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## Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for "Practice-Ready" Graduates Will Impact the Faculty Status of Clinical Law Professors

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# Three Generations and Two Tiers: How Participation in Law School Clinics and the Demand for “Practice-Ready” Graduates Will Impact the Faculty Status of Clinical Law Professors

Todd A. Berger\*

## INTRODUCTION

Since the emergence of clinical legal education in its modern form, a majority of law school faculties have created and maintained a faculty structure in which clinicians do not enjoy the same “employment security, status, monetary and non-monetary benefits, rights of citizenship, academic freedom and autonomy” currently enjoyed by non-clinical faculty.<sup>1</sup> This Essay posits that, in the

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This Essay grew out of a presentation given at the 2012 Midwest Clinic Conference. It is intended only as a scholarly starting point for the discussion that follows. To that end, the author recognizes the existence of counter arguments to the central premise of this work, including issues related to cost, the increasing attack on tenure as a whole, and whether elite institutions might be less receptive to equal faculty status for clinicians than non-elite institutions. It is the author’s goal to expand on the arguments advanced in this Essay, as well as to address the validity of various counter arguments, in more lengthy future works.

Further, even if clinical faculty are afforded equal status, it has long been a topic of debate amongst clinicians whether it is in the best interests of clinical faculty to have equal status, if doing so requires they devote less time to teaching and practice. Further, debate exists with respect to whether clinical faculty should have to meet the same requirements for tenure as doctrinal faculty. The purpose of this work is only to address historical developments that I argue will soften the stance of a new generation of doctrinal faculty members toward the granting of equal status to clinical faculty. Whether the granting of equal status is desirable, and, if so, whether clinical faculty should have the same tenure standards as doctrinal faculty, is beyond the scope of this particular work.

1. Nina W. Tarr, *In Support of a Unitary Tenure System for Law Faculty: An Essay*, 30 WM. MITCHELL L. REV. 57, 58 (2003). See also Bryan L. Adamson et al., *Clinical Faculty in the Legal Academy: Hiring, Promotion and Retention*, 62 J. LEGAL EDUC. 115 (2012).

For the purposes of this Essay, the use of the phrases “clinical faculty,” “faculty members who teach in the clinic,” and “clinical law professor” are used interchangeably and are defined as: “persons teaching and/or supervising students in live-client clinics or field placement

ensuing decades, we are likely to see this two-tiered system replaced by a different system that extends the same rights, privileges, and compensation to both clinical and non-clinical faculty.<sup>2</sup>

With respect to the diminished faculty status of law school clinicians, the winds of change blow from two directions. The first of these winds relates to the fact that law school faculties find themselves in the midst of a generational changing of the guard. The modern day American legal profession is primarily dominated by three distinct generations. At the oldest end of the generational spectrum are the Baby Boomers (born between 1946 and 1964). They are followed by Generation X (born between 1965 and 1980) and the Millennials (born between 1981 and 2004).<sup>3</sup> This Essay argues that, as Gen X'ers and Millennials take over the teaching positions once held by Baby Boomers, such changing of the guard will have a positive and lasting effect on the status of clinical faculty.

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programs. Katherine R. Kruse, *Report and Recommendations on the Status of Clinical Faculty in the Legal Academy*, 2010 ASS'N LAW SCHS. SEC. CLINIC. LEGAL EDUC. v. n.3, available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1482&context=facpub>. Further, the use of the phrases "non-clinical faculty," "doctrinal faculty," and "faculty who teach outside of the clinic" are used interchangeably and are defined as: "faculty members who do not principally teach clinical courses and are tenured or on tenure track." Adamson, *supra*, at 116 n.4.

Further, "[t]his definitional choice reflects the fact that the availability of tenure is the norm for non-clinical faculty. We recognize that other statuses exist for non-clinical faculty, but that the predominant status model is tenure." See also Bryan L. Adamson et al., *Clinical Faculty in the Legal Academy: Hiring, Promotion and Retention*, 62 J. LEGAL EDUC. 115, 116 n.4 (2012).

2. This two-tiered system is rather complex and consists of various rights and privileges. Tenure, unlike general faculty status, technically refers to a process whereby academic freedom is protected by requiring due process before dismissal. See James J. Fishman, *Tenure: Endangered or Revolutionary Species*, 38 AKRON L. REV. 771, 782 (2005). Status, on the other hand, includes tenure as well as the other types of status issues such as voting rights, compensation, and title. Therefore, as will be demonstrated in Part I of this Essay, it is technically possible for law school clinical professors to have significant academic freedom that resembles tenure and yet still find themselves firmly implanted in the second tier of faculty status as a result of reduced compensation, different faculty titles, and, most pointedly, diminished voting rights.

However, commentators will often use the words "tenure" and "status" interchangeably. In doing so, they are referencing not only a process that protects academic freedom but also the granting of the various rights and privileges identified above, as this is most clearly the norm when traditional tenure is granted. Consistent with their common and not technical meanings, this work also uses the phrases tenure and status interchangeably.

3. The ranges of birth dates for each generation have been adopted from Pew Research Center. PEW RESEARCH CTR., *MILLENNIALS: A PORTRAIT OF GENERATION NEXT 4* (Feb. 2010), available at <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf>.

The discussion that follows proceeds in four parts. Part I provides an overview of the evolution of clinical legal education, from its inception to its current role in the modern legal curriculum. A specific focus is paid to the emergence of in-house law school clinics, as well as the corresponding treatment of clinical faculty at American law schools from the time Baby Boomers first began their legal education in the 1960s to the present day.

Part II explores the various factors that led to the creation of the two-tiered system of faculty status that exists at many American law schools today. This Essay argues that many of the factors that led to clinicians being treated as “second-class citizens” at many law schools were allowed to take root as Baby Boomers, who lacked meaningful opportunities to participate in clinical legal education as law students and therefore did not particularly value clinical education, joined law school faculties.<sup>4</sup> However, in the next five to ten years, many Baby Boomers will retire from law school faculties,<sup>5</sup> and a changing of the guard will occur.

Part III explores the value the Baby Boomers’ successors, Generation X’ers and Millennials, assign to the importance of clinical legal education. This Essay suggests that because Gen X’ers and Millennials are far more likely than their Boomer counterparts to have participated in a law school clinic and are likely to view law school clinics as a meaningful aspect of a contemporary legal

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4. The use of the phrase “second-class citizen” to describe the status of clinical law professors at many American law schools is frequently used by clinicians to describe their place in the existing faculty hierarchy at a particular institution, and has been used to describe the status of clinicians in academic writing. See PHILIP G. SCHRAG & MICHAEL MELTSNER, REFLECTIONS ON CLINICAL LEGAL EDUCATION 269 (1998).

5. One economist has noted, “‘Ten thousand baby boomers turn 65 today’ has become a demographic cliché (or *meme*, if you prefer). Barring a mass and age-selective plague, this means 10,000 or so are also turning 66, their official Social Security retirement age. Many, if not most, baby boomers are retiring.” See Paul Solomon, *Is Baby Boomer Retirement Behind the Drop in July’s Unemployment Rate?*, PBS NEWSHOUR (Aug. 2, 2013), <http://www.pbs.org/newshour/businessdesk/2013/08/is-baby-boomer-retirement-behi.html>. See also MITRA TOOSI, BUREAU OF LABOR STATS., MONTHLY LABOR REV. 43–44 (Jan. 2012) (positing the “projected labor force growth over the next ten years will be affected by the aging of the baby-boom generation, persons born between 1946 and 1964. The baby boomers will be between the ages of 56 and 74 in 2020, placing them in the 55-years-and-older age group in the labor force, with distinctively lower participation rates than those of the prime age group of 25-to-54-year-olds.”).

education, they will be far more willing than their Boomer counterparts to see clinicians attain equal faculty status.<sup>6</sup>

Part IV explores the second of the two winds affecting clinical legal education: market-based criticism that the law school curriculum, as currently constructed, does little to ensure that, upon graduation, law students are, in fact, “practice-ready.”<sup>7</sup> Commentators, in calling for curricular reforms designed to accomplish that end, have stressed the importance of clinical legal education.

