerings—e.g., international law and environmental law; and increased student support—e.g., academic support, career services, and admissions support.”⁴⁴

In addition to these three cost drivers, law school officials also reported that *U.S. News & World Report* rankings drove up law school expenses.⁴⁵ The *U.S. News & World Report*'s ranking criteria include factors such as expenditures per student, student-to-faculty ratio, and library expenses.⁴⁶ Law school officials state that offering more clinics and more elective courses helps them to compete for students and that offering higher salaries helps them compete for faculty.⁴⁷ Student selectivity—including median test scores and grade point averages and ac-

⁴⁰ *Id.* at 37–38.

⁴¹ *Id.*

⁴² GAO REPORT, *supra* note 32, at 3.

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 24. The *GAO Report* did not give any more specific information concerning these expenses. This lack of specific information renders the *GAO Report* rather general and, at times, more anecdotal and less useful than a more rigorous investigation.

⁴⁵ *Id.* at 25.

⁴⁶ *Id.*

⁴⁷ GAO REPORT, *supra* note 32, at 25.

ceptance rates are weighted at 25% in the ranking formula.⁴⁸ Peer, lawyer, and judge assessments comprise an additional 40% of the rankings.⁴⁹

The *GAO Report*, among other sources, indicates that in-house clinical legal education contributes to higher law school tuition, but by no means is it the leading cause.⁵⁰ In fact, a major expense not analyzed is the cost of new law school buildings. New law school construction projects are very expensive; recent buildings have cost schools in the range of \$85 million to \$250 million.⁵¹ As a result, even with alumni donations and other contributions, most law schools incur enormous debt when paying for new buildings, which can take decades to pay off.⁵²

While new buildings represent large, one-time expenditures, the most significant long-term drivers of rising legal education costs are lower teaching loads and higher salaries for law faculty.⁵³ Professor Theodore Seto reviewed reports on law school teaching submitted to the ABA in 2006, which indicated that “[a]t the 10 highest-ranked law schools, for example, the average annual teaching load is 7.94 hours; in *U.S. News’s* third and fourth tier, it is 11.13 hours—40% higher.”⁵⁴ This is essentially the difference between teaching less than three courses per year and approximately four courses per year, assuming a typical three credit course.

Overall, teaching loads at law schools have fallen dramatically.⁵⁵ A study of teaching loads at ABA-accredited law schools in 1941 shows

⁴⁸ Robert Morse & Sam Flanigan, *Law School Rankings Methodology*, U.S. NEWS & WORLD REP. (Mar. 14, 2011), <http://www.usnews.com/education/best-graduate-schools/articles/2011/03/14/law-school-rankings-methodology-2012>.

⁴⁹ *Id.*

⁵⁰ See, e.g., GAO REPORT, *supra* note 32, at 24; Riggs, *supra* note 6; Segal, *supra* note 4.

⁵¹ Segal, *supra* note 4. The University of Baltimore and Michigan Law School have building projects over \$100 million each, and Fordham Law School is building a new \$250 million facility. *Id.* Even the smaller Marquette University Law School in Wisconsin spent \$85 million for its new building. *Id.*

⁵² *Id.* For example, New York Law School sold \$135 million worth of bonds for its new building in 2006. *Id.*

⁵³ Benjamin Franklin Boyer, *The Smaller Law Schools: Factors Affecting Their Methods and Objectives*, 20 OR. L. REV. 281, 284–85 (1941); Jack Crittenden, *Why Is Tuition Up? Look at All the Profs*, NAT’L JURIST, Mar. 2010, at 40, 40.

⁵⁴ Theodore P. Seto, *Understanding the U.S. News Law School Rankings*, 60 SMU L. REV. 493, 546 (2007). The annual teaching load is a calculation made by the ABA, wherein they divide the total number of contact hours by the number of full-time equivalent faculty members and then multiply by a factor of two if the school is on a semester system or three if the school uses quarters. *Id.* at 546 n.186.

⁵⁵ Compare Boyer, *supra* note 53, at 284–85, with Seto, *supra* note 54, at 546.

that professors at that time taught much more than in modern times.⁵⁶ The survey classified schools into three groups and measured several criteria including the size of the full-time faculty, average enrollment, teaching salary, size of the library, and expenditures per student.⁵⁷ The survey found that law schools with larger student bodies paid faculty more but expected them to teach less.⁵⁸ Among twenty-one larger and better-resourced law schools, faculty annual teaching loads averaged 13.42 hours, while those at smaller, less-resourced schools had annual teaching loads averaging approximately 15.3 hours.⁵⁹ Faculty at the smallest schools with the least resources had annual teaching loads of 17.32 hours.⁶⁰

The contrast in the teaching load expectations from 1941 to 2006 are striking. Law faculty teach approximately half as much as they did in the past, and some teach even less.⁶¹ Professor Seto found some faculty with annual teaching loads of 6.7 hours, which is approximately one course per semester.⁶² Reducing the teaching expectations of faculty consequently puts pressure on law schools to increase hiring, which is a major expense.⁶³

A review of the growth of law school faculties from 1998 to 2008 demonstrates that faculty at “ABA-accredited law schools grew from 12,200 to 17,080—a 40 percent increase.”⁶⁴ Part of the growth was in part-time faculty, but that demographic expanded at a lower rate of 33%.⁶⁵ During this time, the average salary for a full-professor grew from \$101,600 in 1998 to \$147,000 in 2008, a 45% increase.⁶⁶ When fringe benefits—which amount on average to 27% of overall salary—are added, the total average cost of a full-time professor in 2008 was

⁵⁶ Compare Boyer, *supra* note 53, at 284, with Seto, *supra* note 54, at 546.

