

FROM BUSINESS TAX THEORY TO PRACTICE

ALINA BALL AND MANOJ VISWANATHAN*

The past decade has seen a dramatic increase in the number of business law clinics in legal academia. This increase in clinical transactional courses has not, however, resulted in a congruent rise in transactional tax clinical offerings. Although tax issues, including federal, state, and local tax matters, are an integral consideration in nearly every business transaction, most business law clinics explicitly exclude tax representation from their client services. For social enterprise clients—companies that combine market-based business strategies and social mission—this lack of tax-focused representation is problematic for two reasons. First, the taxing of social enterprises and other innovative social ventures continues to be a complicated and contested area of business tax, making the need for this type of business tax counsel more acute. Second, many students pursue careers in transactional tax law and want exposure to the transactional complexity that social enterprise clients present. By omitting tax issues from clinical representation, these students do not get the educational opportunities they desire. Thus, the vacuum in transactional tax clinical offerings is a detriment to both student learning and client access to justice, as clinical clients often have few options for affordable transactional tax counsel. In this Article, we provide a novel clinical structure—a tax practicum embedded within a general corporate law clinic—that allows law students to focus their representation on transactional tax issues and simultaneously expands much-needed tax counsel to social enterprise clients. Our practicum-clinic model can and should be adopted by other law schools across transactional practices to provide more holistic corporate representation and legal education to business-oriented students.

Introduction	29	R
I. Innovating Business Tax Pedagogy.....	33	R
A. Unpacking the Practicum-Clinic Model	34	R
1. The Social Enterprise & Economic Empowerment Clinic	34	R

* Associate Professors of Law, UC Hastings College of the Law. For helpful comments on earlier drafts, we are grateful to Kate Bloch, Jennifer Fan, Heather Field, Randy Hertz, Lynnise Pantin, Ascanio Piomelli, and participants in the NYU Clinical Law Review Writers' Workshop and USC Marshall School of Business Social Entrepreneurship Conference. We also thank Echeme Emole, Paul Jones, David Pasca, Jason Stenson, and Mary Wilbourn for research assistance.

2. The Business Tax Practicum	35	R
B. Seminar Component of the Practicum	37	R
1. Taxing Social Enterprises	38	R
2. Integrating Corporate and Tax Legal Education	40	R
3. Incorporating Clinical Pedagogy	42	R
C. Client Representation through the Practicum	44	R
1. Client Selection	44	R
2. Representative Practicum Matters	45	R
II. The Imperative for Business Tax Clinics	49	R
A. Transactional Clinical Opportunities	49	R
1. Empirical Analysis of Transactional Clinics	49	R
2. Transactional Clinics and the Pursuit of Social Justice	52	R
B. Current Clinical Offerings in Taxation Law	53	R
1. Limited Offerings of Transactional Tax Clinics .	53	R
2. Demand for Experiential Transactional Tax Courses	55	R
3. Prioritizing Experiential Transactional Tax Education	57	R
C. Unmet Demand for Transactional Tax Clinics	58	R
1. Paucity of Clinician Expertise	58	R
2. Difficulty in Operating a Standalone Transactional Tax Clinic	59	R
3. Nonobvious Connection of Business Tax to Social Justice	59	R
III. The Future of Business Law Pedagogy	61	R
A. Promoting Student Learning	62	R
1. Working with Non-Tax Attorneys	62	R
2. Understanding Justice and Professional Identity	63	R
3. Limiting the Scope of Student Autonomy to Increase Student Learning	65	R
B. Implications for Underrepresented Transactional Practices	67	R
1. Real Estate	69	R
2. Intellectual Property	69	R
3. Employment	71	R
4. Fair Chance	73	R
Conclusion	76	R

INTRODUCTION

Facebook CEO Mark Zuckerberg and wife, Priscilla Chan, made headlines in December 2015 when, in their daughter's public birth announcement, they pledged to donate the majority of their wealth to alleviate pressing social issues.¹ Breaking with philanthropic tradition, the couple opted against establishing a tax-exempt private foundation to hold and distribute their estimated \$45 billion wealth.² Instead, they pledged their largesse to a limited liability company, an entity for which contributions are not tax deductible.³ Notwithstanding the lack of deductibility for donors, this choice of entity does, however, give Zuckerberg and Chan greater flexibility regarding the philanthropic endeavors they can pursue.⁴

Zuckerberg and Chan's philanthropic decision is indicative of a new generation of business leaders⁵ who are contributing in the social

¹ Vindu Goel & Nick Wingfield, *Mark Zuckerberg Vows to Donate 99% of His Facebook Shares for Charity*, N.Y. TIMES (Dec. 1, 2015), <http://www.nytimes.com/2015/12/02/technology/mark-zuckerberg-facebook-charity.html>. See CHAN ZUCKERBERG INITIATIVE, LLC, <https://chanzuckerberg.com/about/> (last visited Aug. 30, 2017).

² Private foundations are defined as all Section 501(c)(3) organizations not meeting certain requirements that would otherwise confer public charity status. See I.R.C. § 509(a) (2016). Private foundations allow donors significant amount of control for the allocation of their charitable donations. See Victoria B. Bjorklund, *Charitable Giving to a Private Foundation and the Alternatives, the Supporting Organization and the Donor-Advised Fund*, SE86 ALI-ABA 73, 78 (2000) ("The main advantage of a private foundation over the alternatives can be summarized in one word: Control.").

³ Limited liability companies (LLCs) are pass-through entities (meaning not directly taxed) that provide their members with limited liability. Jeffrey S. Quinn, *Allen v. Dackman: Doing Away with Limited Liability in Maryland*, 70 MD. L. REV. 1171, 1182-83 (2011) ("Limited liability companies are generally understood to provide members with the pass-through tax benefits of a partnership and the liability shield of a corporation."); Nicholas G. Karambelas, *The Limited Liability Company in Perspective*, in LIMITED LIABILITY COMPANIES: LAW, PRACTICE AND FORMS (2014) ("The [LLC] is the most dominant form of business organization in the United States."). See also Natasha Singer & Mike Isaac, *Mark Zuckerberg's Philanthropy Uses LLC for More Control*, N.Y. TIMES (Dec. 2, 2015), <http://www.nytimes.com/2015/12/03/technology/zuckerbergs-philanthropy-uses-llc-for-more-control.html>.

⁴ Limited liability companies are rarely Section 501(c)(3) organizations; as such, Chan Zuckerberg's contributions to the Chan Zuckerberg Initiative, LLC are not tax-deductible. Philanthropic entities, however, are more strictly regulated by the IRS. Under I.R.C. § 4942, private foundations are required to donate a minimum of five percent of the value of their net assets every year for charitable purposes. Chan and Zuckerberg will, however, be entitled to tax deductions as the Chan Zuckerberg Initiative, LLC funds are awarded to other tax-exempt organizations.

⁵ See Vindu Goel, *Philanthropy in Silicon Valley: Big Bets on Big Ideas*, N.Y. TIMES (Nov. 4, 2016), http://mobile.nytimes.com/2016/11/06/giving/philanthropy-in-silicon-valley-big-bets-on-big-ideas.html?emc=edit_ca_20161108&nl=california-today&nid=72550941&te=1&_r=0&referer (explaining that "founders of Silicon Valley's technology companies . . . tend to look at their philanthropic giving much as they do their companies: They study a problem, explore a number of ways to attack it and eventually invest heavily to scale up the ideas they think will be winners"); Adam Levene, *The Age of the Impact Entrepreneur*,

impact space that was once characterized by tax-exempt charities and private foundations but is increasingly attracting varied and complex corporate structures,⁶ each blurring traditional distinctions between the private market and public benefit.⁷ The Chan Zuckerberg Initiative, LLC⁸ and other high-profile social ventures⁹ similar to it illustrate how social enterprises¹⁰—companies that combine market-based business strategies and social mission—accomplish social good in increasingly creative ways. Social enterprises take many different forms, vary widely in size, and often present complicated tax issues. Working on these tax issues provides clinical students interested in tax an ideal substantive legal foundation in the tax treatment of nonprofits,¹¹

WIRED (Oct. 2014), <https://www.wired.com/insights/2014/10/the-age-of-the-impact-entrepreneur/> (discussing the “making the world a better place” mantra of a new generation of entrepreneurs who “don’t believe in selling—they believe in solving problems”).

⁶ See Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity through Public Benefit Corporations* (Aug. 2, 2016), <https://ssrn.com/abstract=2817881>; Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59, 60 (2010) (“An increasing number of people and entities are coalescing under [the social enterprise banner]. Their expanding influence is reflected in the 2006 Nobel Peace Prize awarded to Muhammad Yunus, a leading promoter of microfinance and the concept of ‘social business;’ the growth of centers for social entrepreneurship at leading business schools such as Harvard and Stanford; and media attention such as Business Week’s annual list of ‘America’s 25 Most Promising Social Entrepreneurs.’ The Obama Administration has also unveiled several initiatives to encourage the growth of social enterprise.”).

⁷ For example, Bill and Melinda Gates created a two-entity structure comprising a foundation and a trust to accomplish their philanthropic efforts. See GATES FOUNDATION, <http://www.gatesfoundation.org/Who-We-Are/General-Information/Financials> (last visited Aug. 30, 2017). See, e.g., Jody Freeman, *Extending Public Law Norms through Privatization*, 116 HARV. L. REV. 1285 (2003) (arguing how privatization of public services can extend the values such as accountability, due process, equality, and rationality into the private sector).

⁸ See CHAN ZUCKERBERG INITIATIVE, LLC, *supra* note 1.

⁹ See, e.g., Julianne Pepitone, *Meet Calico, Google’s Mysterious New Health and Aging Project*, CNN (Sept. 18, 2013), <http://money.cnn.com/2013/09/18/technology/innovation/google-calico-health-care/>. Calico Life Sciences LLC is a subsidiary of Alphabet Inc. (formerly Google) dedicated to alleviating suffering in aging, available at <https://www.calicolabs.com/>.

¹⁰ Social enterprises are companies that cross the traditional distinctions between for-profit and nonprofit entities by blending social mission and market-based, business strategies. Dana Brakman Reiser, *Theorizing Forms for Social Enterprise*, 62 EMORY L.J. 681, 681 (2014) (concisely summarizing the definition of social enterprise as “an organization formed to achieve social goals using business methods.”). See, e.g., GREYSTON BAKERY, <http://greyston.com/about-greyston/mission-history/> (achieving their mission to “better our community and the lives within it” by providing “employment opportunities regardless of education, work history or past social barriers, such as incarceration, homelessness or drug use” and registered in 2012 as the first New York benefit corporation). See *infra* Part I.B.1 for discussion of benefit corporations.

¹¹ See Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017 (2007) (arguing it is unjustifiable and inefficient to grant tax exemptions based solely on entity form, and that tax exemption should instead be available for socially beneficial activities regardless of whether they are generated by an entity organized as a for-profit or nonprofit).

traditional for-profit entities, passthroughs, benefit corporations,¹² and other hybrid entities.¹³ Such representation also helps address the pressing but often unmet legal needs that mission- and profit-driven social enterprise clients face.

Despite the desire of students to apply their transactional tax knowledge in a clinical context, and the novelty and relevance of such opportunities, few law schools provide students with such an experience.¹⁴ A tax-based transactional clinical experience would prepare students for the transactional tax issues that social enterprises and other business entities face. This pedagogical shortcoming is especially troublesome given the importance the legal academy places on the *doctrinal* study of tax law,¹⁵ and the critical role tax issues play in nearly all transactions.¹⁶

To address what we perceive as a gap in current transactional clinical offerings, at UC Hastings we are experimenting with an innovative way to provide a clinical course in transactional tax. Recently, our first cohort of students enrolled in the UC Hastings Business Tax Practicum for Social Enterprises (the “Practicum”),¹⁷ an experiential, live-client course where students work exclusively on transactional tax matters. Students in the Practicum work alongside members of the UC Hastings Social Enterprise & Economic Empowerment Clinic (the “SEEE Clinic”)¹⁸ to advise social enterprise clients, integrating

¹² See DEP’T OF TREASURY, GENERAL INFORMATION LETTER 2016-0063 (Jun. 2, 2016) available at https://www.irs.gov/pub/irs-wd/16-0063.pdf?_ga=1.111090245.1358193585.1458701010 (stating benefit corporations, an alternative to the for-profit corporate form that requires the inclusion of a general public benefit in its charter documents, may deduct payments to a 501(c)(3) as business expenses; thus, not restricting benefit corporations to the standard ten percent charitable contribution limitation).

¹³ The term “hybrid entity” is used in this Article to describe the statutory entity forms that explicitly engage social mission and profit-driven strategies such as the Low-Profit Limited Liability Company (L3C), which has been adopted in several states to allow businesses the advantages of a traditional LLC while articulating their social mission. See *infra* Part I.B.1 for additional discussion on the proliferation of hybrid entities.

¹⁴ See generally Part II.B.

¹⁵ There are forty-one advanced tax degrees offered at ABA accredited law schools, placing tax first within the legal academy for specialized legal studies. See *Programs by School, A.B.A.*, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_school.html (last viewed Aug. 30, 2017).

¹⁶ Peter H. Ehrenberg, *Structuring the Transaction When the Tax Advisors Leave the Room*, 218-DEC N.J. LAW. 9, 9 (Dec. 2002) (“There is no question that tax considerations often drive the structuring of a business acquisition.”).

¹⁷ See *Business Tax Practicum for Social Enterprises*, UC HASTINGS, <http://www.uchastings.edu/academics/clinical-programs/clinics/Business%20Tax%20Practicum/index.php> (last visited Aug. 30, 2017) [hereinafter PRACTICUM WEBSITE].

¹⁸ Students in the Social Enterprise & Economic Empowerment Clinic counsel social enterprises on corporate and transactional matters, advising clients on a variety of corporate governance, compliance, transactional, and operational matters; See Alina Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLIN. L. REV.

both business tax and corporate law expertise to provide more holistic transactional representation.¹⁹ The Practicum offers students a unique lens to develop their knowledge and critically explore issues of business tax as they test their assumptions about the taxation of social enterprises through client-based assignments. The Practicum is novel among clinical educational offerings²⁰ as it allows students to specialize in practicing transactional tax law and requires them to work collaboratively with students in a general corporate law clinic in the ever-evolving social enterprise sector.

We launched the Practicum in response to SEEE Clinic client need,²¹ interest from business tax-focused students, and faculty desire to deepen students' understanding of the intricacies and complexities of business tax representation. Since the Practicum's debut, we have learned much about how a business law clinic can effectively teach students and provide clients business tax representation. The goals of this Article are to share those lessons learned and advance conversations about expanding access to justice through business tax representation.²² Our specific objectives are to: (1) demonstrate, that in

1, 48–52 (2015). See also UC HASTINGS, <http://www.uchastings.edu/academics/clinical-programs/clinics/socialenterpriseandeconomicempowerment/index.php> (last visited Aug. 30, 2017).

¹⁹ The term “transactional law” is used interchangeably in this Article with “corporate law” and “business law” to refer to the practice of law that integrates “the substantive business, financial, and lawyering skills needed to consummate business transactions.” Susan R. Jones and Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 J.L. & POL'Y 85, 94 (2013) [hereinafter *Enriching the Law School Curriculum*]. While transactional lawyering has been used in other lawyering scholarship to describe a broad range of skills that include almost any non-litigation-based practice, this Article narrows the use of the term to the representation of business entities where the legal team interprets, analyzes, and advises on private ordering, statutes, regulations, and case law to assist their clients in realizing their transactional goals and business objectives.

²⁰ Clinical legal education is a pedagogy for teaching law students in the context of real cases with real clients, where the law student learns by assuming the role of lawyer and working alongside clients under the supervision of faculty admitted to practice. See WILLIAM PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS (1980); *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 511 (1992) [hereinafter *Report*] (“Clinical education is first and foremost a method of teaching.”); and Susan L. Brooks, *Meeting the Professional Identity Challenge*, 41 BALT. L. REV. 395, 413 (2012) (describing the “first chair” role where the student lawyers in clinics take “on a high level of direct responsibility for the legal matter at hand”).

