

# JUSTICE IN THE BALANCE: AN EVALUATION OF ONE CLINIC'S ABILITY TO HARMONIZE TEACHING PRACTICAL SKILLS, ETHICS AND PROFESSIONALISM WITH A SOCIAL JUSTICE MISSION

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A number of developments have firmly established the role of clinics in legal education, allowing law school clinicians greater latitude in designing programs consistent with law school curricular values and priorities. Consequently, current law school clinical offerings are comprised of richly varied structures and goals. A myriad of goals fall under the general rubric of clinical legal education. Among the most widely cited goals are providing practical skills training in a real world context, instilling a public interest ethos in students, advancing social justice, encouraging the critique of the law and legal institutions, inculcating high standards of ethics and professionalism and imparting the habit of self-reflective lawyering.

Clinical educators are not monolithic in their approach to issues of clinic goals and design, and many clinicians would be pleased to construct a clinic that equalizes and integrates all of these laudable goals. Not

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\* Associate Clinical Professor, Western New England College School of Law. I would like to express deep appreciation to my colleagues at Western New England College School of Law who provided support and comments on earlier drafts of this paper: Tina Cafaro, Beth Cohen, Jamison Colburn, Harris Freeman, Leora Harpaz, Art Leavens, Jennifer Levi, Bruce Miller, Barbara Noah, Sam Stonefield and Katharine Van Tassel. Thanks are also due to Dean Art Gaudio for supporting this project. I am also profoundly grateful for the insights and encouragement provided by members of the Clinical Writer's Workshop, Jane Aiken, Isabelle Gunning, Paul Cain, Mary Hanna and Spencer Rand. Finally, I wish to thank Shannon Leger, Craig Novick and Christine Unger for their research assistance and good humor.

surprisingly, achieving perfect balance is quixotic. As with the design of any course, clinicians face difficult curricular choices. The tension between the important social justice considerations and the premium on practical skills and professionalism training is intensified by resource limitations that confront many law schools. Because no clinic can incorporate every worthy and compelling clinical goal, each clinician must strive to identify and balance multiple objectives and values in a thoughtful, deliberate way.

In light of the widespread concern bemoaning the inadequate access to legal representation for those at the bottom of our nation's socioeconomic ladder, many clinicians espouse the pivotal role of a social justice mission in law school clinics. As wealth becomes more stratified<sup>1</sup> and access to the legal system more severely restricted,<sup>2</sup> law schools have a moral obligation not only to raise awareness of unequal access to justice,<sup>3</sup> but to identify and

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1. Judith Goode & Jeff Maskovsky, *Introduction* to THE NEW POVERTY STUDIES: THE ETHNOGRAPHY OF POWER, POLITICS, AND IMPOVERISHED PEOPLE IN THE UNITED STATES 4 (Judith Goode & Jeff Maskovsky eds., 2001) ("At the economic level, the gap between rich and poor has widened to an unprecedented distance, both in the United States and worldwide, over the last three decades."); see also Henry Rose, *Retrospective on Justice and the Poor in the United States in the Twentieth Century*, 36 LOY. U. CHI. L.J. 591 (2005).

2. The Legal Services Corporation (LSC) undertook a study to determine the extent to which low-income Americans were unable to secure access to civil legal assistance. The report, "Documenting the Justice Gap in America—*The Current Unmet Civil Legal Needs of Low-Income Americans*," concluded that "[a]lthough state and private support for legal assistance to the poor has increased in the last two decades, level (or declining after factoring in inflation) federal funding and an increased poverty population have served to increase the unmet demand." LEGAL SERVICES CORP., *Overview* of DOCUMENTING THE JUSTICE GAP IN AMERICA—*THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS* 2, <http://www.lsc.gov/press/documents/JusticeGapReportOverview120105.pdf> (last visited Nov. 4, 2006) (quoting report overview; full report available at [http://www.lsc.gov/press/documents/LSC%20Justice%20Gap\\_FINAL\\_1001.pdf](http://www.lsc.gov/press/documents/LSC%20Justice%20Gap_FINAL_1001.pdf) (last visited Nov. 4, 2006)). The overview notes that the researchers finished collecting data in August 2005, so "none of the data in the report reflects the vastly increased need for legal assistance that will result from the impact of Hurricane Katrina by a greatly expanded client-eligible population." *Id.*

3. Deborah L. Rhode, *Access to Justice: Again, Still*, 73 FORDHAM L. REV. 1013, 1021 (2004) ("[M]ost legal academics have done little to educate themselves, the profession, or the public about access to justice and the strategies necessary to increase it . . . . [W]e are not shouting from rooftops about unmet needs; we are not, for the most part, even murmuring in classrooms or muttering in law reviews."); see also John O. Calmore, *Social Justice Advocacy in the Third Dimension: Addressing the Problem of "Preservation-Through-Transformation"*, 16 FLA. J. INT'L L. 615, 632 (2004) ("[L]aw school fails to produce public spirited and socially responsible lawyers . . .").

implement strategies aimed at ameliorating these pervasive inequities.<sup>4</sup> Law school clinics are ideally situated to serve at the vanguard of this social justice mission. As the driving force in clinic design and goals, clinical faculty must aspire to be “Provocateurs for Justice.”<sup>5</sup> Given the relative expense of clinical programs, law schools cannot be complacent in supporting a clinical mission that is merely adequately conceived and should set priorities that advance critical social justice goals. This article assumes an expansive definition of social justice that extends beyond both procedural access to justice and an equitable, just outcome in a particular case. This broad definition of a social justice mission encompasses a transformative agenda aimed at identifying and implementing advocacy strategies that provide enduring, meaningful and systemic relief for marginalized communities.<sup>6</sup> The notion that the dynamics of the lawyer-client relationship should not replicate the social and political subordination imposed on clients elsewhere in their lives is implicit in this social justice agenda. Given the incalculable costs of indifference to fundamental questions of justice and fair play, it is incumbent on law schools to rise to the challenge of integrating social justice considerations into their clinical mission.<sup>7</sup>

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4. See Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 *FORDHAM L. REV.* 997, 1011 (2004).

In order to increase the number of law school graduates who embrace a professional responsibility to assure access to justice for the poor, clinicians must strive to inculcate in their students an understanding and compassionate concern for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice.

*Id.* See also DEBORAH L. RHODE, *ACCESS TO JUSTICE* 191-93 (2004), for a discussion about the responsibility of legal educators to instill professional values. “Legal education plays an important role in socializing the next generation of lawyers, judges, and public policymakers. As gatekeepers to the profession, law schools have a unique opportunity and obligation to make access to justice a more central social priority.” *Id.* at 193.

5. Jane H. Aiken, *Provocateurs for Justice*, 7 *CLINICAL L. REV.* 287, 288 (2001) (“A provocateur for justice actively imbues . . . students with a lifelong learning about justice, prompts them to name injustice, to recognize the role they may play in the perpetuation of injustice and to work toward a legal solution to that injustice.”).

6. The Equal Justice Project rejected limiting its objectives to increasing “access to justice,” and instead identified “equal justice” as a far more visionary and substantive goal; “[t]he Project eschewed the term ‘access to justice’ in its planning literature in the belief that access to the legal system, though critical to many when meaningful, did not capture the full range of legal inequality that affects people and communities . . . .” EQUAL JUSTICE PROJECT, *ASS’N OF AM. LAW SCH., PURSUING EQUAL JUSTICE: LAW SCHOOLS AND THE PROVISION OF LEGAL SERVICES* 3 (2002), available at [http://www.aals.org/equaljustice/final\\_report.pdf](http://www.aals.org/equaljustice/final_report.pdf) [hereinafter EQUAL JUSTICE PROJECT].

7. See generally Symposium, *The Justice Mission of American Law Schools*, 40 *CLEV. ST. L. REV.* 277 (1992) (providing commentary on the social justice mission of law schools).

While the ability of law schools to promote a social justice mission through their clinical programming is well documented,<sup>8</sup> balancing the competing goals of providing skills training and furthering a social justice agenda within the confines of one particular clinic construct is less studied. This article considers one clinician's efforts to evaluate and reconcile the tension between these goals.<sup>9</sup> In order to create a collective body of knowledge about pursuing social justice goals within clinical pedagogy, clinicians are exhorted to document and disseminate their experiences.<sup>10</sup>

During the time I evaluated the civil clinic, Western New England College School of Law (WNEC), which is the only law school in Western Massachusetts, employed two full-time clinicians and offered five clinics, one practicum and an externship program. The Anti-Discrimination Clinic, the only civil clinic supervised by a full-time clinician, operated as a hybrid model.<sup>11</sup> Under my supervision, students served as Volunteer Commission

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8. See, e.g., Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461 (1998).

9. Clinicians may need to temper their idealism in articulating dramatic social justice objectives with more pragmatic considerations. These include ensuring opportunities to provide training in a reasonable range of lawyering skills, as well as other contingencies, such as the constraints imposed by limitations on institutional resources, loyalty to existing clinical programs, the clinician's own area of expertise, student interest, the opportunities and demand present in the local community, and the challenges and uncertainty of determining the clinic structure most likely to achieve social justice goals. See, e.g., Douglas A. Blaze, *Déjà Vu All Over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 953 (1997) ("[I]t is important . . . that community service fall within the proper scope of law school educational activity to the extent that service affords demonstrably sound, pedagogic opportunities for the education of law students.").

10. See EQUAL JUSTICE PROJECT, *supra* note 6, at 23 ("Combining personal belief, passion, and intellectual integrity, equal justice scholarship provides fulfilling opportunities for synthesizing teaching, scholarship, and service. When grounded in social movements, this scholarship has real potential for affecting change."). See also Irene Scharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Law Clinic*, 12 CLINICAL L. REV. 243 (2005), for reflections on a clinician's experience designing and directing an immigration law clinic. Scharf noted the tension between some critics of clinical scholarship who characterize it as too pedestrian and those who reproach it as inaccessible to all but a few academics who are familiar with its impenetrable prose and theoretical abstractions. *Id.* at 245 n.5. In chronicling her efforts to develop a clinic that balances a service mission with attention to the ongoing nature of legal education, Scharf hoped to strike a middle ground between these competing visions of clinical scholarship, thereby offering "constructive assistance to law faculty who are struggling to develop high-quality models of education and service in an atmosphere of limited finances." *Id.* I share the hope that this article adds to the body of literature providing guidance to clinicians striving to balance social justice goals with other pedagogical concerns.

11. There is no single definition of what constitutes a hybrid clinic, although it typically contains components of both in-house clinics and externship programs. See Margaret A. (Peggy) Tonon, *Beauty and the Beast—Hybrid Prosecution Externships in a Non-Urban Setting*, 74 MISS. L.J. 1043, 1048 (2005). In many hybrid clinics, both the clinic faculty member and an on-site supervisor share the responsibility to supervise students. In what I will refer to as the MCAD model, I retained full responsibility to train and supervise the clinic students, and students assumed primary professional

Counsel to the Massachusetts Commission Against Discrimination (MCAD), the state administrative agency charged with enforcing the state's discrimination laws.<sup>12</sup> This article critically reflects on the Anti-Discrimination Clinic's ability to provide an optimum balance between skills training and a social justice mission, and illustrates the challenges of satisfying a social justice mission in a clinic operating within the limitations of administrative agency practice.

This article is comprised of four parts. Part I briefly explores the evolution of clinical education, with particular emphasis on synthesizing skills training and social justice issues, and describes some recent developments underscoring the urgency of developing a comprehensive plan to address social justice issues.<sup>13</sup> Part II briefly surveys a few relevant developments in contemporary progressive lawyering theories that provide a context for a critique of the Anti-Discrimination Clinic. Part III describes the Anti-Discrimination Clinic, and examines how the clinic balanced the demands of current clinical pedagogy, including providing training in practical skills, ethics and professionalism, against the law school's social justice mission, which was premised in part on the progressive lawyering theories discussed in Part II. This evaluation considers the context of the law school's overall clinical programming. The article concludes that while WNEC's Anti-Discrimination Clinic presented some valuable teaching opportunities, operating within the framework of this particular state agency hampered the realization of critically important pedagogical and social justice goals. Prominent among these unrealized goals was the law school's failure to ameliorate the vast landscape of unmet legal needs confronting indigent clients. Also particularly troubling was the clinic's subordination of the individual complainant's goals and interests to the vaguely defined "public interest" goals of the state agency, which modeled habits in direct conflict with client empowerment strategies. The analysis of this clinic's efficacy in advancing social justice goals may be useful in guiding other clinicians who are contemplating clinic design with an administrative agency. Part IV briefly describes an unsuccessful attempt to remedy these shortcomings.

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responsibility for the cases. Rather than represent individual clients, we served as counsel to the administrative agency.

12. The clinic students and I filed a Notice of Appearance in the cases, serving in the same role as MCAD Commission Counsel. For a description of the clinic and the specific role of the students, see discussion *infra* Part III.

13. This article does not intend to articulate a comprehensive, groundbreaking analysis of topics on which clinical scholarship abounds. Instead, the goal is to briefly explicate the relevant emerging clinical pedagogy and social justice lawyering theory in order to provide the context for an informed critique of the Anti-Discrimination Clinic.

## I. CLINICAL EDUCATION AND SOCIAL JUSTICE

### A. BRIEF HISTORY AND RECENT TRAJECTORY OF CLINICAL EDUCATION

The value of clinical instructional methodology, through experiential education, has been firmly established as an integral component of legal education. The ABA mandates that law schools provide clinical or field placement opportunities,<sup>14</sup> and clinics now exist at virtually all law schools.<sup>15</sup> As many clinicians have prioritized social justice goals, innovative clinics have flourished. Because the roots of clinical legal education have been thoroughly recounted in innumerable articles, this article will focus briefly on the origin, maturation and refinement of clinical pedagogy necessary to provide a context for a critique of the clinic structure and goals at WNEC.

In its initial incarnation, legal training was premised on instruction in applied skills imparted through the apprentice model or lectures delivered through the didactic classroom model.<sup>16</sup> By the 1890s, law school pedagogy shifted to the dominance of the method popularized by Christopher Columbus Langdell, known as the case method.<sup>17</sup> This instructional technique, designed to teach students “how to think like lawyers,”<sup>18</sup> elevated the concept of “law as science,” in which good lawyering skills were presumed to rely exclusively on the lawyer’s ability to predict the application of appellate decisions to specific facts.<sup>19</sup> The

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14. ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS Standard 302(b)(1) (2006), available at <http://www.abanet.org/legaled/standards/chapter3.html>.

15. David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 236 (2003) (noting that 182 law schools employ over 1400 clinicians in clinics covering 130 different subject areas). Despite uniform incorporation into law school offerings, clinical education is not without its detractors, including those who see the academy as a place of intellectual rigor that should not deign to dilute its mission by providing pedestrian training in lawyering skills, which they fear would render the legal academy little more than a trade school. See Suzanne Valdez Carey, *An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice*, 51 U. KAN. L. REV. 509, 509 (2003) (stating that due in part to this criticism, law schools were slow to adopt clinical programs).

16. Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21<sup>ST</sup> Century*, 27 LOY. U. CHI. L.J. 449, 451-52 (1996).

17. See Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 5 n.7 (2000).

18. See Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351, 358-59 (1998) (citing Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 20-21(1996)).

19. Some critics of the case method reject the presumption that legal analysis could be reduced to “the collection, synthesis, and analytical comparison of common law . . . that could be consistently

ascendancy of the Langdellian method eclipsed the past reliance on the apprentice method, leaving little opportunity for law students to acquire practical skills.<sup>20</sup> By the 1930s, several prominent and outspoken legal scholars questioned the value of the Langdellian methodology as the exclusive training offered to lawyers, and proposed the widespread adoption of more practical skills training. Jerome Frank,<sup>21</sup> Karl Llewellyn<sup>22</sup> and others argued that in assuming that the proficient practice of law depended entirely on a lawyer's ability to understand and apply the principle of stare decisis, traditional teaching methodologies left lawyers wholly unprepared to deal effectively with contingencies not contained within the narrow and predictable sphere of appellate analysis. Frank proposed the implementation of clinics as an integral part of legal education that would serve as a foundation for a more realistic method of providing comprehensive lawyering skills instruction.<sup>23</sup> Despite the support for the expansion of legal training, clinical education did not immediately gain any significant foothold in the academy.<sup>24</sup>

Although clinical training had been present in the academy for years, the 1960s ushered in a watershed in clinical legal education.<sup>25</sup> A number of

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applied in predicting results and deciding future cases.” Bernard K. Freamon, *Action Research for Justice in Newark, New Jersey*, in *EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION* 167, 169-70 (Jeremy Cooper & Louise G. Trubek eds., 1997).

20. See Blaze, *supra* note 9, at 943-44.

21. See Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) [hereinafter Frank, *Why Not*]; Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947) [hereinafter Frank, *Plea*]. Frank proposed modifying the law school methodology to more closely follow the medical school model.

22. Legal realists believed that “legal education should expose students to the dynamic relationship between theory and practice—that good theory is practical, and that good practice is informed by theory.” Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1932 (2002).

23. See Frank, *Plea*, *supra* note 21; see also Blaze, *supra* note 9, at 945-948 (noting that early proponents argued that clinical pedagogy could provide invaluable educational benefits that extend beyond the practical skills training previously imparted through the apprenticeship method.).

24. Barry et al. attribute the legal academy's resistance to fully embracing clinical education to four factors. Barry et al., *supra* note 17, at 8-9. First, law schools believed that their desire to be fully identified with the intellectual rigors of the academy required them to distance themselves from the apprenticeship method. *See id.* at 8. Second, law schools were under-funded and unable to even consider the cost-prohibitive adoption of clinics. *See id.* Third, there was far from universal agreement among law school faculty about the wisdom of providing training beyond pure legal analysis. *Id.* Finally, during the period from the 1920s to the 1940s when the American Bar Association strove to elevate and consolidate standards for law schools, there was no overt or even tacit encouragement for law schools to develop clinical programming. *See id.* at 8-9. These factors continued to impede the adoption and incorporation of clinics through the 1950s, and although some clinics existed, they were often considered extracurricular activities rather than academic offerings. *See id.* at 9-10.

25. *See id.* at 12-13 (noting that by the 1960s, clinics had become an institutionalized part of some law school curricula); see also Wizner, *supra* note 22, at 1933 (recounting the work done by the

factors influenced this shift, including the increasingly politicized social climate, vocal student demand for the social relevance of their studies, the availability of some funding for clinics, faculty interest in teaching clinical topics,<sup>26</sup> and, starting in the 1970s, the incipient development of a distinct clinical instructional methodology.<sup>27</sup> During that time, the clinical movement was most visibly and forcefully advanced by the advocacy of William Pincus, vice president of the Ford Foundation. Pincus created a program now known as the Council on Legal Education and Professional Responsibility (CLEPR), which aspired to provide legal services to the poor.<sup>28</sup> With an initial \$6 million, “Pincus set out on his crusade to transform American legal education.”<sup>29</sup> CLEPR funded several law school clinics, which facilitated the development and consolidation of clinical pedagogy that was intentionally and explicitly fused with a social justice agenda.<sup>30</sup> During this era of clinical education, “[c]linics were about skills training, providing service, influencing policy, and developing future legal aid and civil rights lawyers.”<sup>31</sup>

By the 1980s, many clinical educators campaigned for a less marginalized role in the academy, seeking greater acceptance and

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Council on Legal Education for Professional Responsibility starting in the late 1960s). Commentators attribute various factors to this rise in clinical education: criticism emanating from legal realists, the end of the apprentice system and the legal aid movement. Blaze, *supra* note 9, at 943-45.

26. Barry et al., *supra* note 17, at 12.

27. *Id.* at 16 (asserting that while the social unrest of the 1960s was a catalyst to the expansion of clinical programs, “it was the development of a clinical teaching methodology that was critical in solidifying the place of clinical legal education in the law school curriculum during the period running from the 1970’s through the present”).

28. *Id.* at 18-19.

29. Wizner, *supra* note 22, at 1933.

30. See Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 338 (2001) (“From the beginning of the clinical legal education movement, experiential learning and skills-training were seen as the means for achieving the justice goal articulated by William Pincus, not as ends in themselves.”); see also Wizner & Aiken, *supra* note 4, at 998 (“[C]linics began at many law schools primarily as programs to enable law students to provide free legal services to the poor or to bring important impact litigation . . .”).

31. Wizner & Aiken, *supra* note 4, at 998. At that time, the ABA issued its Model Student Practice Rule, with many states following suit, in order to provide legal services and an opportunity for student learning. According to some observers, the decision to limit representation to the poor was in part a pragmatic effort to placate the private bar’s concern that clinics would compete for fee-paying clients. See David F. Chavkin, *Am I My Client’s Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1516 n.28 (1998) (explaining that most states limit student representation to indigent clients). Navigating the balance between learning and service has been a challenge from the inception of clinical legal education. See Blaze, *supra* note 9, at 950-52. Nevertheless, service has always been an integral component of clinical education.



integration of clinical pedagogy in the law school curriculum.<sup>32</sup> There were some for whom this quest for legitimacy elevated the primacy of skills training and displaced the social justice mission of clinics.<sup>33</sup> This trend dovetailed with widespread concerns about the competence and ethics of new attorneys, and prompted a comprehensive evaluation of the structure and efficacy of legal training.<sup>34</sup> The results of this evaluation were cataloged in what became known as the MacCrate Report,<sup>35</sup> which attempted to create a taxonomy of skills and values necessary to lawyering, and implored law schools to “narrow the gap” between law graduates and the practicing bar.<sup>36</sup> In addition to enumerating specific lawyering skills, the MacCrate Report also identified important normative goals, including the Provision of Competent Representation; Striving to Promote Justice, Fairness, and Morality; Striving to Improve the Profession; and

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32. See Minna J. Kotkin, *The Law School Clinic: A Training Ground for Public Interest Lawyers*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 19, at 129, 137-38.

33. See *id.* at 138. The recalibrated focus has been attributed to a variety of factors. One influence was a change in the ideals of the students entering law school, which was reflected in a more careerist and less politicized student body. *Id.* at 137. Accordingly, “[i]ncoming law students lacked the ideological commitment of their predecessors to a vision of law as a tool of empowerment for the poor and disadvantaged.” *Id.* Moreover, clinicians seeking greater parity with their doctrinal colleagues often faced scholarship and other requirements, which decreased the time available to dedicate to live-client representation. *Id.* at 138. Finally, some clinicians were less committed to law reform efforts than their predecessors. *Id.* Scholars have reflected on the implications of this shift, and Wizner and Aiken query, “Have we [clinicians], in our struggle to become accepted as members of law school faculties, compromised our identities as advocates for the poor and unprivileged, as fighters for social justice?” Wizner & Aiken, *supra* note 4, at 1002; see also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 169 (2001) (concluding that “teaching . . . fundamental lawyering skills and values to help prepare law graduates for practice” is a burden to be borne not solely by clinics, but law schools as a whole).

34. See Kotkin, *supra* note 32, at 138.

[T]he organized bar was increasingly pressuring law schools to provide essential skills training, particularly as employers saw these efforts on their own part as not economically advantageous.

Thus, once perceived as a radically new teaching methodology that also infused ideological social goals into law schools, clinical legal education began to serve very different ends: career development for students and efficiency for the private bar.