⁵⁷ Boyer, *supra* note 53, at 284.

⁵⁸ See *id.* at 284–85.

⁵⁹ *Id.*

⁶⁰ See *id.* The survey listed the teaching loads on a weekly average basis, and multiplied them by a factor of two—assuming that each school operated on a semester system, calculates the annual teaching loads. See *id.*

⁶¹ Compare *id.*, with Seto, *supra* note 54, at 546.

⁶² Seto, *supra* note 54, at 546 n.186.

⁶³ See *id.* at 546–48.

⁶⁴ Crittenden, *supra* note 53, at 40.

⁶⁵ *Id.*

⁶⁶ *Id.* Crittenden based this calculation on voluntary salary surveys administered by the Society of American Law Teachers (SALT). *Id.* The 1998 survey compiled information provided by 95 of 196 surveyed schools, a 48% response rate, plus salary information for two law schools in publicly available documents. 2008–09 SALT Survey, SALT EQUALIZER, Mar. 2009, at 1, 1, available at http://www.saltlaw.org/userfiles/SALT_salary_survey_2009.pdf.

\$187,000.⁶⁷ At the four top paying law schools in 2008 for which salary data was available, salaries for full professors averaged \$234,738 and fringe benefits averaged an additional 29.1% for a combined average of \$303,046 per full-time professor.⁶⁸ All of these average salaries are based on nine-month pay and do not include summer research support, which is common at most law schools.⁶⁹

Thus, faculty expenses represent a strong contributing—if not leading—cause for the increase in law school tuition.⁷⁰ Comparing the 40% average growth in faculty size with the 45% average increase in salaries more clearly identifies how tuition increases are spent.⁷¹ If law schools eliminated in-house clinical programs, the subsequent savings would amount to less than that saved by requiring each faculty member to teach one additional course every other year, thereby reducing the number of full-time law faculty.⁷²

The main benefit of a large faculty—aside from providing more teaching positions for those interested in academia and providing faculty with high incomes and reduced teaching loads—is a greater opportunity to publish more scholarship.⁷³ Professor Richard Neumann examined legal scholarship and its significance in terms of law school resource allocations at the *Journal of Law & Social Justice* Symposium

⁶⁷ Crittenden, *supra* note 53, at 40.

⁶⁸ See 2008–09 SALT Survey, *supra* note 66, at 1–3. The four schools with the highest salary and benefits for full law professors were: Emory, with a \$212,004 salary and 37% benefits, Harvard, with a \$252,450 salary and 25% benefits, Michigan, with a \$254,500 salary and 24% benefits, and Minnesota, with \$220,000 salary and 30.4% benefits. *Id.*

⁶⁹ See Crittenden, *supra* note 53, at 42; 2008–09 SALT Survey, *supra* note 66, at 1–3; Joseph P. Tomain & Paul L. Caron, *The Associate Dean for Faculty Research Position: Encouraging and Promoting Scholarship*, 33 U. Tol. L. Rev. 233, 235 (2001).

⁷⁰ See Crittenden, *supra* note 53, at 40.

⁷¹ See *id.*

⁷² For example, assuming a full-time law school faculty of 50, a 3 course teaching load, and that no one is on leave, faculty would teach 150 courses or sections of courses per year. If the faculty instead had a 3.5 course teaching load, schools would only need 43 faculty to teach the same number of courses. If one assumes that the average salary and fringe benefits amount to \$160,000 (representing a mix of assistant, associate, and full professors), reducing the size of the faculty by 7 produces a savings of \$1.12 million per year in faculty salaries and expenses. In addition, schools would realize more savings in fewer summer faculty scholarship stipends, less faculty travel, and at least two fewer faculty assistants. Unless in-house clinical programs employ more than seven full-time faculty and staff at comparable salaries (and few do), simply requiring all full-time faculty to teach one additional course every other year would produce more cost savings than altogether eliminating in-house clinical programs at most law schools. See *id.*

⁷³ See *id.* at 42.

entitled *The Way to Carnegie: Practice, Practice, Practice*.⁷⁴ Professor Neumann estimated that a law review article written by a full professor over one year could cost a law school over \$100,000, assuming that as much as 50% of a faculty member's job is to produce scholarship.⁷⁵ Of course, for faculty receiving less pay, the cost would be less, but still substantial.⁷⁶ Professor Neumann discussed the many implications of scholarship costs and he raised a number of issues to consider when assessing those costs in light of the law school's mission to prepare students for the practice of law.⁷⁷ Ultimately, he explained, law school is an unsustainable business model because the trend toward reduced teaching loads comes at the expense of actually educating students on how to practice law.⁷⁸

