

DISRUPTIVE PEDAGOGY: INCORPORATING CRITICAL THEORY IN BUSINESS LAW CLINICS

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ABSTRACT

The discourse of business law clinics, which extensively emphasizes their value in practical skills training, can obscure the intellectual contributions of business law clinicians within the legal academy. As the number of business law clinics across the country increases, clinical education literature must incorporate a deeper understanding of the distinct learning ecology business law clinics offer. This Article provides a conceptual framework of how business law clinics can counter the cultures of conformity and complacency within traditional legal education. The Article elevates this discourse by examining the disruptive pedagogy business law clinicians engage in when they integrate critical legal theory into their courses. Finally, the Article posits that by exposing future corporate lawyers to critical legal theory, through the vehicle of strategic client selection, business law clinics prepare students to be generative lawyers who are more creative in their lawyering and more apt to lead in the ever-changing landscape of corporate law.

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INTRODUCTION

In the wake of the Great Recession,¹ the legal profession and regulators have focused on financial reforms to restrict risky corporate conduct. Several years after the financial crisis, however, it is important that the legal profession think prospectively of necessary reform to the practice of corporate law.² Many corporate lawyers were complicit in bringing about the financial crisis—either through direct involvement or facilitating risky strategies of their clients.³ Some corporate lawyers were fully aware of the dangers of risky financial transactions while others were unable to or did not question the dangers of their clients’ actions. Still others were unwitting accomplices to the destruction their actions and their clients’ actions caused on a global level. Not only did these corporate lawyers fail to protect their clients, they also failed to protect the legitimacy and moral character of the legal profession. As law schools contemplate how best to train corporate lawyers in the new age of transactional law, law professors must incorporate into their pedagogy the lessons learned from these recent events. Courses on business law, including the proliferation of

¹ U.S. DEP’T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 2 (2009) available at http://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf (characterizing the 2008 financial crisis as “the most severe financial crisis since the Great Depression”).

² I use the terms corporate law(yer), business law(yer) and transactional law(yer) interchangeably in this Article to refer to the practice of law that integrates “the substantive business, financial, and lawyering skills needed to consummate business transactions.” 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, 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 organizational goals and business objectives. In the relevant scholarship, these lawyers are also referred to as deal lawyers.

³ See Steven L. Schwarcz, *The Role of Lawyers in the Global Financial Crisis*, 24 AUSTL. J. CORP. L. 1, 5–7 (2010) [hereinafter *The Role of Lawyers*] (discussing the complacency of corporate lawyers and their unwillingness to challenge “market-participating clients”).

business law clinics, are rapidly increasing in the legal academy, yet, business law pedagogy has not responded with disruptive methodologies that challenge traditional legal education of corporate lawyers and better prepares lawyers to transform this field.

In business and technology literature, “disruptive” describes innovations that improve products or services in unanticipated ways,⁴ typically by designing for new kinds of consumers—often overlooked by an industry.⁵ A unifying theme of disruptive innovations is that they are undervalued and disregarded⁶ by entrenched market leaders.⁷ While it can take years or even decades for products to disrupt,⁸ the subculture of Silicon Valley permeates the region encouraging those within and without it to strive for disruption.⁹ This Article attempts to capture the spirit of disruption by applying it to the pedagogy of business law clinicians. The convergence of recent calls

⁴ Joseph Bower, *Disruptive Change*, 80 HARV. BUS. REV. 95 (2005) (“When the technology that has the potential for revolutionizing an industry emerges, established companies typically see it as unattractive: it’s not something their mainstream customers want, and its projected profit margins aren’t sufficient to cover big-company cost structure. As a result, the new technology tends to get ignored in favor of what’s currently popular with the best customers.”).

⁵ CLAYTON CHRISTENSEN, *THE INNOVATOR’S DILEMMA* (1997) (defining disruptive technology and explaining Christensen’s theory why many disruptive innovations are not “advanced technologies,” but rather, they are often novel combinations of existing off-the-shelf components, applied cleverly to a small, fledgling value network). Joseph L. Bower & Clay M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV. (Jan.–Feb. 1995) available at <https://hbr.org/1995/01/disruptive-technologies-catching-the-wave> (coining the term disruptive technologies and noting that “[t]he technological changes that damage established companies are usually not radically new or difficult from a technological point of view. They do, however, have two important characteristics: First, they typically present a different package of performance attributes—ones that, at least at the outset, are not valued by existing customers. Second, the performance attributes that existing customers do value improve at such a rapid rate that the new technology can later invade those established markets.”).

⁶ “[I]t is not unusual for a big corporation to dismiss the value of a disruptive technology because it does not reinforce current company goals, only to be blindsided as the technology matures and threatens the status quo.” STEVEN O’CONNOR & PETER SIDORKO, *IMAGINE YOUR LIBRARY’S FUTURE: SCENARIO PLANNING FOR LIBRARIES AND INFORMATION ORGANISATIONS* 35 (2010) (citation omitted).

⁷ Clayton Christensen argues “[s]mart companies fail because they do everything right. They cater to high-profit-margin customers and ignore the lower end of the market, where disruptive innovations emerge from.” Jeff Howe, *Clayton Christensen Wants to Transform Capitalism*, WIRED, Feb. 12, 2013, available at <http://www.wired.com/2013/02/mf-clayton-christensen-wants-to-transform-capitalism/>.

⁸ Generally, it is the *business model* enabled by a technology that creates the disruptive impact. See PAUL MULJADI, *INNOVATION CREATIVITY TECHNIQUES* 41 (2012).

⁹ See FACEBOOK, INC., Registration Statement (Form S-1), at 70 (Feb. 1, 2012) available at http://www.sec.gov/Archives/edgar/data/1326801/000119312512034517/d287954ds1.htm#toc287954_10 (summarizing a company core value as “Move fast and break things”); and ZAPPOS available at <http://about.zappos.com/jobs/why-work-zappos/core-values> (explaining the family core value “[e]mbrace and drive change.”).

for legal education reform with the growth of business law clinics¹⁰ provides a unique opportunity to conduct a robust exploration of the learning ecology of business law clinics and extrapolate the value creation within these spaces.¹¹

A recurring difficulty in establishing and designing any clinical course, and business law clinics in particular, is grounding students' acquisition of practical lawyering skills in a deeper understanding of legal and social theory. The creation of business law clinics in legal education has focused, almost exclusively, on these clinics' contribution to students' "practice-readiness."¹² The discourse of preparing aspiring corporate attorneys with skills-training in transactional lawyering overshadows the far more complex efforts of some business law clinicians to strengthen the intellectual capacity, e.g., knowledge, and conceptual thinking, problem-solving, of our students. This Article fills that gap in perception and practice, analyzing how business law clinicians incorporate critical legal theory into their pedagogy and exploring strategic decisions, e.g., client selection as a means of deepening student learning and disrupting the dominant culture of legal education.¹³ Implementing clinical legal theory and critical legal the-

¹⁰ The term business law clinic is used in this Article to describe a live-client, clinical program that employs clinical pedagogy and clinical legal theory in the practice of business, corporate, or transactional law. For this reason, the Article describes those specific educational programs that not only identify themselves as a business law clinic, but are also utilizing the foundational theories and practices of clinical pedagogy. As mentioned above, the term transactional law is broad enough to include almost any non-litigation-based practice. Thus, the Article intentionally uses the term business law clinic to emphasize the clinic's focus on advising and representing company clients in financial and business transactions. While I acknowledge that several business law clinics may also identify as community economic development ("CED") clinics, I also recognize that the term business law clinic is not synonymous with CED clinic, as many business law clinics are not explicitly linked to a social justice mission and may limit their representation to traditional corporate law practices. For a robust description of the multifaceted components of CED law and lawyering, see generally SUSAN D. BENNETT ET AL., COMMUNITY ECONOMIC DEVELOPMENT LAW: A TEXT FOR ENGAGED LEARNING (2012).

¹¹ John Seeley Brown is acknowledged as introducing the idea of a "learning ecology" to describe the space where learning occurs that is "an open, complex, adaptive system comprising elements that are dynamic and interdependent." See John Seeley Brown, *Growing Up Digital: How the Web Changes Work, Education, and the Ways People Learn*, CHANGE, March/April 2000, at 10-20; see also Brigid Barron, *Interest and Self-Sustained Learning as Catalysts of Development: A Learning Ecology Perspective*, 49 HUM. DEV. 193, 194-197 (2006) (describing a learning ecology framework to explain how learners develop fluency across multiple contexts, people, artifacts, resources, and settings among other factors).

¹² Stephen Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 331 (2001) ("[Even we clinicians] may have felt ourselves pushed by our law schools to describe our teaching in those modest terms, but we must be careful not to buy into that characterization of what we are about.").

¹³ The terms "critical legal theory" or "critical theory" (which are used interchangeably in this Article) refer to the body of legal scholarship that challenges norms and standards

ory, business law clinicians can achieve the primary goal of clinical legal education, “mak[ing] conscious the tacit theories that the legal system embodies and expresses.”¹⁴ Although transactional clinics have been a part of clinical education for over three decades, there is limited scholarship analyzing the teaching pedagogies of these clinicians and the learning opportunities that exist within this unique learning ecology.¹⁵ Central to this Article is the claim that to fully realize the potential of clinical pedagogy clinicians should engage their students in legal theory, and, thus, business law clinicians must also account for how they incorporate theory into their clinical teaching. While the contributions of critical legal theory to clinical education are underexplored generally, no prior article explicitly discusses the potential impact of critical legal theory in preparing students for transactional practice.¹⁶ Thus, this Article expands clinical pedagogy scholarship by exploring the benefits and challenges of preparing future corporate lawyers through a business law clinical program that intentionally and strategically incorporates critical legal theory into the learning experience.

Part I begins by situating business law clinics within the range of curricular innovations now available as legal education responds to the changing demands of students, alumni, and the legal profession to better prepare entry-level corporate lawyers. This section also articulates why business law clinics are particularly well suited to expose critical legal theory to students interested in pursuing a corporate law practice. Part II outlines the body of critical legal theory and summarizes key contributions of critical legal theory scholarship. This section argues that integrating critical legal theory into a business law clinic enables students to become transactional attorneys who are critical, creative, contextual, and reflective professionals. Recognizing the significant number of substantive topics that business law clinicians cover in their courses—in addition to skills training—Part III explains why client selection is the most efficient and effective methodology for engaging students in critical theory scholarship. When

in legal theory to, among other things, theorize and examine how subordination of groups of people is perpetuated through structures of law absent formal systems of intentional, *de jure* discrimination. Critical theorists focus on relationships of power and document how the law legitimizes the norms and furthers the interests of the powerful.

¹⁴ Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717, 722 (1992).

¹⁵ Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. SCH. L. REV. 233, 246 (2011) (“Since [small business clinics] and transactional clinics are a relatively new phenomenon, an effort to analyze various teaching pedagogies within this learning environment is necessary.”).

