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Lulling Ourselves into a False Sense of Competence: Learning Outcomes and Clinical Legal Education in Canada, the United States and Australia

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LULLING OURSELVES INTO A FALSE SENSE OF COMPETENCE: LEARNING OUTCOMES AND CLINICAL LEGAL EDUCATION IN CANADA, THE UNITED STATES AND AUSTRALIA

Gemma Smyth and Maggie Liddle[*]

Abstract

Over the past several years, the regulation and accreditation of legal education in most common law jurisdictions has been shifting significantly with the greater emphasis on "outcomes" and "outputs". In Canada, the Federation of Law Societies of Canada is entering more boldly into the approval and accreditation of law schools. In Australia, legal regulators are increasingly nationalising their approach to legal education and developing new "threshold learning outcomes" for law schools. In the United States, the American Bar Association is shifting to a more outcomes-focused regulatory regime. The result of these accreditation processes is not entirely clear: however, most jurisdictions have set out their respective approaches in later-stage or final form, allowing an initial comparative view. While debate on regulation, accreditation and assessment in all three countries has been vigorous, a notable gap exists in discourse around the role of clinical legal education, particularly in Canada and Australia. This article explores how clinical education fits (either explicitly or implicitly) in these accreditation schemes, and focuses on the strengths and weaknesses of competency/outcome regulation from a clinical legal education perspective. Although there is potential for clinical legal education to be used as a "competency boot camp", which weakens the reflective, deep and integrative assessment approach that is the cornerstone of mature, "third wave" clinical legal education, there is also potential for greater commitment to integration of clinical legal education into the law school curricu-

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lum more generally. This article sets out the importance of curricular integration and self-assessment to realise the full potential of not only clinical legal education, but also the aspirational vision of lawyering many hope to achieve.

Résumé

Depuis plusieurs années, la régulation et l'accréditation de l'enseignement du droit dans la plupart des juridictions de common law mettent davantage d'emphase sur le concept de « résultats ». Au Canada, la Fédération des ordres professionnels de juristes a décidé d'avancer sur le terrain de l'approbation et de l'accréditation des diplômes en droit en formulant une série de « compétences » que doivent posséder les diplômé(e)s aspirant être avocat(e)s. En Australie, les régulateurs de ce domaine sont en train de nationaliser leur approche à l'enseignement du droit, et développent de nouvelles « compétences minimales » pour les facultés. Aux États-Unis, l'Association du Barreau Américain adopte un modèle de régulation qui met lui aussi l'emphase sur les compétences acquises. La conséquence de cette mouvance n'est pas vraiment connue; toutefois, la plupart des juridictions ont présenté leurs approches respectives en forme finale ou presque, permettant une analyse comparative initiale. Alors que le débat sur la réglementation, l'accréditation, et l'évaluation dans ces trois pays a été vigoureux, un écart notable existe dans le discours sur le rôle de l'enseignement clinique, en particulier au Canada et en Australie. Cet article explore ensuite comment l'enseignement clinique s'inscrit explicitement ou implicitement dans ces programmes d'accréditation, en se concentrant sur les points forts et les faiblesses de l'approche par compétences et résultats, dans une perspective de l'enseignement clinique du droit. Bien qu'il existe un danger pour l'enseignement clinique d'être utilisé comme un « camp d'entraînement des compétences », affaiblissant ainsi les modes d'évaluation qui constituent la pierre angulaire de l'enseignement clinique dit de « troisième génération » et qui encouragent la réflexion, la profondeur et l'intégration des connaissances, il est également possible de voir la possibilité d'atteindre une plus grande intégration de l'enseignement clinique dans les programmes de droit. Cet article expose donc l'importance de l'intégration de l'enseignement clinique dans les cursus des programmes de droit ainsi que de l'auto-évaluation, afin de réaliser le plein potentiel non seulement de l'enseignement clinique, mais également de la vision ambitieuse du droit à laquelle plusieurs aspirent.

1. INTRODUCTION

What Gregory Munro called "the assessment movement"[1] has arrived in Canadian,[2] American[3] and Australian[4] law schools, and in many other law schools around the world.[5] Although there are distinct regional motivations, most jurisdictions cite similar reasons for increased or re-conceptualised accreditation and assessment: the internationalisation of law and the attendant increasing mobility of students,[6] recent global events,[7] and federal and regional legislative mandates have all prompted the legal profession and legal educators to focus on the assessment and, to varying degrees, regulation of legal education. This article briefly examines the current state of law school accreditation and assessment, beginning with the United States and Australia, and ending with Canada as the newest and least documented of the group. The article analyses these three approaches to outcomes-based legal education through the lens of clinical legal education. The article then explores several critiques of these learning outcomes. Despite clinical legal education's generally reflective and integrative approach, there is potential for its increased and perhaps singular use as a "competency boot-camp", weakening a mature approach to legal education that has been one of the cornerstones of what Margaret Barry, John Rubin and Peter Joy termed the "third wave"[8] of clinical legal education. While there have been many ways suggested to approach these complex problems, this article concludes by supporting what many in the legal education reform movement have already elegantly stated: integrative and systemic assessment practices are imperative to ensure the continuing integrity of clinical legal education from skills, knowledge and values perspectives.

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1 Greg Munro, *Outcomes Assessment for Law Schools* (Spokane, WA: Institute for Law School Teaching, 2000) at 3.

2 Federation of Law Societies of Canada, Task Force on the Canadian Common Law Degree: Final Report (October 2009), online: <http://www.flsc.ca/_documents/Common-Law-Degree-Report-C.pdf>.

3 American Bar Association, online: <http://www.abanet.org/legaled/committees/comstandards.html>.

4 Australia is also reviewing its legal profession with a view to nationalisation, see online: <www.ag.gov.au/legalprofession>.

5 The United Kingdom is also moving to outcomes-focused regulation for its solicitors. See the Solicitors Regulation Authority, online: <www.sra.org.uk.ofr>.

6 *Supra* note 1 at 3-4.