Professor Brian Tamanaha discusses the plight of law students when trying to decide between an elite school promising lots of debt or a less well-regarded school offering reduced tuition.⁷⁹ One way to avoid this problem altogether, he suggests, is to limit faculty raises, institute salary reductions, decrease faculty size, increase teaching loads, operate with smaller law school administrations, or grant less money for faculty research, travel, and conferences.⁸⁰

Professors Neumann and Tamanaha both raise important issues that most law faculties do not seem to consider seriously.⁸¹ As the march toward lower teaching expectations and higher salaries indicates, the history for law faculties is one of improving working conditions.⁸² Unfortunately, law faculty lack incentives to engage in the discussions suggested by Professors Neumann and Tamanaha, as their proposed reforms ultimately may reduce tuition at the cost of professors' salaries and increased teaching loads.⁸³

⁷⁴ See Richard Neumann, Professor of Law, Hofstra University School of Law, Remarks at the Boston College Journal of Law & Social Justice Symposium: The Way to Carnegie: Practice, Practice, Practice—Pedagogy, Social Justice, and Cost in Experiential Legal Education (Oct. 28, 2011), available at http://www.bc.edu/schools/law/newsevents/events/conferences/carnegie_symp_twlj/carnegie_video.html.

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ Tamanaha, *supra* note 26.

⁸⁰ Brian Tamanaha, *Wake Up, Fellow Law Professors, to the Casualties of Our Enterprise*, BALKINIZATION (Jun. 13, 2010, 6:48 PM), <http://balkin.blogspot.com/2010/06/wake-up-fellow-law-professors-to.html>.

⁸¹ See Neumann, *supra* note 74; Tamanaha, *supra* note 26; Tamanaha, *supra* note 80.

⁸² See Neumann, *supra* note 74; Tamanaha, *supra* note 26; Tamanaha, *supra* note 80.

⁸³ See Neumann, *supra* note 74; Tamanaha, *supra* note 26; Tamanaha, *supra* note 80.

II. IN-HOUSE CLINICAL LEGAL EDUCATION AS PART OF EXPERIENTIAL EDUCATION

In-house clinical courses are one type of experiential education available at almost all law schools in the United States. An in-house clinical course is a capstone educational experience, where law students work closely under the supervision of faculty to represent clients, draft legislation, or mediate disputes. Other types of experiential education include externship programs, where law students enter a professional legal settings outside of the law school, and simulation courses, where students assume lawyer roles in simulations that usually involve client representation.⁸⁴

A. *In-House Clinical Education Programs*

When working as student-lawyers for their clients in an in-house clinic, students learn how to “grapple with the real-life demands of being a lawyer.”⁸⁵ Law students are able to practice law and represent clients through clinical programs because every jurisdiction in the United States has adopted a student practice rule.⁸⁶ Once admitted, according to the relevant student practice rule, a law student working under the close supervision of a faculty member is able to perform all of the work of a licensed attorney.⁸⁷ For example, students in clinical programs often meet with clients and witnesses to gather information, analyze client problems and provide legal advice, review and prepare legal documents such as contracts, wills, or legal briefs, negotiate with opposing parties or their lawyers, and represent clients in administrative hearings, in court, or before other tribunals.⁸⁸

Faculty working as both lawyers and teachers in an in-house clinic engage law students in a process of reflection and self-critique.⁸⁹ Professor Donald Schön describes the process of self-critique as teaching

⁸⁴ See, e.g., Paul S. Ferber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers*, 9 CLINICAL L. REV. 417, 418–19 (2002) (describing simulation pedagogy); J.P. Ogilvy, *Introduction to the Symposium on Developments in Legal Externship Pedagogy*, 5 CLINICAL L. REV. 337, 339 n.7 (1999) (describing externship pedagogy).

⁸⁵ Peter A. Joy, *Clinical Scholarship: Improving the Practice of Law*, 2 CLINICAL L. REV. 385, 386 n.8 (1996).

⁸⁶ deNeve et al., *Submission of the Association of American Law Schools to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court’s Student Practice Rule*, 4 CLINICAL L. REV. 539, 549 (1998).

⁸⁷ *Id.* at 550.