¹⁶ Cf. Richard R. W. Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006) (examining the creation of the corporate personhood doctrine through the lens of race).

students encounter the themes and issues discussed in critical theory in the context of client representation, they are more likely to engage in self-directed, inquiry-based learning and understand the interconnectedness of legal theory and practice. In this section, I draw upon my own experiences in establishing and directing the Social Enterprise & Economic Empowerment Clinic (“SEEE Clinic”) at the University of California, Hastings College of the Law (“Hastings”) to illuminate how client selection can provide opportunities for students to explore critical legal theory and influence their professional growth as transactional lawyers.¹⁷ This Article concludes with reflections that business law clinicians should consider as they integrate critical legal theory in their clinics.

I. DIVERSIFYING BUSINESS LAW PEDAGOGY

This section provides a brief overview of the principles and norms of business law pedagogy, including pedagogy that aims to prepare law students to be transactional attorneys. It also explains the range of courses now offered to business-oriented law students and the contributions of business law courses to the legal academy. It then explores the proliferation of business law clinics and how these clinics are typically described in the spectrum of business law courses as providing students with opportunities to learn, apply, and practice lawyering skills in live-client situations. This characterization of business law clinics is descriptive and continues to be used widely because it is concrete and easily understood. The section explains, however, why this characterization is not comprehensive. The section concludes by arguing that business law clinics provide an ideal opportunity to integrate critical legal theory into the training of future business lawyers to cultivate deeper, more creative thinkers.

A. *Responding to the Demand*

A resurgent demand¹⁸ for legal education reform has once again

¹⁷ See generally THE UNIVERSITY OF CALIFORNIA, HASTINGS COLLEGE OF LAW available at <http://www.uchastings.edu/academics/clinical-programs/clinics/socialenterpriseandeconomicempowerment/index.php>.

¹⁸ Proponents of legal education reform are not a new phenomenon and their calls for reform have been unwavering since the 1930s. Jerome Frank, for example, was a proponent of the clinical-lawyer school. See generally Jerome Frank, *Why Not a Clinical-Lawyer School*, 81 U. PA. L. REV. 907 (1933) (arguing that law schools were too academic and needed to include the acquisition of lawyering skills). See also AMERICAN BAR ASSOC. TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, A.B.A. SEC. LEGAL EDUC. AND ADMISSION TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (concluding that clinical programs are needed to produce competent practicing attorneys).

placed law schools under a microscope.¹⁹ Many reforms seek to address legal education's effectiveness in training the next generation of lawyers and preparing them for practice.²⁰ Among other things, critics have called into question the andragogy of law school, which primarily consists of the Langdellian case method.²¹ "Although the case method did not immediately take hold of the legal education process in [the United States], it is firmly entrenched as the primary method of legal training today and has undergone little change since its inception."²² As Dean Claudio Grossman explains, "while the study of case law continues to provide an indispensable vehicle for legal training, we now know the importance of expanding legal training beyond this one-dimensional approach."²³

The need to expand legal andragogy is particularly pressing for transactional lawyers, because their legal practice is more dynamic than the case method may demonstrate and can require more diverse skills than inductive reasoning skills sharpened through the Socratic method may provide.²⁴ Transactional lawyering differs from litigation-based lawyering or group advocacy and requires a specialized and distinct form of legal education to prepare students for practice.²⁵ In addition to substantive legal expertise, transactional lawyering "also requires business industry knowledge and keen practice judgment, to

¹⁹ James Huffman, *Law Schools: Reform or Go Bust*, NEWSWEEK (Feb 20, 2015), available at <http://www.newsweek.com/law-schools-reform-or-go-bust-308339>; Peter Lattman, *Obama Says Law School Should be Two, not Three Years*, N.Y. TIMES (Aug. 23, 2013), available at <http://dealbook.nytimes.com/2013/08/23/obama-says-law-school-should-be-two-years-not-three/>; Tovia Smith, *Should It Take 2 or 3 Years To Earn A Law Degree*, NPR, Sept. 18, 2013, available at <http://www.npr.org/2013/09/18/223610581/should-it-take-3-years-to-earn-a-law-degree>; David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, available at <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html> ("Law schools have long emphasized the theoretical over the useful, with classes that are often overstuffed with antiquated distinctions, like the variety of property law in post-feudal England.").

²⁰ *But see* Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 316 (1995) (noting that "some legal academics seem to celebrate the disjunction between law school and the training of lawyers.").

²¹ Amy Deen Westbrook, *Learning from Wall Street: A Venture in Transactional Legal Education*, 27 QUINNIPIAC L. REV. 227, 256 (2009) ("Contemporary U.S. legal education is still rightly dated from the 1870's.").

²² Leonard D. Pertnoy, *Skills Is Not a Dirty Word*, 59 MO. L. REV. 169, 176 (1994).

²³ Claudio Grossman, *Building the World Community: Challenges to Legal Education and the WCL Experience*, 17 AM. U. INT'L L. REV. 815, 827 (2002).

²⁴ *See generally* Lisa Penland, *What a Transactional Lawyers Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRS. 118 (2008) (arguing that there are several essential transactional lawyering skills not traditionally taught in law school contributing to the unpreparedness of the junior corporate lawyer).

²⁵ Karl S. Okamoto, *Learning and Learning To Learn By Doing: Simulating Corporate Practice in Law School*, 45 J. LEGAL EDUC. 498, 501 (1995).

refine ideas based on legal and financial opportunities and constraints.”²⁶ In the wake of criticism from law firms, alumni, and students²⁷ that law schools have not sufficiently adjusted to the expanding demands of transactional practice,²⁸ several new law school courses are now commonly available to prepare students.²⁹ In fact, the growth in business and transactional law course offerings is one of the more robust engines of innovative classroom design and interdisciplinary approaches to training lawyers.³⁰

While there has not always been agreement on specific skills and training future business lawyers should acquire prior to graduating,³¹ there is consensus that it is advantageous for law students to have more opportunities to explore business law.³² Thus, law schools regu-

²⁶ *Enriching the Law School Curriculum*, *supra* note 2, at 97.

²⁷ Patricia Mell, *Law Schools and their Disciples*, 79 MICH. B.J. 1392, 1394–5 (2000) (providing a comprehensive criticism of law school curriculum by practicing lawyers, law students and law professors and explaining that “[t]here may remain a crucial disconnect between the expectations of law students who take these programs believing they have résumé value and the assessment by many employers that the completion of these programs does not add to a graduating law student’s credentials for hiring purposes.”).

²⁸ Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 J. BUS. & TECH. L. 223, 233 (2013) (“Law firms are increasingly less likely to formally train entry-level associates through an apprenticeship experience during the first years of practice. Instead, recent law school graduates are now expected to perform at a profitable level from the start of their careers.”); Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 J.L. & POL’Y 195, 200 (2003) (explaining that “the modern practice of transactional law is more complex than in the past.”).

²⁹ A non-exhaustive list of currently standard business law courses includes Accounting for Lawyers, Business Bankruptcy, Business Planning, Contract Drafting, Corporate Finance, International Business Transactions, Investment Management, Mergers & Acquisitions, Nonprofit Institutions, Real Estate Transactions, Secured Transactions, Securities Regulation, Structured Financing, and Taxation of Business Enterprises.

³⁰ See Anthony Luppino, *Minding More than Our Own Business: Educating Entrepreneurial Lawyers through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 160 (2007) (“With respect to the education of would-be-transactional lawyers and counselors to entrepreneurs, faculty involved in small business/transactional law school clinics have, in fact, been among the most forceful advocates for exposing law students to interdisciplinary learning.”).

³¹ Compare Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 303-306 (1984) (advocating that law students should study finance and transaction cost economics); with Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 352 (2005) (urging law students to enroll in joint degree JD-MBA programs because legal education is thoroughly inadequate to prepare students for a business law career); and Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 507 (2007) (explaining that law students would be better served focusing on the application of legal concepts to solve real-world problems to prepare them to be successful corporate lawyers).

³² Eric C. Chaffee, *Answering the Call to Reinvent Legal Education: The Need to Incorporate Practical Business and Transactional Skills Training into the Curricula of America’s Law Schools*, 20 STAN. J.L. BUS. & FIN. 121, 153 (2014) (arguing that transactional lawyers should graduate law school with a basic understanding of how businesses function, “a basic

larly offer introduction to financial analysis and accounting courses.³³ There may also be an advanced course on business valuation.³⁴ Law schools have also expanded simulation-based business law courses where students must perform in the context of a subject specific practice area. Real estate transactions, mergers and acquisitions, contract drafting, business negotiations, and anatomy of a deal are a few examples of these types of courses.³⁵ In addition, lecture-based business law courses are now likely to include a practical application portion on the exam where students must, for example, write a memo to a client or partner explaining the legal issues using the appropriate business and legal vocabulary. This new slate of business law courses responds to the legal education reform demands by exposing law students to non-litigation aspects of the legal system, expanding their understanding of law, including relying on contracts and statutes instead of solely relying on case law. These courses are also introducing and valuing broader forms of knowledge, such as finance and accounting, and skills, such as reading balance sheets, project management, and teamwork.³⁶

There are also more opportunities for law students to prepare for a corporate practice outside of the classroom as law schools are expanding externship opportunities in transactional law settings. Hybrid experiential learning environments where students learn both inside and outside the classroom about legal and business issues from an interdisciplinary mix of faculty and practitioners.³⁷ A growing number of schools also support their students' participating in extracurricular activities such as the National Transactional LawMeet.³⁸ Combined,

level of financial literacy," "understand basic business terminology," and "transactional drafting skills.").

³³ E.g., UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW COURSE CATALOG available at <https://www.law.berkeley.edu/php-programs/courses/courseSearchResults.php?categoryfield=Business+Law&termCode=D&termYear=2015&orderByTitle=y>.

³⁴ E.g., HARVARD LAW SCHOOL COURSE CATALOG available at <http://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=66438>.

³⁵ E.g., UNIVERSITY OF VIRGINIA SCHOOL OF LAW COURSE CATALOG available at http://www.law.virginia.edu/html/academics/lawbusiness_courses.htm; see also UNIVERSITY OF MICHIGAN SCHOOL OF LAW COURSE CATALOG available at <https://www.law.umich.edu/currentstudents/registration/ClassSchedule/Pages/AboutCourse.aspx?crseId=040502>.

³⁶ "Yet, compared to all that law faculty have created to teach litigation oriented practices, transactions pedagogy is still in its infancy." Daniel B. Bogart, *The Right Way to Teach Transactional Lawyers: Commercial Leasing and the Forgotten "Dirt Lawyer,"* 62 U. PITT. L. REV. 335, 336 (2000).

³⁷ See, e.g., the New York City Program in International Finance and Law, University at Buffalo Law School, State University of New York available at <http://www.law.buffalo.edu/beyond/nyc.html>.