²¹ See Eric H. Franklin, *A Rational Approach to Business Entity Choice*, 64 KANSAS L. REV. 573, 574 (2016) (discussing tax counsel as an essential component of business planning and strategy); BRADLEY T. BORDEN & STEVEN A. DEAN, FEDERAL TAXATION OF CORPORATIONS AND CORPORATE TRANSACTIONS 117 (identifying business owners “should generally consider the tax treatment of operations, the tax treatment of formation and contributions, and the tax treatment of distributions and liquidations” among other business tax issues).

²² The “access-to-justice gap” refers to the unmet legal needs of low-income and other-

addressing the need for a transactional tax clinic, we have developed a clinical structure that can also expand other clinical opportunities in corporate law; (2) explain how our experiences operating the Practicum could assist legal educators—clinical and doctrinal—innovate new clinical courses in response to recent ABA accreditation standards requiring expanded experiential learning opportunities;²³ and (3) elevate the conversation on how transactional practices, including business tax, can increase access to justice for underserved clients.

This Article proceeds in three parts. Part I describes the design and operation of the Practicum and how it leverages and strengthens the client relationships established through the SEEE Clinic. Part II provides an empirical analysis of current business law clinical offerings and demonstrates the pedagogical need for more clinical opportunities in business tax law such as the Practicum. Part III discusses what we have learned from designing and operating the Practicum. We conclude by encouraging business law clinicians to consider incorporating into their courses a cohort of students focused on business taxation, noting that the insights provided in this Article are not limited to business tax and are transferable to other underrepresented transactional practice areas.²⁴ We hope law schools will continue to develop and explore innovative experiential opportunities in business tax and transactional law.

I. INNOVATING BUSINESS TAX PEDAGOGY

In this section, we provide a detailed description of the UC Hastings Business Tax Practicum for Social Enterprises (the “Practicum”) by discussing both the types of clients represented and the nature of the business tax matters addressed. We describe why the corporate law expertise of the SEEE Clinic, a general corporate clinic that represents social enterprise clients, was not sufficient to address these client matters. We also explain how the Practicum and the SEEE Clinic

wise marginalized populations in the United States. See Luz E. Herrera, *Encouraging the Development of “Low Bono” Law Practices*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 1–2 (2014) (“In 2011, the United States ranked 50th out of 66 developed nations in providing accessibility to its civil justice system to its citizens.”).

²³ See A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2017–2018, 303(a)(3), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter3.authcheckdam.pdf [hereinafter ABA STANDARDS] (now requiring ABA accredited law schools to offer curriculum that requires each student to complete “one or more experiential course(s) totaling at least six credit hours.”); see also *infra* note 162 and accompanying text for discussion of the new ABA standards on experiential learning.

²⁴ See *infra* Part III.B for discussion on the transferability of our practicum-clinic model to intellectual property, employment, and real estate transactional practices.

function as a unified firm to provide clients more complete transactional representation. We detail how this enhanced representation by our “one firm” model promotes our social justice mission while also creating a robust live-client tax course designed to address student demand. Our observations since launching the Practicum have revealed that we are also filling a void in students’ understanding of how business taxation relates to broader issues of entity representation. Although the Practicum does not encompass the fullness of a traditional clinic,²⁵ this live-client model grounded in clinical pedagogy has had a significant impact on students’ comprehension and appreciation of not only business tax law but also the advancement of justice, a fundamental element of the transformative power of clinical education.

A. *Unpacking the Practicum-Clinic Model*

We hope that this description will guide other clinicians and doctrinal faculty in creating their own dedicated transactional tax components within their existing business law clinics. This section also discusses our decision to structure the course as a “practicum” as opposed to a traditional clinic.²⁶

1. *The Social Enterprise & Economic Empowerment Clinic*

The SEEE Clinic is an in-house business law clinic where students serve as outside counsel for social enterprises on corporate and transactional matters. Social enterprises are both for-profit businesses that seek to have a social impact and nonprofits that use market-based, commercial strategies to accomplish their goals.²⁷ Accepting both for-profit and nonprofit social enterprises as clients of the SEEE Clinic challenges our students’ assumptions about both sectors.²⁸ Many of our nonprofit social enterprise clients have business models that for-profit businesses commonly use; similarly, our for-profit social enterprise clients have clearly articulated missions that could make them eligible for tax-exemption.²⁹ The for-profit social enterprise may be distributing a portion of its profits to its owners and also reinvesting the remaining profits back into the business to advance its social mission. These for-profit social enterprises counter the common belief

²⁵ See *infra* Part I.B.3.

²⁶ See *infra* notes 32–38 and accompanying text.

²⁷ See MARC J. LANE, SOCIAL ENTERPRISE: EMPOWERING MISSION DRIVEN ENTREPRENEURS 7 (2011) (noting that social enterprises are “thinking about social impact every day and, in that quest, are going about the serious business of applying strategic planning and management tools to social causes”); Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 928 (2016).

²⁸ Ball, *supra* note 27, at 928.

²⁹ *Id.* (giving specific examples of these social enterprise clients).

that profit maximization must dominate successful for-profit companies.³⁰

Students in the SEEE Clinic advise their social enterprise clients on a variety of corporate governance, corporate structure, regulatory compliance, transactional, and operational matters. Through their client work, students gain experience as business attorneys and develop transactional lawyering techniques such as strategic planning, project management, client interviewing and counseling, legal research and analysis, contract drafting, and cross-cultural competencies. Students work closely with clients to understand their organizational models, industry, and social impact goals to then provide counsel customized to the client's particular corporate needs. Students are encouraged to grapple with and develop their own perspectives about how lawyers can best participate in the growing social enterprise sector and how transactional law can advance issues of economic and social justice. The SEEE Clinic typically accepts eight students, who are designated the "corporate students" or "Clinic students." A full-time faculty member operates and directs the SEEE Clinic, allowing for continuity semester to semester and client matter coverage over the summer when students do not enroll in the course.

2. *The Business Tax Practicum*

The Practicum is a three-credit course in which "students apply their knowledge of business taxation and test their assumptions on taxing social enterprises through client-based assignments."³¹ Students earn one classroom credit for the one-hour weekly seminar that SEEE Clinic students also attend.³² Students earn two additional credits for completion of client-based fieldwork.³³ The Practicum is co-taught by the same clinical professor who directs the SEEE Clinic and a doctrinal tax professor who provides subject matter expertise on the busi-

³⁰ See Lynn A. Stout, *The Shareholder Value Myth*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 26, 2012), <http://corpgov.law.harvard.edu/2012/06/26/the-shareholder-value-myth/> ("Shareholder-value thinking dominates the business world today. Professors, policymakers, and business leaders routinely chant the mantras that public companies 'belong' to their shareholders; that the proper goal of corporate governance is to maximize shareholder wealth; and that shareholder wealth is best measured by share price"); see also Ball, *supra* note 27, at 948.

³¹ See PRACTICUM WEBSITE, *supra* note 17. We have offered the Practicum at UC Hastings since 2016. For the first two semesters, the Practicum was a two-credit course. For future offerings, the Practicum will be a three-credit course.

³² See *infra* Part I.C.1 for descriptions of representative client matters that tax-focused student lawyers can reasonably accomplish within one or two units of client fieldwork.

³³ We piloted the course with one unit of client fieldwork but increased the fieldwork units in subsequent offerings of the course to allow students more time to complete client matters.

ness tax matters. We selected the term “practicum”³⁴ to describe this live-client course to distinguish the level of responsibility Practicum students would assume in contrast to students enrolled in clinical courses at UC Hastings.³⁵ Enrollment in the Practicum is limited to four students who have taken the introductory course in federal income taxation, with preference given to students who have taken a business tax course.³⁶ Students are not permitted to concurrently enroll in the Practicum and the SEEE Clinic in part because the SEEE Clinic and Practicum operate as one firm, where the tax practice group supports the firm’s corporate practice group in transactional matters that have tax implications.

The Practicum is offered for only one semester during the academic year, which we select based on anticipated client need. During the semester (and summer) when the Practicum is not in session, we carefully identify possible tax matters so that Practicum students can begin their client work from the first day of their representation.³⁷ Offering the Practicum for only one semester in an academic year also adequately balances our other teaching obligations³⁸ and ensures healthy demand for the course. This flexibility additionally allows for a consistent flow of tax issues that are neither too complex nor insufficiently interesting for the Practicum students.

Practicum students are required to prepare an agenda for each weekly supervision meeting with the faculty co-directors that identifies the topics they would like to discuss. Their agenda includes updates on work accomplished since the last supervision meeting, planned next steps, internal and external deadlines, and any questions or concerns students have moving forward. Supervision meetings pro-

³⁴ *But see* Cynthia F. Adcock, Cynthia Batt, Susan Brooks, Justine Dunlap, Carrie Kaas, Kate Kruse, Susan Maze-Rothstein, & Ruth Anne Robbins, *A Glossary for Experiential Education in Law Schools* 11 (Sep. 13, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2532208 (defining law practicum as a “course focused on a discrete area of law that integrates a requirement that students engage in practical fieldwork or complex simulations on the topic of study. Experiential education is an integral part of the class but a secondary method of instruction.”). The Practicum differs from this proposed definition of “law practicum” as the live-client work is an essential and *primary* method of student learning.

³⁵ On average, UC Hastings in-house clinics require students to complete sixteen hours of fieldwork hours on a weekly basis.

³⁶ This course (formally known as Federal Income Taxation of Corporations & Partnerships) covers both corporate and passthrough taxation. The UC Hastings Business Associations course is often called “Corporations” at other law schools. If a student has not previously taken Business Associations, they must take it concurrently with their enrollment in the Practicum.

³⁷ Because the SEEE Clinic operates year-round, we constantly connect with possible Practicum clients. *See supra* Part I.A.1 for more information on the SEEE Clinic.

³⁸ Prof. Ball also teaches the SEEE Clinic, and Prof. Viswanathan teaches a variety of doctrinal tax courses.

vide an opportunity for the Practicum students to think critically about their past week of activities, what they have learned, and what they would do differently in the future and why. These meetings also provide regular opportunities for the faculty co-directors to make any necessary interventions in the student learning process. Weekly meetings reinforce our primary teaching goal of honing problem-solving skills and deepening critical thinking by requiring students to document their decisions and challenge them as they work to resolve their clients' legal issues. Practicum students are expected to average approximately eight hours of client work for the two credits allocated to their fieldwork. In practice, these hours are typically front-loaded such that students spend more hours per week on fieldwork early in the semester. Their last few weeks of the semester are spent completing final deliverables and preparing documents necessary for the smooth transition to future student teams.

Currently, our student teams consist of two SEEE Clinic students and two Practicum students, with Practicum students responsible for advising at least two clients. Thus, those clients with both tax and corporate matters will have four law students, two tax and two corporate, working with them during a given semester. Our objective for each Practicum team is to have a client whose needs are more time-sensitive and generally more discrete. Allocating matters with differing urgency and structure enables students to learn how to prioritize their time and hone their research skills to best address the less-pressing (and often more abstract) issues of the other clients over the course of the semester. Students can then apply substantive knowledge, professionalism lessons, and lawyering techniques they gained in addressing the first client matter to subsequent client matters.

B. Seminar Component of the Practicum

The one-hour per week classroom component of the Practicum is held concurrently with the eight students participating in the SEEE Clinic.³⁹ During this hour, we discuss substantive issues of social enterprise law, business taxation, and transactional lawyering.⁴⁰ Examples of topics covered include dominant theories of doctrinal corporate and pass-through taxation law, techniques for interviewing entity clients,⁴¹ client counseling,⁴² and business forms common to so-

³⁹ The twelve students in aggregate are often referred to as the "Firm," since the group of twelve is responsible for both the general corporate representation as well as the specialized tax representation.

⁴⁰ See PRACTICUM WEBSITE, *supra* note 17.

⁴¹ See DAVID A. BINDER, PAUL B. BERGMAN, PAUL R. TREMBLAY & IAN S. WEINSTEIN, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 213–38 (3rd ed. 2012); Laurie Shanks, *Whose Story is it Anyways? – Guiding Students to Client-Centered Law-*

cial enterprises.⁴³

1. Taxing Social Enterprises

The seminar portion of the Practicum not only exposes students to the black-letter law associated with the taxation of social enterprises but also allows students to explore the normative and policy implications associated with how these entities should be and are taxed. A primary teaching goal is to instill problem-solving skills and deepen students' critical thinking in the context of transactional tax matters. Because social enterprises run the gamut with respect to entity type, the seminar touches on a full range of issues associated with business taxation. We take theories and insights from current legal scholarship exploring how taxes should be imposed on social enterprises and discuss these principles in the context of specific SEEE Clinic clients. As a result, students reflect on the real-world implications of tax policy and consider the effects of these policy decisions on actual social enterprises.

There has been a significant increase⁴⁴ in the number of jurisdictions creating new legal forms⁴⁵ to enable social enterprises to combine an explicit social mission and profit-making in a single entity.⁴⁶ These new legal entities include the low-profit limited liability company (or "L3C"), the benefit LLC, the benefit corporation (or "b-

ying *Interviewing through Storytelling*, 14 CLIN. L. REV. 509, 509–516 (2008); Stephen Ellmann, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 VA. L. REV. 1103, 1128–46 (1992).

⁴² See BINDER, ET AL, *supra* note 41, at 465–96; RICHARD NEUMANN, *TRANSACTIONAL LAWYERING SKILLS* 53–71 (2013). R

⁴³ These include, among other entity forms, special purpose corporations, nonprofits, limited liability companies, C-corporations, benefit corporations, and cooperatives.

⁴⁴ L3C became an official social enterprise entity in Vermont on April 30, 2008. VT. STAT. ANN. tit. 11, § 3001 (2008). Since then, at least 33 states have adopted the Model Benefit Corporation Legislation. See *State by State Status of Legislation*, B LAB, <http://benefitcorp.org/policymakers/state-by-state-status> (last visited Aug. 30, 2017) (identifying 33 states including Arizona (2014), Arkansas (2013), California (2012), Colorado (2014), Connecticut (2014), District of Columbia (2012), Florida (2014), Hawaii (2011), Idaho (2015), Illinois (2013), Indiana (2015), Kansas (2017), Kentucky (2017), Louisiana (2012), Massachusetts (2012), Maryland (2010), Minnesota (2015), Montana (2015), Nebraska (2014), Nevada (2014), New Hampshire (2015), New Jersey (2015), New York (2012), Oregon (2014), Pennsylvania (2013), Rhode Island (2014), South Carolina (2012), Tennessee (2016), Texas (2017), Utah (2014), Vermont (2011), Virginia (2011), and West Virginia (2014) that have adopted the Model Benefit Corporation Legislation).

⁴⁵ Brian Galle, *Social Enterprise: Who Needs It?*, 54 B.C. L. REV. 2025, 2025 (2013) ("Social enterprise lawmaking is a growth industry.")

⁴⁶ See Reiser, *supra* note 10, at 685 ("One of the most basic things social entrepreneurs seek in a specialized legal form is safe space to declare that their entities are committed to a new and different goal — pursuing both profit and social good."); Ball, *supra* note 27, at 943. R

corp”), and the social purpose corporation.⁴⁷ Scholars have addressed some of the tax issues raised by these hybrid entities,⁴⁸ but this area of law remains fertile for debate and theorizing.⁴⁹ For example, should grants made to a benefit corporation by a private foundation qualify as a program related investment?⁵⁰ If an L3C limited to zero its return for investors of capital, should the L3C be given tax-exempt status? Are there any conditions for which investments in hybrid entities should be treated as charitable contributions? Rather than being discussed in the abstract, we engage our students in conversations around hybrid entities that carry special relevance because how governments should tax hybrid entities is a live topic generating ongoing scholarly discussion.⁵¹

Topics in the seminar portion of the Practicum go beyond social enterprises undertaken by hybrid entities. The seminar also touches on how social enterprises generally should be taxed to encourage the inclusive and conscious economy that social enterprises represent. Social enterprises blur the traditional distinctions between for-profit and nonprofit entities by blending social mission and market-based, business strategies. The tax treatment of these social enterprises can be exceedingly complex. Offering a course that allows students to reexamine business tax law through the lens of the emerging social enterprise sector challenges their understanding of dominant theories of the doctrinal corporate and pass-through taxation law. By scrutinizing the arguments for and against various tax treatments of social enterprise legal entities (nonprofits, traditional for-profit entities, and pass-throughs, in addition to hybrid entities) and reviewing the consequences that could flow from offering tax preferences to these entities, tax students are engaged in critically examining what they might otherwise consider stagnant areas of the law.

