Towards a New World of Externships: Introduction to Papers from Externships 4 and 5

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TOWARD A NEW WORLD OF EXTERNSHIPS: INTRODUCTION TO PAPERS FROM EXTERNSHIPS 4 AND 5

Harriet N. Katz & Alexander Scherr*

The scholarly literature on externships is growing and deepening, addressing concerns of importance to field placement programs and to clinicians in general. This Introduction places the issues raised by the subsequent four articles on externships into the context of current national debates about the externship method. These issues, which both extend and diverge from current thinking about externship pedagogy, include: 1) the impact of a harsh economic climate; 2) the educational potential of placements in corporate counsel offices; 3) the argument for compensating students in for-credit placements; and 4) the value of course design for teaching power dynamics in supervisory relationships. Taken together, the issues explored in these four articles point toward a new world of externships, filled with both opportunity and risk for clinical education. This new world poses key questions, not just for externships, but for clinical legal education and legal education generally.

Introduction

The publication of this selection of scholarly articles about legal externships marks a critical and interesting time in the theory and practice of externships. Externships 5: Responding to Changing Times, sponsored by the University of Miami School of Law in March, 2010,1 was the most recent of five national conferences on legal externships held in the past twelve years.2 With this volume, at least 100 articles

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1 Externships 5 was planned by conference chair Jennifer Zawid, University of Miami program coordinator Sabrina Sogbe, and planning committee members Sande Buhai, Liz Ryan Cole, Eden Harrington, Harriet Katz, Peggy Maisel, Bob Parker, Avis Sanders, and Alexander Scherr. Events during the conference were sponsored by Florida International University, Florida Coastal School of Law, the Clinical Legal Education Association (CLEA), and the Greater Los Angeles Consortium on Externships (GLACE).

2 Previous conferences were (1) Learning from Practice: Developments in Externship Pedagogy, the first externship conference, conceived and developed by faculty at Catholic University and held in 1998; (2) Externships 2: Learning from Practice, held at Catholic University in 2003; (3) Externships 3: Learning from Practice, a National Externship Con-
and books have been published, primarily in the last twenty years, on topics relating to the pedagogy, design, value, and purposes of externships. These publications include articles in symposia in the New Mexico Law Review (in 1989), three previous volumes of the Clinical Law Review (1999, 2007, and 2009) and a portion of one volume of the Mississippi Law Journal (in 2005). Texts for use in classes accompanying externships have been published both for general use and for specific use with judicial externships.

Externship publications have not only increased in number, but have become a dynamic dimension of clinical scholarship, confident in the fundamental place of externships in the law school curriculum and willing to explore provocative ideas. From its beginning, the externship method diverged from a traditional clinical model by relying on practicing attorneys for direct casework and skills supervision of students. This format provided students the opportunity to experience multiple aspects of law practice, while challenging law school faculty to consider how to achieve optimum levels of mentoring and to add independent academic value.

A comprehensive review of the development of externship scholarship is beyond the scope of this summary. But a comparison of the 1989 New Mexico articles to the 2009 and the current 2010 Clinical Law Review symposia provides a glimpse of both continuity and change in reflecting on externship pedagogy. The role of law school faculty in preparing attorneys to be effective mentors, identified in the

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6 Symposium, Prosecutorial Externship and Clinical Programs, 74 Miss. L.J. 919 (2005) (including articles that described both faculty-supervised and practitioner-supervised program designs).


8 See Rebecca A. Cochrane, Judicial Externships: The Clinic Inside the Courthouse (3d ed. 2005).
earlier work as a critical issue, continues to be an important subject of exploration. On the other hand, setting out persuasive arguments for the academic value of experiential learning outside of the law school, important in 1989, stands in contrast today to explorations of diverse contemporary challenges and potential new directions for established externship programs, whose value is no longer in question.

Three of the articles in this volume resulted from presentations at Externships 5: Responding to Changing Times. This conference brought together some 150 participants from over 100 law schools to exchange ideas about fundamental elements of externships and creative responses to the challenges of changes in the economy, the practice of law, and legal education. Thirty sessions included plenaries, concurrent presentations, workshops, works-in-progress, "great ideas" teaching demonstrations and meetings focused on current national debates in the externship community. The fourth article is based on a presentation from Externships 4: A Bridge to Practice, a conference which focused on the ways in which well-run externship experiences