*Id.* (footnotes omitted).

35. TASK FORCE ON LAW SCH. & THE PROFESSION: NARROWING THE GAP, ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3-8 (1992) (report issued by the Task Force, which was established by the ABA Section of Legal Education and Admissions to the Bar and was headed by Robert MacCrate) [hereinafter MACCRATE REPORT].

36. See *id.* at 138-40 (identifying ten fundamental lawyering skills: Problem Solving, Legal Analysis and Reasoning, Legal Research, Factual Investigation, Communication, Counseling, Negotiation, Litigation and Alternative Dispute Resolution Procedures, Organization and Management of Legal Work, and Recognizing and Resolving Ethical Dilemmas).

Professional Self-Development.<sup>37</sup> Stressing the importance of these values, the MacCrate Report commented that they “are at least as important as the substance of courses or the skills of practice.”<sup>38</sup> The report, which galvanized clinical educators, exhorted law school professors to “assist students to recognize the responsibility of lawyers to advance individual and social justice.”<sup>39</sup>

During the 1990s, many clinicians embraced a renewed commitment to the clinical movement’s social justice roots, emboldened in part by the MacCrate Report.<sup>40</sup> In the initial five years after its publication, the

37. *Id.* at 140-41. Regarding the second normative goal—“Striving to Promote Justice, Fairness, and Morality”—the MacCrate Report states that lawyers should be committed to the values of:

2.1 *Promoting Justice, Fairness, and Morality in One’s Own Daily Practice*, including:

(a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client;

(b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society;

(c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;

2.2 *Contributing to the Profession’s Fulfillment of its Responsibility to Ensure that Adequate Legal Services Are Provided to Those Who Cannot Afford to Pay for Them*;

2.3 *Contributing to the Profession’s Fulfillment of its Responsibility to Enhance the Capacity of Law and Legal Institutions to Do Justice.*

*Id.* at 213 (citations omitted). *But cf.* Jane Harris Aiken, *Striving to Teach “Justice, Fairness, and Morality,”* 4 CLINICAL L. REV. 1, 6-10 (1997) (arguing that although the MacCrate Report identifies “promoting justice, fairness, and morality” as core values, this imperative has not been uniformly embraced, and methods of providing instruction in this area are underdeveloped); Engler, *supra* note 33, at 144-49 (noting the difficulty in assessing cause and effect with respect to the report); Russell G. Pearce, *MacCrate’s Missed Opportunity: The MacCrate Report’s Failure to Advance Professional Values*, 23 PACE L. REV. 575 (2003).

38. MACCRATE REPORT, *supra* note 35, at 235.

39. STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (Ass’n of Am. Law Sch. 2003), available at [http://www.aals.org/about\\_handbook\\_sgp\\_eth.php](http://www.aals.org/about_handbook_sgp_eth.php) [hereinafter AALS STATEMENT OF GOOD PRACTICES]. The MacCrate Report also noted that “[l]aw school deans, professors, administrators and staff must not only promote these values [of justice, fairness and morality] by words, but must so conduct themselves as to convey to students that these values are essential ingredients of our profession.” MACCRATE REPORT, *supra* note 35, at 236.

40. *See, e.g.*, Wizner, *supra* note 22; Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 32-34 (1993). Despite clinical education’s historical focus on a social justice mission, several commentators have articulated discomfort with situating responsibility for social justice education exclusively within the bailiwick of clinics, arguing the reliance on clinics to address issues of social justice permits the rest of the academy to abdicate their responsibility to address these concerns. Many clinicians believe that law schools should embrace instruction pervasively, particularly with respect to social justice, ethics and professionalism. *See* Engler, *supra* note 33, at 165. Integrating a public service ethos into the core curriculum would create the perception of unified, institutional support rather than relegating the social justice mission of law schools to the periphery of the skills

MacCrate report engendered lively discourse about clinical education within both clinical circles and the broader academy. In commemorating the tenth anniversary of the MacCrate Report, Russell Engler exhorted clinicians to renew reflection on the report and its aftermath, and assess whether the design of clinical programs succeeds in “narrow[ing] the gap.”<sup>41</sup> Engler also urged clinicians to heed the report’s mandate to law schools to “Pursue Equal Justice.”<sup>42</sup> This sentiment is reinforced by other academics echoing the call for law schools to shoulder some responsibility for instilling concerns about equal access to justice.<sup>43</sup> The recent consolidation of clinical emphasis has been reflected in the development of a body of distinctly clinical scholarship, which encourages clinicians to revive the social justice mission of law schools through clinical programming.<sup>44</sup>

### B. CURRENT CRISIS IN ACCESS TO JUSTICE

Critical commentators lament this country’s failure to even remotely approach the foundational and exalted concept of “equal justice under law.”<sup>45</sup> It is widely reported that only 20% of the legal needs of the poor are satisfied.<sup>46</sup> The American Bar Association conducted a study determining that roughly three-fourths of the legal problems of the poor were handled without any legal assistance.<sup>47</sup> People of moderate means do not fare much better, with studies estimating that our legal system excludes meaningful participation for approximately 40-60% of middle-income

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training curriculum. *See id.* at 168; *see also* Barry et al., *supra* note 17, at 15-16 (calling on each law school course to raise issues of access to justice).

41. Engler, *supra* note 33, at 169.

42. *See id.*

43. *See* RHODE, *supra* note 4, at 193.

44. *See* EQUAL JUSTICE PROJECT, *supra* note 6, at 5.

45. Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2001); *see also* Robert Rubinson, *A Theory of Access to Justice*, 29 *J. LEGAL PROF.* 89, 104 (2005) (“Everyone—lawyers, judges, academics, the public—knows that the ‘rich’ get more justice than everyone else.”).

46. *See* Rhode, *supra* note 45, at 1785. Another scholar notes:

[T]here is about one lawyer for every 240 nonpoor Americans, but only one lawyer for every 9,000 Americans whose low income would qualify them for legal aid. Forty-five million Americans qualify for civil legal aid, and they are served by a mere 4,000 legal-aid lawyers plus an estimated 1,000 to 2,000 additional poor people’s lawyers. . . . In very real effect, low-income Americans are denied access to justice.

Luban, *supra* note 15, at 211-12 (footnotes omitted).

47. *See* Albert H. Conril, ABA, *AGENDA FOR ACCESS: THE AMERICAN PEOPLE AND CIVIL JUSTICE—FINAL REPORT ON THE IMPLICATIONS OF THE COMPREHENSIVE LEGAL NEEDS STUDY 5-6* (1996) [hereinafter *AGENDA FOR ACCESS*]. While the notion that pro se litigants are disadvantaged when appearing in court seems manifest, it has also been analyzed empirically. *See, e.g.*, Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers’ Negotiations with Unrepresented Poor Persons*, 85 *CAL. L. REV.* 79, 116 n.163 (1997); Wizner, *supra* note 30, at 328.

individuals.<sup>48</sup> As Deborah Rhode eloquently notes, “[i]t is a shameful irony that the nation with the most lawyers has among the least adequate systems for ensuring legal assistance. It is more shameful still that the inadequacies attract so little concern.”<sup>49</sup> The profound impact of this shortage on the perceived legitimacy of representative democracy should not be minimized,<sup>50</sup> as “[s]ocial science research confirms what political theorists have long argued: public confidence in legal processes depends heavily on opportunities for direct participation.”<sup>51</sup> For millions of Americans, some legal assistance is the only way that they can participate in adversarial, legislative and administrative processes. Access to legal services helps prevent erroneous, unjust decisions and “affirms a respect for human dignity and procedural fairness that are core democratic ideals.”<sup>52</sup>

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48. See AGENDA FOR ACCESS, *supra* note 47, at 4-9; see also RHODE, *supra* note 4, at 103; CLINICAL LEGAL EDUC. ASS’N, BEST PRACTICES FOR LEGAL EDUCATION 18 (2006), available at <http://professionalism.law.sc.edu/news.html#CLEA> [hereinafter BEST PRACTICES] (“Advice on topics of daily importance in the lives of individuals, such as landlord/tenant law, child custody disputes, and testamentary dispositions is priced beyond the reach of millions of working Americans. Equal Justice Under the Law is an ideal whose pursuit is becoming increasingly futile.” (quoting Mary C. Daly, *The Structure of Legal Education and the Legal Profession, Multidisciplinary Practice, Competition, and Globalization*, 52 J. LEGAL EDUC. 480, 484 (2002))); John B. Attanasio, *Out-of-the-Box Dialogs: Foreword*, 52 J. LEGAL EDUC. 473, 475 (2002) (“The academy has failed to train lawyers who provide legal services to the middle and working classes, which, of course, constitute the overwhelming majority of American society.”); Denise R. Johnson, *The Legal Needs of the Poor as a Starting Point for Systemic Reform*, 17 YALE L. & POL’Y REV. 479, 480-81 (1998).

49. Rhode, *supra* note 3, at 1013; see also Rubinson, *supra* note 45, at 156 (“It is astonishing that the principle of equal justice—a principle enshrined in virtually every articulation and embodiment of civic virtue and pride in our democracy, from courthouse facades, to the Pledge of Allegiance, to the iconography of ‘blind justice’—remains so obviously and utterly hollow and illusory.”).

50. See Rubinson, *supra* note 45, at 90 (“[T]he ideal of equal justice is incompatible with the social realities of unequal wealth, power, and opportunity, which no amount of legal formalism can disguise. In an unequal society, the Haves usually are better served by legal formalism than the Have-Nots, a disparity that creates a persistent legitimacy crisis.”).

51. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, in ETHICS IN PRACTICE: LAWYERS’ ROLES, RESPONSIBILITIES, AND REGULATION 266 (Deborah L. Rhode ed., 2000). As Deborah Weissman notes:

The premium derived from opportunities to enforce legal rights may be categorized as a public good that confers benefits on all members of society. But the celebration of legal principles as the foundation of a democratic society must take particular measure of the degree to which the poor and the powerless are included as beneficiaries. To deny the poor access to the courts because of economic constraints would represent an egregious failure of due process and a repudiation of democratic principles of civilized society.

Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 749 (2002) (footnote omitted). However, there is also widespread misinformation obscuring the extent of the problem. “Four-fifths of Americans believe, incorrectly, that the poor are entitled to counsel in civil cases; only a third think that low-income individuals would have difficulty finding legal assistance, a perception wildly out of touch with reality.” Rhode, *supra* note 3, at 1016.

52. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 376 (2004); see also EQUAL JUSTICE PROJECT, *supra* note 6, at 3 (noting that “issues of

Although discourse surrounding inequitable access to justice is not new, the current climate, replete with instances of retrenchment in policies, has sparked a renewed sense of urgency. Commentators have identified a number of contemporary developments that have adversely impacted the ability of low-income persons to obtain legal services. Among the most damaging were the widespread restrictions imposed by the Legal Services Corporation (LSC)<sup>53</sup> and fluctuations in its funding.<sup>54</sup> Challenges to the legitimacy of law school clinics that successfully advanced positions contrary to powerful local interests also threaten to chill clinics that effectively advocate for social justice.<sup>55</sup> Additionally, restrictions on the

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legal inequality profoundly affect the fabric of our democracy”). As a citizen, a lawyer should seek to improve the law, the administration of justice and access to the legal system. MODEL RULES OF PROF'L CONDUCT pmbl. (2006). As a member of the legal profession,

[a] lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives . . . .

*Id.*

53. See Raymond H. Brescia et al., *Who's in Charge, Anyway? A Proposal for Community-Based Legal Services*, 25 FORDHAM URB. L.J. 831, 862 (1998) (“Recent funding cuts and restrictions imposed on legal services programs have created a sense of profound crisis among legal services staff.”). Legal services offices that receive federal funds are prohibited from using those federal funds, and for some issues using funds from any other source, for a broad range of matters including school desegregation, labor boycotts, abortion, political redistricting, military service, welfare reform, undocumented aliens, prisoners and public housing tenants who face eviction due to alleged drug activities. Rhode, *supra* note 52, at 379. Legal Services advocates are also proscribed from engaging in activities such as lobbying, community organizing, or representation in legislative and administrative rule-making proceedings. *Id.* As a result, many legal services offices split into different entities: those who accepted LSC funds and were constrained by the restrictions, and those who eschewed LSC funds in order to avail themselves of the full panoply of advocacy strategies. Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 369-70 (1998).

54. See Helaine M. Barnett, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 413-16 (2005) (discussing the changes in LSC funding).

55. Potential interlopers included business leaders, legislatures, the local bar, university administrations, alumni and donors. Robert Kuehn and Peter Joy recount a troubling history of interference with law school clinical prerogatives, starting as early as the 1960s, and note that “[a] recurring ethical issue is the propriety of politically, economically, or ideologically-motivated [sic] efforts by persons and organizations outside the law school clinic to limit the clinic’s choice of clients and cases.” Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 FORDHAM L. REV. 1971, 1975 (2003). They posit that with the notable exception of the Louisiana Supreme Court, the judiciary has generally been protective of student/clinical prerogatives. *Id.* at 1991-92. Kuehn and Joy conclude by highlighting the important role law school clinics play in representing unpopular or subordinated groups who may otherwise go unrepresented, and exhort law school clinics to continue to resist interference. *Id.* at 2049-50.

In Louisiana, successful student advocacy in the Tulane Environmental Clinic ran afoul of the interests of local businesses and the governor, and the Louisiana Supreme Court altered its student

availability of attorneys' fees for prevailing parties under fee shifting provisions have also obstructed access to legal services.<sup>56</sup> In the midst of a string of defeats, beleaguered advocates for the poor have had some cause for optimism. An attack on the Interest on Lawyers' Trust Account (IOLTA) system of legal services funding was defeated,<sup>57</sup> and a campaign to proscribe LSC funded legal services from challenging certain laws was

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practice rules to obstruct the clinic's ability to undertake any similar cases. See Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y 33 (2000). One alteration required strict enforcement of the student practice rule's indigency requirements, effectively making it difficult to represent a community organization unless it could certify that a majority of the organization's members fell within 200% of the federal poverty guidelines. *Id.* at 91-92. According to one commentator, this requirement erected an impediment to representing community groups, which are often comprised of members with varied economic resources, all of whom may not satisfy rigid income requirements. See *id.* at 97 n.317. Moreover, many groups decline to probe the finances of their members, concerned that economic inquiries will deter membership. *Id.* at 98.

56. See *Buckhannon Bd. & Home Care, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). The Court curtailed the ability of lawyers to petition for attorneys' fees as a prevailing party under the catalyst theory, which in practice could allow defendants to enter a settlement agreement on the eve of trial without incurring liability for attorneys' fees. *Id.* at 609-10. Attorneys still retain the right to negotiate for attorneys' fees, but they are often waived in the interests of a better settlement for the client. Although not a recent development, Luban points out the Court's holding in *Evans v. Jeff D.*, 475 U.S. 717 (1986), which, in essence, allows defendants to make "sacrifice offers" conditioning settlement on opposing counsel's willingness to waive attorneys' fees. These offers place attorneys in the difficult predicament of reconciling the potentially conflicting interests of maximizing their clients' financial recovery and their own economic survival. Luban, *supra* note 15, at 241-43.

57. *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (upholding the legitimacy of IOLTA funding). The Court noted that the appropriation of interest via IOLTA resulted in no pecuniary loss for the plaintiffs, because the individual costs of administering the distribution of the interest would negate any monies due, at least in cases where the amount deposited in the account is small and the duration is short, and that the "public use" component of a regulatory taking is clearly satisfied. *Id.* As the Court stated, "[i]n this case, the overall, dramatic success of IOLTA programs in serving the compelling interest in providing legal services to literally millions of needy Americans qualifies the Foundation's distribution of the funds as a 'public use.'" *Id.* at 217. The decision leaves the IOLTA program open to a challenge by a party who could establish that they did suffer an uncompensated pecuniary loss, in violation of the Fifth Amendment. In his dissenting opinion, Justice Kennedy noted that the plaintiffs may have a valid "compelled speech" argument by asserting that they were forced to contribute to an organization whose positions and functions they do not support, in violation of the First Amendment. *Id.* at 253 (Kennedy, J., dissenting). Luban points out the subtext and meaning of the compelled speech argument. Luban, *supra* note 15, at 234-36. Because challengers to IOLTA cannot identify the direct flow of the interest to which they allege they have been deprived, they cannot identify the exact nature and subject matter of the representation they oppose. *Id.* at 235. Accordingly, their only argument must be premised on the tenuous and inflammatory notion that "making them contribute to IOLTA interest compels clients to fund speech that they abhor [and] is tantamount to saying that they abhor anything that anyone might say on behalf of a poor person." *Id.* Despite this victory, other potential challenges to the long-term viability of relying on IOLTA to fund legal services programs remain. See Tarra L. Morris, *The Dog in the Manger: The First Twenty-Five Years of War on IOLTA*, 49 ST. LOUIS U. L.J. 605 (2005).

overturned as impermissible “viewpoint discrimination.”<sup>58</sup> Despite these victories, the ominous trend toward the decreased ability of poor and subordinated communities to avail themselves of legal remedies demands a coordinated response that ensures that access to justice does not erode further.

### C. INTERPLAY BETWEEN CLINICAL EDUCATION AND SOCIAL JUSTICE IMPERATIVES

The current political and economic climate’s stark impact on our nation’s poor compels law schools to prioritize attention to social justice issues. Incorporating social justice goals into clinical programming serves this mandate in multiple ways, including providing relief, however minimal, to underserved poor members of local legal communities, instilling values of public service in students, and exposing students to the lack of access to lawyers and the court systems, which creates an impediment to equal justice.<sup>59</sup> As the institutions vested with a monopoly in providing legal training, law schools must pervasively embrace their role in heightening awareness of unequal justice and cultivating an individual moral imperative to respond to this crisis.<sup>60</sup>

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58. *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 548-49 (2001) (striking down a provision restricting LSC attorneys from advancing legal strategies which included an attempt to amend or challenge current welfare statutes, premised on the notion that the restriction was “designed to insulate the Government’s interpretation of the Constitution from judicial challenge”). The Court found that an independent judiciary relies on the ability of attorneys to fully present their arguments and concurred that the restrictions engendered “lingering doubt” about the fundamental fairness of limiting LSC attorneys to “truncated representation.” *Id.* at 546.

59. *See* Wizner & Aiken, *supra* note 4, at 1011.

In order to increase the number of law school graduates who embrace a professional responsibility to assure access to justice for the poor, clinicians must strive to inculcate in their students an understanding and compassionate concern for the plight of people living in poverty, and a sense of professional responsibility for increasing their access to justice.

*Id.*

60. A 1997 AALS survey of law school deans revealed that ninety-five percent concurred that “it is an important goal of law schools to instill in students a sense of obligation to perform pro bono work during their later careers.” COMM’N ON PRO BONO & PUB. SERV. OPPORTUNITIES, ASS’N OF AM. LAW SCH., LEARNING TO SERVE, <http://www.aals.org/probono/report2.html> (last visited Nov. 7, 2006); *see also* Steven H. Hobbs, *Shout from Taller Rooftops: A Response to Deborah L. Rhode’s Access to Justice*, 73 *FORDHAM L. REV.* 935, 935 (2004) (noting that Rhode “calls upon law schools to plant, fertilize, and water the seeds of pro bono service in the hearts and minds of law students as they pursue their legal education”); Robert R. Kuehn, *A Normative Analysis of the Rights and Duties of Law Professors to Speak Out*, 55 *S.C. L. REV.* 253, 293 (2003) (“[T]he issue is not whether law schools should seek to instill the legal profession’s public service norms, but rather, how this should best be done.”); EQUAL JUSTICE PROJECT, *supra* note 6, at 3 (“[L]aw schools have a vital role to play in explicating the nature of the problems and generating approaches for their resolution.”).

In 1999, grave concerns about the inadequate access to legal services that plagues low-income individuals spurred the American Association of Law Schools to launch the Equal Justice Project (“the Project”) aimed at confronting “the severe maldistribution of legal resources adversely affecting people and communities faced with immediate legal issues.”<sup>61</sup> The Project was “borne of the conviction that law schools have a special responsibility to promote equality in the legal system and meaningful access to law and lawyers,”<sup>62</sup> a trend that mirrors the general belief that universities should direct at least some of their resources toward promoting justice. In locating law schools at the center of this crisis, the Project opined that the implications of this disparity reach far beyond the individuals themselves, as “issues of legal inequality profoundly affect the fabric of our democracy.”<sup>63</sup> The Project advanced the position that law schools,<sup>64</sup> the judiciary, the bar and the broader community must work together to illuminate the depth and range of the problem and to explore and implement strategies to address the inequalities.<sup>65</sup> The imprimatur of the Association of American Law Schools should motivate law schools to experiment with pioneering strategies to address the crisis of great

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61. EQUAL JUSTICE PROJECT, *supra* note 6, at 1.

62. *Id.* at 5; *see also* RHODE, *supra* note 4, at 193. The Equal Justice Project calls for education about access to justice, both among lawyers and the general public. *See* EQUAL JUSTICE PROJECT, *supra* note 6, at 3.

63. EQUAL JUSTICE PROJECT, *supra* note 6, at 3.

64. *See* Tigran W. Eldred & Thomas Schoenherr, *The Lawyer’s Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367, 400 (1994) (asserting that “‘law schools . . . constitute the greatest opportunity’ to instill an ethic of public service in young lawyers” (quoting the ABA Commission on Professionalism)). Eldred & Schoenherr recommend that law schools expose students to the lack of any structural guarantee of access to the legal system for the poor, noting that such exposure should be taught pervasively throughout the curriculum, rather than isolated in professional ethics courses. *See id.* at 400-01. They encourage law schools to provide a mix of doctrinal and clinical opportunities that address issues of poverty and justice while combating the perception that public interest work is less worthy or less prestigious than corporate work. *Id.* at 401-02; *see also* Kristin Booth Glen, *Pro Bono and Public Interest Opportunities in Legal Education*, N.Y. ST. B.J., May–June 1998, at 20, 20 (noting that law schools should capitalize on the time they have to influence student mores by providing service opportunities that arouse a public interest commitment, exposing students to disadvantaged persons and fulfilling unmet legal needs).