⁴⁷ See generally Lloyd Hitashi Mayer & Joseph Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387; Ball, *supra* note 27, at 943.

⁴⁸ See, e.g., Lloyd Hitashi Mayer & Joseph Ganahl, *Taxing Social Enterprise*, 66 STAN. L. REV. 387 (arguing against preferential tax treatment for hybrid entities).

⁴⁹ Compare Malani & Posner, *supra* note 11, at 2064–65 (“Existing theories of nonprofit status are not persuasive justifications for coupling the nonprofit form and tax breaks for community-benefit activities.”); with Brian Galle, *Keep Charity Charitable*, 88 TEX. L. REV. 1213 (2010); and James R. Hines Jr., Jill R. Horowitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179 (2010).

⁵⁰ See Dana Brakman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619 (2010). See also Mayer & Ganahl, *supra* note 48, at 396 (defining a program related investment or PRI as “an equity investment or loan that a private foundation makes primarily to further charitable or similar purposes and not in significant part to realize a profit.”). Program related investments qualify as the distribution requirement on private foundations if the investments further the foundations’ tax-exempt purpose. See I.R.C. §§ 4942(g)(1)(A), 4944(c).

⁵¹ See Mayer & Ganahl, *supra* note 48.

R

R

R

The study of business taxation often centers on learning the black-letter law associated with corporate and pass-through entities. This knowledge is important for any student wishing to pursue a career in transactional tax practice. But also of vital significance is understanding the normative questions that have implicitly been answered by extant law, and challenging those assumptions in the business law context. Most tax courses offered at law schools beyond basic federal income tax (and, of course, courses specific to tax and social policy) spend little time on these value-laden questions of why the law of business taxation is what it is. The seminar associated with the Practicum gives students an opportunity to ask these questions. By discussing the justifications for and against preferential treatment, students in the Practicum can articulate their own normative preferences and policy rationales for certain tax policies.

This instruction is not simply an intellectual exercise whose practicality is limited to the ivory tower of academia. Not all students interested in business tax careers will work in private practice.⁵² For graduates working for state and local governments or the Internal Revenue Service, the normative and policy underpinnings of local and federal tax laws, and understanding why the law is what it is, can greatly improve these new lawyers' ability to serve their non-business employer for whom profit maximization is not a primary concern.⁵³ But even students aspiring to careers in private practice will benefit from considering these issues. Statutory interpretation often involves divining Congressional intent, which for tax legislation frequently involves appealing to foundational principles of taxation.

2. *Integrating Corporate and Tax Legal Education*

Paramount among the many objectives of legal education is to teach law students how to examine the law and legal institutions critically.⁵⁴ To develop the skills to think critically, professors need to ex-

⁵² Two examples of government entities which have recently hired UC Hastings tax concentrators include the Internal Revenue Service and the U.S. Department of Justice, Tax Division.

⁵³ OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881) (arguing to understand law one needs experience in addition to logic).

⁵⁴ See Patricia Mell, *Taking Socrates' Pulse*, 81 MICH. B.J. 46 (May 2002) ("[T]he Socratic method is a teaching style in which a student is selected at random and then questioned about a case previously prepared for class discussion. The interrogation of the student proceeds beyond the facts of the case to a series of hypotheticals designed by the professor to force the student to apply reasoning to each successive 'new' situation."); Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 728-29 (1989). *But see* A.B.A. SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT ON THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NAR-

pose students to the intersections of various areas of the law and non-legal considerations. Thus, in designing the academic component of the Practicum, we intentionally integrated the corporate and tax students in one classroom for the seminar portion of both courses.⁵⁵ This not only facilitates engaging in problem-solving exercises around client matters,⁵⁶ but also allows both groups of students to share lessons learned from their lawyering experiences. Moreover, in their client representations, the Practicum students are instructed to explore with their clients what other transactional issues they might have. In this way, the Practicum students are consistently forced to think of their clients' operations and legal issues beyond the confines of business tax.

The integration of various practice area specializations to achieve client goals is common in practice⁵⁷ but rarely reflected in law school course curriculum.⁵⁸ Instead, legal education is often characterized by teaching in silos where each subject matter—e.g., property, contracts, civil procedure, bankruptcy—is presented as a “walled-off component” of the law.⁵⁹ In reality, a single client matter could easily engage issues of property law, contracts law, civil procedure, and bankruptcy. Similarly, business associations, securities regulation, corporate finance, and other courses on corporate and transactional law rarely delve into exploring the tax implications of business decisions, as each subject may be treated as separate and distinct without integrating with tax law.

In actuality, subjects often presented in law school as discrete ar-

ROWING THE GAP 138 (1992) [hereinafter the MACCRATE REPORT] (identifying problem solving as the first skills essential to legal education).

⁵⁵ See Mark N. Aaronson, *Judgment-Based Lawyering: Structuring Seminar Time in a Non-Litigation Clinic*, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 81 (2014).

⁵⁶ See *infra* Part I.B.3.

⁵⁷ See BORDEN & DEAN, *supra* note 21, at 375 (“Striking an appropriate balance between business objectives and tax concerns forms the core of a transactional tax lawyer’s skill set.”).

⁵⁸ See Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) (identifying “the growing disjunction between legal education and the legal profession” and arguing “law schools and law firms are moving in opposite directions.”).

⁵⁹ Steven I. Friedland, *Adaptive Strategies for the Future of Legal Education*, 61 LOY. L. REV. 211, 216 (2015) (“A system of silos, meaning separate, walled-off components has emerged in legal education.”); see also ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 212 (1983) (describing the “fragmentary nature of [law school] curriculum”); and Christine Cerniglia Brown, *Efficient Collaboration: How to Build Pathways between Silos, Model Behavior Ideal for Professional Identity Formation, and Create Complex Experiential Modules All While Having Fun*, 1 J. EXPERIENTIAL LEARNING 93, 95 (2015) (“[Law students] are learning from our failures to reach across silos and exemplify collaborative behavior.”).

eas of law are constantly intersecting and influencing legal theory or simultaneously being considered by lawyers to address client issues. Learning subject matters in isolation can stunt students' understanding of the law. Because another teaching goal for the Practicum is for students to learn the habits of practice⁶⁰ that will impact their success in the practice of law, we curated an environment for collaborative learning between the corporate and tax students that starts at the very beginning of the semester with an all-day mandatory orientation. During this orientation and in their joint seminar course, the SEEE Clinic and Practicum students are treated equally regarding reading assignments and expectations for class participation. Students are mixed and matched during the various group exercises and encouraged to share information with each other. Not only can this model of integrated learning deepen student knowledge, but it also sets the stage for the holistic representation⁶¹ students will engage in throughout their professional careers.⁶²

3. *Incorporating Clinical Pedagogy*

In designing the Practicum, we were intentional about incorporating the fundamental elements of clinical pedagogy into the course.⁶³ Among the principal components are these features:

. . . students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problem in role [as an attorney]; the students are required to interact with

⁶⁰ See Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 434 (2005) (summarizing “habits of practice” as included in “everything that [lawyers] have to work with, against, or around when they do something ‘legal.’”).

⁶¹ Holistic representation is a goal of “community lawyering,” an often espoused lawyering theory of clinical legal education. See Susan R. Jones, Jacqueline Lainez & Debbie Lovinsky, *Viewing Value Creation by Business Lawyers Through the Lens of Transactional Legal Clinics*, 15 U.C. DAVIS BUS. L.J. 49, 89 (2014) (identifying “[c]ommunity lawyering is a perennial focus within clinical legal education”); Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *New Directions in Clinical Legal Education: Conversations on “Community Lawyering”: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL’Y 359, 362 (2008) (“Community lawyering requires that lawyers, law students, and clients engage the policy choices of society together, and that they be ‘big thinkers,’ taking on together society’s ‘wicked’ economic, social, and political problems.”).

⁶² Stuart Goodman, *The Fundamental Role of the Corporate Lawyer—And How to Succeed in It*, in INSIDE THE MINDS: THE CORPORATE LAWYER—INDUSTRY INSIDERS ON THE SUCCESSFUL PRACTICE OF BUSINESS LAW (Aspatore Books, 2003) (arguing “[f]iguring out what the client needs is an important proactive piece of the corporate lawyer’s role. To do that [the corporate lawyer] must spend a lot of time learning about and understanding the client’s business—understanding the industry the client operates in; understanding the business environment in which it operates . . .; and understanding what’s happening with their competitors and customers”).

⁶³ See Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321 (1982).

others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review [by a faculty member or supervising attorney employed by the law school].⁶⁴

Each of these core elements is incorporated into the Practicum, engaging students in active learning as they think and behave as business tax lawyers working with real clients.⁶⁵ Consistent with the clinical pedagogical methodology, a significant portion of classroom time is devoted to case rounds, during which a team of students presents and facilitates a discussion on a particular issue (or set of issues) arising from the representation of their client.⁶⁶ Prior to the case rounds session, the entire class reviews an update memo sent by the presenting student team that provides background and context for the issues that are to be presented. This structure helps maximize the two units of fieldwork by providing the tax students with real-time feedback and reflection on their client work. We reinforce our teaching goals by meeting with the pairs of Practicum students during weekly supervision meetings.⁶⁷ These weekly meetings help students keep their client matters on track, focus their research, and refine their legal analysis in short periods of time.⁶⁸ Students also complete a mid-term self-assessment not only to consider their performance and professional development to date but to also identify areas of improvement for the remainder of the semester. In these ways, the Practicum is an implementation of clinical pedagogy.

In addition to the aforementioned core structure, clinicians often utilize ill-structured client matters and reflective essays as a standard part of clinical methodology. Ill-structured client matters⁶⁹ allow students to embrace and work through ambiguity and uncertainty. Re-

⁶⁴ Report, *supra* note 20, at 511.

⁶⁵ See Michael Prince, *Does Active Learning Work? A Review of the Research*, 93, J. ENG'G EDUC. 223, 223 (2004) ("Active learning is often contrasted to the traditional lecture where students passively receive information from the instructor.").

⁶⁶ The case rounds format we follow is adapted from Jane Aiken and the Community Justice Project at Georgetown University Law Center and employs a seven-part process that includes: (1) issue presentation; (2) fact gathering; (3) problem diagnosis; (4) question flooding; (5) problem solving; (6) checking in; and (7) critical review of and reflection on the preceding discussion.

⁶⁷ See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND, AND LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 171 (Jossey-Bass 2007) [hereinafter *Carnegie Report*] (noting "studies of how expertise develops across a variety of domains are unanimous in emphasizing the importance of feedback as the key means by which teachers and learners can improve performance").

⁶⁸ See *supra* Part II.A.2 for discussion on supervision agendas which students prepare in advance of each supervision meeting to help them memorialize and articulate their progress and questions on a weekly basis.

⁶⁹ See Susan Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLIN. L. REV. 45 (2002).

fective essays allow students to document their metacognitive awareness⁷⁰ and development during the semester.⁷¹ Both of these are important aspects of the SEEE Clinic that we could not translate to the abridged clinical experience of the Practicum. With more faculty availability, these aspects may be incorporated by other business and tax law clinicians into the design of their specific practicum-clinic model.

C. *Client Representation through the Practicum*

As discussed previously, similar to the corporate and tax departments of a law firm, the SEEE Clinic students handle the general corporate issues and the Practicum students handle the specialized tax issues for the same clients.⁷² This bifurcated representation is not something of which the clients are made explicitly aware. Depending on what each team decides, the points of contact for the client may be the SEEE Clinic team, the Practicum team, or the entire four-student team. Knowledge of what work each team is doing is shared between the SEEE Clinic students and the Practicum students and maintained within the same document and client management systems, but the particular student teams perform the appropriate specific tasks.

1. *Client Selection*

In prior SEEE Clinic client representations, tax issues would arise that required specialized tax counsel that are now addressed by the Practicum students. This pathway to finding Practicum clients has provided a sufficient supply of matters for Practicum students and in many cases allowed Practicum students to benefit from the pre-existing relationship between the SEEE Clinic and these clients.

The Practicum has also represented new social enterprise clients with discrete tax matters. These clients did not have a previous relationship with the SEEE Clinic but are involved in projects and have institutional goals that fit within the SEEE Clinic's mission and could evolve into long-lasting clients. Referrals for new clients could also be taken, for example, from community organizations, other clinics at UC Hastings, or other nearby law schools. Regardless of the referral source, we will continue to prioritize client selection for the Practicum

⁷⁰ See Lisa McGuire, Kathy Lay, & Jon Peters, *Pedagogy of Reflective Writing in Professional Education*, 9 J. SCHOLARSHIP TEACHING & LEARNING 93 (2009).

⁷¹ See Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 943 (2008) (discussing the intellectual rigor that reflective writing can inspire in law students).

⁷² The SEEE Clinic also represents clients that have no tax matters; these clients are counseled solely by SEEE Clinic students with no Practicum involvement.

where synergies with the SEEE Clinic are apparent and the potential for a long-lasting SEEE Clinic client relationship is present. Otherwise, we risk providing social enterprise clients with piecemeal transactional representation. Our observations that continuity of corporate counsel facilitates a strong foundation upon which both budding and established companies can continue to flourish inform our lawyering philosophy and clinical mission. Additionally, because so many of our previous SEEE Clinic clients have consistently had tax matters arise in their transactions, we do not anticipate needing to often look outside of the SEEE Clinic client docket for Practicum tax matters.

2. Representative Practicum Matters

The social enterprise clients within the SEEE Clinic are intentionally selected to provide students with a variety of corporate and transactional matters. Thus, the lifecycles of our business clients span the spectrum from newly formed start-ups to companies that have been in operation for over twenty-five years. That said, we have found that we can usually provide the most significant impact between the second and fifth years of these businesses' operation. It is during this timeframe that businesses often have complex legal issues for which affordable⁷³ and pro bono corporate counsel is difficult to find.⁷⁴ The following are descriptions of clients and tax matters that the SEEE Clinic could not have addressed without the establishment of the Practicum.

⁷³ See Alison R. Weinberg & Jamie A. Heine, *Counseling The Startup: How Attorneys Can Add Value to Startup Clients' Businesses*, 15 J. BUS. & SEC. L. 39, 43 (2014) ("Startups are cash-poor and time-strapped, with a mean of 18 months between founding and closing the first round of funding.").

⁷⁴ See Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 112 n.672. (2004) (identifying "incorporating nonprofits or drafting simple contracts" as "the more routine transactional pro bono cases" and noting that "the more sophisticated transactions . . . involve a complex range of substantive issues and skills sets, firms are reluctant to turn . . . over to younger associates without making significant investments at the partner level in supervision"); Tremblay, *infra* note 94, at 39–44 (discussing the law firm pro bono commitment to transactional legal services and the difficulty in determining which business entities justify law firm investment). See also PRO BONO INSTITUTE, LAW FIRM PRO BONO CHALLENGE COMMENTARY TO STATEMENT OF PRINCIPLES, <http://www.probonoinst.org/wpps/wp-content/uploads/Law-Firm-Challenge-Commentary-2016.pdf> (last visited Aug. 30, 2017) ("For-profit business ventures are rarely eligible for pro bono legal services. . . . In order to be eligible for pro bono legal services, if the individuals creating the business do not themselves qualify for pro bono legal services: . . . (3) the business or particular venture would have to possess insufficient operating funds to pay for legal and other professional services and would not be paying legal or other professional fees; and (4) the pro bono relationship would be viewed, from the beginning, as being 'time bound'—to last only until the business becomes successful and can pay for counsel without sacrificing its mission.").

a. Tax-Exempt Social Business Incubator

One Practicum client is a tax-exempt 501(c)(3) nonprofit that incubates and launches social businesses to level the economic playing field in local communities. A program of the nonprofit is an e-commerce company that uses an online platform to market and sell artisan crafts. The nonprofit also operates a thrift store in a low-income neighborhood of color. The SEEE Clinic had previously advised the client on entity formation matters, representing the client as it successfully applied for both federal and state tax exemption. The clinic had also drafted, analyzed, and revised various contracts, leases, and service agreements for the client.