9 See Cole, supra note 4.


11 See Motley, supra note 4; Stickgold, supra note 4.


13 In addition to the articles in this volume, the presentations and discussions at Externships 5 concerned other aspects of design, pedagogy, and assessment, as fundamental aspects of externship programs and as sources of innovation for meeting contemporary challenges. Several sessions considered program design ideas such as full-time, international, and business sector placements. Others generally addressed teaching methods that could enhance student engagement in classes and in the reflective component of externships. Yet others considered specific aspects of course content. Ideas for continued improvement of supervisor mentoring included training, constructive contact with the externship clinicians, and students’ initiative to design and implement their own desired feedback. Sessions considered how to set goals for, and assess the quality of, a program as a whole and how to measure the success of individual students. Throughout the conference, a tone of respect for a diversity of views prevailed on these and other topics, no matter how controversial. The full final schedule of sessions and the abstracts of presentations at Externships 5 may be viewed at http://www.miamiexternshipconference.com/works.php. We refer to several of the sessions at Externships 5 in the course of this essay. This Introduction discusses in some depth two of the more controversial topics addressed at the conference: whether to pay students for credited fieldwork, see infra notes 36-43 and accompanying text; and whether to offer placements in for-profit legal settings, see infra notes 21-35 and accompanying text.
meet the professional education challenges articulated by the *Carnegie Report*. The *Carnegie Report* identifies current issues often attributed to the changing economic climate and the resulting change in the legal profession. The concerns they examine — coordination with career assistance for students, expansion of externship programs to the private sector and to paid placements, and the power dynamics of supervisory relationships — predate the current economic situation, but as Baker and Lancaster’s article notes, the economic crisis has refocused attention on them. Pedagogical questions also continue to be important to externship clinicians. Maurer and Seibel’s work analyzes the supervisory relationship from the perspective of power dynamics among the participants in the supervisory triangle of faculty, student, and attorney/mentor. Baker and Lancaster’s data highlight other aspects of the impact of economic crisis on teaching and learning in field placements.

In this essay, we place the authors’ arguments in the context of current debates both within and outside the externship community. The authors’ proposals at once extend and diverge from much current thinking, and so provoke questions for all faculty, whether they teach in externships, other clinics, or non-clinical courses. In the sections that follow, our essay provides a brief overview of each article, then offers comments that place the article in a broader context. The insights and innovations presented here pose both opportunities and risks. In the concluding section, we try to articulate both.

I. THE ARTICLES

A. Cynthia Baker and Robert Lancaster: A Harsh Economy

In *Under Pressure: Rethinking Externships in a Bleak Economy*, Cynthia Baker and Robert Lancaster report the findings of a survey they conducted showing a perception among externship clinicians that economic stresses have increased student demand for externships, and that law school faculty and staff have responded by increasing cooperation between externship programs and career services. Asserting that the economic downturn of recent years has negatively affected the cost and availability of student loans, reduced employment prospects for law students, and changed the financial outlook for law firms, the authors suggest that the line between educational placement and job clerkship has been unavoidably blurred. Firms and student

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needs coalesce; both require students to be "practice-ready lawyers." The ABA's interest in outcome measures for legal education may also play a role in the pressure on law schools to prepare students for practice. In this environment, the authors' survey revealed, students seeking externship placements appear to be more focused on career prospects than on reflection, and externship faculty feel that they must function as career advisors.

Baker and Lancaster argue that "best practices" for externships—experience and feedback, learning goals and assessment—can still be maintained in this new environment. Externship faculty need to identify supervising lawyers with good skills and teaching ability, and they need to articulate clear educational objectives. While describing the challenge to faculty attempting to maintain these standards in the face of increased numbers of students with a growing focus on career needs, the authors also acknowledge that students have long relied on jobs to learn how lawyers practice and to make themselves known to potential employers. They conclude that law schools can still shape that experience in line with high educational standards.

Baker and Lancaster's discussion highlights important aspects of the externship method that have surfaced with greater prominence under the stress of economic conditions. Most salient is the extraordinary "placement potential" of the externship method. In direct service clinics, students work in practices created, staffed, and funded by law schools. By contrast, in externships, students work in law practices driven by concerns other than pedagogy, and in a working world similar and in some cases even identical to one in which students will eventually practice. Baker and Lancaster's article provides compelling evidence that law students and law schools see this placement value of externship participation as distinctive and significant.

As Baker and Lancaster recognize, this placement potential exists in tension with the pedagogical potential of the externship method. Law schools have strong interests in assuring the success of their graduates in the marketplace. For a law school to deploy an externship program primarily to improve its post-graduation placement rates would prompt different approaches than those it might implement solely for pedagogical purposes. Baker and Lancaster pinpoint the challenge for externship clinicians: to innovate in integrating intense demand for post-graduate placement into pedagogically sound courses.