This Essay argues the growing importance of clinical education increases the likelihood clinical law professors will achieve equality with non-clinical faculty.<sup>8</sup> It concludes by suggesting that the confluence of this generational changing of the guard, combined with increased calls for curricular reform, will permanently alter the traditional structure of law school faculties for generations to come.

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6. The exact nature of the argument presented in this Essay has little to do with the characteristics of a particular generation, and instead is related to the time period in which the student attended law school. This Essay operates on the assumption that most law students attend law school in their early- to mid-20s. *See* KIMBERLY DUSTMAN & PHIL HANDWERK, LAW SCH. ADMISSIONS COUNCIL, ANALYSIS OF LAW SCH. APPLICANTS BY AGE GROUP, A.B.A. APPLICANTS 2005–2009 2 (Oct. 2010), available at [http://www.lsac.org/docs/default-source/data-\(lsac-resources\)-docs/analysis-applicants-by-age-group.pdf](http://www.lsac.org/docs/default-source/data-(lsac-resources)-docs/analysis-applicants-by-age-group.pdf) (indicating that about half of all law school applicants are between the ages of twenty-two and twenty-four, one in five are over the age of thirty, and only 5 percent are forty or older). The era in which one is likely to have gone to law school will track closely along generational lines. Therefore, as Baby Boomers retire from law school faculties, they will inevitably be replaced by Gen X’ers and Millennials, who went to law school during a much different era and had a much different law school experience with respect to clinical legal education.

7. This particular criticism of law schools is not new, although it appears to have reached a fever pitch for reasons that will be expounded on further in Part IV. For a detailed history of this particular criticism of legal education, *see* Jessica Dopierala, *Bridging the Gap Between Theory and Practice, Why are Students Falling off the Bridge and What are Law Schools Doing to Catch them?*, 85 U. DET. MERCY L. REV. 429, 430 (2008). *See also* David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1.

8. For examples of commentators calling for curricular reform, which, among other changes, stresses the importance of clinical legal education, *see generally* Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598 (2010); Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C. J.L. & SOC. JUST. 247 (2002). *See also* the recent passage of A.B.A. House of Delegates Resolution 10B, calling on law schools to enhance clinical offerings to make law students more practice-ready. A.B.A. HOUSE OF DELEGATES, RESOLUTION 10B (2011), available at <http://www.abanow.org/2011/07/2011am10b/> (last visited June 15, 2013).

## I. THE EVOLUTION OF THE LAW SCHOOL CLINIC

### A. *Increasing Opportunities for Clinical Participation*

The evolution of the modern law school clinic began during the 1960s.<sup>9</sup> Prior to that time period, there were generally very few law school clinics, as “clinical experiences existed on the fringes of the law school curriculum.”<sup>10</sup> However, the period spanning from the early 1960s through the late 1990s can be best characterized as a period of rapid growth in clinical legal education.<sup>11</sup> During this time period, “clinical legal education solidified and expanded its foothold in the academy.”<sup>12</sup>

There were several reasons for this expansion, namely, “demands for social relevance in law school, the development of clinical teaching methodology, the emergence of external funding to start and expand clinical programs, and an increase in the number of faculty capable of and interested in teaching clinical courses.”<sup>13</sup> Reflecting the increased focus on legal skills training and its importance in the law school curriculum, in 1997, the American Bar Association (ABA) amended its accreditation standards and enacted Standard 302(d), ensuring that, in order to receive ABA accreditation, a law school must offer “live-client or other real-life practice experiences.”<sup>14</sup>

The net effect of the above factors ultimately led to a significant expansion of clinical programs at American law schools from the late 1960s to the late 1990s.<sup>15</sup> In 1974, 41 percent of law schools offered

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9. Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 12 (2000).

10. *Id.* at 11.

11. *Id.* at 12.

12. *Id.*

13. *Id.*

14. A.B.A., STANDARDS FOR APPROVAL OF LAW SCH., SEC. 302(d) 37 (1997), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standardsarchive/1997\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1997_standards.authcheckdam.pdf). The current standard is reflected in A.B.A., STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. 2012–2013, SEC. 302(b)(1) 20 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.pdf).

15. Barry, Dubin & Joy, *supra* note 9, at 12–21.

in-house clinics.<sup>16</sup> By 1987, that number had risen to 80 percent.<sup>17</sup> By 1997, there were in-house clinics at 147 law schools.<sup>18</sup> By 1999, 183 law schools reported having clinical programs, and a total of 1,736 individuals self-identified as clinicians.<sup>19</sup>

This substantial growth of clinical programs, as well as the number of people who identified themselves as clinicians, led those chronicling the history of clinical legal education to conclude that by the turn of the 20th century, “law school clinical programs had become part of the curriculum at virtually every law school in the United States.”<sup>20</sup> Moreover, scholars have argued law school clinical programs had become not merely a part of the law school curriculum but that “[d]uring the past thirty years, clinical legal education ha[d] become an *important* component of most law school curricula.”<sup>21</sup>

Importantly, as the number of law school clinical offerings has increased significantly over the past several decades, so too has actual participation in law school clinics.<sup>22</sup> In fact, a clear relationship exists between increased participation in law school clinics and whether a law student is a Baby Boomer, Gen X’er, or Millennial.<sup>23</sup> With respect to the levels of clinical participation from the Baby Boomers through to the Millennials, “the overall trajectory is one of increasing participation in clinical training by law students during the past forty years.”<sup>24</sup>

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16. Marjorie Anne McDiarmid, *What’s Going on Down There in the Basement: In-House Clinics Expand Their Beachhead*, 35 N.Y.L. SCH. L. REV. 239, 242 n.6 (1990).

17. *Id.* at 241–42.

18. Barry, Dubin & Joy, *supra* note 9, at 20.

19. *Id.* at 30 (citing the database maintained by Professor David Chavkin on behalf of the AALS Section on Clinical Legal Education and the Clinical Legal Education Association).

20. Barry, Dubin & Joy, *supra* note 9, at 21.

21. Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359, 360 (2008) (emphasis added).

22. Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 78 (2009).

23. *See id.* at 77–78 (detailing that participation in law school clinics has increased from around 16 percent for those who graduated law school between the mid-1960s and 1970s to 35 percent for those who graduated between 2000 and 2002. The most recent data from 2007 suggests approximately one-third of law students are currently participating in clinics, and approximately 50 percent or more are participating in some kind of live-client course focused on experiential education.).

24. *See id.* at 78.

*B. The Evolution of Unequal Faculty Status for Clinical Faculty*

The significant expansion in the total number of law school clinics has not brought with it broad-based institutional legitimacy for clinical law professors.<sup>25</sup> This is not surprising in light of the fact that prior to the 1980s, the ABA had no formal accreditation standard in place that specifically addressed the status of clinical faculty within the legal academy.<sup>26</sup>

However, “troubled by the unequal treatment of clinical faculty,” beginning in 1984, the ABA attempted three different times, through the adoption and modification of its law school accreditation standards, to address the disparity in treatment between clinical faculty and their doctrinal colleagues.<sup>27</sup> These efforts culminated in 1996 with the passage of ABA Accreditation Standard 405(c), providing, in relevant part: “A law school shall afford to full-time clinical faculty members a form of security of position *reasonably similar* to tenure, and non-compensatory perquisites *reasonably similar* to those provided other full-time faculty members.”<sup>28</sup>

Today, the end result of ABA Standard 405(c), allowing clinical faculty to receive a form of job security and a role in faculty governance that need only be “reasonably similar,” is that clinical faculty at American law schools generally fall within one of five

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25. See Adamson, *supra* note 1, at 116.

