

January 2011

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### Recommended Citation

Mensel, Robert E. (2011) "From College to the Clinic: Five Proposals to Narrow the Skills Gaps," *University of Massachusetts Law Review*: Vol. 6: Iss. 1, Article 5.

Available at: <http://scholarship.law.umassd.edu/umlr/vol6/iss1/5>

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## FROM COLLEGE TO THE CLINIC: FIVE PROPOSALS TO NARROW THE SKILLS GAPS

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ROBERT E. MENSEL \*

It is presumptuous of me to talk about what constitutes a good legal education. I know no lawyer who has had one. Certainly, I have not.<sup>1</sup>

Recent criticisms of legal education have focused on the absence of sufficient practical training in the curriculum.<sup>2</sup> The new goal of modern, reformed legal education is to bridge the gap between law school and practice. Reformers aspire to prepare “practice-ready” graduates—neophyte lawyers capable of beginning practice at a level of competency previously associated with second-year practitioners.<sup>3</sup> This new imperative is slowly being imposed

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<sup>1</sup> Jerome Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A. J. 723 (1933).

<sup>2</sup> This movement is driven largely by the perceived economic needs of the practicing bar, memorialized in such aspirational literature as WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007) and their many predecessors. For a selective bibliography, see SULLIVAN ET AL., 203–211. Earlier critics of legal education expressed more concern that it was ineffective, and no particular concern that it was uneconomical. See Frank, *supra* note 1.

<sup>3</sup> See, e.g., <http://cc.bingj.com/cache.aspx?q=skills+of+second+year+associates+law+school&d=4897877736229575&mkt=en-US&setlang=en-US&w=f4437daa,f7d18b95>. See also <http://law.wlu.edu/thirdyear/>

on law schools by the market and in particular by firms no longer willing to provide practical training to law graduates capable only of thinking like lawyers, but not of practicing law.<sup>4</sup>

Implicit in this criticism is the suggestion that law students arrive at law school with the full complement of skills, other than substantive legal knowledge, needed in order to participate effectively in practical legal training. The surfeit of legal theory in the curriculum can simply be replaced in part with clinic experience and all will be well. The focus of the recent reform movement on the practical skill set ignores shortcomings in the skill set with which students begin law school. Implicit within it is the assumption that there is no gap between college and law school, or between the 1L curriculum and the 3L clinics. One premise of this essay is that this assumption is false. It is a fact, verified by the nearly universal experience of law professors, law review editors, and, indeed, by many unpleasantly surprised law students, that students reach law school with serious shortcomings in their basic skills. It is also a fact that, when many students reach their 3L clinical experiences, they have never seen a litigation file, never drafted a litigation document, and never drafted a transactional document. The other premise of this essay is that it is possible and necessary to bridge both of these skills gaps before students begin their 3L clinical experiences.

University financial imperatives have recently driven some law schools, particularly those in the lower tiers of academic prestige, to admit more and more students with lesser and lesser basic academic skills. This is a change from the good old days, as the story is sometimes told, when law was one of the learned professions. Law students' earlier educations had outfitted them with superior language skills

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(Follow "Academics" hyperlink, then follow "The New Third Year" hyperlink).

<sup>4</sup> Jamie R. Abrams, *A Synergistic Pedagogical Approach to First-Year Teaching*, 48 DUQ. L. REV. 423, 425 (2010); Scott E. Thompson, *Developing A Comprehensive Approach to Teaching Lawyering Skills: A Response to the MacCrate Report, Fifteen Years Later*, 3 LIBERTY U. L. REV. 47 (2009).

and a significant body of shared knowledge that included at least a modicum of history, literature, and philosophy, including political philosophy. This, in turn, enabled students to “read” the law, suffer through the Langdell case method of instruction, absorb legal theory, and learn to think like lawyers. Law school, in its turn, outfitted law students to begin work in law offices. There they learned to perform those perhaps “too servile and illiberal”<sup>5</sup> tasks of lawyering now the objects of concern.<sup>6</sup>