Baker and Lancaster highlight a trend that crystallizes this tension: a shift of responsibility for externship programs from teaching
The authors draw respectful lines between the respective areas of expertise of these two professional disciplines. At the same time, they point to concern about this trend in the externship community and in the clinical community at large. The organizers of Externships 5 made efforts to include law school career services professionals, resulting in significant attendance from that community. At least one presentation at the Conference discussed ways to enhance collaboration between externship faculty and career services offices. No authoritative empirical evidence exists that such a shift in structure is underway. However, the concern that externship programs reflect little more than “placement programs” has a long pedigree, and (along with other concerns) has influenced the structure of ABA regulation of externships over time.

Finally, Baker and Lancaster’s findings stress the impact of restricted prospects on student attitudes toward externships. They note several cross-currents: an increase in student demand for credited work as the market for part-time work has constricted, an increase in the demand for summer placements, an increase in student desire to please placement supervisors at the cost of critical reflection or other pedagogical goals, and an increase in hours devoted to externship work. Admitting the anecdotal nature of their evidence, Baker and

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15 Baker & Lancaster, supra note 12, at notes 38 – 41 and accompanying text.
16 The request for proposals for Externships 5 was circulated to the national listserv for career services professionals.
17 Dena Bauman, William Robinson & Jennifer Sheppard, Generating Synergy Between Law School Externship Programs and Career Service Offices to Develop Professional Management Skills (March 5, 2010).

The Committee feels that special attention to placement clinics is warranted because placement clinics have a well-deserved, but unnecessary, bad name in academic circles. Law students want placement clinics because they provide real world experience and enhance job placement opportunities. The legal profession wants placement clinics because they are one sign that law schools are moving in the “right direction” and because some lawyers want to be involved in legal education and some want to have a free source of labor. Law School administrators want placement clinics because they keep their student and lawyer constituencies happy and they improve their competitiveness in the placement market.

Id. (citing Marilyn V. Yarborough, Chair, ABA SKILLS TRAINING COMMITTEE, REPORT ON PLACEMENT CLINICS AND RELATED MATTERS TO COUNCIL OF THE SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR (Dec. 14, 1985). Joy notes: “[I]t is a poorly kept secret that some schools have established placement clinics primarily in response to these factors and not because of any belief that they offer valuable educational experiences.” Id.
19 Baker & Lancaster, supra note 12, at notes 42 – 50 and accompanying text. Leah Wortham has also commented on a possible conflict created when law students view externships as a career step:

There can be at least perceived conflicts between careerist and educational goals. Students who hope to get offers may be less willing to take risks. Such students may
Lancaster do not seek a comprehensive description of the effect of the economy on the student psyche. But in highlighting student experience and expectation, they pose a key question: to what extent do an externship clinician’s goals diverge from what students seek from placements? In a bad economy, if students need jobs and see field placements as the means to that end, how can externship clinicians reorient students toward other learning?

Students’ concerns about their emerging careers have likely always affected their interest in externships. Indeed, some programs may already encourage reflection on professional development, prompting discernment about career direction. In our view, this is a constructive role for any clinic to play. However, encouraging a student to focus on personal self-development would supplement, and not replace, guided exploration of the student’s concern for justice, both within the placement and in law practice more generally. Baker and Lancaster’s call for innovation focuses on precisely this need to integrate the critical inquiries of clinical teaching into the needs of students for career development in the face of weakening job prospects.

B. Carl Circo: Corporate Counsel and Educational Partnerships

In An Educational Partnership Model for Establishing, Structuring, and Implementing a Successful Corporate Counsel Externship, Carl J. Circo asserts that placing legal externs in corporate in-house law departments provides a valuable educational and career development opportunity that cannot be met in other clinical education settings, on or off campus. Circo recommends ways to carefully structure and administer such placements, and explains the unique lawyering skills that a student can learn in a well-structured corporate counsel setting. In-house counsel must understand the business client and how business factors are balanced with legal concerns in decisionmaking. They do not just identify legal risks, but also, taking the perspective of their clients, they keep “legal obstacles” from blocking business progress. In these placements, students learn to be an integrated part of an enterprise, working as part of a team with nonlawyers to solve problems and encountering an important perspective on professional

seek assignments that require only tasks they know they can perform well. Students may be reluctant to seek assignments that would offer opportunities to develop new skills and may avoid making waves. Students may take any assignment without protest, even if it involves excessive clerical work that is not appropriate for academic credit. They may not remind their supervisor of experiences that were promised but have not materialized or learning objectives that are not being addressed.

Leah Wortham, Setting Goals for the Externship, in LEARNING FROM PRACTICE, supra note 7, at 11, 23.
responsibility as employees of their clients.

Circo argues that, as with other externship placements, the pedagogy of reflective learning, including careful supervision by externship faculty, can overcome concerns about appropriate assignments and supervision. Circo reviews concerns about a legal service mission for clinical education, but concludes that the professional development possibilities in a business context are valuable enough to add these opportunities to others provided by a law school. Circo recommends that a law school creating such placements begin slowly, establishing "teaching partnerships" with companies known to the faculty, and he provides specific guidelines for new corporate externship programs. He acknowledges that his professional background as a corporate attorney may have been critical to the success of the in-house placements he developed for his law school.