26. *Id.* at 124.

27. *Id.*

28. A.B.A., STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. 2012–2013, SEC. 405(c) 32 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.pdf) (emphasis added). Interpretation 405-6 to A.B.A. Standard 405 defines a form of security of position reasonably similar to tenure to include “a separate tenure track or a program of renewable long-term contracts.” *Id.* at 33. Further, a long-term contract is defined as “at least a five-year contract that is presumptively renewable or other arrangement sufficient to ensure academic freedom.” Once granted clinical tenure or a long-term contract, the clinical faculty member may only be terminated for “good cause.” *Id.* Interpretation 405-8, which addresses “non-compensatory” rights, states law schools “shall afford to full-time clinical faculty members participation in faculty meetings, committees, and other aspects of law school governance in a manner reasonably similar to other full-time faculty members.” *Id.* at 34. Lastly, it should be noted that Standard 405(c) does not require all clinical faculty members be afforded these rights. The rule allows for “a limited number of fixed, short-term appointments in a clinical program predominantly staffed by full-time faculty members.” *Id.* at 32.



models of faculty status.<sup>29</sup> These models are (1) unitary tenure track, (2) clinical tenure track, (3) long-term contract, (4) short-term contract, and (5) clinical fellowships (which in many respects is simply a variant of the short-term contract model).<sup>30</sup> The most recent published data indicates that, as of 2010, most law school clinical programs were staffed by a combination of faculty members holding differing degrees of status.<sup>31</sup> In this regard, 48 percent of all ABA-

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29. Adamson, *supra* note 1, at 126.

30. For more expansive definitions of the various types of clinical faculty status, see Adamson, *supra* note 1, at 127–30. However, for the purposes of this Essay, it should be noted that a unitary tenure track is defined as a process whereby a faculty member will “gain tenure through the same process and enjoy the same security of position and governance rights as tenured non-clinical faculty members. They also enjoy the same academic freedom in their research, teaching, and (presumably, by extension) practice.” *Id.* at 127. While the unitary tenure-track model extends identical status, security, governance, and financial benefits to clinical and non-clinical faculty members, the clinical tenure-track model does not. Instead, it creates a separate tenure system for clinical faculty, defining different processes and standards for gaining tenure. Further, while some institutions might extend full governance and voting rights to those with clinical tenure, at many institutions, those with clinical tenure are not extended this privilege. *Id.* at 127–28.

A long-term contract in the context of law school faculty status is defined as “an employment contract of five or more years in duration and presumptively renewable. In some institutions, the long-term contract is conditioned on the faculty member successfully completing one or more ‘probationary’ periods lasting one to three years.” Adamson, *supra* note 1, at 129–30. Further, rarely can those faculty members with long-term contracts vote on all faculty governance matters. Often, clinical faculty on long-term contracts are prohibited from participating on committees that address the hiring and promotion of faculty who teach doctrinal courses. At some institutions, clinical faculty on long-term contracts are barred from committees focusing on the hiring and promotion of other clinical faculty. *Id.*

A short-term contract is an appointment that is not presumptively renewable and is less than five years in duration. Adamson, *supra* note 1, at 130. Further, “[c]linical faculty working under short-term contracts generally have, at most, a limited role in faculty governance. Some may be appointed to a faculty committee or invited to attend faculty meetings. However, marks of influence, like membership on an appointments committee or voting rights, are invariably absent.” *Id.*

A clinical fellowship is generally regarded as a variant of a short-term contract. Clinical fellowships are designed to prepare the fellows to enter the market for a permanent clinical teaching job. At some institutions, fellowship programs confer a degree, such as an LL.M., in exchange for teaching. Because they are not members of the law school faculty, clinical fellows very rarely participate in faculty governance. *Id.* at 131.

However, those clinical faculty who are not on a unified tenure track may gain promotion through different processes and standards, and might not enjoy comparable academic freedom compensation, job security, or voting rights. *Id.* at 127–30.

31. *Id.* at 126. This data was collected in 2007 by the Center for the Study of Applied Legal Education (CSALE), and was compiled through the use of a master survey sent to clinical program directors at the 188 then-fully accredited American Bar Association law schools. *Id.* at 115.

accredited law schools have at least one faculty member who is either fully tenured or on a unitary tenure track.<sup>32</sup> If one of these fully tenured positions does exist, it is often held by the clinical program director.<sup>33</sup>

Approximately 13 percent of clinical law professors are employed under a clinical tenure-track model,<sup>34</sup> and 21 percent of full time clinical faculty are employed on long-term contracts.<sup>35</sup> Excluding clinical fellowships, which make up an extremely small part of those teaching in law school clinics, 15 percent of all clinical faculty are employed on short-term contracts.<sup>36</sup>

A review of the above data has prompted legal commentators to observe that, “despite great strides in the growth of clinical legal education in the last thirty years, equality between clinical and non-clinical faculty remains elusive at most schools.”<sup>37</sup>

## II. WHY CLINICAL FACULTY DO NOT ENJOY THE SAME FACULTY STATUS AS NON-CLINICAL FACULTY AT MANY AMERICAN LAW SCHOOLS

While some law schools have moved to a unitary tenure track for clinical law professors, the data above indicates many have not. Why then, after close to thirty years of significant growth in law school clinics, have clinical faculty not achieved the same faculty status as non-clinical faculty across the academy? The answer to this question relates to both the historical evolution of the law school clinic as well as to the culture of law school faculties. Long before the ABA first adopted accreditation standards relating to clinical faculty, members of the legal profession, as well as various committees tasked with studying the state of legal education, expressed concern over the unfair treatment of clinical faculty.<sup>38</sup> For the purposes of the current

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32. Adamson, *supra* note 1, at 127.

33. *Id.* at 126.

34. *Id.* at 128.

35. *Id.* at 129.

36. *Id.* at 130.

37. *Id.* at 116.

38. Peter A. Joy & Robert Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 190 (2008).

discussion, perhaps the most important of these reports was issued in 1980 by a joint committee of both the ABA and the American Association of Law Schools (AALS), which focused on providing “guidance to law school faculties wishing to initiate clinical training programs or evaluate existing programs.”<sup>39</sup>

What is noteworthy about the joint ABA and AALS report is that, while the report did recommend that at least one clinician “have the same underlying employment relationship as the faculty teaching in the traditional curriculum,”<sup>40</sup> the report also noted that “individual schools may wish to have some principal clinical teaching responsibilities fulfilled by individuals not eligible for tenure.”<sup>41</sup> The drafters reasoned unitary tenure for all clinicians was not required in light of “budgetary considerations” and “the experimental nature of clinical legal studies curriculum.”<sup>42</sup> The drafters went on to describe clinical legal education at that point in time as “a field which is still young” and “comparatively underdeveloped.”<sup>43</sup>

This particular report plainly demonstrates that early concerns relating to the extension of unitary tenure to clinical faculty were born out of the newness of clinical legal education at a particular point in its history, and out of clinical legal education’s still maturing role in modern legal education. Today, despite the fact that clinical legal education can no longer be described as a new educational phenomenon and simply dismissed as “experimental,” Baby Boomers who dominate law school faculties have continued to support the maintenance of a two-tiered system of faculty status.<sup>44</sup> Therefore, it is necessary to explore additional reasons, unrelated to the historic

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39. See *id.* at 190 (citing REPORT OF THE A.A.L.S./A.B.A. COMM. ON GUIDELINES FOR CLINICAL LEGAL EDUC. 1, 33 (1980)).

