(Un)Supervised Student Practice

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ABSTRACT

Law student practice is a powerful pedagogical tool that must be wielded judiciously. At its best, student practice coalesces a student's professional values and prepares that student to become a competent, compassionate, and confident lawyer. However, the current regime of state student practice rules, rooted in the American Bar Association's (ABA) model rule, undermines the integrity of student practice in several crucial ways. In most states, students are authorized to practice law without meaningful oversight by law schools, and supervisors need not complete any special training. Supervisors are not universally required to accompany students to court, even when students are acting as prosecutors. Some student practice rules still fail to account for the wide range of work that is done by students in many law school clinics, particularly in transactional clinics. Financial incentives skew the focus away from student learning in states that allow students to not only represent wealthy individuals but also charge for their services, all outside the oversight of law school programs. This Article examines these problems with existing state student practice rules and proposes rule reform in light of the goals and purpose of student practice.

I. INTRODUCTION

Imagine going to your doctor's office with a serious medical concern. You tender a copay and wait to be seen. When your name is called and you go back to the examination room, instead of a physician you are greeted by a student-doctor. The student-doctor tells you she has a permit allowing her to practice medicine. You make conversation by asking about the process to obtain that type of permit. She says she completed a form and sent it to the medical board along with her transcript. You ask if she is getting credit for this internship and she says no, this is not a school program; she is being paid. She has not mentioned a supervisor, so you ask what type of supervision she gets. The student-doctor says there is no requirement that her supervisor observes nor checks her work, nor provides any particular training or oversight of any kind. The supervising doctor is generally responsible for the student's work, but the manner of supervision

is up to the discretion of the individual supervisor. The student-doctor says she thought she would get more supervision, but the supervising doctor is very busy so they do not get to talk as much as she would like. Growing concerned, you ask what type of practical training she has had so far in medical school. The student-doctor tells you she has completed a number of lecture courses but no practical training yet—that is what she is hoping to get in this internship.

The above vignette is, of course, fantasy in a medical context—but not in the practice of law. Student practice is a powerful tool in experiential learning, central to law school clinics and many externship programs.[1] However, in many states, law students can be certified to engage in the practice of law outside law school clinics or even externship programs, without accountability to any law school.[2] The level of supervision required varies by state, but does not generally include any specific practices, training, or self-reflection on the part of the supervisor.[3] In many instances, the supervisor need not be present with a student in court.[4] Often, students can be paid and clients charged for this work.[5] Unaffiliated student practice occurs not only in non-for-profit contexts, but also in government and the private sector.[6] One particularly troubling setting in which unaffiliated student practice can occur is a prosecutor's office.[7] Given the heightened ethical responsibility of the prosecutor and the devastating consequences of prosecutorial conduct in the machinery of mass incarceration, law

1. Sixty-nine percent of clinics and externships report that their students practice under a student practice rule. ROBERT R. KUEHN, MARGARET REUTER & DAVID A. SANTACROCE, 2019-20 SURVEY OF APPLIED LEGAL EDUCATION 27 (2020).

2. *See infra* Part II.A. This Article will refer to this practice as unaffiliated student practice.

3. *See infra* Part II.A.

4. *See infra* note 7.

5. *See infra* Part II.B.

6. *See infra* notes 72–73 and accompanying text.

7. *See, e.g.*, COLO. R. CIV. P. 205.7(2)(a)(i) (allowing students to appear in "any county or municipal court criminal proceedings, except when the defendant has been charged with a felony"); KAN. SUP. CT. R. 719(i)(3) ("With the supervising attorney's written consent and the court's approval, a legal intern may appear on behalf of the government in a criminal matter without the personal presence of the supervising attorney."); MASS. S.J.C. RULE 3:03(1)–(2) (2020) (allowing prosecutor's to "general[ly] supervis[e]" students without being present in court).

student practitioners are poorly equipped to play the role of prosecutor in the absence of rigorous supervision.[8]

Loosely regulated law student practice threatens not only the public, but the students who engage in it. A client or opponent's rights may be harmed by an unsupervised student. Unsupervised or incompetently supervised students may learn bad habits, including a disregard for procedural justice, and be exposed to unnecessary ethical or malpractice liability. Quality supervision is a valuable commodity that is not likely to materialize without certain regulations in place.[9] Because supervising student practitioners is incredibly time-intensive, lawyers who accept unaffiliated student practitioners either have an unusual abundance of time or are not actually engaging in proper supervision. Certainly there are practitioners who have a passion for mentorship and a willingness to dedicate appropriate time to adequately supervise students. However, the current student practice rules in many states have no way of distinguishing between those special lawyers and cavalier ones who may even see student practitioners as a low-cost labor source.

This Article will address various shortcomings in the current student practice rule regime. Particularly when combined, these shortcomings significantly deregulate student practice in problematic ways. Some issues are found in the American Bar Association (ABA) model rule for student practice,[10] which was passed in 1969 and amended in 1979;[11] other issues have arisen where states have abandoned the few model rule provisions that did impose concrete parameters on student supervision. Regardless of the origin of these problems, states need not accept flawed student practice rules. Professors Wallace Mlyniec and Haley Etchison have argued that student practice rules should be updated when the rules no longer function.[12] This Article will provide an overview of the national landscape

8. Prosecutors are subject to heighted ethical rules, MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983), as well as disclosure obligations such as those required by *Brady v. Maryland*, 373 U.S. 83 (1963). Prosecutors also have vast discretion within the justice system, which can be highly destructive when not exercised with exquisite caution. *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).

9. *See* Karen A. Jordan, *Enhancing Externships to Meet Expectations for Experiential Education,* 23 CLINICAL L. REV. 339, 349 (2016) (arguing that it is unrealistic to expect supervisors who are not compensated as supervisors to "carve out time from day-to-day demands for effective teaching and feedback during supervision in the field").

10. *See infra* Part III.

11. *Annual Report of the American Bar Association*, 94 AM. BAR ASS'N. 290–92 (1969) [hereinafter *1969 A.B.A. Report*]; *Annual Report of the American Bar Association*, 104 AM. BAR. ASS'N 730 (1979) [hereinafter *1979 A.B.A. Report*].

12. *See* Wallace J. Mlyniec & Haley D. Etchison, *Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules*, 28 GEO. J. LEGAL ETHICS 207, 258 (2015).

of student practice rules, explore the theoretical underpinnings of student practice, discuss the need for specific reforms, and urge the profession, the academy, and experiential educators in particular to advocate for rules that better fit current practice models and the goals of student practice.

Part II will delineate the most problematic common pitfalls found in current student practice rules: abdication of supervisor responsibility, susceptibility to financial pressures, erosion of client autonomy, and the underinclusive focus on in-court practice. Part III will briefly trace the history of the model student practice rule, including how the model rule spurred the passage of student practice rules in all states. Part IV will define the theoretical goals of student practice, which will serve as a foundation for updating the rules to better serve these goals. Part V will argue the importance of rule reform for all those involved in the legal profession and outline several guiding concepts or touchstones to help shape reform efforts and ensure that student practice is serving students and the public, and advancing the interests of justice.

II. SHORTCOMINGS OF EXISTING STUDENT PRACTICE RULES

Today, many states' student practice rules still carry vestiges of the ABA model rule, first adopted in 1969.[13] Although some states have completely overhauled their student practice rules,[14] a number of states continue to follow many, if not all, of the model rule's provisions.[15] Where states have deviated from the model rule, those deviations have not always been productive to the interests of students and the public.[16] This Part will

13. Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 20 (2000).

14. *See, e.g.*, Mlyniec & Etchison, *supra* note 12, at 219–58 (explaining the process of modernizing D.C.'s student practice rule); D.C. CT. APP. R. 48 (reflecting the many changes discussed in Mlyniec and Etchison's article).

15. *See 1969 A.B.A. Report*, *supra* note 11, at 291 (stating that the presence of a supervisor is not required); *infra* note 25 (listing states that follow the model rule in not requiring a supervisor present); *1969 A.B.A. Report*, *supra* note 11, at 290–92 (allowing unaffiliated student practice); *infra* note 32 (listing states that follow the model rule in allowing unaffiliated student practice); *1979 A.B.A. Report*, *supra* note 11 (the indigency requirement from the model rule); *infra* note 61 (listing states that have no indigency requirement); *1969 A.B.A. Report*, *supra* note 11, at 291 (allowing indirect compensation); *infra* note 74 (listing states that allow indirect compensation); *1969 A.B.A. Report*, *supra* note 11, at 290–92 (focusing on in-court practice); *infra* note 99 (listing some states whose rules focus only on in-court practice).

16. *See infra* Part III.C.

discuss deficits in the national landscape of student practice rules, focusing on the ways in which rules detract from student learning and client interests. It is important to keep in mind how the issues outlined below interact with one another. Addressing one of these issues may significantly mitigate the risks presented by other issues. However, when states fail to impose regulations in multiple areas, the result can be almost entirely deregulated student practice.

A. Abdication of Supervision Responsibility

Although high-quality supervision is an essential component of successful student practice, the current patchwork of student practice rules does not ensure adequate student supervision in all states. Following the model rule, many states permit student practice of law to occur entirely outside of in-house clinics or even externship programs.[17] In those states, students can obtain permits and practice law in the community, supervised by lawyers with no additional training, oversight, or pedagogical accountability.[18] Some students are allowed to be paid for these placements and some are not.[19] Although ABA reports from the time the model rule was passed and updated indicate that the model rule intended for student practice to be managed by law school faculties, the rule does not make that assumption explicit.[20] As a result, states that adopted the model rule had wide latitude to permit student practice outside of law school oversight.

The model rule required a law school dean to certify that the student has "good character and competent legal ability" and has been "adequately trained to perform as a legal intern;"[21] there was no requirement that the law school approve of the student's practice placement or supervisor.[22] This is unlike the student practice model in other professions, such as medicine, in which student practice is deeply integrated into the medical

17. In its purpose section, the model rule stated that it was adopted "[a]s one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds . . . ." *1969 A.B.A. Report*, *supra* note 11, at 290. The notion of students doing work outside of law school clinics for paying clients seems well outside the scope envisioned by the model rule.

18. *Id.*

19. *See infra* Part II.B.

20. *1969 A.B.A. Report*, *supra* note 11, at 290–91; *1979 A.B.A. Report*, *supra* note 11.

21. *1969 A.B.A. Report*, *supra* note 11, at 290.