In some respects, Circo's article describes an aspect of the externship world, and of clinical education generally, with which clinicians would readily agree. As he argues, legal education should prepare law students for the practice of law. Experience with representation of clients in real practice settings constitutes a "signature pedagogy" for that preparation. He describes a thoughtful, reflective approach to externship design: identifying goals, developing partnerships, creating a classroom pedagogy that informs and merges student experience with conceptual and reflective learning, and structuring administrative approaches that seek to assure ongoing quality for the various components of the program. His broader frame for this effort (an "educational partnership" between externship clinicians and a particular practice community) reflects Baker and Lancaster's call to integrate placement pressures and pedagogy and implicates Maurer and Seibel's call for the management of power issues in supervision.

Yet, as Circo himself carefully notes, his effort exists in a context that may to some extent be hostile to his claims. With few exceptions, placements in corporate counsel offices will most likely occur in for-profit entities and not in placements that would qualify as "public interest" or "public service" placements. Circo notes that he does

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20 Carnegie Report, supra note 14, at 95-100. The authors of the Carnegie Report define the term "signature pedagogy" as "a key educational practice by which a given field creates a common frame through which it can induct new members." Id. at 50. They apply it to the use of the case-dialogue method, especially during the first year of law school, as a "standardized form of the cognitive apprenticeship." Id. We borrow their usage, but apply it differently, to the preparation of new lawyers for all three apprenticeships identified by the Report, including apprenticeships of expert practice and of identity and purpose. Id. at 27 - 29. See also Kelly S. Terry, Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose, 59 J. Legal Educ. 240 (2009).

21 Consider placements in the corporate headquarters of a major national charitable organization, such as the American Red Cross or the American Cancer Society.
not seek to address the "legitimacy or efficacy of placements with for-profit organizations."\textsuperscript{22} At the same time, Circo also identifies objections to creating a corporate counsel externship, one of which might arise from those who believe that clinics should focus solely on public interest or social justice concerns: "Substantial conflicts can arise when the clinical and experiential programs at a school are expressly dedicated to public interest law, legal services for the underprivileged, and social justice objectives."\textsuperscript{23}

Circo acknowledges that, by definition, corporate counsel programs do not meet this definition: "For-profit corporations do not need free legal services, and they do not exist to serve the public interest or social justice."\textsuperscript{24} He identifies two potential sources of conflict: whether the school itself has a core mission "primarily devoted to public interest and social justice goals"\textsuperscript{25} and whether "existing clinical and externship programs share an exclusive commitment to public interest and social justice."\textsuperscript{26} Circo suggests that corporate counsel externships can co-exist with programs devoted to social justice and public interest work, if necessary by dividing supervisory and structural resources to clarify distinctions between the programs.

Circo explicitly acknowledges the controversy associated with for-profit placements, including the placement of students in law firms outside the corporate counsel context. In 2007, Bernadette Feeley reported that law school use of such placements had increased between 1992 and 2002.\textsuperscript{27} In this issue, Baker and Lancaster report anecdotal evidence that private for-profit firms have placed increased pressure on law schools to provide interns for credit, in circumstances where the firm might previously have paid the student.\textsuperscript{28} Intense debate on

\textsuperscript{22} Circo, \textit{supra} note 12, at note 4 and accompanying text. Circo notes that Bernadette Feeley has already discussed the respective merits of this issue in Bernadette T. Feeley, \textit{Examining the Use of For-Profit Placements in Law School Externship Programs}, 14 CLIN. L. REV. 37 (2007). Feeley concludes that law schools can realistically implement such externships in the service of particular goals, provided the school imposes limits designed to reduce the risks that she identifies. Circo's article represents a specific application of Feeley's conclusion to the corporate counsel context.

\textsuperscript{23} Circo, \textit{supra} note 12, at note 63 and accompanying text.

\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} Feeley, \textit{supra} note 22, at 37 n.1 (reporting that between 1992 and 2002, the number of law schools that permitted placements in corporate counsel offices rose from 25 to 50, and in other for-profit law practices from 25 to 39).