40. *Id.*

41. REPORT OF THE A.A.L.S./A.B.A. COMM. ON GUIDELINES FOR CLINICAL LEGAL EDUC. 1, 33 (1980).

42. *Id.*

43. See Joy & Kuehn, *supra* note 38, at 193 n.56 (citing REPORT OF THE A.A.L.S./A.B.A. COMM. ON GUIDELINES FOR CLINICAL LEGAL EDUC. 1, 115 (1980)). It is worthwhile to note that the drafters did not include any clinical faculty. The chair was a former law school dean, and the remaining members included a university president, two law school deans, two tenured non-clinical faculty, and one member of the public. See Joy & Kuehn, *supra* note 38, at 192.

44. See *supra* notes 22–34 and accompanying text.

evolution of clinical education, that have contributed to the differences in status between clinical and non-clinic faculty.

One of the primary reasons for this difference relates to the typical educational and professional experiences of the doctrinal law school faculty. Many doctrinal law professors have come to the academy with similar backgrounds. To that end, many doctrinal faculty members went to the same handful of elite law schools.<sup>45</sup> Following graduation, many went on to federal clerkships, followed by brief stints at prestigious corporate law firms, before transitioning into academia.<sup>46</sup> This particular phenomenon has been referred to as the “institutional glide path.”<sup>47</sup> Several empirical studies of the prior practice experience of tenure-track law professors hired during the past thirty years consistently show that “the typical professor practiced law for only a relatively short time before becoming a full-time member of the legal academy.”<sup>48</sup> The average length of time spent in legal practice prior to becoming a doctrinal law professor is 3.7 years.<sup>49</sup> The data reflecting the fact that tenure-track law professors hired during the last thirty years have a limited amount of practical experience is largely consistent with Professor Alan Watson’s assertion “that most of them entered the academy because they had ‘a strong distaste for the practice of law.’”<sup>50</sup>

Traditionally, “most clinical law professors were longtime legal-aid lawyers who had come to the university after decades in the

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45. “Studies of the composition of law school faculties over the last twenty-five years have found that ‘about 60 percent of law teachers graduated from twenty elite schools, with the largest number graduating from Harvard or Yale.’” Tan N. Nguyen, *An Affair to Forget: Law School’s Deleterious Effect On Student’s Public Interest Aspirations*, 7 CONN. PUB. INT. L.J. 95, 103–104 (2008).

46. NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* 138 (2010).

47. *Id.*

48. Brent E. Newton, *Preaching What they Don’t Practice: Why Law School Faculties’ Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 127–28 (2010) (citing Robert J. Borthwick & Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation’s Law Professors*, 25 U. MICH. J.L. REFORM 191, 218–19 (1991); Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 511 (1980)).

49. LEVIT, *supra* note 46, at 138.

50. Newton, *supra* note 48, at 130 (citing ALAN WATSON, *THE SHAME OF AMERICAN LEGAL EDUCATION* 29 (2d ed. 2006)).

trenches of housing, family, or criminal court.”<sup>51</sup> While the number of years in practice prior to becoming a clinical law professor might no longer be “decades,” the most recent survey results available indicate that, as of 2007, those teaching in law school clinics had practiced law for an average of 8.6 years prior to transitioning to academia, compared with the previously mentioned 3.7 years for their doctrinal counterparts.<sup>52</sup>

Further, the nature of the work performed by clinical and non-clinical faculty prior to joining law school faculties might have been quite different. It has been noted that for those professors with only a few years of practical experience—typically gained while working as an associate at a large law firm—such limited experience usually would not have permitted much significant professional development, as the first three to four years at a large law firm allow for limited courtroom experience and client contact.<sup>53</sup> Instead, “[m]ost of the time, [such employees] will have conducted research, drafted memos or briefs, reviewed documents, or revised agreements.”<sup>54</sup>

However, the practice experience of a future clinical law professor, most of whom have practiced as a legal-aid lawyer “in the trenches of housing, family, or criminal court,” is undoubtedly quite different.<sup>55</sup> In fact, practicing law in these settings involves almost all of the lawyering skills clinical law professors impart to their students. These lawyering skills include client interviewing and counseling, negotiation, the writing and filing of legal briefs, filing and arguing legal motions, and trial advocacy.<sup>56</sup>

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51. Daphne Eviatar, *Clinical Anxiety*, LEGAL AFF. MAG., Nov./Dec. 2002, available at [http://www.legalaffairs.org/issues/November-December-2002/review\\_eviatar\\_nov\\_dec2002.msp](http://www.legalaffairs.org/issues/November-December-2002/review_eviatar_nov_dec2002.msp).

52. DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 27 (2008), available at <http://www.csale.org/files/CSALE.07-08.Survey.Report.pdf>. See also LEVIT, *supra* note 46, at 138.

53. David Hricik & Victoria S. Salzmann, *Why There Should be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 769 (2005).

54. *Id.* at 769.

55. See Eviatar, *supra* note 51.

56. See Newton, *supra* note 48, at 130 (noting that many clinical law professors began their careers as legal-aid lawyers). See YALE LAW SCH. CAREER DEV. OFFICE, PUBLIC INTEREST CAREERS 6 (2011–2012), available at <http://www.psjd.org/getResourceFile.cfm?ID=15> (recognizing “[t]he activities of legal services lawyers are varied and comprehensive and

As a result, the difference in practice experience between doctrinal and clinical faculty is not only a difference in quantity but also a difference in kind. In this regard, the differing experiences of clinical and doctrinal faculty prior to becoming law professors are rather profound. This largely stems from the fact that the path to academia for the typical doctrinal law professor might very well have consisted of navigating the “institutional glide path.”<sup>57</sup> Some have even argued that doctrinal “[l]aw professors are a self-perpetuating elite, chosen in overwhelming part for a single skill: the ability to do well consistently on law school examinations, primarily those taken as 1Ls, and preferably ones taken at elite ‘national’ law schools.”<sup>58</sup> On the other hand, the path a clinical law professor must follow will, in all likelihood, be paved through practice experience, frequently in a public interest law setting.<sup>59</sup>

Currently, non-clinical faculty members hold the keys to the tenure kingdom. If full tenure opportunities were extended to clinical faculty, such would serve as an endorsement of the value of practice experience, experiential learning, and the teaching of lawyering skills. These characteristics often stand in contrast to the professional background and areas of scholarly focus of many non-clinical faculty members.

This is not to disparage the important role of non-clinical faculty. Both clinical and non-clinical faculty are incredibly valuable to the institutions they serve and the students they teach. In this regard, a unitary tenure track need not and should not be viewed as an “either-or” proposition. However, because of the differences in professional backgrounds and teaching areas, many non-clinical faculty members might be resistant to extending full tenure opportunities to clinical faculty, as doing so might be viewed as a repudiation and de-

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may include client counseling, negotiation, advocacy, research, assistance with legal documents, and representation in court and administrative proceedings”).

57. See LEVIT, *supra* note 46, at 138.

58. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?*, 45 S. TEX. L. REV. 753, 762 (2004).

59. See Eviatar, *supra* note 51 (noting “most clinical law professors were longtime legal-aid lawyers who had come to the university after decades in the trenches of housing, family, or criminal court”).

legitimization of an educational and professional paradigm that has served them exceedingly well.