⁸⁸ *Id.*

⁸⁹ DONALD A. SCHÖN, *EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING IN THE PROFESSION* 31, 33, 35 (1987).

the law student how to learn from experience, or as he terms, “reflection-in-action.”⁹⁰ This faculty-intensive educational endeavor is indeed costly, but it is not the most costly aspect of legal education.⁹¹

B. Externship Programs

While in-house clinical legal education is expensive due in large part to the low student-to-faculty ratio, other forms of experiential legal education are usually less expensive or, at the very least, no more costly than typical in-class courses.⁹² For example, lawyering skills courses such as Trial, Pretrial, Negotiation, Mediation, and planning and drafting courses utilize case simulations to teach students. At most law schools, these courses are principally taught by adjunct faculty—practicing lawyers and judges—often paid at a small fraction of the rates of full-time faculty.⁹³

Another form of clinical legal education is an externship or field placement program. These, too, are either less or no more expensive than non-clinical courses and seminars.⁹⁴ Lawyers and judges conduct the day-to-day supervision of most law student externs and they usually receive no pay.⁹⁵ Typically, a full-time or part-time faculty member will teach a classroom component to the externship or otherwise facilitate student self-reflection.⁹⁶ This faculty member, however, may have as many extern students as would be enrolled in a typical course, and cer-

⁹⁰ *Id.* at 31.

⁹¹ See Crittenden, *supra* note 53, at 40, 42.

⁹² See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 25 (2000); Crittenden, *supra* note 53, at 42.

⁹³ Barry et al., *supra* note 92, at 25. Law schools typically pay adjunct faculty a flat fee or honorarium, usually \$1,500 to \$3,000 per course, and some adjunct faculty donate their fees back to the law school or simply teach for free. *Id.* These simulation skills courses can provide students with valuable insights into both the skills and values necessary to be a lawyer, as students handle legal matters for hypothetical clients. See *id.* But “[e]ven the best simulation-based courses . . . provide make believe experiences with no real consequences on the line.” ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 151 (2007). Only when a law student takes the role of lawyer with real clients does he or she confront the dynamic and complex realities a lawyer faces in practice. See SCHÖN, *supra* note 89, at 31, 33, 35.

⁹⁴ See GAO REPORT, *supra* note 32, at 11, 24; Peter deL Swords & Frank K. Walwer, *Cost Aspects of Clinical Education*, in CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS—AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION 133, 141 (1980).

⁹⁵ Swords & Walwer, *supra* note 94, at 141.

⁹⁶ *Id.*

tainly as many students as would be enrolled in a typical law school seminar course.⁹⁷

Law schools, however, cannot simply place a student with a legal employer and hope that the student learns something.⁹⁸ A sound externship program is structured to emphasize experiential *education* and not just experiential *learning*.⁹⁹ Externships that fail to provide student training and monitoring can result in students feeling “as if they had been ‘thrown to the wolves’ in the sense that they were simply handed files and told to handle them, being left to their own devices to determine what needed to be done and how to do it.”¹⁰⁰ ABA Standard 305 addresses requirements for externship programs.¹⁰¹ Standard 305 requires a law school to demonstrate that it devotes sufficient instructional resources to its externship programs, including training and monitoring of field supervisors, so that there is a demonstrated relationship between the program’s goals and operations.¹⁰²

Of course, one important distinction often remains between in-house clinics and externship programs: “Many externship programs only offer a small percentage of first-chair experiences for law students.”¹⁰³ Still, students learn a great deal in externships even without the first-chair experiences typical of in-house clinics.¹⁰⁴ Professor Sandy Ogilvy suggested guidelines for externships to emphasize their educational value, including articulated goals that translate into measurable outcomes, appropriate oversight of student experiences both by field supervisors and faculty supervisors, clearly defined responsibilities for

⁹⁷ *Id.* If the faculty member is an adjunct member of the faculty, then again the cost is much less than a full-time faculty member.

⁹⁸ See SCHÖN, *supra* note 89, at 34–35.

⁹⁹ See *id.*

¹⁰⁰ Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students’ Professional Values: Observations, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537, 578 (1991). Professor Lawrence Hellman studied students who worked in a bar-sponsored student practice program through the Oklahoma City University School of Law. See *id.* at 559, 561. The Oklahoma City University School of Law awarded credit to students only for the externship’s companion course, unlike neighboring University of Tulsa College of Law and University of Oklahoma College of Law, which awarded credit for the entire experience. See *id.* at 558, 560–61.

¹⁰¹ ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2011–2012, Standard 305.

¹⁰² *Id.*

¹⁰³ Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 494 n.5 (2002). Arguably, unless the externship program provides first-chair experience, students do not have the chance to engage in the responsibility associated with full and complete representation. See SCHÖN, *supra* note 89, at 33; Joy & Kuehn, *supra*, at 494 n.5.