However, it was clear that the client would benefit from further investigation into their sales tax practices to confirm compliance with all applicable laws. The client wanted the SEEE Clinic to research the extent to which the enterprise qualified for sales and property tax exemptions and wanted assistance with the various steps of the application process. The client also needed guidance on strategically planning the tax implications of what it would mean to “launch” its business lines into independent social enterprises. The client wanted to engage the SEEE Clinic to provide counsel on how to optimize its organizational structure and reduce exposure to liability. Accepting this client matter required evaluating proposed business models as well as assessing the tax consequences of the income streams from these various social enterprises.

The Practicum students first assisted the client in determining its sales tax liability for previous tax years. Although the client did not collect sales tax or remit it to the state, the sales tax it should have collected was still due. With the Practicum’s assistance, the client’s liabilities for failure to file a sales tax return were cleared, including penalties and interest.

Tax-exempt organizations in the client’s state of operation that sell goods to customers are not automatically entitled to a waiver from collecting sales tax from customers. However, certain organizations relieving poverty *are* entitled to a waiver from collecting sales tax. The Practicum team began the process of applying for the client’s sales tax waiver and wrote a user-friendly memo explaining the numerous remaining steps required to ensure the granting of the waiver.⁷⁵ Obtaining a waiver from the collection of sales tax was also the starting point for the client to obtain an exemption from remitting property

⁷⁵ The timeline for obtaining the sales tax waiver continued into the summer, beyond the timeline for the Practicum’s representation. The memo that was written ensured that the process could be continued by the client’s in-house team during the months the Practicum and SEEE Clinic were not operational.

tax. Precisely how to obtain the property tax exemption was outlined for the client, including a sequence enabling the client to seek both exemptions in parallel.

b. For-Profit Food Recovery

Another SEEE Clinic client is a for-profit food recovery business that created a mobile, logistical application to connect businesses that have excess edible food with local nonprofits (i.e., soup kitchens or foodbanks) available to accept this food for distribution to the hungry. The client communicates with the donating company as well as the recipient nonprofit organization and reduces the transaction costs for both parties. The client aims to provide the donating company with substantiation of their charitable contribution and provides pick-up and drop-off services for the food to be donated. By so doing, the client seeks to reduce food waste and provide food to organizations and the needy individuals that they serve.

The SEEE Clinic was originally retained to provide advice on the client's corporate structure, including governance issues associated with the operation of for-profit and nonprofit entities with similar operations. During this representation, a variety of tax issues arose that necessitated the involvement of the Practicum team.

The client's business model depends on accurately determining the value of the charitable deduction its customers get by donating food using the for-profit's mobile application. Providing counsel on this tax matter required researching the interplay between charitable contributions and deductible business expenses for various entity types, and learning how new laws specific to donations of food inventories could affect the viability of the client's business model. What began as a representation focused on corporate structure and governance soon evolved into providing advice on not just corporate issues but also complex issues of federal tax law.

Practicum students provided the client with a memo detailing previously unforeseen factors that affected how revenue would be generated for the client. The value of the charitable contributions, and thus the price charged by the client (under their preexisting business model), depended on not just the value of the donated food, but also the financials of the donating company, the type of entity donating the food, and how the donating company previously accounted for the purchase of food.

c. Tax-Exempt Provider of Employment Skills and Training

Practicum students also worked with a tax-exempt nonprofit with several million dollars in assets whose mission is to support, via vari-

ous revenue-generating businesses, workers facing barriers to employment. These revenue-generating businesses both provide skills training for their underserved employees and generate profits, which the businesses reinvest into other training programs for these workers.

Due to the range of its revenue-generating activities, which include retail stores, manufacturing, and medical services, the client was concerned about liabilities created by any one of these activities affecting the assets of the nonprofit as a whole. The client engaged the SEEE Clinic to provide options for reorganizing the company's various activities into different business structures to maximize liability protection, minimize adverse tax consequences, and ensure continued compliance with the nonprofit's tax-exempt purpose.

While the SEEE Clinic students analyzed how various organizational configurations affected the client's exposure to liability, the Practicum students researched the tax consequences of these potential structures at both the state and federal levels. We complicated this analysis due to the interplay between federal and state exemption and the existence of revenue-generating activities that could give rise to unrelated business income tax for the nonprofit.

The client's wholly-owned LLC, though eligible to directly receive charitable contributions due to its status as a disregarded entity,⁷⁶ was not eligible for California state income tax exemption unless it elected taxation as a corporation.⁷⁷ Practicum students assessed the relative merits of the LLC having pass-through versus corporate status given the tax consequences (federal and state) associated with each form. This analysis depended on many different factors, including the risk of the activities contained within the LLC, the expected amount of income (both related and unrelated to the client's exempt purpose) to be earned by the LLC, and administrative fees each structure imposed.

A complete description and assessment of the various options available to the client were explored in a legal memo the students composed and presented during an in-person client meeting. During the subsequent semester, a new set of SEEE Clinic students were positioned to form a subsidiary LLC for the revenue-generating businesses, a decision the client would not have been able to make without understanding the tax consequences of the potential organizational structures.

⁷⁶ See Treas. Reg. § 301.7701-2.

⁷⁷ See generally STATE OF CALIFORNIA FRANCHISE TAX BOARD, INTRODUCTION TO TAX-EXEMPT STATUS (2014). See also *Limited Liability Companies and Tax-Exempt Status*, STATE OF CALIFORNIA FRANCHISE TAX BOARD, <https://www.ftb.ca.gov/businesses/Exempt-Organizations/LLC-Exemption-Eligibility.shtml> (last visited Aug. 30, 2017).

II. THE IMPERATIVE FOR BUSINESS TAX CLINICS

We launched the Practicum at UC Hastings in part because of the limited experiential options for students interested in transactional tax law. As this Section illustrates, a lack of experiential offerings in transactional tax is common in legal academia. As a result, courses similar to the Practicum could be valuable additions at many law schools other than UC Hastings.

A. Transactional Clinical Opportunities

Transactional clinical offerings,⁷⁸ while still limited relative to litigation-based clinical experiences, have increased rapidly in the last few years, with many law schools offering students at least one transactional experiential opportunity. The increase in clinical transactional courses has not, however, resulted in a proliferation of transactional *tax* clinical offerings. Tax issues, including federal, state, and local tax matters, are an integral consideration of nearly any business transaction.⁷⁹ Business law clinicians need a generalized corporate background to manage the broad range of corporate issues their clients face. It is rare, however, that a business law clinician has both the breadth of general corporate knowledge and the depth of specialized tax experience to supervise complex tax issues within business transactions. Thus, there is a vacuum in transactional tax offerings, leaving students interested in pursuing business tax careers with few to no opportunities for a clinical experience in their chosen practice area.

1. Empirical Analysis of Transactional Clinics

In the last decade, there has been a dramatic increase in the number of business law clinics.⁸⁰ We reviewed publicly available information on the clinical opportunities available at all ABA accredited law schools and found that these approximately 200 institutions offer about 1700 clinics in total.⁸¹ Of these 1700 clinics, about 240, or roughly fourteen percent, are clinics that self-identify as focused on transactional lawyering. This number represents an approximately

⁷⁸ See *supra* note 19 and accompanying text.

⁷⁹ Failing to consider the tax consequences of a transaction can lead to malpractice claims. See, e.g., *Williams v. Ely*, 423 Mass. 467 (1996) (affirming a finding that plaintiffs incurred tax liabilities that they might not have incurred but for defendants' negligence).

⁸⁰ There is no one definition of what constitutes a "business law clinic," but most generally, business law clinics deal with non-litigation based issues of corporate and nonprofit law.

⁸¹ We gleaned most of this information from the websites of each law school's clinical program, which are current and descriptive to varying degrees. Data on file with authors, and available at http://repository.uchastings.edu/research_data/1/, archived at <https://perma.cc/9K45-D579>.

twenty percent increase in transactional clinics in the two years since 2014 and an astounding sixty percent increase over the last three years.⁸² Only about twenty percent of the law schools examined have zero transactional clinical offerings.

Despite this growth, the clinical offerings at U.S. law schools are still overwhelmingly litigation-based. The majority of transactional legal clinics were started after the first substantial wave of social justice-driven clinics were created in the mid- to late 1970s and early 1980s.⁸³ As of the mid-1990s, there were only a handful of small business clinical programs, with these programs often described as community economic development clinics.⁸⁴ Although the number of transactional clinics has increased since then, most U.S. law schools typically only offer one clinical opportunity for students wishing to gain experience in transactional law.⁸⁵ Whereas litigation-based clinical opportunities exist in specific practice areas, such as criminal defense, immigration, and labor law,⁸⁶ to name a few, *transactional* clinical opportunities are typically in general corporate law, advising clients on a range of transactional issues.⁸⁷

The diversity of legal work performed by transactional clinics is due largely to the longitudinal client representation offered by many transactional clinics. Litigation-based clinics often offer their clients

⁸² Jennifer Fan, *Institutionalizing the USPTO Law School Clinic Certification Program for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 327, 332 n.14 (2015) (identifying 188 transactional law clinics as of August 1, 2014). See also Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Law Schools*, 43 J.L. & POL'Y 85 (2013) (noting that in 2013 there were more than 140 transactional clinics at just over 200 American Bar Association approved law schools, which is twenty-eight times more than the five transactional clinics reported in 1992).

⁸³ Praveen Kosuri, "Impact" in 3D—Maximizing Impact Through Transactional Clinics, 18 CLIN. L. REV. 1, 7 (2011).

⁸⁴ See Jones & Lainez, *supra* note 82, at 92 (stating the number of community economic development clinics to be eighteen).

⁸⁵ The average number of transactional clinics offered across all U.S. law schools is approximately 1.2, whereas the average number of clinics offered is approximately 8.6 (data on file with authors, see *supra* note 81). See also Patience Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 LEWIS & CLARK L. REV. 413, 415 (2015) ("Law school curricula have historically failed to accurately reflect the realities of law practice by basing instruction almost entirely on litigation practice to the exclusion of business law and transactional practice.").

⁸⁶ At UC Hastings, these litigation-based practice areas taught in the Criminal Practice Clinic, Immigrants' Rights, Refugee and Human Rights Clinics, and the Workers' Rights Clinic, respectively. See *Clinics*, UC HASTINGS, <http://uchastings.edu/academics/clinical-programs/clinics/index.php> (last visited Aug. 30, 2017).

⁸⁷ See, for example, the Entrepreneurship Legal Clinic at the University of Pennsylvania (<https://www.law.upenn.edu/clinic/entrepreneurship/>), the Community and Economic Development Clinic at the University of Michigan (<http://www.law.umich.edu/clinical/CEDC/Pages/default.aspx>), and the Community Enterprise Clinic at Boston College (<https://www.bc.edu/bc-web/schools/law/academics-faculty/experiential-learning/clinics/community-enterprise.html>).

R

R

assistance for a discrete event, such as a criminal proceeding, asylum hearing, or administrative examination. Effectively representing clients in transactional matters often involves simultaneously providing counsel on such diverse areas of law, as real estate, contracts, employment, and tax. This is especially true when the client representation is not for a discrete, clearly defined client matter, but for a prolonged time.⁸⁸ For the latter, transactional clinical representation can be analogous to a general counsel relationship, with the clinic retaining the autonomy to consider new client matters within their capacity during the duration of the attorney-client relationship.⁸⁹ Other transactional clinics purposefully keep client matters discrete and note for the client at the onset of the relationship that they cannot fill the role of general counsel but are willing to consider additional client matters in the future.

The ability to gain exposure to several areas of transactional law makes transactional clinics appealing to many students. The overwhelming majority of clinical offerings nationwide are litigation-based, yet a much smaller percentage of law school graduates enter litigation-based careers.⁹⁰ As a consequence, student demand for clinical transactional opportunities is high. This demand combined with the relative paucity of relevant clinics can make it difficult for students to enroll in the clinical transactional opportunities they de-

⁸⁸ Similar to some litigation-based clinics, transactional clinics often undertake representation that lasts multiple semesters, or even years. For example, the Georgetown Harrison Housing Clinic has represented some of its clients for more than a decade. *Affordable Housing Transactions Clinic*, GEORGETOWN LAW, <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIHC/> (last visited Aug. 30, 2017).

⁸⁹ Whether or not the clinic undertakes a new transactional matter will depend on a range of factors, including pedagogical value to students, supervisory capability, and student availability. It is important to note that transactional clinics vary widely in terms of, among other things, number of students, credit hours, length of representation, and whether or not students may continue beyond one semester.

⁹⁰ See *supra* note 81. While only 14 percent of clinics may practice transactional law, we acknowledge that the remaining 86 percent are not all litigation-based clinics. For example, mediation clinics, medical legal partnership clinics, and estate planning clinics are examples of non-litigation-based clinics that are also offered at various law schools that are not business law clinics. See also *Tribal Legal Clinic*, UCLA LAW, <https://law.ucla.edu/academics/curriculum/course-list/law-728/> (last visited Aug. 30, 2017); and *The Samuelson Law Technology and Public Policy Clinic*, UC BERKELEY, <https://www.law.berkeley.edu/experiential/clinics/samuelson-law-technology-public-policy-clinic/> (last visited Aug. 30, 2017). The exact percentage of graduates entering litigation-based versus transactional jobs after graduation is not easily determined. In major U.S. law firms, however, the percentage of lawyers classified as litigation attorneys is approximately 30 percent (data on file with authors and available at http://repository.uchastings.edu/research_data/5/, archived at <https://perma.cc/L329-D9UF>). Assuming that a J.D. is necessary for any litigation-based legal job, we can safely assume that the percentage of transactional clinics (relative to all clinics) is significantly lower than the percentage of graduates entering into transactional practice.

sire. At UC Hastings, for example, applications for the SEEE Clinic routinely exceed available spots.⁹¹

2. *Transactional Clinics and the Pursuit of Social Justice*

The shortage of transactional experiential offerings is due, in no small part,⁹² to the connection that experiential legal education has to social justice⁹³ and a misconception that transactional clinical offerings by default ignore or minimize this precept of clinical pedagogy.⁹⁴ Although clinical courses that do not have social justice as an overarching theme are defensible for the other goals they accomplish,⁹⁵ transactional clinical courses can easily comport with the ideals from which early clinical programs sprung. “Social justice” is an amorphous concept, but one good working definition “is the commitment to act with and on behalf of those who are suffering because of social neglect, social decisions, or social structures and institutions.”⁹⁶ In this regard, lawyers can advance social justice in a myriad of ways. For example, community empowerment,⁹⁷ impact transactions,⁹⁸ or neigh-

⁹¹ During the spring 2014 semester, for example, over sixty students applied for what was then six available spots in the SEEE Clinic.

⁹² Another contributing factor is the devaluing of transactional lawyering within the legal academy, as represented by the general marginalization of transaction law courses versus the variety of litigation-based courses. See generally Lynnise E. Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 OHIO N.U. L. REV. 61, 81 (2014).