Resistance to extending equal status to clinical faculty also stems from the fact that “[l]aw school has long had a dual identity” as both “an academic department in a university and a school that trains students for a professional trade.”<sup>60</sup> Over time, the academic side of the equation has won out, as law schools attempt to not just integrate themselves into the institutions of higher education they are attached to but to also show they clearly belong.<sup>61</sup> To do so, law professors have worked to promote the notion that law schools are institutions of intellectual value and not mere trade schools.<sup>62</sup> This phenomenon is perhaps best explained by Professor W. Bradley Wendel of Cornell Law School:

Law school has a kind of intellectual inferiority complex, and it’s built into the idea of law school itself. People who teach at law school are part of a profession and part of a university. So we’re worried that other parts of the academy are going to look down on us and say: “You’re just a trade school, like those schools that advertise on late-night TV. You don’t write dissertations. You don’t write articles that nobody reads.” And the response of law professors is to say: “That’s not true. We do all of that. We’re scholars, just like you.”<sup>63</sup>

In light of Wendel’s analysis, it is not surprising that “[t]he typical twenty-first century law professor has the self-identity of a ‘university professor’—one of the humanities—rather than a practitioner-teacher.”<sup>64</sup> Compounding this problem for clinicians is the fact that, “despite their growing numbers, clinical law professors have remained suspect in the eyes of many academic professors.”<sup>65</sup>

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60. Phyllis Goldfarb, *Back to the Future of Clinical Legal Education*, 32 B.C. J.L. & SOC. JUST. 229, 283 (2012).

61. See generally Stephen M. Feldman, *The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)*, 54 J. LEGAL EDUC. 471 (2004).

62. Newton, *supra* note 48, at 127.

63. Segal, *supra* note 7.

64. Newton, *supra* note 48, at 127.

65. Eviatar, *supra* note 51.

Wallace Mlyniec, an Associate Dean of Clinical Studies at Georgetown, noted, “The assumption was always that clinicians couldn’t compete with the academic rigor of the rest of the faculty.”<sup>66</sup> The desire to have a law professorship seen as inherently academic, as opposed to merely a vocational pursuit, has played a significant role in the unequal treatment of clinical law professors across the spectrum of American legal education. Extending full tenure to those within the institution whose primary responsibility involves the teaching of lawyering skills, and who might be viewed as lacking sufficient “academic rigor,” might be seen as lending credence to an unfortunate perception across the broader university landscape that law schools are simply trade schools in disguise.

Even beyond the above proffered reasons, perhaps much of the resistance to a more egalitarian relationship between clinical and non-clinical faculty members stems from a far more basic instinct. Despite the expansion of law school clinics and even the adoption of ABA Accreditation Standard 302(d) in 1997 requiring law schools to “offer live-client or other real-life practice experience,”<sup>67</sup> a clear hierarchy within the legal academy has been created over the past thirty years. This hierarchy plainly exists with non-clinical faculty perched firmly at the top. Extending full tenure to clinicians would allow them to occupy the same upper tiers of the current law school governing structure. Even more to the point, many non-clinical faculty members fear clinicians will vote as a block, particularly with respect to issues of curricular reform that emphasize the importance of legal skills training, ultimately leading to the marginalization of non-clinical faculty.<sup>68</sup>

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66. *Id.*

67. A.B.A. STANDARDS FOR APPROVAL OF LAW SCH., SEC. 302(d) 37 (1997), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/standards\\_archive/1997\\_standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standards_archive/1997_standards.authcheckdam.pdf).

68. For this reason, some law school governing bylaws actually contain provisions limiting the percentage of clinical faculty that may comprise the entire law school faculty. A clear example of such can be seen at the University of Iowa College of Law: “The salaried clinical faculty, calculated on a full-time equivalency basis, will not comprise more than 25 percent of the entire law school faculty, that is the salaried clinical faculty, the tenured faculty and the tenure-track faculty.” UNIV. OF IOWA COLL. OF LAW, STANDARDS & PROCEDURES FOR CLINICAL LAW FACULTY 1 (2009), available at <http://www.csale.org/files/University.Iowa.3.09.pdf>.



In 1983, Professor Clinton Bamberger, then- Co-Director of Clinical Education at the University of Maryland School of Law, suggested at the AALS Annual Meeting that the efforts to deny clinical faculty members tenure was “an effort to hold clinical faculty ‘outside’ so the changes in the method of law-school teaching that we have encouraged will not succeed.”<sup>69</sup> While it might be a stretch to suggest non-clinical faculty members wished to prevent clinicians from succeeding, it is not a stretch to suggest the reason clinicians have been held “outside” is “that distinguishing one group of teachers from another can only be explained as an attempt by a select group to hang onto its monopoly on power in the legal academy . . . .”<sup>70</sup>

### III. HOW THE VIEWS OF GEN X’ERS AND MILLENNIALS ON CLINICAL EDUCATION WILL IMPACT THE STATUS OF CLINICAL FACULTY

The above proffered reasons for the creation and maintenance of the two-tiered system of faculty status undoubtedly permeate the reasoning of Baby Boomers, who currently constitute the majority of law school faculties. However, younger doctrinal faculty members are not significantly different in their educational and practice backgrounds than their Boomer predecessors.<sup>71</sup> Despite these

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69. See Joy & Kuehn, *supra* note 38, at 196.

70. Tarr, *supra* note 1, at 61.

71. See Newton, *supra* note 48, at 127–129. Newton indicates data collected by the Association of American Law Schools from the mid-1970s through the late 1980s shows the average number of years in practice prior to becoming a law professor was 5 years. A further study demonstrated law professors (excluding clinicians and legal writing instructors) hired between 1996 and 2000 had approximately 3.7 years of practice experience. Those hired between 2000 and 2009 averaged around 3 years of practice prior to becoming a law professor. In addition to limited practice experience, Gen X law professors are just as likely to have attended an elite institution as their Boomer counterparts. To that end, a longitudinal comparison of the demographic characteristics and qualifications of law teachers over the last quarter-century reveals the following: studies conducted in the 1960s, 1970s, and 1980s reveal 60 percent of law teachers graduated from twenty elite law schools, with the largest number graduating from Harvard or Yale. Further, five elite law schools (Harvard, Yale, Columbia, Chicago, and Michigan) produced almost one-third of all United States law teachers. A more recent study of law professors, hired between 1996 and 2000, indicates one-third of all new teachers graduated from either Harvard (18 percent) or Yale (15 percent); another third graduated from other top-12 law schools, and 20 percent graduated from other top-25 law schools. Only 14 percent graduated from a school not ranked among the top 25 law schools. Indeed, these statistics reveal “[t]he old pattern of hiring graduates of elite law schools continues.” Richard E. Redding, “Where Did You Go To Law School?” *Gatekeeping for the*

similarities, a key difference does exist: Gen X'ers and Millennials have had far more opportunities to participate in law school clinics than Boomers, and they have seen law school clinics occupy a more central role in legal education.<sup>72</sup>

As law school faculties begin the inevitable transition from Baby Boomers to Gen X'ers and Millennials, it is essential to explore the impact this increased participation in law school clinics will have on the continued existence of the common two-tiered system of faculty status in law schools. More specifically, the continued existence of this two-tiered system might very well be impacted by the value that Gen X'ers and Millennials assign to the importance of clinical legal education.

*A. The Views of Gen X'ers and Millennials on the Value of Clinical Legal Education*

Recognizing that the value Gen X'ers and Millennials place on clinical legal education might impact the status of clinical faculty in the years to come, it is necessary to ask what Gen X'ers and Millennials think of the value of clinical legal education. Recent empirical analysis has revealed that Gen X'ers and Millennials generally feel strongly about the importance and value of clinical education.<sup>73</sup>

The *After the JD* study surveyed the career outcomes of almost five thousand "new lawyers" through 2007, and was, in part, designed to offer a nationally representative picture of lawyer attitudes toward clinical legal education.<sup>74</sup> The study revealed that of

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*Professoriate and its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 596–599, 606 (2003).

72. See *supra* Part I (a), detailing the expansion of law clinics at American law schools as well as increased student participation in law school clinics across generational lines. See also 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) (noting "clinical legal education has become an integral component of law school instruction over the past thirty years," and that "[c]linical programs have moved into the mainstream of law school curricula").