65. EQUAL JUSTICE PROJECT, *supra* note 6, at 3. Obligations to practice in the public interest extend beyond those employed as “public interest lawyers,” and the private bar has played an increasing role in this effort. *See* Stuart Scheingold, *The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 118 (Austin Sarat & Stuart Scheingold eds., 1998); Louise G. Trubek, *The Worst of Times . . . and the Best of Times: Lawyering for Poor Clients Today*, 22 FORDHAM URB. L.J. 1123 (1995); *see also* MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. (2006), (“Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.”).



disparities in access to justice. Moreover, it may encourage law schools to recognize and reward scholarship that analyzes and addresses a comprehensive, informed response to these inequities.<sup>66</sup>

Clinical education is an ideal vehicle to promote a social justice mission.<sup>67</sup> First, “social justice is furthered through the provision of services and pursuit of legal and social reform on behalf of clients and community groups lacking meaningful access to society’s institutions of justice and power.”<sup>68</sup> Second, students inculcated with a sense of civic responsibility in law school have a greater propensity to provide pro bono services or select public interest jobs after graduation.<sup>69</sup> Third, participation in clinics “facilitat[es] transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in law.”<sup>70</sup> Fran Quigley characterizes a clinic student’s exposure to the life circumstances of their clients as a “disorienting moment,” impossible to replicate in all its complexity in a classroom setting focused on doctrinal analysis, but a necessary precursor to meaningful learning, particularly about social justice issues.<sup>71</sup> Fourth, clinical education provides a necessary counterbalance to the still dominant Langdellian method of instruction, which “ignores the impact of social and political factors on law and therefore presents a picture of the legal system and lawyers’ place in it that is, at best, hopelessly naïve, and at worst, dangerously misleading.”<sup>72</sup> Finally, a carefully constructed clinical

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66. The Equal Justice Project notes that law faculty are evaluated on scholarship, service, and teaching, but these criteria are not accorded equal value. EQUAL JUSTICE PROJECT, *supra* note 6, at 6. “Rigid definitions of countable scholarship have often inhibited faculty, usually at the pre-tenure stage, from conducting research on controversial, contested or political issues or linking their research to the activities of grassroots groups.” *Id.* Moreover, it is widely perceived that service is devalued in faculty performance evaluations. *Id.* Finally, “[e]xcellence in teaching is universally valued, but the standardized approaches to evaluation of teaching rarely include the extraordinary demands of teaching advocacy-based or community-centered courses.” *Id.* These impediments led the report to conclude that “inhibitors to faculty (and student) involvement in equal justice work pose tangible disincentives for faculty members who desire to link theory, passion, and values with useful action.” *Id.*

67. Wizner, *supra* note 22, at 1929-30.

68. Dubin, *supra* note 8, at 1475.

69. *Id.* at 1476.

70. *Id.* at 1477.

71. See Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995).

72. *Id.* at 39; see also Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 79 (2002) (noting the “psychological distress, dissatisfaction, and substance abuse” brought about by the Langdellian method and suggesting that these effects may be mitigated by courses that focus on morality and social justice).

experience can serve as a catalyst for students to observe more generally “the many subtle and unsuited ways in which invidious discrimination permeates our legal system.”<sup>73</sup>

Law schools should strive to “create a subculture that sustains students in the pursuit of public interest career goals.”<sup>74</sup> Many students enter the academy brimming with optimism and energy to engage in public interest work. All too often, however, students who enter law school with altruistic goals and idealistic visions of the law as an effective and powerful tool for social change embark on their careers having forsaken their idealism and commitment to social justice issues.<sup>75</sup> Incorporating social justice imperatives into both clinical and doctrinal pedagogy may serve to ameliorate the erosion of commitment to public interest work that students often experience during and after law school. Analysts speculate that a number of factors contribute to the widespread desertion of lofty goals that brought many to law school in the first place.<sup>76</sup> Many doctrinal classes are

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73. Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 464 (2000) (noting that faculty diversity within clinical legal education is woefully inadequate).

74. See Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199, 225 (1993). Law schools should also facilitate, nurture and encourage student interest in engaging in public interest work in ways outside of clinical education. See Engler, *supra* note 33, at 164-165. The Equal Justice Project recommends that law schools encourage collaborative efforts among career placement offices, pro bono coordinators and faculty to inform students about career options that “expand access to justice.” EQUAL JUSTICE PROJECT, *supra* note 6, at 37. This type of alliance would contribute to the perception of institutional support for equal justice work. See Kotkin, *supra* note 32, at 129 (noting that law school training “may ‘create a schism between a student’s belief in social change and the use of his or her legal career to bring about such change’” (quoting Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1701 (1993))).

75. Many theorists have posited explanations of the shift away from public interest commitment, although little methodical analysis has been conducted. Further study into the atrophy of public interest commitment is clearly necessary to identify the causes with certainty. In the interim, however, we can give some credence to hypotheses based on anecdotal information, and attempt to create strategies to remedy the problem. See Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443 (1992). Rose cites Erlanger and Stover, who attribute this decline to a number of factors, including “lack of emphasis . . . on social justice issues and the general devaluation of these concerns by law school teachers,” students’ reaction to the stress of first year law school in which survival is paramount, a lack of peer support for social justice issues, trepidation about inadequate compensation and a lack of loan forgiveness programs, and general concern about job satisfaction in public interest work. *Id.* at 445 (citing ROBERT V. STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* (Howard S. Erlanger ed., 1989)).

76. See Sally Maresh, *The Impact of Clinical Legal Education on Decisions of Law Students to Practice Public Interest Law*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 19, at 154. Maresh conducted a small empirical study to ascertain whether participation in a clinical program impacted a student’s perception of and commitment to public interest work. *Id.* at 159-64. Though limited in sample size, she determined that for those predisposed to public interest work, participation in a clinic had little impact on that commitment—96% retained their commitment. *Id.* at 163. In contrast, for 57% of those with no predisposition to public interest work, participation in a

structured to inculcate the notion that the practice of law requires logical and dispassionate analysis applied to concrete predetermined facts, insulated from the social, historical and political context in which the cases are decided. However, law does not occur in a sanitized vacuum, and law schools do their students a disservice by requiring them to completely dissociate their sense of justice and fair play from their legal persona,<sup>77</sup> a practice encouraged by privileging and valuing a purely analytical perspective.<sup>78</sup> As one commentator notes, “[t]his risk is especially great if professors are training students to ‘think like a lawyer’ as if legal decision-making is autonomous and without moral context.”<sup>79</sup> This methodology imparts a monochromatic and depersonalized view of law and the people it impacts, removed from the facts and details that color real-world people with concrete, intractable problems.<sup>80</sup> A well-structured clinical experience

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clinic did more favorably dispose them to consider public interest practice. *Id.* When queried as to what factors influenced their decision, they cited

a ‘personalization’ of the plight of the poor, a realization that many of their clients needed representation through not fault of their own, a recognition that the integrity of the judicial system is dependent on equal access to representation regardless of individual resources, and that the ‘right’ to counsel is not an inalienable right.

*Id.* at 164. While no longitudinal data were available to determine whether the attitudinal shift endured or actually influenced career choice or the ongoing provision of pro bono services, the results confirm that there is the potential for clinical experiences to have a profound impact. *See id.*; *see also* Erlanger & Lessard, *supra* note 74, at 225 (positing that although it is too soon to assess whether participants’ experience in the Interuniversity Consortium’s Project Group resulted in an abiding commitment to public interest work, participants “did report or demonstrate that their experiences affected their thinking about poverty and the legal system”).

77. *See* Calmore, *supra* note 3, at 631 (enumerating fifteen structural impediments that “hamper students in developing a legal persona that reflects social justice lawyering,” including “legal education itself”); *see also* Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL’Y 63, 73 (2003) (noting that law students encounter a “curriculum [that] is designed to neutralize . . . passion by imposing a rigor of thought that divorces law students from their feelings and morality,” in contrast to the progressive curricula preferred by many social work programs).

78. *See* Hess, *supra* note 72, at 78-79 (noting that students are instructed “that tough-minded analysis, hard facts, and cold logic are the tools of a good lawyer, and it has little room for emotion, imagination, and morality. For some students, ‘learning to think like a lawyer’ means abandoning their ideals, ethical values, and sense of self.”). A number of recent studies demonstrate the link between law school training and a decline in law student wellbeing. *See* Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005) [hereinafter Krieger, *Inseparability*]; Lawrence S. Krieger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112 (2002) [hereinafter Krieger, *Institutional Denial*]; *see also* Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 538 (1998) (noting that students suffer when they are required to sacrifice personal values on the “altar of rationalism”).

79. Marjorie L. Girth, *Facing Ethical Issues with Law Students in an Adversary Context*, 21 GA. ST. U. L. REV. 593, 599 (2005).

80. *See* Adrienne Stone, *Women, Law School and Student Commitment to the Public Interest*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 19, at 56. Stone explored the correlation between some women’s characterization of their experience at law school as

can keep students impassioned and engaged throughout law school, fostering a commitment to public service. Moreover, interaction with clients can shatter archetypal images of the poor.<sup>81</sup> Clinical Education is the best method for teaching the skills and values that lead to effective lawyering for social justice.<sup>82</sup> The benefits inure both professionally and personally, as “many individual lawyers have much to gain . . . from greater involvement with issues of social justice. Public interest and pro bono service can enhance skills, contacts, reputation, and psychological well-being.”<sup>83</sup>

A variety of objectives coexist under the big tent of clinical pedagogy.<sup>84</sup> Law schools and individual clinicians have broad latitude to develop an overarching clinical vision by prioritizing from among those legitimate pedagogical goals, including which lawyering skills and values to emphasize, as well as the substantive focus of the programs. As the above discussion makes clear, a law school’s clinic programming should devote at least some of its faculty resources and pedagogical focus to ensuring that access to justice and broader social justice concerns are more than just hollow aspirations. This mandate includes attention to providing services to marginalized communities, addressing the issue of unmet legal

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dehumanizing and devoid of emotional content and context, *id.* at 70, with the “fate of public interest commitment at law school.” *Id.* at 56. She concludes that while other factors may influence student commitment to public interest work, it is imperative that we recognize and address the transformative nature of legal education and affirm the values students embrace prior to law school, rather than extinguish them. *See id.* at 59; *see also* Jeremy Cooper & Louise G. Trubek, *Social Values from Law School to Practice: An Introductory Essay*, in EDUCATING FOR JUSTICE: SOCIAL VALUES AND LEGAL EDUCATION, *supra* note 19, at 1, 14 (“A law school . . . can too easily destroy the potential desire of law students to commit themselves passionately and wholeheartedly to social justice, by its obsession with the acontextual, the dispassionate, and the analytical.”). Additionally, the students’ lack of exposure to and engagement with social justice issues is compounded by the burdens of unprecedented educational debt, leaving many students unable to opt for a low-paying career that does not permit them to service their loans. *See* EQUAL JUSTICE WORKS ET AL., FROM PAPER CHASE TO MONEY CHASE: LAW SCHOOL DEBT DIVERTS ROAD TO PUBLIC SERVICE 6 (2002), *available at* <http://www.equaljusticeworks.org/choose/lrapurvey.pdf> (“Faced with staggering law school debt, many law school graduates must forgo the call to public service despite their interest and commitment to such a career.”).

81. The stereotype of a generic “welfare queen” may be most effectively countered by exposure to a real, live, struggling, complicated client. *See* Abbe Smith, *For Tom Joad and Tom Robinson: The Moral Obligation to Defend the Poor*, 1997 ANN. SURV. AM. L. 869, 878 (1997) (“The law school clinic provides the best opportunity for law students to connect with those in need . . .”).

82. There are barriers to the success of clinics in achieving this goal, as not all students enroll in clinics, and “clinical faculty are often accorded lesser status in the law school hierarchy, thus conveying a negative message about the value of public service work.” Kotkin, *supra* note 32, at 130.

83. Rhode, *supra* note 3, at 1023; *see also* Donald Patrick Harris, *Let’s Make Lawyers Happy: Advocating Mandatory Pro Bono*, 19 N. ILL. U. L. REV. 287 (1999) (arguing that public service work can serve as an antidote to lawyer dissatisfaction).

84. *See* Engler, *supra* note 33, at 150-51.

needs and inculcating a sense of professional responsibility. While these goals may suggest different trade-offs, the choices require thoughtful consideration.

## II. PROGRESSIVE LAWYERING THEORIES

Evaluating a law school clinical program's success in articulating and pursuing a social justice mission requires familiarity with some recent theoretical developments related to lawyering for justice. The underpinnings of progressive lawyering have evolved as the clinical education movement has matured. Although there is not complete accord as to the goals and methodology of social justice lawyering, a few trends are worthy of brief recitation. As with most issues, reducing the discussion to a few pages necessarily obscures the complexity, depth, scope and nuance of the issues. While this discussion is admittedly facile, it is intended primarily to provide the context for the critique of the clinic.

The section starts by establishing a working definition of social justice lawyering for the purposes of the clinic critique. Next, this section briefly discusses some of the limitations advocates encounter when they rely exclusively on rights-based approaches to advance social justice, and identifies advocacy efforts that encompass a broader set of strategies. This section concludes by discussing the widespread censure of the potentially disempowering nature of the attorney-client relationship that can run afoul of client empowerment and social justice strategies.<sup>85</sup> Much of the discussion about the relational dynamic between lawyers and clients is inextricably related to the criticism of the rights-based strategies in Section B, *infra*. The synthesis of these criticisms has propelled a movement toward a more inclusive, egalitarian, comprehensive community-based model of lawyering for social justice. The critique of Anti-Discrimination Clinic's ability to meet social justice goals in the next section is premised in part on the above-noted considerations.

### A. DEFINING SOCIAL JUSTICE LAWYERING

The terms public interest lawyering and social justice lawyering are often used interchangeably. While there is indeed overlap between them, both terms evade easy definition and consensus.<sup>86</sup> Rather than draw an

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85. Often, the criticism of lawyering efforts incorporates both strategic and relational concerns. For ease of presentation, I place the criticism in the section that best fits its focus.

86. See Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority*, Introduction to CAUSE LAWYERING, *supra* note 65, at 3, 5.

artificial or normative line between public interest and social justice lawyering, or wade into the debate about what type of lawyering qualifies for these labels, I prefer to characterize them as occupying different places on the continuum of lawyering for the public good. Ultimately, “[w]hether the pursuit of any particular cause advances the public interest is very much in the eye of the beholder.”<sup>87</sup> While it is not my intent to characterize an inclusive definition of public interest work pejoratively, some argue that:

While fine work for social justice continues to take place through public interest law firms and public interest organizations, the broad term “public interest law” no longer fully captures either the commitment to work on behalf of marginalized, subordinated, and underrepresented clients and communities or the value placed on transformation that characterizes lawyering for social justice.<sup>88</sup>

For purposes of clarity and simplicity, this article will rely Louise Trubek’s definition of “critical lawyering,” which she described as a strategy that “aims to provide subordinated groups with greater access to legal representation [to] . . . better promote social change.”<sup>89</sup> Simply put, for purposes of this analysis, “social justice lawyering” is premised on the commitment to work for marginalized clients.<sup>90</sup> This characterization envisions an agenda that addresses both procedural justice and more

87. STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 5 (2004).

88. MARTHA R. MAHONEY ET AL., CASES AND MATERIALS ON SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW 4-5 (2003).

89. Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in CAUSE LAWYERING, *supra* note 65, at 201, 203. Alternative labels include rebellious lawyering, equal justice lawyering, activist lawyering, critical lawyering, political lawyering and visionary lawyering. Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in CAUSE LAWYERING, *supra* note 65, at 31, 33. These generic definitions differ from “cause-specific” labels that denote a particular substantive area of practice, such as legal services, death penalty and environmental work. *Id.* For a more thorough discussion of the difficulties in defining social justice lawyering, or “cause lawyering,” see *id.* See also SCHEINGOLD & SARAT, *supra* note 87, at 3, in which the authors note that the definitional and conceptual underpinnings of cause lawyering are dependent on intent and culture-specific variables that are dynamic and disputed.

90. Compare Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2108-09 (2004) (discussing a definition of public interest lawyering based on low remuneration and noting the “legal profession’s habit of equating public interest with financial sacrifice”), with Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 730-31 (2001) (arguing that public interest work is characterized by lawyering on behalf of under-represented constituencies). Some now contend that there has been an “increasingly overinclusive label of ‘public interest law.’ . . . [C]onservative and reactionary advocates have effectively rearticulated and redeployed the term ‘public interest.’” John O. Calmore, “*Chasing the Wind*”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167, 1169 (2004) [hereinafter Calmore, *Chasing the Wind*].

ambitiously, substantive justice. The goal of procedural justice, defined loosely as the access to representation and courts that is integral to a fully functioning adversarial system, seems unlikely to generate significant discord.<sup>91</sup> Defining matters of substantive justice is a far more perilous enterprise. In its most radical form, demands for true substantive justice could be perceived to require disassembling the existing power structure in order to precipitate a redistribution of resources.<sup>92</sup> While I do not intend to critique the clinic's ability to completely overhaul all of society's structural inequities, I believe the social justice goals of a clinic should incorporate more than just technical access to the legal system. Moreover, sensitizing students to issues of equal justice is a critical element of encouraging social justice work. Accordingly, a clinical program should embrace a commitment to serve marginalized clients and simultaneously heighten student awareness about issues of equal justice.

#### B. LIMITATIONS OF STRATEGIES BASED EXCLUSIVELY ON LEGAL REMEDIES

Advocates have long analyzed and debated the most effective methods of achieving enduring, systematic relief for poor and subordinated clients and communities. Among the most prominent concerns articulated by progressive lawyers has been the disappointing results of law reform and social justice efforts that were premised exclusively on the rights-based approach of combining impact litigation and individual representation.<sup>93</sup> Many advocates concede that a reform strategy based exclusively, or even primarily, on litigation will ultimately be ineffectual in achieving enduring

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91. See, e.g., Calmore, *Chasing the Wind*, *supra* note 90.

92. *Id.* at 1175 (“[W]e must always keep our eyes on the prize of improving material conditions, dismantling structural inequality, disrupting systemic oppressions, and redistributing wealth. We must create more egalitarian institutions and we must erode illegitimately held privilege.”).

93. See STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 5 (2d ed., The Univ. of Mich. Press 2004) (1974) (“Legal frames of reference tunnel the vision of both activists and analysts leading to an oversimplified approach to a complex social process—an approach that grossly exaggerates the role that lawyers and litigation can play in a strategy for change.”); Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode's Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 *GEO. J. LEGAL ETHICS* 1019, 1024 (1998) (asserting that rights-based strategies cannot address structural inequalities); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 *HARV. C.R.-C.L. L. REV.* 407 (1995); Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 *COLUM. HUM. RTS. L. REV.* 67 (2000) (encouraging lawyers to expand strategies beyond rights-based approaches and adopt a community-based response); Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 *YALE L.J.* 256, 259-60 (2005).

social change.<sup>94</sup> “The consensus . . . seems to be that the role of litigation and the courts is very limited in producing meaningful social change but that [it] can play an essential part in the overall strategy of the social change agenda.”<sup>95</sup> Reflective advocates recognize the importance of methodically and meticulously analyzing how progressive lawyers can enact meaningful reform.

Historical failures have prompted lawyers to develop and experiment with new strategies aimed at achieving social change. Premised in part on empirical evidence demonstrating that representation in individual and impact cases was insufficient to effect widespread reform, many poverty lawyers now advocate a revised strategy that “take[s] on the task of securing systemic and institutional changes that would alleviate poverty itself.”<sup>96</sup> New strategies include multidisciplinary problem-solving, community economic development work, law and organizing, therapeutic jurisprudence and a shift toward a human rights framework.<sup>97</sup> Their

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94. Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 537 (1988) (“In this changed climate, where litigation no longer consistently produces systemic reform, poor people’s advocates must be creative and flexible in responding to their clients’ needs.”); see also FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE’S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* (1977) (arguing that litigation should be used as a mechanism to inspire and mobilize the constituencies it endeavors to empower).

95. Jeff Streiffer, *If You Can’t Get There from Here, Then That’s Not Where You Need to Go: Epistemological Priority, Cultural Action, and Lawyering for Social Change*, 19 HAMLINE J. PUB. L. & POL’Y 397, 399 n.8 (1997).

96. Stephen Loffredo, *Poverty Law and Community Activism: Notes from a Law School Clinic*, 150 U. PA. L. REV. 173, 178 (2001).

97. For further information on multi-disciplinary problem-solving, see, for example, V. Pualani Enos & Lois H. Kanter, *Who’s Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002) (describing a multidisciplinary approach to domestic violence at Boston Medical Center’s Domestic Violence Project); Louise G. Trubek & Jennifer J. Farnham, *Social Justice Collaboratives: Multidisciplinary Practices for People*, 7 CLINICAL L. REV. 227 (2000). For a discussion of community economic development work, see Scott Cummings, *Community Economic Development and the Legacy of Brown v. Board of Education*, 13 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 443, 443 (2004) (“[W]hereas the civil rights paradigm sought legal change through the medium of the courts, CED eschews courts altogether and seeks instead to facilitate community-based transactions designed to promote economic and political empowerment.”); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001) [hereinafter Cummings, *Progressive Politics*]; Laurie A. Morin, *Legal Services Attorneys as Partners in Community Economic Development: Creating Wealth for Poor Communities Through Cooperative Economics*, 5 UDC/DCSL L. REV. 125 (2000); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 207 (1997); Peter Pitegoff, *Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L.J. 275, 276-82 (1995); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999). For additional information on law and organizing, see Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001). Lastly, for further discussion of the



relevance to the critique of the law school's clinical program requires brief discussion of the first four approaches.

Recognizing that many problems faced by poor and marginalized client communities extend far beyond a discrete legal problem amenable to a purely legal solution, many advocates are developing approaches that include multidisciplinary problem-solving:

Newer lawyering models, which shift the focus from vindication of legal rights and injuries to creative problem solving, stress the need to transcend doctrinal areas, legal fora, and professional disciplines to fully address client problems. In increasing numbers, lawyers in both public interest and private practice settings are working collaboratively or cooperatively with professionals in other disciplines to address client problems in a more holistic, efficient, comprehensive, and cost-effective fashion.<sup>98</sup>

Multidisciplinary approaches bring together professionals with expertise in various areas to avoid isolating legal problems and lawyers from their broader context. This comprehensive approach to problem-solving endeavors to generate meaningful solutions to problems that cannot be solved by legal remedies alone.

Community Economic Development (CED) has also emerged as a means to alleviate poverty and empower marginalized communities. CED is based on the organizing principle that economic development is a necessary precursor to a comprehensive solution to poverty.<sup>99</sup> The CED model aspires to lift neighborhoods out of poverty by encouraging development through ventures in economically disadvantaged neighborhoods, with initiatives that solicit broad support from a diverse coalition of groups. This model promotes the alternative economic vision that "focus[es] on enlisting the political power of community-based

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shift to a human rights framework, see, for example, Leti Volpp, *Righting Wrongs*, 47 *UCLA L. REV.* 1815, 1833-36 (2000) (noting that lawyers are increasingly focusing on international human rights standards); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 *YALE J. INT'L L.* 505, 509 (2003) ("[H]uman rights lawyering can be considered the twenty-first century's manifestation of the original social justice mission of clinical legal education.").

98. Barry et al., *supra* note 17, at 65-66 (footnotes omitted).

99. See WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* 2-3 (2001) (defining the integral components of CED as "(1) efforts to develop housing, jobs, or business opportunities for low-income people, (2) in which a leading role is played by nonprofit, nongovernmental organizations (3) that are accountable to residentially defined communities").

coalitions of residents, labor union members, clergy, and other activists to challenge economic inequality and corporate dominance.”<sup>100</sup>

The critical appraisal of law reform efforts in the early 1990s also triggered a revitalized progressive model that underscores the importance of fusing grassroots community involvement with legal advocacy.<sup>101</sup> Adherents of “law and organizing” stress the need to concentrate on cultivating broad-based social movements as integral to meaningful and enduring social change. Implicit in the structure of these social change organizations is that they are democratically run and scrupulously avoid privileging lawyering tasks above other efforts at mobilization.<sup>102</sup> In fact, for some theorists, “lawyers are ancillary to the definition and implementation of a transformative agenda.”<sup>103</sup> Many exalt the law and organizing model as an ideal fusion of contemporary progressive lawyering models and social movement theory aimed at combating the pervasive and intractable nature of social and economic injustice.<sup>104</sup>

Another frequently articulated criticism of litigation-based strategies is that they fail to identify, acknowledge and attend to the emotional needs of clients. A response to those concerns is reflected in the relatively new field of Therapeutic Jurisprudence, which exhorts lawyers to be mindful of the emotional and psychological consequences of a client’s interactions with the law and legal system. Therapeutic Jurisprudence is just one of a variety of approaches to lawyering which “seek to broaden traditional conceptions

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100. Cummings, *Progressive Politics*, *supra* note 97, at 405. “Under this new approach, CED is reconceptualized as a progressive political strategy that fuses legal advocacy and grassroots organizing to achieve broad-based economic reform.” *Id.* at 408; *see also* Morin, *supra* note 97, at 130-31.