7 *Supra* notes 1 and 2. Financial concerns and lower student enrollment have been major challenges in the United States, although less so in Australia and Canada. However, increased globalisation and movement of citizens generally affects all jurisdictions.

8 Margaret Barry, John Rubin and Peter Joy, "Clinical Education for the Millennium: The Third Wave" (2000) 7 Clinical L. Rev. 1. This article articulates the increasing volume and high quality of clinical pedagogy, which, at its root, seeks to integrate "learning by doing".

2. WHAT IS CLINICAL LEGAL EDUCATION?

Clinical legal education takes many forms depending upon jurisdiction, institutional and governmental funding, and law school capacity. Generally, clinical legal education refers to a law school-affiliated program through which students gain firsthand experience of legal practice by utilising the skills, knowledge and values learned in the classroom to deliver legal services to clients under the supervision of a qualified lawyer, or, in some cases, in collaboration with social workers, paralegals or community legal workers. Students may engage in direct client services, policy advocacy, dispute resolution, law reform and community development in a variety of practice areas. Clinical legal education is informed by its rich history as a venue for educating students in social justice lawyering. Clinical legal education affords law schools an avenue for advancing institutional community goals, while providing students with an authentic, integrated learning experience.

Around the world, both experiential learning and one of its incarnations — clinical education — are increasingly recognised as hallmarks of politicised educational excellence. Quoting Moore, Cantor explains:

> [E]xperiential learning offers as good an opportunity as we have in higher education to create a critical pedagogy, a form of discourse in which teachers and students conduct an unfettered investigation of social institutions, power relations and value commitments.[9]

At the same time, the MacCrate, Stuckey and Carnegie Reports, as well as more recent studies, convincingly support the role of clinical legal education in preparing law students for practice.[10] This dual mandate — preparation for practice and critically and politically informed learning — can, at times, struggle for dominance.

Clinical legal education programs are not a new phenomenon. Barry, Rubin and Joy traced the growth of clinical legal education in the United States back to the late nineteenth century.[11] In doing so, they identified three distinct "waves" that provide a useful framework through which to analyse clinical legal education programs around the world. The first wave of clinical legal education generally involved small projects peripheral to the core law curriculum in which students worked with a small number of lawyers doing advocacy and direct client service. Barry describes the second wave of clinical legal education:

> [During] a period spanning from the 1960s through the late 1990s — clinical legal education solidified and expanded its foothold in the academy . . . [F]actors . . . included demands for social relevance in law school, the development of clinical teaching methodology, the emergency of external funding to start and expand clinical programs, and an increase in the number of faculty capable of and interested in teaching clinical courses . . . [along with] . . . the zeitgeist of the 60s . . .[12]

The "new millennium" saw clinicians explicitly linking clinic work, access to justice and the larger law school curriculum — particularly, through the significant advancements in clinical teaching methodology.[13] The rise of clinical legal education in the United States is tempered by the fact that most schools do not grant equal status to clinical law professors as to full-time, tenured or tenure-track professors. When clinicians are granted status, they often have to do "double duty", teaching courses, researching and writing and carrying on the activities of their clinic(s).

As we will see, the development of clinical legal education in common law jurisdictions has not been uniform. There are clinics caught between the first and second waves through lack of funding, value and academic integration. In assessing the possible future development of clinical legal education in Canada as law schools move towards accreditation compliancy, useful lessons can be learned from the American and Australian experiences. In both jurisdictions, the learning environment has changed. Traditional case-based teaching and Socratic Method is being supplemented or transformed by experiential learning initiatives that combine knowing with doing. One of the driving forces behind this change is the conditional benchmark learning for accreditation. This is gradually steering legal educators away from input assessment towards outcome-based assessment that provides demonstrable evidence of institutional and program effectiveness in producing graduates eligible for professional admission.

3. THE INSTITUTIONAL AND REGULATORY CONTEXT

The Law Societies in America, Australia and Canada have set minimum standard benchmarks for graduate entry into the profession. Benchmark standards are set for legal knowledge, skills and values. "Knowledge" is, in essence, the substantive law necessary to be effective and responsible counsel;[14] "skills" are broadly categorised as problem solving, legal research and communication;[15] and "values" are generally conflated with ethics and professionalism. This context sets the stage for the "outcomes movement", which we later argue may be detrimental to clinical legal education, depending on its focus and implementation.

(a) United States[16]

Law school graduates in the United States earn a *Juris Doctor* (J.D.), a profes-

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9 D. Moore, "Experiential Education as Critical Discourse" in J. Kendall and Associates, eds., *Combining Service and Learning: A Resource Book for Community and Public Service*, vol. 1 (Raleigh, NC: National Society for Internships and Experiential Education, 1990) at 280.

10 Rebecca Sandefur & Jeffrey Selbin, "The Clinic Effect" (2009) 16 Clinical L. Rev. 57. For references to the MacCrate, Stuckey and Carnegie Reports, see *infra* notes 24–26.

11 *Supra* note 8.

12 *Ibid* at 12.

13 *Ibid.*

14 In the U.S. this is found in Standard 302.

15 Australia has expanded skills to include "thinking," "collaboration" and "self management" (i.e., self actualisation in the legal profession). Self-management consists of skills and values. For a brief commentary see Anna Higgin, "The Threshold Learning Outcomes on self-management for the Bachelor of Laws Degree: A proposed focus for teaching strategies in the first year curriculum" (2011) 2:2 Int. J. FYHE 23–44.

16 The Canadian, American and Australian institutional contexts are not meant to be "snapshots" of the modern regulatory framework with brief histories to contextualise

sional doctoral degree. Each state maintains a different credentialing system for lawyers who wish to be admitted to the bar, but students are not required to attend bar preparation courses or to article. The American Bar Association (ABA) maintains the accreditation system for the approximately 200 ABA-accredited law schools.[17] In September of 2008, The Council of the Section of Legal Education and Admissions to the Bar launched a review of the American Bar Association's *Standards for the Approval of Law Schools* (Standards) and the attendant *Rules of Procedure for the Approval of Law Schools (Rules)*.[18] This comprehensive review of the Standards occurs periodically.[19] The Standards set out minimum requirements for a wide variety of law-school related functions, including the program of legal education. Among other issues, the Standards are intended to "examine ways to revise the accreditation process to rely, to a greater extent than it currently does, on output measures".[20]

The trend toward accountability and program assessment in American legal education is longstanding, dating back to the first Carnegie Report published in 1921.[21] Since then, there have been twelve reviews, the most recent being 2011-

reforms. References to more fulsome histories of the legal profession and legal education are contained in footnotes throughout.