Tempting as it is, it does no good to debate whether those halcyon days ever were, or to lament their passing. Today, all too many students arrive at law school lacking the reading and writing skills needed to learn substantive law and to participate in clinical education. Many graduate from law school with the same poor skills.<sup>7</sup> Recently, the University of South Carolina School of Law commissioned a study of members of that state’s bar in which the responding practitioners ranked the importance and the quality of new lawyers’ skills.<sup>8</sup> These practitioners ranked basic writing as the most important skill of all, more important even than those legal skills which might qualify a graduate as “practice-ready.”<sup>9</sup> It does not come as a surprise that these respondents were least satisfied with new graduates’ basic writing skills.<sup>10</sup>

It does no good to blame the K-12 and undergraduate

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<sup>5</sup> CHRISTOPHER MARLOW, DR. FAUSTUS, Act 1, scene 1, line 36 (1592). There were, even in those halcyon days, voices demanding an element of practical legal education from the academy. See Frank, *supra* note 1. These voices have grown in number and volume over time, and have now become a chorus.

<sup>6</sup> While this story is familiar to everyone who has spent significant time in legal education, it is described with particular force by Stephen J. Friedman, former dean at Pace University School of Law, and before that a partner at Debevoise & Plimpton. Stephen J. Friedman, *Why Can’t Law Students Be More Like Lawyers?*, 37 U. TOL. L. REV. 81, 84 and n. a1 (2005).

<sup>7</sup> Abigail Salisbury, *Skills Without Stigma: Using the JURIST Method to Teach Legal Research and Writing*, 59 J. LEGAL EDUC. 173, 174 (2009).

<sup>8</sup> PREPARATION FOR THE PROFESSION OF LAW (Metromark Legal Research Center 2008) (on file with the author and with the editors).

<sup>9</sup> *Id.* 9, 11.

<sup>10</sup> *Id.* This is confirmed by Dean Friedman, *supra* note 6, at 83.

systems of education for their manifest failures to teach these skills. Once a student is admitted to a law school he or she becomes that school's responsibility. If a student lacks the basic skills that form the foundation of all that follows, both in legal theory and in legal skills, the law school must respond. A student who cannot write effectively cannot practice law effectively. Neither can such a student participate effectively in clinical programs intended to introduce students to the practice of law and to satisfy the demands of the reform movement. As a consequence, law schools today face the task of fixing the defects in their students' previous educations, both with respect to skills and knowledge. They also face the task of teaching the theory, as well as the practice of law, all within a curriculum of approximately ninety credits.<sup>11</sup> Reform efforts that do not address all of these needs squarely and balance them deliberately, are doomed to failure.

This essay proposes five courses to be added to the 1L and 2L curriculum. The 1L course would be mandatory, the others a forced choice between pairs. They are presented in this order because the deficiencies they address present themselves in this order to law school faculty. The first goal is to prepare graduates who can read with a discerning eye and write with a competent, if not an eloquent, pen. The deficiencies in these skills vex faculty even at second and

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<sup>11</sup> There is no realistic possibility of increasing the length of law school, and in fact, some law schools have recently offered a two year program leading to the J.D. Northwestern University School of Law has done so, see Leigh Jones, *Northwestern University to Launch Two-Year J.D. Program: No Other Highly Ranked Law School Offers a Five-Semester, Two-Year Program*, NAT'L L. J. (June 23, 2008). The University of Dayton has done the same. See <http://www.law.udayton.edu/curriculum.edu/law> (follow the "Academic program" hyperlink, then the hyperlink for "J.D. program", then follow the hyperlink for "2 yr option"). These programs retain the credit requirements of the three year program, but the mere existence of such programs reflects pressures to reduce the requirements for the degree. See also Kristina Dell, *Fast-Tracking Law School*, TIME (July 23, 2008), available at <http://www.time.com/time/nation/article/0,8599,1825863,00.html> (discussing both the Northwestern and Dayton programs).

some first tier schools, and are abiding concerns of faculty in the third and fourth tiers. Together with the legal writing curriculum, this proposed course would likely work a significant improvement in student writing skills.