101. Community organizing is obviously not a new concept. Saul Alinsky pioneered community organizing as a strategy in the 1930s. *See* SAUL D. ALINSKY, *REVEILLE FOR RADICALS* (1946); SAUL D. ALINSKY, *RULES FOR RADICALS: A PRAGMATIC PRIMER FOR REALISTIC RADICALS* (1971). As proponents of community organizing efforts have more recently noted:

Legal services programs can improve the quality of their service by establishing community-based programs which emphasize closer links with community groups and community institutions. By moving in this direction, legal services programs will be better situated to mobilize community resources and reflect community priorities. A community-based program will avoid the top-down, lawyer-dominated priorities that we believe now exist.

Brescia et al., *supra* note 53, at 832. For other commentaries calling for the expansion of strategies to ameliorate poverty see, for example, Steve Bachmann, *Lawyers, Law, and Social Change*, 13 N.Y.U. REV. L. & SOC. CHANGE 1 (1984); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L. J. 1049 (1970).

102. *See* Cummings & Eagly, *supra* note 97, at 467 (stating that lawyers should also use “organizing techniques” to empower client communities, instead of relying solely on lawyering skills).

103. *Id.* at 447.

104. Another proponent of law and organizing is Stephen Loffredo, who chronicled the efforts of the City University of New York and the Welfare Rights Initiative to craft a “purposefully structured, mutually reinforcing interaction between legal advocacy, law reform, and grassroots activism in the poverty context.” Loffredo, *supra* note 96, at 177.

of the legal profession by adding an interdisciplinary, psychologically oriented paradigm that concerns itself with client needs and emotional well-being as well as rights.”<sup>105</sup>

In collaboration with partners from other disciplines and members of the communities in which they work, progressive lawyers are experimenting with a variety of innovative approaches aimed at achieving equal justice. These strategies should inform clinical pedagogy when social justice lawyering is an explicit goal.

### C. RECONCEPTUALIZING THE ATTORNEY-CLIENT DYNAMIC

The emergence of theories extolling explicitly political-activist lawyering often combines the goals of providing access to justice and meaningful social change with attention to ensuring that clients are not subordinated by the dynamics of the attorney-client relationship. The last few decades have witnessed the proliferation of “extensive literature stressing the importance of a more egalitarian collaboration between attorneys and lower-income clients.”<sup>106</sup> The genesis of this self-reflection was sparked by post-modern critics who turned their attention to the methodology of poverty lawyers, scrutinizing the disempowering interpersonal dynamics of the attorney-client relationship and the broader social context in which lawyers practice.<sup>107</sup> Under a more egalitarian paradigm, an activist lawyer “not only interacts with the client on a non-hierarchical basis, but also participates with the client in the planning and implementation of strategies that are designed to build power for the client and allow the client to be a repeat player at the political bargaining table.”<sup>108</sup>

The conception and behavior of lawyers as domineering experts has been frequently assailed. The first critics who received widespread acclaim

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105. Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 433 (2005). Other approaches include Holistic Lawyering, Collaborative Lawyering, Preventive Law, Restorative Justice, Creative Problem-Solving, Transformative Mediation and Problem-Solving Courts. *See id.*; *see also* Keri K. Gould & Michael L. Perlin, “Johnny’s in the Basement/Mixing Up His Medicine”: *Therapeutic Jurisprudence and Clinical Teaching*, 24 SEATTLE U. L. REV. 339 (2000); Mary Berkheiser, *Frasier Meets CLEA: Therapeutic Jurisprudence and Law School Clinics*, 5 PSYCHOL. PUB. POL’Y & L. 1147 (1999).

106. Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 432 (2000).

107. Cummings & Eagly, *supra* note 97, at 456-58.

108. Diamond, *supra* note 93, at 109; *see also* Cummings & Eagly, *supra* note 97, at 469 (discussing how law and organizing “foster[s] client empowerment and achieve[s] important client victories”).

were Binder and Price (later Binder, Price and Bergman), who proposed client-centered counseling as an alternative relational dynamic in 1977.<sup>109</sup> Their perspective revolutionized the way some lawyers conceptualize and structure their client interactions.<sup>110</sup> Binder et al. emphasized the primacy of client empowerment and autonomy, criticizing the traditional model of attorney-client interaction as oppressive. They argued that decision-making, both as to the goal of representation and the method by which it is achieved, should devolve to the client.<sup>111</sup> The model of client-centered lawyering resonates partially because it is the clients who live with the outcome of strategic and substantive choices and, as such, they should be vested with the power to make those decisions. Moreover, from a philosophical standpoint, it is critical to reject attorney paternalism and domination.<sup>112</sup> Aside from the lofty ideals of client autonomy, clients have much to contribute to the case, as they are most intimately familiar with the circumstances and context in which the problem arises.<sup>113</sup>

In rallying attorneys to challenge the traditional model of attorney omnipotence and client subordination, Gerald Lopez championed “rebellious lawyering.” Lopez encouraged lawyers to discard the model of lawyering he characterizes as “regnant” and adopt a more empowering dynamic that encompasses a community-based approach to reform.<sup>114</sup>

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109. See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977).

110. See, e.g., Robert D. Dinerstein, *Clinical Texts and Contexts*, 39 *UCLA L. REV.* 697 (1992) (reviewing DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (1991); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, *INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION* (1990)).

111. Piomelli, *supra* note 106, at 437 (“[The client-centered model] urged lawyers to hone their interpersonal skills, recognize the non-legal (especially emotional) dimensions of legal problems, and give clients the necessary information and power to make informed choices on significant decisions.”). Piomelli notes that this model presupposes advocacy in the context of cases. See *id.* at 438.

112. Some critics contend that the Binder model goes too far in avoiding lawyer paternalism and dominance by exhorting lawyers to refrain from giving advice, lest they exert undue influence over vulnerable and impressionable clients. See generally Donald G. Gifford, *The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy in the Negotiation Context*, 34 *UCLA L. REV.* 811, 816-22 (1987); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501 (1990).

113. Justine A. Dunlap, *I Don't Want to Play God—A Response to Professor Tremblay*, 67 *FORDHAM L. REV.* 2601, 2610-11 (1999).

114. See Gerald P. Lopez, *Lay Lawyering*, 32 *UCLA L. REV.* 1 (1984); Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 *GEO. L.J.* 1603 (1989); Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 *W. VA. L. REV.* 305 (1989); see also GERALD P. LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (Robert W. Gordon & Margaret Jane Radin eds., 1992) [hereinafter LOPEZ, *REBELLIOUS LAWYERING*].

Many others echo the call for community-based lawyering.<sup>115</sup> Anthony Alfieri expanded the dialogue about client-centered lawyering, highlighting the manner in which traditional interactions between attorney and client replicate the oppressive dynamics imposed on marginalized communities more broadly. He further decried the shortcomings of the traditional poverty law strategies that combine individual representation and impact litigation, but failed to enact any sustained reform. Instead, Alfieri suggested that poverty lawyers transform their practice to focus on strategies aimed at mass mobilization, consciousness-raising and empowerment of marginalized people. Espousing a model of “dialogic empowerment” to combat the subordination inherent in the traditional model of representation,<sup>116</sup> Alfieri advocates collaborative lawyering, a style that envisions a dynamic even more acutely sensitive to the attorney-client dynamic than that advanced through client-centered lawyering.<sup>117</sup> Building on those alternative lawyering theories, Marsico championed “facilitative lawyering,” characterized by its client-directed function and its determination to avoid over-politicizing issues at the cost of individual client goals.<sup>118</sup>

Michael Diamond offers a friendly critique of the collaborative, client-centered and facilitative lawyering models, in which he reproaches their focus on process at the expense of substantive outcome.<sup>119</sup> Diamond argues that characterizing the dynamic between lawyer and client as paramount often reduces problems to discrete legal and relational issues, disregarding the broader context in which those challenges arise.<sup>120</sup> Other critics have noted that while dissecting the nature of the attorney-client

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115. See John O. Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1936-37 (1999) (“Left-activist, non-regnant cause lawyering must first be community-based, because the poverty we confront is primarily situated at the intersection of race, space, and poverty. . . . Community, here, is not a romantic abstraction, but rather the site of material deprivation and relations that are formed to cope with oppressive circumstances.”).

116. See Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 *N.Y.U. REV. L. & SOC. CHANGE* 659, 695-711 (1987); see also Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *YALE L.J.* 2107 (1991) [hereinafter Alfieri, *Reconstructive Poverty Law*] (arguing that lawyers should exercise caution to avoid silencing client voices in framing and editing stories to fit in with the conventions of legal advocacy, a practice that often extracts elements of client dignity); Anthony V. Alfieri, *Speaking Out of Turn: The Story of Josephine V.*, 4 *GEO. J. LEGAL ETHICS* 619 (1991) (noting that client participation is integral to avoiding attorney paternalism and domination).

117. Piomelli, *supra* note 106, at 438-39.

118. See Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for “Facilitative” Lawyering?*, 1 *CLINICAL L. REV.* 639, 639-40 (1995).

119. See Diamond, *supra* note 93.

120. See *id.* at 77-78.

relationship is a worthy endeavor, the exercise is of limited utility. Diamond asserts that much of the scholarship regarding the attorney-client dynamic has not resonated beyond the ivory tower of the academy. The emphasis on the disempowering nature of attorney-client interactions has engendered some hostility between academics and practicing lawyers, who resent that their professional and political efficacy, premised on “progressive lawyering,” is consistently questioned.<sup>121</sup> Moreover, the focus on micro-interpersonal dynamics comes at the expense of more urgent demands to pursue some measure of permanent relief for marginalized clients.<sup>122</sup> Diamond opines that effective advocacy on behalf of subordinated populations requires far more, and he espouses activist lawyering as the most effective model, noting that “[t]oo often, . . . attorneys who serve poor communities see their function as closely approximating the traditional model: as serving individuals with problems that are readily susceptible to purely legal intervention.”<sup>123</sup> In his view, addressing problems that “are chronic, political and economic, rather than acute and traditionally legal,”<sup>124</sup> requires a more systemic and comprehensive response.<sup>125</sup>

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121. Gary L. Blasi, *What's a Theory For?: Notes on Reconstructing Poverty Law Scholarship*, 48 U. MIAMI L. REV. 1063, 1088 (1994) “Resistance stiffens further when practitioners perceive the critical messages as floating down from the serene heights of law schools in voices that seem haughty, hostile, distant, and distinctly uninterested in dialogue.” *Id.* at 1088-89. Blasi wryly observes the irony that critics of silenced-client narratives ignore the effect of disregarding “poverty-lawyer narrative[s].” *Id.* at 1089. He further notes that a risk of post-modernism is that it precludes an orchestrated and strategic response to the ramifications of collective narratives, and cautiously stresses the utility of meta-theory. *Id.* at 1093-94. Blasi cites Barbara Bezdek’s work in a Baltimore housing court, in which she went beyond amplifying individual silenced voices to generalize from compiled client experiences, in order to search for more comprehensive solutions to systemic problems facing clients. *Id.* at 1091-92.

122. Blasi commented in 1994 that a significant amount of scholarship focused on the attorney-client relationship to the detriment of larger issues: “The implicit suggestion is that the main problem faced by poor and subordinated people is not unemployment, illness, hunger, homelessness, degradation, or racist oppression, but rather the ‘interpretive violence’ done to their narratives by poverty lawyers.” *Id.* at 1089; see also Lucie White, *Paradox, Piece-Work, and Patience*, 43 HASTINGS L.J. 853, 858 (1992) [hereinafter White, *Paradox*] (criticizing Alfieri’s client-centered approach for “shift[ing] our attention away from . . . other kinds of violence” facing impoverished communities).

123. Diamond, *supra* note 93, at 75.

124. *Id.* at 76.

125. See *id.* at 77-78. In response to the criticisms leveled at members of the practicing bar, some practitioners concede the limits of legal strategies but bristle at the suggestion that their work on behalf of individual clients is inconsequential merely because it lacks global impact or because it relies primarily on legal remedies. Paul Tremblay acknowledges that traditional lawyering efforts on behalf of the poor have had mixed and limited success. He notes, however, that traditional poverty lawyering strategies have been continually dissected and modified. See Paul R. Tremblay, *Acting “A Very Moral Type of God”: Triage Among Poor Clients*, 67 FORDHAM L. REV. 2475 (1999). In contrast, the long-term efficacy and impact of the more recent mobilization efforts are more speculative in nature. *Id.* at 2478; see also Dean Hill Rivkin, *Reflections on Lawyering for Reform: Is the Highway Alive Tonight?*,

#### D. OVERARCHING THEMES IN PROGRESSIVE LAWYERING

As evidenced by the evolving and competing theories, many areas overlap, but neither progressive lawyers nor clinicians endorse a monolithic empowerment strategy for marginalized communities and clients. Despite the lack of consensus, certain themes recur, including the need to leverage change for low-income constituencies by augmenting the historical tools of individual and impact litigation with more community-based strategies. Intrinsic to a more inclusive and empowering approach to social justice lawyering is the need to reconceptualize the nature of the attorney-client relationship. Moreover, many lawyers have adopted an approach that encompasses a holistic approach to alleviating client problems. As lawyers and clinicians continue to explore, assess and refine their empowerment strategies, it is critical to chronicle these self-reflective experiences through reflective and empirical scholarship. As this scholarship matures, the lessons learned should be accessible to the diverse constituencies clinicians seek to integrate into comprehensive law reform efforts.

#### III. THE ANTI-DISCRIMINATION CLINIC: DESCRIPTION AND CRITIQUE OF THE MODEL

The prior sections have noted the history and importance of a social justice mission within clinical education, as well as widespread calls for improved access to justice and a tilt toward more comprehensive, holistic anti-subordination strategies. Accordingly, a law school's clinical program should devote some institutional resources toward advancing a social justice mission, imparting skills and values consistent with that goal, and energizing law students to commit time toward public interest lawyering. As self-reflective practitioners, we must carefully analyze the theories that inform our clinical pedagogy and structure, make enlightened and intentional choices about competing priorities, and critically reflect on whether our clinic choices are designed to maximize those overarching goals.<sup>126</sup>

In the Anti-Discrimination Clinic, the law school's in-house civil clinic, the students served as volunteer counsel to a state administrative agency, assisting MCAD prosecute violations of the state anti-discrimination laws. Section A describes MCAD's mission and relevant procedures. Next, Section B critiques the clinic, first describing the Anti-

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64 TENN. L. REV. 1065 (1997) (arguing that it is elitist to denigrate lawyers who pursue rights-based strategies for individual clients).

126. See Piomelli, *supra* note 106, at 514 (discussing the "reflective practitioner").

Discrimination Clinic's ability to provide opportunities in skills training and exposure to issues of ethics and professionalism, and then evaluating whether this model advanced social justice goals. This Section concludes that the model had flaws that impeded the law school's ability to maximize social justice goals. Finally, Section C situates the critique within the broader clinical program of the law school; it notes that the clinic's shortcoming was particularly troubling given that none of the law school's other clinical offerings professed an explicit focus on social justice.

Although the polemic surrounding whether lawyers who work for the government engage in social justice work is arguably relevant to this analysis, it is not the focus of this discussion. Nevertheless, it warrants brief mention. For many attorneys, working for the government, or working in a practice area that is not exclusively situated within the private sphere, fits squarely within a conception of lawyering for the common good and, as such, qualifies as public interest lawyering.<sup>127</sup> As others have noted, prosecutors handling domestic violence cases, hate crimes, impaired driving cases, tax and securities fraud, and environmental violations are considered by many to be practicing for the public good and, accordingly, engaging in public interest work.<sup>128</sup> However, much has been written about the challenges agency lawyers face in defining and vindicating the public interest.<sup>129</sup> Indeed, some have argued that by their nature, governmental agencies face significant structural challenges to fulfilling their public service mission. Moreover,

[s]ome critics of the ["public interest serving"] role for government attorneys argue that government attorneys cannot work to pursue the public interest because the very concept of a "public interest" is unintelligible and cannot provide a workable guidepost for government

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127. See Russell Engler, *From the Margins to the Core: Integrating Public Service Legal Work into the Mainstream of Legal Education*, 40 *NEW ENG. L. REV.* 479, 493 (2006) ("Many people . . . simply believe that regardless of the terminology, government work is public service and/or public interest.").

128. See Luize E. Zubrow, *Is Loan Forgiveness Divine? Another View*, 59 *GEO. WASH. L. REV.* 451, 501-03 (1991) (arguing that the definition of public interest lawyering should include government lawyers that represent the "public at large"); see also Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 *LAW & CONTEMP. PROBS.* 193, 204 (1995) ("defin[ing] public interest law broadly").

129. See generally Steven K. Berenson, *The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 *BRANDEIS L.J.* 13 (2003); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 *WIDENER J. PUB. L.* 235 (2000).



attorneys with regard to the choices and decisions that they must make in their professional roles.<sup>130</sup>

In addition to the definitional challenges, government lawyers' decision-making process in individual cases is necessarily influenced by a number of factors, including resource allocation and politics.<sup>131</sup> As noted by one commentator, another "vexing problem . . . is how to think about the professional responsibilities of government lawyers. The problem arises because of the tension between the government lawyer's public role and the private relationship basis of traditional conceptions of legal ethics."<sup>132</sup>

MCAD is charged with enforcing the state's anti-discrimination laws and eradicating discrimination. In serving victims of discrimination, many of whom represent historically underserved constituencies, the agency has a clear and important public interest mission. Moreover, state participation in the enforcement of civil rights through regulatory agencies in some ways sets MCAD apart from other administrative agencies that may be at greater risk of agency "capture."<sup>133</sup> However, it is beyond the scope of this paper to make sweeping judgments about the efficacy of either administrative agencies generally or MCAD specifically in promoting social justice. Instead, the discussion is focused on the administrative agency as the location for clinical work with explicit social justice goals. While this distinction may seem inconsequential, goals of clinical pedagogy add a distinctly different element to the analysis. The discussion below is limited to an evaluation of situating a clinic with explicit social justice goals within an administrative agency, as well as critiquing other skills and values-based considerations.

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130. Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789, 790 (2000) (analyzing the tension between the professional responsibilities of government lawyers and proposing a paradigm that fuses both the agency loyalty and public interest models).

131. See Richard Abel, *Civil Rights and Wrongs*, 38 LOY. L.A. L. REV. 1421, 1425 (2005) ("Government agencies (state attorneys general, city attorneys, prosecutors, the EEOC, and state and city anti-discrimination bodies) are constrained and shaped by inadequate resources, bureaucracy, and career incentives.").

132. Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170, 1170 (2002).

133. See generally Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

## A. THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

MCAD<sup>134</sup> is the state agency charged with safeguarding equal opportunity by enforcing the state's anti-discrimination laws in employment, housing, public accommodations, credit, mortgage lending and education.<sup>135</sup> The agency has the authority to receive, investigate and adjudicate complaints of unlawful practices.<sup>136</sup> In order to file a civil claim alleging discrimination, a claim must first be filed with MCAD.<sup>137</sup> Assuming the case meets jurisdictional requirements, MCAD assigns an investigator to probe the allegations.<sup>138</sup> After completing the investigation, the investigator must determine whether there is probable cause to believe that the respondent engaged in discriminatory conduct.<sup>139</sup> If MCAD issues a Probable Cause Finding, the investigator "endeavor[s] to eliminate the unlawful practice" through a process of "conference, conciliation and persuasion."<sup>140</sup> Once an investigator issues a Probable Cause Finding, MCAD departs from its neutral, investigative function to assume a partisan role, and Commission Counsel is assigned to present the case on behalf of MCAD.<sup>141</sup> If efforts to settle the case through conciliation are unsuccessful, MCAD assigns an investigating Commissioner who can authorize "post-determination discovery,"<sup>142</sup> which can include

134. See MASS. GEN. LAWS ANN. ch. 6, § 56 (West 2004); see also *id.* ch. 151B, § 2.

135. See *id.* ch. 151B, § 4 (unlawful employment and business practices); *id.* ch. 151C, § 2 (unfair educational practices); *id.* ch. 272, §§ 92A, 98 (unlawful public accommodation practices); *id.* ch. 149, § 105A (unlawful wage practices). Under a work-sharing agreement with the EEOC, MCAD also processes cases that arise under certain federal statutes. See *id.* ch. 151B, § 6. Also, there is a parallel enforcement structure which allows complainants and, in certain circumstances, respondents to remove the case from MCAD to the court system. *Id.* ch. 151B, § 9.

136. *Id.* ch. 151B, § 3(6). Note that while MCAD has the power to engage in rulemaking, investigation and adjudication, the EEOC—MCAD's federal analog—has only investigative and adjudicative authority. *Id.* ch. 151B, § 3(5)-(7).

137. *Id.* ch. 151B, §§ 5-6. Under the work-sharing agreement with the EEOC, complaints arising under federal anti-discrimination laws must first be filed with MCAD, but complainants can then elect to have the case processed by the EEOC. See *id.*

138. *Id.* ch. 151B, § 5; see 804 MASS. CODE REGS. 1.10(7)(b) (1999). The investigative process prior to a determination that "Probable Cause" exists depends on whether both parties are represented by counsel. See 804 MASS. CODE REGS. 1.13(7) (1999).

139. 804 MASS. CODE REGS. 1.15(7)(a) (1999).

A finding of Probable Cause shall be made when, after appropriate investigation, the Investigating Commissioner concludes that there is sufficient evidence upon which a fact-finder could form a reasonable belief that it is more probable than not that the respondent committed an unlawful practice. In making this determination, disputes involving genuine issues of material fact are to be reserved for determination at hearing.

*Id.*

140. MASS. GEN. LAWS ANN. ch. 151B, § 5 (West 2004).

141. See 804 MASS. CODE REGS. 1.09(5)(a) (1999). Represented complainants may move to have private counsel prosecute the case as MCAD's agent. *Id.* § 1.09(5)(c).

142. *Id.* § 1.19.

interrogatories, document subpoenas and depositions.<sup>143</sup> After discovery has been completed, the parties may request a Certification Conference, in which the Commissioner determines whether administrative adjudication of the case is in the public interest.<sup>144</sup>

In the clinic, students served as Volunteer Commission Counsel and typically undertook representation in the cases after a finding of probable cause had been issued, first appearing in the case at the conciliation stage. Under this model, the agency, rather than the complainants, was the clinic's "client." At the time I analyzed the program, the clinic docket consisted primarily of employment discrimination cases, but also included housing, education and public accommodation cases.