¹⁰⁴ See SCHÖN, *supra* note 89, at 33.

students related to learning goals, and mechanisms for program self-evaluation.¹⁰⁵ Externships that implement these or other similar mechanisms to emphasize field supervisor and faculty engagement are likely to enhance student learning from their experiences.¹⁰⁶

C. *The Call for Practical, Practice-Based Legal Education*

For over ninety years, studies, committees, task forces, and educators have evaluated U.S. legal education and called for practical, practice-based legal education in addition to legal theory.¹⁰⁷ In 1921, the Carnegie Foundation for the Advancement of Teaching funded the *Reed Report*, which identified three components necessary to prepare students for the practice of law: general education, theoretical knowledge of the law, and practical skills training.¹⁰⁸ The casebook method's emphasis on legal analysis, commonly used in most law school courses, fulfilled only the theoretical knowledge objective.¹⁰⁹ The *Reed Report* derided law schools for not embracing practical skills training.¹¹⁰

Starting in the late 1950s and lasting through 1978, the Ford Foundation supported clinical legal education with a series of grants

¹⁰⁵ J.P. Ogilvy, *Guidelines with Commentary for the Evaluation of Legal Externship Programs*, 38 GONZAGA L. REV. 155, 160–61 (2002/03). “The program goals selected by the institution should be translated into measurable outcomes so that the students can determine whether, and to what extent, they are making progress toward achieving the goals and so that the program can evaluate whether the program design is satisfactory.” *Id.* at 161. The field work supervisor and faculty member should involve the student in drafting an “individualized learning plan,” and both the field supervisor and faculty member should take responsibility for seeing that the goals and objectives are appropriate and have a reasonable opportunity of being fulfilled. *Id.* at 169–73. “An externship program should require of student participants certain acknowledgments of responsibility for successful completion of the fieldwork placement experience and specific evidence and documentation of learning activities and outcomes.” *Id.* at 174. Professor Ogilvy describes specifically how the student responsibilities at the externship should relate to learning goals. *See id.* at 173–76. “[T]he program should have a developed plan for self evaluation that includes the solicitation of evaluation from students, fieldwork supervisors, former students, and other stakeholders in the externship program.” *Id.* at 176–77. Professor Ogilvy explains both the content and process for engaging in the assessments. *See id.* at 176–78.

¹⁰⁶ *See id.* at 177.

¹⁰⁷ *See, e.g.*, ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW: HISTORICAL DEVELOPMENT AND PRINCIPAL CONTEMPORARY PROBLEMS OF LEGAL EDUCATION IN THE UNITED STATES WITH SOME ACCOUNT OF CONDITIONS IN ENGLAND AND CANADA 276–77 (2d ed. 1986); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 95 (2007) [hereinafter CARNegie REPORT]; Joy & Kuehn, *supra* note 103, at 494 n.4.

¹⁰⁸ REED, *supra* note 107, at 276.

¹⁰⁹ *See id.*; Barry et al., *supra* note 92, at 5–6.

¹¹⁰ REED, *supra* note 107, at 281.

totaling more than \$19 million given through the Council on Legal Education for Professional Responsibility (CLEPR).¹¹¹ From 1978 through 1997, the United States Department of Education provided additional funding of over \$87 million to law schools for in-house clinical legal education.¹¹² By the end of this funding infusion, at least 147 law schools offered in-house clinical programs.¹¹³

As grants assisted the growth of clinical programs, members of the bench and bar called for even more lawyering skills training for law students.¹¹⁴ Perhaps most famously, Chief Justice Warren Burger emphasized the need for law graduates to be better skilled advocates.¹¹⁵ To assist with the development of clinical education, the ABA adopted a Model Student Practice Rule in 1969.¹¹⁶ States also adopted student practice rules, which furthered the growth of clinical legal education by permitting law students to represent clients in courts.¹¹⁷

The next major call for an increased focus on clinical education came from the ABA's *MacCrate Report* in 1992.¹¹⁸ The *MacCrate Report* identified lawyering skills and professional values necessary for the

¹¹¹ See Barry et al., *supra* note 92, at 18–19. The Ford Foundation provided \$500,000 to 19 law schools from 1959 to 1965 through the National Council on Legal Clinics (NCLC). See *id.* at 19. The Ford Foundation provided an additional grant of \$950,000 to NCLC in 1965, and NCLC eventually renamed itself the Council on Education for Professional Responsibility. *Id.* The Ford Foundation gave an additional \$11 million to CLEPR to support clinical legal education programs from 1968 through 1978. See RICHARD MAGAT, THE FORD FOUNDATION AT WORK: PHILANTHROPIC CHOICES, METHODS, AND STYLES 51 (1979); Barry et al., *supra* note 92, at 19.

¹¹² Barry et al., *supra* note 92, at 19.

¹¹³ deNeve et al., *supra* note 86, at 547.

¹¹⁴ See, e.g., ADVISORY COMM. ON PROPOSED RULES FOR ADMISSION TO PRACTICE, JUDICIAL COUNCIL OF THE SECOND CIRCUIT, FINAL REPORT OF THE ADVISORY COMMITTEE ON PROPOSED RULES FOR ADMISSION TO PRACTICE, 67 F.R.D. 161, 164, 167–68 (1975); COMM. TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FED. COURTS, THE JUDICIAL CONFERENCE OF THE UNITED STATES, FINAL REPORT OF THE COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS TO THE JUDICIAL CONFERENCE OF THE UNITED STATES, 83 F.R.D. 215, 215 (1979); SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF LAW SCHOOLS 3–4 (1979).

¹¹⁵ Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 233–34 (1973).