⁹³ As Philip Schrag and Michael Meltsner state, “clinical legal education was born in the social ferment of the 1960s.” N.Y. STATE JUDICIAL INST., PARTNERS IN JUSTICE: A COLLOQUIUM ON DEVELOPING COLLABORATIONS AMONG COURTS, LAW SCHOOL CLINICAL PROGRAMS, AND THE PRACTICING BAR 8 (2005), quoting Philip G. Schrag & Michael Meltsner, REFLECTIONS ON CLINICAL LEGAL EDUCATION 5 (1998). See also Richard A. Boswell, *Keeping the Practice of Clinical Education and Scholarship*, 43 HASTINGS L.J. 1187, 1187–88 (1992) (“In the late 1960s law schools—primarily at the behest of students, the legal profession, and other outside of academia—began developing clinical programs with the objective of delivering legal representation to persons who traditionally were underrepresented.”).

⁹⁴ Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 WASH. U. J. L. AND POL’Y 11, 15 (2015) (“[T]he triage-driven sentiments of the access-to-justice campaigns plainly treat dispute resolution as more critically important than transactional business development.”).

⁹⁵ See generally Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B. C. J. L. & SOC. JUST. 331 (2012) (arguing that clinics without a social justice component should be accommodated).

⁹⁶ William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DePaul J. Soc. Just. 7, 13–14 (2007). See also Kosuri, *supra* note 95, at 331 n.1 (defining social justice to mean “the assistance of low-income individuals and communities who cannot afford market rate lawyers or have limited access to them”).

⁹⁷ See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67 (2000).

⁹⁸ See Patience Crowder, *Impact Transaction: Lawyering for the Public Good Through Collective Impact Agreements*, 49 INDIANA L. REV. 621 (2016) (defining impact transactions as “a strategy of transactional advocacy in the public interest that, like impact litiga-

neighborhood mobilization⁹⁹ are all mechanisms that promote social justice, even if the clients being served by these clinics could afford legal counsel. To the extent that the work done by the clinic or experiential course imparts social value to the communities served, social justice goals can be accomplished.

The work performed in a transactional clinic can easily fit within a commitment to advancing social justice. For example, the SEEE Clinic, described above in more detail in Part I, limits its representation to social enterprises;¹⁰⁰ organizations that work to create social, environmental, and economic value or achieve a social good through business techniques.¹⁰¹ Clients of the SEEE Clinic are working on projects that, although often have a profit-motive, also result in social value for the communities in which they operate.¹⁰² Small businesses in low-income neighborhoods, nonprofits entering into joint ventures, and worker-owned cooperatives are just a few examples of clients who need the assistance of transactional lawyers to compose and review contracts, help structure transactions and financings, manage and allocate risks, understand and comply with regulatory requirements, and establish business entities.¹⁰³ By representing clients who are providing employment options in low-income communities, increasing services to low-income populations, and addressing other social issues, transactional lawyers have a significant role to play as engineers of a more just and inclusive economy.

B. Current Clinical Offerings in Taxation Law

1. Limited Offerings of Transactional Tax Clinics

Approximately 150 U.S. law schools offer at least one transactional clinic.¹⁰⁴ Of these schools, only 39 explicitly state that they counsel clients on tax matters.¹⁰⁵ Additionally, this tax representation is often limited to certain areas of tax law, such as tax issues associated

tion, has the potential for making large-scale social change”).

⁹⁹ See Mark N. Aaronson, *Representing the Poor: Legal Advocacy and Welfare Reform during Reagan's Gubernatorial Years*, 64 HASTINGS L.J. 933, 942–44 (2013) (discussing group representation for low-income communities “intended to generate systemic pressure for institutional change”).

¹⁰⁰ See Ball, *supra* note 18, at 40–42.

¹⁰¹ See Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLINICAL L. REV. 215 (2013).

¹⁰² See *supra* Part I.C.1 for discussion on representative social enterprise clients.

¹⁰³ See George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 279, 288–318 (2009) (discussing the critical role of transactional lawyers in the lifecycle of a business).

¹⁰⁴ Data on file with authors, *see supra* note 81.

¹⁰⁵ *Id.*

R

R

with tax-exempt organizations.¹⁰⁶ There are few clinical or live-client courses at any U.S. law school dedicated solely to addressing a range of transactional tax issues across both for-profit and tax-exempt entities.¹⁰⁷ While some general transactional clinics do provide limited tax advice,¹⁰⁸ it is more common for general transactional clinics to explicitly carve out business tax as an area of law in which they do not practice.¹⁰⁹

Given the lack of clinical offerings dedicated to transactional tax issues, students wanting transactional tax experience are likely to find that opportunity only in a *general* transactional clinic, and only if that transactional clinic is one of the few that provides tax advice. Given that specific client matters are often not known in advance of the start of the semester, it can be difficult for a student interested in transactional tax matters to ensure that any work in her area of interest will be available that semester. Students wanting to counsel clients on business tax issues may elect not to participate in the general transactional clinic believing that the other elements of representation would not sufficiently benefit their career pursuits. In any given semester, the general transactional clinic's docket might not include any tax matters. Also likely is that the anticipated tax matters either do not materialize or become deprioritized relative to the other general corporate matters that suddenly become more pressing. Thus, tax-focused students could spend significant time working in areas of law in which they have no intention of practicing.¹¹⁰

¹⁰⁶ For example, the Nonprofit Tax and Transactional Clinic at Stanford Law School, which provides transactional assistance to nonprofits, assists clients with tax issues but these tax issues necessarily pertain only to tax-exempt organizations.

¹⁰⁷ We came to this conclusion from researching publicly available information on clinical programs, and from surveying clinical faculty via the clinical listserv. While there are clinics that focus solely on obtaining tax-exempt status for nonprofits, these clinics do not provide counsel on a range of business tax issues. There are, for example, clinics that might attend to tax issues of clients from a law school's clinical program, but these clinics do not currently have a general transactional clinic from which to regularly obtain business clients.

¹⁰⁸ The Ludwig Center for Community & Economic Development at Yale Law School, for example, provides tax counsel as part of its broad transactional representation. See *Ludwig Center for Community & Economic Development*, YALE LAW SCHOOL, <https://www.law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/ludwig-center-community-economic-development> (last visited Aug. 30, 2017).

¹⁰⁹ The Entrepreneurial Business Law Clinic at the Ohio State University Moritz College of Law, for example, does *not* provide tax advice to its clients. Susan Post, *Entrepreneurial Business Law Clinic at OSU Helps Startups with Legal Tasks* (Aug. 12, 2013), <http://www.themetropreneur.com/columbus/entrepreneurial-business-law-clinic-osu-helps-startups-legal-tasks/>.

¹¹⁰ The same could be said about other transactional areas of law, such as real estate or banking. Indeed, clinicians could use the model we describe for implementing an experiential transactional tax course to implement experiential courses in these other areas of law as well. See *infra* Part III.B.

The overwhelming majority of clinical offerings focused on taxation law consist of low-income taxpayer clinics (“LITCs”). The number of these clinics burgeoned following Congress’s 1998 passage of Internal Revenue Code § 7526, which provides grants to qualifying organizations that represent low-income taxpayers involved in controversies with the Internal Revenue Service (“IRS”).¹¹¹ There are currently approximately 42 LITCs across all U.S. law schools.¹¹² These LITCs provide much needed tax services to clients, but they focus exclusively on individual tax controversies and do not represent any organizational clients with transactional tax needs.¹¹³ Students wanting experience addressing transactional tax concerns will not find that experience in a LITC.

Because LITCs are the only clinical experiences common to U.S. law schools where students can work exclusively on tax issues, law students intending to make a career in transactional tax will often enroll in a LITC. However, if more students had the option to take a transactional tax clinic, it would not only increase these students’ employment prospects relative to other students at competing law schools, but also make them more effective lawyers earlier in their careers. If transactional clinics prepare students for jobs as business lawyers,¹¹⁴ it is reasonable that transactional tax clinics prepare students for jobs as transactional tax attorneys.

2. Demand for Experiential Transactional Tax Courses

This lack of clinical opportunities for students seeking transactional tax experience is especially problematic given that the majority of practicing tax lawyers *do not* work in tax controversy or tax dispute resolution, i.e., in litigation-based tax practice.¹¹⁵ Precise statistics are difficult to obtain, but among major U.S. law firms that offer tax controversy representation, transactional tax lawyers represent a majority of the total number of tax attorneys at the firm.¹¹⁶ Additionally, as of January 2017, 63 law schools, UC Hastings included, offer J.D. stu-

¹¹¹ INTERNAL REVENUE SERVICE, Pub. 3319, at 3 (2016). Each qualifying organization can receive a grant worth up to \$100,000. *Id.*

¹¹² INTERNAL REVENUE SERVICE, Pub. 4134 (Aug. 2016) (listing all LITCs, not just those associated with law schools).

¹¹³ See generally INTERNAL REVENUE SERVICE, Pub. 3319 (2017) (describing LITC program).

¹¹⁴ See Crowder, *supra* note 85, at 414 (arguing that “transactional law clinics offer the most optimal environments for teaching law students the self-regulated learning tools they need to develop to ensure their ongoing professional development as attorneys.”) R

¹¹⁵ See BORDEN & DEAN, *supra* note 21, at 375 (“The work of a corporate tax lawyer is, above all, transactional.”) R

¹¹⁶ Data on file with authors and available at http://repository.uchastings.edu/research_data/4/, archived at <https://perma.cc/8Q8N-LT4H>.

dents the option of concentrating in taxation law,¹¹⁷ a law school certification analogous to an undergraduate major.¹¹⁸ Taxation law is a field in which there are always interested students, but there are few opportunities for these interested students to obtain the experiential education they might desire.

LL.M. students, both foreign and domestic, are particularly ill-served by the lack of transactional tax opportunities. As of January 2017, approximately 40 U.S. law schools offer LL.M. degrees in taxation.¹¹⁹ These students have demonstrated a commitment to pursue a career in tax law, yet no transactional clinical opportunity exists at these U.S. law schools where LL.M. student can obtain live-client experience in their chosen field of study. Although the credit load of some clinical programs would preclude LL.M. students from participating in clinics, at many law schools, the credit load of a clinical course would easily fit within the typical LL.M. course schedule.¹²⁰

There are other types of experiential courses¹²¹ where students can gain exposure to transactional tax in addition to clinical education, but it is not clear any of those could satisfy the student demand for hands-on learning and substitute the student-knowledge acquisition that occurs via clinical education. Other experiential courses include field placement externships, simulation courses,¹²² and, at some law schools, pro bono programs or service-learning courses.¹²³ Currently, few externship placements¹²⁴ offer law students the opportunity to fo-

¹¹⁷ Data on file with authors and available at http://repository.uchastings.edu/research_data/3/, archived at <https://perma.cc/FH62-8AQ4>. See generally Carl G. Paffendorf, *Legal Specialization – Why the Objections?*, 12 U. MIAMI L. REV. 228 (1958) (identifying client need and demand as the driving force behind the expansion of concentrations and specializations such as tax in legal education).

¹¹⁸ At UC Hastings, tax concentrators must take the year-long tax concentration seminar, Federal Income Taxation, Corporate & Partnership Tax, and Taxation of Family Wealth Transfers. More information available at <http://www.uchastings.edu/academics/jd-program/concentrations/tax/index.php>. The number of tax concentrators at UC Hastings is approximately 12–15 students per class.

¹¹⁹ See *supra* note 15.

¹²⁰ As described previously in Part I, the Practicum is three credit hours. See *supra* notes 31–33 and accompanying text.

¹²¹ ABA STANDARDS, *supra* note 23, at 303(a)(3) (defining “experiential course” as course integrating theory and practice by combining academic inquiry with actual experience.).

¹²² *Id.* (identifying examples of experiential course as “a simulation course, a law clinic, or a field placement.”).

¹²³ See Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum: Expanding Opportunities for the Ethical-Social Apprenticeship*, 56 NYLS L. REV. 561 (2011) (discussing service-learning—teaching and learning that integrates community service and reflection with faculty instruction—in the law school context).

¹²⁴ See ROBERT R. KUEHN & DAVID A. SANTACROCE, 2013-14 SURVEY OF APPLIED LEGAL EDUCATION 9 (2014) (reporting only 1.6 percent of externship placements from 164 law schools are in tax law) available at http://www.csale.org/files/Report_on_2013-

cus on gaining experience in business tax matters, as those tax questions are often referred to specialized tax counsel rather than being handled in-house. Moreover, it is often difficult to fabricate the complexity of legal practice in a simulation course. Simulation courses rarely provide students the opportunity to interact with a client representative, engage in client interviewing, or participate in client counseling sessions. While both students and faculty may appreciate the reliability of fact patterns and learning outcomes of a simulation course, students might not grasp the dynamic and interdisciplinary nature of business tax representation from a simulation course. A survey of simulation course offerings in business tax yielded few options for law students, with only one, if any, per law school.¹²⁵

3. *Prioritizing Experiential Transactional Tax Education*

Meeting the student demand for experiential education in transactional tax law should be a priority of U.S. law schools. Beyond the simple argument that laws schools should meet the curricular demands of students, providing students with experience in solving tax matters encountered by actual clients is valuable to students, law schools, and clients. Taxation law at the federal, state, and local levels permeates nearly every aspect of business law. The tax consequences of any transaction should be contemplated before the transaction's consummation. Not providing this legal analysis to business law clinic clients limits the effectiveness of their counsel. Failing to provide experiential transactional tax education to students, which faculty cannot replicate in the doctrinal classroom, is a missed opportunity to educate students fully in a major area of jurisprudence.¹²⁶

In addition, students specializing in tax law are often more successful candidates on the job market.¹²⁷ The level of specialization required of tax attorneys separates graduates focusing on tax from graduates seeking to enter general corporate practice. Careers in tax

14_CSAL Survey.pdf. For example, in the San Francisco Bay Area, students interested in business tax would not have many other options for externship placement outside of the IRS or Franchise Tax Board. The possible expansion of for-profit externship placements, may provide more opportunities for business tax externships, though externship directors surveyed have not observed for-profit placement interest in business tax in part because of the complicated nature of tax legal counsel.

¹²⁵ Data on file with authors. Few have written about developing experiential modules into tax courses. *But see* Heather Field, *Experiential Learning in a Lecture Class: Exposing Students to the Skill of Giving Useful Tax Advice*, 9 *PITT. TAX REV.* 43 (2012).

¹²⁶ *See* Jessica Erickson, *Experiential Education in the Lecture Hall*, 6 *NE. L.J.* 87, 87–88 (2013) (noting doctrinal courses inability to incorporate experiential learning).

¹²⁷ At Hastings, for example, tax concentrators are 17 percent more successful at obtaining full-time, long-term employment compared to students who are not tax concentrators. Data on file with authors.

are available not just in private practice but at all levels of government—as long as government exists, taxes and lawyers who understand them will be necessary. A clinical experience in transactional tax would, thus, better prepare students to compete for limited job placement opportunities.

Lastly, students participating in clinical transactional tax courses would be working on client issues that were often previously going unaddressed. Affordable or pro bono tax counsel is difficult for business entities to secure. Educational opportunities, like the Practicum, let students provide more complete representation to their clients. This comprehensive representation not only helps clients better accomplish their goals but also promotes the social justice ideals on which many clinical courses are founded.¹²⁸

C. *Unmet Demand for Transactional Tax Clinics*

The student demand for experiential offerings in transactional tax and the justifications for making such courses a priority raise the question of why so few transactional tax clinics currently exist.

1. *Paucity of Clinician Expertise*

The successful operation of any clinical course requires that supervising faculty be well-versed in the areas of law in which their clinic operates. Clinicians supervising transactional clinics typically possess experience as practicing corporate lawyers. It is this general corporate experience that enables business law attorneys to successfully run transactional clinics operating in a range of subject matters and substantive areas of law.¹²⁹ However, it is not uncommon for lawyers otherwise experienced in business and corporate law to lack specialized knowledge of tax law. Taxation law is a niche practice area with transactional tax attorneys in private practice typically forming a dedicated legal department. Clinicians rarely have both the breadth of general corporate knowledge and the depth of specialized tax expertise to supervise complex issues in both areas.¹³⁰ As a result, it is more common

¹²⁸ See *infra* notes 148-155 and accompanying text.