³⁸ The National Transactional LawMeet is simulation experience for law students interested in a transactional practice. The program is a part of the larger LawMeet family of experiential, interactive, educational competitions designed to give law students a hands-

these experiential opportunities add to the expanding variety, depth and interdisciplinary nature of training future business lawyers.

Following this trend of increasing offerings in business law, there has also been rapid increase in the number of business law clinics in the last decade. Transactional legal clinics emerged in legal education during the late 1970s and early 1980s.³⁹ Despite their relatively late introduction into clinical education,⁴⁰ business law clinics “have developed a stronghold in American clinical legal education.”⁴¹ “While transactional law is taught in a variety of law school classes, transactional clinics give students opportunities to use their theoretical doctrinal knowledge, provide exposure to entrepreneurial ecosystems, and provide opportunities to learn concrete transactional lawyering skills prior to entering law practice.”⁴²

In this regard, business law clinics are widely recognized as preparing students for their first day of practice,⁴³ but less acknowledged as challenging the dominant culture of legal education by expanding alternative means for effectively training law students.⁴⁴ Furthermore, business law clinics are yet to be recognized as ideal platforms for developing the analytical skills and intellectual capacity necessary for leadership and innovation within the business legal profession.⁴⁵ Each of these characteristics of business law clinics provides a valuable contribution to the legal academy, which I explore further in the following sections.

B. Practice-Readiness as the Predominant Narrative

The tale is often espoused of the entry-level transactional lawyer

on experience in developing and honing transactional lawyering skills. Participating students are given a case fact pattern, opportunities to meet with their “client”, drafting guidelines, and exchange documents with their “counter-party.” At regional and national competitions, the students negotiate the terms of the transaction documents with the counter-party student team. In 2014, more than 70 law schools around the country sent student teams. More information available at <http://transactionalmeet.lawmeets.com>.

³⁹ *Enriching the Law School Curriculum*, *supra* note 2, at 92.

⁴⁰ Margaret B. Kwoka, *Intersecting Experiential Education and Social Justice Teaching*, 6 NE. U. L.J. 111, 113 (2013) (stating that the first clinical programs were established sometime between 1890–1910 as partnerships with legal aid societies at Duke, USC and Northwestern); *but see* Amy M. Colton, *Eyes to the Future, Yet Remember the Past: Reconciling Tradition with the Future of Legal Education*, 27 U. MICH. J.L. REF. 963, 976–77 (2003) (noting, after a comprehensive history of the development of clinical legal education, that clinical legal pedagogy did not emerge until the 1950s–60s and noting that the first few clinics that took place in the early 1900s were not consistent with modern clinical legal theory).

⁴¹ *Enriching the Law School Curriculum*, *supra* note 2, at 94.

⁴² *Id.* at 89.

⁴³ *See infra* Part I.B.

⁴⁴ *See infra* Part I.C.

⁴⁵ *See infra* Part II.

who is unprepared for complex tasks and lacks the core competencies of practice.⁴⁶ This narrative resonates as many seasoned business attorneys can vividly recall how uncomfortable they felt during their first year of practice. As Charles Fox describes it:

Your junior transactional attorneys take on tough tasks right away, including drafting contracts and performing due diligence. The big problem? Fed a strict diet of case-method analysis in law school, these new practitioners don't have the necessary background to handle their duties effectively.⁴⁷

In addition to many business law courses described above, business law clinics are specifically designed to address this unpreparedness issue by allowing students to participate in the rigors of corporate practice while still in law school.⁴⁸ Although business law clinics vary from law school to law school, students in a business law clinic will often have opportunities to counsel entity clients on legal issues related to their business objectives, draft and analyze transactional documents, and conduct fact investigation that requires them to apply business, as well as legal, acumen. Business law clinics achieve the same goals of other business law courses in expanding legal education but also introduce these themes in the context of working with a live client. Working with a live client makes a profound difference on the student learning experience.⁴⁹ Students in a business law clinic need to know business, finance, tax, capital markets, motivations, incentives, and industry standards.⁵⁰ They have to integrate facts, synthe-

⁴⁶ Jay A. Mitchell, *Reading (in the Clinic) is Fundamental*, 19 CLINICAL L. REV. 297, 306 (2012) (describing the summer associate who struggles with an entry-level assignment of reviewing a standard contract). See also CHARLES M. FOX, WORKING WITH CONTRACTS: WHAT LAW SCHOOL DOESN'T TEACH YOU 1–3 (2008); MATT SWARTZ & DANIEL LEE, THE CORPORATE, SECURITIES, AND M&A LAWYER'S JOB: A SURVIVAL GUIDE v (2007) ("Law schools do not prepare students to be associates in the corporate documents of modern law firms. Though law school courses on tax, securities, and mergers and acquisitions are helpful, these courses focus, appropriately, on the laws covering these areas, not the tasks that new associates will actually be assigned."); Tina L. Stark, *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 223, 224 (2004) (explaining students inability to "translate the business deal into contract concepts."); Victor Fleischer, *Deals: Bringing Corporation Transactions into the Law School Classroom*, 2 COLUM. BUS. L. REV. 475, 486 (2002) ("Most law schools teach the basics of the underlying legal doctrine and produce graduates who lack transactional skills.").

⁴⁷ Charles M. Fox, *Overview, Online Survival Skills Training Program: What Junior Deal Lawyers Need to Know* [on file with author].

⁴⁸ *Enriching the Law School Curriculum*, *supra* note 2, at 89 (noting that transactional clinics "provide opportunities to learn concrete transactional lawyering skills prior to entering law practice.").

⁴⁹ See Pertnoy, *supra* note 22, at 171 (explaining the "excitement, motivation, and unpredictability" of working with a live client).

⁵⁰ 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) ("You can't really

size information, apply relevant laws, and incorporate this into governing or contractual documents. They also have to master expository legal writing, as well as contract drafting and analysis. This means learning the grammar, structure, and tenets of analytic reasoning and evidence-based arguments.⁵¹

In interacting with the clinician, law students are also learning important professional skills related to business judgment, empathy, cultural competency, and how to “worry” a transactional client matter.⁵² Making mistakes under supervision also provides students with the opportunity to learn how to pivot towards problem solving in practice, regain client confidence, and move forward with the representation. In other words, in a business law clinic, students become active participants in every aspect of their learning experience. They depend on the supervising clinician for resources and direction, but not for answers. In sum, “[t]ransactional legal clinics are well positioned to offer students a scalable experiential learning foundation and a range of legal and non-legal skills that position them as lawyers not only now but in the future.”⁵³

Given these contributions, transactional law clinics are mentioned among other clinical programs in the *Carnegie Report* as addressing the divide between legal education and the practice of law.⁵⁴ The *Carnegie Report* notes the importance of both theory and practice.⁵⁵ This may be interpreted, however, as the doctrinal classes within legal education providing the theory and clinics existing so students can put that theory into practice.⁵⁶ Having resisted the perception of clinical legal education as the “trade school” component of the legal academy, clinicians are understandably uncomfortable with exclusive emphasis on the skills training portion of clinical pedagogy.⁵⁷

be a good corporate lawyer today without understanding basic accounting principles and the accounting issues that are in the news today.”).

⁵¹ See SWARTZ & LEE, *supra* note 46, at 1 (“Clients look to their [corporate] counsel to provide overall deal strategy, transaction structure, negotiation skills, corporate governance, tax planning, knowledge of customary practices, logistics, and organization, as well substantive legal expertise in a wide variety of specialties.”).

⁵² Junior associates are often expected to have thought through, planned, and organized the different components of a client matter. The term “worrying the case” refers to the lawyering skill of constantly thinking through the various moving parts of the matter and being prepared for the reasonably foreseeable circumstances that will arise during the client matter.

⁵³ *Enriching the Law School Curriculum*, *supra* note 2, at 123.

⁵⁴ William M. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 15 (Jossey-Bass 2007) [hereinafter *Carnegie Report*].

⁵⁵ *Id.* at 12–14.

⁵⁶ Chaffee, *supra* note 32, at 155 (contrasting transactional law training with exposure to legal theory).

⁵⁷ Compare Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and*

While clinical legal education has never solely focused on skills acquisition, the unique experience clinics provide for students to hone lawyering skills is undoubtedly one of the touchstones of clinical education.⁵⁸ Pioneers of clinical education “identified the pursuit of justice as a primary educational value in clinical experience for law students.”⁵⁹ Consistent with clinical legal theory,⁶⁰ it follows that business law clinics would make their most impact when the learning environment integrates both academic inquiry and practice.

C. *Business Law Clinics as Disruptive Pedagogy*

As discussed above, a host of commentators have criticized traditional legal education for its incapacity to adequately train transactional lawyers and convey practical skills.⁶¹ A related, but distinct criticism,⁶² is that the culture of legal education—the large classrooms, the case method, and the competitive environment of the law school classroom—adversely affects future lawyers’ development.⁶³ Business law clinics address the practice-readiness critique by providing inter-

Identifying the Gaps We Should Seek to Narrow, 8 CLINICAL L. REV. 109, 116–24 (2001); with Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231, 1256, n.102 (1991) (characterizing clinical education as “too narrowly focused” on training students in the skills of a lawyer and exercising the knowledge gained in the doctrinal classroom).

⁵⁸ See generally Sara H. Paoletti, *Finding the Pearls When the World is Your Oyster: Case and Project Selection in Clinic Design*, 5 DREXEL L. REV. 423, 424 (2013) (discussing how human rights clinics are particularly well-suited for preparing students for practice within the global legal market).

⁵⁹ Wizner, *supra* note 12, at 331 (discussing the contributions of William Pincus to clinical education).

⁶⁰ *Id.* at 332 (“In the early days of the clinical legal education movement, experiential learning and skills training were thought of as pedagogical means for enabling law students to transcend the limitations of traditional legal education. They were the means, not the end.”). *But see* Westbrook, *supra* at note 21, at 255 (claiming that “clinics and the array of critical approaches have not constituted a new mode of legal education.”).

⁶¹ 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.”).

⁶² *Id.* at 519 (defining culture as “the incentive structures and peer pressure, dominant rituals and unspoken habits of thought that construct and then define the interpersonal, institutional and cognitive behaviors and beliefs of members of the education community.”). See Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970) (identifying the sense of malaise and discontent pervasive in law school in part because of students learning from faculty teaching styles to either intellectually disengage or supplant their own creative impulses with conformity to thinking like a lawyer).

⁶³ See DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY—A POLEMIC AGAINST THE SYSTEM* (1983) (arguing that the artificial hierarchies of legal education reflect, sustain, and create illegitimate hierarchies in society).

disciplinary, practiced-based training. Business law clinics also counter and disrupt the dominant culture of legal education critique by offering an interactive experience, supportive environment, diversified assessment, and inclusive approach to learning. This section expands on this latter, disruptive contribution of business law clinics.