¹¹⁶ A.B.A. MODEL STUDENT PRACTICE RULE, reprinted in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 993–95 (1978); see George K. Walker, *A Model Rule for Student Practice in United States Courts*, 37 WASH. & LEE L. REV. 1101, 1113 (1980).

¹¹⁷ Walker, *supra* note 116, at 1101–02.

¹¹⁸ SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 56, 128 (1992) [hereinafter MACCRATE REPORT].

ethical, effective practice of law, and called for clinical programs to be the vehicle for teaching them in law school.¹¹⁹ Responding to the *MacCrate Report*, the ABA amended its accreditation standards in 1996 to require every accredited law school to offer “live-client or other real-life practice experiences . . .”¹²⁰ Law schools may satisfy the requirement through offering “clinics or [externship] field placements,” but they need not offer these programs to all students wishing to enroll.¹²¹

In 2007, the Carnegie Foundation for the Advancement of Teaching once again examined legal education and published a book commonly referred to as the *Carnegie Report*.¹²² The *Carnegie Report* found a need for the “integration of student learning of theoretical and practical legal knowledge and professional identity.”¹²³ Examining legal education in the twenty-first century, the report posited that “[c]linics can be a key setting for integrating all the elements of legal education, as students draw on and develop their doctrinal reasoning, lawyering skills, and ethical engagement, extending to contextual issues such as the policy environment.”¹²⁴ The *Carnegie Report’s* ultimate conclusion is that clinical legal education can play a key role in preparing students for the practice of law.¹²⁵

Also published in 2007, the book *Best Practices for Legal Education* emphasized a need for students to engage in the supervised practice of law as part of their legal education.¹²⁶ The book notes, “it is only in the in-house clinics and some externships where students’ decisions and actions can have real consequences and where students’ values and practical wisdom can be tested and shaped before they begin law practice.”¹²⁷ Such experience is especially critical after law school when “graduates will become fully licensed to practice law as soon as they pass

¹¹⁹ *Id.* at 128, 138–40. The *MacCrate Report* identified ten fundamental lawyering skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of legal work, and recognizing and resolving ethical dilemmas. *Id.* at 138–40. The four fundamental values are: providing competent representation; striving to promote justice, fairness and morality; striving to improve the profession; and professional self-development. *See id.* at 213–16, 234–36, 331–32.

¹²⁰ ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2011–2012, Standard 302(b)(1).

¹²¹ *Id.* Interpretation 302-5.

¹²² CARNEGIE REPORT, *supra* note 107, at 17.

¹²³ *Id.* at 13.

¹²⁴ *Id.* at 121.

¹²⁵ *Id.* at 197–98.

¹²⁶ STUCKEY ET AL., *supra* note 93, at 154–57.

¹²⁷ *Id.* at 155.

a bar examination without any requirement that their work be supervised until they demonstrate competence.”¹²⁸

D. *The Continuing Need for Clinical Legal Education*

The *MacCrate Report*, *Carnegie Report*, and *Best Practices for Legal Education* together emphasize the need for clinical legal education in law schools to prepare students better.¹²⁹ The Ford Foundation, through CLEPR, and the Department of Education devoted millions of dollars to funding clinical legal education because of the quality and value of learning coming from student representation of clients under close faculty supervision.¹³⁰ Much like doctors in medical school clinical rotations, law students in clinical courses put the theory they learn in classes to work for clients.¹³¹

Both legal employers and clients expect graduates to be prepared for the practice of law.¹³² Professor John Schlegel noted that the days when most legal employers provide good mentoring are long gone.¹³³ Indeed, one often hears that legal employers expect to hire graduates who can hit the ground running in the practice of law. While some larger law firms provide new associates with lawyering skills training, some employers—including many prosecuting attorney and public defender offices—prefer hiring graduates who have already received similar training in clinical courses in law school.¹³⁴ In the face of these realities, clinical legal education should be an essential part of every student’s education as law schools have an obligation to their students and, most importantly, the public to prepare graduates for the practice of law.¹³⁵

¹²⁸ *Id.*

¹²⁹ See MACCRATE REPORT, *supra* note 118, at 56, 128; STUCKEY ET AL., *supra* note 93, at 154–57; CARNEGIE REPORT, *supra* note 107, at 197–98.

¹³⁰ Barry et al., *supra* note 92, at 19.

¹³¹ STUCKEY ET AL., *supra* note 93, at 155; Walker, *supra* note 116, at 1139.

¹³² See John Henry Schlegel, *Walt Was Right*, 51 J. LEGAL EDUC. 599, 608 (2001).

¹³³ *Id.*

¹³⁴ See, e.g., David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1 (describing in-house training programs at some corporate law firms); *Attorney Positions*, OFFICE COLO. STATE PUB. DEFENDER, http://coloradodefenders.us/index.php?option=com_content&view=section&layout=blog&id=38&Itemid=61 (last visited Feb. 29, 2012) (“[S]trong hiring preference is given to applicants who have participated in a law school clinical program or interned for a public defender program where they were actually able to represent clients in court.”); *Employment: Current Positions*, MIAMI-DADE OFFICE OF THE STATE ATT’Y, 11TH JUD. CIRCUIT, <http://www.miamisao.com/employment/asa/index.htm> (last visited Apr. 2, 2012) (“Clinical participation is strongly preferred.”).