73. See Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLINICAL L. REV. 57, 786 (2009) (detailing the results of the *After the JD* study and its revelations regarding students attitudes toward clinical education). The results of the *After the JD* study are discussed at much greater length in this section.

74. Sandefur, *supra* note 22, at 85.

those who graduated in 1998, 1999, and 2000, 62 percent of respondents rated “clinical courses/training” as “helpful in making the transition to early work assignments as a lawyer.”<sup>75</sup> Consistent with this study, the 2010 *Survey of Law School Experiential Learning Opportunities and Benefits* reported 63.1 percent of surveyed clinic participants found the experience “very useful.”<sup>76</sup>

Moreover,

The differences between clinical courses and the lower-rated elements of law school training are statistically significant: new lawyers were significantly more likely to say that clinical training was “extremely helpful” for making the transition to practice than they were to make the same assessment of legal writing training, upper-year lecture courses, course concentrations, pro bono service, the first year curriculum and legal ethics training.<sup>77</sup>

Further, and of significant importance with respect to how future law school faculties made up of Gen X’ers and Millennials might value clinical legal education, those who attended elite law schools were just as likely to view clinical legal education as “extremely helpful” as were those who attended lower ranked schools.<sup>78</sup> Indeed, “[b]etween groups of schools, there were no statistically significant differences in ratings: clinical education was rated highly, and it was rated highly across the board.”<sup>79</sup>

In addition to legal skills training, clinical legal education has a deep emotional—and even transformative—impact on students. This stems from the unique opportunities clinical legal education provides law students: to use what they learned in doctrinal classes in the actual practice of law, and to experience the excitement and emotional satisfaction that comes from representing a real client. It is not surprising, therefore, when clinicians note that “[l]aw students

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75. *Id.*

76. NAT’L ASS’N FOR LAW PLACEMENT & NAT’L ASS’N FOR LAW PLACEMENT FOUND., 2010 SURVEY OF LAW SCH. EXPERIENTIAL LEARNING OPPORTUNITIES & BENEFITS 6 (2011), available at <http://www.nalp.org/uploads/2010ExperientialLearningStudy.pdf>.

77. Sandefur, *supra* note 22, at 88.

78. *Id.* at 89.

79. *Id.*

often write in their clinic evaluations: ‘This is the best course I have taken at the law school.’<sup>80</sup> This is not to say every clinician is the best professor in every law school, or that students do not have great doctrinal classes or doctrinal instructors. While such comments are clearly an endorsement of the clinical faculty member, they also reflect “the relief and excitement students feel when they are permitted to put all of the pieces of being a lawyer together.”<sup>81</sup>

Many law schools prominently feature their clinical offerings on their websites, often accompanied by student testimonials. Many of these testimonials discuss how rewarding students found their clinic experience and the important role it played in their legal education.<sup>82</sup>

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80. Suellen Scarnecchia, *The Role of Clinical Programs in Legal Education*, 77 MICH. B.J. 674, 674 (1998).

81. *Id.*

82. The author’s review of law school marketing and promotional materials has revealed that the overwhelming majority of law school websites have a section dedicated solely to clinical education. Most of these websites feature some form of glowing student testimonial, either in writing or, increasingly, in video. Just a few examples of law school websites prominently featuring their school’s clinic accompanied by student testimonials include:

- Harvard Law School:

“The clinical program has been critical to my development as a public interest attorney. My clinical work, more so than any other experience I’ve had at HLS, has exposed me to the kinds of lawyers, law, and practice settings that have shaped the way I think about the provision of legal services.”

*Office of Clinical and Pro Bono Programs*, HARV. L. SCH. (Sept. 3, 2013), <http://www.law.harvard.edu/academics/clinical/clinics/index.html>.

- The University of Texas at Austin:

“Without exaggeration, the Immigration Clinic has transformed my law school career and changed my life. Working directly with underserved and vulnerable people who desperately needed our help both filled me with purpose and reminded me why I went to law school in the first place, which is frequently easy to forget after 1L year.”

Amelia Ruiz Fisher, *Clinical Educ. at UT Law*, U. TEX. AUSTIN SCH. L., [http://www.utexas.edu/law/clinics/immigration/student\\_experience.php](http://www.utexas.edu/law/clinics/immigration/student_experience.php) (last visited Sept. 3, 2013).

- The University of Arizona College of Law:

“I highly recommend clinic experience as an essential part of the law school curriculum.”

Meredith Lynch, *The Immigration Law Clinic*, U. ARIZ. JAMES E. ROGERS C. L. (Aug. 8, 2012), [http://www.law.arizona.edu/clinics/Immigration\\_Law\\_Clinic/student\\_comments.cfm](http://www.law.arizona.edu/clinics/Immigration_Law_Clinic/student_comments.cfm).

For additional examples of law schools featuring videotaped student testimonials about their clinic experiences, see *Clinical and Externship Programs*, VT. L. SCH., [http://www.vermontlaw.edu/Academics/Clinical\\_and\\_Externship\\_Programs.htm](http://www.vermontlaw.edu/Academics/Clinical_and_Externship_Programs.htm) (last visited Sept. 4,

The marketing and recruitment strategies advanced by many law schools plainly demonstrate that Gen X'ers and Millennials feel strongly and passionately about the importance of clinical legal education. In this regard, it has not gone unnoticed by legal commentators that “[c]linical programs are featured prominently in most law school admissions materials, websites, magazines, and brochures.”<sup>83</sup>

*B. How the Experiences of Gen X'ers and Millennials Will Impact the Status of Clinical Faculty*

Ultimately, the strong feelings Gen X'ers and Millennials have with respect to clinical legal education might serve to rebut the arguments presented thus far regarding the unequal treatment of clinical faculty. Currently, many Baby Boomers arguing against the equal treatment of clinical faculty have not participated in a law school clinic.<sup>84</sup> However, personal experiences matter. As Baby Boomers retire, they will be replaced by younger faculty members who have probably participated in law school clinics and who will most likely have a positive view of that experience. Those who have had meaningful experiences in law school clinics might be less willing to treat clinical faculty as second-class citizens, because doing so would be inconsistent with the value and meaning of their own personal experiences.

Based on the reasons offered in Part II of this Essay, some argue younger doctrinal faculty members will be unlikely to grant equal faculty status to clinical faculty because they will see themselves as more deserving of a higher status and different from clinical faculty. But this prediction assumes the personal clinical experiences of Gen X'ers and Millennials did not affect them. Many Gen X'ers and Millennials chose courses in law school that consisted of both

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2013); *Clinics*, N.Y. L. SCH., [http://www.nyls.edu/academics/jd\\_programs/office\\_of\\_clinical\\_and\\_experiential\\_learning/clinics/](http://www.nyls.edu/academics/jd_programs/office_of_clinical_and_experiential_learning/clinics/) (last visited Sept. 4, 2013); *About the Clinic*, NW. L. SCH. <http://www.law.northwestern.edu/legalclinic/about/#video> (last visited Sept. 4, 2013).

83. See Joy & Kuehn, *supra* note 38, at 229.

84. See Krieger, *supra* note 21 (noting only about 16 percent of law students between the mid-1960s and 1970s (the time when many Baby Boomers would have been attending law school) participated in a law school clinic).

doctrinal and clinical classes, believing doing so had educational value.<sup>85</sup> It makes sense, then, that Gen X and Millennial doctrinal faculty members would be more receptive to granting equal status to clinical faculty, and are therefore unlikely to believe that granting such status represents an affront to their educational and professional backgrounds, an assault on their monopoly on power, or an attempt to turn law schools into trade schools.