As Professors Susan Sturm and Lani Guinier identify in their research, there is a dominant culture of competition and conformity pervasive within law schools.⁶⁴ Their argument goes far beyond noting the critiques of the Socratic method in traditional large classrooms to analyzing how the various apparatuses of traditional legal education sustains a culture that breeds competition and incentivizes conformity among law students early in their exposure to the legal academy.⁶⁵ This dominant law school culture can be disempowering for many students, but has a particularly devastating impact for marginalized groups of students,⁶⁶ such as students of color,⁶⁷ trans* or gender non-conforming students,⁶⁸ and students with disabilities.⁶⁹ Professors

⁶⁴ *The Law School Matrix*, *supra* note 61.

⁶⁵ *Id.* at 519–521.

⁶⁶ Dean Spade, *For Those Considering Law School*, 6–7, available at <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School-Nov-2010.pdf> (“The traditional pedagogy of law school relies on humiliating students if they bring in other ways of thinking or knowing about the world, thereby whittling them down to a shadow of their former selves and reshaping them to make them think inside a very narrow box . . . Critical dialogue is made impossible in such an environment, and ostracism of people who fall outside the norms is par for the course.”). See also Lani Guinier, et al., *Becoming Gentlemen: Women’s Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994).

⁶⁷ Discussing the psychological impact of his experiences in law school, Professor Lawrence reflects:

I was one of only three black students in my first year class, and I recall expending considerable intellectual and emotional energy in an effort to maintain my sanity as I struggled to make sense of a discursive world that rarely reflected my lived experiences. . . . So I wrote to keep from going crazy, to explain to myself and others why the legal analysis of race that my professors, and later my colleagues, presented as wise and just often struck me as foolish or evil. And, I wrote with the hope that in my own struggle to understand what was making me crazy I might help all of us understand the insanity of white supremacy.

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); see also *The Law School Matrix*, *supra* note 61, at 516 n.4 (finding that the culture of legal education “contributes to law student disengagement, particularly for women and people of color . . . Students of color and women reported, at statistically significant higher rate, feeling invisible, isolated and alienated, and reported lower frequencies of volunteering in class and three times the experience of social exclusion.”); see also BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS A PRACTICE OF FREEDOM* 4 (1994) (describing her “shift from beloved, all-black schools to white schools where black students were seen as interlopers” and what those experiences taught her about “the difference between education as the practice of freedom and education that merely strives to reinforce domination.”).

⁶⁸ See generally Dean Spade, *Making Classrooms Welcoming for Trans Students*, available at http://www.iamsafezone.com/resources/Ally_Handouts_Article_Making_Class

Sturm and Guinier argue that the dominant culture of legal education also has detrimental long-term effects in the professional legal careers of our former students.⁷⁰ The legal profession requires lawyers to be creative and “think outside the box,” which is hindered by their training in conformity. Professors Sturm and Guinier articulate four features of traditional legal pedagogy that sustain the dominant culture of law schools despite advancements in reforming legal education:

- (1) the form of conflict built into the classroom structure and the law school environment;
- (2) the idea of expertise reflected in the dominant discourse;
- (3) the segmentation of the intellectual, professional, and personal dimensions of learning; and
- (4) the incentive structure and evaluation system driving decisions, for both students and faculty.⁷¹

Business law clinics can advance the counter-hegemonic project of clinical legal education by expanding the pool of students who engage in a clinical experience to include future corporate lawyers.⁷² In broadening the influence of clinical pedagogy, business law clinics provide a unique function in developing corporate lawyers. Given that the contributions of clinical methodology and pedagogy to legal education generally are well documented, I will not recapitulate them in their entirety in this Article.⁷³ Rather, this section describes how

rooms_Welcoming.pdf.

⁶⁹ See David M. Engel and Alfred S. Konefsky, *Law Students with Disabilities: Removing Barriers in the Law School Community*, 38 *BUFF. L. REV.* 551 (1990); Sande L. Buhai, *Practice Makes Perfect: Reasonable Accommodation of Law Students with Disabilities in Clinical Placements*, 36 *SAN DIEGO L. REV.* 137 (1999); Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 *NEV. L.J.* 116 (2005–06).

⁷⁰ *The Law School Matrix*, *supra* note 61, at 520 (“The culture of competition and conformity becomes an invisible but ubiquitous gravitational force affecting how students perceive the law and their place in it.”). See Schwarcz, *The Role of Lawyers*, *supra* at note 31, at 5-7 (discussing the affects of complacent corporate lawyers in the events leading to the financial crisis).

⁷¹ *The Law School Matrix*, *supra* note 61.

⁷² Business law clinics vary widely in their focus, mission, and target client populations. Some business law clinics are conservative spaces where words like “counterhegemonic” are unlikely to be used by students or faculty. While other business law clinics are intentionally aligned with social justice missions, marginalized neighborhoods, and community lawyering efforts. Thus, it is difficult to discuss the theoretical projects of business law clinics as a monolith. Notwithstanding, a clinical program that employs the strategies of clinical pedagogy can be characterized as countering the traditional, oppressive forms of legal education as outlined herein. For this reason, the conversations in this Article are only meant to describe those educational programs that not only identify themselves as a business law clinic, but are also utilizing the foundational theories and practices of clinical pedagogy.

⁷³ Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 *VAND. L. REV.* 321 (1982) (establishing a methodology-based justification for clinical education and discussing the value of the clinical approach as a teaching method). See also *Carnegie Report*, *supra* note 54, at 120–21 (“The potential of clinical-legal education for bringing

business law clinics, in particular, counter the four features of traditional legal education Professors Sturm and Guinier identify as maintaining and entrenching the dominant culture of competition and conformity within the legal profession.

1. *Engendering Private Law through Cooperation and Collaboration*

In traditional legal education, conflict “lies at the core of legal inquiry and intervention: it is what brings issues to the courtroom and the classroom; it is what brings lawyers to the table and creates the occasion for the exercise of state power.”⁷⁴ Practice, however, and, therefore, teaching transactional law, does not focus on conflict as litigation does. Instead, transactional law regularly requires corporate lawyers to work as part of multi-professional collaborations.⁷⁵ “Much of what transactional lawyers do is organize and coordinate multiple parties to work toward a common goal; requiring both project management skills and strong people management skills.”⁷⁶ Similar to most business law courses, business law clinics expose students to engineering transactions where creative solutions, which seek to minimize conflict and maximize benefit,⁷⁷ are at the heart of effective corporate lawyering.⁷⁸ Thus, adversarial conflict does not provide “the underlying framework of interaction, knowledge generation, and problem solving” in a business law clinic as it does in conventional law school classrooms and many other clinical programs.⁷⁹ The role of state power is also different in business law than in adjudicative processes. In transactional law clinics, students use statutes and regulations to make prescriptive recommendations towards clients’ busi-

together the multiple aspects of legal knowledge, skill, and purpose has long been noted . . . [T]he student comes to understand that the cognitive and the practical are two complementary dimensions of meaningful professional activity that gets its point and intensity from its moral meaning.”)

⁷⁴ *The Law School Matrix*, *supra* note 61, at 525.

⁷⁵ Schlossberg, *supra* note 28, at 196 (“Interdisciplinary or multi-professional collaborations are a common part of a transactional attorney’s experience and therefore provide a valuable lesson to introduce in a clinic environment.”)

⁷⁶ Praveen Kosuri, “Impact” in *3D—Maximizing Impact Through Transactional Clinics*, 18 *CLINICAL L. REV.* 1, 7 (2011).

⁷⁷ See Gilson, *supra* note 31, at 245 n. 9 (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.”)

⁷⁸ Carrie Menkel-Meadow, *When Winning Isn’t Everything: The Lawyer as Problem Solver*, 28 *HOFSTRA L. REV.* 905, 908 (2000) (explaining transactional lawyers can and should work outside of the winner and loser binary construction for litigation).

⁷⁹ *The Law School Matrix*, *supra* note 61, at 526. See also Luppino, *supra* note 30, at 160 (explaining that business law clinicians “tend to have substantial practice experience and consequent familiarity with the reality that business transactions involve teamwork among clients and professionals from multiple disciplines.”).

ness objectives. The focus, however, of business lawyering is private ordering of relationships between parties.⁸⁰ In other words, it is often the client—with assistance from the legal team—and counterparties who determine the appropriate resolution and not the state resolving legal issues.

In addition to the substantive differences in lawyering and interrogating conflict, the instruction of business law clinics can seek to advance creative thought as opposed to eliciting from students specific right answers. In conventional law school classrooms, “[t]he professor structures interactions with students by invoking the style of an appellate judge who questions lawyers to ferret out the weaknesses of their positions and validate winning arguments.”⁸¹ Conversely, in a business law clinic, the classroom is a space of collaborative problem-solving and sharing, where both the clinician and students are working together. Business law clinicians may rarely lecture or invoke the Socratic method of questioning individual students on specific areas of law. Thus, business law clinic seminars can structure learning around the specific students in the classroom in contrast to the standard, conflict-dominant classroom environment.

2. *Empowering Student Agency by Challenging the Idea of Professor as Expert*

Student autonomy and primary responsibility⁸² are key components that business law clinicians can incorporate to counter the conventional model of legal education where the professor models mastery and power⁸³ that “places students in a passive and reactive position.”⁸⁴ Similar to medical school education and business school instruction, business law clinics can emphasize deep understanding, decision-making and action.⁸⁵ Business law clinics that prioritize student autonomy⁸⁶ and provide students the opportunity to lead the de-

⁸⁰ Gilson, *supra* note 31, at 303.

⁸¹ *The Law School Matrix*, *supra* note 61, at 526.

⁸² Philip G. Schrag, *Constructing a Clinic*, 3 CLINICAL L. REV. 175, 185 (1997) (“[T]he clinic can enable students rather than teachers to make and execute virtually all the case-related decisions, and even to make certain educational decisions such as what subjects will be the primary issues for supervisory meetings and what kind of feedback they want from teachers at various stages of the cases.”).

⁸³ See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 593 (1982) (“The [law school] classroom is hierarchical with a vengeance, the teacher receiving a degree of deference and arousing fears that remind one of high school rather than college.”).

⁸⁴ *The Law School Matrix*, *supra* note 61, at 532.

⁸⁵ *Id.* at 533.

⁸⁶ Katherine R. Kruse, *Biting off What They Can Chew: Strategies for Involving Students in Problem-solving Beyond Individual Client Representation*, 8 CLIN. L. REV. 405, 429 (2002) (noting the value of primary student ownership and control); see also Alicia E.

cision-making process⁸⁷ distinguish themselves from other business law courses and externship opportunities. In these kinds of business law clinics, it is law students who make most of the legal team's strategic and technical decisions. Where there is flexibility outside of client articulated or necessary work product, it is the student or, more often, student team who will select which additional aspects of the representation to focus on and develop.