#### B. CRITIQUE OF ANTI-DISCRIMINATION CLINIC MODEL

In critiquing the Anti-Discrimination Clinic model, the article evaluates issues of general clinical pedagogy as well as the clinic's success in articulating and advancing a social justice mission. Under that general rubric, the article addresses aspects of the clinic that range from prosaic to overarching. Not all areas of appraisal can be neatly characterized as either positive or negative, as often there are advantages and disadvantages of a particular attribute. The first three sections of this critique address areas of general clinical pedagogy. Subsection 1 begins with a description of the general administrative considerations of the clinical construct. Subsections 2 and 3 discuss the skills training and professionalism opportunities. The final three subsections focus on social justice concerns. Subsection 4 discusses how the clinic satisfied considerations of access to justice and multicultural sensitivity. Subsection 5 uses the criticisms of rights-based strategies to evaluate the clinic's ability to satisfy social justice goals. Subsection 6 then analyzes the implications of exposing students to the attorney-client dynamic under a model where the students owed their professional loyalty to an agency, rather than to individual clients. Finally, Subsection 7 summarizes these findings, concluding that the MCAD model did not adequately pursue social justice objectives.

As noted earlier, the critiques of rights-based strategies and historical conceptions of the attorney-client relationship are inextricably intertwined. I artificially separate them for purposes of clarity. The following discussion focuses on the limitations of situating a clinic with explicit social justice goals within an administrative agency and discusses other

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143. *Id.* §§ 1.13(2), 1.14(2).

144. *Id.* § 1.20(3) (2004).

skills and values-based considerations. Ultimately, distinct advantages accrued from our role as Commission Counsel, especially the ability to teach practical skills, ethics and professionalism. However, the model was less successful in advancing a social justice mission. Admittedly, many of the criticisms leveled in the sections on social justice are applicable to many clinics. Nevertheless, the impossibility of constructing a clinic that satisfies all goals should not preclude a critical and comprehensive assessment of each model's merits and shortcomings.

### 1. General Administrative Issues

The Anti-Discrimination Clinic offered several practical, logistical and administrative benefits. While these concerns may seem mundane at first blush, clinical pedagogy is only as effective as the actual experiences it consistently offers to students. In the clinic, working with the state enforcement agency eliminated any pressure on the clinic to maintain a public presence in order to generate cases.<sup>145</sup> Moreover, because the agency conducted the initial case intake and the clinic did not need to conduct screening for income or other eligibility, the students spent more of their time working on cases that at least initially appeared to be meritorious.<sup>146</sup> Because the clinic and MCAD enjoyed a collegial institutional relationship, the two parties engaged in an ongoing, constructive dialogue as to how best balance the competing interests of maximizing the learning opportunities for the students and providing a public service to the agency. MCAD accommodated the time constraints associated with an academic schedule by attempting to expedite the scheduling of motions and hearings, thus increasing opportunities for students to develop a case and shepherd it through significant progress during the semester.<sup>147</sup> Moreover, the scheduling staff at MCAD endeavored to accommodate the law school's summer hiatus in order to

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145. In fact, one could argue the agency has a captive audience. In order to file a lawsuit, cases must initially be filed with the agency, although they can be subsequently removed to state court. MASS. GEN. LAWS. ANN. ch. 151B, § 9 (West 2004).

146. Arguably, students develop critical evaluation skills by conducting intake interviews and initial case assessments. Given the small number of cases filed with MCAD that meet the probable cause requirement, I believe that the students were better off receiving pre-screened cases. However, by first appearing in cases after the initial complaint had been framed, the students lost critical opportunities to develop case theory.

147. Obviously, opposing counsel can elect to obstruct the progress irrespective of MCAD's best efforts to move a case along.

minimize the clinic's obligation to provide full-time ongoing coverage, allowing me more time to conceptualize and develop other projects.<sup>148</sup>

Despite these advantages, when I first took over the clinic, a number of administrative difficulties demanded prompt attention.<sup>149</sup> The clinic had transitioned from a one-semester program to a two-semester program, which enhanced the continuity of case-handling. Unfortunately, the clinic's expansion had an initial impact on the availability of cases at the appropriate procedural posture for clinic representation.<sup>150</sup> Given the varied availability of suitable cases from the Commission Counsel's litigation docket, which fluctuated between overwhelming and insufficient, I enjoyed little discretion in selecting the most pedagogically appropriate cases. Moreover, the clinic appeared in cases based on investigations we did not conduct and that were completed and processed by the chronically overworked and under-sourced investigative staff.<sup>151</sup> Not infrequently, a

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148. MCAD's efforts at cooperative scheduling were not always successful with regard to summer scheduling dates and case obligations.

149. In addition to seeking to enhance the clinic within the confines of the MCAD structure, I explored other opportunities that would supplement our role as Volunteer Commission Counsel, while still maintaining overall instructional coherence. In the fall of 2000, I was appointed Special Assistant Attorney General, with the expectation that the clinic would assist the Attorney General's office in prosecuting a number of housing discrimination cases, in addition to conducting community training on the Massachusetts Hate Crimes Law. Unfortunately, the Attorney General's docket consisted of only seven housing discrimination cases, a few of which settled and others which were subject to interminable delays. Moreover, the school system in which we expected to conduct the training was initially resistant, so we were unable to schedule any training sessions. It became apparent that this would not develop into either a consistent or sufficient source of appropriate work.

150. Due to a chronic backlog at the agency, cases were always abundant. However, many cases were delayed in the predetermination investigative stage, prior to the clinic's involvement. For a discussion of the ramifications of this backlog, see Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKC L. REV. 643, 654-55 (2005) (analyzing, from the plaintiff's perspective, whether antidiscrimination laws were effective in combating workplace discrimination on the basis of sexual orientation and noting that inadequate resources at MCAD constructed a significant impediment to achieving justice). Lester specifically notes that "beginning in the mid-1980's, state budgetary restrictions forced major cutbacks at a time when the number of complaints was steadily increasing." *Id.* (quoting 1996 MASS. COMM'N AGAINST DISCRIMINATION ANN. REP. 8). "This problem became further magnified by the inclusion of anti-disability and sexual orientation discrimination provisions . . . and the dramatic increase in sexual harassment claims . . ." *Id.* at 655. Lester concludes that the backlog "remained a significant challenge," *id.* at 655, arguing that a "discrimination law that does not have a sufficient budget to fund its enforcement has no teeth." *Id.* at 654.

151. Whether by design, inadvertence or necessity, MCAD was hamstrung by inadequate staffing, funding and resources, which impeded the agency's ability to pursue a proactive agenda to eradicate discrimination. MCAD must determine whether conducting a public hearing is in the public interest, while considering, among other things, resource issues. If the agency concludes that a hearing is not in the public interest, MCAD may then dismiss the complaint, thereby leaving unrepresented and indigent complainants with no opportunity to avail themselves of the court system. One could argue that allowing the agency to rely on students for work decreased pressure on the legislature to adequately

more thorough review of a case revealed a lack of merit, yet we usually felt obligated to proceed with conciliation and discovery rather than trigger a reversal of a recent decision.<sup>152</sup> Because we owed our allegiance to the agency and its priorities, our autonomy was necessarily constrained. As with many hybrid clinics, there was occasional tension as we navigated between the educational needs of the students and the pressure on the agency to process cases more quickly than was reasonable given their enormous caseload.<sup>153</sup>

## 2. General Clinical Pedagogy/Skills Training

The Anti-Discrimination Clinic fulfilled a variety of general pedagogical objectives common to many clinics. The clinic provided opportunities for students to practice a range of fundamental lawyering skills enumerated in the MacCrate Report,<sup>154</sup> including interviewing, counseling,<sup>155</sup> fact investigation, negotiation, and discovery planning and execution.<sup>156</sup> The training in these areas benefited the large number of

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fund the agency; but given the political climate at the time, I suspected that no additional resources would be allocated irrespective of the clinic's involvement.

152. Mechanisms were in place that would allow for a reconsideration of the initial probable cause finding, but in practice, it seemed impolitic to reverse the finding before the discovery process had been completed. In real practice, students will invariably confront the fact that, despite their best efforts to screen and investigate potential clients, cases unravel for reasons beyond their control. It was educational for students to understand that cases often develop very differently from the path suggested by their initial assessment, which encouraged them to consider what constitutes an informed and accurate preliminary assessment. Students must learn to advocate, marshal the evidence and move forward even in the face of weak cases. However, in a different clinical construct, we would be able to exercise greater control over information elicited during initial intake and conduct some investigation and legal research before committing to ongoing involvement in a case.

153. As with many challenges that arise in clinical education, this tension created teaching opportunities. In many hybrid clinics, opportunities for reflection and institutional critique are enhanced by the students' exposure to the inner machinations of the agency. In this clinic, although students served as volunteer agency counsel, they were not integrated into the agency milieu. Depositions, meetings with clients and other case activities were conducted at the law school clinic building rather than the MCAD office, and student interactions with MCAD staff were primarily limited to communications regarding scheduling, conferences, hearings and attending conciliations. Students therefore had a role similar to that of private counsel interfacing with the agency.

154. See MACCRATE REPORT, *supra* note 35, at 138-40 (listing fundamental lawyering skills).

155. Because students were counseling agency complainants rather than clients with whom they had an attorney-client relationship, they did not always practice the widely preferred client-centered counseling methods.

156. Theoretically, students had the opportunity to practice trial skills by presenting their cases at public hearing. However, given the pressures on the agency to settle cases and the nature of civil litigation generally, most of the cases were resolved in advance of the hearing. In practice, only four cases were adjudicated at a hearing over the seven semesters. The vast majority of student work involved interviewing complainants immediately after a finding of probable cause, preparing a memorandum of damages, engaging in the conciliation and subsequent negotiations, and conducting discovery, including interrogatories and depositions. Arguably, engaging in a wide variety of tasks

WNEC graduates who went on to work in solo or small firm practices, where they immediately assumed case responsibility with little or no mentoring, thus enhancing the likelihood that they provided competent representation.<sup>157</sup> The ABA notes that “students who expect to enter practice in a relatively unsupervised practice setting have a special need for opportunities to obtain skills instruction.”<sup>158</sup> The clinic also provided a forum and context for the classic clinical goals of examining the application of doctrine to real life situations, allowing students to act in the role of a lawyer, critiquing the law and legal institutions, imparting the habit of self-reflective lawyering and introducing students to general practice management issues.

### 3. Professionalism and Ethics

The clinic allowed students to explore issues of ethics and professionalism in real-world situations, under the strains of law practice.<sup>159</sup> Immersion in full-blown adversarial proceedings forced students to confront the unanticipated stresses, conflicts and tensions attendant to adversarial lawyering that are wholly distinct from the pressure they face in a traditional classroom setting.<sup>160</sup> Students were exposed to attorneys who conducted themselves with integrity and civility, as well as those who employed scorched-earth litigation tactics.<sup>161</sup> The students’

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deprives students of the opportunity to practice one skill with sufficient repetition to truly refine that skill. However, irrespective of the particular skill being practiced, I strived to emphasize self-reflection as a habit that students should cultivate throughout their careers as a lawyer, enabling them to engage in ongoing professional development. See Aiken, *supra* note 5, at 289, who comments:

We have learned that if we can teach our students, at best, how to reflect on their experience, engage in meaningful self-criticism and learn lessons on their own, then we have accomplished a great deal. We have launched the student on [the] way toward being that skillful lawyer we would like to produce.

157. See Steven C. Bahls, *Preparing General Practice Attorneys: Context-Based Lawyer Competencies*, 16 J. LEGAL PROF. 63, 63-64 (1991).

158. MACCRATE REPORT, *supra* note 35, at 330.

159. See Melissa L. Breger et al., *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 308-9 (2003) (describing professionalism as fluid and contextual, and noting that “clinical legal education, with its convergence of theory and real-world practice, provides an ideal opportunity for teaching professionalism and ethics to students in meaningful ways”).

160. See Rose, *supra* note 75, at 451. “The professional identity of many law students begins to emerge in the reflective environment of clinics,” *id.*, making it imperative that clinical professors strive to model professional, self-reflective behavior. See *id.*

161. Although I encourage students to develop their own conceptions and standards of professionalism, I am often surprised by the degree to which they were tempted to adapt their style to that modeled by opposing counsel, particularly when that style is combative and insolent. I encourage students to explore whether adjusting their standards of professionalism and courtesy to those of their adversary perpetuates the very aspects of lawyering despised by both the bar and the public.

exposure to issues of professional reputation was enhanced because the Springfield MCAD office is small, and many attorneys carrying substantial MCAD caseloads appear there with regularity. On a purely pragmatic level, students knew that the clinic was a repeat player in a small legal community, and this realization enhanced their understanding of the importance of cultivating and maintaining a reputation of professional and ethical behavior, both for individual cases and for their long-term effectiveness while advocating in that venue. Students also had the opportunity to explore and develop their own “philosophy of lawyering.”<sup>162</sup>

Another important aspect of professionalism is developing sensitivity to multicultural issues.<sup>163</sup> Irrespective of the area of practice ultimately selected by a law student, in an increasingly multicultural world, lawyers must attain some level of cross-cultural competence, and law schools should take seriously their obligation to cultivate sensitivity to diversity issues.<sup>164</sup> “Until relatively recently many, perhaps most, American lawyers could easily survive professionally and personally without multicultural consciousness. Many, if not most, functioned in a predominantly white legal culture.”<sup>165</sup> However, demographic trends support the premise that lawyers must develop multicultural competence, both nationally and globally.<sup>166</sup> Therefore, it is critical for students, even those who do not discern the immediate value of developing these skills, to understand that they will not be insulated from the diverse world. Working at MCAD

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162. See Nathan M. Crystal, *Developing a Philosophy of Lawyering*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 75, 75 (2000) (“Almost all significant ethical decisions that lawyers face in the practice of law involve discretion. For some of these decisions, no rules or standards guide lawyers.”).

163. The MacCrater Report specifically proscribes discrimination, under the category of “Striving to Promote Justice, Fairness, and Morality,” which cautions attorneys to avoid engaging in “any form of discrimination . . . in one’s professional interactions with clients, witnesses, support staff, and other individuals.” MACCRATER REPORT, *supra* note 35, at 213-14. This prohibition also reinforces the importance of cultivating sensitivity to cross-cultural issues that enable attorneys to recognize and avoid more subtle biases.

164. See generally Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140 (1995); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997) (discussing the importance of training law students to practice law with cultural sensitivity); Aiken, *supra* note 37; David Dominguez, *Beyond Zero-Sum Games: Multiculturalism as Enriched Law Training for All Students*, 44 J. LEGAL. EDUC. 175 (1994).

165. Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 229 (2002).

166. See Barry et al., *supra* note 17, at 62 (citing projections by the U.S. Census Bureau that by 2050, the percentages of Caucasians and persons of color will be equal); see also David Hall, *Giving Birth to a Racially Just Society in the 21st Century*, 21 U. ARK. LITTLE ROCK L. REV. 927, 935 (1999) (suggesting that “by the year 2030, the number of people of color will exceed the number of whites in this country”).



immersed students in an area of practice that virtually guaranteed a multicultural clientele. Because of the breadth of the state anti-discrimination law, students were exposed to members of a range of “protected classes,” including race, national origin, gender, religion, age, sexual orientation and disability.<sup>167</sup> Working with a diverse group of complainants forced students to “perceive the relevance of race to lawyering. Lawyers approach interactions with clients with unexamined, often unconscious, assumptions that our clients do, or at least should, share our worldview.”<sup>168</sup> Although mere exposure to multicultural clients is insufficient to engender awareness and impart sensitivity, it does provide the context to explore issues of multicultural awareness in a concrete, rather than theoretical, way. In providing students with exposure to a socio-economically and culturally diverse group of complainants, the Anti-Discrimination Clinic helped students to heighten their sensitivity to the demands and necessity of functioning effectively in multicultural environments.

By assuming primary professional responsibility for the cases, the students were exposed to the ethical issues that attend real lawyering.<sup>169</sup> The students’ introduction to one critical ethical issue, however, was quite troubling. As agency attorneys, students were spared the challenges of grappling with issues that accompany the duty of loyalty to individual clients. In their role as Commission Counsel, students sometimes made decisions that were antagonistic to the tenets of zealous advocacy for their clients.<sup>170</sup> Faced with crushing resource shortages, MCAD was in the

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167. See Calleros, *supra* note 164, at 142 (noting the likelihood of such exposure by future lawyers). Calleros posits that:

[S]ome law students may expect to practice law in a field in which race, gender, sexual orientation, age, religion, physical and mental ability, economic class, and other significant personal characteristics simply do not matter. Thus, a graduate may try to define a narrow legal niche in which he or she can maintain at least the illusion that sensitivity to diverse perspectives is unnecessary for a successful practice of law. However, even those who do not seek to challenge the legal system’s claims of objectivity will find it difficult to deny or escape the cultural pluralism of our national identity . . . .

*Id.* (footnote omitted).

168. Silver, *supra* note 165, at 220.

169. For a brief discussion about the importance of examining ethical issues as they arise in real world situations, see Girth, *supra* note 79, at 604-06. “As reality becomes their operational context, law students discover how difficult it is to identify the correct ethical decision in a particular strategic situation or context.” *Id.*

170. The costs and benefits of our adversarial system’s model of zealous representation is a dominant topic of ethics discourse. Nevertheless, it is the paradigm under which lawyers must discharge their professional duties. Numerous scholars have examined the morality of the zealous representation model. See, e.g., Paul R. Tremblay, *Practiced Moral Activism*, 8 ST. THOMAS L. REV. 9, 13 (1995) (discussing moral activism, which “in its broadest sense demands accountability from lawyers for their actions, and tends not to permit the mere fact of occupational role expectations to

unenviable position of considering whether prosecuting an individual complainant's meritorious case was in the broad public interest, rather than focusing on the injustice visited on the individual complainant.<sup>171</sup> While this determination is intrinsic to the structure of administrative agency practice, resource-driven decision-making is not always ideal for the aggrieved parties.

Although the clinic students faced less pressure than MCAD staff with respect to heavy caseloads, many students had to resist the temptation to coerce complainants to settle.<sup>172</sup> I observed instances in which pressures on the students unrelated to the complainant's case were intertwined with or dissembled behind their concept of the agency's duty to the "public interest." This buffer could obscure the necessary self-reflection about whether the settlement was consciously or unconsciously influenced by other factors, such as insecurities, antipathy or frustration with the complainant or opposing counsel, or competing time pressures.<sup>173</sup> Furthermore, students lapsed into a paternalistic mode with surprising ease. At times discouraged by the hurdles of prevailing in difficult cases, students made subjective judgments about a fair settlement colored by their own circumstances and cloaked behind arguments about the agency's

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justify lawyer conduct"). For the arguments advanced by theorists advocating an activist model of ethical behavior, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (arguing in part that lawyers should not use their roles within the adversarial system to shield themselves from introspection about their choices and behavior); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (asserting that lawyers, through a merit- or justice-based analysis, should possess ethical discretion to achieve a legally (not morally) just result). *But see* Stephen Ellmann, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 178 (1990) (arguing that allowing lawyers to engage in unacceptable conduct so long as they are promoting the greater good is ripe for abuse, given such a rule's subjectivity). *See generally* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994); Beverly Balos, *The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves*, 4 CLINICAL L. REV. 129 (1997).

171. The obligation is to seek a reasonable settlement, rather than maximize the outcome for the client.

172. Students often believed that the complainants overvalued their damages, and at times overemphasized the weaknesses of a complainant's position, a tendency not uncommon to new lawyers.

173. I attempted to expose students to these extrinsic influences in the seminar portion of the clinic. For example, I used a negotiation exercise designed to confront students with complicated pressures and nuanced attorney motives that could be characterized as less than pure. Moreover, students sometimes viewed situations exclusively from their perspective. This was particularly acute when students were frustrated with a complainant's lack of responsiveness, such as a failure to promptly return phone calls, without considering possible explanations. Students also often lacked empathy in understanding a complainant's resistance to, and resentment about, a settlement offer they felt cajoled into accepting. For a brief discussion on the importance of encouraging students to examine their reactions to clients, see Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 NW. U. L. REV. 695, 729-30 (1994) (arguing that "civic republican" dialogue among clinic supervisors, students and clients facilitates both student and client empowerment).

limited resources. As in real practice, mounting pressures require constant vigilance to ensure that decision-making is premised on considerations related to the particular case rather than the attorney's extrinsic pressures. In non-agency practice, however, at least the professional regulatory scheme mandates deference to client decisions and goals in many matters.<sup>174</sup> For better or worse, we are training lawyers to practice in a system in which they are ethically bound to exalt individual rights over collective justice and in which client prerogative is sacrosanct.<sup>175</sup>

#### 4. Access to Justice

The unmet legal needs of low-income and moderate-income individuals is a pervasive problem, and law students represent a resource that can begin to satisfy the need for legal services.<sup>176</sup> Moreover, because students' first exposure to lawyers and lawyering is typically in law school, it is incumbent upon law schools to expose and sensitize students to concepts of unequal access to justice.<sup>177</sup> As Russell Engler notes, "[i]f law school graduates are unaware of the extent of unmet legal needs, that topic likely was not a focus of their legal education."<sup>178</sup> Under the MCAD

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174. Another risk of the agency counsel model is that respondents typically required complainants to sign standard settlement agreements which waived their rights to pursue other potential causes of action. Entering into settlement agreements in reliance on the advice of agency counsel left complainants without the protections that attach from an advocate retained to act on their behalf. Moreover, as Volunteer Commission Counsel, we did not advise complainants about the possible impact regarding the receipt of public benefits or tax consequences related to accepting a settlement, as those areas were deemed outside our charge and expertise.

175. *But cf.* Katherine R. Kruse, *Lawyers Should Be Lawyers, But What Does That Mean?: A Response to Aiken & Wizner and Smith*, 14 WASH. U. J. L. & POL'Y 49 (2002) (comparing the perspectives on appropriate professional role advanced by Wizner & Aiken, who encourage lawyers to be more like social workers, with that of Abbe Smith, who vigorously defends the partisan nature of zealous advocacy). Kruse notes that under the "lawyers as social worker" paradigm, a lawyer "analyzes justice substantively and structurally, attends holistically to a client's problem as embedded within the context of multiple systems, and views client interests in terms of the client's well-being," *id.* at 76, whereas "the zealous advocate sacrifices outcomes to procedure, preferring to preserve the lawyer's role in the adversary system rather than compromise it to appease the interests of justice in any particular case." *Id.* at 77.

176. *See* Stephen F. Befort & Eric S. Janus, *The Role of Legal Education in Instilling an Ethos of Public Service Among Law Students: Towards a Collaboration Between the Profession and the Academy on Professional Values*, 13 LAW & INEQ. 1 (1994). In 1994, there were 200,000 low-income individuals whose legal needs went unsatisfied in Minnesota. *Id.* at 1. In attempting to address that shortfall, Befort and Janus note that "[f]ar and away the largest untapped resource for meeting that need is volunteer attorneys and law students." *Id.* (citing Jeremy Lane, Executive Dir., Mid-Minnesota Legal Servs., Remarks at A Symposium: Legal Education and Pro Bono, William Mitchell College of Law (Apr. 8, 1994)).