Instead, equal treatment of clinical faculty is largely consistent with a new way of looking at American legal education. It is far more likely that, based on their own educational experiences, younger doctrinal faculty members will view the integration of doctrinal and clinical curriculums as creating a rising tide that will, in turn, float all boats. Younger doctrinal faculty members are likely to recognize “there is ground to allow both perspectives; a law school must train lawyers but also can be ‘a centre [sic] of research, criticism, and contribution to the better understanding of the laws’ with the goal of improving the law.”<sup>86</sup> Fully and equally integrating clinical faculty into existing faculty structures is entirely consistent with this vision.

While not all future faculty members will have participated in a law school clinic, it is essential to note that most have attended law school during a time when clinical education occupied a central role

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85. Some legal educators have noted “clinical legal education extends a student’s learning beyond the point where the classroom stops. The task of ‘learning to think like a lawyer’ is extended to include an effort to integrate the student’s interpersonal, analytical, and advocacy skills with her credibility, values and work habits to form a professional identity.” Suellyn Scarnecchia, *The Role of Clinical Programs in Legal Education*, 77 MICH. B.J. 674, 674 (1998). In this regard, a typical Gen X or Millennial law student might believe their doctrinal classes teach them to “think like a lawyer,” and clinic allows them to apply what they learned in the classroom in the “real world.” The following comment made by a student at Washburn University School of Law, and posted on the school’s clinic website, illustrates this point: “Clinic was an amazing experience that helped me put together all of the things I had learned in my classes. Clinic is like the final puzzle piece of law school.” Stacey Anderson, *Washburn Law Clinic*, WASHBURN U. SCH. L., <http://www.washburnlaw.edu/academics/clinic.html> (last visited Apr. 10, 2013). See also Jeffrey Ward, *One Student’s Thoughts on Law School Clinics*, 16 CLINIC L. REV. 489, 491 (2010) (arguing legal education builds competencies in doctrine, technical rules, and legal analysis; and participation in a law school clinic provides “a way for students to engage the law more deeply, to explore various real-life contexts in which it works, and to build relationships with the people whose lives it affects”).

86. A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 1952, 1957–58 (2012) (citing Cecil A. Wright, *The University Law Schools*, 2 J. LEGAL EDUC. 409, 412 (1950)).

in the law school curriculum.<sup>87</sup> A frequently cited law review article about the history of clinical legal education was titled, in part, “What’s Going on Down There in the Basement”—a reference to both the physical and figurative placements of law school clinics in the past at many American law schools.<sup>88</sup> However, Gen X’ers and Millennials attended law school during a time when most law clinics were no longer literally and figuratively in the basement. Instead clinics were considered an “indispensable” part of the law school curriculum.<sup>89</sup>

As a result, even those who have not participated in clinics themselves are likely to know classmates and colleagues who have, and are therefore likely to view clinical legal education as a mainstream and accepted part of the law school experience. Treating clinical faculty as anything less than equal, therefore, would be largely inconsistent with an aspect of future faculty members’ law school experience, in which clinical legal education occupied a central role in the modern law school curriculum.

#### IV. THE MARKET PLACE DEMANDS “PRACTICE-READY” LAW STUDENTS

##### A. *The Practice-Ready Movement*

The realization that legal education is in a state of crisis further influences the status of clinical faculty.<sup>90</sup> Much of the crisis appears

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87. 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) (noting “clinical legal education has become an integral component of law school instruction over the past thirty years,” and that “[c]linical programs have moved into the mainstream of law school curricula”).

88. See McDiarmid, *supra* note 16.

89. Goldfarb, *supra* note 60, at 292.

90. Many legal commentators and the popular press have addressed the crisis in legal education for much of the last two years. See Paul Campos, *The Crisis of the American Law School*, 46 U. MICH. J.L. REFORM 177 (2012). See also Eric Posner, *The Real Problem with Law Schools: They Train Too Many Lawyers*, SLATE (Apr. 2, 2013), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/04/the\\_real\\_problem\\_with\\_law\\_schools\\_too\\_many\\_lawyers.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/04/the_real_problem_with_law_schools_too_many_lawyers.html); STEVEN J. HARPER, *LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013); BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2012); Kyle P. McEntee, Patrick J. Lynch & Derek M. Tokaz, *The Crisis in Legal Education: Dabbling in Disaster Planning*, 46 U. MICH. J.L. REFORM 225, 226–28 (2012); Deborah L. Rhode, *Legal Education: Rethinking*

to stem from the “Great Recession of 2008,” in which the legal marketplace, along with the rest of the economy, began to contract considerably. This has had a profound impact on American law schools.<sup>91</sup>

The effects of the Great Recession on the legal marketplace were made worse by the outsourcing of legal jobs to lower paid contract attorneys, lawyers working overseas,<sup>92</sup> and the invention of new technologies reducing the number of lawyers needed to complete basic legal tasks such as document review.<sup>93</sup> As a result, large law firms began hiring fewer associates than ever before, and their clients have refused to pay for legal work performed by first- and second-year associates who are learning on the job.<sup>94</sup>

Crushing amounts of student debt have made the situation even worse, as recent graduates search for employment.<sup>95</sup> Moreover, many observers believe the post-Great Recession legal marketplace is permanently altered, as clients are unwilling to return to a pre-recession billing cycle, and jobs lost to outsourcing and technology will never return.<sup>96</sup> The net effect of this perfect storm has resulted in lawsuits by students alleging law schools falsified employment data in promotional materials,<sup>97</sup> noting scrutiny from the United States Senate,<sup>98</sup> and, perhaps most importantly, citing declining admissions.<sup>99</sup>

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*the Problem, Reimagining the Reforms*, 40 PEPP. L. REV. 437 (2013); Jack Graves, *An Essay on Rebuilding and Renewal in American Legal Education*, 29 TOURO L. REV. 375 (2013).

91. Hannah Hayes, *Recession Places Law School Reform in the Eye of the Storm*, 18 PERSPECTIVES 4, 8 (2010). See also Thies, *supra* note 8, at 599.

92. Heather Timmons, *Where Lawyers Find Work*, N.Y. TIMES, June 3, 2011, at B1.

93. Spencer, *supra* note 86, at 1953. See also Posner, *supra* note 90.

94. See Segal, *supra* note 7.

95. See William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble*, 98 A.B.A. J. 30, 30 (Jan. 2012) (“In 2010, 85 percent of law graduates from ABA-accredited schools boasted an average debt load of \$98,500.”).

96. Adam Cohen, *Just How Bad Off are Law School Graduates*, TIME, Mar. 11, 2013, available at <http://ideas.time.com/2013/03/11/just-how-bad-off-are-law-school-graduates/>.

97. See Ben Wolfgang, *Unemployed Lawyers Sue Schools over Promise of Jobs*, WASH. TIMES, June 17, 2012, available at <http://www.washingtontimes.com/news/2012/jun/17/unemployed-lawyers-sue-schools-over-promises-of-jo/?page=all>.

98. Katherine Mangan, *U.S. Senator Adds to Pressure on Law Schools for More-Reliable Job-Placement Data*, CHRON. OF HIGHER EDUC., Oct. 6, 2011, available at <http://chronicle.com/article/US-Senator-Adds-to-Pressure/129300/>.