22. One potential part of the solution to the issue discussed in this subsection would be for law deans to more critically view their responsibility to certify interns as prepare to practice. However, law students are not considered to be fully prepared to practice until they have graduated and passed the bar. The critical component of student practice is supervision, which is not the responsibility of the law dean, but the placement supervisor.

school curriculum and supervised by medical schools.[23] The model rule for law student practice also contained no parameters to ensure a minimum standard of supervision. A supervisor's presence was not required when a student appeared in court; the supervisor needed to only "introduce" the student.[24] Remarkably, many states today allow students to represent clients in court without a supervisor present.[25]

Anyone who has supervised enough students in court is well aware that proceedings can quickly go awry and even well-prepared students may require supervisor intervention to ensure that a client's interests are protected. Such moments may be rare, but they are not the only reason a supervisor's presence is essential. A supervisor who is not present in court cannot give a student specific feedback on their performance. Such feedback, as well as facilitation of student self-reflection,[26] is an essential part of experiential learning.[27] A student who is not supervised in court will miss

23. *See, e.g.,* Lucien Cardinal & Alan Kaell, *The Role of Medical Education in the Development of the Scientific Practice of Medicine,* 7 J. CMTY. HOSP. INTERNAL MED. PERSPS. 58, 59–60 (2017).

24. *1969 A.B.A. Report*, *supra* note 11, at 291.

25. *See, e.g.,* ALA. R. LEGAL INTERNSHIP L. STUDENTS R. II(C) (requiring supervisor presence only for jury trials); ALASKA BAR R. 44 § 5(b)(1)–(3) (stating that presence can be waived for certain case and hearing types); ARIZ. SUP. CT. R. 39(c)(4)(C)(ii) (requiring presence only in certain case types); MASS. S.J.C. R. 3:03 (stating presence not required); CAL. R. CT. 9.42(d)(4) (stating presence not required for low level prosecutions with supervisor approval); COLO. R. CIV. P. 205.7(2)(a)(i) (requiring presence only for testimonial proceedings when representing a criminal defendant); DEL. SUP. CT. R. 56(b)(2) (stating presence can be waived by the court in certain cases); HAW. SUP. CT. R. 7.2(a)(2) (court can waive presence); IOWA CT. R. 31.15(2) (requiring presence only for appellate cases and second-year students); MINN. SUPERVISED PRAC. R. 5(A)(4) (stating court can waive presence); MO. SUP. CT. R. 13.01(a) (stating that client can waive presence when not entitled to counsel); NEB. SUP. CT. R. § 3-702(A)(1) (stating court can waive presence); 27 N.C. ADMIN. CODE 01C.0206 (prerequiring presence at the court's discretion); OHIO GOV. BAR R. II § 5 (stating client and supervisor can waive presence in some case types); VT. R. ADMISSION BAR R. 24(c) (stating client and court can waive presence); WIS. SUP. CT. R. 50.06(2)(b) (stating client and court can waive presence in some cases); R. GOV. WYO. STATE BAR & AUTH. PRAC. L. 9(c)(4) (stating client and court can waive presence in some cases).

26. For a discussion on the importance of critical reflection as a goal of experiential learning, see *infra* Part IV.B.3.

27. Feedback and assessment are critical to the success of any learning experience. *See* Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 232 (2015) (citing studies documenting the efficacy of formative assessment); Paula J. Manning, *Understanding the Impact of Inadequate Feedback: A Means to Reduce Law Student Psychological Distress, Increase Motivation, and Improve*

the opportunity to receive appropriate feedback and may develop bad habits. While some judges may be kind enough to offer corrections to a wayward student, a judge cannot replace a supervisor who occupies the same litigation role as the student—that of an advocate. Ultimately, providing feedback is the responsibility of the supervisor and a fundamental part of experiential education.[28]

Another failure to ensure adequate supervision stems from the model rule not limiting students practice to law school programs, such as clinics and externships.[29] Currently, only nine states and the District of Columbia limit student practice to clinics or law school administered externships.[30] Six states allow students to practice in clinics after earning zero to forty-five credits, and then outside of a law school program after earning thirty to sixty credits.[31] The remaining states have no such limitations.[32] The phenomenon of student practice outside the confines of any law school program raises the question of whether student practice is necessarily educational, which will be discussed at length in Part IV.[33] Unaffiliated student practice also raises the question of supervisor accountability. Although supervising lawyers may be considered responsible for certain subordinate conduct under rules of professional conduct, those rules fail

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Learning Outcomes, 43 CUMB. L. REV. 225, 228 (2013) (noting that feedback is an essential part of learning).

This is particularly true in experiential learning settings. *See* Victor M. Goode, *There Is A Method(ology) to This Madness: A Review and Analysis of Feedback in the Clinical Process*, 53 OKLA. L. REV. 223, 224 (2000) (arguing that feedback "is of singular importance to nearly every aspect of clinical teaching").

28. *Id.*

29. *1969 A.B.A. Report*, *supra* note 11, at 290–92.

30. *See* D.C. CT. APP. R. 48; HAW. SUP. CT. R. 7; IOWA CT. R. 31.15 (allowing students to continue to practice in their field placement, even when no longer earning credit); KY. SUP. CT. R. 2.540; LA. SUP. CT. R. XX; MD. R. 19-217; MISS. CODE ANN. §§ 73-3-201–73-3-211 (2011); N.M. R. CIV. P. 1-094; S.C. APP. CT. R. 401(a), (d)(1)–(3); TENN. SUP. CT. R. 7 § 10.03.

31. CONN. R. SUPER. CT. § 3-16(a)(2); KAN. SUP. CT. R. 719(i)(3); N.H. SUP. CT. R. 36; OKLA. STAT. tit. 5, § 2.1 (2018); OR. SUP. CT. R. 13.20; TEX. R. GOV. SUPERVISED PRAC. L. QUALIFIED L. STUDENTS & QUALIFIED UNLICENSED L. SCH. GRADUATES R. II.

32. *See* ALA. R. LEGAL INTERNSHIP L. STUDENTS R. IV(B); ALASKA BAR R. 44; ARIZ. SUP. CT. R. 39(c); CAL. R. CT. 9.42; IDAHO BAR COMM'N R. 226; MONT. STUDENT PRAC. R.; NEB. SUP. CT. R. § 3-703; NEV. SUP. CT. R. 49.3; 27 N.C. ADMIN. CODE 01C .0201–.0206; N.D. STATE CT. R. LTD. PRAC. OF L. BY L. STUDENTS III; PA. B.A.R. 321, 322; S.D. CODIFIED LAWS §§ 16-18-2.1–16-18-2.10 (2011); VT. R. ADMISSION BAR R. 21, 22; VA. R. PROF'L CONDUCT 15.

33. This is not to say that nothing can be learned from work, internship, or volunteer experiences that do not involve the level of supervision imposed in a clinic or externship setting. Valuable lessons arise in a wide variety of life experiences. However, not all life experiences meet the standards for an academic program.

to account for the unique circumstances of student practice.[34] The ethics rules assume either independent professional licensure and judgment on the part of a lawyer supervisee or that the supervisee is a non-lawyer who is not engaged in the practice of law.[35] Law student practice fits neither of those assumptions.

Supervision is essential not only to ensure quality of services delivered,[36] but also to preserve the educational experience of student practice.[37] A rich and rigorous educational experience is available in any well managed in-house clinic.[38] High-quality externship programs can also offer a valuable learning experience for students. The academic literature as well as ABA standards reflects that an externship should be overseen by a law school faculty member who is focused on providing a meaningful and challenging educational experience for students.[39] The ABA further requires that all law schools assess for pedagogical efficacy in all programs, including clinics and externships.[40] Notably, no such assessment is required for student practice that occurs outside the purview of law school programs.

Where students practice in the community through externship programs, ensuring the quality of site supervision generally requires active involvement of a faculty member, site supervisor training, a classroom component for

34. MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 1983) (holding the supervisory lawyer responsible for certain subordinate conduct).

35. *See* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983).

36. The legal profession requires passage of the bar exam as a means of ensuring that new lawyers meet a minimum competency standard. Student practice functions as a waiver to that requirement, allowing students to practice prior to establishing their competency by passing the bar exam. As such, student practice relies upon supervision to ensure minimum competency of those services delivered by a student. For more on this, see *infra* Part IV.

37. *See* Ann Shalleck & Jane H. Aiken, *Supervision: A Conceptual Framework*, *in* SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 169 (2014) (asserting that quality supervision is essential for student learning).

38. *See* Jordan, *supra* note 9, at 342 (referring to the "unique educational benefits" of an in-house clinic).

39. *See* AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–2021, at 19–20 (2020) (mandating standard 304, which sets forth various requirements for experiential courses); Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 CLINICAL L. REV. 611, 612 (2004) ("Effective supervision is acknowledged as the most essential element of law student training in an off-campus setting or externship.").

40. AM. BAR ASS'N, *supra* note 39, at 25 (mandating standard 315, which requires law schools to implement and assess learning outcomes).

externship students, and site visits.[41] Not only are these elements necessary to ensure the integrity of the educational program, but most are required by the ABA standards for legal education.[42] In writing about the qualities of effective externship field supervision, Professors Barbara A. Blanco & Sande L. Buhai wrote:

> Effective supervision is acknowledged as the most essential element of law student training in an off-campus setting or externship. The importance of effective field supervision is demonstrated in a growing body of literature addressing the theories of effective supervision and the nature of student learning.[43]

Though practitioners who are capable of providing educationally valuable and rigorous student practice experiences even outside of an externship program exist, structural realities make it unlikely that such practitioners represent the norm. The pressures of law practice are fundamentally at odds with the investment of time and energy necessary to cultivate such an experience. As will be discussed further in Part IV.B, the pedagogical goals of student practice are robust and working to meet those goals is time-consuming for the supervisor.

Blanco and Buhai went on to identify obstacles of ensuring high-quality field supervision even in an externship setting:

> Yet the practical mechanics of implementing an off-campus program in which supervisors are consistently motivated and trained to incorporate the educational goals of the institution into a busy practice and in which students are likewise consistently motivated and trained to initiate guidance, clarification and self-assessment, eludes all but the most experienced program directors.[44]

This emphasis on an experienced externship program director is critical. Externship program directors are tasked with ensuring that students are placed with field supervisors who will provide adequate supervision. While the highest-performing students may take the initiative to seek out the resources and support necessary to succeed in a trial-by-fire environment, a good externship director ensures that those resources and support are available to all students. Externship directors also help students integrate the learning that occurs in their field work.