The plan to address these problems also partially mitigates another problem, rarely commented upon but always problematic. That is the absence of any shared base of factual knowledge widely held by incoming law students. The proposed 1L course is intended to mitigate, in some small way, that problem as well.

The proposed 2L courses are intended to bridge the gap, not between law school and practice, but between the doctrinal courses of the 1L year and the live-client experiential courses of the 3L year. These simulations are intended for the second year of a three year curriculum. They are designed to be as true to the experience of practice as a simulation can be. They require a great deal of writing, and so might serve as alternatives to other courses currently offered in the advanced legal writing curriculum. They are based on the assumption that better training in the 2L year, training that sparks the beginning of integrated and comprehensive expertise, will increase the rate of learning in the 3L year.

#### I. PROBLEM ONE: BASIC READING AND WRITING SKILLS

All too many students arrive at law school with reading skills that must be characterized as modest and writing skills that are even worse. This reflects the anecdotal experience of the vast majority of law professors outside of the very top of the scale of academic prestige. The partial solution proposed herein is to add to the first semester curriculum a three credit course, called for the present discussion simply “Introduction to American Law”. The principal purpose of this course is to improve those skills. The secondary purpose is to provide some small element of shared knowledge of history, literature, and philosophy relevant to law and its context. It is intended to mitigate, not eliminate, these problems.

As proposed, this course is both reading and writing intensive. It is intended to meet three times per week. Some

meetings would be large group sessions, and these would be taught by a law professor. That instructor would be responsible for explaining the legal content presented by the readings. As the discussion below indicates, some readings would have more such content than others. Law faculty would also be responsible for explaining the relationship between legal content and the broader context of the readings. In the alternative, portions of the course could be assigned to different law professors according to their own substantive interests. Either the principal instructor or the group of instructors would select the readings and determine the schedule.

The majority of meetings would be small section meetings taught by adjunct composition teachers who need not have legal training. The composition faculty would be required to attend the meetings taught by law faculty, or to listen to recordings, before teaching the small sections. This would mitigate the disadvantage they would inevitably experience as a result of their lack of legal training. These instructors, or perhaps one of them appointed to a supervisory position, would plan a standardized course of language skills instruction to accompany the readings.

Small section instruction would focus on the structure of the reading, including complex sentence structure, obscure vocabulary, rhetorical strategy, and the overall effectiveness of the assignment as a piece of writing. In cases of the most severe need, instruction might descend almost to the level of translation. Systematic instruction in the mechanics of the language would be a required part of every meeting. Some examples might be drawn from the assigned text. Students would be expected to complete at least one writing assignment every week. These would be graded mostly for the quality of the writing, rather than for the content. In other words, grades would be based almost entirely on basic academic skills. Every assignment would be graded.

Why might this be expected to work after sixteen or more years of education have failed to instill such skills in so many of our students? The first semester of law school is probably the most intense educational experience ever had by anyone who has experienced it. Intensity substitutes for duration in

this, as in many aspects of human experience. Few students in any academic enterprise are as conscious of grades as are first semester law students. They are likely to work harder for the immediate gratification of a grade than they might otherwise. In this sense, student reaction to the course is likely to resemble their reaction to their first-year legal writing course.

The assigned readings would be chosen on two bases. First, only texts including challenging prose would be used. "Challenging" in this context is a bit of a slippery term. It ought to encompass both the complexity of the ideas expressed and the complexity of the sentence structure and vocabulary in which those ideas are expressed. The other basis for the choice would be the content. Selections ought to include information relevant, in some broad sense, to the law and to legal education. Legal history, jurisprudence, and other types of law-related literature would form important elements of the reading.

So, for example, chapters from leading legal history monographs might be included in order to provide broad background and to dispel widely held errors about the history of American law. Selections from the *Federalist* and *Anti-federalist* papers would also answer the general purpose, as would certain judicial opinions with significant historical importance. The extrajudicial writings of influential judges, such as Justice Holmes' essay, *The Path of the Law*,<sup>12</sup> or selections from Cardozo's *The Nature of the Judicial Process*,<sup>13</sup> might be included. Selections from Thoreau's *Civil Disobedience*,<sup>14</sup> speeches or legal arguments by Clay or Webster, even short stories or lyric poems with legal themes might be incorporated in the curriculum as well.