\textsuperscript{28} Baker & Lancaster, \textit{supra} note 12, at notes 58 – 60 and accompanying text. As Baker and Lancaster note, the increase is not uniform, because the economic downturn may result in the loss of available placements. The authors also discuss in some detail the impact of limited staffing and limited legal work on the quality of the legal experience provided to students. \textit{Id.} at note 59 and accompanying text.
the externship listserv in the months preceding the March 2010 conference led the organizers of Externships 5 to schedule a working group focused exclusively on the questions associated with private firm placements. During the session, passionate opinions on both sides of the question emerged.29

Several strands of the national debate exist. First, and most intensely, the debate raises the question of whether to allow for-profit placements of any kind.30 Second, if such placements are allowed in any form, the question then becomes how to remedy either the real or perceived weaknesses of supervision that might arise specifically in the for-profit context.31 Other debated questions include: Would student demand for placements in for-profit firms (many offering postgraduate positions) outstrip demand for placements in public interest placements? Would law schools come to prefer such placements for the potential to improve placement rates?

Circo also touches on another live issue concerning for-profit placements: whether such placements violate the Wage and Hour provisions of the Fair Labor Standards Act.32 For some time, externship programs had existed in a zone of ambiguity on this question, created by a series of Department of Labor opinion letters that left several key questions unanswered.33 In April 2, 2010, the New York Times published an article indicating that both state and federal labor departments had begun a crackdown on unpaid internships for credit, primarily in the undergraduate sphere.34 In late April, the federal Department of Labor issued a new Fact Sheet, which sought to clarify the rules as they applied to internships in for-profit placements.35 This

30 On this question, Circo suggests that an in-house counsel externship has distinctive pedagogical goals that justify its inclusion as a placement opportunity. Circo, supra note 12, at notes 24 – 61 and accompanying text. See also Backman, supra note 12, at notes 100 – 103 and accompanying text (describing the most common contexts in which law schools permit placements with for-profit firms, including entertainment law firms, corporate counsel placements, and the pro bono practices of private firms).
31 Overall, Circo’s article presents a model “educational partnership” that addresses this concern through close relationships between law schools and on-site supervisors, carefully focused classroom components, and regular oversight of student experience. See also Maurer & Seibel, supra note 10 (on designing externship pedagogy to identify and manage power disparities in supervisory relationships).
32 Circo, supra note 12, at note 74 and accompanying text. See also Backman, supra note 12, at notes 135 – 139 and accompanying text.
33 David Yamada, The Employment Law Rights of Student Interns, 35 Conn. L. Rev. 215 (2002); Feeley, supra note 22, at notes 38 – 47 and accompanying text.
Fact Sheet distinguishes between placements with for-profit organizations and placements with public or non-profit organizations. As Circo notes, the rules with respect to the former pose notable questions that the firms themselves may need to assess.

C. James Backman: Compensating Externship Students

In *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, James Backman argues that the ABA should delete the rule that prohibits compensating students for credit-earning experience. He posits that the federal Fair Labor Standards Act, antitrust jurisprudence, and contemporary economic reality may force this change. More importantly, he argues that the change is long overdue, as it would bring legal education into line with other established professional educational programs which allow compensation for supervised work experiences. Moreover, it would contribute significantly to making externships available to more students.

Backman details the history of the current rule, acknowledging its positive impact on the availability of legal externships. He considers the objections raised in earlier ABA reviews of the Standard as well as concerns raised by clinicians today. Placing this historical record in the light of the development of externships, clinical legal education generally, and the critique of legal education in recent years, Backman concludes that law schools are well equipped to counter the potential problems posed by permitting compensation. He asserts that the overall result of doing so would be more opportunity for learning that is integrated with work experience in a professional setting.

Like Circo, Backman presents his argument with full awareness of both the urgency and the controversy that attaches to the issue. In a draft issued for a public meeting on January 8-9, 2010, a sub-committee of the ABA Council on Legal Education and Admission to the Bar presented a proposal to eliminate the ban on compensation for field placement programs. Upon dissemination of this document, de-

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specifically to placements with "for-profit" private sector employers," suggests that placements with public, charitable, or private non-profit employers might not be subject to wage and hour concerns and states that the Wage and Hour Division "is reviewing the need for additional guidance on internships in the public and non-profit sectors." *Id.*


bate on both the externship and the clinical listservs led the organizers of *Externships 5* to schedule an open meeting at the conference to discuss the change.³⁸ Representatives of both the Clinical Legal Education Association and the Society of American Law Teachers attended and took notes on the ensuing discussion, in preparation for possible advocacy on the change before the ABA.³⁹ Several participants spoke in favor of deleting the rule, but an overwhelming majority of the more than 65 participants at the meeting opposed removal of the rule, on a variety of grounds.⁴⁰ As of May 5, 2010, the proposed deletion had been withdrawn, but the possibility of resubmission remains.⁴¹