17 See American Bar Association, ABA Approved Law Schools, online: <http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html>.

It should be noted that America has a volume of students and law schools that far exceeds Australia and Canada.

18 According to the federal U.S. Department of Education, American law schools must review their accreditation policies and procedures for the purpose of program evaluation.

19 American Bar Association, 2011-2012 Standards and Rules of Procedure for Approval of Law Schools, online: <http://www.americanbar.org/groups/legal_education/resources/standards.html>.

20 American Bar Association Section of Legal Education and Admission to the Bar, *Final Report of the Outcome Measures Committee* (July 2008). The American Bar Association (ABA) maintains the accreditation system for the approximately 200 ABA-accredited law schools of which one is provisionally approved. See American Bar Association, ABA Approved Law Schools, online: <http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_ schools.html>.

According to the federal U.S. Department of Education, American law schools must intermittently undertake comprehensive review of their accreditation policies and procedures (The Standards for the Approval of Law Schools (Standards) and the attendant Rules of Procedure for the Approval of Law Schools (Rules)) for the purpose of program evaluation. See American Bar Association, 2011-2012 Standards and Rules of Procedure for Approval of Law Schools, online: <http://www.americanbar.org/groups/legal_education/resources/standards.html>.

21 Alfred Z Reed, *Training for the Public Profession of the Law* (New York: Carnegie Foundation for the Advancement of Teaching, 1921) [Reed Report]; See also William V Rowe, "Legal Clinics and Better Trained Lawyers — A Necessity" (1917) 11 Illinois L. Rev. 591.

12.[22] An increase in both the volume and quality of reports is evident since 2006, notably the MacCrate,[23] Stuckey[24] and Carnegie Reports,[25] as well as ABA Committee Reports.[26] In 2009, the Standards Review Committee wrote that "[a]ccreditation review in law, like other disciplines, must move law schools toward articulation and assessment of student learning goals and achievement levels."[27] Similar to Canada and Australia, accreditation has been used to drive American legal education toward an outcomes-based learning model in which knowledge, skills and values must be clearly articulated and tangibly demonstrated throughout the degree program.

Unlike the Canadian and Australian accreditation standards, the ABA Standards make explicit reference in s. 303(b) to clinical legal education.

> A law school shall provide substantial opportunities to students for:
>
> (1) live-client clinics, externships, or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence.

Although this Standard does not make clinical legal education or externship placements mandatory, it does include best practices in education generally, referring to the skills and value-based aspects of clinical experiences, as well as the ability to strengthen critical self-assessment and practice competence. However, the Standard falls short, in that it fails to articulate the social justice mandate of clinics, namely the provision of legal service to people and groups living in poverty or those marginalised in other ways. It also does little to demonstrably strengthen social justice commitments in law students, law schools or the profession.

(i) Clinical Legal Education in the United States

Early legal education in the United States developed in two primary branches:

22 American Bar Association, 2011-12 Standards and Rules of Procedure for Approval of Law Schools, online: <http://www.americanbar.org/groups/legal_education/resources/standards.html>.

23 American Bar Association Task Force on Law Schools and the Profession, *Legal Education and Professional Development — An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago: ABA, 2002) [MacCrate].

24 Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Roadmap* (New York: Clinical Legal Education Association, 2007) [Stuckey Report].

25 William Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass, 2007) [Carnegie Report].

26 Randy Hertz, chair of the Section of Legal Education and Admissions to the Bar, cites the Accreditation Policy Task Force, the Special Committees on Outcome Measures, Transparency, and Security of Position, as well as the adoption of a Strategic Plan. Memorandum, "Comprehensive Review of the ABA Standards for the Approval of Law Schools" (15 August 2008).

27 ABA Standards Review Committee, *Statement of Principles of Accreditation and Fundamental Goals of Legal Education* (6 May 2009).

legal education as apprenticeship program, and legal education as a general education model more akin to social science degrees.[28] Although the casebook method dominated much of legal education in the United States at the time,[29] volunteer law students began offering legal aid services to people living in poverty from the late 1890s to early 1900s. Integration of clinical or service learning into the curriculum was advocated as early as 1917[30] and the Carnegie Foundation-funded *Reed Report* supported this approach.[31] The ABA first incorporated what could be termed clinical legal education into the 1999 Standards, stating that law schools should "encourage and provide opportunities for student participation in *pro bono* activities".[32]

The "new millennium" saw clinicians explicitly linking clinic work, access to justice and the larger law school curriculum, particularly through the significant advancements in clinical teaching methodology.[33] The social justice mission of clinical legal education was part of this movement from the beginning, although understanding of "social justice" varies from *pro bono* service provision to deep and politicised approaches to advocating for and with marginalised populations.[34] In fact, this mission has been institutionalised quite broadly in many law schools across the United States, although the historical struggle between the knowledge-based and skills-based missions of law schools has sometimes been at odds. Thus, while the new Standards do not make clinical legal education mandatory, there is clear recognition of its value, given its potential for paving the road toward further integration and institutionalisation of the social justice and skills development missions of clinical legal education.

(b) Australia

Unlike the U.S., the Australian law degree is predominately an undergraduate degree (LL.B.), but is moving steadily toward becoming a graduate degree. Students enrol from high school as a law major, or as a combined law degree major.[35]

28 Brian J Moline, "Early American Legal Education" (2004) 42 Washburn L.J. 775.

29 There is a great deal of diversity in American legal education . . . "Legal doctrine dominated law school syllabi . . . with virtually all instruction offered through classroom courses dominated by "Socratic" dialogue and appellate-court-oriented casebooks in the United States . . .". Frank S Bloch & MRK Prasad, "Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States" (Fall 2006) 13 Clinical L. Rev. 165 at 168.