Another, perhaps more interesting approach, might be to combine an overtly legal reading with a reading that would invoke a related but broader context. Legal content and context could be combined by coupling certain readings and

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<sup>12</sup> O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>13</sup> BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

<sup>14</sup> HENRY DAVID THOREAU, *ON THE DUTY OF CIVIL DISOBEDIENCE* (1849).

discussing them individually and together. So, for example, Herman Melville's novella *Benito Cereno*<sup>15</sup> might be read together with *United States v. Amistad*,<sup>16</sup> upon which the novella was loosely based. Susan Glaspell's heartrending story *A Jury of Her Peers*<sup>17</sup> might be read with *Hoyt v. Florida*,<sup>18</sup> in which the court held that a woman might lawfully be tried by a jury comprised entirely of men. It might also be read with cases discussing that form of legal insanity, based upon volitional defect, known as "irresistible impulse."<sup>19</sup> Kafka's short story *In the Penal Colony*<sup>20</sup> might be read together with death penalty cases or jurisprudence. These last three present interesting opportunities to discuss moral and ethical issues implicated in legal decisions. John Milton's paean to freedom of the press, *Areopagitica*,<sup>21</sup> might be read together with leading First Amendment cases. *Marbury v. Madison*<sup>22</sup> might be read together with Federalist 78 and Brutus 11–15.<sup>23</sup> Together, these present opportunities to discuss political issues implicated in legal decisions. These examples only illustrate some of the many possibilities presented by such a course.

Faculty would have considerable flexibility in assembling a list of readings. The particulars would be limited only by

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<sup>15</sup> HERMAN MELVILLE, *Benito Cereno*, reprinted in MELVILLE'S SHORT NOVELS (Dan McCall ed., Norton Critical Ed. 2002) (1855).

<sup>16</sup> *United States v. Amistad*, 40 U.S. 518 (1842).

<sup>17</sup> Susan Glaspell, *A Jury of Her Peers* (1917), reprinted in WOMEN IN THE TREES: U.S. WOMEN'S SHORT STORIES ABOUT BATTERING AND RESISTANCE 76 (Susan Koppelman ed. 2004).

<sup>18</sup> *Hoyt v. Florida*, 368 U.S. 57 (1961).

<sup>19</sup> For a history of the insanity defense including the irresistible impulse test, see DANIEL N. ROBINSON, *WILD BEASTS AND IDLE HUMORS: THE INSANITY DEFENSE FROM ANTIQUITY TO THE PRESENT* (1996).

<sup>20</sup> FRANZ KAFKA, *IN THE PENAL COLONY* (1919).

<sup>21</sup> JOHN MILTON, *AREOPAGITICA* (1644).

<sup>22</sup> *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>23</sup> Federalist 78 is the principal federalist paper addressing the authority of the judiciary. Brutus 11–15 is the principal anti-federalist response. The authorship of the Brutus papers is not known. They are widely available, and all are collected in *THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION II* (Bernard Bailyn ed., Library of America 1993).

the creativity of the course planner. The purpose would be to provide basic information about the law to the students, to require the intensive reading of complex texts, and to require weekly writing assignments graded strictly according to their conformity with standard rules of grammar, syntax, and usage.

Grading a writing course with a strong emphasis on basic skills would present problems for most law schools that impose rigid curves. Because basic skills can be measured in a generally objective manner, a curve might reasonably be seen as unjust. This proposal requires that students receive grades every week. These grades ought, to the extent possible, to be numerical scores that might be conformed from section to section. It would also seem fair to begin the course with a standardized test and to end the course with a comparable test. The latter score could be factored into the final grade for the course. In no event should such a course be subjected to a strict curve with requirements, for example, that some percentage of students receive grades below a stated letter grade.