177. *See generally* Louise G. Trubek, *Introduction to the Symposium on New Approaches to Poverty Law, Teaching, and Practice*, 4 B.U. PUB. INT. L.J. 235 (1995).

178. Engler, *supra* note 127, at 485.

model, we failed to respond to the compelling charge to alleviate issues of unequal access to justice, as clinic students did not provide services for people who would otherwise go unrepresented.<sup>179</sup> The laws enforced by MCAD have fee shifting provisions intended to encourage private enforcement for people who could not otherwise afford representation. Moreover, many complainants with meritorious cases can retain counsel on a contingency basis, although attorneys' fees could be deducted from their settlement proceeds. Finally, after MCAD issues a threshold finding that probable cause exists, the complaint is further investigated and presented by Commission counsel, whether or not the complainant can secure or afford private counsel.<sup>180</sup> As a result, a complainant's case would be presented by MCAD attorneys irrespective of the clinic's involvement.<sup>181</sup>

Of equal importance, it is critical to the students' professional development that they are exposed to the vast and intractable problem of unmet legal needs.<sup>182</sup> Students can develop sensitivity to the fact that legal services are inaccessible to many poor and middle-class families once they are confronted with the realization that, absent their assistance, these clients would be without legal counsel. Representing indigent clients who lack adequate access to vindicate their rights helps students to

begin to appreciate the seriousness of the plight of persons who face a mix of legal and social problems, who may not be able to articulate their positions lucidly, whose limited resources may significantly limit possible options, and who may perceive the law to be an oppressive rather than positive force in their lives.<sup>183</sup>

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179. *But cf.* William R. Mureiko, *A Public Goods Approach to Calculating Reasonable Fees Under Attorney Fee Shifting Statutes*, 1989 DUKE L.J. 438, 452 (1989) (arguing that private civil rights enforcement for the "have-nots" confers benefits to broader society). It is noteworthy that students were exposed to the workings of an under-resourced state agency and could observe how insufficient funding impedes justice. The students' work alleviated some of the pressures created by understaffing and allowed staff attorneys to focus their energy on other matters. It can be argued, however, that in allowing the agency to rely on the clinic, we lessened the pressures on the agency and thereby enabled the legislature to continue chronic under-funding.

180. Providing free agency counsel, however, presents its own set of challenges for complainants. *See Lester, supra* note 150, at 654 ("Having access to a free agency-appointed lawyer, while financially beneficial, had its downside, however, because since the agency tended to be understaffed, it might take time before an MCAD attorney could direct his or her attention to a particular case.").

181. It is important to note that prior to a finding of probable cause, MCAD plays a non-partisan, investigative role. Given the small percentage of cases in which probable cause is found, complainants may well have benefited from student advocacy prior to a Probable Cause Finding. However, that would have raised a host of other pedagogical issues.

182. *See Wizner, supra* note 30, at 329 (noting that "[t]he student's feeling of personal responsibility in representing an individual client can grow into a feeling of social responsibility for the provision of legal services to the poor"); *see also Wizner & Aiken, supra* note 4, at 1011.

183. *Rose, Law Schools, supra* note 75, at 451.

Students struggling to navigate their first efforts at legal advocacy can often appreciate the difficulty pro se litigants face. This realization can instill a lifelong commitment to provide services to underrepresented clients, either as a fulltime public interest lawyer or through pro bono work.<sup>184</sup> Law schools can and should serve the dual functions of providing legal services to low-income people through a variety of endeavors, including pro bono representation and clinics, and inculcating students with the imperative to provide services to low-income persons.<sup>185</sup>

In considering the mission of their clinical programs, law schools should strive to identify national trends and respond to the needs of the stakeholders in the local community.<sup>186</sup> Alan Houseman advocates for “the development in each state of an integrated, coordinated, collaborative, and comprehensive system of civil legal assistance to low-income persons that seeks to achieve equal justice for all.”<sup>187</sup> Law students can be an integral part of this initiative.<sup>188</sup> In order to evaluate and coordinate the delivery of legal services to the poor, the Massachusetts Legal Assistance Corporation,

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184. See *id.* at 453. See also Engler, *supra* note 33, at 135-38, in which he recounted his study of data at New England School of Law to evaluate how student participation in clinics impacted the likelihood that they would engage in pro bono work after graduation. He found that “[t]he most striking comparison was not the variation from clinic to clinic, but from setting to setting: 73% of students in legal services setting[s] answered that the work made them ‘more likely’ to do pro bono work, compared to only 31% of the students in government settings, and 31% of the students in private settings.” *Id.* In explaining their answers, students referred to “the learning of skills, contact with clients, awareness of unmet legal needs, and gratification from helping others.” *Id.*

185. There is a distinction between advocating for underrepresented constituencies and addressing unmet legal needs. It can be reasonably argued that complainants on Commission Counsel’s litigation docket represented underserved populations, although not all of the complainants were indigent or members of marginalized constituencies. The clinic did not, however, address the issue of unmet legal needs. Some complainants faced impediments to obtaining private counsel, such as those with difficult claims or cases in which the potential recovery was insufficient to attract private counsel on a contingency basis. However, the availability of agency counsel to present cases made the clinic’s services less compelling. As Engler notes in reference to externships, “[they] will not further the goals of Promoting Equal Justice if the placements are not tied to that concept.” Engler, *supra* note 127, at 494.

186. See, e.g., Antoinette Sedillo Lopez, *Learning Through Service in a Clinical Setting: The Effect of Specialization on Social Justice and Skills Training*, 7 CLINICAL L. REV. 307, 317 (2001) (“In a clinical setting, providing access to justice means designing a program to address needs for legal service in our communities.”).

187. Houseman, *supra* note 53, at 372.

188. “The capacity of the law schools and the wider academic community to assist in the design and assessment of methods used to address unmet legal needs should be encouraged.” LEGAL NEEDS STUDY ADVISORY COMM., POLICY IMPLICATIONS OF THE MASSACHUSETTS LEGAL NEEDS SURVEY 5 (2003), available at [http://www.masslegalservices.org/docs/Policy\\_Report\\_6.5.pdf](http://www.masslegalservices.org/docs/Policy_Report_6.5.pdf); see also MASS. STATE PLANNING BD. FOR CIVIL LEGAL SERVS., RECOMMENDATION FOR RECONFIGURATION INTO FOUR LEGAL SERVICES CORPORATION SERVICE AREAS (December 10, 2003), available at [http://www.masslegalservices.org/docs/XP-MLRI-TAGNO\\_20040331\\_100503.pdf](http://www.masslegalservices.org/docs/XP-MLRI-TAGNO_20040331_100503.pdf) [hereinafter MASS. STATE PLANNING BD.] (discussing the role of law schools in the delivery of legal services).

the state analog to the Legal Services Corporation, undertook a comprehensive analysis of legal needs.<sup>189</sup> The alarming results demonstrated that access to legal services had deteriorated considerably since the prior assessment in 1993. Over 700,000 residents of Massachusetts are eligible for legal services, qualifying with incomes of 125% of the federal poverty line or lower.<sup>190</sup> Of those, over two-thirds reported a minimum of one legal problem annually, “almost double that reported in 1993.”<sup>191</sup> Many of those with unmet legal needs reside in Western Massachusetts.<sup>192</sup> These disturbing findings reinforce the notion that as the only law school in Western Massachusetts, WNEC should play a critical role in augmenting access to legal services in its local community.<sup>193</sup>

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189. See MASS. STATE PLANNING BD., *supra* note 188.

190. See STATE PLANNING COMM., MASS. LEGAL AID, REPORT OF THE STRATEGIC PLANNING COMMITTEE OF THE MASSACHUSETTS LEGAL AID PROGRAMS 20, [http://www.masslegalservices.org/docs/XP-MLRI-TAGNO\\_20040331\\_100503.pdf](http://www.masslegalservices.org/docs/XP-MLRI-TAGNO_20040331_100503.pdf) (last visited Nov. 9, 2004).

191. *Id.*

192. THE MASS. LEGAL ASSISTANCE CORP., MASSACHUSETTS LEGAL NEEDS SURVEY 36 (2003), available at [http://www.masslegalservices.org/docs/Data\\_report\\_final.pdf](http://www.masslegalservices.org/docs/Data_report_final.pdf). The Massachusetts Legal Assistance Corporation (MLAC) “funds and supports programs providing civil legal aid to low-income residents in Massachusetts.” *Id.* at 3.

193. See, e.g., Engler, *supra* note 33, at 134-138 (describing the implementation of a clinic at New England School of Law that addressed unmet legal needs). Engler discussed the findings of a commission that “was appointed by the Massachusetts Supreme Judicial Court, . . . [which] focused on the unmet legal needs of the poor.” *Id.* at 135 n.124. The report noted that:

The commission believes that law schools should inculcate in all law students an understanding that public service is an ethical and moral requirement of all attorneys. Many leading law schools in the country, including Northeastern University School of Law, require public service as a condition of graduation. By doing so, these law schools instruct students in the value of public service and teach them how it may be performed. All law schools in Massachusetts could increase access to justice and help ensure the continuation of high professional standards by requiring their students to provide civil legal assistance to low-income people.

*Id.* at 135 n.123 (quoting MASS. COMM’N ON EQUAL JUSTICE, EQUAL ACCESS TO JUSTICE: RENEWING THE COMMITMENT 56 (1996)).

A related issue is that legal services are unavailable for those who are only dollars above the mandatory income eligibility guidelines imposed by LSC. These rigid rules do not fairly consider whether a party with legal needs actually possesses the resources to retain representation. Some argue for a modification of the guidelines to incorporate more flexible standards. However, easing the arbitrary guidelines would increase the pool of LSC-eligible clients without a concomitant increase in the number of legal aid lawyers, possibly decreasing overall access to legal services. See Dunlap, *supra* note 113, at 2604. But note that the Massachusetts Student Practice Rule, Supreme Judicial Court Rule 3:03, allows students to represent indigent clients or the Commonwealth and its agencies. MASS. R. S.J.C. 3:03. However, while “indigent” is not defined within the rule itself, it is defined under Massachusetts General Law as 125% of federal poverty guidelines, MASS. GEN. LAWS ANN. ch. 261, § 27A (West 2004), thus maintaining the mandatory income cutoff.

## 5. Limitations of Rights Based Strategies, Specifically in the Discrimination Context

Through their work at MCAD, students were exposed to both the obvious and nuanced ways that litigation has a limited ability both to provide meaningful relief to individuals and to transform social behavior more generally.<sup>194</sup> This Subsection focuses on the potential implications of the rights-based corrective strategies employed by the clinic for individuals involved in adversarial proceedings and, more generally, the elusive nature of systematic reform.<sup>195</sup>

a. The adversarial posture of cases eclipsed alternative problem-solving

The Anti-Discrimination Clinic demonstrated problem-solving skills through adversarial adjudication, a perspective reinforced by the students' exposure to the dispute resolution methods represented in their doctrinal classes.<sup>196</sup> Throughout law school, and in their study of appellate cases, "students are imbued with the notion that litigation is the primary method of resolving disputes,"<sup>197</sup> and that winning is paramount. Both litigation and law school often emphasize the winner-loser, "zero-sum game" nature of conflicts,<sup>198</sup> rather than promoting varied, less contentious and more creative approaches to problem-solving. Because the clinic docket consisted exclusively of cases that were fully immersed in adversarial proceedings, students could not explore non-adversarial, alternative problem-solving.<sup>199</sup>

Some critics note that an oft-cited reason for the public's disdain for the legal profession is the adversarial posturing adopted by its

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194. For more on the importance of exposing law students to the limitations of legal remedies, see Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455, 467 (2005) (noting that students "need to be educated in the limits of law and legal institutions. Students must understand the limits of law so that they have a realistic appreciation of the law's potential. . . . Formal legal education programs should reflect the messy reality of practice as well as lofty theoretical ideals.").

195. For a discussion on innovative interdisciplinary approaches to combating discrimination, see *id.* at 469-70.

196. Note that the clinic model does not empower complainants to advocate for themselves, as they must rely on lawyers to present their case. Complainants need legal advice on substantive matters, but they also need assistance in interpreting and navigating through the complicated regulatory procedures necessary to administratively adjudicate the cases in front of MCAD.

197. Balos, *supra* note 170, at 140.

198. See, e.g., Krieger, *Institutional Denial*, *supra* note 78, at 116-19.

199. Complaints had already been filed, placing cases into the administrative adjudication process. Although complainants could elect to engage in mediation or arbitration, it is generally difficult to reverse the adversarial posture adopted by the parties once a complaint has been filed.

professionals, “characterized by contentiousness, hostility toward opponents and witnesses, incivility, and a view of litigation as a game.”<sup>200</sup> Because dissatisfaction with the adversarial nature of lawyering is prevalent,<sup>201</sup> depriving students of exposure to creative problem-solving outside of litigation is regrettable. Further, the impact of this dynamic on lawyer well-being should be acknowledged.<sup>202</sup> This effect is often exacerbated because, once a dispute has degenerated to litigation, relationships are often permanently ruptured, minimizing chances for reconciliation.<sup>203</sup> This tension was present in the MCAD context because, after an aggrieved party has filed a complaint with MCAD, the range of possible solutions is more limited.<sup>204</sup> Many believe that law schools should encourage increased professionalism and civility in an attempt to counteract public and personal dissatisfaction with the legal profession. In order to achieve that lofty goal, law schools should engage in unflinching self-reflection about the ways in which legal education inadvertently reinforces, elevates and perpetuates the often fierce nature of litigation-based lawyering.<sup>205</sup> Exposing students to creative problem-solving outside

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200. Balos, *supra* note 170, at 140.

201. See Lawrence S. Krieger, *What We’re Not Telling Law Students—and Lawyers—That They Really Need to Know: Some Thoughts-In-Action Toward Revitalizing the Profession from Its Roots*, 13 J.L. & HEALTH 1, 4 (1999) (“[S]tudies confirm the common experience of student distress during law school, the negative public perception of lawyers, and simple observation of attorney behavior: lawyers as a group tend to be stressed and relatively unhappy people.”).

202. See, e.g., BEST PRACTICES, *supra* note 48, at 21 (“It is well-known that lawyers suffer higher rates of depression, anxiety and other mental illness, suicide, divorce, alcoholism and drug abuse, and poor physical health than the general population or other occupations.”); see also, e.g., Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 874-78 (1999) (arguing that unhappy lawyers are disproportionately afflicted with mental health issues as compared to other professions); Harris, *supra* note 83, at 307-12 (documenting rising unhappiness among the practicing bar).

203. This dynamic can be counterproductive in cases in which the parties have an interest in preserving an ongoing relationship, such as when a complainant wishes to remain in the employ of the respondent. Many other conflicts would benefit by a dispute resolution approach that values the importance of avoiding the irrevocable breakdown of relationships between parties, such as a divorce involving children or a special education dispute. In those situations, the parties may be well served by a collaborative problem-solving approach in order to minimize acrimony that can endure long past the resolution of the conflict, to the detriment of the parties involved.

204. But see Thomas A. Kochan et al., *An Evaluation of the Massachusetts Commission Against Discrimination Alternative Dispute Resolution Program*, 5 HARV. NEGOT. L. REV. 233 (2000) (discussing how MCAD did initiate a pilot alternative dispute resolution project, and although the project was fraught with difficulties at the inception, over time the project improved and provided a viable alternative to administrative adjudication).

205. See Alan M. Lerner, *Law & Lawyering in the Workplace: Building Better Lawyers By Teaching Students to Exercise Critical Judgment as Creative Problem Solver*, 32 AKRON L. REV. 107, 109 n.2 (1999) (“[L]awyers who exercise critical judgment and function as thoughtful, reflective, creative problem solvers can contribute significantly to reducing the volume and intensity of litigation as a tool for resolving disputes, as well as reducing polarization in society.”).



of the litigation context is one way to reinforce these concepts,<sup>206</sup> and the clinic's failure to incorporate alternative problem-solving methods was unfortunate.

b. Administrative adjudication often provided only partial relief

The clinic demonstrated multiple ways in which both the agency and the law's ability to remedy wrongs can be severely constrained. For example, MCAD lacks the jurisdiction, resources and expertise to redress violations of other laws that are often intertwined with the discrimination complaints, such as wage and hour violations, and safety and collective bargaining violations. Despite this, the clinic did not collaborate or coordinate with other enforcement agencies or mechanisms to address these intertwined issues.<sup>207</sup> Moreover, to their great frustration, students were frequently confronted with concrete examples of behavior that, while morally repugnant, were not legally remediable.<sup>208</sup> Students were vexed by cases in which they believed discrimination had occurred, yet they could not marshal enough admissible and credible evidence to sustain a claim.<sup>209</sup> Even when sufficient evidence existed, students encountered complainants who elected not to go forward with a legally viable case for reasons unrelated to the merit or value of the case. The considerations were not always comprehensible or rational to the students. For example, some complainants lacked the endurance to withstand the considerable stress and time commitment attendant to litigation;<sup>210</sup> were conflict-avoidant or culturally averse to challenging authority; felt bullied by opposing counsel or the process of administrative adjudication; did not wish to subject

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206. Thomas D. Barton, *Conceiving the Lawyer as Creative Problem Solver: Introduction*, 34 CAL. W. L. REV. 267, 267 (1998) (arguing that problem-solving is a powerful tool for lawyers "who seek to examine how law and the legal process may contribute to effective, respectful, inclusive ways to resolve personal and social problems").

207. I do not mean to imply that other avenues for redressing those grievances did not exist. For example, the Attorney General's Office has a division dedicated to enforcing wage and hour violations. MASS. GEN. LAWS ANN. ch. 149, § 148 (West 2004). However, requiring complainants to pursue individual remedies against the same employer in multiple venues, repeat the facts with different advocates, and understand and comply with varying enforcement procedures could certainly chill their enthusiasm to proceed on all fronts.

208. For example, the clinic had a case in which the students felt that an elderly, long term employee of a company was immorally discharged due to absences related to medical treatment, yet legal liability was dubious.

209. See *supra* note 152 and accompanying text; see also *infra* note 211, 213 (discussing the difficulty in prevailing on discrimination claims).

210. In the MCAD context, as with litigation, aggrieved parties often perceive an interminable delay between filing a complaint, adjudication at public hearing, issuance of a decision and the exhaustion of the appeals process. These delays can be compounded by potential problems with collecting of damages and bankrupt respondents, which can make pursuit of vindication at hearing a fairly unappealing prospect.

friends, family or former coworkers to the adversarial process; feared retaliation; settled for far less than their cases warranted due to imminent financial crisis; or had other compelling concerns about the process or ramifications of vindicating their rights.<sup>211</sup> These extra-legal factors and exigencies that influence both the course of litigation and the attainment of a just result are present in the real world but cannot be fully reflected in law school hypotheticals.

c. Corrective strategies often did not foster change in individuals or society

The clinic highlighted the inability of the law to reform the behavior or beliefs of individual malefactors. When settling cases, students often encountered respondents whose belligerence and adamant denial of wrongdoing evinced their intent to settle for nuisance value only, in order to avoid publicity or for some other reason unrelated to their recognition of the claim's merit. In these cases, the quest for rehabilitation was chimerical.<sup>212</sup> Limited in scope by resource issues, MCAD's investigation and enforcement mechanisms were a source of frustration for some students. Of the instances in which discriminatory conduct is alleged or perceived, only a subset file claims, and only in a fraction of those claims is probable cause found.<sup>213</sup> Some complainants who chose not to pursue administrative redress of their grievances were intimidated by the process or deterred by unclean hands, which allowed respondents to violate the law with impunity. Accordingly, only a percentage of alleged perpetrators of discrimination are subject to administrative investigation and adjudication by MCAD. Even when a complainant prevailed, and MCAD imposed equitable remedies, the agency lacked the resources to monitor equitable

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211. See Lester, *supra* note 150, at 654. In her study about sexual orientation discrimination cited *supra*, Toni Lester speculates on this topic:

Many claimants likely dropped out of the MCAD process without ever settling their claims or waiting for a formal hearing. This could have occurred for a variety of reasons that have nothing to do with the feasibility or credibility of their accusations. Potential reasons for declining to pursue a discrimination claim with MCAD include stress, the fear of being outed, or frustration over having to wait so long to get their "day in court."

*Id.*

212. This extends beyond liability disclaimers that are standard fare in settlement agreements. It can be argued that irrespective of a respondent's failure to recognize and acknowledge wrong-doing, the costs incurred by litigating and settling, however minimal, may serve to deter future illegal behavior, even if the underlying attitude has not changed. Conversely, the significant expense of litigation, absent introspection, may serve to drive invidious attitudes further underground. Rather than enlightening defendants, litigation may educate employers on how to avoid litigation rather than how to avoid discrimination.

213. Although it varies, the rate at which probable cause is found is typically small, and it does not include cases that are screened out for jurisdictional defects or the presumably significant number of people who never come forward to file a complaint.

sanctions in any but the most egregious of cases. This phenomenon obviously pervades the legal system more generally and militates in favor of an approach to social change that extends beyond traditional rights-based strategies.<sup>214</sup>

In addition to considering the impact on clients and the community, an important social justice goal is “to empower students: to encourage them and give them a sense of optimism and confidence as they contemplate careers in public interest law.”<sup>215</sup> In many of the cases handled at the clinic, redressing a legal violation after it occurred may have had limited impact, since adjudicating discrimination cases *ex post facto* did little to foster meaningful social change. For some students, this realization generated feelings that a more sweeping reform agenda is futile. Susan Sturm criticizes the pursuit of workplace equity by plaintiffs’ discrimination attorneys because of their over-reliance on redressing grievances that have already occurred, as they “continue to operate within a rule-enforcement framework.”<sup>216</sup> As she notes, “[l]egal advocacy on behalf of workers tends to be litigation-centered, individualistic, compensatory, and focused on after-the-fact enforcement of rule violations.”<sup>217</sup> At first blush, discrimination laws garnered some successes. However, while overt acts of discrimination have diminished, subterranean and subconscious animus have exacted an equally insidious toll because more subtle discrimination is ultimately neither less offensive nor less destructive.<sup>218</sup> Sturm characterizes this change as the transition from “first generation” to “second generation” discrimination:

Cognitive bias, structures of decisionmaking, and patterns of interaction

214. See, e.g., Mack, *supra* note 93, at 259-60 (“[A] group of scholars critiqued the practice of public interest lawyering that grew up after the success of the *Brown* litigation as ineffective in achieving its objectives, counterproductive in diverting resources away from progressive goals, and conservative in reinforcing the power of existing institutional arrangements and structures of subordination.”).

215. Kotkin, *supra* note 32, at 139.

216. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 546 (2001).

217. *Id.*

218. See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752-53 (2001). As Chamallas notes:

Two themes are often sounded in the critical commentaries: 1) new-style discrimination is pervasive yet subtle and hard to distinguish from “normal” ways of doing business and interacting socially, and 2) despite several decades of enforcement of antidiscrimination laws, entrenched forms of bias are not just being phased out, but are simultaneously being reproduced in updated forms.

*Id.* (footnote omitted); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1217 (1995) (“The overwhelming conclusion is that there now exists a fundamental ‘lack of fit’ between the jurisprudential construction of discrimination and the actual phenomenon it purports to represent.”).

have replaced deliberate racism and sexism as the frontier of much continued inequality.

