

# STUDENT, ESQUIRE?: THE PRACTICE OF LAW IN THE COLLABORATIVE CLASSROOM

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*Law faculty and non-profit lawyers are working together in a variety of partnerships to offer students exposure to “real life” clients in the first year of law school, as well as in advanced courses in substantive areas. Teachers engaged in this client-centered advocacy through experiential frameworks have broken out of their isolated silos in the law school (e.g., legal writing, clinical, externship, and doctrinal) and begun to work together. To help students develop a sense of professional identity, cultivate professional values, and tap into key intrinsic motivations for lawyering, such as serving the public good, collaborative classrooms have an important role in meeting the needs of twenty-first century law schools. But implementing innovation without planning and forethought spells disaster. These partnerships amongst faculty, students, and lawyers have not yet seriously engaged with the ongoing conversation about ethical representation in student legal work for real clients. For collaborative classrooms to remain within ethical boundaries, teachers creating innovative classroom experiences with clients need to define the legal tasks being completed by students early on and examine local unauthorized practice of law (UPL) rules to determine whether students’ work implicates these ethics rules. By engaging in this conversation, we model the ethical professional behavior that modern learning initiatives challenge us to address: how to be innovative, creative, justice-seeking lawyers within the ethical contours of our profession. This Article begins that conversation.*

## INTRODUCTION

In the face of extreme censure about the cost and value of legal

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education voiced by education experts,<sup>1</sup> national media outlets,<sup>2</sup> as well as legal professors and consumers of the education themselves,<sup>3</sup> legal education reform movements have swept the nation. Graduating “practice ready lawyers” has never been more imperative. New learning initiatives encourage law professors to create integrated classes that explicitly join “lawyering” professionalism and legal skills, starting on the first day of law school.<sup>4</sup>

As part of this movement, faculty at law schools across the country are leaving their silos and collaborating with one another to provide experiential learning opportunities that incorporate client work into the learning of the class. This includes legal research and writing (LRW), clinical, externship, doctrinal faculty, and non-profit lawyers working together in a variety of partnerships to offer students exposure to “real life” clients in the first year of law school, as well as advanced courses in particular substantive areas.<sup>5</sup> For example, my LRW first-year class partnered with the workers’ advocacy group, 9to5 National Association of Working Women,<sup>6</sup> to provide them research and analysis on a legal issue important to their policy goal of advocating for paid sick leave to better the lives of working families. This Article uses the phrase “collaborative classroom” to capture these myriad innovations that are currently blossoming in legal education.

Collaboration between clinics, non-profit partners, externship programs, doctrinal classes, and LRW students should be mindful of the parameters of legal practice when developing their classes, paying particular attention to the practice of law rules in their jurisdiction.<sup>7</sup>

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<sup>1</sup> See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP (Clinical Leg. Educ. Ass’n 2007) [hereinafter BEST PRACTICES]; WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (Jossey-Bass 2007) [hereinafter CARNEGIE REPORT]; ABA SEC. LEG. EDUC. & ADMIS. TO B., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (ABA 1992) [hereinafter MACCRATE COMMISSION REPORT], available at <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html> (last visited Mar. 7, 2013).

<sup>2</sup> See, e.g., Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs are Cut*, N.Y. TIMES, Jan. 30, 2013, <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html>; Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. TIMES, Feb. 10, 2013, <http://www.nytimes.com/2013/02/11/us/lawyers-call-for-drastic-change-in-educating-new-lawyers.html>.

<sup>3</sup> Paul Campos, *Goodbye Is Too Good a Word*, INSIDE THE LAW SCHOOL SCAM (Feb. 27, 2013, 4:43 AM), <http://insidethelawchoolscam.blogspot.com/>.

<sup>4</sup> See CARNEGIE REPORT, *supra* note 1, at 87–88, 191–92.

<sup>5</sup> See generally Nantiya Ruan, *Experiential Learning in the First-Year Curriculum: The Public-Interest Partnership*, 8 LEGAL COMM. & RHETORIC: JALWD 191 (2011).

<sup>6</sup> 9to5 is dedicated to working families and economic justice issues. See 9to5, WINNING JUSTICE FOR WORKING WOMEN, <http://9to5.org/> (last visited Mar. 20, 2013).

<sup>7</sup> MODEL CODE OF PROF’L RESPONSIBILITY R. 5.5 (2011); see also Laura L. Rovner,

This Article addresses one of the ethical risks associated with implementing these “collaborative classrooms”: the ethics rules surrounding the unauthorized practice of law. One of the most widely understood barriers to nonlawyer advocacy is the attorney practice rules.

Generally, states regulate the unauthorized practice of law (UPL) for their jurisdiction through state rules enacted by various sources: court rules, statutes, administrative regulations, judicial opinions, and the state’s constitution.<sup>8</sup> UPL rules regulate the delivery of legal services, which are defined in varying degrees of breadth and oversight.<sup>9</sup> A universal definition of legal services is lacking, but some baseline agreement is that legal services consist principally of preparing legal instruments, giving legal advice, and appearing in a representational capacity before an adjudicatory tribunal.<sup>10</sup>

Some states broadly interpret UPL standards to more heavily restrict the work of lay advocates in legal matters.<sup>11</sup> Justifications for restricting lay advocates include protecting the public against harmful and unscrupulous conduct and keeping competition for lawyers to a minimum in exchange for their submitting to regulation.<sup>12</sup> Other states follow a more narrow definition of legal services to allow for more broad-based lay advocacy, which is in keeping with the ABA Commission’s 1995 Nonlawyer Practice endorsement of lay advocates.<sup>13</sup> Such an approach recognizes the unmet legal needs in communities of limited resources and efforts to improve access to justice.<sup>14</sup>

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*The Unforeseen Ethical Ramifications of Classroom Faculty Participation in Law School Clinics*, 75 U. CIN. L. REV. 1113 (2007).

<sup>8</sup> Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 797 (2003).

<sup>9</sup> For a recent comprehensive list of state definitions, see AMERICAN BAR ASSOCIATION TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, app. A (2003), available at [http://www.abanet.org/cpr/model-def/model\\_def\\_statutes.pdf](http://www.abanet.org/cpr/model-def/model_def_statutes.pdf).

<sup>10</sup> *Task Force on the Model Definition of the Practice of Law: Model Definition of the Practice of Law Challenge Statement*, ABA CENTER FOR PROF. RESP. [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_challenge.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html) (last visited Mar. 20, 2013).

<sup>11</sup> See Soha F. Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1910 (2004).

<sup>12</sup> See *id.* at 1959 (citing Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999) (discussing the legal monopoly)).

<sup>13</sup> See Suzanne J. Schmitz, *What’s the Harm?: Rethinking the Role of Domestic Violence Advocates and the Unauthorized Practice of Law*, 10 WM. & MARY J. WOMEN & L. 295, 305 (2004) (recognizing the ABA’s role in advocating for more lay advocates in the domestic violence courts).

<sup>14</sup> See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 712 (1996); ABA COMM’N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 45 (1995); Kendra Emi Nitta, *An Ethical Evaluation of*

For classes that engage with clients outside the in-house clinic, this Article suggests guidelines to implement in order to avoid potential unauthorized practice of law violations. In order for collaborative classrooms to remain within ethical boundaries, teachers creating innovative classroom experiences with clients need to define early on the legal tasks being completed by first year and nonclinical students and examine local UPL rules to determine if students' work implicates these ethics rules. Ultimately, after analyzing the categories of legal work done in these types of classrooms, the Article concludes that there is a potential for UPL violation only in situations where both: (1) student work implicates practice of law tasks with the risk of negatively impacting clients or potential clients, and (2) students are neither covered by the student practice rules, nor supervised by a licensed attorney within the jurisdiction's ethic rules.

First, this Article explains the early legal reform efforts, today's modern learning initiatives aimed at educating tomorrow's lawyers, and the silos of experiential learning in today's law schools. Next, the Article outlines the resulting movement in law schools of collaborations among legal writing classes, clinics, doctrinal classes, and non-profit agencies (the "Collaborative Classroom" movement). Then, the Article provides a historical backdrop to UPL rules, and analyzes the modern UPL framework to determine whether Collaborative Classrooms violate these rules. Lastly, the Article outlines general and specific guidelines and best practices for Collaborative Classrooms in defining tasks and memorializing understandings among the students, faculty, and partners. The Article concludes that Collaborative Classrooms have an important role in meeting the needs of twenty-first century law schools, but require attention and forethought.

#### I. "CLIENT CENTERED" AND "PRACTICE READY": EXPERIENTIAL LEARNING IN LAW SCHOOL CURRICULA

The most widespread of modern legal education reforms centers on the call to involve "real lawyering" throughout the law school curriculum. "Experiential learning" is the touchstone for these reformists who seek to inculcate pedagogies for engaging students in legal work in real-life situations.<sup>15</sup> Many law school administrators have

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*Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 913 (1996).

<sup>15</sup> "Experiential learning" is a moniker with broad support but without an agreed-upon definition in legal education. An early education theorist who developed a framework for experiential learning crafted this definition: "Learning is the process whereby knowledge is created through the transformation of experience." DAVID A. KOLB, *EXPERIENTIAL LEARNING: EXPERIENCE AS THE SOURCE OF LEARNING AND DEVELOPMENT* 38 (1984). To

embraced and marketed these changes by supporting experiential learning efforts in their strategic plans,<sup>16</sup> funding national conferences,<sup>17</sup> and structuring hiring priorities in line with this focus.

Experiential learning efforts of today have their genesis in American legal education reform movements of the early twentieth century. The three major professional reform efforts culminated in the nearly ubiquitous silos of experiential learning in the law school: legal research and writing, clinical, and externship programs.

#### A. *Early Legal Reform Efforts: Legal Writing, Clinical Education, and Professional Ethics*

Reformists' decrying of the case method of law schools is hardly new. Since the proliferation of early twentieth century American law schools operating and copying Dean Langdell's innovations at Harvard Law School, legal education reformists have challenged the wisdom of teaching legal doctrine exclusively by the case method and evaluating successful learning solely by a final examination. As early as the 1920s and '30s, law schools began experimenting with "functional" as opposed to "doctrinal" curricula.<sup>18</sup> These include such prominent law schools as Columbia Law School, which experimented with different readings beyond appellate cases, and the University of Chicago Law School, which started its research and writing program for first-year students in 1938.<sup>19</sup>

Thus, one of the earliest legal reform efforts that challenged the traditional case method is the legal research and writing ("LRW")

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put meat on those bare bones, Dr. Kolb emphasized four aspects of experiential learning:

First is the emphasis on the process of adaptation and learning as opposed to content or outcomes. Second is that knowledge is a transformative process, being continuously created and recreated, not an independent entity to be acquired or transmitted. Third, learning transforms experience in both its objective and subjective forms. Finally, to understand learning, we must understand the nature of knowledge, and vice versa.