30 William Rowe, "Legal Clinics and Better Trained Lawyers — A Necessity" (1917) 11 Illinois L. Rev. 591.

31 Walter Reed, *Training for the Public Profession of Law* (Carnegie Foundation, 1921).

32 Section If Legal Education and Admission to the Bar, American Bar Association, *Standards for Approval of Law Schools, Standards 203(3)* (1999).

33 *Supra* note 9.

34 *Supra* note 30 at 170.

35 In Australia most universities offer law as a four years undergraduate course (LLB), or a five to six years combined degree (BSc/LLB, BCom/LLB, BA/LLB, BE/LLB). An example of the new graduate level law degree is the Melbourne Model that was introduced in 2008. University of Melbourne students having completed three years of their first degree, with specified law modules can apply to spend the last two or three years of study completing the law degree. Alternatively, students can apply to enter into law as graduate entrants after completing their first degree to a high standard.

To practice as a lawyer, students must be admitted to the bar — which requires a law degree and the completion of a legal practice training course or, in limited circumstances, articling.

Like the U.S., Australia has a history of calls for reform of the legal profession and legal education. Professor Sally Kift, who is one of the leaders of the recent reform effort, writes that:

> [T]ertiary legal education [in Australia] has been subjected to intense scrutiny by government, employers, University management, professional bodies, the judiciary, law reform agencies and, not least of all, an extremely diverse student cohort. All stakeholders demand that law faculties should be accountable at every level for the quality and efficacy of the professional education they offer.[36]

The result has been significant reform — the outcome of which remains somewhat unclear. Two key drivers behind the reform have been the move towards nationalised regulation of the legal profession, which began in 1994 and is expected to culminate in the implementation of the new national regulatory legislation later this year; and tertiary accreditation under the Australian Qualifications Framework audit. Academic accreditation now falls under the auspices of the newly created Tertiary Education Quality Standards Agency (TEQSA), a national regulatory and quality assurance body that regulates tertiary education standards.[37]

At its simplest, the benchmark standards for academic and professional accreditation now focus on what lawyers "need to do", rather than simply what they "need to know". The drafting of the academic Teaching and Learning Outcomes for law "seek to recognize the relationship between the degree's academic and professional accreditation requirements and the reality that law graduates work in diverse roles in addition to professional legal practice," and therefore embrace a whole-of curriculum approach, with a series of measurable assessments and a capstone "experience or project that is integrative towards the end of the degree".

Professional practice accreditation standards for law degrees, legal education and practice requirements are set by the Law Admissions Consultative Committee

36 Sally Kift, "Harnessing Assessment and Feedback to Assure Quality Outcomes for Graduate Capability Development: A Legal Education Case Study" in P.L. Jeffrey, *Proceedings Australian Association for Research in Education* (Brisbane, 2002) 1.

37 This move followed the publication of the *Review of Australian Higher Education* (the Bradley Review). The enabling legislation for TEQSA is the *Tertiary Education Quality and Standards Agency Act 2011* [TESQA Act]. To facilitate this new regulatory environment, the Australian government awarded the Australian Learning and Teaching Council $2 million to coordinate six distinct discipline communities' definition of academic standards. Australian Learning and Teaching Council, "Learning and Teaching Academic Standards Report: Final Report" (Australian Government Department of Education, Employment and Workplace Relations, 2011). For law, Professors Kift and Israel are working consultatively with the legal academy, the legal profession and other stakeholders to define "threshold learning outcomes" (TLOs) for the bachelor level law degree.

(LACC). The standards require students to complete 12 compulsory subjects (the "Priestley 12"), which are either mandated to cover a specific range of topics, or, alternatively, must be of sufficient "breadth and depth" to familiarise students with the "general doctrines".[38] The 12 is practical legal training (PLT). PLT is usually undertaken after completion of the law degree. The PLT provider varies between states and territories but is generally either a law school or the Law Society. Law school providers must meet the legal training competency requirements if participating students are to be admitted to the profession.[39]

Australian law schools are set teaching and learning outcomes that articulate academic and professional standards of competence needed for accreditation. The curriculum is designed to constructively align those outcomes with appropriate learning activities and assessment that enable the schools to demonstrate the benchmark learning required by the law societies and the TEQSA.[40] Although there are still assertions that "the traditional teacher-centered, content-focused, case law model continues to dominate",[41] there is evidence of a progressive move away from traditional case-based Socratic learning towards experiential/active learning initiatives that integrate knowledge, skills and values.

(ii) Clinical Legal Education in Australia

Although there is notable variation between the Territories and States, Australian law schools have also increased their clinical offerings significantly.[42] Four clinics were government-funded beginning in 1999, and state funding for clinics has increased since. Clinics were integrated into the curriculum in some schools in the 1980s, but gained some traction in the mid-1990s, in part due to increased

38 Australian Learning and Teaching Council, online: <http://www.altc.edu.au/standards/overview>.

39 The Standards were developed by the LACC and the Australian Professional Legal Education Council and are used as guidelines for graduate admittance to the profession.

40 See Highlights of AUTC's Learning Outcomes and Curriculum Development in Law Report, 2009.

41 See *ibid.* Also see Australian Learning and Teaching Council "Project Final Report: Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment" (Council of Australian Law Deans, 2009). In March 2010, the Australian Prime Minister announced that the legal profession would be one of the Council of Australian Government's (COAG) areas of reform, the goal of which was the establishment of uniform, national legal regulation. The Commonwealth Attorney General appointed a Taskforce, which released its Consultation Package with a draft Legal Profession National Law and accompanying Rules, along with a report. The final results of this report are not yet published.