Backman thus writes in direct opposition to a widely held view against payment for credited experience. His article seeks to address longstanding concerns about permitting payment for credited placements, including many of the concerns stated at the Open Meeting during *Externships 5*. The article poses important questions for law schools generally and for clinicians in particular, touching on questions discussed in other articles in this issue: the effects of the economy, the prevalence of well-run programs, and the career development effects of a broader pool of placements. Backman pays particular attention to the impact of paid placements on a law school’s commitment to placements that cannot pay, such as those in government, public interest, or public service offices. He acknowledges that inclusion of paid placements would have an impact on the overall balance of student interest, but he predicts that, over time, those effects would neither last as long nor be as severe as opponents suggest.⁴²

Backman also touches on two distinctive aspects of the controversy over pay for student externs. First, he notes that rising costs have imposed increased debt on law students. Permitting pay for

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The relevant text reads:
The committee does recommend deleting the following interpretation, consistent with Standard 303:

**Interpretation 305-3**

A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation. This Interpretation does not preclude reimbursement of reasonable out-of-pocket expenses related to the field placement. [Strikemarks that appear throughout original title and text have been deleted.]


³⁹ Id.


⁴² See Backman, supra note 12, at note 162 and accompanying text.
credited work experience can help alleviate that debt, providing students with more employment options after graduation.\textsuperscript{43} Secondly, Backman dismisses concerns that the firms which pay students will devalue the educational goals of the experience and that students will feel constrained from questioning their experiences by the power imbalances that result from paying relationships. Against these arguments, Backman traces a history of improvement in externship standards and practices nationwide, and points specifically to the challenge to externship clinicians of designing and teaching programs that directly address the shift in power that arises from compensation.

To some extent, Circo's "educational partnership" presents one model for addressing these risks. In a different way, Maurer and Seibel's discussion of power dynamics poses similarly fundamental questions.

\textbf{D. Nancy Maurer and Robert Seibel: Power and Supervision}

In \textit{Addressing Problems of Power and Supervision in Field Placements}, Nancy M. Maurer and Robert F. Seibel use the perspective of power in relationships to revisit the recurring issue of effective externship supervision. They cite examples of supervisors who overstep boundaries, students who feel unable to get constructive feedback, and externship clinicians who are not as effective as their aspirations in getting supervisors to meet a high supervision standard. Maurer and Seibel relate each example to an analysis of power differences among the participants.

The authors argue that the students themselves bear some responsibility for handling these situations, asserting that developing a good mentoring relationship with a supervisor is an important practice skill both for novice attorneys and for externship students. Further, professional responsibility rules suggest that a student, like any subordinate attorney, has a duty to seek supervision. At the same time, attorneys are generally not formally trained in supervision. Most importantly, the authors contend that the power dynamics between student and supervisor may impede the development of an effective and boundary-respecting mentoring relationship.

Maurer and Seibel make numerous recommendations about how to address supervision issues. First, students' initial introductions to the externship program, whether in informational materials or orientation sessions, should identify the skill of developing a positive supervisory relationship. The externship class and externship faculty should prepare students to undertake this task. Externship clinicians should

\textsuperscript{43} See Backman, \textit{supra} note 12, at notes 93 – 95 and accompanying text.
help students to initiate and maintain good supervisory practices and should provide formal and informal guidance to field supervisors on how to assist in this process.44

At first blush, Maurer and Seibel address a concern both more specific and more universal than the other articles in this issue: how best to manage the power dynamics that occur in the three-way relationship between student, site supervisor, and externship clinician. They address the experiential problem in terms of human dynamics and formulate useful frames of reference for those dynamics.45 They name and assess the risks of failing to address these dynamics, offer pedagogical methods to manage those risks, and suggest both barriers and pathways to walking through the complexities of the three-way structure of power in externship teaching.

At root, Maurer and Seibel convey optimism about dealing with power dynamics, even problematic ones. They do this explicitly, by asserting that externship clinicians can identify and address power issues in externships, and implicitly, by formulating and presenting extensive protocols that manage the risks of imbalanced power. In the authors' view, externships facilitate important lessons: that students will encounter power disparities in their work as lawyers and that careful, reflective practice is the key to coping with those disparities throughout their careers.

Maurer and Seibel's optimism suggests a reassessment of the positions of the other authors, who, one might argue, often seem to focus on power dynamics. For Baker and Lancaster, intensified student need for employment affects students' motivations both in seeking a placement and in working while at a placement. Essentially, a harsh economy affects the balance of power between the student and the site by increasing student anxiety about post-graduation employment. Although he argues that all placements suffer from such risks, Circo identifies power imbalances in corporate counsel placements as a possible objection to his proposal. His formulation of "educational partnerships" is an effort to counteract these dynamics. Finally, Backman acknowledges that compensation might influence the power relationship between student and supervisor. He accepts that shift, in service of other goals, but argues that externship pedagogy has matured to the point where it can minimize the risks associated with the change.