<sup>16</sup> See, e.g., Univ. of Denver Sturm Coll. of Law, *The Future of Legal Education for the Future of Legal Practice: Strategic Plan 2010-2015*, <http://www.law.du.edu/index.php/strategic-plan> (last visited Mar. 20, 2013).

<sup>17</sup> E.g., Inst. for the Advancement of the Am. Legal Sys., *Educating Tomorrow's Lawyers*, <http://educatingtomorrowlawyers.du.edu> (last visited Mar. 20, 2013) (hosting a series of conferences concerning legal education reform); *Hybrid Law Teaching*, Inst. for Law Teaching & Learning, <http://lawteaching.org/conferences/2013/> (last visited Jan. 31, 2014) (hosting conference on hybrid law teaching in July 2013 at Washburn University School of Law in Topeka, Kansas).

<sup>18</sup> See Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1982-83 (1999) (citing John Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1933); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933)).

<sup>19</sup> See Harry Kalven, Jr., *Law School Training in Research and Exposition: The University of Chicago Program*, 1 J. LEGAL EDUC. 107, 108 (1948).

course. Beginning in the 1920s, the LRW classes began as mere “legal bibliography” courses that rigidly and mechanically taught students how to find legal authorities.<sup>20</sup> More formalized programs that taught legal writing skills along with legal research gained prominence in law schools during the 1940s and ‘50s.<sup>21</sup>

Following in the footsteps of LRW reform movements, clinical education appeared in law schools in the 1960s.<sup>22</sup> Motivated by the social justice movements of that era, law students were a new source of representation for underserved populations unable to afford representation.<sup>23</sup> But fundamentally, even though clinical education had its birth in progressive social change, the impetus to make legal education “more relevant” helped inspire the proliferation of clinical education across law schools.<sup>24</sup> Clinical faculty soon began “refin[ing] their pedagogies and deepen[ing] the academic connections between their work and the work of the university.”<sup>25</sup>

During the 1970s, trailing the clinical education reform efforts and the national spectacle that was the Watergate Affair, the public

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<sup>20</sup> See, e.g., FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH WITH BIBLIOGRAPHICAL MANUAL 20-25 (1923); see also Marjorie Dick Rombauer, *First-Year Legal Research and Writing: Then and Now*, 25 J. LEGAL EDUC. 538, 539 (1973); Emily Grant, *Toward a Deeper Understanding of Legal Research and Writing as a Developing Profession*, 27 VT. L. REV. 371, 375-76 (2003); Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education into the First Year*, 12 CLINICAL L. REV. 441, 448 (2006); David S. Romantz, *The Truth about Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 128 (2003).

<sup>21</sup> Sarah Schrup, *The Clinical Divide: Overcoming Barriers to Collaboration Between Clinics and Legal Writing Programs*, 14 CLINICAL L. REV. 301, 311 (2007); see also Grant, *supra* note 20, at 375-76 (citing Alfred F. Mason, *Brief-Making in Law Schools*, 1 AM. L. SCH. REV. 294, 294 (1905)); Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 SW. L.J. 1089, 1093-94 (1986); Terrill Pollman, *Building a Tower of Babel or Building a Disciple? Talking about Legal Writing*, 85 MARO. L. REV. 887, 893 (2002); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 49 (1994); Adam Todd, *Neither Dead nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 919 (2006).

<sup>22</sup> Kissam, *supra* note 18, at 1984. Although the movement caught on in the 60s, early education reformers saw the need for clinical education much earlier. See Frank, *supra* note 18.

<sup>23</sup> Deborah Maranville et al., *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 521 (2011-2012).

<sup>24</sup> Kissam, *supra* note 18, at 1984.

<sup>25</sup> Maranville et al., *supra* note 23, at 522 (citing Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5-18 (2000); Marc Feldman, *On the Margins of Legal Education*, 13 N.Y.U. REV. L. & SOC. CHANGE 607 (1985) (“[D]escribing a four-stage development: first, skills training and service to the poor; second, the shift to teaching self-learning; third, the integration of the first two, involving limited client representation combined with high levels of supervision and intense student reflection; and fourth, the clinicians’ critique of and integration into the core curriculum”).

took a new interest in the ethical behavior of lawyers. Legal ethics grew in importance and the legal profession responded by establishing a professional ethics segment to bar examinations and, through the ABA, requiring law schools to teach “legal ethics” in law school.<sup>26</sup> At first, law schools took a “minimalist approach” to such standards by simply adding a required course to the curriculum.<sup>27</sup> But soon, legal professionalism (a broader spectrum capturing legal ethics) became the center of a new wave of legal reform efforts.

*B. Modern Learning Initiatives: Making Graduates Ready for Today's Legal Market*

As the LRW, clinical, and legal ethics reform initiatives took hold in legal education, a new wave of legal professionalism efforts has begun. The legal education reformists query whether professional identity development is consistently and effectively being taught in law school. By focusing on professional identity formation, the reformists emphasize both experiential learning (to create “practice ready lawyers,”) as well as professional values (that remind lawyers of the legal needs of the community they are sworn to serve).

An influential starting point for this reform effort is the ABA's Commission Report on Professionalism (the Stanley Report) of 1986, which stressed “the importance of competence among members of the profession, trustworthiness and accountability to the client, and devotion to the public good.”<sup>28</sup> This Report's recommendations included “weav[ing] ethical and professional issues into courses in both substantive and procedural fields”<sup>29</sup> and specifically referenced the importance of teaching law students that the legal profession includes service to the public good.

Integrating professional development and client-centered practices throughout law students' learning gained traction in 1992, when the ABA Section of Legal Education and Admissions to the Bar studied and issued extensive recommendations in a report entitled “Legal Education and Professional Development — An Educational Continuum” (the MacCrate Commission Report).<sup>30</sup> The MacCrate Commis-

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<sup>26</sup> Kissam, *supra* note 18, at 1984 (citing MICHAEL J. KELLY, LEGAL ETHICS AND LEGAL EDUCATION 2 (1980)).

<sup>27</sup> *Id.*

<sup>28</sup> David S. Walker, *Teaching and Learning Professionalism in the First-Year With Some Thoughts on the Role of the Dean*, 40 U. TOL. L. REV. 421, 423-24 (2009) (citing ABA COMM'N ON PROFESSIONALISM, “IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 10-11 (1986) [hereinafter THE STANLEY REPORT]).

<sup>29</sup> THE STANLEY REPORT, *supra* note 28, at 12.

<sup>30</sup> MACCRATE COMMISSION REPORT, *supra* note 1.

sion Report identified many professional skills and “fundamental values” that law schools must expose students to before they enter the legal profession.<sup>31</sup> The Report recommended teaching law students competent representation and professional self-development, and instilling in them a desire to “striv[e] to promote justice, fairness, and morality” and to “improve the profession.”<sup>32</sup>

The MacCrate Commission Report sparked new and innovative thinking on how to inspire law students to develop these professional values.<sup>33</sup> Soon thereafter, in 1996, the ABA’s Professionalism Committee issued “Teaching and Learning Professionalism.”<sup>34</sup> By looking at “the purposes of the profession, the character of the practitioner, and supportive characteristics of professionalism,” the Report listed “essential characteristics” that law students must master before graduation.<sup>35</sup> The first three characteristics focus on the knowledge and skill needed to be a competent lawyer: (1) learned knowledge (doctrine); (2) skill in applying the applicable law to the factual context (analytical skill); and (3) thoroughness of preparation.<sup>36</sup> The last three reflect a greater sense of professional identity: (4) practical and prudential wisdom; (5) ethical conduct and integrity; and (6) dedication to justice and the public good.<sup>37</sup>

Entering into the discussion was the next round of legal education reformists, including the Carnegie Report on *Educating Lawyers* (Carnegie Report)<sup>38</sup> and CLEA’s *Best Practices in Legal Education* (Best Practices).<sup>39</sup> Together, the Carnegie Report and Best Practices embody our newest modern learning initiative.<sup>40</sup> While the Carnegie Report and Best Practices differ in important ways,<sup>41</sup> their conclusions and proposals for expanding and reforming law school curricula overlap quite a bit, as well as echo the MacCrate Report’s themes.

Best Practices focuses legal education reform on the effective utilization of experiential learning in legal education: teaching meth-

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<sup>31</sup> *Id.* at 135–221.

<sup>32</sup> *Id.* at 140–41, 207–21.

<sup>33</sup> See, e.g., Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek To Narrow*, 8 CLINICAL L. REV. 109 (2001); Russell G. Pearce, *MacCrate’s Missed Opportunity: The MacCrate Report’s Failure To Advance Professional Values*, 23 PACE L. REV. 575 (2003).

<sup>34</sup> ABA SEC. LEG. EDUC. & ADMIS. TO B., TEACHING AND LEARNING PROFESSIONALISM (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM].

<sup>35</sup> *Id.* at 5–6.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 7.

<sup>38</sup> CARNegie REPORT, *supra* note 1.

<sup>39</sup> BEST PRACTICES, *supra* note 1.

<sup>40</sup> See, e.g., Stephen Ellmann, *What We Are Learning*, 56 N.Y.L. SCH. L. REV. 171, 190–92 (2011–2012).

<sup>41</sup> Maranville et al., *supra* note 23, at 523–24.



odologies must “integrate[ ] theory and practice by combining academic inquiry with actual experience.”<sup>42</sup> Meanwhile, the starting point for the Carnegie Report is that law schools must foster “civic professionalism”: “linking the interests of educators with the needs of practitioners and with the public the profession is pledged to serve . . . .”<sup>43</sup> Both the Carnegie Report and Best Practices speak to legal education’s “apprenticeship of professional identity.”<sup>44</sup> For the Carnegie Report authors, professionalism inculcation has three pillars: (1) “cognitive, academic apprenticeship,”<sup>45</sup> which focuses on “the knowledge base” (doctrine or substantive content and theory of law); (2) “practical apprenticeship,”<sup>46</sup> which focuses on the development of professional skills and competencies such as legal reasoning and communication (writing and advocacy);<sup>47</sup> and (3) “ethical–social apprenticeship,” including the moral dimension of the law, ethical issues, and matters of professionalism.<sup>48</sup>

This third pillar of “ethical-social apprenticeship” — developing professional identity — is secondary in law school experiences to the pillar of “cognitive apprenticeship.”<sup>49</sup> To combat this subordinate position given to professional development, the Carnegie Report provides several recommendations, beginning with the call for law schools to “offer an integrated curriculum” that “joins ‘lawyering,’ professionalism and legal analysis from the start.”<sup>50</sup>

This modern learning initiative challenges law schools to incorporate experiential learning more deeply and thoroughly into their curriculum—including the first year of law school. Such pedagogy must require students to “assume the role of the lawyer, and while in role, face the sort of problems that lawyers encounter in practice.”<sup>51</sup> Today’s law schools are encouraged to provide opportunities for first-year students to develop an understanding of their status as members of a profession that has ethical norms and moral dimensions at the very start of their law school careers. Such reform efforts warn schools against relegating this vital aspect of students’ education to

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<sup>42</sup> BEST PRACTICES, *supra* note 1, at 165.