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The complex and dynamic problems inherent in second generation discrimination cases pose a serious challenge for a first generation system that relies solely on courts (or other external governmental institutions) to articulate and enforce specific, across-the-board rules.<sup>219</sup>

Although enforcement of laws still plays a crucial role in combating discrimination, it is a flawed and ultimately ineffectual strategy to pursue in isolation.<sup>220</sup>

d. The clinic's lack of community lawyering and multidisciplinary problem-solving

As with many intractable social problems, the challenges facing many MCAD complainants extended far beyond the legal problem handled by the agency.<sup>221</sup> Although the agency's charge was broader than mere investigation and adjudication of complaints, the day-to-day demands of processing thousands of discrimination complaints often forced the agency to focus its limited resources on the resolution of the individual disputes of the complainants rather than undertake ambitious, proactive litigation permitted under the agency's authority. While the substantive limitations are linked inextricably with the agency's mission, expertise and resources, an approach that treats complainants only as subject-specific cases can detract from complete resolutions of complaints' legal difficulties, ultimately doing little to improve their circumstances.<sup>222</sup> Given MCAD's limitations, the clinic did not incorporate components dealing with

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219. Sturm, *supra* note 216, at 460-61.

220. In considering whether litigation alone can alter the social landscape, there are parallels to the analysis of societal progress commonly attributed to the decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). Commentators have noted that the desegregation decision reflected, rather than precipitated, a major shift in public opinion. *E.g.*, Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13-14 (1994) ("The reason the Supreme Court could unanimously invalidate public school segregation in 1954, while unanimously declining to do so just twenty-seven years earlier, was that deep-seated social, political, and economic forces had already begun to undermine traditional American racial attitudes." (citation omitted)).

221. See Enos & Kanter, *supra* note 97, at 84 (discussing this issue and positing that "[c]lients dealing with complex and multidimensional problems need service providers who approach problem-solving in a way that is client-centered, client-empowering, and incorporates multidisciplinary and community-based solutions and resources").

222. For a discussion on the importance of communication and listening skills in a legal setting, see Barry et al., *supra* note 17, at 65-71. In addition, they note that "[i]nterdisciplinary clinical programs offer many opportunities for the acquisition of valuable skills by means of collaboration with and exposure to the culture, professional strengths, and limitations of other disciplines in a group setting." *Id.* at 69.

community education,<sup>223</sup> community outreach,<sup>224</sup> organizing<sup>225</sup> or any other law reform agenda.<sup>226</sup>

Through this exclusive focus on individual cases, the clinic students' actual legal work ran afoul of the goals of community lawyering.<sup>227</sup> This omission was unfortunate:

Larger community service projects have the benefit of engaging students in social justice issues, and giving them a personal stake in evaluating

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223. In describing its mission, MCAD highlights its efforts to incorporate outreach and other affirmative measures aimed at preventing discrimination. MCAD, WELCOME TO THE MCAD, <http://www.mass.gov/mcad/welcome.html> (last visited Nov. 10, 2006). "The agency strives to innovate, wherever possible, pioneering proactive measures, while reaching out to citizens and businesses alike in order to meet the ever increasing demand for its services." MCAD, HISTORY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION, <http://www.mass.gov/mcad/history.html> (last visited Nov. 10, 2006). The clinic students endeavored to expand the impact of the cases by demanding equitable relief, including policy changes, training and education that would benefit the broader community. While they serve important goals, these measures primarily educate the public about the agency and the laws it enforces rather than organizing a broader societal or grass-roots community response to discrimination. MCAD also had the authority to initiate complaints in compelling cases. However, given the chronic resource shortages, the staff was typically under considerable pressure to manage the existing caseload, with little time to proactively and aggressively seek out violations.

224. See Calmore, *supra* note 115, at 1936 (commenting that "lawyers must know how to work with the client community, not just on its behalf").

225. Cf. Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 775 (1998) (illustrating the collaborative efforts of broad-based community advocates to adopt a strategy intended to "provide a window into the social relations and processes underlying distributive inequities and, thus, assist reformers in identifying the types of policy reforms likely to help achieve environmental justice").

226. Cf. Krieger, *supra* note 218, at 1241-44 (proposing modifications to Title VII of the Civil Rights Act of 1964, which has many parallels to chapter 151B of the Massachusetts General Laws, in response to the law's failure to reckon with the structural flaws that deeply diminish its efficacy). Krieger posits that "[o]ur antidiscrimination jurisprudence has failed to adequately address this new type of disparate treatment discrimination, to think rigorously about it, and to fashion doctrine equipped to reckon with it." *Id.* at 1241. For further discussion, see also Sturm, *supra* note 216, at 552-53. Sturm criticizes the EEOC because the agency does not consistently aggregate and analyze information on race and gender patterns. She notes, however, that some offices, operating without obvious sanction from Washington, have implemented "more proactive, interactive, and deliberative forms of involvement." *Id.* But see Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671 (2005) (arguing that the EEOC is still an important tool in the fight to eradicate employment discrimination, given the breadth of the problem and the agency's role in processing complaints, vindicating the public interest, undertaking systemic litigation, utilizing broad equitable powers and serving as a resource with considerable institutional expertise).

227. See Shauna I. Marshall, *Mission Impossible?: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147, 158-62 (2000) (outlining some components of community lawyering, which include facilitating interactions between clients with similar issues, in order to build a sense of solidarity and foster lay advocacy). Although the clinic may have been able to undertake some of these efforts irrespective of MCAD's resource strains, we would have had to operate with care so as not to appear overly partisan.

and creating solutions to those problems, in [a] way that it is not possible to achieve by working solely within the individual case model, on a caseload purposely limited to focus students on the skills and values of individual representation.<sup>228</sup>

Scholars and activists studying the efficacy of adversarial and litigation-based approaches have urged the expansion of strategies aimed at both individual justice and broader social reform.<sup>229</sup> These tactics often involve broader initiatives aimed at comprehensive problem-solving by integrating other disciplines and community actors into reform efforts. Because the clinic was not involved in other efforts of law reform, nor was it involved in challenging structural and societal impediments to combating discrimination, the students were not given the opportunity to “understand that social action lawyering takes place in the community as well as in the courts.”<sup>230</sup> Moreover, modeling a paradigm of representation that severs a discrete legal issue from similar cases, isolates similarly aggrieved parties and ignores the broader social context can foster detached lawyering. This dynamic is a particularly compelling reason to engage students in collaborating with other community groups and devoting resources to client empowerment strategies.<sup>231</sup>

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228. Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Students in Problem-Solving Beyond Individual Client Representation*, 8 CLINICAL L. REV. 405, 411 (2002). For comprehensive reference guides to law and organizing, see generally Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000).

229. See e.g., LOPEZ, REBELLIOUS LAWYERING, *supra* note 114. For a discussion addressing a different criticism of legal services practice, see Paul R. Tremblay, *The Crisis of Poverty Law and the Demands of Benevolence*, 1997 ANN. SURV. AM. L. 767 (1997).

The sublimation argument says that the real reason the power structure has invited and permitted the funding of legal aid is that law offices in poor communities serve to forestall insurrection. Legal aid offers a patina of justice, a convenient deception that implies to the power structure that poor people are treated with the same respect as the rest of the world. If a poor person loses public benefits or forfeits her right to stay in her apartment, those actions should not really be perceived as “unjust” because the government has established law firms ready and able to protect those poor people who need it most. This image of free legal services diverts creative, rebellious energy away from true social change and towards incremental, “regnant” change.

*Id.* at 771-72 (footnotes omitted).

230. Kotkin, *supra* note 32, at 140.

231. Another more nuanced disadvantage of a clinic that functions in isolation is that the students are denied the opportunity to engage in collaborative lawyering. In this model, I served as their only role model. Although students worked in teams and benefited from the experience of their student peers, they had no basis to compare the instruction I modeled to that of other practitioners (other than those that we encountered as opposing counsel, which is not a complete picture of advocacy). Although I strive to be mindful of this limitation and to distinguish between stylistic differences and those that breach clear boundaries of acceptable behavior, this is necessarily influenced by my own biases and perceptions. Moreover, it is generally difficult for clinic students to effectively critique the performance of their supervisor/professor, given the structural power imbalance. See Robert J. Condlin,

e. The law's inability to heal

The clinic created a forum for students to discover that even a complete legal victory is an inadequate mechanism to rectify perceived wrongs, and students witnessed firsthand the inability of the law to fully restore a complainant to wholeness.<sup>232</sup> Even when complainants achieved the outcome they specifically articulated at the outset, students were enlightened with the recognition that complainants are often not “healed” by attaining their initial goals.<sup>233</sup> A significant monetary award does not necessarily compensate victims for their pain, nor do existing remedies facilitate therapeutic or comprehensive relief.<sup>234</sup> This insight is crucial, as some lawyers compartmentalize their clients' cases by focusing on strictly legal conceptions and excluding equally important psychological needs, which may ignore or even inflame clients' emotional distress.<sup>235</sup> Parallel to objections voiced about litigation, complaining parties often experience the formal “alternative” dispute resolution process as traumatizing and coercive,<sup>236</sup> and the parties perceive themselves as doubly victimized, first by the defendant and then by the adjudicative system. At times the students were palpably frustrated when a complainant's experience and preferences did not harmonize with their own assessment of a fair outcome

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“*Tastes Great, Less Filling*”: *The Law School Clinic and Political Critique*, 36 J. LEGAL EDUC. 45, 55 (1986) (noting how clinicians and students have “different levels of experience, status, perspective, and formal authority, and in each of these categories teachers have the upper hand . . . . Clinicians sometimes pretend that they are no different from their students, but this usually appears patronizing or silly . . . .” (footnote omitted)).

232. MCAD did consider an innovative program aimed at rectifying the shortcomings of administrative adjudication. Charles E. Walker, Chair of MCAD in 1999, proposed a “Truth Commission and Reconciliation Model”; this was based on the Truth and Reconciliation Commission in South Africa, which envisioned a program of restorative justice that acknowledged the role of reconciliation within the structure of a law enforcement paradigm. See Jamie L. Wacks, *A Proposal for Community-Based Racial Reconciliation in the United States Through Personal Stories*, 7 VA. J. SOC. POL'Y & L. 195, 244-45 (2000). The proposal aspired to facilitate healing and was directed toward complainants who were “particularly interested in experiencing restorations of their dignity.” *Id.* at 246. At the time of his article, Wacks did not know if the proposal had been implemented. *Id.* at 244-45 n.162. During my four-year tenure serving as Volunteer Commission Counsel, I had not heard of the program.

233. For a discussion on trauma suffered by complainants, see Jean R. Sternlight, *In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis*, 78 TUL. L. REV. 1401, 1474-77 (2004). “From the victim's standpoint, it has been shown that losing one's job is one of the most traumatic things that a person can undergo. Jobs in modern societies are closely tied to our sense of self and self-esteem.” *Id.* at 1474 (footnote omitted).

234. See Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1273 (2006) (“Commodified concepts of compensation may provide some measure of recompense for physical injuries, but they do little to redress emotional and psychological wounds.”)

235. See *id.* (discussing the importance of attending to these psychological needs).

236. See generally Winick, *supra* note 105.

that they believed should provide total relief. In these instances, their exposure to the complex emotional reaction of the complainant imparted an important and enduring lesson. Because a facile and flawed conception of complainants can reduce them to little more than the sum and merit of their legal issues, students should refrain from reductionist thinking.<sup>237</sup> They should be sensitized to the importance of attending to the whole client, including their emotional well-being.<sup>238</sup>

f. The increasing relevance of transnational issues

The Anti-Discrimination Clinic did not expose students to the interrelationship between local poverty and globalization.<sup>239</sup> Admittedly, it would be challenging for any clinic to untie the Gordian knot that connects poverty in one's own community and global economic integration. Nevertheless, these concerns are noteworthy. The increasing interdependency of the current global economy renders it impossible to develop and implement a comprehensive strategy to address the myriad issues that affect our low-income and subordinated client communities without a full understanding of their global context.<sup>240</sup> Numerous scholars point out the importance of recognizing the ubiquitous impact of transnational capitalism and argue that public interest lawyers must reckon with the scope and impact of globalization in order to be effective, as "[t]he future of lawyering for lower income people will be linked both to

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237. See J. Michael Norwood & Alan Paterson, *Problem-Solving in a Multidisciplinary Environment? Must Ethics Get in the Way of Holistic Services?*, 9 CLINICAL L. REV. 337, 341 (2002) (calling for holistic lawyering, which is lawyering that first recognizes that clients often have both legal and other needs for which the representing practitioner cannot provide services, and then attempts to address these needs, often in partnership with non-lawyers). The article analyzes the ethical conundrums facing lawyers engaging in this type of practice, but urges the profession to continue to address and resolve the impediments to effective problem-solving. See *id.* at 371-72.

238. See *supra* notes 115-125 and accompanying text (referencing alternative lawyering models).

239. For a discussion on social movements as they relate to globalization, see Fran Ansley, *Inclusive Boundaries and Other (Im)possible Paths Toward Community Development in Global World*, 150 U. PA. L. REV. 353, 405-11 (2001).

240. See Lucie E. White, *Facing South: Lawyering for Poor Communities in the Twenty-first Century*, 25 FORDHAM URB. L.J. 813, 814 (1998).

[T]o talk realistically about "Lawyering for Poor Communities in the Twenty-first Century," we must expand our frame of reference beyond the world of service-eligible client groups that we have traditionally represented in poverty law practices . . . to include all of the people who are being rendered destitute by current policies of global economic integration, regardless of which side of the territorial borders of the United States and other rich countries their bodies happen to fall on at any particular moment of time . . . [W]e must add the idea of global equity to the core normative commitments that motivate our work.

*Id.* at 814; see also Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 AM. U. INT'L L. REV. 815 (2002) (explaining Washington College of Law's pedagogical response to global developments and the obligation of law schools to train students to practice in "the new world reality"); Hurwitz, *supra* note 97.



understanding the global economy and cooperating with lawyers for poor people across national borders.”<sup>241</sup>

As Fran Ansley concedes, persuading marginalized communities to recognize the connection between their immediate woes and issues of globalization would be challenging for a variety of reasons.<sup>242</sup> First, it is difficult to compel people to see beyond their own immediate misery to develop compassion and empathy for those even less fortunate and privileged.<sup>243</sup> Second, issues of nationalism may serve to downplay the extent and detrimental impact of U.S. economic hegemony.<sup>244</sup> Third, it is a daunting prospect to rouse people who may perceive that they are acting against their own self-interest.<sup>245</sup> Finally, the lack of immediacy in these issues and the complexity of the interrelationship between local and global issues makes developing a viable strategy seem insurmountable.<sup>246</sup> Ansley, however, provides a compelling response to the voices of skepticism:

[A]t least for currently disempowered communities, there is no alternative. Unless poor and working-class people in the world’s North achieve the capacity to see themselves in a global context, it will be flatly impossible for them to build organizations that are strong enough to defend their interests or to carry out successful campaigns for economic justice.<sup>247</sup>

Most clinics are vulnerable to this criticism, and many social justice activists argue that this omission will render more localized efforts ultimately ineffectual.

g. A rights-based strategy is ultimately limited in this context

Relying on a rights-based strategy to combat discrimination in the MCAD context illustrated the limitations of this approach as a clinical

241. Louise G. Trubek, *U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective*, 5 MD. J. CONTEMP. LEGAL ISSUES 381, 392 (1994).

242. Ansley, *supra* note 239, at 405.

243. *See id.*

244. *See id.* at 405-06.

245. *See id.* at 406.

246. *See id.*

247. *Id.* For more on these and similar considerations, see also Barry et al., *supra* note 17. As they observe:

Whether focused on private law and international economic relationships, public law and transnational problems, or public interest or poverty law implications, the inevitable move towards globalization will require that lawyers acquire the skills needed for these new practice settings. . . . As the division of the academy that focuses on professional skills development, clinical education will inevitably play a crucial role in imparting the new skills and values needed for competent, ethical and reflective practice of law in the increasing number of settings and situations created by globalization.

*Id.* at 59 (footnotes omitted).

model. These limitations were present on a structural level, in terms of the clinic's ability to contribute to social change, and on an individual level, in terms of the clinic's ability to provide meaningful and systematic relief to victims of discrimination. As with most challenges in clinical teaching, these shortcomings can often be parlayed into important teaching moments. However, because advancing social justice is an important goal, I would prefer tangible progress toward achieving social change over a critique of how the law and legal institutions fail to promote this goal.

#### 6. The Dynamics of the Attorney-Client Relationship

In introducing students to the dynamics of the "attorney-client relationship" as government lawyers, the clinic modeled a precedent that was incongruous with the directives of client-centered lawyering. Commission Counsel serve as government lawyers who represent the interests of the complainants only as long as they are not dissonant with the priorities of MCAD. Accordingly, the students owed no professional duty of loyalty to the complainants.<sup>248</sup> Although the cases were initiated by complainants, the agency's mission is to vindicate the public interest rather than to serve as a proxy for enforcing the individual rights of the complainants. In discussing clinics that are not structured as direct client representation models, Stephen Wizner and Jane Aiken note that those clinical constructs "may convey to students the wrong message about the correct motivation for doing the work, which is to use the legal system to struggle for social justice for the poor, not to empower lawyers to determine in the abstract what is in the public interest."<sup>249</sup> This criticism is equally applicable to the Anti-Discrimination Clinic, in that MCAD, rather than complainants, determined the agency's agenda and defined the "public interest." As Commission Counsel, we endeavored to harmonize the interests of the complainants with MCAD's mission to ferret out and eradicate discrimination. In application, we were able to provide some satisfaction and relief to many complainants. Working on behalf of the government, however, spared students from two important challenges—

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248. Students often handled the cases in a manner that was consonant with the complainant's wishes and, perhaps to a large extent, how private counsel working on behalf of the complainant may have proceeded. However, because students had no professional duty of loyalty to the client, the absence of direct responsibility to the client circumvented important pedagogical opportunities. For a discussion on the importance of these opportunities, see Wizner & Aiken, *supra* note 4, at 1008. Wizner & Aiken note that it is essential to help "our students appreciate the broader lessons about power and privilege, about their role in bringing about or inhibiting social justice. It is the sense of responsibility that they feel, the fear, the vulnerability when representing real clients, that inspires students to strive to be effective lawyers with excellent skills." *Id.*

249. *Id.* at 1008 n.41.

developing client-centered lawyering skills and learning to identify and resolve the ethical issues that they will likely face in practice.<sup>250</sup> As Stacy Caplow observes in relation to prosecution clinics:

[S]tudents do not have an identifiable client (whether an individual or an entity) so that many of the moral and ethical considerations that arise in the context of legal representation are missing. Observations about and reactions to these dilemmas often provide the richest fodder for both formal and ad hoc discussions . . . .<sup>251</sup>

The students' role as agency lawyers had implications both for the complainants and the students.<sup>252</sup> MCAD's ability to vigorously pursue each case filed was often hampered by inadequate resources. Once a determination of probable cause had been issued, complainants were not given the opportunity to decline student representation unless they retained private counsel. Although complainants typically welcomed the clinic's assistance, some complainants resisted the prospect of student representation. The underlying risk, however, is that both complainants and students could reasonably labor under the impression that complainants are coerced to accept a two-tiered system of justice: one consisting of those who can afford their own attorney and are, therefore, free to determine the objectives of their representation, and the other consisting of complainants who lack the resources to retain private counsel and who may be subordinated to MCAD's mandate to act in the broad public interest, as defined by the particular attorney making that determination.<sup>253</sup> Perhaps

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250. Although the students endeavored to ensure a just outcome for the complainants, the students did not feel a sense of professional duty to respect the complainants' prerogatives because the complainants were not clinic clients. Accordingly, the students were shielded from some of the pressures and challenges that accompany the obligation to satisfy the complex, and sometimes conflicting, array of client needs.

251. Stacy Caplow, "Tacking Too Close to the Wind": *The Challenge to Prosecution Clinics to Set Our Students On a Straight Course*, 74 *MISS. L.J.* 919, 928 (2005).

252. We apprised complainants of the potential conflict from the outset. Complainants were informed that they may face administrative closure for a variety of reasons, including, *inter alia*, their failure to accept a settlement offer that MCAD deemed reasonable. See 804 MASS. CODE REGS. 1.15(6)(b) (1999) (stating that "[w]hen a formal offer of settlement by a respondent is acceptable to the Commission but not to the complainant, the Commission may close the matter pursuant to 804 CMR 1.02 and 804 CMR 1.15(5)"). MCAD retains the right to impose this outcome on complainants represented by private counsel as well, treating cases presented by Commission Counsel and private counsel similarly. In practice, however, if a privately represented complainant holds out for the best settlement, rather than accepting a reasonable outcome, it poses less of a threat to agency resources. Presumably, in these circumstances, administrative closure is less likely to be invoked on those grounds.

253. The vast majority of complainants professed their satisfaction with student representation throughout the process. As in real practice, however, students occasionally bore the brunt of a complainant's dissatisfaction with legal reality.

more disturbing from a pedagogical perspective, the clinic modeled a paradigm of representation that is antithetical to client empowerment strategies, one that risks silencing clients' voices<sup>254</sup> and relegating client narratives to a secondary role.<sup>255</sup> Despite my admonitions to the students to be mindful of the way in which this dynamic conflicts with the precepts of client-centered lawyering, the students were given a dangerous taste of lawyer dominance.<sup>256</sup>

In managing cases exclusively as Volunteer Commission Counsel, students were insulated from the total legal needs of a particular complainant.<sup>257</sup> In this decontextualized approach, the students were circumscribed from identifying and providing comprehensive legal services. The clinic's specialization in one discrete aspect of law, primarily employment discrimination, precluded attention to legal problems that were often inextricably linked with the discrimination and that shared a nexus of facts. As noted earlier, any legal or employment issue that did not fit squarely into discrimination law was immaterial for the clinic students, as

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254. For more discussion on the negative impact of suppressing client voices, see Lucie E. White, *Subordination, Rhetorical Survivor Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990); Alfieri, *Reconstructive Poverty Law*, *supra* note 116, at 2119 (discussing the injury to client integrity when clients' voices are silenced).

255. A significant body of literature addresses the importance of eliciting, honoring and preserving client narratives. See, e.g., Natasha T. Martin, *Allegory from the Cave: A Story About a Mis-Educated Profession and the Paradoxical Prescription*, 9 LEWIS & CLARK L. REV. 381, 391 (2005) (reviewing DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002)) ("Law school pedagogy includes narrative and storytelling which seek to further humanize the law and to highlight its effects on individuals and institutions."); Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 945 (1992) ("When lawyers misinterpret or subordinate client narratives, they disregard the client's narrative purpose and her perspective of the harm to be remedied, and may do violence to the client's normative values and beliefs."). But see Cathy Lesser Mansfield, *Deconstructing Reconstructive Poverty Law: Practice-Based Critique of the Storytelling Aspects of the Theoretics of Practice Movement*, 61 BROOK. L. REV. 889, 893 (1995) ("[A]pplication of a theory of poverty law such as the one conceived by the theoretics of practice movement fails to take into consideration certain realities of poverty law practice; derives from a singular, romanticized view of the poor; and actually may frustrate client goals by eviscerating the *raison d'être* of the attorney-client relationship" (footnote omitted)).