44 Appendices to the article provide agreements, in use at California Western School of Law and Albany Law School, designed to clarify supervisory responsibility between law schools and supervising attorneys.

45 See, e.g., Maurer & Seibel, supra note 10, at notes 19 - 24 and accompanying text (framing the power dynamic between field supervisor and student as one involving a "fiduciary relationship").
Maurer and Seibel do not explicitly address questions concerning career development, for-profit placement, or compensation for credited work. Nor do they express an opinion on the power issues raised by those questions. But the scope and thoughtfulness of their approach to power dynamics suggest that an externship program’s careful attention to power dynamics might effectively address imbalances of power in any supervisory relationship. Would thoughtful and reflective approaches to power dynamics promote improved supervisory relationships in both paid externships and for-profit placements? Would such approaches alleviate the worst risks of job desperation as a motivator for participation in externship programs? If accepted and effective, Mauer and Seibel’s recommendations might remove a principal objection to the use of paid or private placements, both during and after an economic downturn.

II. Reflection

A. A New World

Imagine a world in which law schools carry out what these authors propose:
- all law schools offer externship programs that are not just in de minimis compliance with current standards, but that affirmatively seek the best possible pedagogical experiences for students.46
- students may receive pay for work for which they receive credit, with ABA approval.
- students may work in private law firms, in programs focused on educational value, with no violation of the Fair Labor Standards Act.
- schools coordinate clinical learning of externships with the professional development work of career services professionals, so that students maximize the career-building potential of externships.

What opportunities and risks would such a world pose?

B. Opportunities

The authors in this issue explore many of the most desirable opportunities available in this new world. In this world, externships pre-

46 De minimis compliance would entail meeting those standards set by the ABA in Standard 305(e) and its interpretations, either for low-credit (less than 4 credit) programs or for high-credit (4 or more credits) programs. See ABA Section of Legal Education and Admissions to the Bar, Standards and Rules of Procedure for Approval of Law Schools Standard 305(e) (2009-2010). Models for best practices include Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map 198 - 205 (2007) (best practices for externship courses); J.P. Ogilvy, Guidelines with Commentary for the Evaluation of Legal Externship Programs, 38 Gonzaga L. Rev. 155 (2002/03). High quality programs might also take advantage of the wealth of available scholarship on externship pedagogy, including the articles in this volume.
pare students for law practices that are similar or identical to the practices in which they find jobs when they graduate. Students receive training that includes critically reflective assessment of lawyering practices in the very practice contexts in which they will soon be employed.

In such circumstances, law schools, through their externship programs, would have improved the chances for students to succeed in the market for post-graduate jobs, while improving the reputation of their students through carefully supervised and supported work experiences during law school. Students in turn would have relieved some of the financial burden of attending law school, and some of the resulting debt that they carry after law school. This might increase their options for post-graduate work, and allow them to seek and to accept a wider range of post-graduation career alternatives.

In the process, externship faculty will have created new opportunities to influence the shape of private law practice through their relationships with supervisors in the world of for-profit law practice. These same faculty will gain new insight into the dynamics of private law practice, opening doors to potential new teaching and new scholarship.

C. Risks

This world also poses risks. Cynics might suggest that, if the opportunities described above do emerge, they will do so with *de minimis* effort from law schools and they will be designed to serve other goals independent of their pedagogical value. In this scenario, externship programs will become offshoots of career services. Or yet worse, they will be real or virtual card files in financial aid or student employment offices, with too little attention to teaching, reflective assessment, or monitoring of supervision.

Even if law schools do sustain the quality of their programs, the costs of doing so could divert resources from the traditional aims of clinical education, especially indigent service, and a concern for justice and public service. To be sure, the availability of placements that offer pay as well as credit, or networking in private firms, may enhance the appeal of clinical experience to new groups of students who otherwise might not participate in clinics. Yet assuming that the costs of law school remain high and the competition for post-graduation jobs remains stiff, it seems plausible to believe that, over time, the demand for these placements may outstrip the demand for public interest placements.

Faced with investing resources in paid and/or private placements on the one hand, and unpaid and/or public interest placements on the
other, it will take a disciplined school to decline the opportunities in this new market. To be sure, a school lacking this discipline might increase the resources it allocates to externship supervision, or stretch existing resources to cover all types of programs. But such a school could also eliminate its commitment to undersubscribed public service placements, or even abandon in-house clinics focused on public interest work.

A final risk lies in the collaboration that exists between law schools and the private firms into which so many students graduate and with which law schools have complex relations. In the new world, a mirror-image collaboration would arise between externship programs and these same firms. Maurer and Seibel suggest that power dynamics in relationships between students and supervisors matter. In the same way, the power relationships between private firms and externship programs should also matter. These collaborations might create complex overlaps between pedagogical concerns, financial support for the school, and post-graduate student placement. A risk exists that these dynamics might constrain the degree to which an externship program could prompt inquiry into the pursuit of justice or other concerns raised in private law practice.