42 The first reference to clinical teaching of law students in Australia was in a daily newspaper in 1933, but it was not until 1975 that the first clinical program was established at Monash University. F. Russell, "How to Educate Young Lawyers: Legal Clinics in the U.S.A.", *Herald* (7 January 1933), cited in Jeff Giddings, "Clinical Legal Education in Australia: A Historical Perspective" (2003) 3 International Journal of Clinical Legal Education at 7.

scholarship and research in the area.[43] Like in the United States and Canada, Australian clinics aimed to serve those who otherwise could not afford legal services, but some clinics were more dedicated to systemic social change than others.[44] Professor Jeff Giddings outlines four animating themes in Australian clinical legal education: "emphasizing community service, including focusing on real cases rather than simulations; enhancing Student Learning — 'Legal Education in Context'; practical legal scholarship; and client-centered lawyering".[45]

Giddings also points to clinics as legal research sites that have created space for clinicians to obtain research grants.[46] Thus, the pairing of social justice and skills training (along with the focus on clinical teaching methodology and the more recent move towards curricular integration) puts some Australian clinics quite squarely in the "third wave" of clinical legal education.[47] However, it remains that clinical legal education has not taken hold across Australia, and some Australian law schools might reasonably be classified as "first wave".

(c) Canada

Although Canadian law schools traditionally awarded LL.B.s, most law schools have attempted to recognise the postgraduate nature of the degree by awarding J.D.s. Prior to the 2009 report by the Federation of Law Societies Task Force on the Canadian Common Law Degree (Task Force) recommending the adoption of a national requirement for entry to the legal profession,[48] Canadian law degrees were not subject to professional accreditation; thus, the form and content of legal education lay with individual law schools.[49] As long as applicants had earned

43 Among them: S. Rice and G. Coss, *A Guide to Implementing Clinical Teaching Method in the Law School Curriculum* (Centre for Legal Education, 1996); Marlena LeBrun & R Johnstone, *The Quiet Revolution: Improving Student Learning in Law* (Law Book Company, 1994).

44 A. Evans, "Client Group Activism and Student Moral Development in Clinical Legal Education" (1999) 10 Legal Education Rev. 179.

45 See Jeff Giddings, "Clinical Legal Education in Australia: A Historical Perspective" (2003) 3:1 International Journal of Clinical Legal Education 7 at 22.

46 *Ibid.* at 26–28.

47 There are certain elements that make Australia less than fully "third wave", including occasionally patchy government and institutional funding.

48 Federation of Law Societies of Canada, "Task Force on the Canadian Common Law Degree: Final Report" (October 2009). The Report recommended that law societies in common law jurisdictions adopt a uniform national requirement for entry to their admissions programs. All law societies in Canada approved the Task Force report and recommendations between 2009 and March 2010.

49 Historically, Canada has not had any national standard regulating the academic content of Canadian legal education, and provincial attempts by the law societies have failed. Resistance to regulation by law societies has historical roots. Professor Constance Backhouse documents the 1949 attempt of benchers of the Law Society of Upper Canada to assert control over legal education:

> [t]he *en masse* public resignation of Dean Cecil Augustus Wright and the full-time law faculty [at Osgoode Hall] set in motion a highly-

a law degree, confirmed their good character, passed the solicitors and barristers law examination and completed a period of articling,[50] law societies granted them admission.[51] From 2015 onwards, this will change. Law schools will need to establish that their degree programs meet the Law Societies legal competency requirements for Common Law degrees. Although the Canadian Federation of Law Societies has framed benchmark standards as competencies, this is little more than semantics.[52] Law Society accreditation requires the same sort of curriculum development and shift towards constructively aligned outcome-based learning that has occurred in the U.S. and Australia. Once again, despite the emphasis on skills, ethics, and professionalism, clinical legal education is conspicuous by its absence and apparent relegation to skills training. Like the U.S and Australia, there is no recognition that if properly funded and integrated across the broader law school curriculum, clinical legal education could offer the means for demonstrating program and institutional effectiveness, whilst simultaneously vanquishing legitimate concerns that Canadian legal education has been narrowed or "ossified" by the accreditation process.

Although not uniform, provincial governments in Canada, like Australia, have also set benchmarks for higher education providers. This has begun in earnest in Ontario, where academic benchmarks will now run in tandem with the Law Society's professional accreditation standards.[53]

(iii) Clinical Legal Education in Canada

Clinics in Canada are certainly not as diverse or plentiful as in the United States, and there is comparatively little writing about the history or context of clinical legal education in Canada.[54] Although there are increasing numbers of clin-

charged controversy over the philosophy and principles of legal education that ultimately resulted in the retirement of the profession from hands-on regulation of law school programs.

LSUC did set out seven required courses and twenty-five optional courses for law schools that have never been either accepted by law schools or other law societies, which were last reviewed in 1969. See *supra* note 2 at 3.

50 Once mandating significant amounts of skills and substantive law training, some law societies are increasingly opting against mandating classroom training and leaving students to train themselves for bar exams.

51 The academic content of the law degree has been of largely ignored for the following reasons: there has been little testing of the regulatory relationship because of the limited numbers of law schools in Canada, provincial government assessment has been minimal, as has student agitation for change.

52 Although it is acknowledged that the term "competencies" has a specific connotations rooted in vocational training pedagogy.

53 In Ontario, the provincial government has begun serious assessment of higher education as evidenced by the establishment of HEQCO, the Higher Education Quality Council of Ontario, an independent advisory council founded by the Ministry of Training, Colleges, and Universities, online: <http://www.heqco.ca/inside.php?&ID=1>.