Given these challenges, the likelihood of a student obtaining a high-quality, educational student practice experience outside a formal law school program

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41. *See generally* Blanco & Buhai, *supra* note 39 (discussing effective supervision of law externs in field placement programs).

42. AM. BAR ASS'N, *supra* note 39. For more details on what constitutes a thoughtfully-designed and well-managed externship, see Cynthia Adams et al., *Upward! Higher: How a Law Faculty Stays Ahead of the Curve*, 51 IND. L. REV. 415, 428–38 (2018) and Harriet N. Katz, *The Past and Future of Externship Scholarship*, 23 CLINICAL L. REV. 397 (2016).

43. Blanco & Buhai, *supra* note 39.

44. *Id.*

such as a clinic or externship is small.[45] Most practitioners are ill-prepared to provide the training, support, and supervision—that is, *time*—necessary to empower a student to not only provide a quality service to the client but also learn from the experience. Instead, for example, students may be sent to crowded dockets without supervisors, where they are subject to unfair pressures and given inappropriate power and discretion.[46] In such a scenario, the student's development is undermined, and the quality of service provided to the public is compromised. This failure can occur because unlike law school programs, unaffiliated student practice is not subject to any accountability structure ensuring that students placed in such settings are actually learning.[47]

B. Susceptibility to Financial Pressures

Current student practice rules in many states, following the model rule, fail to regulate financial pressures around student practice of law.[48] These financial pressures may influence the triad of client, student, and supervisor in ways that jeopardize student learning and client service. Such financial pressures are particularly dangerous when combined with other provisions that create laxity in the regulation of student practice. For example, risks to students and clients increase when unchecked financial incentives occur in student practice settings that are not affiliated with law school programming.[49] Problematic financial pressures stem from each of two model rule provisions widely adopted by states across the country: first,

45. This is not to say that there is no value to a law clerk internship experience in which a student observes and supports the practice of a licensed attorney, even outside of a law school program. However, there are critical differences between a law clerk model and a student practice model, in which the student actually represents clients and provides legal services herself. The latter requires intensive training, support, and supervision, which is beyond the scope of what most law practices can provide to students who are unlikely to yield a return on that investment—that is, a benefit to the law practice—within a semester or even an academic year.

46. For example, in Kansas, law students are permitted to handle low-level prosecution dockets without a supervisor present. KAN. SUP. CT. R. 719(i)(3).

47. AM. BAR ASS'N, *supra* note 39, at 25 (mandating standard 315, which requires law schools to implement and assess learning outcomes).

48. *See infra* notes 71, 76–78 and accompanying text.

49. This Article does not suggest that no unaffiliated student practice supervisor could ever provide high-quality supervision. However, the financial and practical conditions of unaffiliated student practice in many states do not support quality supervision. Further, in those states, there is no provision of the rules to ensure or even encourage quality supervision or require any pedagogical value whatsoever for student practice of law.

the 1979 removal of the client indigency requirement,[50] and second, allowance of student compensation and client billing.[51] This subsection will discuss each of these provisions in turn, noting how they interact with one another. This Article does not take a position in the debate about paid externships.[52] The point made here is simply that financial pressures can degrade both pedagogical and service outcomes of student practice, particularly when student practice occurs outside the purview of law school programs. Therefore, financial pressures must be balanced within the context of a rule that ensures high-quality supervision and focus on student learning.

Early efforts to promote clinical legal education on a national stage were imbued with the sense that public interest was a fundamental part of the clinical education model.[53] The ABA's 1969 Report from the Section of Judicial Administration spoke of law students representing "indigent persons" in "legal aid, public defender and like programs which are essential to the requirement of furnishing competent legal services for all."[54] Prosecutor's offices were part of the vision as well.[55] The original model rule limited student practice to representing only indigent clients or prosecutor's offices.[56] The model rule disallowed direct compensation from client to student, but did allow lawyers, law schools, legal aid offices, and governments to both pay student practitioners and charge clients for services rendered.[57] Thus, financial interests were at play in the original model rule, but balanced within the context of public interest and public service limitations on student practice.

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50. *1979 A.B.A. Report*, *supra* note 11 (removing the indigency requirement from the model rule and broadening its purpose section).

51. *1969 A.B.A. Report*, *supra* note 11, at 291 ("Neither ask for nor receive any compensation or renumeration of any kind for his services from the person on whose behalf he renders services, but this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.").

52. *See infra* note 76.

53. *See* Barry, Dubin & Joy, *supra* note 13, at 12.

54. *1969 A.B.A. Report*, *supra* note 11, at 290.

55. For a discussion of concerns unique to students practicing as prosecutors, see *supra* notes 7–8 and accompanying text. Those concerns are relevant here because prosecutor's offices may face tight budgets and have a motivation to see students as an affordable labor source without regard to the need for significant investment of supervisor time. This may be true of legal aid and defender's offices as well, but some states have less-restrictive supervision requirements for student practitioner's acting as prosecutors. *See, e.g.*, CAL. R. CT. 9.42(d)(4)(b); KAN. SUP. CT. R. 719(i)(3). Overall, the interplay of supervision and financial concerns is strong, and this subpart must be read and balanced with subpart A above.

56. *1969 A.B.A. Report*, *supra* note 11, at 290–91.

57. *Id.* at 291.

Ten years after first promulgating the model rule, the ABA removed the rule's indigency requirement.[58] Although the purpose section indicated a continued focus on service-learning and access to justice,[59] without the indigency limitation, there was no provision left in the model rule to ensure that purpose was effectuated.[60] Today, many states allow students to practice law on behalf of any client, regardless of financial means,[61] thus inviting the potential for private sector profit motives into the paradigm of student practice. Those profit motives pose a risk to both students and clients that their interests may be subjugated to financial concerns of a supervisor.[62] Furthermore, without a concrete commitment to serving poor or marginalized people, those states have essentially abandoned service-learning goals of student practice, such as teaching relational skills and justice, discussed in Part IV.B. below.

One argument against a requirement that student practice clients be indigent is that such a requirement creates an administrative burden on law schools and courts in the administration of student practice permits.[63]

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58. *1979 A.B.A. Report*, *supra* note 11.

59. *Id.* The purpose statement in both the 1969 and 1979 versions included the following language: "The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for the services." *Id.*; *1969 A.B.A. Report*, *supra* note 11, at 290. This component is the "access to justice" purpose. Moreover, both versions included the following language: "[to] encourage law schools to provide clinical instruction in trial work of varying kinds . . . ." *1979 A.B.A. Report*, *supra* note 11; *1969 A.B.A. Report*, *supra* note 11, at 290. This component is the "service-learning" purpose.

60. *1979 A.B.A. Report*, *supra* note 11 (removing the indigency requirement, which was in the 1969 version).

61. *See, e.g.*, ALA. R. LEGAL INTERNSHIP L. STUDENTS R. III; ALASKA BAR R. 44; CAL. R. CT. 9.42; CONN. R. SUPER. Ct. §§ 3-14–3-21; IDAHO BAR COMM'N R. 226; MONT. STUDENT PRAC. R.; NEB. SUP. CT. R. §§ 3-701–3-706; TEX. R. GOV. SUPERVISED PRAC. L. QUALIFIED L. STUDENTS & QUALIFIED UNLICENSED L. SCH. GRADUATES; VT. R. ADMISSION BAR R. 21–24; VA. R. PROF'L CONDUCT 15; WASH. ADMISSION & PRAC. R. 9; WIS. SUP. CT. R. 50.

62. Some may also be concerned that the profit-driven model of student practice creates unnecessary competition between students and the private bar. Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 258 (1999) ("In permitting law students the right to practice law under student practice rules, a state supreme court may be concerned about some practicing lawyers losing potential clients to clinical programs.").

63. During recent rule reform efforts in Kansas, some advocates asked the Supreme Court to remove the indigency requirement because it would be difficult to administer with respect to programs in rural areas and entity representation. *See* Letter from Stephen Mazza, Dean, Univ. of Kan. Sch. of L., et al., to Barry L. Garrison, Admissions Adm'r, Clerk

However, there is no evidence that states with indigency requirements experience any administrative issues.[64] Another argument against an indigency requirement is the fact that many people in rural communities—even those who are able to afford an attorney—are subject to a lawyer shortage.[65] Similarly, there may be individuals and entities facing access to justice barriers other than finances, unable to obtain legal services for a variety of reasons.[66] The District of Columbia offers an elegant solution to this concern, allowing student practitioners to represent "any client who is indigent or who, because of limited financial ability or the nature of the claim, would be unlikely to obtain legal representation, or any non-profit organization . . . ."[67] Professors Wallace Mlyniec and Haley Etchison explained that the rules committee wanted to expand access to representation to all "'under-served persons' and leave it to the good faith of the clinical directors to implement the rule."[68] Because D.C. limits student practice exclusively to clinical programs,[69] the discretion necessary for the implementation of the rule is left to those who teach in experiential learning programs within law schools.[70]

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of the Supreme Ct. (February 9, 2018) (on file with the University of San Diego School of Law Library) (establishing that the University of Kansas School of Law asked the court to remove the indigency requirement from Kansas's student practice rule).

64. No reported cases reflect an accusation that a student represented a non-indigent person. In an in-house clinic, professional discretion of the supervisor is sufficient to navigate this issue.

65. This argument was also made during recent rule reform efforts in Kansas. *See* Letter from Stephen Mazza et al. to Barry L. Garrison, *supra* note 63. Although the rural justice gap disproportionately affects the poor, wealthier rural residents are not immune. *See* April Simpson, *Wanted: Lawyers for Rural America,* PEW CHARITABLE TRS. (June 26, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/26/wanted-lawyers-for-rural-america [https://perma.cc/4H3R-SZMS].

66. For example, a hearing may be set so near in the future that it would be impossible to obtain a private practice attorney before the hearing, as in the case of domestic violence protection orders. *See, e.g.*, W. George Senft, *Restraining Orders and Domestic Violence*, OR. STATE BAR (Aug. 2018), https://www.osbar.org/public/legalinfo/1140_restrainingorders.htm [https://perma.cc/PTZ7-XNS9]. A law school clinic collocated with other agencies in a courthouse domestic violence intake center may be prepared to immediately accept such a case for representation when the client would not have time to obtain private counsel.