The viability of this proposal depends upon three things. First, it could not be fit into a first year curriculum centered around two-semester, six credit courses. The first year curriculum could only absorb this course if at least some of the standard 1L courses were one semester long. Second, this proposal depends upon the availability of a sufficient number of English composition teachers. College towns generally offer large numbers of such persons. A law school dependent upon them would be wise to offer them better pay than that offered by undergraduate departments in order to attract and retain the best in adequate numbers. Finally, a large number of small teaching spaces would be necessary. The effectiveness of this proposal depends upon each section being very small, perhaps as few as eight students, in order to make the writing instruction sufficiently intense and effective. One possible course description is set forth below.

**LAW 500 Introduction to American Law  
(1L Fall) 3 Credits**

This writing intensive course will introduce

students to the nature of American law through readings chosen from classics of legal literature, including leading cases, Federalist and Anti-federalist papers, extrajudicial writings of judges such as Holmes and Cardozo, law review articles, and literature about law. Writing assignments based upon the readings will be critiqued and graded primarily based upon the quality of the writing. Special attention will be paid to rules of grammar, punctuation, sentence structure, and paragraph structure, as well as to the substantive content of the student work.

The advantages of this approach are numerous. First, it would place in the hands of real experts the task of teaching the mechanics of writing. Second, it would be relatively inexpensive, because the majority of the instructors would be adjuncts.<sup>24</sup> Third, it would place the teaching of grammar into a context within which students would learn generally about the law. This would tend to advance, albeit without fully achieving, the goal of retaining the law's status as a learned profession. Fourth, because the content of the reading assignments would be overtly legal and would be taught in part by law faculty, the course ought not to attract any negative attention from accrediting agencies. And, of course, the fifth advantage it offers is the reason for its creation in the first instance. It would address the skills gap at the entry stage of the profession, the beginning of law school. Without meaningful attention to that skills gap, efforts to address other skills gaps will ultimately fail.

## II. PROBLEM TWO: THE SKILLS OF A STUDENT CLINICIAN

If you assume that the law is and must remain a learned profession, you must recognize one problem posed by the

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<sup>24</sup> The greater expense associated with small-section legal education was a concern of Professor Sullivan's, *supra* note 2, at 114, as well as of others cited in that volume's selective bibliography.

addition of new courses to the curriculum. To train students to be learned in the law, a great deal of factual and theoretical knowledge must be imparted within the limits of a ninety credit curriculum. Law schools must continue to impart a sufficient measure of such knowledge. While doing so, law schools are now expected to advance their students from neophytes in the practice of law to something more. True expertise is not and cannot realistically be the goal, but students ought to be able to work with a case file if they intend to litigate, or prepare basic transactional documents if they intend to do transactional work as lawyers.

The remaining courses proposed herein seek to balance the time demands of the two goals above by providing a truly intense practice simulation, again, in a small section taught by an adjunct. They are intended to offer opportunities to integrate the discrete substantive knowledge gained in 1L courses, thereby allowing students to develop the beginnings of a comprehensive professional expertise. This is the “integrative thinking”<sup>25</sup> Dean Friedman described, and it is precisely this sort of thinking that distinguishes a nascent professional from a student who has taken some courses. Most importantly, these courses are intended to prepare 2L students for their 3L externships, clinic practice, and other live-client experiences generally reserved for the third year.

The practica proposed herein require only six credit hours of the ninety in most law school curricula. By requiring intense engagement with a practitioner, based upon detailed real or simulated facts, they promise to inculcate more practical judgment in students than their scant credit hours would suggest. They substitute intensity for duration. The first two-course sequence is a litigation practicum. The second is a transactional practicum.<sup>26</sup> They are offered as forced choices, the selection of one of which would preclude selection of the other.

The forced choice carries with it all the advantages and disadvantages of the concentrations or tracking that many law

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<sup>25</sup> Friedman, *supra* note 6, at 84.

schools offer today.<sup>26</sup> This, too, is a matter of balancing the time demands of the traditional doctrinal curriculum with the demands of the new curriculum. One must keep in mind that students would progress to 3L live-client experiences based on the practica, and that such work can be expected to consume a significant portion of the credits allotted to the final year of school. There is only so much one can do in such limited time. The 3L year is the last opportunity most students will have to benefit from law school's signature pedagogy, the Socratic Method. That opportunity ought not to be abandoned entirely, even in the face of reasonable demands for practical training.