D. Questions for Clinical Education

In the broadest sense, the new world envisioned in these articles, and the opportunities and risks that this world poses, suggest several closing questions, not just for the externship community, but for clinical education as a whole.

First, is the principal value of clinical education its capacity to prepare students for the practice of law? If so, several of these articles

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47 See Backman, supra note 12, at note 165 and accompanying text. Backman suggests that "[l]aw schools will be pushed to permit paid externships," especially those in the private sector. Id.

48 Neither public nor private law schools are immune from financial distress. Alumni and employers of school graduates see themselves as stakeholders in the institution, and they are identified by the administration as potential donors. In addition, a strong pool of student applicants is critical to financial viability. The need to court these funding sources, as well as to attract dollars from grant-bestowing entities, places pressure on law schools to effectively market themselves to multiple constituencies and distinguish themselves from peers.


49 Here are some examples of the kind of questions that might arise in such circumstances: To what extent would the hiring partners in a private law firm that offered students paid placements seek to limit enrollment to the students whom they had already chosen to hire? Might that conflict with a clinician's desire to make placements available to capable students who might otherwise be overlooked by traditional hiring standards? How would the school resolve this conflict?
suggest that law schools can devote resources to preparing students for the work that they will actually perform, while still encouraging critical reflection on the practice contexts in which they will work. Because the externship method separates law practice supervision from law school funding, it permits students to encounter a wider range of practice contexts than a law school could feasibly support through its own sponsored programs. The questions that follow are: why not place students in the practices into which over 80% of law students will graduate? Why not promote thoughtful critical assessments of these practices at a formative stage, so that students may navigate them more effectively and make personal choices more responsibly? And finally, why promote work in public sector practices to which only a few of our students will devote their careers? Powerful answers to these questions may well exist, but the pressure to articulate them anew has grown.

Second, to what extent is a concern for justice a necessary value of clinical education? As these articles rightly point out, clinical education has been traditionally associated with a concern for justice, expressed as service to the indigent and the underrepresented, accompanied by critical assessment of structures of power and oppression. Clinics serve important functions for both clinicians and students with strongly felt commitments to these concerns. Even for those with less strongly felt commitments, a clinic’s concern for justice serves values that are important to legal education, promoting a widely held and honored vision of the lawyer’s role.

Is that vision central to the role of clinics in law schools, or of law schools generally? Externships that successfully place students in private firms, with careful attention to supervisory dynamics, suggest that it may not be. In the new world envisioned here, reflective exploration of ethical and effective private practice is both appropriate and sufficient for clinical teaching. Imagining how this new world might perform in a market of student and institutional preferences highlights once again the need to articulate why a concern for justice centers legal education.

Third, to what extent can the pedagogical value of supervised experience with clients co-exist with compensation and explicit career development in a for-profit setting? At one point, legal education consisted solely, in a sense, of “externships”; American law students read law as apprentices in for-profit “placements.” Modern law schools

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50 See Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s 3 (1983) (describing formal and informal apprenticeships during the colonial and early republic period). We recognize that the terms “externship” and “placement” imply a location from which the student is sent to work for credit. Without a “law
have long diverged from that model, with in-house clinics representing only a partial return. Few in-house clinics operate for profit, and all work within the confines of educational institutions. By contrast, however central teaching is to externship faculty, externships expose students to placements in which pedagogy is not primary to the practice. The articles published here push this feature of externships to a logical extreme. They hint at a full-scale reintegration into modern legal education of apprenticeships in for-profit settings. They push us to ask whether such a reintegration is possible, whether it is desirable, and if so, how to make it a reality.

In this essay, we have sought to convey the controversy that surrounds these questions. An easy answer would be to dismiss the significance of externships to legal education. But externship programs have become more important to law schools, not less. Well-run externships continue to thrive at most law schools, alongside well-run in-house clinics. Externship scholarship is engaged in an ongoing dialogue with clinical theory. The articles in this issue, the questions they pose, and the contexts in which they ask them, extend the logic of externships in unavoidable ways: unavoidable, because of the institutional and economic imperatives that drive law schools, and because of the ferment in legal education which clinical education has spawned.

School,” of course, no such location would exist. Cf. Vt. R. Admission to the Bar 6(g) (permitting admission to the bar to an otherwise qualified individual who has “pursued the study of law” either “for a period of not less than four years within this state under the supervision of an attorney in practice in this state... or... in a law school approved by this Court...”) (emphasis added). Vermont still requires written examinations at the end of its four-year apprenticeship period. Vt. R. Admission to the Bar 6(a).