<sup>43</sup> CARNEGIE REPORT, *supra* note 1, at 4.

<sup>44</sup> BEST PRACTICES, *supra* note 1, at 27–29; CARNEGIE REPORT, *supra* note 1, at 129.

<sup>45</sup> CARNEGIE REPORT, *supra* note 1, at 28, 48–84.

<sup>46</sup> *Id.* at 28, 95–100.

<sup>47</sup> *See id.* at 27–29.

<sup>48</sup> *Id.* at 139–47.

<sup>49</sup> *Id.* at 132–33.

<sup>50</sup> WILLIAM M. SULLIVAN ET AL., SUMMARY OF EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8-9 (2007), available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf); see also CARNEGIE REPORT, *supra* note 1, at 50–54.

<sup>51</sup> Maranville et al., *supra* note 23, at 524.

later clinical and externship opportunities and a single stand-alone course on professional responsibility.

*C. The Silos of Experiential Learning in Legal Education: LRW, Clinical, and Externship Programs*

Unfortunately, today's law schools' offerings remain far from the integrated curriculum envisioned by the reformists of the modern learning initiative. The courses that incorporate experiential learning are often stand-alone silos in the law school, which, with few exceptions, have little to do with one another. These three programs (LRW, clinic, and externship) provide students with the most engaged experiential learning experience, but separate and apart from one another.

*1. LRW Programs: Simulation-Based Experiential Learning*

Today, every ABA-accredited law school offers some form of LRW instruction, and in the highest ranking programs, such instruction is taught by a faculty of professional full-time teachers, as opposed to a cadre of adjuncts and student teachers that historically dominated the profession.<sup>52</sup> Substantively, LRW pedagogy of the past has focused on a "product"-centered approach: students write after the analytical process is complete and the measure of success is demonstrated ability to produce particular legal documents (such as legal memoranda and briefs) to particular specifications and audiences.<sup>53</sup>

In the following wave of LRW reform, this "product"-centered approach was supplanted by a "process" method, which relies upon the "new rhetoric" theory—that writing is a process for constructing thoughts.<sup>54</sup> Viewing writing as "fluid," LRW faculty began focusing less on inflexible writing rules and assessment focused solely on end products.<sup>55</sup> Instead, LRW faculty reoriented students to focus on the acts involved in writing and to keep the reader firmly in mind. This flexible, multi-faceted approach has a postmodern influence because of its rejection of single, unitary models for instruction.<sup>56</sup>

Close on the heels of this process-centered reform movement, a "third wave" of LRW reform emerged, incorporating a "post-process" or social-context methodology. This "third wave" of LRW pedagogy

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<sup>52</sup> See Schrup, *supra* note 21, at 311-12.

<sup>53</sup> See Ruan, *supra* note 5, at 199 (citing Phelps, *supra* note 21; Pollman, *supra* note 21; Rideout & Ramsfield, *supra* note 21; Todd, *supra* note 21).

<sup>54</sup> See Ruan, *supra* note 5, at 200 (citing Schrup, *supra* note 21, at 313).

<sup>55</sup> *Id.* (citing Todd, *supra* note 21, at 919).

<sup>56</sup> See *id.* at 200-01 (citing Todd, *supra* note 21, at 924).

incorporates teaching ideas that emphasize the contextual nature of legal writing. Whereas the product-centered approach relied upon “the sage on the stage”<sup>57</sup> teaching style, and the process approach supported writing as a “recursive” style (where students received teacher feedback to incorporate in multiple drafts), “third wave” LRW teachers simulate “real world” fact patterns to provide students with meaning and context.<sup>58</sup>

This social-context approach relies upon simulation of client problems to provide meaning for students. Students role-play as junior attorneys or associates in a law office setting, are given fact stories taken from previous cases, and research and write for a particular audience. LRW professors operationalize “canned” facts patterns to simulate client-attorney interactions, including mock client interviews and counseling sessions, as well as supervising attorney and judicial interactions, such as court hearings, oral reports, and oral arguments.

While this model of legal writing instruction has room for incorporating other faculty and attorneys into the classroom to enrich the experience, these guest-speaking opportunities do little to truly integrate learning across the curriculum because of their limited, infrequent use.

## 2. *Clinical Programs: Live Client-Based Experiential Learning*

In 1996, the ABA included in its accreditation standards the value of clinical legal education and required every ABA-accredited law school to “offer live-client or other real-life practice experience.”<sup>59</sup> Soon, law school clinical programs became a part of the curriculum “at virtually every law school in the United States.”<sup>60</sup>

At its core, clinical legal education provides “the performance of legal roles by students in some kind of supervised setting.”<sup>61</sup> “The basic point of clinical education is to integrate doctrinal knowledge with skills in ways that involve the complicated and unruly worlds of clients, facts, and problems to be solved . . . .”<sup>62</sup> Many law school

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<sup>57</sup> Eric Haas & Leslie Poynor, *Issues of Teaching and Learning*, in *THE SAGE HANDBOOK OF EDUCATIONAL LEADERSHIP* 495 (Fenwick W. English ed., 2005) (“Acts of leadership and teaching deemphasize someone being a *sage on the stage* and encourage them to be a *guide on the side*.”).

<sup>58</sup> See Ruan, *supra* note 5, at 201.

<sup>59</sup> AM. BAR ASS’N, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 2012-2013 20 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf) (codified at Standard 302 (b)(1)).

<sup>60</sup> Barry et al., *supra* note 25, at 20-21.

<sup>61</sup> See, e.g., Marc Fedman, *On the Margins of Legal Education*, 13 N.Y.U. REV. L. & SOC. CHANGE 607, 612-13 (1984-85).

<sup>62</sup> See Kissam, *supra* note 18, at 1993.

clinics use “in-house models” that provide students with a faculty-supervised setting in which students represent clients who are in need of legal services.<sup>63</sup> Under the auspices of student attorney practice rules in local jurisdictions, clinical students represent clients in trials, court hearings, and negotiations with opposing counsel, and engage in client interviewing and counseling and alternative dispute resolution, such as mediation.<sup>64</sup> This skill building under close supervision of clinical faculty aligns seamlessly with the goals of experiential learning.

The downside of this alignment is that it has been relegated to upper-level students, and, in many law schools, not all students who seek such opportunities are able to enroll in a clinic.<sup>65</sup> Clinical education as currently configured demands a high commitment of resources, with typical student-teacher ratios being eight to one.<sup>66</sup> And although the “third wave” of clinical education advises that the first-year curriculum should incorporate clinical teaching methodologies,<sup>67</sup> most law curricula is not ripe for expansion of traditional clinics into the first-year or to all students that request it.

In fact, with regard to integration across the law school, clinical education “has been kept separate, even invisible, from the rest of legal education as a matter of curriculum, space, and time . . . .”<sup>68</sup> Because of ethical concerns with confidentiality, conflicts of interest, and unauthorized practice of law, teaching collaborations in the clinic amongst clinical and non-clinical legal faculty, while beneficial for a host of reasons, has not been widely adopted.<sup>69</sup>

### 3. *Externship Programs: On-Site Experiential Learning*

A more recent, but growing experiential learning model in legal education is the academic externship program. In a traditional law school externship, law students spend a specified number of hours at a

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<sup>63</sup> Ruan, *supra* note 5, at 203 (citing Elliot S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001)).

<sup>64</sup> E.g., COLO. R. CIV. P. 226.5 (2013); COLO. SUP. CT. R. 226.5 (2013).

<sup>65</sup> ENGAGING LEGAL EDUCATION: MOVING BEYOND THE STATUS QUO, LAW SCH. SURVEY OF STUDENT ENGAGEMENT, 2006 ANNUAL SURVEY RESULTS 16 tbl. 4 (2006), available at [http://lssse.iub.edu/2006\\_Annual\\_Report/pdf/LSSSE\\_2006\\_Annual\\_Report.pdf](http://lssse.iub.edu/2006_Annual_Report/pdf/LSSSE_2006_Annual_Report.pdf).

<sup>66</sup> See Gregory S. Crespi, *Comparing United States and New Zealand Legal Education: Are U.S. Law Schools Too Good?*, 30 VAND. J. TRANSNAT'L. L. 31, 42-46 (1997); Paulette J. Williams, *The Divorce Case: Supervisory Teaching and Learning in Clinical Legal Education*, 21 ST. LOUIS U. PUB. L. REV. 331, 335-36 (2002).

<sup>67</sup> Barry et al., *supra* note 25, at 41-44.

<sup>68</sup> Kissam, *supra* note 18, at 1997.

<sup>69</sup> See Rovner, *supra* note 7 (analyzing consultations and assistance of classroom faculty who work with law school clinics and propose strategies for addressing potential ethical issues).

legal placement, supervised by an on-site attorney or judge, and reports on the experience to a faculty member to receive academic credit.<sup>70</sup> The law school supervisor approves the placement and monitors the students' learning by regular conferences with the placement supervisor and students.

An outgrowth of the traditional law school externship is the newest model for experiential learning: the academic externship, whereby externship faculty teach classes that incorporate the students' learning in a context of professional identity development, ethical values, and legal analysis of client legal issues. Externships in this model are "fieldwork-based clinical experiences supervised collaboratively by practicing attorneys or judges and by clinical faculty."<sup>71</sup> This "split-supervision" model allows externship professors to tailor class to the experiences of the student and address legal issues in the context of their placement's clients. "From the law school's point of view, externships have developed, together with in-house clinical programs, in response to the need for an apprenticeship feature in the education of lawyers. They have also enabled law students to contribute their services to meet the need for low-cost legal services."<sup>72</sup>

Importantly, from the students' perspective, externships that combine fieldwork with academic experiences make their learning more personal and contextual. A great advantage of academic externship programs is that students' personal choices regarding the types of organizations, clients, and practice areas are valued and the students' learning is personalized to their legal experience. An externship is also less resource intensive than traditional clinical education, and in many schools, the externship program can support all or most students who wish to take advantage of this learning opportunity. Importantly, academic externships incorporate many of the same clinical methodologies, including professional development, problem-solving, and reflective, non-directive supervision.<sup>73</sup>

Externship programs, however, suffer from the same isolated silo problem of clinical programs. Because confidentiality and conflict of interest ethical concerns remain, especially as between clinical programs (that might, for example, include a criminal defense clinic) and externship programs (that routinely place students at local prosecutors' offices), walls of separation, literally and figuratively, have been

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<sup>70</sup> *Id.* at 1114 n.1.

<sup>71</sup> Harriet N. Katz, *Personal Journals in Law School Externship Programs: Improving Pedagogy*, 1 T.M. COOLEY J. PRAC. & CLINICAL L. 7, 7 (1997).

<sup>72</sup> *Id.* at 7.