67. D.C. CT. APP. R. 48(a)(1). Washburn University School of Law advocated for a similar approach in Kansas during rule reform efforts. *See* Letter from Stephen Mazza et al. Barry L. Garrison, *supra* note 63. However, the Kansas Supreme Court removed the indigency requirement altogether. KAN. SUP. CT. R. 719.

68. Mlyniec & Etchison, *supra* note 12, at 232.

69. D.C. CT. APP. R. 48(a)(1), (b)(1).

70. *Id.* Missouri provides an alternative approach, allowing certified students to represent any clinic client but only indigent persons, or the state, outside the clinic context. MO. SUP. CT. R. 13.01(a).

The second source of financial incentives arising from the model rule is indirect student compensation and client billing.[71] The model rule barred a student from requesting or receiving "any compensation or renumeration of any kind for his services from the person on whose behalf he renders services . . . ."[72] However, the rule went on to state that "this shall not prevent a lawyer, legal aid bureau, law school, public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require."[73] Many states continue to use the same or substantially similar language in their student practice rules today.[74] Other states are silent on the issues of fees and compensation.[75]

The bar on "direct" compensation leaves a great deal of ambiguity for financial incentives to influence student practice. This is particularly true when students are serving higher-income clients and practicing outside of law school programs. The propriety of student compensation in externships is a source of debate in the field.[76] The most significant objection to compensated externships is that compensation undermines the educational integrity of student practice by introducing financial motives that militate against good supervision.[77] Those who support compensated externships

71. *1969 A.B.A. Report*, *supra* note 11, at 291.
72. *Id.*
73. *Id.*
74. *See, e.g.*, ALA. R. LEGAL INTERNSHIP L. STUDENTS R. IV(F); ARIZ. SUP. CT. R. 39(c)(4)(A)(ii); ARK. R. GOV. ADMISSION TO THE BAR R. XV(C); COLO. R. CIV. P. 205.7(2)(a)(i); CONN. R. SUPER. CT. § 3-16(b); DEL. SUP. CT. R. 56(c); GA. R. SUP. CT. 92(c); HAW. SUP. CT. R. 7.4(b); IDAHO BAR COMM'N R. 226(j); ME. R. CIV. P. 90(b)(4); MO. SUP. CT. R. 13.02(c); MONT. STUDENT PRAC. R. V(E); NEB. SUP. CT. R. § 3-703(F); 27 N.C. ADMIN. CODE 01C.0203(e); N.D. STATE CT. R. LTD. PRAC. OF L. BY L. STUDENTS III(E); OHIO GOV. BAR R. II § 6; OKLA. STAT. tit. 5, § 9.1 (2018); PA. B.A.R 321(a)(5)(i-iii); S.C. APP. CT. R. 401(d)(4); S.D. CODIFIED LAWS §§ 16-18-2.2(5) (2011); TEX. R. GOV. SUPERVISED PRAC. L. QUALIFIED L. STUDENTS & QUALIFIED UNLICENSED L. SCH. GRADUATES R. IX; VT. R. ADMISSION BAR R. 24(f); VA. R. PROF'L CONDUCT 15(b)(v); W.V. R. ADMISSION PRAC. L. R. 10.1(e); WIS. SUP. CT. R. 50.08.
75. *See, e.g.,* ALASKA BAR R. 44; CAL. R. CT. 9.42; MICH. CT. R. 8.120; N.J. CT. R. 1:21–23; N.M. R. CIV. P. 1-094.
76. *See, e.g.*, James H. Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 29 (2010); Niki Kuckes, *Designing Law School Externships That Comply with the FLSA*, 21 CLINICAL L. REV. 79, 79 (2014).
77. *See* Backman, *supra* note 76, at 49.

say programmatic design and implementation can protect pedagogical interests against financial ones, or at least balance the two.[78]

Regardless of one's views on whether externships should be paid, that is a separate question from whether students working outside externship programs—and outside any law school program—should be compensated for practicing law, particularly in the private sector and on behalf of high-income clients. The original model rule placed important constraints on the financial incentives for student practice by limiting all student practice to serving indigent clients or the state.[79] Although students could be paid for their work under the Model Rule,[80] economic interests were originally moderated by the fact that student practice clients were necessarily poor.[81] Once the indigency limitation was removed in 1979,[82] that check on financial incentives was lost. Today, in states that follow the model rule, a student can earn a salary from a private-sector employer who bills clients for the student's work. Thus, supervisors may see certified law student practitioners as inexpensive fee-generating labor without properly considering the intense commitment that is supervising a student.

C. Erosion of Client Autonomy

Although client consent was a key feature of the 1969 model student practice rule,[83] many states have deviated from that approach.[84] The model rule required the student to obtain written consent from the client or state and required the supervising attorney to file that consent with the court and "[bring the consent] to the attention" of the judge or presiding officer.[85] These requirements ensured that student practice would occur with both client and supervisor consent, imposing upon the student the burden of obtaining that consent. That burden carried both practical and pedagogical value. As a practical matter, clients would be informed of the

78. *Id.*

79. *1969 A.B.A. Report*, *supra* note 11, at 290–91 (limiting students to representing indigent persons in civil and criminal matters, II(A), and representing the State in criminal matters, II(B)).

80. *Id.* at 291 (allowing students to be paid for their work under the model student practice rule so long as they did not bill clients directly).

81. *Id.* at 290–91. *See also* Backmun, *supra* note 76, at 28 (noting service of indigent persons will not yield compensation).

82. *See 1979 A.B.A. Report*, *supra* note 11 (removing the indigency requirement from the model rule and broadening its purpose section).

83. *1969 A.B.A. Report*, *supra* note 11, at 290 (allowing student representation "if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance . . . .").

84. *See infra* notes 86–87.

85. *1969 A.B.A. Report*, *supra* note 11, at 290–91.

students' status and have the opportunity to decide whether to be represented by a student. Further, by requiring students to take multiple actions to establish and document client consent, the model rule demonstrated the importance of client autonomy and ensured that students spent a meaningful amount of time concerning themselves with client consent. This signaled to students that client autonomy matters.

Despite the helpful example the model rule set on this particular point, client consent has been marginalized in many states. In several states, written client consent is only required for lawyering activities that take place in court.[86] In a number of other states, client consent is not required at all.[87] This erosion of emphasis on client consent is troubling, first as a matter of autonomy—and constitutional rights. Clients should be well informed that their representatives are law students. It is easy enough for a client to become confused about a law student's status as a non-lawyer; thus, affirmative measures should be required to combat that potential confusion. Properly obtaining and documenting client consent may be particularly important in cases involve a constitutional right to counsel.[88] Second, weak or nonexistent client consent requirements teach students that client consent, and thus client autonomy, is unimportant. This lesson runs counter to many of the goals of student practice as discussed in Part IV below.

D. Focus on In-Court Practice

Everything about the model rule reflected the idea that student practice would be a phenomenon that took place within the walls of the courtroom. In the preamble, student practice was mentioned twice—each referencing in-court practice.[89] The first section of the model rule laid out a twofold purpose: first, to provide representation to indigent clients and second, "to encourage law schools to provide clinical instruction in trial work of varying

86. *See, e.g.*, HAW. SUP. CT. R. 7; LA. SUP. CT. R. XX; CAL. R. CT. 9.42; NEB. SUP. CT. R. § 3-703; ME. R. CIV. P. 90; N.J. CT. R. 1:21–23; MO. SUP. CT. R. 13.

87. *See, e.g.*, N.M. R. CIV. P. 1-094; MD. R. 19-217(d); KY. SUP. CT. R. 2.540; MISS. CODE ANN. § 73-3-207.

88. *See* Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 570 (2002) (discussing cases in which courts have found a defendant's right to counsel necessitates certain protections associated with student practice, such as specific informed consent).

89. *1969 A.B.A. Report*, *supra* note 11, at 290.

kinds . . . ."[90] The activities contemplated for law students to perform were all court appearances.[91] Nearly every section of the rule mentioned court appearances. Even the "other activities" section contemplated only litigation-related tasks.[92] The rule authorized preparation of pleadings briefs and other documents "to be filed," assistance for inmates seeking postconviction relief, and oral argument in appellate court.[93]

Although student practice may have been initially imagined in the courtroom, today's clinic students practice in a variety of settings and engage in a variety of functions, including transactional lawyering.[94] Some readers may argue that student practice was designed as a court-based concept because supervised out-of-court student practice does not require special authorization since the supervisor is ultimately responsible for the student's work. That is not entirely accurate. Even in litigation, the practice of law extends well beyond the courtroom and preparation of court filings; a law license is required for many of those activities.[95] Litigators, like their transactional counterparts, counsel clients, render legal advice, and make decisions about legal strategy.[96] These are critical lawyering activities that form a large part of many clinical practices.[97] Certainly, engaging in many of these tasks as a non-lawyer would be considered unauthorized practice of law.[98] Unlike paralegals, student-attorneys do not simply pass advice from supervising attorneys to clients. Student practice is about a student asserting professional judgment and engaging in lawyering activities. Though a supervisor may be supporting and monitoring the student's work, that can be done without usurping the student's professional autonomy.