The proposed 2L practica are intended to be the first experiential simulations offered to students. The author believes strongly that experiential exercises, other than those forming the traditional legal writing curriculum, are best left out of the 1L curriculum. This is not to say they have no value, but only to say that in the balance they do not return sufficient real learning for the enormous time and distraction they cost. In addition, should the writing course, Introduction to Law, be implemented with the practica, more 1L credits would be expended on skills, to the exclusion of doctrine? It is critical to keep in mind that the sort of "integrative thinking" these practica foster depends upon there being sufficient content to integrate. The job of the first year curriculum is to implant that content. It is perfectly acceptable to wait for the second year to begin to integrate that content in simulation-based courses.

#### *A. Litigation Practicum*

One problem with litigation simulations is finding a source for facts and litigation-related documents sufficiently realistic to make the simulation meaningful and instructive to the student. Published cases in themselves do not offer sufficient material. Attorneys cannot be asked to violate confidentiality by turning over real files. One solution to this is to locate a detailed record on appeal and use it as a basis

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<sup>26</sup> *Id.* at 88.

for a simulated file. Records on appeal are generally matters of public record, so there is no concern for litigant confidentiality. Many records of lengthy litigation culminating in trial or complex motion practice include, in addition to the pleadings present in every record, copies of interrogatories, document demands, demands for admissions, as well as documentary evidence, correspondence, and transcripts of depositions, motion arguments, and trials. These would form the basis of a file, partially reconstructed by the faculty supervisor, which would form the principal text of the course.

The plan calls for one faculty supervisor, a full-time faculty member who would be responsible for locating the record and supplementing it as needed to make it a complete teaching tool. This professor would be required to locate and develop a new record every year for at least the first three years. One ought not underestimate the time such a project is likely to take. The locating and developing of these records, together with selection and supervision of adjuncts, is likely to take up all, or nearly all, of one full-time professor's time. The burden would likely diminish after that initial period because some records might be reused if the substantive and procedural rules applied therein remained unchanged.

Adjuncts with litigation experience in local courts would teach this simulation in sections of eight to ten students. There are many ways in which the material could be presented. One way would be to start the class with student interviews of persons playing the role of client. The students would be charged with interviewing the fictional client and preparing a simple narrative of the events leading to the litigation. That narrative might be compared to items, such as a statement of facts, taken from the file. The file materials might be introduced all at once or piece by piece.

The heart of the first semester course would be supervised exercises based upon parts of the file. These might include exercises in which students analyze and critique the contents of the record. In each case students must be made to understand the relationship between the substantive areas of law being litigated and the pleadings and discovery. "What facts do I need, and where am I likely to get them?" Students

ought to ask that question repeatedly of themselves and of the materials.

Students ought to be required to draft their own pleadings based upon variations on the facts of the case. They might be required to draft interrogatories and answers to interrogatories, demands for production of documents, demands for admissions, and other litigation documents based on facts added to the record, or altered by the instructor. The instructor would be responsible for explaining the particular parts of the file in class lectures, to assign readings in court rules, statutes and case law relevant to the file, and to review the students' written work. Student role-playing would include taking a deposition and arguing a motion. One possible course description is set forth below.

**LAW 600 Litigation Practicum I (2L Fall)**

**3 Credits**

This year-long, hands-on course will introduce students to the litigation process by requiring each student to work through a litigation file based upon a real case. The course will be taught by experienced litigators. It will begin with the record on appeal filed in a case pending before an appellate court. Students will work through the file with the instructor. They will focus on the structure and content of the pleadings, discovery demands and responses, deposition transcripts, motions, and trial transcripts. Assignments will include readings that explain the nature of the materials in the record, as well as exercises in which students will prepare their own pleadings, discovery demands, and other litigation documents based on facts added to the record by the instructor. Student role-playing will include taking a deposition and arguing a motion.