<sup>73</sup> See, e.g., Univ. of Denver Sturm Coll. of Law, *Legal Externship Program Educational Objectives*, <http://www.law.du.edu/index.php/legal-externship-program/educational-objectives> (last visited Mar. 20, 2013).

installed to separate these experiential learning programs in “space and time.”<sup>74</sup>

## II. THE COLLABORATIVE CLASSROOM: HYBRID CLASSES AND PUBLIC INTEREST PARTNERING AS AN INTEGRATED EXPERIENTIAL LEARNING APPROACH

As described in Part I, although the most influential modern learning initiatives recommend an integrated experiential learning curriculum that “joins lawyering, professionalism and legal analysis from the start,”<sup>75</sup> few law schools have picked up that gauntlet. Reasons for the dearth of innovation could include law schools’ lack of resources, skepticism, or territorial faculty politics. But whatever the reason, integrated experiential learning that spans the law school curriculum, including the first year, remains a largely unrealized dream.

However, there are a few bright spots in the legal academy where collaborative experiential learning efforts have taken root and blossomed. This section outlines two such efforts: the collaboration between legal writing classes and non-profits (“Public Interest Partnering”)<sup>76</sup> and classes that bring clinical education from the in-house clinic into substantive classes (“Hybrid Classes”).<sup>77</sup> Such Collaborative Classrooms hold promise for students to gain practical, client-centered learning in a social justice context, thereby underscoring the legal profession’s “dedication to the public good”<sup>78</sup> and beginning students’ professional development at the earliest stages of their education.

### A. *Public Interest Partnerships: Integrating Professional Identity Development*

In Public Interest Partnerships, law students in their first-year legal writing or upper-level writing classes partner with a nonprofit organization to provide legal research and written advocacy in furthering the organization’s or clinic’s (together, “public interest

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<sup>74</sup> See Kissam, *supra* note 18, at 1997.

<sup>75</sup> WILLIAM M. SULLIVAN ET AL., SUMMARY OF EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8-9 (2007), available at [http://www.carnegiefoundation.org/sites/default/files/publications/elibrary\\_pdf\\_632.pdf](http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.pdf); see also CARNEGIE REPORT, *supra* note 1, at 50–54.

<sup>76</sup> See Ruan, *supra* note 5 (introducing the model of the “public-interest partnership,” where LRW classes partner with nonprofit organizations to provide legal research and writing that furthers the partner’s impact litigation goals).

<sup>77</sup> See, e.g., David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995) (exploring the strengths and limitations of a method of ethics teaching that combines classroom and clinical instruction).

<sup>78</sup> CARNEGIE REPORT, *supra* note 1, at 126.

partner”) legal goals. In a previous Article, I coined the phrase “public interest partner” to reflect these beneficial partnerships where LRW professors provide their first-year students with an experiential learning opportunity that encourages them to work like lawyers on a real-world, client-centered problem stemming from the unmet needs of nonprofits.<sup>79</sup> Public interest partnerships also have been successful when LRW classes partner with in-house clinics as the public interest partner.<sup>80</sup>

The LRW professor and the public interest partner collaboratively craft the legal problem that the students address in the Public Interest Partnership.<sup>81</sup> For the public interest partner, the problem closely matches the fact story of their constituency and aims to address a particular legal issue, either policy-related in nature or impact litigation, for a future campaign or representation. For the LRW professor, the problem is drafted in a way to optimally promote student professional identity development while learning critical lawyering skills, such as legal writing, legal research, and client advocacy.<sup>82</sup>

At the University of Denver Sturm College of Law, I have partnered with various national and local non-profits and with Denver Law’s in-house civil litigation clinic to provide the public interest partners with legal research and writing on legal issues important to their mission and client representation.<sup>83</sup> As referenced in the Introduction, my LRW first-year class partnered with the workers’ advocacy group, 9to5 National Association of Working Women,<sup>84</sup> to provide them research and analysis on a legal issue important to their policy goal of advocating for paid sick leave to better the lives of working families. By researching and writing on the topic, first-year students were able to learn critical lawyering skills in the context of a real world problem with an advocate from an organization client that read and learned from their work. At the same time, the public interest partner gained valuable legal analysis on a public policy topic on

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<sup>79</sup> See Ruan, *supra* note 5, at 193. See also Mary Bowman, *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, 62 J. LEGAL EDUC. 586 (2013); Jason Cohen, *Partnering with a LGBT Legal Services Organization to Teach Analysis, Writing and Research*, 25 THE SECOND DRAFT: THE OFFICIAL MAGAZINE OF THE LEGAL WRITING INST. 22 (Fall 2011); Stephanie Hartung, *Legal Education in the Age of Innocence: Integrating Wrongful Conviction Advocacy into the Legal Writing Curriculum*, B.U. PUB. INT. L.J. (forthcoming).

<sup>80</sup> See, e.g., *Legal Writing Collaborative*, SEATTLE U. SCH. OF LAW, [http://www.law.seattleu.edu/Centers\\_and\\_Institutes/Access\\_to\\_Justice\\_Institute/LEARN\\_Explore\\_Social\\_Justice/Legal\\_Writing\\_Collaborative.xml](http://www.law.seattleu.edu/Centers_and_Institutes/Access_to_Justice_Institute/LEARN_Explore_Social_Justice/Legal_Writing_Collaborative.xml) (last visited Mar. 20, 2013).

<sup>81</sup> Ruan, *supra* note 5, at 193.

<sup>82</sup> *Id.*

<sup>83</sup> For a full list of recent public interest partnerships, see Ruan, *supra* note 5, at 208.

<sup>84</sup> 9to5 is dedicated to working families and economic justice issues. See *supra* note 6.

which it hoped to organize and lobby in the state legislature.

More recently, my class partnered with the law school's in-house Civil Litigation Clinic as the public interest partner, on a legal issue that the Clinic hoped to address for its clients in the future. The clinical professor came regularly to class to speak to the Clinic's learning and justice-oriented goals, client experiences, and his desire to further a particular legal issue for clients underrepresented in this area of law. The clinical professor and student attorneys participated in client counseling exercises and oral research reports with the LRW students. Specifically, the students researched and wrote on the legal issue of whether workers who are denied state unemployment benefits because they were fired for absenteeism problems stemming from a medical condition have a valid Family Medical Leave Act claim.<sup>85</sup>

Such partnerships offer students many of the advantages of live client and simulation exercises and potentially diminish their disadvantages. First, law students understand the limitations of simulated problems and desire more client connections during the first year. Having a "real client" in the form of the public interest partner motivates them to do their best work because they know their research and writing outputs are used to further the partner's legal goals. Second, law students are awakened—in their first year—to their professional responsibility to do their best work when a real partner is counting on the results. Moreover, students are reminded of their responsibility to promote the public good when sharing a common goal of policy or impact litigation advocating for the legal rights of underprivileged populations. This furthers professional identity development in the first year of law school in ways that simulation cannot.<sup>86</sup>

The drawbacks of Public Interest Partnerships, including the time and effort it takes to operationalize them and translating the partner's legal issues into reasonable problems for first-year students, are challenging but manageable.<sup>87</sup> Importantly, these partnerships bring cli-

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<sup>85</sup> In a previous partnership, I partnered with the same in-house Civil Litigation Clinic on a current client matter. The Clinic represented a worker who suffered religion and national origin employment discrimination in a class action claim, and the LRW students researched and wrote on the damages issue stemming from those discrimination claims. While the clinical professor and student attorneys participated in learning exercises for the LRW students similar to the ones outlined above, limitations were placed to separate the LRW students from the Clinic's client: the LRW students never met the Clinic's client; the fact pattern was fictionalized to capture the broader class story; the LRW students never read any documents outside the publically available complaint; the Clinic student attorneys never talked about legal strategy or client information; and none of the writing produced was ever used in legal documents presented at court or to the client.

<sup>86</sup> For more about Public Interest Partnerships, see Ruan, *supra* note 5, at 195-99.

<sup>87</sup> For a more detailed discussion about the challenges of Public Interest Partnerships, see *id.* at 201-04.



ent-centered advocacy to the first year experience and integrate professional identity development and substantive legal issues beginning on the very first day of law school.

### *B. Hybrid Classes: Clinical Collaborations Across the Law School*

Legal education reformists have called for moving beyond the case method to a wider integration of clinical methodologies throughout the curriculum.<sup>88</sup> Clinical education, with its client advocacy and hands-on training of lawyering skills, squarely meets the experiential learning model. However, clinics are too often sequestered to the upper level years and do not have much, if any, cross-fertilization with other law school courses.

But in some bright spots in the legal academy, innovative programming is bringing clinical education into both advanced substantive classes and first year courses.<sup>89</sup> Partnerships have formed between clinical professors and other law school professors to teach: (1) classes that incorporate clients into doctrinal or upper-level classrooms; or (2) a clinic that collaborates with other law school classes (sometimes referred to as “hybrid clinics”<sup>90</sup>) (together called “Hybrid Classes” in this Article) that allows students to learn a substantive area of the law while providing legal assistance to clients. Professors partner to design Hybrid Classes that involve real lawyering experiences, and can have myriad structures and features depending on the substantive area of law, pedagogical goals, and intention of the collaborators.<sup>91</sup>

Important considerations for designing a successful Hybrid Class include determining: who are the clients, teachers, and learners; what are the supervised experiences; when in the lifetime of the client’s case is the learning most optimal for the students; and how to best assess the success of the educational goals and experience.<sup>92</sup>

One such example is at Rutgers School of Law-Camden, where Professor Jason Cohen offers an “Advanced Legal Writing- Community Based Practice” class as an advanced LRW Hybrid Class. “Based

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<sup>88</sup> See Barry et al., *supra* note 25, at 32-33.

<sup>89</sup> See Cohen, *supra* note 79; Luban & Millemann, *supra* note 77, at 31; Maranville et al., *supra* note 23 (offering an “organizing framework for the creation of experiential learning opportunities that involve the provision of legal services to others”).

<sup>90</sup> For exploration of “hybrid clinics” or “quasi-clinical” law school courses, see Kissam, *supra* note 18, at 2005-16; Sara E. Ricks & Susan C. Wawrose, Comment, *Survey of Cooperation Among Clinical, Pro Bono, Externship, and Legal Writing Faculty*, 4 J. ASS’N LEGAL WRITING DIRECTORS 56 (2007); Margaret A. Tonon, *Beauty and the Beast- Hybrid Prosecution Externships in Non-Urban Setting*, 74 Miss. L.J. 1043 (2005).

<sup>91</sup> For a thoughtful and detailed typology of clinical collaborations that provide legal assistance to real clients, see Maranville et al., *supra* note 23, at 526-28.