54 A general review of Legal Aid in Canada can be found in HW Arthurs, R Weisman & FH Zemans, "The Canadian Legal Profession" (Summer 1986) 11:3 American Bar Foundation Research Journal447 at 523–526. Also see Jennie Abell, "Women, Violence, and the Criminal Law: 'It's the Fundamentals of Being a Lawyer that are at Stake Here'" (1992) 17 Queen's L.J. 147; James C Hathaway, "Clinical Legal Education" (1987) 25 Osgoode Hall L.J. 239; Janet E. Mosher, "Legal Education: Nemesis or Ally of Social Movements?" (1997) 35 Osgoode Hall L.J. 613; Rose Voyvodic, "Considerable Promise and Troublesome Aspects: Theory and Methodology of Clinical Legal Education" (2001) 20 Windsor Y.B. Access Just 111; Lucie E. White, "The Transformative Potential of Clinical Legal Education" (1997) 35 Osgoode Hall L.J. 603; Frederick H. Zemans, "The Dream is Still Alive: Twenty-five Years of Parkdale Community Legal Services and the Osgoode Hall Law School Intensive Program in Poverty Law" (1997) 35 Osgoode Hall L.J.499.

ics associated with law schools in Canada — particularly in Ontario with its greater funding of community and Student Legal Aid Service clinics — types of clinics vary widely. For example, Quebec students are restricted in their ability to give legal advice of any kind; therefore, Quebec clinics provide legal information and policy advocacy. Some Ontarian and British Columbian clinics have deep roots in their communities, and despite B.C.'s defunding of clinics, many have continued doing innovative "third wave" work with the support of law schools. Integration of clinical learning with the rest of the law school curriculum in Canada is mixed.

The existence of legal aid clinics allows law schools to partner with some provincial governments to provide services with law students representing clients under the supervision of lawyers. Due to the crisis in legal aid, however, Canadian schools are increasingly pursuing private and public donors and foundations to launch innovative clinic programming.[55] There are very few clinical professorships in Canada. Professors who have clinic-related duties are generally expected to perform these duties on top of "regular" tenure-track related professorial expectations.[56] Therefore, purposeful curricular integration across the curriculum does not occur in most law schools, absent volunteerism, advocacy by individual faculty and clinicians, and institutional commitments.[57]

It is difficult to predict the future of clinical legal education in Canada. While many Ontario clinics will likely survive the cost-reduction mandate of the provincial government, it is unclear whether clinical education will be a priority for law schools, particularly with the reality of budgetary issues at virtually every univer-

55 Canadian law schools host a menu of service learning activities for students. A brief survey of Canadian law schools in 2010 found the majority of service learning opportunities took place within a course, with occasional outside opportunities to work on a small number of cases under the supervision of a lawyer, or to observe a lawyer in her work. These and other placements can be best defined as externships, rather than clinical placements. There are 8 legal aid clinics that host significant numbers of students in Ontario. Other clinics provide services through a patchwork of funding. In Quebec, students are permitted to give legal information rather than advice. Thus, the number of Quebec clinics is relatively few.

56 See, for example, "academic clinic directors" at Osgoode Hall at York University, University of Saskatchewan and University of Windsor.

57 Osgoode Hall Law School has recently committed to mandating experiential learning for all law students. It is unclear to what degree this learning will be through in-class simulations, clinical work, externships, or a combination of these.

sity in Canada.[58] So, while some law schools, particularly in Ontario, are moving forward using a "third wave" approach (attempting curricular integration with reasonably solid funding), many institutions still teeter on the brink of "second wave" clinical legal education.

4. RESPONSES TO ACCREDITATION

The American and Australian accreditation documents use the language of "outcomes", which has been almost universally adopted by educational institutions generally and in law specifically.[59] Both jurisdictions clearly differentiate between the "list of courses" (content) versus the more accurate statements of what students should understand or be able to demonstrate (process). The latter approach is measurable in terms of course content, teaching methods, learning activities and assessment, and provides indicators of more complex learning than the "checkbox" approach that often accompanies a mandatory list of courses and skills.

Munro, writing in 2000, stated that universities have "embraced assessment as a means of ensuring institutional effectiveness" (i.e. that required learning outcomes are met), but "law schools have been conspicuously absent from national discussions regarding assessment."[60] This no longer holds true.[61] Law schools in the U.S. and Australia have made the epistemic shift to adopt new approaches to accreditation and assessment that are now second nature in other disciplines. While this leap might be shorter and more halting in some law schools, the move towards institutional assessment is very clearly occurring.

The historical reality of knowledge-heavy approaches to legal education has been acknowledged, and attempts have been made in all jurisdictions to remedy this through recognition that skills "matter" and values are essential for ethical lawyering. Graduating students' proficiency in the required knowledge, skills and values is being assessed by their ability to "do" certain things to a particular standard, rather than simply "knowing".[62] Perhaps the most significant departure from the knowledge-heavy approach is illustrated by the incorporation of "thinking skills", "communication and collaboration" and "self management" as core elements of the Australian degree.

58 Cost issues continue to be cited as problematic for clinic viability in Canada. However, the excellent work in Barry et al. (*supra* note 9) citing several American studies, questions the truth of the necessarily high cost of clinical legal education (at 20–30). See also data collected by CSALE (Centre for the Study of Applied Legal Education in the United States, online: <http://www.csale.org/survey.html>.

59 See Appendix 3 of the Australian LTAS Standards which contains a national and international comparative tables of relevant learning outcomes from the US, Canada, England, Scotland, Ireland, Europe and Latin America.

60 *Supra* note 2 at 6.

61 *Ibid.*

62 This applies irrespective of whether "outcome" or "competency" is used in the benchmark statements. Interestingly, the ABA uses both terms. It incorporates the language of competencies as subsets of outcomes. The Canadian use of competency is understandable but unfortunate. It stems from vocational evaluation system. This is a continuum that begins with novice, moves to competency, then proficiency, expertise and finally mastery after ten years in practice.

The change towards an outcomes-based approach to learning and assessment has meant that while law schools and faculty retain discretion over the teaching and learning process, that process has been modified to meet the demands of accreditation. The traditional assessment by of a single end of course examination does not capture students' progression to mastery over time or how the knowledge from one course is being put to use in others. In short, it is a weak tool for establishing institutional or program proficiency.[63] Clinging to outmoded or ineffective teaching and assessment practices carries high risk. A school's failure to establish institutional or program effectiveness, if left unresolved, results in loss of accreditation.