99. Wolfgang, *supra* note 97 (“The number of students seeking entry into the nation’s



In response to this crisis, law schools have attempted to respond by looking for new and innovative ways to increase students' employment prospects.<sup>100</sup> Law schools have begun to stress the importance of experiential learning with a newfound intensity.<sup>101</sup> This increased focus on the importance of experiential learning has resulted in the emergence of the "practice-ready movement."<sup>102</sup>

While proponents of the practice-ready movement do in fact stress an ethical obligation to ensure that those becoming practicing lawyers have sufficient legal skills training, the movement's most consistent appeal is that practical skills training is increasingly necessary for many law schools to remain competitive in a marketplace of declining applications.<sup>103</sup>

The logic of the practice-ready movement stems from the notion that large law firms are hiring less than before the recession, and that the distressed economy has resulted in budget cuts for government employers, further reducing job opportunities.<sup>104</sup> As a result, more and more law school graduates are becoming employed in smaller law firms or as solo practitioners.<sup>105</sup> Budget cuts for training

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nearly 200 law schools dropped by about 11 percent in the 2011–12 academic year, according to information from the Law School Admissions Council. Preliminary data for the 2012–13 term show that the downward trend is continuing, the possible result of more prospective students taking a more thoughtful look at their post-graduation job opportunities.”).

100. See Karen Sloan, *Reality's Knocking: The Ivory Tower Gives Way to the Real World's Demands*, NAT'L L.J. & LEGAL TIMES, Sept. 7, 2009, at 1, 15 (detailing how law schools are responding to various market-based pressures). See generally Hayes, *supra* note 91.

101. See Barry, *supra* note 8, at 254–66 (detailing various types of curricular reforms under way at different law schools, all of which are designed to stress practical skills training).

102. *Id.* at 250. While the exact origin of the phrase is unknown, a generally accepted definition of “practice-ready” is: “a sufficient grounding in how the law is developed, interpreted, critiqued, accessed, and used to work toward expertise, whether independently or with the benefit of organizational support.” *Id.*

103. See Thies, *supra* note 8, at 611 (noting for many “marginal” law schools, “the new job market will present a significant challenge. Such schools will only attract students if they can ensure them a good return on their investment. Many law schools will thus face more pressure than ever before to emphasize practical training.”).

104. Benes Z. Aldana, *The Chair's Corner, Helping Recent Graduates*, 30 GPSOLO 1, (Jan./Feb. 2013), available at [http://www.americanbar.org/publications/gp\\_solo/2013/january\\_february/chairs\\_corner\\_helping\\_recent\\_graduates.html](http://www.americanbar.org/publications/gp_solo/2013/january_february/chairs_corner_helping_recent_graduates.html).

105. *Id.* (citing employment statistics from the National Association for Legal Career Professionals indicating that “[t]he Class of 2009 saw 43 percent of graduates in private practice start at firms of between two and 25 lawyers; that number rose to 54.7 percent for the Class of 2011. Similarly, the number of graduates in private practice beginning their careers as solos has also risen. In 2009, 5.5 percent began as solos; that number rose to 6.1 percent for the

programs at government agencies and the lack of resources available to smaller law firms to train new lawyers has meant those students entering the legal marketplace as practice-ready have a competitive advantage. Therefore, offering a practice-ready education at an affordable price will ultimately benefit law schools by increasing their attractiveness to future law school applicants.<sup>106</sup>

Law school clinics have come to play an important role in the practice-ready movement. Indeed, it has been noted “[t]hat one of the most significant changes in upper level courses has been the expansion of clinical and externship offerings.”<sup>107</sup> Perhaps the foremost example of the current emphasis on the production of practice-ready graduates, as well as the expanding importance of clinical legal education, can be seen in the recent adoption of Resolution 10B by the ABA House of Delegates:

American Bar Association urges legal education to implement curricular programs intended to develop practice-ready lawyers including, but not limited to enhanced capstone and clinical courses that include client meetings and court appearances.<sup>108</sup>

*B. How Market-Based Forces Will Impact the Future Status of Clinical Faculty*

It is undeniable that the changing legal marketplace has had a profound impact on the nation’s law schools. One observer pointedly noted that “[e]conomic uncertainty has done more to make law schools receptive to change than decades of critique. Survival has

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Class of 2011.”). See generally NAT’L ASS’N OF LAW PLACEMENT, RESEARCH & STAT.: RECENT GRADUATES, <http://www.nalp.org/recentgraduates> (last visited June 12, 2013).

106. Thies, *supra* note 8, at 610–11. While also addressing the cost of law school, Thies summarizes the importance of the practice-ready movement to both recent graduates and law schools as follows: “[t]he schools that figure out how to make their graduates more competitive in the coming job market, while at the same time limiting the cost of a legal education, will be most attractive in this situation. Because the job market will favor job-seekers with proven practical training, the market will ultimately reward law schools that can deliver a skills education at a reasonable price.” *Id.*

107. Barry, *supra* note 8, at 264.

108. A.B.A. HOUSE OF DELEGATES, RESOLUTION 10B (2011), available at <http://www.aba.org/2011/07/2011am10b/> (last visited June 15, 2013).

entered the lexicon, and practice readiness is seen as a lifeline.”<sup>109</sup> In this sense, the practice-ready movement has added significant value to those faculty members who teach legal skills, including clinical faculty.<sup>110</sup>

In addition, the importance of law school clinics in attracting future students can be plainly seen in the manner in which they are promoted and marketed by most law schools. If, as suggested by some, being practice-ready is seen as a potential “lifeline” for law schools, the denial of equal status for clinical faculty will eventually become an even more untenable position. Law school faculties might find it increasingly difficult to deny clinical faculty the same status as non-clinical faculty members while at the same time relying on clinical programs to both attract new students and answer the call for more practice-ready lawyers.

Thus, the continued denial of equal status for clinical faculty contradicts the value an institution purports to assign to legal skills training. It also undermines the position that the institution has in fact heeded the calls of reformers and meaningfully acknowledged the importance of skills training. Moreover, the simple and obvious unfairness of relying on clinical education to satisfy calls for reform and using it as a promotional vehicle to attract new students, all the while treating clinical faculty as second-class citizens, should not be overlooked or understated in those law schools that do not provide equal status for clinical faculty.

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109. Barry, *supra* note 8, at 276.

110. A report prepared by The Special Committee on the Impact of Law School Debt on the Delivery of Legal Services of the Illinois State Bar Association has called for many reforms in the structure of legal education. In addition to calling for more emphasis on skills training, teaching, and the hiring of experienced practitioners, the Committee advocated for equal status for clinicians and legal writing instructors.

Currently, legal writing instructors and clinical faculty members often do not enjoy the same power in faculty governance as traditional doctrinal faculty. These faculty members are the most involved with educating lawyers with the skills that are necessary for practice. Clinical and legal writing instructors should be fully implemented into the governance structure of the law school, giving them the same say as traditional faculty on hiring, curriculum, and other important topics.

ANN JORGENSEN ET AL., ILL. STATE BAR ASS'N, SPECIAL COMM. ON THE IMPACT OF LAW SCH. DEBT ON THE DELIVERY OF LEGAL SERVS., FINAL REPORT & RECOMMENDATION 47 (Mar. 8, 2013), available at <http://www.isba.org/sites/default/files/committees/Law%20School%20Debt%20Report%20-%203-8-13.pdf>.

## CONCLUSION

One legal commentator has observed that “law school, as it exists today, is an artifact of its past, with a structure and tradition that is rooted in history more so than being founded on rational design.”<sup>111</sup> The fact that clinical faculty at many law schools do not enjoy the same status as their doctrinal counterparts is indeed a reflection of history’s choke-hold on legal education. The unequal treatment of clinical faculty fails to reflect that “of all the curricular developments since the introduction of the case book method, clinical legal education is the most significant.”<sup>112</sup>

Ultimately, to achieve equal status, clinical faculty at many of the nation’s law schools will have to advocate for change. Hopefully, as Baby Boomers retire and are replaced by a new generation of law professors, clinical faculty will likely find their younger doctrinal colleagues a far more receptive audience.

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111. Spencer, *supra* note 86, at 1960.

112. Joy, *supra* note 38, at 230.