<sup>92</sup> See *id.* at 527-31.

on an experiential and service-learning approach, the course is paired with a non-profit community organization” representing LGBT clients.<sup>93</sup> Importantly, Professor Cohen generates each research and writing project in collaboration with the organization’s legal services department and teaches both the LRW theory along with substantive learning on LGBT legal issues in collaboration with the clinical program at Rutgers-Camden.<sup>94</sup>

Another example is at the University of Seattle School of Law, where students can take a one-credit, real client course that runs parallel to the related substantive course. This “Parallel, Integrative Curriculum” offers these courses in areas such as Health Law, Immigration Law, Law and Psychiatry, Professional Responsibility, Trusts and Estates, Intellectual Property, Business Planning, and Housing Law, while “drafting labs” supplement some of these courses that incorporate drafting exercises related to the course.<sup>95</sup> The professors work collaboratively to teach this integrative program.

Another long-time collaboration at the University of Maryland School of Law combines substantive legal ethics classes with clinical teaching. Professors Lubman and Millemann “combine a full classroom legal ethics course of two or three credit hours with a multcredit clinical course in which students, under faculty supervision, and faculty, with student critique, represent clients.”<sup>96</sup> Students have two sets of classes: legal ethics and clinical rounds. Students discuss ethical issues arising in their clinical work, including representing clients in “landlord-tenant disputes, special education placements, the construction of an alternative dispute resolution mechanism mandated by a major out-of-court settlement, criminal defense (including capital appeals) and criminal prosecution.”<sup>97</sup>

These longer-standing collaborative efforts in Hybrid Classes

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<sup>93</sup> See *Advanced Legal Writing: Community Based Practice*, RUTGERS SCH. OF LAW CAMDEN, <http://camlaw.rutgers.edu/cgi-bin/course-description.cgi?class=592>. Another professor at Rutgers- Camden that engages in innovative collaborations is Professor Sarah Ricks, *Public Interest Legal Research & Writing*, RUTGERS SCH. OF LAW CAMDEN, <http://camlaw.rutgers.edu/cgi-bin/course-description.cgi?class=664>.

<sup>94</sup> The course description marks the class as a “hybrid clinic” and takes steps to address the ethical concerns associated with the collaboration:

Currently, because this course will be considered a hybrid clinic and considered a part of the clinical offerings at Rutgers, students will have certain limitations on their registration and participation in the class, including particular conflicts and confidentiality restrictions as set by the professor, the director of the clinical programs and applicable rules of professional responsibility.

<sup>95</sup> See Barry et al., *supra* note 25, at 45 n.180; see also *Course Offerings Fall 2010-Present*, SEATTLE UNIV. SCH. OF LAW, [http://www.law.seattleu.edu/Academics/Curriculum/Course\\_Offerings.xml](http://www.law.seattleu.edu/Academics/Curriculum/Course_Offerings.xml) (last visited Mar. 20, 2013).

<sup>96</sup> Luban & Millemann, *supra* note 77, at 64.

<sup>97</sup> *Id.*

have paved the way for smaller, more recent collaborations across the country.<sup>98</sup> Such innovations have been much lauded by schools invested in graduating “practice ready lawyers” and highlighted in schools’ strategic plans to remedy deficiencies in their experiential curriculum.

### III. THE UNAUTHORIZED PRACTICE OF LAW: THE POTENTIAL DANGER IN THE SEA OF INNOVATION

The innovative collaborations amongst and between law school faculty and nonprofit organizations advance the experiential learning goals of the most recent legal education reforms in exciting and transformative ways. Law students in these settings develop their professional identities and values in a learning setting that simultaneously sharpens their lawyering skills. The benefits of such partnerships and collaborations are as varied as they are deep.

But one understudied element of these innovations is the ethical consequences of bringing clients into the classroom outside the in-house clinic. One important article examined the unforeseen ethical consequences of law faculty consulting and advising clinical students and faculty about client matters in the in-house clinic.<sup>99</sup> Professor Laura Rovner examined the ethical concerns of confidentiality, conflicts of interest, and unauthorized practice of law in the context of these consultations, and provided a comprehensive map for clinical and doctrinal faculty in navigating these potentially treacherous waters.<sup>100</sup>

This Article builds upon Professor Rovner’s work and focuses on the collaborations amongst LRW faculty, clinical faculty, doctrinal faculty, and nonprofit organizations in bringing clients’ legal interests into the law school classroom outside the in-house clinic. The question becomes: do students who engage in Hybrid Classes and Public Interest Partnerships engage in the unauthorized practice of law (UPL) in their legal work? Ultimately, after analyzing the categories of legal work done in these types of classrooms, the Article concludes that only in situations where both: (1) student work implicates practice of law tasks with the risk of negatively impacting clients or potential clients, and (2) students are either not covered by the student practice

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<sup>98</sup> E.g., *Domestic Violence Prosecution Hybrid Clinic*, ALBANY LAW SCH., <http://www.albanylaw.edu/cjc/clinics/domestic-violence/Pages/Domestic-Violence.aspx> (last visited Mar. 20, 2013).

<sup>99</sup> See Rovner, *supra* note 7 (analyzing the most common professional responsibility issues that may develop when classroom faculty work with law school clinics and proposing strategies for addressing those issues).

<sup>100</sup> See *id.*

rules, nor supervised by a licensed attorney within the jurisdiction's ethic rules, is there a potential for UPL violation.

This section provides a history for the regulation of the practice of law in America, including background and model definitions in this important ethical regulatory regime. It then examines the application of those definitions to Hybrid Classes and Public Interest Partnerships, and links the analysis to the call to eliminate or narrow the unauthorized practice of law regulation to address the unmet legal services needs of underrepresented populations.

A. *The Birth of Unauthorized Practice of Law as Self-Regulation of the Legal Profession*

For almost as long as lawyering has been a professional enterprise in America, the legal profession has "self-regulated" the practice of law.<sup>101</sup> But at the birth of our country, the regulation did not resemble the restrictions we have today. Instead, this previous era is by today's standards, a marked liberalization of who can engage in lawyering. In the earliest period of our nation's legal history, courts adopted UPL rules only to control those "who appeared before them."<sup>102</sup> However, "[c]ertain colonies sought to prevent the establishment of a professional lawyer monopoly by permitting nonlawyers to appear before the courts and prohibiting the charging of fees for these services."<sup>103</sup> In fact, a handful of states continued allowing nonlawyers to advocate for and represent clients in court well into the nineteenth century, including Indiana, Maine, Massachusetts, Michigan, New Hampshire, and Wisconsin.<sup>104</sup> But even in those states that wished to control court appearances, nonlawyers "were free to engage in a wide range of activities which would be considered UPL today, such as giving legal advice and preparing legal documents."<sup>105</sup> One sign that UPL was not on the legal radar is that the first ABA Canons of Ethics adopted in 1908 was silent about UPL.<sup>106</sup>

Yet, a sea change was brewing with the proliferation of bar associations and resulting professionalization of the bar in the early

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<sup>101</sup> See *Dressel v. Ameribank*, 468 Mich. 557, 563 (2003) (citing SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *HISTORY OF ENGLISH LAW* 211-17 (Little, Brown, & Co. 2d ed. 1899); J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 21, 179 (Buttersworth 3d ed. 1990)); Denckla, *supra* note 12.

<sup>102</sup> Denckla, *supra* note 12, at 2583 (citing HENRY S. DINKLER, *LEGAL ETHICS* 19 (1953); ERWIN N. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES: THE COMMON LAW UNDER STRESS* 15-16 (1964)).

<sup>103</sup> *Id.* at 2583 n.6 (citing DINKLER, *supra* note 102).

<sup>104</sup> *Id.* (citing DINKLER, *supra* note 102; GRISWOLD, *supra* note 102).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

twentieth century. With increasing concern over unlicensed practitioners harming the public it was sworn to serve, the bar associations “attempted to gain greater control over the practice of law by spearheading efforts to ‘integrate’ the bar through courts rules . . . or statutes”<sup>107</sup> through mandated bar membership. The newer standard began “dictating the process for admitting lawyers to practice and disciplining unprofessional behavior through sanction, suspension, and disbarment.”<sup>108</sup>

Professional bar associations began . . . organiz[ing] against UPL. In 1914, the New York County Lawyers Association launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition from title and trust companies. By 1930, the [ABA] had formed its own committee on unauthorized practice and began publishing Unauthorized Practice News a few years later. The Canons of Professional Ethics were amended in 1937 to include a strong attack on UPL. Bar associations initiated lawsuits seeking injunctions against individuals and entities purported to be performing UPL. State courts invoked their inherent powers to regulate the practice of law based on ‘common-law doctrines of exclusive lawyer competence,’ even upon matters not directly before a particular tribunal.<sup>109</sup>

For the next fifty years, the ABA and state bar associations waged war against UPL in hopes of eliminating competition, resulting in a growing list of legal practices that must be performed exclusively by lawyers and a culture of lawyers who expect to monopolize the law’s reach. This culture remains even though, by some accounts, UPL prosecutions began declining in the 1970s. This decline can be explained by a variety of reasons, including: states relaxing UPL standards in the 1960s to permit legal assistants and paralegals to perform what was previously considered the work of a lawyer; the growth of administrative proceedings before federal and state agencies where nonlawyers are allowed to represent others; and the high cost to the bar of prosecuting UPL cases.<sup>110</sup> In a 1992 ABA survey, only twenty-two state bars retained “active” UPL committees.<sup>111</sup>

But more recently, in keeping with the monopoly mindset, lawyers are complaining that there is a “rising tide” of nonlawyer practice,<sup>112</sup> and have pushed for a “revival” of UPL enforcement efforts by

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<sup>107</sup> *Id.* at 2583.

<sup>108</sup> See Dressel v. Ameribank, 468 Mich. 557, 564 (2003).

<sup>109</sup> Denckla, *supra* note 12, at 2583-84.

<sup>110</sup> COMM’N ON NONLAWYER PRACTICE, AM. BAR ASS’N, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS 24 (1995), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non\\_Lawyer\\_Activity.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity.authcheckdam.pdf).

<sup>111</sup> See Denckla, *supra* note 12, at 2585.