Because some states still fail to fully recognize out-of-court practice in their student practice rules, many clinicians and externship directors live with a student practice rule that do not expressly authorize the work that students do in their programs.[99] Simply acquiescing to a student practice

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90. *Id.*
91. *Id.* at 290–91.
92. *Id.* at 291.
93. *Id.*
94. *See* KUEHN, *supra* note 1 ("Sixty-two percent of overall clinic work is focused on litigation/dispute resolution, 19% is primarily transactional, 9% primarily legislative or policy work, and 6% primarily regulatory.").
95. *See, e.g.*, Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc., 635 P.2d 730, 732 (Wash. 1981).
96. *Id.*
97. *See* KUEHN, *supra* note 1.
98. *See, e.g.*, *Ruhl*, 635 P.2d at 732 ("practice of law" includes giving legal advice and preparing legal instruments).
99. *See, e.g.*, CONN. R. SUPER. CT. §§ 3-14, 3-17 (stating student may appear in court and prepare litigation-related documents); DEL. SUP. CT. R. 56 (stating student may appear in court); IOWA CT. R. 31.15(1) (stating student may appear in court); MASS. S.J.C.

rule regime that does not, by its letter, authorize the activities performed by students creates a number of problems. First, it exposes the faculty and students to potential liability for unauthorized practice of law.[100] Second, it undermines the pedagogical mission and integrity of experiential education, teaching students a troubling lesson. When students first entering into law practice are told, either directly or by implication, they should ignore or stretch the rule that authorizes them to practice, those students may take away the troubling message that when an ethics rule does not authorize what you want to do, you can just ignore the rule. Students may also conclude that they are not capable of analyzing the law without their supervisor telling them what it really means. The supervisor essentially says, "I know the rule says no, but I say yes." This reinforces the notion that the student is not knowledgeable enough to understand and follow basic court rules.[101]

The damage caused by an underinclusive scope of practice may not be catastrophic on its face, but it does chip away at the ethical foundation of student practice. Requiring students to essentially ignore the letter of the rule that authorizes them to practice sets a troubling precedent at the foundation of initiation into the profession. This is particularly problematic because student practice supervisors are expected to instill in students the highest standards of practice and ethics.[102] While skilled clinicians may teach around this problem by helping students name and contextualize the issue, a clearer student practice rule would obviate that need and create a stronger ethical foundation for student practice. Outside of a clinic setting, supervisors may be less likely to recognize and correct for the damage caused by an underinclusive scope provision.

III. HISTORY OF THE STUDENT PRACTICE RULE

Professors Margaret Martin Barry, Jon C. Dubin, and Peter A. Joy have written an extensive history of the development of clinical legal education

R. 3:03(1) (stating student may appear in court); VT. R. ADMISSION BAR R. 21, 24 (stating student may appear in court and conduct other litigation-related activities).

100. *See, e.g.*, N.Y. R. PROF'L CONDUCT 5.5.

101. High-quality clinical education positions the student in the role of primary attorney, encouraging the student to engage in strategic thinking and analysis, rather than relying on the professor for executive guidance. A rule that requires reinterpretation by the professor in order to reconcile the student's behavior with the letter of the rule undermines the development of student autonomy.

102. Joy & Kuehn, *supra* note 88, at 499.

in their book *Clinical Education for This Millennium: The Third Wave.*[103] This Part will not recount that history, but will instead focus specifically on the development of the rules that have governed student practice, beginning with the American Bar Association's 1967 resolution calling for the adoption of student practice rules. That resolution set up the ABA's passage of a model student practice rule two years later. The model rule, which was amended in 1979, has functioned as a template for student practice in nearly every U.S. jurisdiction, sometimes with very little variation.[104]

A. Resolution Calling for Student Practice Rules

In 1967, the ABA House of Delegates adopted a resolution submitted by the Section on Legal Education and Admissions regarding student practice. That simple resolution called for the adoption of student practice rules.[105] At that time, thirteen states allowed for law students to appear in court under supervision.[106] The resolution called for courts to pass rules permitting third-year students to appear in court under "adequate supervision . . . on behalf of indigent persons or the prosecution in both criminal and civil matters in connection with the stated functions of public defender, legal aid and like programs."[107] Without including any proposed model rule, the resolution urged "in principle" the adoption of such rules.[108] A second paragraph, which called for federal funding for "the development and operation of organized programs of instruction" in law school clinical programs,[109] was separated from the first due to the controversy it apparently generated.[110] Despite its detractors, the second paragraph ultimately passed as well.[111] It is noteworthy that the two-part resolution included not only a call for rules to allow student practice, but also funding to allow the practice to be done within an "organized program[] of instruction."[112]

The 1967 resolution was sparse, but it contained several key features that began to shape student practice as we know it.[113] First, the resolution was framed in terms of the dual mission of student practice—education

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103. Barry, Dubin & Joy, *supra* note 13, at 9–10.
104. *See infra* Part III.C.
105. *Annual Report of the American Bar Association*, 92 AM. BAR ASS'N. 662 (1967) [hereinafter *1967 A.B.A. Report*].
106. *Id.*
107. *Id.* at 326.
108. *Id.*
109. *Id.* at 662.
110. *Id.* at 326–27.
111. *Id.* at 327.
112. *Id.*
113. *Id.* (The resolution was limited to indigent persons and prosecution, which have been adopted by states over time).

and service.[114] Second, adequate supervision was one of the only practical considerations mentioned in the resolution.[115] That priority was emphasized by the inclusion of a proposal to encourage funding for "organized programs of instruction."[116] Finally, the resolution suggested that student practice clients would be "indigent persons or the prosecution"—which underscored the service mission, through which students could supplement legal services available to the poor.[117] Overall, the 1967 resolution represented the service-learning mission of experiential legal education.[118]

B. Passage of the 1969 Model Rule

In 1969, the ABA House of Delegates adopted a resolution proposed by the Section on Judicial Administration for a model rule of student practice along with a report containing the text of a Proposed Model Rule Relative to Legal Assistance by Law Students.[119] According to that report, the proposed rule was provided to the general assembly "in connection with the responsibility to provide legal services to all persons."[120] The aim of the model rule was to expand "legal aid, public defender and similar programs which are essential to the requirement of furnishing competent legal services for all."[121] The rule was "intended to insure careful supervision of the work of the law students at every stage of their participation in trials and at the same time to give the students enough freedom of action so that they could make a genuine contribution to the proceedings."[122] Passage of the model rule was an incredibly important step in the advancement of the clinical education movement and experiential learning in the United

114. *See id.* at 662 (referring to the value of "clinical experience with legal aid societies, public defenders, and district attorney offices. . . .").
115. *Id.* at 326.
116. *Id.* at 662.
117. *Id.* This resolution also seeded a troubling relationship between student practice and prosecutor's offices. *See supra* notes 7–8 and accompanying text.
118. Barry, Dubin & Joy, *supra* note 13, at 12 ("The earliest forms of clinical legal education embraced the dual goals of hands-on training in lawyering skills and provision of access to justice for traditionally unrepresented clients.").
119. *1969 A.B.A. Report*, *supra* note 11, at 118.
120. *Id.* at 290.
121. *Id.*
122. *Id.* at 118.

States, giving rise to a rapid spread of state student practice rules across the country.[123]

C. Explosion of State Student Practice Rules

Jurisdictions that did not yet have a student practice rule quickly adopted the model rule after it was promulgated by the ABA.[124] By 1973, forty out of the forty-four states in which a law school was located had student practice rules in place.[125] There seemed to be a recognition that the primary purpose of the clinical model was educational, with a strong service component.[126] Steven Leleiko said in an essay published by the Council on Legal Education for Professional Responsibility, "While the service the students afford is terribly important, it is secondary. This means that there should be no pressure for clinics to handle high caseloads that foster a lower quality of work no matter who is doing it."[127] Leleiko critiqued the early legal aid model of clinical practice, noting the failure of that model to deliver on the educational objectives of the clinic experience. [128]

D. Removal of the Indigency Restriction

In 1979, the ABA House of Delegates revisited its model rule and, without debate, removed the indigency restriction from both the purpose statement and the provision describing what student practitioners are authorized to do.[129] The Section of Legal Admission to the Bar explained in its report that the indigency requirement "severely and unnecessarily restricts the educational opportunities of students and the opportunities of law school faculties to provide their students with a broad range of practical experience."[130] Apparently concerned that students were not sufficiently exposed to the legal challenges of those in higher income brackets, the section recommended replacing the phrase "As one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction in trial work of varying kinds" with "To encourage law schools to provide clinical

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123. *See* Barry, Dubin & Joy, *supra* note 13, at 20–21 (documenting the cascade of states following passage of the 1969 model rule and largely adopting the rule).
124. *See id.* at 20.
125. *See* Steven Leleiko, *Student Practice: A Commentary*, *in* COUNCIL ON LEGAL EDUC. FOR PRO. RESP., STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS 3 (2d ed. 1973).
126. *See id.* at 2.
127. *Id.* at 8.
128. *See id.* at 11.
129. *1979 A.B.A. Report*, *supra* note 11, at 256.
130. *Id.* at 730.

instruction in trial work of varying kinds which among other benefits gives law students experience with clients from all walks of life."[131]

IV. GOALS OF STUDENT PRACTICE

The legal profession has set certain standards that must be met before granting licensure to a prospective lawyer. Practicing law without a license is not only an ethical violation but also a crime.[132] Student practice is an exception to the general requirement that one must be licensed in order to practice law.[133] Unless that exception is premised upon a compelling justification, it is simply an arbitrary loophole. The exception must also carry assurances that those served by student practitioners will not receive substandard legal services. Inadequate services not only fail to meet the legal needs of the recipient, but also can materially harm their legal interests, leaving them in worse condition than before receiving those services.[134] The following subparts will explore the justification for student practice by unpacking its specific goals. Part V will then explore how to ensure the student practice rule supports those goals.

A. Service

Historically, one goal of student practice is to increase access to legal services for those who could not otherwise obtain them.[135] Generally, increasing access to justice has meant serving those who cannot afford legal services, but it may also include serving those who are unable to hire a lawyer for geographic reasons or due to the nature of the claim.[136] If service is a primary goal of student practice, then states would limit student practice to public interest or public service work. Rather, in several states, students can represent any client, without income or *pro bono* restrictions.[137]

131. *Id.*
132. *See, e.g.*, N.Y. R. OF PROF'L CONDUCT 5.5 (making unauthorized practice of law an ethical violation); N.Y. JUD. LAW § 478 (Consol. 2020) (making unauthorized practice of law a crime).
133. *See* Joy & Kuehn, *supra* note 88, at 497.
134. *See id.* at 521–22.
135. *See supra* Part III.B (discussing the original passage of the ABA model rule on student practice).
136. *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, 528 (2003).
137. ALA. R. LEGAL INTERNSHIP L. STUDENTS R. II–III; ALASKA BAR R. 44; CAL. R. CT. 9.42; IDAHO BAR COMM'N R. 226; MONT. STUDENT PRAC. R.; NEB. SUP. CT. R. §§ 3-

Therefore, at least in those states, service does not seem to be a central goal or purpose of student practice. In those states, educational goals, which will be discussed below, form the primary or sole justification for student practice.[138]

Whether student practice is justified by service *per se*, (for example, solely to increase access to services, service-neutral experiential learning, solely to educate students, or some combination of the two), basic quality control of student practice is essential. That quality control is accomplished through careful training and diligent supervision of student practitioners. Well-considered structure must be in place to ensure student-provided legal services are adequate. Thus, even in its service goal, student practice has an educational component. Further, as will be discussed below, many educators use service-oriented student practice to meet learning goals related to empathy and justice.