¹²⁹ See Alicia E. Plerhoples & Amanda M. Spratley, *Engaging Outside Counsel in Transactional Law Clinics*, 20 CLIN. L. REV. 379, 384 (2014) (“[T]ransactional law clinics encounter a scope of substantive law that encompasses many different subject-matter areas, each distinctly unique and colored by the complex nuances born of the realities of legal practices within that sub-specialty of law.”).

¹³⁰ It is rare, but of course not impossible. There are transactional attorneys, for example, who specialized in tax credit deals prior to becoming a clinical professor and, thus, come into the academy well versed in both corporate and tax law. Indeed, as discussed earlier, there are transactional clinics that address the tax needs of their clients. But we could identify no experiential course that permits law students to focus solely on transactional tax issues.

for transactional clinics not to address their clients' complex tax issues.¹³¹

2. Difficulty in Operating a Standalone Transactional Tax Clinic

Most clinicians running litigation-based clinics came to their law schools with several years of experience practicing in their fields of law and with a clearly identified population of clients to serve. Criminal defense clinics counsel those accused of crimes. Immigration clinics represent clients in immigration proceedings. This specific representation allows clinics to focus on both a particular area of law, as well as a specific lawyering skill set. For example, a clinician leading an asylum clinic can take her knowledge of conducting client interviews and preparing asylum applications to create a clinic emphasizing those lawyering techniques and substantive areas of law. Students enrolling in this clinic know both the nature of the tasks to be performed and the area of law in which they will practice.

In contrast, experienced tax attorneys wanting to enter clinical teaching cannot easily limit their representation to only tax matters, making operating clinics other than LITCs challenging. Transactional tax issues typically arise during a client's general corporate representation. The analog to a law firm is illustrative: the corporate department of a law firm handles the legal work associated with a client's legal issues arising from, for example, the client's merger with another company. The tax department of the law firm supports the firm's corporate department in that representation and in any other corporate matters that have tax concerns. While the firm's corporate department will handle the macro elements of the representation, the tax department will cover the specialized tax elements of the representation and ensure the merger is accomplished in the most tax-efficient manner.

As such, a standalone transactional tax clinic advising clients solely on tax issues would likely provide incomplete representation, given that the transactions that implicate tax issues would not (assuming the clinic addresses only tax matters) be addressed by the tax clinic. Consequently, it is difficult for tax faculty to create a standalone transactional tax clinic or live-client tax course with their tax law expertise.

3. Nonobvious Connection of Business Tax to Social Justice

To an outside observer, a clinic working solely on transactional issues, tax-based or otherwise, may not have an obvious connection to the themes of social justice that catalyzed the formation of most litiga-

¹³¹ See *supra* note 107 and accompanying text.

tion-based law school clinics. Even if the pedagogical value is clear, some law schools might be reluctant to commit resources to a clinical course that may not qualify for philanthropic funding if the connection to assisting the underserved is unclear. This general criticism of transactional clinics can also apply to specialized transactional *tax* clinics. If students are working on solely the tax issues of a client's representation, with potential clients spanning a range of entity types (nonprofits, for-profits, and everything in between), some might argue that such a course runs counter to the ideals from which clinical education originated.

Beyond the fact that they are valuable even without themes of social justice as their *raison d'être*,¹³² transactional tax clinics most assuredly *can* be powerful tools in empowering the oppressed and promoting the social justice goals commonly associated with clinical education. Through client selection, transactional tax clinics can ensure that they work with clients on projects that promote social justice.¹³³ This does not require the client to be a nonprofit, or even that the client cannot afford other representation.¹³⁴ It does require, however, that the project on which the transactional tax clinic is working is providing social value.¹³⁵ By ensuring that the clinic can provide transactional tax representation to its clients whose projects provide social value, the clinic is also furthering its desired social justice goals. In facilitating the launch or smooth operation of projects that aim to impart both economic and social value onto marginalized communities, a transactional tax clinic, such as the Practicum described in Part I, can serve an important social justice role.

¹³² See *supra* notes 92–98 and accompanying text. Despite there being value in transactional clinics without social justice goals as part of their explicit mission, the authors would not wish to lead any clinical or experiential course without having social justice as part of its mission. R

¹³³ See Ball, *supra* note 18, at 40–42; Manoj Viswanathan, *Effective Client Selection in Transactional Clinics*, 16 TENN. J. BUS. L. 389 (2015) (arguing business law clinicians must reflect on client selection because “client selection informs the nature of the legal work your students will perform” and determines the clinic identity). R

¹³⁴ A client who can afford traditional representation is, however, less likely to receive clinical representation from most business law clinics, though it may not necessarily be precluded. See, e.g., STANFORD ORGANIZATIONAL AND TRANSACTIONS CLINIC, <https://law.stanford.edu/organizations-and-transactions-clinic/clients/> (last visited Aug. 30, 2017) (representing established nonprofits that typically generate between \$1 – 75 million in revenue).

¹³⁵ “Social value” has no precise definition, but the authors use the term to connote some positive external result to the community in which the project is situated. See Robert A. Katz & Anthony Page, *Corporate Creativity: The Vermont L3C & Other Developments in Social Entrepreneurship: The ROLE of Social Enterprise*, 35 VT. L. REV. 59, 87–88 (2010) (using social value and social purpose interchangeably to describe those positive societal externalities that are broader than the legal definition of “charitable”).

III. THE FUTURE OF BUSINESS LAW PEDAGOGY

Our experiences have raised several questions—structural and normative—about how to effectively operate a transactional tax clinical course. We believe that the challenges of establishing a transactional tax clinic—paucity of clinician expertise, difficulty in operating a standalone transactional tax clinic, and the nonobvious connection between business tax and social justice—are addressed by our design of the Practicum.¹³⁶ This Section addresses the questions we have contemplated, including those related to SEEE Clinic and Practicum synergies, access to justice, and the truncated clinical experience offered by a three-credit course.¹³⁷

Although there is a wealth of clinical education scholarship, few articles discuss clinic design in the transactional law context.¹³⁸ Thus, we have documented the structure and strategy behind the design of the Practicum so that future business law clinicians and doctrinal faculty can use this example as a starting point for systematically considering how to incorporate a transactional tax component into their existing clinical program. As schools adjust to comply with new ABA accreditation standards¹³⁹ and state bar regulations requiring experiential courses for admission to practice law,¹⁴⁰ law schools should be contemplating how best to expand transactional experiential offerings to business-oriented students. In addition to faculty resources, student demand, and client need, clinicians should also consider the pedagogical benefits of a one-firm—corporate department and tax department—practicum-clinic model. In this section, we address what the experience of operating the Practicum has revealed regarding students' understanding of complex tax issues and their role in working towards justice gap solutions. We also extrapolate insights from our experience that can be applied to structuring clinical courses for other areas of transactional practice that are underrepresented in legal

¹³⁶ See *supra* Part I.C.

¹³⁷ See *supra* Part I.C.2.

¹³⁸ See Crowder, *supra* note 85. *But see* Stephen R. Miller, *Field Notes From Starting a Law School Clinic*, 20 CLIN. L. REV. 137 (2013) (describing the establishment of clinic that focuses on land use law, administrative law, state and local government law, and environmental law); and Philip G. Schrag, *Constructing a Clinic*, 2 CLIN. L. REV. 175 (1996) (discussing the construction and design of an asylum law clinic).

¹³⁹ See ABA STANDARDS, *supra* note 23, at 303(a)(3). See also *infra* note 162 for discussion on ABA accreditation standards on experiential learning courses.

¹⁴⁰ The Trustees of the State Bar of California unanimously adopted a proposal of the Task Force on Admissions Regulation Reform (“TFARR”) requiring applicants to have completed 15 credits of experiential education prior to sitting for the California Bar. See TFARR: PHASE I FINAL REPORT 24 (Jun. 24, 2013), http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf.

R

R

education.

A. Promoting Student Learning

1. Working with Non-Tax Attorneys

“Most law school work is done individually and usually competitively, but real legal work is usually done cooperatively in small groups” of repeat players.¹⁴¹ This is particularly true for business tax attorneys who, with few exceptions, rely on a larger corporate practice to advise entity clients on the non-tax aspects of their transactions.¹⁴² We deliberately structured the course to require Practicum students to learn how to best collaborate with the corporate students.¹⁴³ We anticipated that it would take some time for Practicum students to determine how to work with non-tax oriented students to achieve client goals effectively.¹⁴⁴ In implementing the Practicum, we find that a significant portion of our supervision meetings is spent counseling students on how to work effectively across practice areas. Students are hesitant to initiate contact and establish working relationships outside of their assigned subject matter partners. By confronting their hesitancy and developing collaboration skills, Practicum students are experiencing the dissonance between their previous legal education and what their employer will expect of them in practice.¹⁴⁵

In these conversations with students, it is instructive to remind them that our practicum-clinic model is not an artificial structure of legal practice. “Law students must be able to communicate with cli-

¹⁴¹ Schrag, *supra* note 138, at 181.

¹⁴² Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 245 n. 9 (1984) (explaining that transactional lawyers regularly engage in “joint problem solving in which, through cooperation, the size of the pie, and hence the size of the piece received by each party, can be increased.”); and Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *VAND. L. REV.* 515, 516 (2007) [hereinafter *The Law School Matrix*] (“Law school has too little to do with what lawyers actually do and offers too little of the institutional, interpersonal, and investigative capacities that good lawyering requires.”).

¹⁴³ Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 *MINN. L. REV.* 697 (1988) (analyzing task-sharing among lawyer teams and concluding that lawyer teams sufficiently divide work and responsibilities); Catherine Gage O’Grady, *Preparing Students for the Profession: Clinical Education, Collaborative Pedagogy, and the Realities of Practice for the New Lawyer*, 4 *CLIN. L. REV.* 485 (1998) (making the case for autonomous development of lawyering skills in hierarchical teams).

¹⁴⁴ See *The Law School Matrix*, *supra* note 142 (arguing competition not collaboration as a core component of legal education); and Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in Law School Curriculum*, 31 *ARIZ. ST. L.J.* 957, 972 (1999) (“The traditional American educational goal structure is based upon competition among students.”).

¹⁴⁵ See Alex M. Johnson, *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 *S. CAL. L. REV.* 1231 (1991).

R

R

ents, work on teams, and manage projects to succeed.”¹⁴⁶ Lawyers accomplish their work by regularly collaborating with others, whether it be with clients, other lawyers, counterparties, or other third parties; thus, effective communication and negotiation is “a process we need to pay more attention to in our teaching, learning, and self-evaluation.”¹⁴⁷ Requiring tax students and corporate students to listen to and learn from each other develops a professional skill they may not have acquired in law school but for our course.

2. *Understanding Justice and Professional Identity*

Integral to the SEEE Clinic is its commitment to advancing economic justice and empowerment in marginalized communities in the San Francisco Bay Area. We prioritize working with clients located in low-income communities and otherwise promoting the interests of subordinated populations. Thus, students in the Practicum are not only working outside of their comfort zone by collaborating with corporate students but also explicitly working to address disenfranchisement and other social injustices. For many of our students, the Practicum is their first exposure to applying transactional tax law to advancing economic or social justice issues. As Professor Philip Schrag has noted, “many lawyers do not realize how much power they have to achieve their vision of a just society, and others have not allowed themselves the luxury of asking what kind of society they would like to help produce.”¹⁴⁸ Thus, the experience of providing tax counsel to social enterprises can be transformative for a law student’s professional development, as it may provide a first glimpse of how business tax counsel can help close the access-to-justice gap.

Regardless of students’ ultimate career goals, participating in the Practicum can be helpful in developing their critical thinking and professional identity.¹⁴⁹ When legal education fails to interrogate legal doctrine, students learn that those laws are fair, neutral, and should not be challenged.¹⁵⁰ However, working with social enterprises also helps us achieve an important teaching goal of allowing the Practicum students to investigate their unconscious assumptions and beliefs

¹⁴⁶ See Friedland, *supra* note 59, at 214–15.

¹⁴⁷ Carrie J. Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 905 (2000).

¹⁴⁸ Schrag, *supra* note 138, at 183.

¹⁴⁹ See Heather M. Field, *Fostering Ethical Professional Identity in Tax: Using the Traditional Tax Classroom*, 8 COLUM. J. TAX. L. 215, 225 (2017) (“No law student can graduate law school with fully formed professional identity and perfect judgment, but law schools can help students understand how to develop these skills and attributes over the course of their careers.”).

¹⁵⁰ See Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*, 10 HASTINGS RACE & POVERTY L.J. 219 (2013).

R

R

about tax law. More importantly, we want students to envision the construction of justice and acknowledge their participation in status quo inequality. By engaging our students in questioning the tax policies of social enterprises, we are asking them to wrestle with the social, political, and economic underpinnings of business tax.¹⁵¹ Working alongside their social enterprise clients, our tax students are witnessing, perhaps for the first time, that their client's legal issues do not necessarily arise from their client's failure to take appropriate actions, but these problems "are symptoms of larger failings in the structure of society itself."¹⁵²

Increasing access to justice should be an imperative for legal institutions and law schools.¹⁵³ Low-income and marginalized clients do not simply need access to lawyers, but specifically to the kinds of lawyers that take the time to know and respect them and provide contextualized information that applies to their lived experiences.¹⁵⁴ Therefore, the work of legal institutions is not to merely provide information but to participate in the project of restoring dignity, often deprived because of the experience of poverty and subordination, to low-income individuals and marginalized populations.¹⁵⁵ Practicum students engage in the process of advancing justice through their tax counsel, and the course reaffirms our law school's commitment to closing the access-to-justice gap.¹⁵⁶

¹⁵¹ See Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365, 384 (1998) (arguing "the apolitical nature of tax scholarship, while responsible for much of the coherence and majesty of the field, seems increasingly out of touch with the remainder of the academy.").

¹⁵² Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLIN. L. REV. 195, 197 (2002).

¹⁵³ See Jonathan Lippman, Matthew Diller & David Udell, *Law Schools Must Focus on Access to Justice*, THE NAT'L L.J. (Sept. 26, 2016), <http://www.nationallawjournal.com/id=1202768467294?slreturn=20160827195803> ("Teaching the next generation of lawyers the values, knowledge and skills needed to deliver on the promise of access to justice is paramount.").

¹⁵⁴ See Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISC. 140 (2014) (proposing law school develop course to train law students in cultural competency); and Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication through Case Supervision in a Client-Service Legal Clinic*, 28 WASH. U. J. L. & POL'Y 37 (2008).

¹⁵⁵ See Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLIN. L. REV. 557, 570 (1999).

¹⁵⁶ See UC HASTINGS SEAL, <http://www.uchastings.edu/news/identity-standards/logo-seal-lockup.php> (last visited Aug. 30, 2017) ("Fiat justitia," translated from Latin as "let justice be done").

3. *Limiting the Scope of Student Autonomy to Increase Student Learning*

There are several reasons why we limit the scope of legal representation in the Practicum. Generally, clinical education provides students a large amount of independence and freedom to make strategic decisions within the representation. Students may even be involved in the client matter selection process by helping the client prioritize what projects the clinic will complete that semester. This degree of student autonomy and flexibility distinguishes clinical education from simulation courses and externships where students are likely working to assist, but not lead, a client matter. In simulation courses, faculty typically give students a finite universe of facts within which to explore. The finite facts limit the possibilities of the hypothetical client's outcomes and, by extension, can limit the student's creativity and problem-solving process. Moreover, in practice, junior associates at law firms may be too myopic to develop creative solutions to client issues¹⁵⁷ or are given discrete tasks within large, complicated transactions that confine their ability to think critically and test the limits of their understanding.¹⁵⁸

Clinical education is, thus, a unique universe where the student attorney is given the complications and complexity of real life,¹⁵⁹ but within a supportive learning environment where the supervising attorney is also a faculty member trained to foster adult learning through

¹⁵⁷ See Weinberg & Heine, *supra* note 73, at 40 (noting the commonly documented criticism from Silicon Valley general counsels that corporate lawyers “focus too intently on the details of a contract, but overlook the bigger picture of deal value; lawyers shy away from risk at the expense of business opportunity; and lawyers fail to integrate other disciplines, such as finance or public relations, into their legal strategies”); Goodman, *supra* note 62 (“Creativity is another critical aspect of helping the client achieve its business goals. To be truly successful, you must be creative . . . to think ‘out of the box.’”).