<sup>112</sup> Sherri Kimmel, *Stemming the Tide of Unauthorized Practice*, 13 ME. B.J. 164, 164

bar associations.<sup>113</sup>

*B. The “Patchwork” Law of Unauthorized Practice of Law*

The law of UPL has been described as a “patchwork of legal rules and concepts from a variety of sources: court rules, statutes, administrative regulations, judicial opinions, and the state’s constitution.”<sup>114</sup> State courts invoke their “inherent powers” to claim jurisdiction over UPL regulation of who may provide legal services and under what circumstances.<sup>115</sup> Accordingly, UPL violators can be subject to criminal,<sup>116</sup> as well as civil sanctions, which include injunctions, forfeiture of fees, and contempt of court actions.<sup>117</sup>

Unfortunately, UPL law is not known for its clarity or consistency. Instead, “[m]uch of [UPL] law is highly ambiguous, uncertain, and often unclear as to who is being prohibited from performing what kinds of legal services.”<sup>118</sup> A good starting point for UPL analysis is what constitutes “practice of law” and the commonalities amongst jurisdictions on what it entails. The longstanding U.S. Supreme Court definition of the “practice of law” is “[p]ersons acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients,” who “may be regarded as attorneys-at-law within the meaning of that designation as used in this country.”<sup>119</sup> To further refine this standard, local jurisdictions are encouraged to set a standard, as articulated by the Model Rules of Professional Conduct (MRPC), which governs the ethical conduct of lawyers. Model Rule 5.5 provides that “[a] lawyer shall not practice law in a jurisdiction” in violation of the “regulation of the legal profession in that jurisdiction, or assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”<sup>120</sup>

The seemingly strict Supreme Court definition makes one clear prohibition: representing clients in some type of legal proceeding or transaction is well within the reach of UPL. State courts and statutes

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(1998); James Podgers, *Legal Profession Faces Rising Tide of Non-Lawyer Practice*, ARIZ. ATT’Y, Mar. 1994, at 24.

<sup>113</sup> *E.g.*, Podgers, *supra* note 112, at 56.

<sup>114</sup> Johnstone, *supra* note 8, at 806.

<sup>115</sup> *Id.* at 807.

<sup>116</sup> UPL is a misdemeanor in many states with UPL statutes. *Id.* at 807 n.26.

<sup>117</sup> *Id.* at 807 n.27.

<sup>118</sup> *Id.* at 807.

<sup>119</sup> *Sav. Bank v. Ward*, 100 U.S. 195, 199 (1879).

<sup>120</sup> MODEL RULES OF PROF’L CONDUCT R. 5.5(a), (b) (2003). By its own terms, the Model Rules do not apply to law students. See Jemma Lohr McPherson, *Penny for Your Thoughts?: The Empirical and Legal Implications of Law Students and Other Non-Lawyers Giving Compensated Legal Advice in New York and Florida*, 23 GEO. J. LEGAL ETHICS 685, 688-89 (2010).

put the meat on the bones of this Supreme Court framework, in keeping with the requirement that one must look to a person's particular jurisdiction to determine the contours of UPL prohibition that apply to her or him. Some states broadly interpret UPL standards to more heavily restrict the work of nonlawyers in legal matters.<sup>121</sup> Other states follow a more narrow definition of legal services to allow for more broad-based lay advocacy in keeping with the ABA Commission's Nonlawyer Practice endorsement of lay advocates in 1995.<sup>122</sup> Such an approach recognizes the unmet legal needs in communities of limited resources, in conjunction with efforts to improve access to justice.<sup>123</sup>

Generally, commentators agree that UPL laws are so vague and ambiguous that they fail to neatly define the practice of law.<sup>124</sup> For example, Professor Rovner notes that UPL laws can "sweep quite broadly," and showcases three separate state laws to show their nebulosity. While Oregon defines the practice of law as "the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other [legal] assistance," Texas defines it as "in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge."<sup>125</sup> In contrast, New Jersey's definition holds that one practices law "whenever legal knowledge, training, skill, and ability are required."<sup>126</sup>

Because of the unsettled and varied approaches to UPL, the ABA appointed a Task Force in 2004 to draft a model definition of practice of law, which culminated in the following standard:

- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;

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<sup>121</sup> See Turfler, *supra* note 11.

<sup>122</sup> See Schmitz, *supra* note 13, at 305 (recognizing the ABA's role in advocating for more lay advocates in the domestic violence courts).

<sup>123</sup> See Kendra Emi Nitta, *An Ethical Evaluation of Mandatory Pro Bono*, 29 LOY. L.A. L. REV. 909, 913 (1996); Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 712 (1996); ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS 45 (1995).

<sup>124</sup> See Denckla, *supra* note 12, at 2587; Johnstone, *supra* note 8, at 807; Rovner, *supra* note 7, at 1146-67 (citing Frederick C. Moss, "Is You Is, or Is You Ain't My [Client]?: A Law Professor's Cautionary Thoughts on Advising Law Students", 42 S. TEX. L. REV. 519, 522 (2001)).

<sup>125</sup> Rovner, *supra* note 7, at 1145-46 (citing TEX. GOV'T CODE ANN. §§ 81.101, 83.001 (West 2006); Or. State Bar v. Smith, 942 P.2d 793 (Or. Ct. App. 1997); *In re Jackman*, 761 A.2d 1103, 1106 (N.J. 2000)).

<sup>126</sup> *Id.*

- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) Negotiating legal rights or responsibilities on behalf of a person.<sup>127</sup>

Although the ABA House of Delegates adopted the definition, the Task Force ultimately “abandoned the proposed draft definition and instead recommended that each state adopt a definition of the practice of law.”<sup>128</sup> Accordingly, given the push for local standards and enforcement, the wide variance in UPL law remains.

### C. Law Students as Potential UPL Violators

Law student work in Collaborative Classrooms can fall into two categories: (1) legal practice, which is presumptively unauthorized unless prescribed by student practice rules, under the auspices of a legal aid dispensary (such as an in-house clinic)<sup>129</sup> or externship program;<sup>130</sup> or (2) nonlawyer advocacy.<sup>131</sup> For Collaborative Classroom students, who are not authorized to practice under the student practice rules, the analysis of what constitutes law student “legal practice” versus “nonlawyer advocacy” requires an examination of the three categories of legal activity generally proscribed by UPL laws: (1) representing others in judicial or administrative proceedings or negotiations; (2) preparing legal documents or instruments that affect the legal rights of

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<sup>127</sup> *Task Force on the Model Definition of the Practice of Law: Model Definition of the Practice of Law Challenge Statement*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_challenge.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_challenge.html) (last visited Mar. 20, 2013).

<sup>128</sup> Turfler, *supra* note 11, at 1940 n.148 (citing *Task Force on the Model Definition of the Practice of Law Report*, AM. BAR ASS'N 3 (2003), available at [http://www.abanet.org/cpr/model-def/model\\_def\\_statutes.pdf](http://www.abanet.org/cpr/model-def/model_def_statutes.pdf)) (“Upon further deliberation, the Task Force became convinced that the considerations in defining the practice of law in each jurisdiction required that a procedural framework for jurisdictions to follow be recommended instead.”).

<sup>129</sup> See, e.g., COLO. REV. STAT. § 12-5-116 (2013) (“Students of any law school that maintains a legal-aid dispensary where poor or legally underserved persons receive legal advice and services shall, when representing the dispensary and its clients, be authorized to advise clients on legal matters and appear in court or before any arbitration panel as if licensed to practice law.”); COLO. R. CIV. P. 226.5(1) (2013) (“Students of any law school that maintains a legal-aid dispensary where poor or legally underserved persons receive legal advice and services shall, when representing the dispensary and its clients, be authorized to advise clients on legal matters and appear in any court or before any administrative tribunals or arbitration panel in this state as if licensed to practice law.”).

<sup>130</sup> See, e.g., COLO. R. CIV. P. 226.5(2); see also McPherson *supra* note 120, at 688; Alexis Anderson et al., *Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom*, 10 CLINICAL L. REV. 473 (2004).

<sup>131</sup> See Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice Within Law Firms*, 85 IND. L.J. 653 (2010) (arguing that law students act as nonlawyers when they work in transaction clinics because UPL rules allow for licensed lawyers to use their discretion in assigning legal tasks).



others; and (3) advising others of their legal rights and responsibilities.

First, it is helpful to keep in mind the rationale for prohibiting UPL: protecting the lay public.<sup>132</sup> As the ABA Task Force articulated: the “chief reason for defining the practice of law and regulating those who perform services within the scope of the definition is to protect the public from harm that may result from the activities of dishonest, unethical and incompetent providers.”<sup>133</sup> Accordingly, for analyzing each legal activity as it relates to the work of students in the Collaborative Classroom, the analysis here will utilize the framework recommended by the ABA Task Force on the Model Definition of the Practice of Law (“ABA Task Force”) for defining the practice of law:<sup>134</sup>

- (1) Does the nonlawyer activity pose a serious risk to the consumer’s life, health, safety, or economic well-being?
- (2) Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?
- (3) Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?<sup>135</sup>

By doing so, the analysis incorporates the motivating theory of UPL: does the specific legal work at issue risk negatively impacting the public? But it also largely ignores the alternate motivation: to protect lawyers from competition of legal work by nonlawyers. In doing so, the analysis admittedly favors broadening legal advocacy opportunities for nonlawyers at the expense of lawyers in order to address the unmet legal needs of so many who are unable to afford lawyers for common legal needs. The line is drawn by limiting those opportunities where, on balance, harm to the public may occur.

### *1. Are Collaborative Classroom Students Representing Others in Judicial or Administrative Proceedings or Negotiations?*

The first query is whether students in Collaborative Classroom programs are representing others in a judicial or administrative proceeding or negotiation? Judicial proceedings can include hearings, settlement conferences, and other appearances before the court that has jurisdiction over the person. Administrative hearings include ap-

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<sup>132</sup> See Rovner, *supra* note 7, at 1149 (citing AM. BAR ASS’N, TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW REPORT 5, available at [http://www.abanet.org/cpr/model-def/taskforce\\_rpt\\_803.pdf](http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf); Jett Hanna, *Moonlighting Law Professors: Identifying and Minimizing the Professional Liability Risk*, 42 S. TEX. L. REV. 421, 443 (2001)).

<sup>133</sup> *Id.* (citing AM. BAR ASS’N, *supra* note 123, at 5).

<sup>134</sup> These factors were applied by Professor Rovner in her study of doctrinal professors consulting with clinical students and is helpful in framing this analysis as well.

<sup>135</sup> See Rovner, *supra* note 7, at 1149 (citing AM. BAR ASS’N, *supra* note 123, at 11 n.29).

pearances on behalf of another that can affect their legal rights, including, for example, unemployment hearings or social security hearings. Negotiations include representing the interest of another in dispute resolution conversations with parties or counsel for parties that has the potential effect of impacting the legal rights and remedies of another.

For Public Interest Partnerships, in collaborations between LRW classes and nonprofits where the legal issue is aimed at informing policy decisions and future impact litigation strategies, students are likely not representing others in judicial or administrative proceedings or negotiations. The projects most Public Interest Partnerships work on are written research and analysis that do not advance to the level of in-person proceedings or negotiations. For example, in my class's partnership with a nonprofit, the students provide research memoranda, research logs, and sample briefs that analyze the legal issue from both sides of the argument. For collaborations between LRW classes and in-house clinics, this type of work is not implicated because the legal issue regards future, not current, clients because there are no proceedings or negotiations to attend. But for collaborations between LRW classes and in-house clinics where the clinic represents an actual current client, the work could implicate this issue, but only if the LRW students attend proceedings and negotiations in a representational capacity.