In the same vein, students in a business law clinic are not just leading the decision-making process but also have primary responsibility⁸⁸ for researching, drafting, and presenting the legal work that stems from those decisions. The students are the primary liaisons with the client and regularly interface with client representatives. Thus, students generate the majority, if not all, of the legal assistance. Unlike in many law firm settings where junior associates perform tedious tasks while partners make client presentations and lead client counseling, clients in business law clinics know that law students on the legal team have the primary responsibility for legal work. Where the clinician is present, for example in client meetings, she can further encourage student leadership by deferring to student teams for answers to any client questions addressed to her as the expert.⁸⁹ The clinician is present to fulfill her ethical duties under the rules of professional responsibility and local student practice rules⁹⁰ and will only interject when doing so is necessary to ensure competent representation. In these ways, both outside and inside the classroom, students in business law clinics emerge from the periphery to the center of knowledge generation and must become active participants in their learning process

Plerhoples and Amanda M. Spratley, *Engaging Outside Counsel in Transactional Law Clinics*, 20 *CLINICAL L. REV.* 379 (2014) (discussing the importance and challenges of maintaining the value of student autonomy).

⁸⁷ For an example of how students take the lead the decision-making process in client representation see Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *CAL. L. REV.* 1879, 1900–1902 (2007) (noting how student buy-in was an essential element of the representation's success because "[t]he students [are] the lead attorneys on the case.").

⁸⁸ Clinicians review and provide substantive, yet often nondirective, feedback throughout the process. Where client deadlines require completion of work product that a student team cannot, or do not, complete, many clinicians will implement the "three-strikes-you're-in" rule, where in the case of this emergency the clinician will, after giving the student three opportunities to competently complete the work, temporarily take over the work product to meet the necessary deadline. The students, however, are expected to remain active contributors to the process (reviewing, commenting, conducting necessary additional research, etc.), and the clinician may additionally require the students to summarize the difference in the clinician-led work-product versus the draft the students produced.

⁸⁹ Cf. *The Law School Matrix*, *supra* note 61, at 530–534 (describing the conventional law school experience).

⁹⁰ MODEL CODE OF PROF'L RESPONSIBILITY R. 5.5 (2013) (discussing the authorized practice of law).

if they are to excel in this educational setting.⁹¹

By challenging the idea of “professor as the expert” both in and out of the classroom, business law clinicians can encourage students to engage in critical thinking. In, *Pedagogy of the Oppressed*, Paulo Freire describes the “banking” concept of education where students are considered empty vessels, which the educator must fill with knowledge often “completely alien to the existential experience of the students.”⁹² Freire argues that the banking pedagogy paradigm stunts creativity and critical thought⁹³ and, thus, facilitates conformity and oppression.⁹⁴ The key to dismantling banking pedagogy and promoting critical thinking, Freire posits, is to reimagine the teacher-student relationship in the exact manner in which business law clinicians can structure the learning environment. Freire advocates that teachers restore students’ dignity⁹⁵ by practicing problem-posing education⁹⁶ where both students and teacher engage in teaching and are taught by each other.⁹⁷ Business law clinicians can practice problem-posing education by allowing their law students to identify the topics of discussion in the classroom and inquiry within the client matters. In doing this, business law clinicians are creating space for students to generate knowledge and think critically.⁹⁸

3. *Aligning Intellectual, Professional, and Personal Learning*

Professors Sturm and Guinier note that “[t]ypically, law students develop their professional identities and career direction outside the

⁹¹ HOOKS, *supra* note 67, at 8 (noting that “any radical pedagogy must insist that everyone’s presence is acknowledged” and valued by the professor).

⁹² PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 71–72 (1970) (“This is the ‘banking’ concept of education, in which the scope of action allowed to students extends only as far as receiving, filing, and storing the deposits.”).

⁹³ *Id.* at 77. (“The banking concept of education . . . attempts to control thinking and action, leads women and men to adjust to the world, and inhibits their creative power.”).

⁹⁴ *Id.* at 73. (“The more students work at storing the deposits entrusted to them, the less they develop the critical consciousness which would result from their intervention in the world as transformers of that world. The more completely they accept the passive role imposed on them, the more they tend simply to adapt to the world as it is and to the fragmented view of reality deposited in them.”).

⁹⁵ *Id.* at 75. (“[T]he humanist, revolutionary educator[s]. . . efforts must coincide with those of the students to engage in critical thinking and the quest for mutual humanization.”).

⁹⁶ *Id.* at 79. (“‘Problem-posing’ education, responding to the essence of consciousness—intentionality—rejects communiqués and embodies communication.”).

⁹⁷ *Id.* at 80. (“The teacher is no longer merely the-one-who-teaches, but one who is himself taught in dialogue with the students, who in turn while being taught also teach.”).

⁹⁸ *Id.* at 81. (“The students—no longer docile listeners—are now critical co-investigators in dialogue with the teacher. The teacher presents the material to the students for their consideration, and re-considers her earlier considerations as the students express their own.”).

context of their academic work and without direct faculty involvement.”⁹⁹ Business law clinics offer students a singular opportunity in legal education to experience a continuity of academic instruction and professional supervision in an intimate learning environment focused on corporate law. Clinicians often wear multiple hats in service to students’ professional development and intellectual engagement. The business law clinician is professor in the classroom, supervising attorney regarding client work, and mentor during individual supervision.¹⁰⁰ This means that the same business law clinician can evaluate students’ professional evolution and critical analysis over time and across different client matters. Ideally, interaction between the business law clinicians and their students is frequent, encouraging, and both structured and informal. This learning environment means that the business law clinician becomes familiar with the student not only as an aspiring corporate attorney, but also as a unique individual. Thus, the business law clinician can challenge her students to reflect on their professional goals and motivations. Additionally, she can provide feedback or resources in the context of client matters that will assist students throughout their legal careers.¹⁰¹ Moreover, as practicing attorneys, business law clinicians are well positioned to guide students’ career choices by providing contemporary information and observations on the current legal market, which they also occupy.¹⁰²

4. *Creating New Incentive Structures for Student Learning*

Business law clinicians determine student performance based on multiple factors in both formative and summative assessments that disrupt the Langdellian paradigm that dominates traditional legal education. For example, the application process for business law clinics

⁹⁹ *The Law School Matrix*, *supra* note 61, at 534–535.

¹⁰⁰ WILLIAM DERESIEWICZ, *EXCELLENT SHEEP: THE MISEDUCATION OF THE AMERICAN ELITE AND THE WAY TO A MEANINGFUL LIFE* 178 (2014) (“Learning is an emotional experience, and mentorship is rooted in the intimacy of intellectual exchange.”).

¹⁰¹ Susan Bryant, et al., *Learning Goals for Clinical Programs*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 14–15, (2014) [hereinafter *EDUCATION OF LAWYERS*] (“The slow pace of clinical work allows students time to examine how their choices and actions reflect professional norms, including how different interpretations of those norms have consequences for the actions of lawyers. Faculty supervision of these actions enables careful exploration of significant professional identity questions, especially those salient for beginners.”).

¹⁰² See Luppino, *supra* note 30, at 160 (explaining that business law clinicians “tend to have substantial practice experience and consequent familiarity with the reality that business transactions involve teamwork among client and professionals from multiple disciplines.”). See also Schrag, *supra* note 82, at 183 (“[C]linical teachers, who often come to know their students well, can encourage them to think deeply about what they want to accomplish after graduation, rather than drifting into traditional career paths for lack of anything better to do.”).

may encourage students to describe achievement and distinction outside of what is commonly rewarded in law school by requiring students to demonstrate a passion for learning and genuine interest in pursuing a career in transactional lawyering.¹⁰³ In this way, students are selected to participate in business law clinics based on a variety of both soft and technical skills.¹⁰⁴

Similarly, the grading matrix in business law clinics can consider, among other things, student work-product, client communications and counseling sessions, participation in clinic seminar, and interactions with clinic partners, third parties, and the clinician. Thus, business law clinics are not limited to one performance metric that is “isolated from the world within which law schools operate.”¹⁰⁵ On the contrary, a significant portion of student evaluation can be how effectively the student interacts in the world around her and operates within the corporate lawyering environment. Moreover, assessment in business law clinics recognizes and celebrates different forms of achievement and success.¹⁰⁶ High achievement¹⁰⁷ in a business law clinic may¹⁰⁸ offset performance in the standard bar courses¹⁰⁹ that employers review to determine where students belong in the professional hierarchy.¹¹⁰

¹⁰³ Student narrative can elicit better information to assess student willingness to learn than a law school transcript. See Westbrook, *supra* note 21, at 256 (explaining the limitations of evaluating student performance based on “[a] semester of presentations with some Socratic questioning of the students, culminating in a pre-arranged final examination, [that] may test students’ understanding of the class presentations, but is unlikely to prepare them for anything other than similar academic challenges.”).

¹⁰⁴ Example soft skills that distinguish students for the SEEE Clinic include, but are not limited to, growth mindset, self-awareness, resilience, communication skills, and managing skills. Example technical skills that distinguish students for the SEEE Clinic include, but are not limited to, substantive understanding of corporate law, corporate finance, corporate taxation, and economic justice issues.

¹⁰⁵ *The Law School Matrix*, *supra* note 61, at 537.

¹⁰⁶ See Susan P. Strum, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy and the Legal Profession*, 4 DUKE J. GENDER L. & POL’Y 119 (1997) (arguing that legal education needs new models of successful performance that recognize different means of success).

¹⁰⁷ Schrag, *supra* note 82, at 203 (explaining that the clinics at Georgetown have a curve that “is somewhat higher than in large courses and a bit higher than in seminars, however, with approximately half the clinic students receiving an ‘A’ or ‘A-’ each semester”).

¹⁰⁸ Some law schools, do not include grades received in clinic when calculating student GPA. Nonetheless, letters of recommendation or personal phone calls by clinicians can encourage an employer to consider a student whose GPA alone would not have distinguished her among the applicants. Indeed, the rigor of some business law clinics is so highly regarded within the local professional community that employers regularly rely on clinical faculty recommendations of graduates of that clinic when filling entry-level positions.

¹⁰⁹ Bar courses tend to account for the majority of units in calculating a student’s GPA. Seminar courses, clinics, and externships may not be included in the GPA calculation.