The identification and implementation of "best practices" in the United States and Australia as evidence of law school effectiveness illustrates that legal educators need to find new ways to demonstrate they can deliver graduates for admission who possess the prescribed academic learning and professional caliber for admission to the profession. Best practices in both jurisdictions are exemplified by a constructively aligned and integrated curriculum illustrated by clear, simply expressed learning outcomes that specify: what students will know and what they will be able to do or value at the end of the course or program; the teaching and learning activities that enable this; and the assessment tasks that can demonstrate, both formatively and summatively, that prescribed performance level learning is met or exceeded.[64]

This requires big picture thinking that articulates learning outcomes in the broader context of an integrated curriculum. In this picture, legal values and skills learning that have often been neglected and devalued are integrated throughout the curriculum and are brought shoulder-to-shoulder with knowledge. This echoes the MacCrate Report's call for curriculum integration of values training across the curriculum.[65]

In an integrated curriculum approach, traditional case-based learning and Socratic Method are supplemented with experiential learning initiatives — as an example, performance in the role of a lawyer. Unfortunately, the adoption of experiential learning and integration of skills and values into mainstream academic courses has been slow in all jurisdictions. As for law school facilitation of "third wave" clinical legal education, such learning and integration has been even slower.

63 One of the results of accreditation or regulation in legal education has been a gradual move away from the traditional "input" pedagogy of measuring money, grades, etc., towards outputs (outcomes), such as the quality of students graduated, jobs upon graduation, learning achieved, bar passage rates, etc. Thus, learning outcomes are the observable and measurable product to be derived from students' law school experience.

64 Artifacts demonstrating institutional effectiveness include: curriculum maps, syllabi teaching methods, learning activities and resources and examples of formative and summative assessment methods and practices.

65 The MacCrate Report contained a comprehensive Statement of Fundamental Professional Skills and Values. The following four values were listed: (1) Provision of Competent Representation; (2) Striving to Promote Justice, Fairness, and Morality; 3) Striving to Improve the Profession; and (4) Professional Self. See Gary S. Laser, "Educating for Professional Competence in the Twenty First Century: Educational Reform at the Chicago-Kent College of Law" (1992-3) 68 Chic-Kent L. Rev. 243 at 248-9.

The curriculum integration exemplified in the "third wave" requires envisioning the curriculum beyond the list of courses and activities that make up the degree program, the working out of how to combine social justice with substantive law knowledge skills and values consistently across the program; as well as determining which assessment methods and practices best reflect the learning outcomes captured in the learning activities in an authentic, valid and appropriately structured way. Indeed, this is happening in small pockets of "third wave" clinical education. But apart from these limited exceptions, there has been no strong movement towards integrating substantive law courses with clinical legal education as a means of demonstrating program or institutional effectiveness.

5. CONSEQUENCES FOR CLINICAL LEGAL EDUCATION

These differing approaches have real consequences for clinical legal education (whose scholars and practitioners have a long history of engaging with creative forms of assessment) integrative curriculum design and skills-based and values-based legal education. The brief history of clinical legal education in Canada, the United States and Australia shows the American and Australian approach to be more advanced in its curricular integration, with the Canadian approach more scattered across institutions. Clinical legal education literature over the past ten years, and in some cases longer, has paired the social justice roots of its work with the skills training required to provide competent, ethical and professional service. Most, or perhaps all of this has occurred absent a mandatory regulatory framework. If we accept that clinical legal education literature shows the field has, at its best, addressed fundamentally important jurisprudential issues inherent in the realities of poverty, racialisation, marginalisation and powerlessness, there is no better way to reach the aspirational (or even minimum) goals of the various accrediting and regulatory bodies. The ability for clinical legal education to serve the values and skills missions of legal education is well supported, forming an important part of the feedback received by the ABA Standards Review Committee. A brief snapshot of writing on the subject is clear. Stuckey wrote about it in his 2007 Report:

> Taught well, it is through this experience of lived responsibility that the student comes to grasp that legal work is meaningful in the ethical, as well as cognitive, sense. Or rather, the student comes to understand that the cognitive and practical are two complimentary dimensions of meaningful professional activity that gets its point and intensity from its moral meaning.[66]

While Stuckey is clearer about the morality of law, the Carnegie Report also supports the role of clinical legal education in supporting the "third apprenticeship" of professional identity development. Bloch and Prasad argue convincingly for a strong social justice mission in clinical legal education beyond skills training:

> Although real, these differences in emphasis — between skills training and social justice — should not obscure what amounts to a strong unifying justification for clinical legal education's key role in reforming the legal profession: improving the quality of practical training in law school is central to legal education's social justice mission. ... Professional legal education must address the public role of law and lawyers in society and must seek to motivate young lawyers to work for the public good. This is where access to the richness of legal aid-based "live client" or other forms of social justice-based clinical education is critical ... A complete clinical program both provides students with the skills training needed to prove lawyer competence generally and obligates them to engage as students in supervised high-quality public service.[67]

66 Roy Stuckey et al., *Best Practices for Legal Education: A Vision and A Road Map* (University of South Carolina: Clinical Legal Education Association, 2007) at 191.

If we couple the above with the legal education literature surveying what lawyers need to do and to be, particularly in the most aspirational sense, the relative lack of recognition of the place of clinical legal education in both the values and the skills portions of legal education is illogical. Key documents relied upon by the Canadian, American and Australian regulatory bodies support the need for pairing the skills and values components of legal education, including, again, Bloch and Prasad:

> Mere analytical skills of problem solving will not be sufficient to solve broader socio-legal problems. ... Therefore, lawyers must be trained in skills that provide for a broader understanding of various facets of legal problems. Fundamental lawyering skills are important to provide social justice; however, any set of skills confined only to traditional methods of problem solving would be manifestly insufficient.[68]

Barry, Dubin and Joy argue that "[d]octrine, theory, and skills cannot be appreciated if they are introduced without engaging the pathos of the human issues that the lawyer encounters when representing clients. So little attempt has been made to reflect this relationship that the goals of the legal academy have been called into question."[69]

One might accept that the "skills" portions of the competencies or outcomes are best met through clinical exposure. However, without an emphasis on the essential values components of clinical legal education, which have been a fundamental part of the work and are equally important to the future of the social justice mission of law, clinical education can become no more than a rote set of mechanical skills that de-contextualise legal practice and client problems. The Canadian approach would have us believe that a course on ethics and professionalism, taught somewhere during the course of a law degree, is the place to introduce and assess values. This is, with respect, misconceived rule-based thinking that does not promote personal growth or reflection. Nor does it encourage a meaningful engagement with "otherness". A broader approach to values is envisioned by the Americans, with emphasis on both the professional and moral elements of ethical duties. Although the Standards demonstrate a greater commitment to the importance of clinical education, the choice to avoid mandating or strongly supporting clinical legal education as a service delivery mechanism may weaken their more expansive

67 *Supra* note 30. See also Stacy L. Brusin and David F. Chavkin, "Testing the Grades: Evaluating Grading Models in Clinical Legal Education" (1997) 3 Clinical L. Rev. 299 at 324: "The traditional law school curriculum teaches and measures only ... [the cognitive], often leaving the competencies of skills and professional values up to clinical, workshop, and simulation based courses".