B. Learning

The second historically rooted goal of student practice is to educate students.[139] Today, learning is a widely accepted goal of student practice.[140] A great deal has been written on the goals of experiential education, particularly clinical legal education, most of which I will not attempt to rehash.[141] Importantly, the goals of each program may vary. However, I will endeavor to broadly define and describe some primary pedagogical goals of student practice here, while acknowledging that this list is neither exhaustive nor universally accepted.

702, 703; VT. R. ADMISSION BAR R. 21, 24; VA. R. PROF'L CONDUCT 15; WASH. ADMISSION & PRAC. R. 9; WIS. SUP. CT. R. 50.06, 50.08. Arizona's rule begins with a purpose statement that states, "This rule is adopted to encourage law schools to provide clinical instruction of varying kinds and to facilitate volunteer opportunities for students in pro bono contexts." ARIZ. SUP. CT. R. 39(c). However, nowhere in Arizona's rule is student practice expressly limited to those settings.

138. I say primary because it is possible that some states intend to increase access to legal services by having more people practicing law in a variety of settings, including both paid and pro bono work.

139. *See supra* Part III.B (discussing the original passage of the ABA model rule on student practice).

140. *See* Susan Bryant, Elliott Milstein & Ann Shalleck, *Learning Goals for Clinical Programs*, *in* SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 13–20 (2014).

141. *See, e.g.*, *id.*; Carolyn Grose, *Uncovering and Deconstructing the Binary: Teaching (and Learning) Critical Reflection in Clinic and Beyond*, 22 CLINICAL L. REV. 301, 315 (2016); Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality*," 4 CLINICAL L. REV. 1, 30–31 (2017).

1. Lawyering Skills

The opportunity for students to learn lawyering skills through first-hand practice of law in real cases can only be achieved through a student practice paradigms. Much has been written about whether skills acquisition is an appropriate aim of experiential education.[142] However, the essence of the dispute may simply be a question of focus. Skills skeptics remind experiential educators to be intentional about where we place the focus—and frame the purpose—of our teaching, arguing that task-based technical lawyering skills should not consume the entire focus of experiential learning opportunities.[143] There is no doubt that students do and should learn technical lawyering skills in experiential learning courses. The question is really how we define lawyering skills and why we teach them.

Regarding how skills are defined, it is critical to note that skills include not only technical lawyering skills, but also "intra-personal,"[144] "interpersonal,"[145] and "social/systemic"[146] relational skills necessary to be a successful lawyer. Professor Susan Brooks and her co-authors argue that these "relational competencies" are not adequately emphasized in law school curricula except in clinical programs.[147] These relational competencies, or relational skills, are uniquely important and may be overlooked in the traditional debate over the role of skills acquisition in experiential education. That debate has focused more on task-based technical skills such as

142. *See, e.g.*, A.J. Goldsmith, *An Unruly Conjunction? Social Thought and Legal Action in Clinical Legal Education*, 43 J. LEGAL EDUC. 415, 415 (1993) ("[A]n academically challenging legal education requires that clinical legal education courses be more than just exercises in skills acquisition for professional legal practice."); Meredith J. Ross, *A "Systems" Approach to Clinical Legal Education*, 13 CLINICAL L. REV. 779, 779–82 (2007) (framing a debate between a goal of skills acquisition versus social justice); Linda F. Smith, *Designing an Extern Clinical Program: Or As You Sow, So Shall You Reap*, 5 CLINICAL L. REV. 527, 527–28, 534 (1999) (extolling skills acquisition as a primary goal of experiential education).

143. *See* Goldsmith, *supra* note 142, at 417; Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 330 (2001).

144. Intra-personal skills include "self-awareness, critical self-reflection, and self-directedness." Susan L. Brooks et al., *Moving Towards a Competency-Based Model for Fostering Law Students' Relational Skills* 3 (Mar. 1, 2021) (unpublished manuscript) (on file with author).

145. Interpersonal skills include "deep and reflective listening, empathy, compassion, cross-cultural communication, and dialogue." *Id.*

146. Social/systemic skills include "appreciating the role of cross-cultural aspects of legal work writ large, along with multiple identities, implicit bias, privilege and power, and structural racism." *Id.*

147. *See id.*

interviewing, counseling, strategy, fact investigation, written advocacy, oral advocacy, negotiation, file documentation, and timekeeping.[148] However, it is notable that relational skills cannot be separated from many of these so-called technical skills.[149]

Skills acquisition can be both a primary and a secondary goal of all experiential education. Skills are valuable *per se,* as well as necessary to serve other teaching goals, such as professional identity formation, critical reflection, and justice.[150] Professor Steve Wizner has argued that teaching lawyering skills is a secondary component of experiential education, intended to serve the primary goal of teaching justice.[151] He wrote, "As clinical teachers we should engage with our students on a deeper level than simply teaching them the craft of practicing law."[152] While the craft of practicing law arguably includes relational skills as much as task-based technical lawyering skills, experiential educators who wish to explicitly pursue relational skills and other learning goals must set a clear intention to do so. In the absence of clear intention, task-based, technical lawyering skills can have a tendency to eclipse other teaching goals through the gravitational pull of the daily work of the practice of law.[153] *Things* must get *done* each day to preserve the interests of the clients; thus, *doing things* can become the point of experiential learning activities in the absence of mindful intention toward a different purpose.[154] Certainly, learning how to accomplish various technical tasks is a valuable experience for students, but it is not the solitary objective of experiential learning.

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148. *See, e.g.,* Wizner, *supra* note 143, at 330 (arguing against clinical teachers focusing solely on "client-centered interviewing, counseling, fact investigation, negotiation, and written and oral advocacy"); Smith *supra* note 142, at 528 (defining skills as, for example, "trial advocacy, client interviewing, problem-solving, witness interviewing, client counseling, negotiating, mediating, lobbying, [and] drafting").

149. "Clinicians reach beyond the disaggregated conception of skills that sometimes characterized 'skills training' to teach students that lawyering tasks are embedded in the lawyering process, an approach that recognizes the complex interrelationships among the many parts of a lawyer's work." Bryant, Milstein & Shalleck, *supra* note 140, at 20.

150. These goals will be discussed in Part III.B.2–4 below.

151. *Id.* at 338–39.

152. *Id.* at 331.

153. As an example of how skills acquisition can eclipse the other goals of clinical teaching, I note that many institutions refer to the ABA's experiential learning requirement as the "skills requirement." AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2019–2020, at 16 (2019).

154. Nationwide declines in enrollment mean that student bodies are changing and the need to focus on remedial training may be increasing for some clinicians. Peter A. Joy, *Challenges to Legal Education, Clinical Legal Education, and Clinical Scholarship*, 26 CLINICAL L. REV. 237, 245–46 (2019).

2. Professional Identity Formation

As Steven Leleiko said in his 1973 essay *Student Practice: A Commentary*, "It is not an overstatement to aver that law student participation in client representation is both an immediate way to express love for people and the initiation of a life long effort to express personal creativity and human concern through one's profession."[155] A central goal of student practice is to aid students in forming their professional identities.[156] Essentially, this means helping students determine who they want to be as lawyers and by what values they want to live by in their careers.[157] This includes what type of practice students will go into, how they will treat clients, their work ethic, their responsibility to the community, how they will interact with the rules of professional responsibility, and what moral codes and values will shape their work as lawyers. Dean Jane Aiken has written about clinical education's "transformational learning," which she defines as creating opportunities for reflection and reorientation of a student's values.[158]

There are few other opportunities in a typical juris doctorate curriculum for highly individualized professional identity formation to occur. Indeed, the 2007 Carnegie Report named professional identity development as a major weakness of law school curricula.[159] The report exalted the best-designed clinics as those in which students "encounter appealing representations of professional ideals, connect in a powerful way with engaging models of ethical commitment within the profession, and reflect on their emerging professional identity in relation to those ideals and models."[160] Most clinicians would agree that we are not morally neutral in guiding the formation of students' professional identities.[161] Instead, clinicians strive

155. Leleiko, *supra* note 125, at 23.

156. Stephen Wizner, *Is Social Justice Still Relevant?*, 32 B.C. J.L. & SOC. JUST. 345, 351–52 (2012) (outlining the responsibilities clinicians have both as teachers and lawyers).

157. *Id.*

158. Aiken, *supra* note 141, at 2–3.

159. *See* WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 135 (2007).

160. *Id.*

161. *See, e.g.*, Aiken, *supra* note 141, at 6–7. *But c.f.* Praveen Kosuri, *X Marks the Spot*, 17 CLINICAL L. REV. 205, 208 (2010) (arguing that clinicians ought to be more ideologically neutral in selecting social justice as a teaching tool but not viewing it as a mission).

to influence our students to be ethical, justice-minded, client-centered, empathetic practitioners.[162]

3. Critical Reflection

I often tell students, "The point of clinic is not just to learn how to handle this particular case; the point is to learn what to do when you don't know what to do." This refrain speaks to one of the primary goals of experiential education: to foster students' development of a methodology for critical reflection and thoughtful decision-making.[163] This methodology serves to shape students into better lawyers, because it sparks in them the determination and clarity to: (1) identify options, (2) judiciously enlist available resources, (3) make intentional choices, and (4) reflect and learn from their experiences.[164] Rather than teaching students to follow directions handed down by the supervisor, good experiential educators help students begin to see themselves as capable of creating their own work plan using existing resources and retrospectively evaluating their work based on internal metrics for success.[165] This instills a level of independence and ease that cannot generally be achieved through mimicry.[166]

Critical reflection also allows students to access a realm of meaning-making not otherwise available in law school curricula.[167] Professor Carolyn Grose defined critical reflection as "the process by which we self-consciously locate ourselves within the system in which we are operating and in relation to the other players in that system."[168] Professor Grose noted that this process allows practitioners to "identify what assumptions are at work and the effect they are having on us, on the other players, and on the system itself."[169] Critical reflection drives students to ask "why?," thus pushing them to question the *status quo* of socio-political power and

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162. *See* Aiken, *supra* note 141, at 6; Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 538 (2012); JoNel Newman & Donald Nicolson, *A Tale of Two Clinics: Similarities and Differences in Evidence of the "Clinic Effect" on the Development of Law Students' Ethical and Altruistic Professional Identities*, 35 BUFF. PUB. INT. L.J. 1, 33–34 (2017).