¹¹⁰ See Orin Kerr, *Thoughts on First-Year Law School Grades*, available at <http://www.volokh.com/posts/1138056460.shtml> (“There are so many law students and so many

In these ways, business law clinics can disrupt the legal education of future corporate lawyers in a manner that subverts tendencies of conformity and complacency, uniquely positioning business law clinics within the business law curriculum.¹¹¹

D. *The Untold Story*

As outlined in the previous two sections, business law clinics make a significant impact on the legal academy and the learning experiences of future corporate lawyers. Unfortunately, the disproportionate emphasis on business law clinics as skills-training diverts attention from the important and significant intellectual contributions of business law clinics.¹¹² Much of what business law clinicians accomplish can go unnoticed and seem invisible in conversations on their pedagogical contributions. The trifecta of student autonomy, primary responsibility, and continuity of instruction across various subject matters also means that business law clinicians regularly have opportunities to engage their students in academic inquiries that critically examine formal law,¹¹³ legal practice generally, and the specific role of the transactional lawyer.¹¹⁴ Indeed “law school clinical programs [generally] have both the luxury and the responsibility to engage students in a critical inquiry into how law is constructed, how it is applied, and the role both of the clinical program and students play in that process.”¹¹⁵

Unlike many law school classrooms, business law clinics can transition students to thinking about application and generation of laws in a legal profession that subscribes to the dominant legal culture. Through business law clinics students are able to “unpack” their lawyering and reflect on elements of legal practice they wish to change.

employers out there that employers tend to rely on proxies to determine which law students will make the best attorneys. The most obvious proxies are an applicant’s school and GPA, in part because there isn’t much else to go on when the applicant is only a student. The basic problem is limited information: employers need an easy way to screen candidates down to a small enough group to interview, and the school/GPA combo is a quick and easy screen.”). See also Frank Wu, *What I Learned About Law School Grading From Danny DeVito, John Rawls and Ryan Lochte*, HUFFINGTON POST (Nov. 20, 2012), available at http://www.huffingtonpost.com/frank-h-wu/law-school-grading_b_2155475.html (“First year grade averages in law school are used by observers such as prospective employers to perform a rough sort of the student body if only for administrative efficiency.”).

¹¹¹ See Paoletti, *supra* note 58, at 432–33 (explaining the objectives and methodology for clinical legal education).

¹¹² Wizner, *supra* note 12, at 330 (“I believe that the emphasis in clinical teaching on what I would call ‘micro-lawyering’ risks shortchanging both our students and our clients by narrowing students’ vision and stifling their passion and creativity.”).

¹¹³ *Supra* Part I.C.3.

¹¹⁴ Paoletti, *supra* note 58, at 433.

¹¹⁵ *Id.* at 450.

Thus, business law clinics can play a unique pedagogical role in preparing students for practice and preparing them to change practice. By engaging students in these critical interrogations, business law clinicians add to the intellectual development and deepen their students' learning. One method business law clinicians can use to marshal critical inquiries among their students is to expose them to critical legal theory while they are practicing in the clinic.¹¹⁶ Exploring how and analyzing why business law clinicians integrate critical legal theory into their courses has not previously been examined in clinical education scholarship.¹¹⁷ In better understanding how and why business law clinicians accomplish the integration of critical legal theory, this Article hopes to initiate a conversation that more closely aligns business law clinics within the pedagogical goals of clinical legal education, including to expose law students to questions of legal theory and cultivate imaginative lawyers poised to be leaders within the legal profession.¹¹⁸

II. CRITICAL THEORY IN PRACTICE

This section examines the body of legal scholarship encompassed in critical theory, identifies the foundational contributions of critical theory to thought and practice within the profession, and describes the law school courses that typically engage critical legal theory in the legal academy. While business law courses rarely integrate critical legal theory, this Article argues that critical legal theory would be particularly useful for preparing transactional lawyers. This Article emphasizes the effectiveness of critical legal theory in facilitating the following interdependent pedagogical goals: (1) contextualizing client work; (2) encouraging creativity; (3) promoting higher order thinking; and, (4) developing professional character and an ethical compass.¹¹⁹

¹¹⁶ See generally Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER & SOC. POL'Y & L. 161 (2005).

¹¹⁷ Poverty law, community lawyering, and human rights clinics have "rich lessons based on years of struggling to incorporate the lessons of critical legal theory into our work." Caroline Bettinger-Lopez, et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice* 18 GEO. J. ON POVERTY L. & POL'Y 337, 380 (2011) [hereinafter *Redefining Human Rights Lawyering*]. Business law clinicians are, however, increasingly addressing critical issues of identity and race in presentations on clinical pedagogy. See, e.g., 37TH ANNUAL CONFERENCE ON CLINICAL LEGAL EDUCATION: BECOMING A BETTER CLINICIAN 12 (2014), available at <https://bestpracticeslegaled.files.wordpress.com/2014/05/clin14bookletweb.pdf>.

¹¹⁸ Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLIN. L. REV. 489, 493 (2013) ("The bottom line is that clinical pedagogy aims to teach students to approach lawyering as theory-driven practice, framing each activity with intentionality and reflection.").

¹¹⁹ "The primary role of law professors is to teach the next generation of lawyers to think critically about problems, to understand the structure and power of law in our soci-

These four competencies—understanding context, creativity, higher order thinking, and professional character—are essential for a successful career as a corporate lawyer.

A. Framing Critical Theory

Before exploring why “[c]ritical theory is important in live-client clinical teaching as a means to achieve the pedagogical goals of clinical education,”¹²⁰ it makes sense to define the term, critical legal theory. While critical legal theory is a diverse body of literature, there are general unifying principles within this scholarship. For example, critical legal theory explains and theorizes how subordination of classes of people is perpetuated even absent formal systems of intentional discrimination.¹²¹ Professor Caroline Bettinger-Lopez notes, “critical legal theories are concerned with the ideology of law and the ways that law facilitates justice while revealing how it may serve as a pretense for justice.”¹²² The scholarship of critical theorists has contributed to “a powerful intellectual and political movement” critiquing law and legal institutions.¹²³ Critical legal studies (“CLS”) “emerged in the 1970s to challenge conventional legal thought and expose the proposition of ‘neutral law’ as myth . . . by suggesting the ways in which prejudices and economic interests infect legal decision-making.”¹²⁴ CLS “began the important work of critiquing the foundational premise that law, as distinct from politics, was rule-bound, objective, and neutral, as part of the effort to expose the role of the law in maintaining and legitimizing an unjust status quo.”¹²⁵ These scholars achieved a significant presence in the legal academy in the late seventies by “organiz[ing] mostly around issues of class and market forces . . . CLS scholars methodically exposed the deeply political and contextual character of supposedly apolitical legal standards and free-market rules.”¹²⁶ Although galvanized, critical legal theorists deliberately re-

ety, and to be thoughtful and engaged with respect to solutions.” Statement of the Deans Steering Committee, of the Association of American Law Schools (2014) available at <http://aals.org/wp-content/uploads/2014/09/Statement-on-the-Value-of-a-Legal-Education.pdf>.

¹²⁰ Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER & SOC. POL’Y & L. 161, 162 (2005).

¹²¹ See Johnson, *supra* note 120, at 167.

¹²² *Redefining Human Rights Lawyering*, *supra* note 117, at 349.

¹²³ *Id.* at 348.

¹²⁴ *Id.* at 349.

¹²⁵ Cheryl I. Harris, *Critical Race Studies: An Introduction*, 49 UCLA L. REV. 1215, 1221 (2002).

¹²⁶ Daria Roithmayr, *Introduction to Critical Race Theory in Education Research and Praxis*, in RACE IS—RACE ISN’T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION 1, 1 (Laurence Parker et al. eds, 1999) (noting that no set of doctrines or methodologies define critical race theory).

sisted adopting one unifying theory or analytic approach,¹²⁷ which led to the emergence of various distinct critical theory “movements including, but not limited to, critical race theory (CRT), feminist legal theory, Latcrit theory, queer theory,”¹²⁸ and poverty law theory.¹²⁹ The sum of these various critical theory movements has “problematized our capacity to theorize and implement justice.”¹³⁰

Critical race theory is “a race-conscious and quasi-modernist intervention into critical legal scholarship”¹³¹ that builds on and transforms many concepts popularized within CLS “in order to develop a theoretical language that would expose the limitations of prevailing racial ideology and facilitate its disruption.”¹³² “Accordingly, critical race theorists attempt to show how contemporary law—including contemporary antidiscrimination law—paradoxically accommodates and even facilitates racism.”¹³³ In this way, critical race theory is “an analytic tool to unpack, shed light on, problematize, *disrupt*, and analyze how systems of oppression, marginalization, racism, inequity, hegemony, and discrimination are pervasively present and ingrained in the fabric of policies, practices, institutions, and systems.”¹³⁴ Among the many significant contributions of critical race theorists are identifying the role of unconscious racism and implicit bias to explain how the intent doctrine entrenches white supremacy;¹³⁵ the reexamination of

¹²⁷ See Deborah L. Rhodes, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 619 (1990) (“Yet these [critical] traditions also differ considerably in their theories about theory, in their critiques of liberal legalism, in their strategies for change, and in their alternative social visions.”); Roithmayr, *supra* note 126, at 3.

¹²⁸ *Redefining Human Rights Lawyering*, *supra* note 117, at 349.

¹²⁹ See Johnson, *supra* note 120, at 162. See also *Redefining Human Rights Lawyering*, *supra* note 117, at 350 n. 57 (explaining the harmony among these distinct theoretical movements to “transform[] legal practices to serve the values of equality and social solidarity.”) (citing RICHARD W. BAUMAN, CRITICAL LEGAL STUDIES: A GUIDE TO THE LITERATURE 4 (1996)). Among other emerging areas of critical theory scholarship is critical tax theory. See, e.g., ANTHONY C. INFANTI AND BRIDGET J. CRAWFORD, CRITICAL TAX THEORY: AN INTRODUCTION (2009); Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3 (2009).

¹³⁰ *Redefining Human Rights Lawyering*, *supra* at note 117, at 350.

¹³¹ Roithmayr, *supra* note 127, at 1.

¹³² Cheryl I. Harris, *supra* note 125, at 1221. See also Devon Carbado, *Critical What What?* 43 CONN. L. REV. 1593, 1596 (2011).

¹³³ Angela P. Harris, *Critical Race Theory*, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, 2 (Elsevier 2012), available at http://works.bepress.com/cgi/viewcontent.cgi?article=1030&context=angela_harris.

¹³⁴ H. Richard Milner IV, *Analyzing Poverty, Learning, and Teaching Through a Critical Race Theory Lens*, 37 REV. RESEARCH IN EDUC. 1, 1 (2013 (emphasis added)).

¹³⁵ See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing the intent doctrine established in *Washington v. Davis* not only unduly burdens the plaintiff who is unlikely to be able to prove knowledge but also requires the legal system to ignore the effects that systematic cultural notions of race which have made us all inherently racially biased). See, e.g., Kristin A. Lane, *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427

landmark civil rights jurisprudence to illustrate that gains towards racial justice occur to the extent they converge with interests of white elites;¹³⁶ identifying the function of race in the foundation of substantive legal doctrine;¹³⁷ and the interrogation of the Constitution as colorblind.¹³⁸

Similar to critical race theory's exploration of entrenched racial inequality through the function of law, feminist legal theory takes gender as a central category of analysis¹³⁹ to examine the perpetuation of sex-based subordination and gender inequality.¹⁴⁰ Narrative theory,¹⁴¹ grounded in concrete lived experiences,¹⁴² is an important element of feminist legal theory's pragmatic critical movement, and distinguishes this corpus of scholarship from critical legal studies, which generally contemplates and imagines domination.¹⁴³ Feminist theorists have identified how legal structures, such as the legal academy, have enforced false dichotomies tied to devalued "female" characteristics that are inferior to those characteristics labeled as "male."¹⁴⁴ The intervention of feminist legal theory responds to and interrogates formal but hollow gender equality under the law.