¹³⁵ See Barry et al., *supra* note 92, at 74–75.

III. COMPARING COSTS BEFORE CUTTING THEM

A sound legal education must be a proper combination of doctrinal courses, simulation lawyering skills courses, externships, and in-house clinical courses.¹³⁶ The MacCrate Task Force found that, in the 1990–1991 academic year, “professional skills training occupie[d] only nine (9%) percent of the total instructional time available to law schools.”¹³⁷ While ultimately still insufficient, the number of lawyering skills and clinical courses taught in American law schools has grown significantly since the *MacCrate Report*'s publication. This change represents some recognition that the objective of law schools, no matter what other goals a school may define for itself in its teaching and scholarship, must be to produce ethical, effective lawyers.

Despite clinical education's proven importance, some commentators have questioned its cost-effectiveness.¹³⁸ In 1980, a report issued jointly by the Association of American Law Schools and the ABA found that the cost per student for clinical education varied greatly depending on the type of clinical program and course.¹³⁹ The report observed that variations in costs may stem from factors including the status of the faculty teaching the courses (a factor which affected their relative salaries), student-to-faculty ratios, the number of credit hours awarded, and, in externship programs, the extent of the classroom component.¹⁴⁰

These factors continue to drive costs in clinical programs.¹⁴¹ As a result, the cost concern often pits in-house clinical courses against externships because the externship structure usually allows higher student-to-faculty ratios, and therefore, lower costs per student.¹⁴² The cost advantage of externship programs has consistently led commentators to predict that law schools will shift resources into externships as the primary form of clinical education.¹⁴³

¹³⁶ See REED, *supra* note 107, at 276–80; Barry et al., *supra* note 92, at 74–75.

¹³⁷ See MACCRATE REPORT, *supra* note 118, at 241.

¹³⁸ See, e.g., HERBERT L. PACKER & THOMAS EHRLICH, NEW DIRECTIONS IN LEGAL EDUCATION 46 (1972) (questioning clinical legal education “given its high costs”).

¹³⁹ Swords & Walwer, *supra* note 94, at 139–43. The faculty resources to support in-house clinical courses are usually greater than faculty resources for externship courses. *Id.*

¹⁴⁰ See *id.* at 140–45.

¹⁴¹ See *id.*

¹⁴² See *id.*; Arthur B. LaFrance, *Clinical Education and the Year 2010*, 37 J. LEGAL EDUC. 352, 355–56 (1987).

¹⁴³ See, e.g., Beverly Balos, *Conferring on the MacCrate Report: A Clinical Gaze*, 1 CLINICAL L. REV. 349, 354 (1994); John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education*, 43 J. LEGAL EDUC. 157, 193–94 (1993); LaFrance, *supra* note 142, at 355; James E. Moliterno, *On the Future of Integration Between Skills and Ethics*

While these predictions of the demise of in-house clinical courses have not come true, the threat remains. But, as Professor Beverly Balos observed in 1994, the emphasis on the cost of in-house clinical courses is usually accompanied by failure to consider educational goals and content.¹⁴⁴ Legal educators must weigh the relative costs and merits, not only weighing in-house clinical courses against simulation courses and externships, but also the cost and merits of experiential learning against those of other aspects of law school operations.¹⁴⁵

In comparing the costs of legal education, it is often difficult to understand the true financial costs of clinical courses versus other courses and other law school expenses.¹⁴⁶ In the past, law schools provided budgetary information to the ABA in ways that made it possible to make more specific comparisons.¹⁴⁷ For example, Dean John Kramer analyzed and compared law school expenditures for 156 ABA-approved law schools from the 1977–1978 and 1987–1988 academic

Teaching: Clinical Legal Education in the Year 2010, 46 J. LEGAL EDUC. 67, 70 (1996). Professor Arthur LaFrance was one of the first commentators to predict that simulation courses and externships would replace in-house clinical programs. LaFrance, *supra* note 142, at 355. Writing in 1996, Professor James Moliterno stated that in-house clinics have become less important, with externship programs taking the place as the preferred form of clinical legal education. Moliterno, *supra*, at 70. Critiquing the *MacCrate Report* as too costly to implement, Dean John Costonis of Vanderbilt University School of Law stated: “The greater financial demands of skills training either cannot be absorbed within tuition-driven budgets or will impoverish other instructional priorities that most law schools value more highly.” Costonis, *supra*, at 194. At a conference devoted to the *MacCrate Report* in 1993, Professor Beverly Balos observed that all of the speakers, many of whom were deans, predicted few increases of in-house clinical programs in spite of the MacCrate Task Force’s recommendations. Balos, *supra*, at 351–52. Balos also stated that one of the speakers extolled the virtues of law school pro bono programs, journals, and moot court programs that could give students experience “on the cheap.” *Id.* at 351–52. Yet another speaker suggested that less costly adjuncts could be used to teach more simulation courses. *Id.* at 352.