256. For example, although it did not happen in any cases handled by the clinic, MCAD could have elected to go forward in a case despite the complainant's opposition, similar to prosecuting a domestic violence case against the wishes of the victim.

257. For a discussion on the problems associated with such insulation, see Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205 (2003). "The idea of holistic lawyering . . . suggests that legal practitioners should be client-centered in their approach, viewing their responsibilities as not just solving issues of law but also helping address the various problems (both legal and nonlegal) that have contributed to their client's troubles." *Id.* at 283.

the clinic had neither the power nor the authority to seek redress.<sup>258</sup> This constraint is antithetical to whole-client lawyering and cross-substantive representation, as the client's legal reality outside those matters relevant to the MCAD case was deemed inconsequential.<sup>259</sup> Without fully grasping the backdrop in which legal problems arise, a myopic focus on one discrete legal issue can obscure other seemingly unrelated legal and non-legal issues that are critical to client-centered counseling in general, and the determination of an appropriate resolution tailored to the individual needs of a particular client more specifically.<sup>260</sup> Admittedly, given the restrictions inherent in a one semester program with limited teaching and supervisory resources, the concept of generalization could careen down the slippery slope, obligating a clinic to address all the legal issues faced by one client. To some degree, this constraint is present in all clinics and routinely faced by lawyers in practice. Such an extreme result would be counterproductive and inefficient, as it would be extremely difficult to adequately coordinate and supervise a clinic envisioning such substantive breadth, particularly given the resources WNEC allocates to its clinical programming.<sup>261</sup> However, a middle ground seems to be a reasonable pedagogical goal that would model more comprehensive attention to client needs, such as identifying other legal issues, developing a referral network and soliciting community input in a legal needs assessment.<sup>262</sup>

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258. Unfortunately, by editing complainants' stories to fit only the legal theories addressed by MCAD, students did not develop and refine critical listening skills and empathy. See Robert Dinerstein et al., *Connection, Capacity and Morality in Lawyer-Client Relationships: Dialogues and Commentary*, 10 CLINICAL L. REV. 755, 755 (2004) (noting the "importance of a fundamental skill and virtue—listening—in the lawyer's work of creating, in each case, a theory of the representation").

259. "Effective interpersonal relationships between lawyers and their clients are critical to the satisfactory resolution of legal problems. As a result, some law professors focus upon the quality of the lawyer-client relationship . . . [and thus] emphasize the lawyer's ability to hear accurately and understand completely the client's problem[s] . . ." Girth, *supra* note 79, at 606.

260. As a mitigating step, I considered training clinic students to identify issues and develop a referral network. Steps as minimal as providing informational sheets on issues such as wage and hour violations, workplace safety issues, unemployment, and immigration issues would have shed light on these issues and provide critical information to aggrieved parties.

261. The University of New Mexico's Community Lawyering Clinic set up an exemplary and innovative program that now provides representation in matters including economic justice, juvenile justice, women's shelter issues, and issues associated with a senior center and a neighborhood association, all of which results in a greatly diversified student caseload. See Lopez, *supra* note 186, at 315-16. Such a construct would not be viable at WNEC without a rotating group of willing professors with varying areas of expertise.

262. Lopez underscores the pedagogical limitations associated with clinics that specialize in one discrete area, stating that "[s]pecialization narrows the students' ability to appreciate the client's full perspective and may limit problem solving and creativity." *Id.* at 311. When students expect to address one issue exclusively, they suppress the client's voice by listening for facts and priorities that are relevant only to the legal issue in which the clinic specializes. See *id.* at 316-18. She argues that "there is pedagogical value in teaching students to see the relationships between all the problems faced by the

### 7. The MCAD Model's Pedagogical Benefits Were Outweighed by Social Justice Concerns

As noted in the first three Sections, the Anti-Discrimination Clinic presented the students with the opportunity to act as lawyers and engage in a reasonably broad range of lawyering skills outlined in the MacCrate Report. Moreover, there were reasonable opportunities to explore issues of professionalism and multicultural sensitivity. However, the issue of loyalty to the agency clouded the exploration of zealous representation to individual clients. The latter part of this critique focused on social justice considerations, including access to justice, limitations of rights-based strategies and the attorney-client relationship. Although MCAD has a worthy and important charge to act in the public interest, the Anti-Discrimination Clinic illustrated the difficulties of imparting social justice values and goals while restricted by the mission and resources of an administrative agency. Under the conception of social justice lawyering outlined earlier, it would be difficult for a clinic embedded within an administrative enforcement agency to pursue a transformative social justice agenda. In sum, while the MCAD model did satisfy the goals of providing a reasonable range of skills training opportunities and exposing students to issues of ethics and professionalism, there were critical areas in which the model was lacking, particularly with respect to inculcating values and pursuing social justice objectives.

By necessity and design, clinicians are both adroit and resourceful in salvaging “teaching moments” from even the worst of experiences. This concept is central to clinical pedagogy, and indeed critical given our inability to control what unfolds in real-life lawyering. However, I believe that in certain instances it is preferable to model the desired behavior rather than deconstruct and undo what students have learned, and I would have favored more effective social justice outcomes.

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poor and in attempting to craft solutions.” *Id.* at 324. Specialization isolates a client’s particular problem and removes the students from the need to recognize the intersecting issues confronted by the poor. Lopez also voices concern with the fact that race and other issues related to subordination can be seen as decontextualized. *See id.* at 310 n.18. “Serving the needs of the client and community, rather than the subject matter, allows students to see the race and gender issues in their full context and not as decontextualized traditional ‘race’ cases that might be presented, for example, in a discrimination clinic.” *Id.* at 321. While Lopez recognizes that specialization simplifies the process, she argues that diversity is preferable. *Id.* at 324-25. Ultimately, Lopez concludes that clinics could best serve the dual interests of skills training and a social justice focus by conferring with the local community to facilitate a needs assessment, ultimately allowing for a clinic geared toward the community’s needs rather than selecting a singular substantive area removed from the context of local needs. *See id.* at 325-26.

## C. CONTEXT OF OTHER WNEC CLINICS

The process of evaluating a particular clinic's balance of skills training and social justice mission should be made in the context of the entire clinical program at a law school.<sup>263</sup> As law schools strive to offer an appropriately diverse range of clinical perspectives and opportunities, social justice goals should factor prominently in that mix.<sup>264</sup> Accordingly, while this critique focuses on the Anti-Discrimination Clinic, it cannot be evaluated in isolation from the other clinics offered by the law school.<sup>265</sup> In addition to the Anti-Discrimination clinic, WNEC's clinical offerings consisted of the Criminal Law Clinic,<sup>266</sup> the Legal Services Clinic,<sup>267</sup> the Consumer Law Clinic,<sup>268</sup> the Small Business Clinic,<sup>269</sup> the Real Estate

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263. See Mary A. Lynch, *Designing A Hybrid Domestic Violence Prosecution Clinic: Making Bedfellows of Academics, Activists and Prosecutors to Teach Students According to Clinical Theory and Best Practices*, 74 MISS. L.J. 1177, 1190 (2005) ("The clinic's place in the larger community should also be examined."). See also Peter A. Joy, *Prosecution Clinics: Dealing with Professional Role*, 74 MISS. L.J. 955, 960-62 (2005), who notes that clinics were traditionally premised on service to underserved populations and many law school programs still reflect that commitment in their overall programming. "Clinical legal education has developed and expanded in the last several decades, and not every law school tailors all of its clinical courses to fit into the historical access to legal services model underpinning the clinical legal education movement . . ." *Id.* at 961-62. At WNEC, the law school does not have a clinical director who defines the mission and goals of the overall program. Accordingly, there is no one at WNEC responsible for articulating a cohesive clinical mission. Issues related to alterations in the clinical construct must go to the curriculum committee and full faculty, with deference given to the prerogative of each clinician.

264. In evaluating a law school's clinical program, it is important to query whether "there [are] a good number of projects which enable access to justice, raise social justice awareness and instill a strong pro bono ethic?" Lynch, *supra* note 263, at 1190-91.

265. See Engler, *supra* note 33, at 150-51.

While the MacCrate report reminds us that no one size fits all, we should nonetheless be able to articulate the justifications for a particular mix in a given context. The curricular imperative becomes the design not simply of a course or clinic but a coherent program, based on prioritized goals, that seeks to fill specific gaps within the realities of a given law school context.

*Id.* (footnote omitted).

266. The Criminal Clinic was directed by a full-time clinical member of the faculty. Students worked with the local District Attorney's Office and were authorized to practice in the District Courts, handling arraignments and prosecuting misdemeanor and felony cases in bench and jury trials.

267. Students who enrolled in the Legal Services Clinic were assigned to a substantive unit, where they represented clients in family, housing, elder, employment or benefits cases. The seminar component devoted time to issues of poverty law.

268. Students in the Consumer Clinic represented clients in consumer matters in small claims court. Cases were selected in one of two ways: they were referred by the Springfield Mayor's Office or small claims court itself. The adjunct faculty member who directed the program was given access to the docket and was able to contact potential clients, in order to offer assistance and/or representation in the consumer matters pending before the court.

269. The Small Business Clinic was a transactional clinic that provided legal assistance to local start-up businesses, while working in collaboration with Springfield Technical Community College, which houses and supports a start-up business incubator.

Practicum<sup>270</sup> and an externship program.<sup>271</sup> The Anti-Discrimination and Criminal Law Clinics operated on fulltime in-house models, requiring a significant commitment of faculty resources. The Small Business Clinic and Real Estate Practicum were offered one semester per year, utilizing fewer faculty resources. The Consumer Law and Legal Services Clinics operated as external clinics.

Although the greatest allocation of faculty resources was devoted to the two fulltime, in-house clinics, neither provided services that ameliorated the problem of unmet legal needs, nor did these clinics provide instruction in client-centered lawyering skills. In the Anti-Discrimination Clinic, students only appeared in MCAD cases once a complainant was entitled to Commission Counsel assistance, and thus the complainants would have their cases prosecuted irrespective of the clinic's involvement.<sup>272</sup> Further, complainants with meritorious cases were often able to capitalize on fee-shifting provisions, enabling them to retain private counsel.<sup>273</sup> The Criminal Law Clinic assisted the District Attorney by providing students that prosecuted cases under the supervision of a member of the law school faculty. Since the District Attorney's "client" is the state, direct representation of individual clients was absent from this clinic model. Moreover, given the nature of law enforcement, the cases would have been prosecuted irrespective of the availability of student representation. While this clinic provided unparalleled training in trial skills and served as an invaluable asset to the law school's overall clinical program, the real commitment of student and faculty resources inured to

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270. The Real Estate Practicum was structured as an externship model, and combined a classroom component with field placements that were divided between attorneys practicing in the areas of residential real estate and title insurance.

271. As then organized, the externship program was comprised of two parts: a Judicial Externship Program that was supervised and administered by a Judicial Externship Director, who was a member of the full time faculty, and clinical externships that were supervised by individual faculty members.

272. Commission Counsel assumed a partisan role after a Probable Cause Finding was issued. *But see* Lester, *supra* note 150, at 672 (concluding that despite the availability of Commission Counsel to prosecute cases, inadequate resources made it difficult to enforce laws). "Unfortunately, under such circumstances, social change cannot occur, even if those delegated with the power to enforce it are well meaning." *Id.*

273. The fee-shifting provisions were intended to encourage private enforcement of civil rights. *See, supra* notes 179-81 and accompanying text (discussing fee-shifting statutes).



the benefit of the District Attorney, not to underserved clients.<sup>274</sup> Moreover, like the Anti-Discrimination Clinic, “[p]rosecution clinics . . . do not provide opportunities to represent individuals and practice client centered representation.”<sup>275</sup>

The law school offered two other in-house courses that provided practical skills training. The Small Business Clinic provided assistance to for-profit start-up companies. While this clinic assisted incipient for-profit businesses with matters of corporate formation, it did not have an overt social justice mission. The clinic was not geared toward affordable housing, non-profits, or businesses whose mission directly benefited anti-poverty efforts in local low-income communities. The Small Business Clinic certainly satisfied the goal of promoting economic development, undoubtedly producing an indirect economic benefit in the local community. However, it did not have an explicit and intentional goal of focusing its efforts on economic revitalization in impoverished neighborhoods through grass-roots coalition building, the hallmark of CED. Accordingly, while the Small Business Clinic clearly had a mission that would inure to the benefit of the local community, it would not qualify strictly within this article’s definition of a social justice mission. In the Real Estate Practicum, students worked on residential real estate conveyances under the supervision of local practitioners, who assigned tasks arising from their regular caseload. Under this model, students were provided training in a discrete substantive area. Although this model presented a worthy educational enterprise, it did not espouse the explicit goals of ensuring legal assistance to poor clients who would otherwise go without representation, nor did it address the other social justice concerns outlined above.

Although the two external clinics, the Consumer Protection and Legal Services Clinics, served traditionally underrepresented clients, they received the least amount of faculty attention and resources, and they may

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274. See also Joy, *supra* note 263, at 962 (pointing out that “prosecution clinics are clinical experiences that are not focused on direct services to clients otherwise unable to afford access to the courts . . .”). He notes further that this divergence “departs from the historical pro bono legal service performed by most clinical programs that expand direct access to the courts for those otherwise unable to hire attorneys.” *Id.* at 963. But see Karen Knight, *To Prosecute is Human*, 75 NEB. L. REV. 847, 866 (1996), who argues:

Many victims of crime are members of traditionally underrepresented groups who are very much in need of legal assistance. Women and children are frequently the victims of crimes such as sexual assault, abuse, and domestic violence. Poor people and members of minority populations are victimized in significant numbers. Assisting victims is compatible with the desire to contribute effectively to the community by providing legal services that are needed by vulnerable populations.

275. Lynch, *supra* note 263, at 1190.

have been legitimately perceived as enjoying less institutional support than the in-house programs. The Consumer Protection Clinic, operated by an adjunct professor, was an effective vehicle for practical skills training. Technically, the clinic served clients who might have otherwise appeared in small claims court without representation. However, small claims court is one of the few judicial forums in which parties may not be distinctly disadvantaged by appearing without counsel, due to the relatively uncomplicated claims and the fact that they often appear against equally unsophisticated adversaries who appear *pro se*. Moreover, clients pursuing cases in small claims court may be able to retain private counsel due to the fee-shifting provisions of the Massachusetts Consumer Protection Act, which was enforced by the Consumer Protection Clinic.<sup>276</sup> Students participating in the Legal Services Clinic did increase the availability of legal services to traditionally indigent clients. However, the Legal Services Clinic was fraught with problems that imperiled the law school's commitment of financial resources and left its future in doubt.

As outlined above, the Anti-Discrimination Clinic's shortcomings with respect to social justice goals were exacerbated by the inattention to these goals in the law school's other clinical programs. Accordingly, rethinking the structure of this program was warranted.

#### IV. PERSPECTIVES ON AN UNSUCCESSFUL REMEDY

Despite my belief that the Anti-Discrimination Clinic's balance of skills training and social justice goals was not optimal, I was disinclined to entirely abandon the clinic. The law school had developed a positive institutional rapport with MCAD, and the agency had come to rely on the students to manage much of the Springfield office's litigation docket. Accordingly, I endeavored to redesign the clinic to enhance the social justice mission, without jettisoning MCAD.<sup>277</sup> Given my interest in combining individual representation with other strategies calculated to achieve more far-reaching, comprehensive and enduring impact, I contemplated a broader employment clinic as a logical extension of the Anti-Discrimination Clinic. Heeding the admonitions of social justice lawyers to reconceptualize the interplay between law and social change, I

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276. See MASS. GEN. LAWS. ANN. ch. 93A (West 2004).

277. The Equal Justice Project acknowledged that legal services alone are not an adequate mechanism to truly dismantle the barriers to justice for subordinated people, and urged a multi-dimensional approach. EQUAL JUSTICE PROJECT, *supra* note 6, at 3. In considering various tactics, including a law and organizing paradigm and community legal education, the Project concluded that the conception of lawyering skills and instruction must be broadened. See *id.*

avored a clinic construct that aspired to present an integrated and comprehensive response to problems facing low-income clients.<sup>278</sup> My interest in expanding the clinic coincided with the work of a coalition of local groups intended to address the concerns of low-wage workers. As the economic picture continued to decline both locally and nationally, problems facing low-wage and immigrant workers were worsening.<sup>279</sup> The area of workers' rights seemed ripe for creative advocacy and in desperate need of a coordinated strategy.

A community-based workers' rights clinic would have provided a coherent complement to the Anti-Discrimination Clinic, as discrimination often coexists with other employment problems. Initially, it appeared both auspicious and plausible to expand the clinic to encompass a general employment focus, as an extension of the efforts, concepts and sentiments generated by the organizers and participants in the Workers' Rights Conference.<sup>280</sup> To that end, I attended numerous meetings with the Pioneer

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278. See generally Doug Ewart, *Parkdale Community Legal Services: A Dream That Died*, 35 OSGOODE HALL L.J. 485 (1997) (arguing that Parkdale Community Legal Services, which endeavored to function as a proactive community law office, failed in its mission to provide meaningful change for its poor constituents). Ewart notes that the failure was due in part to the overemphasis on issues specific to individuals, which precluded the advocates' ability to effectively address the community's long-term needs. *Id.* See also Gordon, *supra* note 93, who asserts that pursuing vindication of individual legal rights satisfies a very limited number of clients. She laments the unintentional result of this strategy, in which clients who are more likely and able to assert their rights are effectively removed from the pool of people agitating for broader justice, leaving fewer prospective recruits for mobilization efforts. *Id.*

279. A combination of factors compounded the devastating impact on the poor of the general economic downturn, including decreased wages, increased job losses and unemployment, reduced money for education and training, the discontinuation of policies allowing education to qualify as "work" under Temporary Assistance for Needy Families (TANF), decreased daycare subsidies, and many welfare recipients nearing or reaching the five-year lifetime limitation on the receipt of benefits. The retrenched policies and economic realities painted a foreboding picture. Rather than attempt to ameliorate root causes of poverty, the government retreated to the largely discredited and retrograde distinctions between the deserving and undeserving poor, and characterized welfare as a cause of poverty, not a response to it. See generally Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697 (1993) (describing the evolution of the government's distinction between the deserving and undeserving poor). For a thorough discussion documenting the fluctuating underpinnings of social welfare policy, including the conceptual shifts between characterizing welfare as an entitlement versus social insurance, see MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* (1996).

280. The first concrete step involved working with a coalition of groups to organize a conference, which was conceptualized as a forum to initiate a critical discourse on how to best serve the needs of low-income workers in the Pioneer Valley, and to inspire broad-based community interest and commitment to working on issues of economic justice. We hoped to fertilize nascent efforts by local labor leaders, activists, community groups, and other interested constituencies to address these problems. The group recognized that it was quixotic to believe that a community would seamlessly coalesce. While the impediments were not inconsequential and warranted careful thought, a thorough analysis is beyond the scope of this discussion. Our pluralistic approach included outreach to draw

Valley Central Labor Council, the University of Massachusetts Labor Center and representatives from activist community groups. A workers' rights clinic could incorporate issues historically conceptualized within the realm of poverty law, as many issues facing low-wage workers straddle the typically separate, and occasionally conflicting, spheres of employment law and poverty law.<sup>281</sup> Moreover, such a construct could remedy some of the deficiencies of the Anti-Discrimination Clinic noted above; and because it arose organically out of local efforts, it would satisfy the goal of responding to local needs. Over time, however, it became apparent that the concept of a workers' rights clinic was not viable for a variety of reasons, including most prominently the dim prospects of fully funding the initiative.

Ultimately, despite the important institutional relationship with MCAD, the foregoing concerns contributed to my conclusion that the law school's clinical resources could be utilized more effectively to advance the social justice goals outlined above. As a result of these and other considerations, including concerns about the long term viability of the Legal Services Program in the absence of a renewed faculty and institutional commitment, the law school engaged in a major reorganization of our civil clinical program, reallocating faculty resources from the Anti-

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together disparate community groups including the Labor Center, the local labor council, community and faith-based groups, low-wage workers, legal services, and academics experienced in law reform efforts. As the process progressed, it was challenging to transcend the inevitable conflicts between the occasionally competing visions espoused by the various participants. Moreover, it was difficult to determine the manner in which the clinic and law school resources could be most effectively utilized, while maintaining our duty to select pedagogically appropriate tasks for a group of students with diverse professional interests. Also, the process was time-consuming and plagued with uncertainty due to funding and governance issues that needed to be resolved. Ultimately, the workers' rights model was not a viable option in the short term.

281. See, e.g., Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245 (1995). Klare notes that poverty law was traditionally conceptualized as encompassing issues related to government entitlements, low-income workers and matters typically focusing on "housing, consumer, family, immigration, and benefits issues." *Id.* at 246-47. On the other hand, employment, or at least labor law, was characterized as responding to issues affecting higher paid workers, and the resulting tension often impeded collaboration between activists concerned about the contingent workforce, those concerned with welfare-to-work transition and those concerned with organized labor. *See id.* at 247-48. Although employment interests and the interests of welfare rights groups have been characterized as at odds with each other, Klare urges lawyers to develop both legal and non-legal strategies to build coalitions between themselves and their advocates. *See id.* at 269-70. In this way, they can address the myriad of issues that affect both constituencies, including workplace safety, workers' compensation, wage and hour violations, transportation, health care, child care, the impact of globalization, and the increasing prevalence of a contingent and immigrant workforce. *See id.*

Discrimination Clinic to the Legal Services Clinic and a newly designed Public Interest Externship Program.<sup>282</sup>

## V. CONCLUSION

This article chronicles one clinician's efforts to apply contemporary clinical and social justice theory to an unflinching critique of one clinical program. While the Anti-Discrimination Clinic satisfied some reasonable pedagogical goals and fit within the broad definition of public interest work, it fell short of an ambitious and visionary social justice mission. Ultimately, locating a clinic within an administrative agency impeded the school's ability to inculcate fundamental values, including client-centered lawyering, and failed to provide legal services to underrepresented populations and address unmet legal needs. It is not inconceivable to construct a clinic within an administrative agency that furthers important social justice goals. However, one can extrapolate from the experiences and analysis of the Anti-Discrimination Clinic that a clinic embedded within an administrative agency may present insurmountable structural challenges to advancing a transformative social justice agenda.

Within the renaissance of poverty law scholarship, clinicians must answer the call to act as conscientious and reflective practitioners.<sup>283</sup> As we strive to develop multidisciplinary and inclusive solutions, we must rely on insights painfully extracted from historical failures of poverty-law advocacy and clinical pedagogy, candidly exposing our missteps as we go. We cannot be complacent, but rather must leverage the resources of the academy in order to provide a meaningful educational service to the students, aid the local community and contribute to the larger movement for social justice. Despite the daunting nature of the problem and the challenges intrinsic to seeking solutions, we must soldier on with ambitious goals, unwavering commitment and a sharp, self-reflective focus.

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282. The full circumstances and details surrounding this reorganization are beyond the scope of this paper.

283. See Robert D. Dinerstein, *Clinical Scholarship and the Social Justice Mission*, 40 CLEV. ST. L. REV. 469 (1992) (noting that clinicians are well placed to contribute to social justice scholarship, and should be collecting and sharing empirical data that analyzes the efficacy of public interest lawyering strategies).