For Hybrid Classes, in collaborations between doctrinal and clinical classes, students could be representing others in judicial or administrative proceedings or negotiations, if the professors incorporate this type of client representation into the learning experience outside the permissible administrative exemptions. For example, if students in a Hybrid Class represent a juvenile's interests in abuse and neglect proceedings through a court-approved nonlawyer advocacy program, those hearings are not likely legal practice because nonlawyer advocacy is particularly allowed in that forum.<sup>136</sup> However, if the students represent a parent's interest in abuse and neglect proceedings, where representation of those interests is traditionally relegated to lawyers, the activity is likely legal practice under this consideration.

In the latter situation, representation of another's interests does implicate the concerns of the ABA's Task Force. Potentially, such

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<sup>136</sup> See, e.g., *Organizational Profile*, CASA: COURT APPOINTED SPECIAL ADVOCATES FOR CHILDREN, [http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5453887/k.7340/Organizational\\_Profile.htm](http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5453887/k.7340/Organizational_Profile.htm) (last visited Mar. 20, 2013) (Court Appointed Special Advocates (CASAs) serve as advocates for children in neglect, abuse, and custody proceedings but are not required to have legal training beyond what is provided by the CASA network itself.).

representation could threaten another's life, health, safety, or economic well-being, the first criterion of the ABA's Task Force. In the above example, a parent's interest in not having her or his parental rights terminated or curtailed is a significant life interest at stake through the representation. And while the Collaborative Classroom professors could inform the consumer about the students' qualifications enough for the consumer to make an informed decision in evaluating the offer of services (which would address the second criterion), it is likely that on balance, the potential negative consequences outweigh the actual benefits to the public (the third criterion), given the important rights at stake.

2. *Are Collaborative Classroom Students Preparing Legal Documents or Instruments that Affect the Legal Rights of Others?*

The second query is whether students in Collaborative Classrooms are preparing legal instruments or documents that could affect the legal rights of another? For purposes of this inquiry, legal documents that affect the rights of others are those that are submitted to a judicial or administrative body that has jurisdiction over that person, such as memoranda of law or motions. Legal instruments that affect the rights of others are those that incorporate and operationalize a person's legal rights, such as contracts or wills.

Students in Public Interest Partnerships can be preparing legal documents affecting the rights of others. For collaborations between LRW classes and non-profits where the legal issue is aimed at informing policy decisions, the students are not preparing legal documents or instruments. But for legal problems involving future impact litigation strategies, this consideration could come into play. This could impact both partnerships with an impact litigation non-profit (such as written legal analysis for the Impact Fund nonprofit that might ultimately wind up in a class action complaint) or in-house clinic (such as a current clinic client where the legal analysis might ultimately wind up in a legal brief). Although counter-intuitive, some UPL rules do not require an actual client for the practice of law.<sup>137</sup> It is the lawyering act of drafting legal documents and instruments that affect the legal rights of others that is the trigger. When a legal document is filed in court, or when a will is operationalized, those documents and instruments affect legal rights. Therefore, conservatively speaking, the practice of law may have occurred.

Similarly, in Hybrid Classes, law students are often preparing le-

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<sup>137</sup> Rovner, *supra* note 7.

gal documents and instruments that impact the legal rights of others. For example, when a professor teaches a Wills doctrinal class with an attached Lab component, and student draft wills for clients in the Lab component, the student is preparing a legal instrument that will affect the client when it is operationalized.

Representation of another's interests through drafting legal document and instruments therefore does implicate the concerns of the ABA's Task Force. Potentially, such representation could threaten another's life, health, safety, or economic well-being. In each of the above examples, the legal rights of others are implicated by filing a complaint with language from a LRW student's work, submitting of a legal brief from a LRW student's work, or drafting a will that is relied upon by a client. And again, while the Collaboration Classroom professors could inform the consumer about the students' qualifications enough for the consumer to make an informed decision in evaluating the offer of services, it is likely that, on balance, the potential negative consequences outweigh the actual benefits to the public, given the important rights at stake. Therefore, in some scenarios, students may be engaging in the practice of law by preparing these types of documents and instruments. Because this type of work can be considered the practice of law, it requires student practice authorization (under the jurisdiction's student practice rules) or supervision by a licensed attorney (within the confines of the jurisdiction's supervision of nonlawyer advocacy).

### 3. *Are Collaborative Classroom Students Advising Others of Their Legal Rights?*

The third inquiry is whether students in Collaborative Classrooms are advising others of their legal rights? Such advising can take myriad forms, including formal client counseling sessions, the drafting of client letters or memoranda, or informal communications in the form of emails and text messages.

For Public Interest Partnerships, in collaborations between LRW classes and non-profits where the students are advising the non-profit whether to litigate a particular legal issue or the advantages and disadvantages to engaging in particular legal strategies in current litigation, students can be advising others of their legal rights. The non-profit could become the consumer, in that the organization is informed of its legal options by the advice given by the LRW students upon completion of their research and writing.

For example, a LRW class could partner with an environmental clinic, which is a non-profit, and the clinic is considering representing the interests of a third party in a class action suit against an oil com-

pany. If the environmental clinic makes a decision about whether to file the lawsuit based on research completed by the LRW students, the interests affected are not only those of the third party, but also its own interest because these types of public interest lawsuits are routinely brought by this clinic which has its own interest in protecting the environment.

For many Hybrid Classes that analyze client problems, students often advise others of their legal rights. For example, a Hybrid Immigration Clinic might be co-taught by a doctrinal and clinical faculty member, where the client is an asylum seeker from Pakistan and wishes to immigrate to California, and seeks the counsel of this Immigration Class, and the students research and analyze the client's asylum claim. The advising of the asylum seeker by the students can be considered the practice of law under this consideration.

Again, representation of others' interests through counseling them about their legal rights does implicate the concerns of the ABA's Task Force. Potentially, such representation could threaten another's life, health, safety or economic well being. In the above example, the environmental clinic deciding whether to file a class action lawsuit has a real interest in environmental impact issues, such as carcinogens in the environment, and any advice will impact its decision to file suit. Likewise, an asylum seeker's life and health are significantly impacted by the advice given by the students. Again, while the Collaboration Classroom professors could inform the consumer about the students' qualifications enough for the consumer to make an informed decision in evaluating the offer of services, it is likely that, on balance, the potential negative consequences outweigh the actual benefits to the public, given the important rights at stake. Therefore, students can be engaging in the practice of law by advising clients on these types of issues. Because this type of work can be considered the practice of law, it requires student practice authorization or supervision by a licensed attorney.

#### IV. COLLABORATIVE CLASSROOM GUIDELINES: AN INFORMED APPROACH

From the analysis in Section III of the Collaborative Classroom's categories of legal activity and rationale for prohibiting nonlawyers from the practice of law, several conclusions can be drawn. First, one important determinative factor on whether students and faculty should be concerned about UPL violations is whether the Public Interest Partnership or Hybrid Class is working with a future litigation issue or current client matter. However, even when analyzing a future potential legal issue, UPL concerns can arise. Second, the wide vari-

ety of types of Collaborative Classrooms and legal projects requires an independent and informed approach to evaluating UPL concerns. Lastly, because UPL law covers such a wide variety of potential legal activities, one size does not fit all when addressing UPL concerns in Collaborative Classrooms.

The following chart highlights the typical types of legal practice activities (on the vertical axis), the categories of Collaborative Classrooms (on the horizontal axis), and provides a general conclusion on whether students and faculty should be concerned about UPL violations. Where the table indicates the practice of law is likely to or could be implicated, students should become authorized to practice under the jurisdiction’s student practice rules or should be supervised by a licensed attorney within the confines of the jurisdiction’s supervision of nonlawyer advocacy.

	Public Interest Partnership with Potential Future Client	Public Interest Partnership with Current Client	Hybrid Class with Potential Future Client	Hybrid Class with Current Client
Represent Others in Judicial or Admin Hearing	NOT Practice of Law	NOT Practice of Law	NOT Practice of Law	LIKELY Practice of Law
Represent Others in Admin Hearing that Allows Nonlawyer Advocates	NOT Practice of Law	NOT Practice of Law	NOT Practice of Law	NOT Practice of Law
Represent Others in Negotiation	NOT Practice of Law	NOT Practice of Law	NOT Practice of Law	LIKELY Practice of Law
Prepare Legal Documents (Legal Briefs, Motions)	COULD BE Practice of Law	LIKELY Practice of Law	COULD BE Practice of Law	LIKELY Practice of Law
Prepare Legal Instruments (Wills, Contracts)	COULD BE Practice of Law	LIKELY Practice of Law	COULD BE Practice of Law	LIKELY Practice of Law
Advise Others on Legal Rights (Memos, Letters, Counseling)	COULD BE Practice of Law	LIKELY Practice of Law	COULD BE Practice of Law	LIKELY Practice of Law

Given the breadth of potential UPL violations and the need for individual determination, the following section provides UPL guidelines<sup>138</sup> and best practices for faculty to implement when engaging in

<sup>138</sup> Note that this Article and these Guidelines do not address other important ethical

## Collaborative Classrooms.

### A. *General UPL Guidelines for All Collaborative Classrooms*

In order to best address the potential concerns raised by UPL law, faculty planning and implementing Collaborative Classrooms should consider the following factors in drafting learning objectives and syllabi and choosing legal issues and problems:

1. Plan early and identify the learning goals and assessment tools.

Legal education experts already advise faculty to plan and articulate the learning objectives of a class from the outset.<sup>139</sup> This approach includes the assessment tools faculty will implement to assess student success in meeting those goals. But for Collaborative Classrooms, this step is particularly important in planning which partner and what projects the students should work on. The better understanding faculty have on what they are trying to accomplish in the class, the more successful faculty will be in planning student work, forming successful partnerships, and flagging and avoiding unintended issues and problems.

2. Research the particular jurisdiction's UPL and student practice laws.

Before contacting and concretizing a collaborative partnership, research the particular jurisdiction's UPL and student practice laws. In order to craft the contours of a project, knowing the parameters of the practice of law for lawyers and law students is key. As outlined above, states' UPL standards vary significantly. Contacting the state's attorney regulation office is also recommended in order to fully understand the contours and implications of the project.

3. Communicate clearly and specifically with partners about student learning objectives and the partner's needs.

Once the project and partner have been identified, communication on key points is crucial. Be sure the partner understands the learning goals and focus on student learning. Ask detailed questions,

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concerns, including confidentiality, conflicts of interest, and work product concerns. These UPL Guidelines should be considered in addition to those other important ethical considerations.

<sup>139</sup> See, e.g., JOEL ATLAS ET AL., *A GUIDE TO TEACHING LAWYERING SKILLS* (Carolina Academic Press 2012); GERALD F. HESS ET AL., *TECHNIQUES FOR TEACHING LAW 2* (Carolina Academic Press 2011); Anthony Niedwicki, *Teaching for Lifelong Learning: Improving the Megacognitive Skills of Law Students Through Effective Formative Assessment Techniques*, 40 *CAP. U. L. REV.* 149 (2012).

including: what is the partner interested in learning about and for what cause; what does their constituency look like; what should the outputs from the students look like; what does the partner plan on doing with the outputs; what are the partner's litigation goals; and how will the partner participate in the class.