¹⁵⁸ See Catherine Gage O’Grady, *Cognitive Optimism and Professional Pessimism in the Large-Firm Practice of Law: The Optimistic Associate*, 20 *LAW & PSYCHOL. REV.* 23, 49 (2006) (“Large or complex cases, however, are intricately staffed. They typically require working teams consisting of a supervising attorney, at least one mid-level associate, and several junior associates. Each member of the team play[s] a unique role in the management of the case, and work is typically allocated in hierarchical and bureaucratic ways.”); WILLIAM R. KEATES, *PROCEED WITH CAUTION—A DIARY OF THE FIRST YEAR AT ONE OF AMERICA’S LARGEST, MOST PRESTIGIOUS LAW FIRM* 49 (1997) (“With their greater experience, mid-level associates can discuss overall case strategy with the supervising attorney and then decide how to delegate work to the junior associates on the case. That frees up supervising attorneys from routine case management so they can focus on issues that require their expertise.”).

¹⁵⁹ See Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community-Economic Development Clinic*, 9 *CLIN. L. REV.* 45 (2002) (discussing student learning as managing ambiguity and complexity); and Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 *VT. L. REV.* 1, 14 (1998) (“Cognitive scientists call hard problems, like lawyering problems, ‘ill-structured’ problems.”).

critical thinking and assessment. Clinicians inform their students they will make mistakes given their inexperience and encourage students to try out new ideas with their peers under the supervision of the clinician. But to exercise the autonomy of the position, many would argue, students need a significant amount of ownership over the client matter to truly understand and take the responsibility of thinking through the potential options.

For various reasons, we could not design a clinical experience that provided the Practicum students with the same range of ill-structured client matters that students typically encounter in clinics. Paramount among the considerations were the limitations on faculty resources. Our tax faculty director is not available year-around to assist with ongoing tax matters. Thus, students in the Practicum would need to be assigned to matters that we were reasonably confident could be addressed in the timeframe of the semester. As such, we operate within the time constraint of one academic semester. This requires that the Practicum students hit the ground running at the beginning of the semester.

To accommodate this, we have been very involved in selecting not only the clients but also the specific tax matters that we will accept for representation. This means that Practicum students start the semester with a clearly defined matter. While it is always possible that the client matter will change with evolving client circumstances, we are more directive with what the Practicum students are expected to accomplish during that semester than we are with the SEEE Clinic students. Our concern was that limiting the universe of student practice might also limit their creativity and, by extension, the development of their problem-solving skills, but that has not been our experience with the course. We believe that other aspects of the course help to balance this limited scope of representation to provide students with opportunities for creativity and metacognitive growth.

Although Practicum assignments are generally defined when the students start the semester, the Practicum students have access to the various other issues the client is contemporaneously facing because they are working alongside the SEEE Clinic students assigned to the same client. The information sharing between the corporate and tax students both during informal student meetings in the clinic working space and formal settings, like case rounds or client meetings, contributes to expanding the Practicum students' thinking about the client matter.

The transformative power of clinical education often occurs as a result of critical analysis that is captured and memorialized through reflective written essays or memoranda. In limiting the credits for the

Practicum, we also made the difficult decision to focus on client work at the expense of assigning reflective writing assignments. This notwithstanding, Practicum students are required to evaluate their performance at the middle of the semester and at the end of the semester memorialize their lawyering decisions, representation outcomes, and lessons learned in a client transfer memo that they write collaboratively with the corporate students in the SEEE Clinic. We find that, while their legal matters are more discrete, the amount of time they have over the course of the semester to reflect on their actions and learning experiences, when combined with the cumulative writing requirement at the end of the semester, pushes their capacity for a three-credit course.

B. Implications for Underrepresented Transactional Practices

We were motivated to launch the Practicum to more capably represent our existing social enterprise clients and because the taxation of social enterprises is an evolving and fascinating area of law. The Practicum permits students to reexamine dominant theories of business tax and allows them to consider how different tax policies could encourage the growth of the social enterprise sector. As a result, the Practicum has the blend of intellectual reflection and advancement of client objectives that clinicians seek to achieve in curating a learning ecology for their students. Although we believe that transactional tax is an especially compelling subject area ripe for expanded clinical offerings,¹⁶⁰ the lessons students learn through the design of the Practicum apply to various other underrepresented transactional practices in clinical education that deserve future consideration by business law clinicians and doctrinal faculty.

The practicum-clinic model described in this Article—where students hone their knowledge and understanding of a specific substantive area of law while they work alongside generalist corporate law students—can be used to create other specialized transactional clinical opportunities at law schools across the country.¹⁶¹ As law schools expand and refine their clinical programs to meet the demands of new ABA requirements for accredited law schools to provide students at least six units of experiential learning opportunities,¹⁶² our practicum-

¹⁶⁰ See generally *supra* Part II.

¹⁶¹ Although it is beyond the scope of this Article, we recognize that clinicians could use the practicum-clinic model in litigation and other advocacy clinical courses as well to increase holistic client representation and invite additional scholarship about how that could function in practice.

¹⁶² Prior to 2014, law schools seeking ABA accreditation needed to offer “substantial opportunities for . . . live-client . . . experiences.” In response to continued criticism about law student graduates’ lack of practice readiness and various reports linking experiential

clinic model can be used to innovate new practice areas that address client needs,¹⁶³ align with doctrinal priorities, and respond to student interest.¹⁶⁴ The following are examples of transactional practicum-clinic models that clinical and doctrinal faculty could implement where a general business law clinic exists. Because many general business law clinics already accept client matters within these practice areas,¹⁶⁵ developing a specialized practicum to allow students to focus their interests should not unduly strain the clinical program and would likely increase the clinic's value to existing clients.¹⁶⁶ There is flexibility in the number of credits and class size for the following practicum course examples; thus, the credit allocation and other specifics would

education to the understanding of legal doctrine, the ABA revised their accreditation standards to require law students to complete six credits of experiential education prior to graduation. *See* ABA STANDARDS, *supra* note 23, at 303(a)(3); A.B.A. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, EXPLANATION OF CHANGES 7 (2014); A.B.A., REPORT AND RECOMMENDATION OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS (1979) (proposing law school curricula include professional experiences); A.B.A., TASK FORCE ON PROFESSIONAL COMPETENCE (1983) (recommending the ABA make lawyering skills a top priority); MACCRATE REPORT, *supra* note 54, at 268 (recommending law schools “develop or expand instruction” in fundamental lawyering skills and professional values); A.B.A., TASK FORCE ON THE FUTURE OF LEGAL EDUCATION REPORT AND RECOMMENDATION 3 (reiterating that the “balance between doctrinal instruction and focused preparation for the delivery of legal services needs to shift still further towards [the latter].”). In addition to the ABA required experiential learning courses, the Trustees of the State Bar of California unanimously adopted a proposal of the Task Force on Admissions Regulation Reform (“TFARR”) requiring applicants to have completed 15 credits of experiential education prior to sitting for the California Bar. *See* TFARR: PHASE I FINAL REPORT, *supra* note 140, at 24.

¹⁶³ *See* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1475 (1998) (“With substantial reductions in federal funding for legal services to the poor, coupled with the unprecedented dismantling of the American safety net, the need for clinical programs to help address pervasive unmet legal needs has scarcely been greater.”).

¹⁶⁴ *See* LSAC REPORT 12 (May 2013), [http://www.lsac.org/docs/default-source/publications-\(lsac-resources\)/may_2013_lsr.pdf](http://www.lsac.org/docs/default-source/publications-(lsac-resources)/may_2013_lsr.pdf) (finding experiential offerings the fourth most determinative factor students apply to and select a law school placing opportunities for experiential learning above the law school's reputation and tuition cost in student decision-making).

¹⁶⁵ *See* ALICIA ALVAREZ & PAUL R. TREMBLAY, INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE 6–8 (2013) (identifying the types of legal practice law students may encounter in a transactional legal clinic including real estate matters, business tax issues, employment law, and intellectual property within the list).

¹⁶⁶ The practicum-clinic model addresses the concerns a clinician might have regarding the quantity of practice areas covered in the transactional law limiting the student-attorney's effectiveness. *See* Fan, *supra* note 82, at 347–48 (“[B]y covering a number of different areas, one could argue that it is difficult to cover every area well. Having only a basic understanding in multiple areas as opposed to a deeper understanding of one area may be challenging for a student as she heads into the job market, particularly if it is during a time when the economy is doing poorly and jobs for attorneys are scarce.”). The practicum-clinic model provides the students exposure and understanding for the broader transactional context of the client, without compromising the opportunity to develop depth in a specialized practice area.

R

R

have to fit within the constraints of faculty availability to provide the doctrinal foundation on the relevant areas of law and supervise the client matters.¹⁶⁷

1. *Real Estate*

Many transactional representations involve real estate law. Business entities frequently sign leases, rent commercial space, or purchase property. While a standalone clinic that engages exclusively in complicated real estate transactions—e.g., real estate finance transactions¹⁶⁸—is an option, it may not be feasible for a variety of reasons at many law schools. Thus, business law clinicians should consider developing a real estate practicum dedicated to advising entity clients on real estate matters. To the extent there exists a cohort of law students interested in real estate and who want to obtain live-client experience, a real estate practicum is a viable option, provided that the clinician can assure a somewhat regular stream of real estate work from the corporate representation through the general transactional clinic. While business law clinics routinely take on real estate matters for their entity clients, the clinician would need to structure the client selection so that a sufficiency of real estate matters is in the client docket.

2. *Intellectual Property*

Similarly, an intellectual property practicum could be incorporated into a general corporate clinic.¹⁶⁹ Issues relating to trademarks, licensing, privacy, and fair use often arise during the representation of clients with artistic pursuits¹⁷⁰ or technology companies.¹⁷¹ The quan-

¹⁶⁷ See Nantiya Ruan, *Student, Esquire: The Practice of Law in the Collaborative Classroom*, 20 CLIN. L. REV. 429, 430 (2014) (“Faculty at law schools across the country are leaving their silos and collaborating with one another to provide experiential learning opportunities that incorporate client work into the learning of the class.”).

¹⁶⁸ See, e.g., HARRISON HOUSING CLINIC, GEORGETOWN UNIVERSITY LAW CENTER <https://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/HIHC/> (last visited Aug. 30, 2017) (advising tenant organizations on acquisitions of their multi-unit apartment buildings and low-income housing cooperatives refinance and rehabilitate affordable housing units).

¹⁶⁹ See Christine Haight Farley, Peter Jaszi, Victoria Phillips, Joshua Sarnoff, & Ann Shalleck, *Clinical Legal Education and the Public Interest in Intellectual Property Law*, 52 ST. LOUIS U. L.J. 735, 735 (2008) (“Clinical legal education provides a powerful methodology for students to learn about the relationships among intellectual property law theories, policies and practices; to encounter the experiences of persons who seek protection or who feel the legal regimes of intellectual property impinging on their ability to engage in educational, creative, innovative, and culturally significant work; and to develop as a lawyer.”).

¹⁷⁰ The Indie Film Clinic at Cardozo Law, for example, “provides free legal services to filmmakers producing independent, documentary, and student films and to artists providing services in independent and documentary film.” *Indie Film Clinic*, BENJAMIN N. CARDOZO SCHOOL OF LAW, <http://www.cardozo.yu.edu/indiefilmclinic> (last visited Aug. 30,

tity of legal issues related to intellectual property is likely to be sufficient to sustain a practicum model.¹⁷² Indeed, several clinics that provide intellectual property representation do so as a standalone clinic.¹⁷³ Thus, issues of insufficient client matter volume are unlikely. As discussed previously, it is rare for transactional representation to adequately meet all of a client's legal needs without also providing general corporate representation.¹⁷⁴ While a standalone intellectual property clinic can work well in some academic settings,¹⁷⁵ integrating intellectual property representation with a more holistic representation of the entity client would be beneficial to both the clients and student lawyers.¹⁷⁶ Although student interest in experiential intellectual property courses is likely high,¹⁷⁷ many law schools are not in a position to hire a faculty member dedicated to maintaining an intellectual property clinical program. In that case, in particular, the practicum-clinic model can be a particularly effective method of achieving the dual goals of expanding access to justice for entity clients and deepening student learning in their articulated priority areas of learning. While the general corporate clinician provides overall supervision of the client representation, a doctrinal professor can instruct and supervise the practicum students on their distinct intellectual property client matters.¹⁷⁸

2017).

¹⁷¹ See, e.g., USC INTELLECTUAL PROPERTY & TECHNOLOGY LAW CLINIC, <http://iptlc.usc.edu/> (last visited Aug. 30, 2017).

¹⁷² Small companies, even technology-based companies, may not identify intellectual property matters as high priority legal needs, which is one reason why providing intellectual property representation in conjunction with other corporate counsel may work best from the client's perspective.

¹⁷³ See, e.g., DETKIN INTELLECTUAL PROPERTY & TECHNOLOGY LEGAL CLINIC, University of Pennsylvania Law School, <https://www.law.upenn.edu/clinic/intellectualproperty/> (last visited Aug. 30, 2017).

¹⁷⁴ See *supra* Part II.B.2 (describing the difficulty in operating a standalone transactional tax clinic).

¹⁷⁵ See Fan, *supra* note 82, at 332 n.16 (identifying ten law schools within the USTPO certification program that have standalone intellectual property clinics including American University Washington College of Law, Case Western Reserve University School of Law, Fordham University School of Law, Lincoln Law School of San Jose, Rutgers University School of Law–Newark, University of California at Los Angeles School of Law, University of Maryland Francis King Carey School of Law, University of San Francisco School of Law, Vanderbilt University Law School, and William Mitchell College of Law).

¹⁷⁶ See *id.* at 346–47 (describing the benefits to students and clients of taking “a comprehensive perspective of IP law within a transactional law setting”).

¹⁷⁷ See Sara K. Stadler, *The Bulls and Bears of Law Teaching*, 63 WASH. & LEE L. REV. 25, 56–58 (2006) (empirically demonstrating that student interest in intellectual property has far exceeded the faculty supply to teach those courses since at least 1946, with a resurgence in student interest in the early 2000s, concluding “[s]tudents love intellectual property law because it is inherently interesting, which is not something one can say about every subject taught in law school”).

¹⁷⁸ Not every doctrinal professor who writes and teaches in the areas of intellectual

3. Employment

Perhaps second only to transactional tax issues, employment-related matters often arise when representing businesses and can be particularly complicated in the context of social enterprises.¹⁷⁹ Our clients often have employment related matters that fall within the traditional transactional scope on which the SEEE Clinic will advise. Some issues, however, involve a deeper analysis of employment law that is outside of our subject matter expertise; thus, we will not take on these employment law matters.¹⁸⁰ With the supervision of a qualified faculty member, however, a dedicated group of employment law-focused students could address these client matters. This is especially valuable given that jobs in employment law are increasingly focused on representing the employer.¹⁸¹

In the context of social enterprises and the midst of the “sharing economy,”¹⁸² determining the difference between an employee and an independent contractor,¹⁸³ for example, can be particularly difficult and pose significant implications on the company’s overall business model.¹⁸⁴ These are client matters for which employment law students

property—or any of the other specialized areas of law mentioned herein—will have the practice experience or state bar licensure necessary to provide supervision on client matters. See Gilson, *supra* note 142, at 304 (acknowledging that law professors often “lack practical legal experience” in areas of transactional practice). Notwithstanding many candidates on the legal market do have practice experience, and law schools may want to consider that experience as an asset that would allow the institution to innovate its curriculum. See also Fan, *supra* note 82, at 349–51 (outlining four alternative models for structuring the faculty components of an intellectual property clinical course including working with staff attorneys and adjunct professors).