163. *See* Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 141 (1993–1994).

164. *See* Bryant, Milstein & Shalleck, *supra* note 140, at 19–21.

165. *See* Mlyniec & Etchison, *supra* note 12, at 523, 527, 569.

166. *See* DAVID F. CHAVKIN, CLINICAL LEGAL EDUCATION TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS 7–10 (2002) (describing clinical teaching methodology using a "kitchen organizer" metaphor for guided discovery learning).

167. *See* Newman & Nicolson, *supra* note 162.

168. Grose, *supra* note 141.

169. *Id.*

inspiring students to find their role in changing that *status quo* for the better.

Importantly, teaching critical reflection in experiential courses plants the seed of critical reflection in a student's future practice of law. Professor Beryl Blaustone described this as "increasing students' critical-minded confidence so as to incorporate effective reflection habits for self-directed assessment in future professional development."[170] Others call this, or something like it, "learning for transfer"[171] or learning how to learn.[172] Regardless of the nomenclature they use, all good experiential educators share the goal of teaching students to be more thoughtful and reflective in their practice of law, both now and in their future careers.[173]

4. Teaching Justice

Although there are some who question the role of social justice in experiential education,[174] most clinicians view it as a fundamental part of our pedagogical mission.[175] This emphasis on justice is an important feature of quality experiential education, particularly in the context of traditional legal education. The persistent Langdellian approach to the

170. Beryl Blaustone, *Teaching Law Students to Self-Critique and to Develop Critical Clinical Self-Awareness in Performance*, 13 CLINICAL L. REV. 143, 150 (2006).

171. Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLINICAL L. REV. 489, 493–94 (2013) (citing Sharan B. Merrian & Brendan Leahy, *Learning Transfer: A Review of the Research in Adult Education and Training*, 14 PAACE J. LIFELONG LEARNING 1, 3–5 (2005)); Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching*, 38 SAN DIEGO L. REV. 347, 366 (2001). *See generally* CATHY DOWN, LEARNING FOR TRANSFER: A THEORY OF SITUATIONAL LEARNING (2001).

172. Grose, *supra* note 171, at 494.

173. *See, e.g.*, Bryant, Milstein & Shalleck, *supra* note 140, at 23–24 (explaining the power and importance of reflection in clinical pedagogy).

174. *See, e.g.*, Kosuri, *supra* note 161 ("In my view, [the dialogue regarding the future of clinical legal education] should be characterized by a more explicit ideological neutrality.").

175. *See, e.g.*, Jayashri Srikantiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 CLINICAL L. REV. 451, 452 (2010) (referring to "effecting social justice" as one of clinical legal education's "bedrock goals"); Wizner, *supra* note 143, at 327; Jane H. Aiken, *Provocateurs for Justice*, 7 CLINICAL L. REV. 287, 288 (2001); Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLINICAL L. REV. 39, 42 (2013) ("The development of projects is also driven by social justice goals.").

juris doctorate curriculum,[176] as practiced in most law schools, has been criticized for advancing the fiction that law is an objective, value-neutral set of rules that need only be applied correctly to produce an optimal result.[177] "The pedagogical assumption within law schools is that our subject matter is innately neutral."[178] Scholars have rightfully challenged this purported neutrality and proposed clinical pedagogy as an antidote.[179] Through clinical pedagogy, students are reminded that the law is a sharp tool that can be used either to aggrandize the powerful or to vindicate the powerless. By seeing these injustices up close—in both personal and technical detail—students can observe the ways in which the legal system was built to reinforce the aggrandizement of the powerful. Additionally, a justice-focused experiential learning program can also foster students' development of empathy, which is a core lawyering skill. By developing a professional interpersonal relationship with a client who is facing particular structural challenges, students can gain a more personal perspective on systemic oppression, while also navigating professional boundaries and other related skills.

Early clinical teachers focused also on *teaching* justice.[180] "From the beginning, clinical education has had a goal to teach students about how the law affects poor people, the ways that law reinforces oppressive systems, and the ways that it can be used to challenge them."[181] Indeed, the goal of teaching students about justice has been infused into the development of student practice since its earliest days in law school curricula.[182]

Ongoing, robust scholarly discussion on the importance of justice as an experiential learning goal should put to rest any concern that justice is

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176. "Even with all that has been added and altered (especially available to students in the second and third year), today's education still parallels too strongly Langdell's 1870 model rather than a 21st Century model of what lawyers variously do and should know how to do." Gerald P. López, *Transform—Don't Just Tinker With—Legal Education*, 23 CLINICAL L. REV. 471, 521 (2017).

177. *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, 39 (1995); Aiken, *supra* note 141, at 11.

178. Aiken, *supra* note 141, at 7.

179. *See, e.g.*, *id.*

180. *See* Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, *in* CLINICAL EDUCATION FOR THE LAW STUDENT: LEGAL EDUCATION IN A SERVICE SETTING 374 (1973); Susan Bryant & Elliott Milstein, *The Clinical Seminar: Choosing the Content and Methods for Teaching in the Seminar*, *in* SUSAN BRYANT, ELLIOTT S. MILSTEIN & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 52 (2014).

181. Bryant, Milstein & Shalleck, *supra* note 180.

182. *See* Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1933 (2002).

falling out of favor as a goal of clinicians and externship directors.[183] Dean Jane Aiken has argued that teaching social justice through clinic is an important part of all law schools' educational missions.[184] Principles of social justice help students learn empathy, which is a skill necessary for success as a lawyer.[185] Dean Aiken encouraged clinicians to be *provocateurs* for justice, a powerful turn of phrase which conveys that clinicians ought to have not just a professional interest but a sort of existential urgency for justice.[186] Provocateurs for justice instill in their students a lifelong passion for justice as well as both the desire to work towards solving injustice and the tools to do so.[187] There is no doubt that justice is a fundamental goal of experiential education for Aiken and many other leaders in the field.[188]

5. Academic Rigor

While not separate from any one of the other goals articulated in this subpart, academic rigor merits treatment as a discrete, if overlapping, goal of experiential learning. As a vital part of the law school curriculum, clinic and other experiential courses must be academically rigorous. Experiential

183. *See, e.g.*, Lynnise E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175 (2017); Julie D. Lawton, *Teaching Social Justice in Law Schools: Whose Morality Is It?*, 50 IND. L. REV. 813, 814 (2017) (arguing that clinics should offer diverse approaches to what social justice means); Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J.L. & SOC. JUST. 231, 231 (2012) (arguing that law schools should use clinics to teach "justice readiness"); Alistair E. Newbern & Emily F. Suski, *Translating the Values of Clinical Pedagogy Across Generations*, 20 CLINICAL L. REV. 181, 181 (2013) (discussing how different generations of clinical teachers talk about justice differently); Spencer Rand, *Social Justice as a Professional Duty: Effectively Meeting Law Student Demand for Social Justice by Teaching Social Justice as a Professional Competency*, 87 U. CIN. L. REV. 77, 78 (2018) (arguing that law schools must teach social justice as a core competency to serve students' multifaceted needs); Douglas L. Colbert, *Clinical Professors' Professional Responsibility: Preparing Law Students to Embrace Pro Bono,* 18 GEO. J. ON POVERTY L. & POL'Y 309, 326 (2011) (arguing that clinicians must instill in students a sense of responsibility to bridge the justice gap).

184. *See* Aiken, *supra* note 183 (arguing that law schools should use clinics to teach "justice readiness").

185. Quigley, *supra* note 177, at 38. For a discussion on the value of using community legal education to teach social justice, see generally Margaret Martin Barry et al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401 (2011).

186. Aiken, *supra* note 175.

187. *Id.*

188. *See, e.g.*, Bellow, *supra* note 180, at 376–77; Bryant, Milstein & Shalleck, *supra* note 140, at 13, 16–17.

learning compliments, reinforces, and expands upon the learning that takes place in other courses. Academic rigor is a key question in the emerging conversation about experiential education's role in potential bar exam alternatives.[189] Although it is not clear what will result from those conversations, they should spur efforts to ensure the academic strength of experiential learning programs. Building rigorous experiential courses takes a significant investment of time and expertise in defining goals, learning outcomes, evaluation criteria, evaluation mechanisms, and teaching methods.[190] Effective design and implementation of experiential learning programs require not only knowledge and skill in the field of experiential pedagogy, but also a commitment to critical reflection and self-improvement on the part of the teacher.[191]

6. Professional Competency Screening?

Whether experiential courses could or should replace the bar exam—either temporarily or permanently—is an interesting open question. For years, the bar exam has served as the definitive professional competency screening tool for the legal profession in nearly every state.[192] Although the search for alternatives to the traditional bar exam did not begin with the 2020 novel coronavirus pandemic,[193] that search gained new salience given the ongoing public health crisis posed by the virus.[194] In the spring

189. Patrick Thomas, *Law Students in 'No Man's Land' as Coronavirus Delays Bar Exams*, WALL ST. J. (Apr. 19, 2020, 7:00 AM), https://www.wsj.com/articles/law-students-in-no-mans-land-as-coronavirus-delays-bar-exams-11587294001 [https://perma.cc/49HP-ZAK2].

190. *See generally* Jordan, *supra* note 9 (outlining the challenges of building quality experiential courses).

191. *See* JEAN KOH PETERS & MARK WEISBERG, A TEACHER'S REFLECTION BOOK: EXERCISES, STORIES, INVITATIONS 26 (2011).

192. *But see* N.H. SUP. CT. R. 42(XII) (allowing graduates of the Daniel Webster Scholar Honors Program to be eligible for admission to the New Hampshire bar upon completion of the program without further examination); WIS. SUP. CT. R. 40.03 (providing requirements for diploma privilege).

193. *See, e.g.*, Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 365–66 (2002) (arguing the need to reform the bar exam and proposing several potential alternatives); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to "MacCrate" Entry to the Profession*, 23 PACE L. REV. 343, 353 (2003) (proposing an "experience and performance-based bar examination").