The second semester of the course would continue with the same case file. Student role playing would include basic

trial practice exercises such as direct examination. The instructor might introduce the students to American Jurisprudence Proof of Facts<sup>27</sup> and Imwinkelried's Evidentiary Foundations.<sup>28</sup> They ought to go through the physical motions of entering documents or things into evidence. They ought to practice opening and closing arguments as well. By mid-semester each section would conduct brief trials of one issue drawn from the record. They would then prepare a substantial appellate brief, which they would argue before a panel of adjuncts and law professors. One possible course description is set forth below.

**LAW 601 Litigation Practicum II (2L Spring)  
3 Credits**

A continuation of Litigation Practicum I, students will meet in the same small sections with the same instructor. They will prepare and try one of the issues in the record. Students will also write a brief that meets all of the requirements of the Federal Rules of Appellate Procedure and the local rules of this federal circuit, or of the intermediate appellate court in the state system. They will then argue the appeal before a panel of practicing attorneys and law professors.

The advantages of such a simulation are numerous. For the future litigator, the course would provide an opportunity to integrate the rules learned in Civil Procedure, Evidence, and at least one of the 1L substantive courses. It would take students through a litigation simulation from client interview through appeal. It would provide experience, so that, when the student is asked to prepare a complaint or a set of interrogatories in a 3L externship or clinic two results would obtain. First, the student will be able to make a real

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<sup>27</sup> AMERICAN JURISPRUDENCE PROOF OF FACTS (2006).

<sup>28</sup> EDWARD J. IMWINKELRIED, EVIDENTIARY FOUNDATIONS (7th ed. 2008).

contribution to the effort undertaken by the clinic, and second, the student will learn at a faster rate than she would otherwise have learned had her response to the assignment been “What is an interrogatory?”. Time and other resources would be more efficiently used under such a succession of experiences than they could ever be if the student’s first exposure to a file should be in the clinic. Finally, from the perspective of the law school, such courses are economical, with instruction provided by adjuncts and only one full-time professor. Provided sufficient small teaching spaces and mock courtrooms are available to make the simulations meaningful, the proposed course would be a win-win for students and law school alike.

### *B. Transactional Practicum*

Transactional simulations also present significant practical problems. It is common in drafting courses to select exercises from the business planning, business associations, real estate finance, and estate planning curricula.<sup>29</sup> Another possible source that has been ignored heretofore is the business school curriculum. The cases that form a significant part of that curriculum are sufficiently realistic and detailed to support the drafting of very detailed documents and to support equally detailed negotiation exercises. They have the further advantage of presenting facts in a manner that more closely replicates the perspectives of clients who know their business concerns and imperatives, but know little about the law.

Scores of cases of this sort are available on line from textbook publishers.<sup>30</sup> Many come with teaching notes that explain the business background of the case, and these notes provide useful background for the law school instructor as

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<sup>29</sup> See, e.g., Thompson, *supra* note 4, at 60–68.

<sup>30</sup> Cases may be purchased individually from the Darden School of Business at the University of Virginia, *see* <https://store.darden.virginia.edu/business-case-studies>, (follow “Business Case Studies” hyperlink) and from Harvard Business School, <http://www.textbooks.com/> (Follow “Buy Textbooks” hyperlink, then follow “Harvard Business School Case Studies” hyperlink).

well. Not all business school cases suit the needs of this practicum, and those that do may require tweaking for the present purposes. Even so, they are a promising source of factual scenarios on which this proposed practicum could be based.

As with the proposed litigation practica, this sequence would be supervised by one full-time professor. That person would be responsible for choosing the problems and adapting them to their intended use. She or he would also participate in the selecting and training of adjuncts. Individual sections would be taught by adjuncts with experience in transactional practice. Sections must be limited to a small number, perhaps eight to ten students. There are many ways in which the material could be presented. One way would be to start the class with student interviews of the fictional client. Students would then prepare a simple narrative setting forth the facts and the client's business imperatives. That might be compared to the case text itself, which would be shared with the students after this initial assignment. The other file materials might be introduced all at once or piece by piece.