¹⁷⁹ JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY 367 (2012) (“[O]ur employment law framework may be one of the greatest barriers to the creation of more cooperative and sustainable economies.”); Ann C. McGinley, *Functionality or Formalism—Partners and Shareholders as Employees under the Anti-Discrimination Laws*, 57 S.M.U L. REV. 3 (2004) (explaining how presumptive employment laws can complicate cooperatively owned businesses).

¹⁸⁰ For example, we would not take on client matters regarding immigration counseling related to foreign-born employees, which is increasingly an issue for employers. See Alice Armitage, Evan Frondorf, Christopher Williams, & Robin Feldman, *Startups and Unmet Legal Needs*, 4 UTAH L. REV. 575, 589–92 (2016).

¹⁸¹ See Rachel S. Arnow-Richman, *Employment as Transaction*, 39 SETON HALL L. REV. 447, 450 (2009) (“In recent decades, the employment law field has migrated away from its public law tradition toward a model in which private ordering holds significant sway.”).

¹⁸² See ORSI *supra* note 179, at 2 (characterizing the “sharing economy” as the new economy that “facilitates community ownership, localized production, sharing, cooperation, small-scale enterprise, and the regeneration of economic and natural abundance.”)

¹⁸³ See Veena Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CAL. L. REV. 101 (2017) (discussing the complexities in determining the legal classification of “employee” or “independent contractor” and documenting how these doctrinal definitions are fiercely contested in the on-demand economy).

¹⁸⁴ See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C.

R

R

R

could conduct the legal research and analysis, counsel the client on appropriate next steps given the legal analysis, and then work in conjunction with the corporate law students to draft the subsequent employment contracts or independent contractor agreements.¹⁸⁵ Other employment-related transactions include forming a worker-owned cooperative or advising on and drafting employee incentive plans, invention assignment agreements, employment manuals, nondiscrimination policies, as well as worker compensation policies. In this way, employment law-oriented students would be learning the substantive law in a clinical program that more closely resembles their practice post law school, while their employer clients would be gaining valuable legal insight on how to structure their workplace to prevent the types of incidents that would otherwise come into a clinical program as a dispute. The results of this preventative legal counseling—consistent with the ethos of transactional lawyering generally—could have tremendous benefits not only for the employers¹⁸⁶ but also their employees,¹⁸⁷ who have a right to a work environment compliant with state and federal labor laws.¹⁸⁸ Because many social enterprises advance their social mission through the individuals they intentionally employ,¹⁸⁹ business law clinics should anticipate employment-related transactions. Thus, a business law clinic that works specifically with social enterprises could consider developing its employment law capacity. However, the tangible impact of an employment practicum within a general business law clinic would be beneficial across a wide

DAVIS L. REV. 1511, 1514 (2016) (“If saddled with th[e] costs . . . [of] payroll taxes, workers’ compensation insurance, health care, minimum wage, overtime, and the reimbursement of business-related expenses . . . the on-demand business model might not survive, at least not in its current form.”).

¹⁸⁵ While California authority does not hold the independent contractor agreement as dispositive requiring the court to assess the actual work duties (among other factors) when classifying an individual as an independent contractor or actual employee, drafting and executing the independent contractor agreement is critical to allowing the parties to document the terms of the relationship and establish expectations for the work product.

¹⁸⁶ See *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 545 (1999) (creating a safe harbor from punitive damages for employers if they “adopt anti-discrimination policies and . . . educate their personnel on Title VII’s prohibitions.”).

¹⁸⁷ See Rachel Arnow-Richman, *The Role of Contract in the Modern Employment Relationship*, 10 TEX. WESLEYAN L. REV. 1, 4–5 (2003) (arguing “that the law of employment contracts is highly idiosyncratic . . . [and, thus,] remains a puzzle, unresolved on key issues that greatly affect workers’ lives.”).

¹⁸⁸ See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1544 (2016) (“[T]he working poor, as a group, are disproportionately more likely to experience abusive employment practices than their better-off counterparts.”).

¹⁸⁹ See, e.g., GOODWILL INDUSTRIES INC., <http://www.goodwill.org/about-us/> (last visited Aug. 30, 2017) (pioneering programs in work force development and employing marginalized individuals since the early 1900s).

variety of companies and business sectors, and not just social enterprises.

4. Fair Chance

A slightly different transactional practice amenable to a specialized area of law is a practicum devoted to addressing the institutional barriers of criminal record collateral consequences. Many law schools and, by extension, many clinical programs, are located in proximity to low-income communities.¹⁹⁰ The effects of mass criminalization,¹⁹¹ mass incarceration,¹⁹² and routine adversarial interactions with the criminal justice system¹⁹³ are acute issues within low-income communities.¹⁹⁴ The collateral consequences of criminal convictions exacerbate the limited opportunities for low-income individuals to find living-wage employment.¹⁹⁵ This compounded effect of criminal record status, non-dischargeable penal debt,¹⁹⁶ and pre-existing poverty

¹⁹⁰ See HENRY LOUIS TAYLOR, JR. & GAVIN LUTER, ANCHOR INST. TASK FORCE, ANCHOR INSTITUTIONS: AN INTERPRETIVE REVIEW ESSAY 2-4 (2013), http://www.margainc.com/files_images/general/Literature_Review_2013.pdf (describing the historical context of “institutions step[ing] forward as the ‘anchors’ of their communities, particularly institutions of higher education and academic medical centers”); Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 346–48 (2009).

¹⁹¹ See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017); Floyd v. City of New York, 2014 WL 3765729 (S.D.N.Y. 2014); Floyd v. City of New York, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1319 (2012) (“At the bottom, where defendants are poorest and offenses pettiest, the criminal process is badly detached from the core legitimating precept of individual fault.”).

¹⁹² See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 98–100 (2010).

¹⁹³ See generally Paul Butler, *Stop and Frisk and Torture-Lite: Police Terror of Minority Communities*, 12 OHIO ST. J. CRIM. L. 57 (2014) (describing police officer initiated interactions with African Americans where force is routinely employed); see, e.g., Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), <http://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html> (“In a 13-year span, Philando Castile was pulled over by the police in the Minneapolis-St. Paul region at least 49 times, an average of about once every three months, often for minor infractions.”); and Matt Apuzzo, *Ferguson Police Routinely Violate Rights of Blacks, Justice Dept. Finds*, N.Y. TIMES (Mar. 3, 2015), <http://www.nytimes.com/2015/03/04/us/justice-department-finds-pattern-of-police-bias-and-excessive-force-in-ferguson.html> (noting arrests of black residents “accounted for 85 percent of traffic stops, 90 percent of tickets and 93 percent of arrests.”).

¹⁹⁴ See *Chapter One: Policing for Profit*, 128 HARV. L. REV. 1723 (2015).

¹⁹⁵ See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 590 (2006) (explaining that collateral consequences of criminal convictions “relegate ex-offenders to the margins of legitimate society”).

¹⁹⁶ See Abbye Atkinson, *Consumer Bankruptcy, Nondischargeability, and Penal Debt*, 70 VAND. L. REV. 917, 928 (2017) (defining penal debt non-dischargeable in bankruptcy).

increases the likelihood individuals will earn income through the informal economy and makes them even more visible and, thus, vulnerable to future police interactions.¹⁹⁷

The highly publicized killings of unarmed individuals of color in police interactions¹⁹⁸ and the subsequent social unrest¹⁹⁹ those deaths have heightened law students' willingness and desire to use their newly acquired legal knowledge to address these issues.²⁰⁰ Most law students interested in "reentry lawyering"—anti-subordination lawyering that works alongside incarcerated individuals or individuals with criminal records who are integrating back into their community²⁰¹—will have a criminal practice clinic as their only clinical option that engages reentry issues. Few law schools have a clinical course that focuses exclusively on reentry legal issues.²⁰² But, even there, the economic isolation of low-income individuals that often contributes to their criminal record status may not be affirmatively addressed in these clinical spaces.²⁰³ These few reentry clinics provide individual representation—not structural redress or institutional reform—to as-

proceedings as "debt stemming from civil and criminal penalties and fines, prosecution costs, court fees, usage fees, [restitution] and interest").

¹⁹⁷ See Valerie Richardson, *Garner's Widow: Husband Targeted for Illegally Selling Cigarettes, Not His Race*, THE WASH. TIMES (Dec. 7, 2014), <http://www.washingtontimes.com/news/2014/dec/7/garners-widow-says-husband-was-targeted-illegally-/>.

¹⁹⁸ See Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CAL. L. REV. 125 (2017) (characterizing 2014/15 as a "watershed moment in the history of U.S. race relations."); *People Shot Dead by Police in 2015*, THE WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Aug. 30, 2017).

¹⁹⁹ See, e.g., Richard Fausset & Alan Blinder, *Man Is Shot in Charlotte as Unrest Stretches to Second Night*, N.Y. TIMES (Sept. 21, 2016), <http://www.nytimes.com/2016/09/22/us/keith-scott-charlotte-police-shooting.html>.

²⁰⁰ See Scott L. Cummings, *Teaching Movements*, 65 J. LEGAL EDUC. 374 (2015) (noting student engagement and desire to address contemporary anti-Black police violence); and Karen Sloan, *Law School Courses Delve into Racial Strife*, LAW.COM (Sept. 23, 2016), <http://www.law.com/sites/almstaff/2016/09/23/law-school-courses-delve-into-racial-strife/> (describing criminal law course taught by Amna Akbar requiring students to observe court proceedings and connect their conversations to contemporary issues of racial inequality).

²⁰¹ See Alina S. Ball, *An Imperative Redefinition of "Community": Incorporating Reentry Lawyers to Increase the Efficacy of Community Economic Development Initiatives*, 55 UCLA L. REV. 1883, 1892 (2008) (providing "reentry lawyer" definition).

²⁰² See, e.g., *Reentry Clinic*, University of Maryland Francis King Carey School of Law, http://www.law.umaryland.edu/academics/program/curriculum/catalog/course_details.html?courseum=598d (last visited Aug. 30, 2017). See also *Reentry Legal Clinic*, UNIVERSITY OF CALIFORNIA, LOS ANGELES, <https://law.ucla.edu/student-life/student-organizations/el-centro-legal-clinics/reentry-legal-clinic/> (last visited Aug. 30, 2017) (non-curricular opportunity for UCLA law students to engage in supervised, limited representation on reentry issues).

²⁰³ Joseph Shapiro, *Jail Time For Unpaid Court Fines And Fees Can Create Cycle Of Poverty*, NPR (Feb. 9, 2015), <http://www.npr.org/sections/codeswitch/2015/02/09/384968360/jail-time-for-unpaid-court-fines-and-fees-can-create-cycle-of-poverty>.

sist returning citizens with much needed support as they file for record expungement and applications for employment and licensures.²⁰⁴

A business law clinic, on the other hand, could take on the responsibility of helping to shift the tides of structural and institutional barriers to reentry post incarceration.²⁰⁵ The business law clinic could select a semester to fill its client docket with businesses that intersect with reentry communities and populations. For example, under President Obama's Administration, the White House launched the Fair Chance Business Pledge,²⁰⁶ where businesses commit to providing individuals with criminal records an equal opportunity to employment or offering services to individuals with criminal records. Business law clinics could select business clients²⁰⁷ that have either taken the Fair Chance Business Pledge or would satisfy the pledge's standards (collectively, "Fair Chance clients") and advise these Fair Chance clients on corporate and transactional matters. Working alongside the corporate students, a dedicated group of law students with interest in researching the collateral consequences of criminal convictions could advise the same Fair Chance clients on various aspects of how criminal conviction status may intersect with employment or business issues. For example, within this practicum-clinic model, students could advise a business client on how to revise vendor contracts to address customer concerns for security but not jeopardize the client's mission to employ individuals with criminal records or subject those employees to unnecessary background checks at the customer's demand. The corporate work would be the contract drafting and negotiation strategy after the reentry student lawyers have identified and researched the impacts of such a provision. Another example where reentry issues and corporate issues overlap may be a categorical disqualification for board or officer positions based on a felony conviction within the en-

²⁰⁴ See, e.g., *Criminal Defense and Reentry Clinic*, NEW YORK UNIVERSITY SCHOOL OF LAW, <http://www.law.nyu.edu/academics/clinics/year/criminaldefense> (last visited Aug. 30, 2017); and *Neighborhood Law & Policy Clinic*, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, <https://www.law.gwu.edu/neighborhood-law-policy-clinic> (last visited Aug. 30, 2017).

²⁰⁵ See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990) ("Institutions . . . structure incentives in human exchange Institutional change shapes the way societies evolve through time and hence is the key to understanding historical change.").

²⁰⁶ See *White House Fair Chance Pledge*, THE WHITE HOUSE, <https://obamawhitehouse.archives.gov/the-press-office/2016/08/16/fact-sheet-white-house-announces-new-commitments-fair-chance-business> and <https://obamawhitehouse.archives.gov/the-press-office/2016/11/30/fact-sheet-white-house-announces-new-commitments-fair-chance-business> (last visited Aug. 30, 2017).

²⁰⁷ For a list of small to medium businesses who signed onto the Fair Chance Business Pledge see <https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge> (last visited Aug. 30, 2017).

tity's charter documents. Once identified by the reentry students, they could counsel the Fair Chance client on how this provision will limit leadership participation and access to valuable information and talent, and then the corporate students would revise the charter document provisions in accordance with the fair chance values of the client.

This Fair Chance practicum mirrors the aforementioned specialized practice areas because general corporate law students are not likely to have an understanding of reentry issues that would allow them to effectively identify issues and problem solve them for their Fair Chance clients. Similarly, reentry students are not likely to have the transactional experience or drafting experience to resolve issues that they identify for the client. By working with corporate students, the reentry students would see new applications for their knowledge of collateral consequences as they work to address the structural barriers to integration in the workplace. Not only would Fair Chance clients receive the type of reentry-informed corporate counsel that otherwise is not available in the legal market, but criminal practice and corporate students would also have the unique opportunity to learn from and collaboratively work together within a clinical program.

CONCLUSION

We hope that in analyzing the strategies and considerations we explored when designing the UC Hastings Business Tax Practicum for Social Enterprises other business law clinicians and doctrinal professors will be inspired to implement our practicum-clinic model in their own transactional law courses. The anticipated student excitement to an expanded transactional law clinical program and the ability to better address client needs are the primary considerations that inspire us to encourage others to carefully consider the addition of a business tax practicum within a general corporate clinic.²⁰⁸ Incorporating business tax students into a clinical program can be monumental to both the law students' legal education and the clients they are advising. Moreover, a transactional tax practice furthers the rich tradition of clinical education to close the access-to-justice gap. We understand that what

²⁰⁸ In addressing factors for clinical design, Professor Wallace Mlyniec writes, "Clinical teaching is different from and more expansive than doctrinal teaching or professional legal practice; clinical teaching is goal driven and based on backward design; faculty intervention must be intentional and based on making choices that further a student's education; clinical education should be based on an expansive theory of justice; client and student needs are equally important in a clinical program and neither need be sacrificed for the other; and clinical teaching is personal and designed to accept students where they are to maximize their learning potential." Wallace J. Mlyniec, *Where to Begin? Training New Teacher in the Art of Clinical Pedagogy*, 18 CLIN. L. REV. 505, 505 (2012).

Fall 2017]

From Business Tax Theory to Practice

77

works well for our clinical program and social enterprise clients may not be completely transferable to other law schools.²⁰⁹ Nor do we advocate that specialized transactional practicums can supplant either the client representation or student learning impact of general corporate law clinics. However, a general corporate law clinic can become the solid foundation upon which business law clinicians, in partnership with practice area specialist faculty, can provide students with new transactional clinical opportunities. The practicum-clinic model also complies with the new ABA accreditation standards for experiential learning and more holistically provides client representation. For these reasons, we look forward to learning from other business law clinicians as we all continue to expand the scholarship on clinic design and further experiment with advancing justice through this practicum-clinic model.

²⁰⁹ Schrag, *supra* note 138, at 178 (“Like a plan for handling a case, a plan for starting a clinic must respond to experience and to changing circumstances.”).