Consistent with the critical theorist resistance to conformity,

(2007) (demonstrating the inadequacy of the intent doctrine given that the human mind operates without conscious awareness of its workings producing unconscious attitudes and responses of an implicit favoritism towards one's own group identity).

¹³⁶ See, e.g., Derrick A. Bell Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1979) (providing a systematic view of *Brown v. Board of Education* and the Fourteenth Amendment which illustrates that the interests of Blacks in achieving racial equality are accommodated to the extent that they coincide with the interests of privileged whites).

¹³⁷ See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (documenting how legal texts and common law have created a tangible property interests in white identity that provide privileges and protections to whites regardless of socioeconomic status).

¹³⁸ See, e.g., Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, 44 STAN. L. REV. 1 (1991) (arguing that the theory of a "color blind" Constitution perpetuates white racial domination by ignoring that programs designed to remediate racial subordination are far different from those designed to implement it and legitimizes the social, economic, and political advantages whites hold over other racial identities).

¹³⁹ Deborah L. Rhodes, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 617-18 (1990).

¹⁴⁰ *Id.* at 618.

¹⁴¹ See Carolyn Grose, 'Wishin and Hopin and Thinkin and Prayin, Planning and Dreamin.' *The Narrative Theor[ies] of Predatory Lending*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337582 (discussing narrative framework as an important lawyering technique).

¹⁴² Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325 (1987) ("When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge.").

¹⁴³ Rhodes, *supra* note 139, at 622.

¹⁴⁴ See Menkel-Meadow, *supra* note 78, at 71.

these scholars also write across and at the intersection of various theoretical disciplines.¹⁴⁵ Notable among several examples of intersectional scholarship is the work of Professor Crenshaw,¹⁴⁶ who has pioneered legal scholarship at the intersection of race, gender, and socioeconomic status,¹⁴⁷ setting the stages for multiple critical theorists to explore the unresponsiveness of dominant legal discourse to the intersection of identities and layered subordinations.¹⁴⁸

1. *Critical Theory in Legal Education*

Despite the richness and persistence of critical scholarship, few law schools consistently offer courses where students engage critical legal theory,¹⁴⁹ nor is it regularly integrated into traditional legal education courses.¹⁵⁰ In fact, UCLA School of Law is the only law school to establish a specialization in Critical Race Studies.¹⁵¹ Outside of specialty seminars, critical legal theory is not commonly addressed in traditional legal education.¹⁵² One structural explanation is that the

¹⁴⁵ See Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309 (2011); Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463 (2008).

¹⁴⁶ Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

¹⁴⁷ Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991).

¹⁴⁸ See Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177 (1997); Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938 (1997); Angela Harris, *Gender, Violence, Race and Criminal Justice*, 52 STAN. L. REV. 777 (2000); Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239 (2012).

¹⁴⁹ Information on the Georgetown University Law Center First Year Curriculum: Curriculum B available at <http://apps.law.georgetown.edu/curriculum/documents/DescriptionofcurriculumB.pdf> (describing an alternative to the first-year curriculum that includes a Legal Justice Seminar incorporating, among other things, feminist theory and critical race theory).

¹⁵⁰ Melissa E. Murray, “I’d Like to Thank the Academy”: *Eminem, Duncan Kennedy, and the Limits of Critique*, 55 J. LEGAL EDUC. 65, 66–68 (2005) (asserting critical legal studies as an entrenched critique yet dismantled and reorganized to prevent it from effecting change within the legal academy). See Angela Harris, *supra* note 34, at 12 (discussing critical race theory at the margins of research and teaching); see also Peggy Li, *Perspectives on Critical Race Theory Conference: Using Critical Race in Legal Practice*, available at <http://diversity.berkeley.edu/perspectives-critical-race-theory-conference-using-critical-race-theory-legal-practice> (“Critical race theory has been around since the 1980s, yet few law schools provide courses on this crucial body of scholarship.”).

¹⁵¹ Cheryl I. Harris, *supra* note 34, at 1216 (acknowledging the significance of the Critical Race Studies program at UCLA School of Law as it “is the first [and only] of its kind anywhere . . . Yet, until recently, there has been scant opportunity to implement formally, in a systematic way, a course of study that takes the insights of CRT as a point of departure for teaching, learning, and writing about race and law.”).

¹⁵² See Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Law-*

large classroom sizes typical in legal education do not lend themselves to interrogating legal systems and the formation of legal doctrine through a critical lens.¹⁵³ It is difficult to discern which law schools offer significant exposure to other critical legal movements given that gender and the law, sexuality and the law, or race and the law courses do not uniformly incorporate critical analysis of feminist legal theory, queer legal theory, and critical race theory respectively. For this reason, there are few law school courses that a general sampling of law students could take that incorporate critical legal theory.¹⁵⁴ Thus, critical legal theory and its various sub-movements are found, if at all, at the margins of law school curriculum.

Several clinical professors have described their efforts to incorporate critical legal theory in their clinical courses.¹⁵⁵ It is reasonable to believe that still more clinical professors are integrating critical legal theory into their clinical courses given both the common origins¹⁵⁶ and shared objectives of critical legal theory and clinical legal theory.¹⁵⁷ In light of the noted educational value clinicians have documented in

ying, 114 YALE L.J. 1459, 1460 (2005) (discussing the difficulty integrating critical race theory into civil procedure, professional responsibility and clinical courses).

¹⁵³ See Spade, *supra* note 66, at 7, (arguing that “[c]ritical dialogue is made impossible” in traditional law school environment).

¹⁵⁴ Although distinct from critical theory pedagogy, scholarship on the incorporation of race and critical identity may be a helpful starting point for teaching critical legal theory. For examples of scholarship discussing the integration of race in law school classrooms. See Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242 (2004) (offering examples from a variety of civil procedure cases and subjects to show how a professor, using the Socratic method and a traditional casebook, can incorporate issues of race, class, and gender); see also Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses*, 23 ST. JOHN’S J. LEGAL COMMENT 667 (2008).

¹⁵⁵ See Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 MINN. L. REV. 1599 (1991); Goldfarb, *supra* note 14; Johnson, *supra* note 120; and *Redefining Human Rights Lawyering*, *supra* note 117.

¹⁵⁶ Both critical legal theory and clinical legal theory are outgrowths of the legal realism movement, which flourished in the 1920s and 1930s. See Goldfarb, *supra* note 14, at 718. Legal realism is a critique of 19th Century idealism that legal institutions provided an autonomous and self-executing system of legal discourse untainted by morals and politics. See Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 474 (1988) (“The legal realists wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends. Law and legal reasoning are a part of the way we create our form of social life.”).

¹⁵⁷ *Id.* at 722 (“Like clinical educators, critical legal scholars seek to illuminate the assumptions, biases, values, and norms embedded in law’s workings in order to heighten awareness of the political and moral choices made by lawyers and the legal system. Although critical legal theorists focus more on legal doctrine and clinical legal theorists on legal practice, both work to make conscious the tacit theories that the legal system embodies and expresses.”).

criminal defense clinics, domestic violence clinics, and human rights clinics, this Article presents beneficial outcomes of incorporating critical theory into a business law clinic.

B. Deepening Learning and Amplifying Disruptive Pedagogy

Future corporate lawyers are among the least likely to be exposed to critical theory during their law school careers because business law courses rarely utilize critical legal theory in their curriculum. Law students focused on taking courses to prepare them for practicing business law could easily complete law school without engaging in the critical analysis and explorations that critical legal theory provides. This is unfortunate for this subset of law students, and for the legal profession, as exposure to critical legal theory assists in developing essential capacities of success in future corporate lawyers. There are four core competencies that engaging with critical legal theory facilitates in future corporate lawyers: (1) contextualizing client-matters; (2) creative lawyering; (3) higher order thinking; and, (4) developing professional character. The following subsections discuss these four competencies and explain why they are critical assets for a successful career as a corporate lawyer.

Corporate lawyering, like many other forms of dynamic lawyering, can be described as “strategic decision-making in a realm of uncertainty.”¹⁵⁸ Thus, it is necessary for law students to have the tools to facilitate transactional clients’ strategic decision-making processes. Each of these competencies is helpful in sound lawyering and, if mastered, provides law students with a confident foundation for evolution throughout their transactional careers. To enhance and stimulate development of these competencies, business law clinicians can offer varied opportunities for introspective writing to memorialize and articulate metacognitive awareness of their growth as they consider the critical perspectives presented in the course.¹⁵⁹

¹⁵⁸ Peter Rosenblum, *Teaching Human Rights: Ambivalent Activism, Multiple Discourses, and Lingering Dilemmas*, 15 HARV. HUM. RTS. J. 301, 304 (2002).

¹⁵⁹ See ARNETHA F. BALL, MULTICULTURAL STRATEGIES FOR EDUCATION AND SOCIAL CHANGE: CARRIERS OF THE TORCH IN THE UNITED STATES AND SOUTH AFRICA 60–72 (2006) (discussing the use of narrative as a pedagogical tool for increasing metacognitive awareness of a learner’s own values, ideologies, feelings, thoughts and behaviors). See also Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2248 (1992) (“Reflection pieces serve several purposes. Students come to class prepared. But more than that, they come having already engaged in the process of experiencing the harmony and dissonance between their own perspectives and the perspectives described in the readings.”); Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLIN. L. REV. 623 (2003); Jane H. Aiken, *Provocateurs for Justice*, 7 CLIN. L. REV. 287, 289 (2001) (discussing the importance of students learning to reflect on their experiences and recognizing the role they play in oppressive systems of power);

1. *Contextualizes Client Matters*

The complexities, circumstances, and ideas explored in critical theory help students better understand their clinical clients.¹⁶⁰ This is especially important if the business law clinic is working in a low-income neighborhood, a community of color, or otherwise engages in social justice lawyering because critical theory helps contextualize the realities of subordinated populations.¹⁶¹ The ability to contextualize, however, is important to all forms of corporate lawyering.¹⁶² In order to be an effective lawyer, students need a “complex understanding of their clients within the context of their situations.”¹⁶³ Acquiring a complex understanding of their client is often difficult for law students to accomplish in a short timeframe given their limited practice, and often life, experiences. A limited understanding of the client context makes it difficult, if not impossible, for the student to develop a solution to the client’s legal and business issues.¹⁶⁴

Integrating critical legal theory into a business law clinic provides students with a more complex understanding of the issues the client faces, which can contextualize the client matter and enhance the effectiveness of the student’s lawyering.¹⁶⁵ It can also help students identify where they have made assumptions and where they need to continue their fact investigation. As Professor Jane Aiken explains, “paradigmatic assumptions are perhaps the most difficult to pin down because they are the very structural assumptions we use to put our

Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 321 (2014) (“The goals of reflective practice are to provide the professional with a self-improvement algorithm, and to increase the capacity of the professional to exercise judgment in the professional context.”).