Under this proposal, the first semester curriculum would begin with simple cases and progress toward more complex and elaborate scenarios. The principal focus would be on translating the facts and business imperatives of one party into legal documents. One possible course description is set forth below.

**LAW 602 Transactional Practicum I (2L  
Fall) 3 Credits**

This year-long course will meet in small sections taught by experienced transactional attorneys. It will be based on cases drawn from a business school casebook and other sources. Students will analyze the transactional needs of a party identified in each case as the client, and will prepare documents appropriate to that client's needs arising from each case. The transactions studied will include transactions in goods, services, real property, as well as internal

corporate transactions not including complex securities transactions.

The second semester curriculum would be based upon fewer, more elaborate factual scenarios. Initially, the students would be assigned to represent different parties to the proposed business transaction, and to conform their documents to the imperatives of that party. Upon completion of that initial assignment, students would be required to enter into supervised negotiations with the goal of reconciling the parties' imperatives. Reconciled imperatives would be effectuated and memorialized in documents agreeable to both sides, or, in the alternative, the transaction would fail. In either case students would be required to negotiate based upon modifications to the documents prepared initially. One possible course description is set forth below.

**LAW 603 Transactional Practicum II (2L Spring) 3 Credits**

This course is a continuation of Law 602. The problems addressed in this course will be more complex, from a transactional standpoint, than those addressed in Law 602. For each problem, the class will be divided into groups of students who will represent different parties to the transaction. Students will initially draft documents appropriate to the representation of their client's interest. They will then engage in supervised negotiations intended to lead to modification of the documents to represent agreement between or among the parties, or a failure to consummate the deal. The work of the course will be a series of such drafting and negotiating exercises.

The advantages of such a simulation are numerous. For the future transactional practitioner, the course would provide an opportunity to integrate the rules learned in Contracts, Property, and other substantive courses from a perspective that begins with the client's needs. It would take students

through a simulated business transaction from client interview through consummation or failure. As with the litigation practicum, the student who completes this sequence would be able to make a real contribution to the effort undertaken by a tax or small business clinic, and would learn in the clinic at a faster rate than she would otherwise have learned. Finally, while these courses would necessarily be labor-intensive for instructor and student alike, they would be inexpensive to prepare and teach. Adjunct faculty are not highly paid, and the one full-time faculty member who would assemble the materials and supervise the adjuncts could teach other courses from time to time. Assuming appropriate teaching space is available, law school costs would, in the balance, be quite modest.

The grading scheme for a practicum such as this or the litigation practicum must be prepared carefully. The skills imparted in such a course are a blend of art and science, of subjective and objective quality, about which much reasonable disagreement might be found. While it increases the burden on instructors, the author proposes that letter grading be limited to pass/fail, but that the instructor be required to prepare a narrative evaluation of each student. In a small section of approximately eight students, taught by the same adjunct for two full semesters, such an evaluation ought to be possible and helpful. Other reasonable schemes might also be devised.

### III. CONCLUSION

The economic imperatives of law practice have finally made significant inroads into the Langdellian system that has dominated the legal academy since the 1880s. We simply have no choice but to accommodate the new demands for more practical training of students working toward the juris doctor degree. At the same time political imperatives, some thinly clad in the veil of educational theory, present us with law school matriculants, poorly skilled in the written language and haphazardly educated in matters heretofore considered general knowledge. Again, we have no choice but to accommodate the basic needs our students bring us unmet

by their earlier educations.

This essay has proposed one partial solution to the latter problem and two partial solutions to the former. If the writing course makes a meaningful improvement in students' basic language skills and gives them a small body of shared knowledge it will have justified its use of three of our ninety credits. Similarly, if the two simulations lead students to integrate their prior learning into an early version of comprehensive expertise, the courses will have succeeded. The proposals are not perfect. Each is the product of compromises and balancing of competing desiderata. No doubt others would compromise differently, but these proposals, in the view of the author and others who have commented on them, promise to make a significant contribution to our common effort and our students' futures.