68 Bloch & Prasad, *supra* note 30 at 161.

69 *Supra* note 9 at 34.

vision of ethical lawyering and public citizenship. And, while the Australian approach very clearly uses the more integrative outcomes model, it, too, fails to mandate or strongly encourage a clinical experience. Thus, the institutional support that clinical legal education requires to plant itself firmly in the "third wave" may be problematic, particularly in this age of austerity. Bloch and Prasad wrote:

> Although social justice remains at the heart of many clinical programs, the effort to obtain broad acceptance of clinical legal education by the legal academy and the bar — realized already to a substantial degree in a number of countries around the world — seems often to undercut its traditional social justice mission.[70]

It is simply not adequate to leave clinics to make the jump from the knowledge-based learning in the law school classroom to the skills and values-heavy clinic work. This lack of integration has left clinical instructors to teach what have been historically marginalised, but increasingly important, pieces of legal education that, without significant institutional and regulatory support, will remain under-valued by students through the process of null curriculum. In the case of Canada, without regulatory commitment to a more expansive value-laden vision of legal ethics, there is a real possibility that clinics will become the place students are sent to learn the required skills-based competencies with no concomitant requirement to consider the essential value-based components which lie at the heart of clinical learning. If clinics align their approaches according to the Task Force document, this odd pairing of skills and knowledge (which, on its face, seems intuitively correct, but with little moral or ethical context outside the stand-alone course) will lead to an erroneous and potentially dangerous sense of professional competency. Although CLEA's Comments on the Outcome Measures were directed at an American audience, they hold very true for Canada as well:

> By its terms this interpretation would permit a school to do no more than assess a student in a single skill taught in a single course, as though proficiency in a single skill were sufficient professional proficiency for a law graduate. It would not ensure that students receive the integrative pedagogy needed to gain insight into the effective and responsible practice of law.[71]

Further, the American and Canadian standards are lacking particular components of learning that are the hallmarks of mature clinical legal education. Nor is there empirical data on what constitutes successful lawyering; although, such data exists and would strongly support a clinical approach. For example:

> [E]mpirical studies of lawyers have identified a set of professional attributes and values that contribute significantly to success in the practice of law. These include honesty, reliability, judgment, respect, diligence, commitment to life-long learning and self-motivation. In fact, many lawyers rate these values and attributes as more important to success in practice than skills and knowledge.[72]

70 *Supra* note 30 at 166.

71 Clinical Legal Education Association, "Comments on Outcome Measures to the ABA's Standards Review Committee" (1 July 2010) at 2-3.

As outlined above, international research shows that a program of study that integrates knowledge, skills and values in all settings — and where learning outcomes are constructively aligned with teaching methods, learning activities and assessment — will produce a competent well-rounded profession-ready graduate. In the words of Barry, Dubin and Joy, "[t]he aim . . . should be to incorporate clinical teaching methodology into non-clinical course to teach lessons that will be further developed and reinforced by in-house clinic and externships experiences".[73] The Australian approach is the closest to this ideal and exemplifies how regulators and educators can meaningfully incorporate skills alongside, but not subsumed by, professional and ethical values.

6. CONCLUSION

When substantive legal doctrine, practice and process are taught and assessed authentically and incorporate practice and professional values, student learning is broadened and deepened. Law schools' current focus on theory and doctrine leaves students to grapple with the force and effect of the law in the uncertain, unique and messy practicalities of authentic client cases. Assessed reflective clinical experience consolidates learning and provides law schools with demonstrable evidence that competencies, Standards or TLO's have been met. However, the content of these standards shape how clinical legal education is framed, and whether its full potential to foster values or attitudes, along with skills and knowledge, is met.

In the United States, commitment to clinical legal education in the Standards is promising; however, omitting self-assessment, social justice concerns and reflective practice — specifically in a clinical context — may undermine its full integration, thwarting one of the requirements of a fully "third wave" approach. In Canada, the lack of acknowledgement of clinical legal education (or any sort of experiential learning) undermines what appears to be a strong commitment to ethical practice through its stand-alone course, as well as its stated commitment to specific skills training. If clinical legal education does indeed flourish in Canada, the Task Force document cannot serve as a guide for a "third wave" approach, as a reflective, deep and integrative assessment approach is absent — as is any reference to the importance of social justice concerns in law. In Australia, the curricular ground is prepared for an ideal clinical law program, with integrative outcomes, recognition of a wide conception of values, and with a concomitant set of skills requirements. But without greater and specific acknowledgement of clinical legal education, there is risk of its marginalisation due to more typical resource problems. However, all three also contain the possibility for greater commitment to clinical legal education if institutions understand the difficulty of the "add and stir" approach to integrating skills and values into the mainstream law curriculum. What clinics do well, and have done well for decades, is what law schools will now have to integrate more broadly. Integration can be done fully (as is imagined in the Aus-

72 Institute for Law Teaching and Learning, "Memorandum to Standards Review Committee" (20 August 20 2010), citing Stephen Gerst & Gerald Hess, "Professional Skills and Values in Legal Education" (2009) 43 Valparaiso U. L. Rev. at 4.

73 *Supra* note 8.

tralian TLOs) or can be done superficially. The best of clinical legal education requires a deep, integrated approach with commitment to reflective practice to meet the aspirational vision of lawyering many hope to achieve.