¹⁴⁴ See Balos, *supra* note 143, at 354.

¹⁴⁵ See *id.* Others have also made recommendations for a broader cost-benefit analysis. See, e.g., *id.* at 352 (arguing that law schools should examine “the entire curriculum and the ways that resources are presently allocated”); Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 404 (1994) (“Upon closer examination, the cost criticism of real-client clinical education is usually myopic. The comparative high costs of seminar classes, supervised research, upper class writing requirements, or maintaining high volume count law school libraries in the computer age are often left out of the cost critique. Moreover, to evaluate effectively any of these programs, one has to look at the benefits of each program in light of their costs.”).

¹⁴⁶ See Swords & Walwer, *supra* note 94, at 140.

¹⁴⁷ See John R. Kramer, *Who Will Pay the Piper or Leave the Check on the Table for the Other Guy*, 39 J. LEGAL EDUC. 655, 658, 661 (1989).

years.¹⁴⁸ Dean Kramer found that in-house clinical legal education expenditures rose by 92.5% during the 10 year period while the overall costs of legal education rose by 173.9%.¹⁴⁹ Thus, expenditures for clinical legal education rose at a slower rate than overall law school budgets.¹⁵⁰ The MacCrate Task force corroborated this finding, observing that expenditures for in-house clinical education “actually dropped as a percentage of the law school budget from 4.5% to 3.1% during this period.”¹⁵¹ Thus, major expenses to law schools aside from in-house clinical education exist, some of which appear to be increasing at a relatively rapid rate. It is only prudent that those expenses should be considered in conjunction with the expense of clinical programs when deciding what costs to cut.

CONCLUSION

The analysis of how to reduce the cost of in-house clinical education must take into consideration other law school expenses and the overall objectives of legal education. There is not, however, a reliable method for such an investigation. Without a consistent way to measure the relative benefits of different courses and teaching methodologies for preparing law students for practice, selecting the courses to restructure or eliminate is a hit-or-miss proposition based more on conjecture than evidence.

There are some areas where cost reductions can be attained without potentially sacrificing the quality of law school education. For example, over the past several years, many law school libraries have shifted more resources to electronic databases and away from paper copies. In addition to these efforts, cost savings may also come from regional law library consortiums and specialization of library collec-

¹⁴⁸ See *id.* The *MacCrate Report* also relied on this data in its discussion of the allocation of law school resources for professional development of students. See MACCRATE REPORT, *supra* note 118, at 249 n.24.

¹⁴⁹ Kramer, *supra* note 147, at 661. These percentages are calculated from the figures in Table D of Dean Kramer’s Article, which he compiled from the ABA annual questionnaire completed by law schools. See *id.*

¹⁵⁰ See MACCRATE REPORT, *supra* note 118, at 249; Kramer, *supra* note 147, at 661.

¹⁵¹ MACCRATE REPORT, *supra* note 118, at 249–50. The sources of funding for in-house clinical programs in 1991–1992 showed 68.4% came from the law school or university budget (hard money), 8.6% from the Title IX program, 3.4% from the Legal Services Corporation, 2.7% from attorney fees, 2.3% from state Interest on Lawyer Trust Accounts (IOLTA) programs, 8% in other grants, 3.8% in other non-law school agency funds, and 0.8% in earmarked alumni donations. *Id.* at 250.

tions.¹⁵² Schools could also analyze the cost of courses and seminars that are consistently under-enrolled due to lack of subject-matter interest or enthusiasm for the professor.

Until there is a better understanding of how to measure the benefits of the various aspects of legal education, simply considering the cost of in-house clinical education or other components of legal education may not do service to law students, their future clients, or employers. In that regard, the calls of the *MacCrate Report*, the *Carnegie Report*, and *Best Practices for Legal Education* should not fall on deaf ears. Law schools must place teaching and learning as their first and foremost objectives. This includes all forms of teaching, including the various approaches to experiential teaching and learning. Scholarship also has its place, but it should similarly undergo the cost-benefit analysis employed for other law school expenditures. In sum, every element of the law school structure should be considered for cost saving potential.

This Article raises some of the questions that must be included in discussions regarding the cost of clinical legal education. This dialogue cannot take place in isolation from broader discussions of how to keep down the cost of legal education as a whole. Law schools have never been under greater financial scrutiny and, with legal employment at historic lows and law school tuition at historic highs, the value of legal education is becoming questionable. The longer law faculties delay in addressing these issues, the more difficult the conversations and choices will become.

¹⁵² See David Barnhizer, *Of Rat Time and Terminators*, 45 J. LEGAL EDUC. 49, 57 (1995). Professor David Barnhizer recommends creating a limited number of "superlibraries" because "[t]he present structure of law libraries is essentially redundant in the electronic age." *Id.* Barnhizer projects that 5% to 10% of law schools' budgets could be saved, thereby expanding the money available for skills and values teaching. *See id.*