4. Draft a written Memorandum of Understanding with the partner to communicate the parameters of the partnership. Share that MOU with program and school administration.

Once the faculty member and partner agree on the parameters and contours of the partnership, it makes good sense to put those in a written document to record the understandings. Be sure to include specific ethical considerations, such as practice of law concerns as outlined in this Article, as well as confidentiality and conflicts of law. It is a good idea to get input on the contents of the MOU from school administration prior to finalization and to provide a copy to the appropriate administrators. Sample MOUs (without identifying parties) might be good to share on sites such as *Educating Tomorrow's Lawyers*<sup>140</sup> or other listservs.

5. Include in the syllabus not only the learning objectives and assessment tools but examples of prescribed and prohibited communications and work activities related to the partnership.

Students should be made aware at the outset that the class incorporates not only experiential learning, but client work specifically. Students have a vested interest in not being disciplined for unauthorized legal practice as a law student, including bar licensing concerns.<sup>141</sup> Discussing these key concepts is a seamless way to introduce legal ethics and values into the class and is in keeping with the newest education reforms, as outlined in Part I.

6. Incorporate a UPL Exercise early in the class.

One of the best ways to teach professionalism is to model it. Ethical issues should be discussed and analyzed with the students early in the Collaborative Classroom, and in order to make the learning "stick," an experiential exercise could work best. After an initial discussion of UPL rules, faculty could assign a closed-universe writing assignment requiring the students to analyze whether the work of the class implicates or violates these rules. Such an exercise meets numer-

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<sup>140</sup> *Educating Tomorrow's Lawyers*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., <http://educatingtomorrowlawyers.du.edu> (last visited Mar. 20, 2013).

<sup>141</sup> See McPherson, *supra* note 120, at 688-89.



ous goals: it models the professionalism we hope students begin developing; it teaches students the learning paradigm of collaborative partnership and client advocacy of the class; and it brings in the value of “civil professionalism” of serving the public good.

Dependent on the type of work, class, and school involved, the above guidelines likely will be only a starting point for faculty in implementing a Collaborative Classroom and addressing the concerns articulated in this Article. For specific types of partnerships and collaborations, the following section highlights particular concerns to address.

### *B. Best Practices for Specific Collaborative Classrooms*

As outlined in Part III, Collaborative Classrooms can take myriad forms and address various types of legal work. For Public Interest Partnerships, which mainly involve LRW classes engaged in impact and policy work, the concerns are cabined to drafting legal documents and advising others. For Hybrid Classes, which may involve clinical and doctrinal collaborations, advanced seminars and labs connected to doctrinal classes, and other collaborative efforts amongst different faculty, ethical concerns around all types of legal work are implicated.

Where ethical concerns are implicated, the Collaborative Classroom faculty can take one of two approaches to avoid UPL concerns. First, faculty can endeavor to have their students authorized to practice under the student practice rules of their jurisdiction. That requires research into the standards for authorization, communication with their law school about authorization, and consideration of other ethical issues, such as malpractice insurance, conflicts of interest, and confidentiality. Second, faculty can become licensed to practice law in that jurisdiction and provide the requisite supervision needed to students as nonlawyers working with them within the contours of their UPL rules. As ABA Model Rule 5.3 allows, nonlawyers associated with a licensed lawyer can engage in lawyering activities, as long as the lawyer provides “appropriate instruction and supervision.”<sup>142</sup> Under this framework, faculty attorneys delegate client work (short of “court-connected proceedings”) subject to “prevailing conceptions of competent representation” (e.g., client considerations as analyzed above), and “the lawyer’s retaining ultimate responsibility for the resulting work product and performance.”<sup>143</sup>

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<sup>142</sup> See R. 5.3: *Responsibilities Regarding Nonlawyer Assistant*, MODEL RULES OF PROFESSIONAL CONDUCT, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_3\\_responsibilities\\_regarding\\_nonlawyer\\_assistant.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html) [hereinafter *Nonlawyer Assistant*].

<sup>143</sup> Tremblay, *supra* note 131, at 654.

Within those guidelines, the following provides “best practice” advice on engaging partners and clients in Collaborative Classrooms.

### 1. *Best Practices for Public Interest Partnerships*

Partnerships between LRW classes and non-profits or in-house clinics can generally involve either policy and impact litigation goals without a current litigation (“future clients”) or current clients of the non-profit or in-house clinic (“current clients”).

For Public Interest Partnerships that work on legal issues through legal research and writing for future clients of the partner, there should be no UPL concerns except where partners plan to incorporate the students’ work into legal documents or for advising clients. The issue to address with the partner is: are they using the research and writing to inform the organization’s decisions for future goals or are they planning to use the writing outputs to submit directly to court or to the client to advise the client on legal rights? A cautionary approach would be to prohibit the latter, namely, that all writing and research is strictly for the organizational decision making on future goals, and will not be directly submitted to a court or to the partner’s clients. It would also be prudent to make clear that the LRW students and professor do not legally represent the partner in any capacity and that the information they provide is not legal advice.

For Public Interest Partnerships that involve working on legal issues of organizational partners with current clients, the UPL implications require one of three approaches: (1) distancing the students and the organizational clients from each other; (2) ensuring that the students are practicing under student practice rules of the jurisdiction; or (3) having a licensed attorney supervise the students within the contours of the ethical rules of nonlawyer work in one’s jurisdiction.<sup>144</sup>

For the first approach, LRW students can still engage in important legal work—just not for the client’s benefit. Students can research, analyze, and write about the legal issue of the client. Partner attorneys and the client can come to class to discuss publically available facts without discussing strategy, work product, or client confidences. Faculty can simulate client counseling sessions, negotiations mediations, and other problem solving strategies for student learning but without the clients or partner participating in those activities.<sup>145</sup>

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<sup>144</sup> See, e.g., *Nonlawyer Assistant*, *supra* note 142.

<sup>145</sup> Although not necessarily applicable to UPL considerations, the Author also cautions Collaborative Classrooms to be careful of who participates in the simulations of the class. For example, it might not be prudent to allow a law clerk to a sitting judge (or the judge herself) in a particular court where the current client’s case is pending to volunteer in the class and give feedback on the client’s legal issue.

For this approach, it is prudent to advise the client that the LRW students are not student attorneys and they (and the LRW professor) do not represent the client's interests. Also, one should make clear with the partner that the research and writing the students are producing are not for legal advice and should not be used in court documents or relied upon to advise the client without independent attorney corroboration. Taking these cautionary steps should distance the LRW students and professor from the client.

For the second approach, if Public Interest Partnerships wish to have the LRW students engage directly in the legal work with the client, it is possible that they could work as student attorneys under the particular jurisdiction's student practice rule, or as student externs. For example, in Colorado, the state legislature carved out a specific exemption for "Student Externs" where a supervising, licensed attorney supervises the students in their legal work.<sup>146</sup> Collaborating with existing externship programs in this way might be beneficial to all parties, including the added benefit of continuing to break down the silos of the law school.

For the third approach, faculty could act as supervising attorneys of the students acting as nonlawyers. Aside from the most explicit prohibition of most UPL laws that forbid nonlawyers from representing clients in judicial proceedings, lawyers have broad discretion in delegating work tasks as long as the nonlawyers have adequate supervision and oversight of the students.<sup>147</sup> Faculty, again, will have to research their particular jurisdiction's UPL rules to educate themselves on the contours of supervision and oversight required, but given the latitude given in most jurisdiction for nonlawyer advocacy supervised by lawyers, this should not prove difficult.<sup>148</sup> And, of course, this means that faculty involved in the partnership will have to be licensed attorneys of that jurisdiction, which might be a limiting factor.

## 2. *Best Practices for Hybrid Classes*

Classes that engage multiple partners, such as clinical and doctrinal faculty, upper-level classes with nonprofits, and doctrinal classes with lab components, often involve myriad legal work in various settings. For Hybrid Classes that work with policy or nonlawyer advocacy groups (such as victims of domestic violence, worker rights advocacy, or child protection), where nonlawyer advocacy has been traditionally exempted in a particular jurisdiction, that work probably

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<sup>146</sup> See COLO. REV. STAT. §§ 12-5-116.1 to 12-15-116.4; COLO. R. CIV. P. 226.5(2).

<sup>147</sup> See Tremblay, *supra* note 131, at 668 ("No court has held that lawyers cannot delegate certain categories of supervised work to nonlawyers.")

<sup>148</sup> See *id.*

does not implicate UPL rules.

For Hybrid Classes that work with clients (such as in-house clinics, Innocence Projects, and asylum programs), unless that particular work has been specifically exempted by UPL rules in a particular jurisdiction, faculty and students must be aware of the UPL implications and take necessary precautions. These considerations are identical to the considerations above for Public Interest Partnerships. First, the Hybrid Class that involves clinical work could investigate whether the class and its students fit within the Legal Aid Dispensary rules of the jurisdiction in order for students to be deemed student attorneys, supervised by licensed attorneys, for clients who are underserved in the community.<sup>149</sup> Additional concerns in that framework would have to be addressed, such as malpractice insurance and other confidentiality and conflict of interest checks.

Second, faculty of Hybrid Classes can work with existing Externship Programs for students to get credit for a lab or practicum component to an existing class and fit within the Student Extern rules, if available. Depending on the jurisdiction and school, partnering in this way would also help break down the silos of experiential learning in one's school.

Lastly, if the Hybrid Class wants to narrow the type of legal work to exclude representation in front of a judicial tribunal, students can work as nonlawyers supervised by faculty acting as licensed, supervising attorneys, in compliance with the requirements of their local rules.

#### CONCLUSION

If newspaper headlines, law school application numbers, and academic conference titles are any indication, legal education is at a crossroads. Learning client-centered advocacy through experiential frameworks cannot be cabined to a few isolated silos in the law school but instead, supported to flourish beginning on the very first day of students' academic careers. To help students develop a sense of professional identity, cultivate professional values, and tap into the intrinsic motivations for lawyering (namely serving the public good), Collaborative Classrooms have an important role in meeting the needs of twenty-first century law schools.

But implementing innovation without planning and forethought spells disaster. These partnerships among faculty, students, and lawyers have not yet seriously engaged in the conversation around ethical representation for legal work with clients in these relationships. By beginning this conversation here, and encouraging it with students, we

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<sup>149</sup> See COLO. R. CIV. P. 226.5(2).

Spring 2014]

*The Practice of Law in the Collaborative Classroom*

465

model the ethical professional behavior the latest modern learning initiative challenges us to address: how to be innovative, creative, justice-seeking lawyers within the ethical contours of our profession. This Article sparks the start of that conversation and hopefully, triggers further exploration of this critical component to modern legal education.