194. *See, e.g.*, STANDING COMM. ON BAR ACTIVITIES & SERVS., AM. BAR ASS'N, REPORT TO THE BOARD OF GOVERNORS 1–2 (2020) (proposing limited licensure by diploma privilege for recent graduates unable to take the bar exam due to the pandemic); Claudia Angelos et al., *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020) [hereinafter Angelos et al., *Licensing Lawyers*], https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence/ [https://perma.cc/948Q-ZKL3]; Claudia Angelos et al., *The Bar Exam and the COVID-19 Pandemic: The*

of 2020, when the vast implications of the pandemic started to become clear, a group of scholars, including Professor Claudia Angelos, quickly articulated the urgent need for bar examiners to take action to provide a safe means of licensure to the class of 2020.[195] Professor Angelos and her co-authors proposed a series of potential alternatives to the bar exam, including experiential learning courses.[196] The group also posited that the pandemic might spur the legal profession to completely reevaluate and potentially abandon the traditional bar exam in the future, saying, "Crises challenge assumptions and demand action . . . For the future, we might find a range of ways to prove competence, rather than resting on the predictions of a written exam."[197]

What, if any, long-term effects the pandemic may have on legal licensure procedures remains to be seen. The experiential education community must consider and discuss the viability and wisdom of experiential courses replacing the bar exam. In the meantime, Professor Angelos's proposal generates a new opportunity to take stock of experiential learning as a whole, and to ask whether all forms of student practice are effectively advancing the purpose and goals of experiential education.[198] As Angelos's group notes, crises challenge assumptions and invite broad reimagining of calcified paradigms.[199] Indeed, it is my position that student practice rules ought to be subject to such paradigm-challenging reimagination.

V. TOUCHSTONES FOR REFORM

Spurred on by the conversation about whether experiential education has a role to play in basic competency screening, experiential educators should embrace the opportunity to reevaluate some fundamental concerns about the regulation of student practice. For the reasons discussed in Part IV above, many state student practice rules are in need of reform, and those reforms would benefit not only experiential educators, but anyone who has an interest in protecting the public and preserving the integrity of

Need for Immediate Action, (Ohio State Pub. L., Working Paper No. 537, 2020) [hereinafter Angelos et al., *The Bar Exam*].

195. Angelos et al., *The Bar Exam*, *supra* note 194.

196. *Id.*

197. Angelos et al., *Licensing Lawyers*, *supra* note 194.

198. As will be argued in Part IV.B, all student practice must have a service-learning purpose in order to justify its existence; otherwise, it is simply a licensure loophole. *See infra* Part IV.B. Therefore, all student practice should be a form of "experiential education."

199. Angelos et al., *Licensing Lawyers*, *supra* note 194.

the legal profession. The goals of student practice should serve to illuminate the path forward towards an ideal student practice rule in each state. Part IV defined those goals as service, skills acquisition, professional identity formation, critical reflection, justice, and an overarching goal of academic rigor.[200] Student practice has always had a service-learning mission, and it is critical that *service* and *learning* go hand in hand.

Because of the educational and the public interests at stake, it is essential to properly regulate student practice. Law faculty, particularly clinicians, will be pivotal players in any student practice rule reform effort. Clinicians, in particular, are likely more invested in student practice rules than anyone else in the profession. In many legal communities, law faculty are viewed as experts, which affords a platform upon which to advance advocacy efforts. At many institutions, law reform efforts are viewed as part of a faculty member's service obligations and therefore carry other professional rewards. For these reasons, as well as a deeper obligation to shape student practice and set our students up for success, clinicians ought to review their state's student practice rules and propose changes where those rules do not align with the goals of clinical or experiential education.

The following concepts are touchstones for reformers, courts, and administrators seeking to align their states' student practice rules with the goals discussed above. These touchstones must be considered relative to one another. There are many ways to balance interests and achieve proper regulation of student practice. For example, the indigency requirement may be less important when student practice is limited to in-house clinics. If one constraint is relaxed, it must be balanced with other constraints in order to maintain a proper level of control and oversight of student practice. Ultimately the following touchstones must be considered as a whole and balanced with one another, rather than treated as separate provisions of a rule.

A. Supervision

High-quality supervision is a necessary condition for the achievement of each goal within the broad, service-learning mission of student practice. A good supervisor has the ability to design and implement an experiential learning program that effectively accesses the transformative potential of student practice. As any experiential educator knows, good supervision takes an immense investment of time and thought. Without good supervision, academic rigor in student practice is unattainable. The stakes of student practice are too high to allow supervision quality to be left up to chance,

200. *Supra* Part IV.

as is the case when student practice takes place outside the purview of law school programs.

Any rule reform must focus on ensuring high-quality supervision for students engaged in the practice of law. This means ending student practice that is unaffiliated with law school programming. Students should practice law only in settings that prioritize student learning. One approach is to limit student practice solely to clinical programs in which a faculty member directly supervises student casework. Another option is to allow a collaboration between non-faculty field supervisors who oversee students' casework and faculty program directors who provide training, oversight, and assessment to ensure the quality of each experiential learning opportunity and support student learning through reflection. Although the latter model may present challenges,[201] it is certainly superior to student practice that occurs in the total absence of faculty supervision.

Other provisions that may help raise the quality of student supervision include requiring a supervisor's presence in court, limiting the number of students that can be supervised by each attorney, and making supervisors explicitly responsible for the students they supervise. These provisions are particularly critical in states that continue to allow student practitioners to be supervised by non-faculty attorneys—against the advice of this Article. Supervisors should be required to be present while students are in court and to review and approve documents that affect a client's rights. Student practice rules should also make clear that supervisors must approve of the delivery of legal services, even outside the courtroom, and will be held responsible for any ethical violation arising from a failure to train or supervise.

B. Scope

In order to ensure integrity in student practice and advance its pedagogical purpose, student practice rules should accurately encompass the scope of what certified student-attorneys actually do. To that end, clinicians advocating for rule reform must consider and define the scope within which they want students to practice. Perhaps the simplest approach is to make student practice coterminous with attorney practice. For example, Kansas authorizes students to "perform any function of an attorney" subject to supervision guidelines,[202] Maryland allows students to "engage in the practice of law" subject to

201. *See* Jordan, *supra* note 9.
202. KAN. SUP. CT. R. 719(j).

certain restrictions,[203] and Minnesota allows "[a] law student practitioner . . . [to] perform, under the supervision of a supervising lawyer, all functions that a lawyer may perform in representing and appearing on behalf of a client."[204] Although it is critical to impose appropriate boundaries and limitations on student practice, those limitations are better made in provisions about supervision and setting, rather than scope of practice.

C. Consent

If student practice aims to teach students about relational skills, justice, critical reflection, and identity formation, then centering client autonomy in the attorney-client relationship is essential. In addition to protecting the public on its face by requiring student practitioners to obtain informed consent, this requirement also helps instill good values in our students. The importance of client autonomy can be reinforced through strong client consent requirements in all student practice rules. By specifically requiring written client consent, we communicate to students the importance of client autonomy as a professional value.[205] The client holds the power to allow the student to practice in a given case, or not.[206] This dynamic sets up an inquiry into deeper issues of power and autonomy that are critical in any productive clinic experience. Clients have the right to be well informed of the fact that they are being represented by a student—this should be built into a student practice rule in multiple ways. Many states require not only that a client provide informed consent, but that such consent is documented in writing,[207] and even filed in court.[208] Some may fear that requiring written client consent for out-of-court practice would create an impracticable administrative burden. However, obtaining client consent for student practice would be no more burdensome than requiring written retainers for all legal services, whether in or out of court.[209] In making reforms, each state must weigh the interest of efficiency against the interests in favor of a written consent requirement, and balance the importance of client consent with the other interests discussed in this Part.

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203. MD. R. 19-220(b).
204. MINN. SUPERVISED PRAC. R. 3.
205. Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 514 (1990).
206. *Id.* at 510–11.
207. *E.g.*, D.C. CT. APP. R. 48(a)(1)(2014); GA. R. SUP. CT. 95(5).
208. *E.g.*, ALA. R. LEGAL INTERNSHIP L. STUDENTS R. II; ILL. SUP. CT. R. 711(c); VA. R. PROF'L CONDUCT 15(a)(i), (iii).
209. *See* MODEL RULES OF PRO. CONDUCT r. 1.5 (AM. BAR ASS'N 1983).

D. Economics

In order to ensure academic rigor, preserve the integrity of the educational experience offered by student practice, and protect the public from poorly supervised student practice, financial pressures must be well-considered and balanced with other parameters. Paid, private-sector student practice experiences, particularly those that are completely unaffiliated with law school programming, create conditions that invite and even incentivize poor supervision. Therefore, whether through provisions aimed at supervision —limiting student practice to clinic or externship programs—or economics, or both, some level of regulation of economic incentives is essential to the success of student practice as a whole. Furthermore, if student practice is aimed at teaching students about justice and pushing them to examine structural inequities in our legal system,[210] it is critical that students have the opportunity to grapple with the legal problems of the poor.[211] Reformers should carefully consider all economic questions, including requirements of indigency, pro bono service, and unpaid work. These concerns should be examined within the context of other assurances of quality supervision to ensure that a final rule prioritizes high-quality services to clients and pedagogical value to students.

VI. CONCLUSION

Student practice rules across the country are rife with provisions that frustrate not only the pedagogical goals of student practice, but also the justice interests of the legal profession. A number of states allow student practice that is unaffiliated with law school programs; this unaffiliated practice can occur in the private sector and prosecutor's offices. Many states lack key assurances for a minimum quality of student practice supervision, such as requiring supervisors to be present with students in court. Some of these problems trace back to the ABA model rule, which was incredibly important when it first passed, but is now outdated. Where states have deviated from the model rule, those deviations have often represented even further deregulation of student practice. Thus, student practice rule reform efforts are necessary in many states. Legal educators, including experiential educators, are well-positioned to spearhead these reforms, but

210. Including the social/systemic relational skills discussed above in *supra* notes 174–88 and accompanying text.
211. *See supra* Part III.C.

all members of the legal profession have a stake in functioning student practice rules because poorly regulated student practice threatens both the public interest and the integrity of the legal profession.

The goals of student practice, as discussed above, should be the driving force in shaping rule reform efforts. Part V above outlines several touchstones to guide those who seek to reform their states' student practice rules. With these touchstones in mind, reformers can further the goals of experiential education and allow experiential teachers to marshal student practice rules to support these goals, rather than undermine them. Particularly important is ensuring adequate supervision and academic integrity by ending the phenomenon of unaffiliated student practice—that is, students practicing law in contexts completely outside of the law school curriculum. Improving student practice rules will help ensure that student practice best serves students, the public, and the quality of justice as we shape a new generation of lawyers.