¹⁶⁰ Johnson, *supra* note 120, at 170.

¹⁶¹ *Enriching the Law School Curriculum*, *supra* note 2, at 89 (noting that “transactional clinics often serve a social justice mission”).

¹⁶² Matsuda, *supra* note 142, at 328 (“It is one thing to suspect that law is indeterminate, but it is quite another to grasp exactly how that indeterminacy works in specific contexts.”).

¹⁶³ Johnson, *supra* note 120, at 184.

¹⁶⁴ Kruse, *supra* note 86, at 431 (noting that “[t]he students’ lack of familiarity with the context of the [client] problem will also limit their ability to think creatively and expansively about possible solutions.” [c]ontinuing to explain that once students have a greater understanding of context, their lack of experience can actually facilitate creative lawyering as they are uninhibited from previous, perhaps unsuccessful, experiences.).

¹⁶⁵ “[G]enuinely critical scholarship . . . can reveal the complexity of issues about which legal precedent and professional discourse are narrow, stultified, or simply nonexistent.” Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 751 (1991). Integrating critical theory into a business law clinic also helps students better understand critical theory, by giving students a concrete example, their client matters, to apply theoretical concepts. One of the major criticisms of critical theory is that it is too “abstract, academic, and confined to traditional academic discussions” to effectuate lawyering. The context of the live-client experience can mitigate these critiques. Murray, *supra* note 150, at 76.

experience into fundamental categories. Many times we see these assumptions as merely facts, the way things are.”¹⁶⁶ Students overcome these blind spots by identifying the paradigmatic assumptions so that they “can more easily remedy resistance to clients and assist in the development of case theories.”¹⁶⁷

Business law clinics can provide complex real world environments by working with clients within specific low-income geographic locations, marginalized entrepreneurs and business managers—e.g., managers who are queer, female or of color—in cutting-edge industries—e.g., sustainable technologies—or hybrid corporate entities and business models. Allowing students to practice within these *fronteras*,¹⁶⁸ where they cannot find correct answers in a textbook or legal opinion, requires that students understand the specifics of their clients’ circumstances in order to anticipate how to counsel them regarding the law.¹⁶⁹ In this way, business law clinicians can prepare students for the uncertainty they will regularly encounter as transactional attorneys, but provide the resources they need as students to understand the environments where they lawyer. “Law students and lawyers must learn how to understand the context in which they are operating, and to assess the possible consequences of different strategic choices.”¹⁷⁰ The critical theory training not only helps students contextualize their client’s circumstances, but to also anticipate potential outcomes.

In sum, understanding critical legal theory helps create students who are client-centered lawyers¹⁷¹ who can prioritize their clients’ needs. For business law students, exposure to critical legal theory helps them to better understand the inner working of legal systems,¹⁷² their client’s broader community,¹⁷³ and better anticipate clients’ needs.

¹⁶⁶ Aiken, *supra* note 159, at 299 (2001).

¹⁶⁷ John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 *LOY. L.A. L. REV.* 1167 (2004).

¹⁶⁸ See GLORIA E. ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 194–195 (1987) (using the term “frontera” to describe the tensions and contested spaces—whether geographical, racial, cultural, or otherwise—at the points where opposing identities and ideologies meet).

¹⁶⁹ Paoletti, *supra* note 58, at 443.

¹⁷⁰ Schlossberg, *supra* note 28, at 205.

¹⁷¹ See Johnson, *supra* note 120, at 167.

¹⁷² *Id.* at 169 (through critical legal theory students gain a vocabulary for describing systems of subordination).

¹⁷³ *Id.* at 167.

2. *Encourages Creative Lawyering*

Critical legal theory facilitates creative and imaginative lawyering,¹⁷⁴ which is necessary for lawyering in the 21st century,¹⁷⁵ allowing lawyers to remain agile throughout their professional careers.¹⁷⁶ Creativity is a critical aspect of transactional lawyering.¹⁷⁷ Transactional lawyers help clients plan into the future to achieve desired outcomes¹⁷⁸ and confront new issues, technologies, and risks that affect their clients' interests on a regular basis.¹⁷⁹ Thus, to lawyer effectively in a corporate practice, lawyers must demonstrate imagination, creativity and flexibility in their analysis, problem-solving, and decision-making. Legal imagination involves "the ability to generate the multiple characterizations, multiple versions, multiple pathways, multiple solutions" to which students then apply "very well honed analytic skills."¹⁸⁰ Building on one of the foundational pedagogical goals of clinical education, business law clinicians must find ways to increase their students' ability to creatively problem-solve because corporate law evolves rapidly and thus requires adaptive lawyering skills. Studies show that adult learners generally are less likely than children to try novel and unusual strategies in their problem-solving process. Adult learners are more likely to be inflexible, narrow thinkers. In many ways, the task of business law clinicians is to restore flexible, agile, fluid thinking and allow students to apply it in the context of corporate law.¹⁸¹ Therefore, creative lawyering is a skill that must be

¹⁷⁴ Schrag, *supra* note 82, at 184 ("One of the hallmarks of an effective lawyer is that he or she can (1) recognize those occasions when doing a task by the book is not likely to achieve satisfactory results, (2) figure out a creative alternative, and (3) find the courage to deviate from the accepted norm of practice.").

¹⁷⁵ See Nancy B. Rapoport, *Is "Thinking Like a Lawyer" Really What We Want to Teach?*, 1 J. ASS'N LEGAL WRITING DIRECTORS 91, 95 (2002) ("In every discipline, old ways of thinking about the discipline are abandoned, regularly replaced with new ones.").

¹⁷⁶ LUKE WILLIAMS, *DISRUPT: THINK THE UNTHINKABLE TO SPARK TRANSFORMATION IN YOUR BUSINESS* 18–19 (2011) (arguing "[t]he ability to imagine things as they never were and ask, 'What if?,' is an essential part of every executive's skill set.").

¹⁷⁷ See George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 BUS. LAW. 278, 317 (2009) (explaining the nonstandard transactions, such as strategic alliances and venture capital financing, are rapidly evolving and that a lawyer's creativity is indispensable in creating value within this expanding realm of corporate practice).

¹⁷⁸ Scott J. Burnham, *How to Read a Contract*, 45 ARIZ. L. REV. 133, 134 (2003) ("Contract reading is nonlinear, imaginative, nonliteral, transformative, and iterative . . . It is an *imaginative* process because, even though contracts are written in the present, they govern the future. You must use your imagination to consider what the future might bring in order to determine whether the contract provides for it.") (emphasis added).

¹⁷⁹ ALICIA ALVAREZ & PAUL TREMBLAY, *INTRODUCTION TO TRANSACTIONAL LAWYERING PRACTICE* 3 (WEST 2013).

¹⁸⁰ Todd D. Rakoff and Martha Minow, *Case for Another Case Method*, 60 VAND. L. REV. 597, 602 (2007).

¹⁸¹ Menkel-Meadow, *supra* note 78, at 909 ("Effective legal problem solvers must learn to *think* differently before they learn to *act* differently.").

taught to and demonstrated for law students interested in corporate law.

“Confronting real legal problems is one of the best ways to foster the sort of ‘legal imagination’ that our graduates will need if they are to become the very best lawyers, problem solvers, and leaders that they can be.”¹⁸² If students, however, are to learn how to think creatively within the context of real legal problems, they also need examples of that skill demonstrated for them. “The Socratic method in the large classroom, though valuable as a way to teach sharp analytic skills, is ill-suited to fostering ‘legal imagination,’ which is what lawyers need most to become effective advocates, institutional designers, transaction engineers, and leaders.”¹⁸³ Critical theory models for students the creative lawyering that is often lacking in traditional legal education. Critical theorists are incredibly imaginative in their ability to analogize the law, generate unique re-framings of the law, and envision a re-articulation of the legal system that addresses the identified issues.¹⁸⁴ The use of narrative and the emphasis on grounding critical analysis in lived experiences illuminate for students how they can tailor legal solutions to meet the needs of their corporate clients. Students can understand the issues presented and see the flaws within the legal system through their engagement with critical legal scholarship.

Critical legal theory also augments clinical pedagogy by challenging students to lawyer in real situations, to approach situations from different angles, and to think outside of traditional legal doctrine. Critical legal theory often draws from different social science disciplines to provide new frameworks for understanding the law. The literature is multidimensional and interconnected to provide new explanations for persistent social issues. Moreover, critical theory leads clinical students to better understandings of context and case theory, which improves their creative lawyering.¹⁸⁵ Critical legal theory is not just about understanding the relationship between law and power, but also about changing it. Once students can learn to recognize issues and gaps within the law, they are one step closer to generating possible solutions to the issues.

The ability to continuously problem-solve and creatively lawyer in new scenarios can also be described as “generative lawyering.” Generativity applied to the context of teaching future lawyers refers

¹⁸² Elena Kagan, *Harvard Law School Revisited*, 11 GREEN BAG 2D 475, 480 (2008), available at http://www.greenbag.org/v11n4/v11n4_Kagan.pdf.

¹⁸³ *The Law School Matrix*, *supra* note 61, at 516.

¹⁸⁴ See, e.g., OSAGIE OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2013).

¹⁸⁵ Johnson, *supra* note 120, at 171.

to the law student's "ability to continually add to [her] understanding by connecting [her] personal and professional knowledge with the knowledge gain[ed] from [her clients] in order to produce or originate new knowledge that is useful [in] . . . problem solving and in meeting [client needs]."¹⁸⁶ Generative or creative lawyering requires that the lawyer first learn with understanding such that she can apply that knowledge to new topics and solve new and unfamiliar problems.¹⁸⁷ A student's lawyering becomes generative when existing knowledge is continually reconsidered in light of new understandings and information.¹⁸⁸ If law students are not learning the power of creativity and generativity, they stand the risk of being stagnant in their thinking about applying the law.¹⁸⁹ Critical theory presents law students with new understandings for their legal knowledge and, thus, accelerates future corporate attorneys' development of generativity.

3. *Promotes Higher Order Thinking*

A primary reason why exposing students interested in transactional law to critical legal theory is that this body of literature actively challenges the dominant understanding of the function of law. Challenging dominant perspectives facilitates the development of the students' own critical thinking skills in the context of legal issues.¹⁹⁰ Junior transactional attorneys need refined critical thinking skills not merely to advance within their own corporate profession but to effectively counter the demands of clients and market forces that threaten to jeopardize entire financial systems.¹⁹¹ Critical legal theory not only

¹⁸⁶ Generativity, a term popularized in teacher education scholarship, denotes a concern for establishing and guiding progressive learning. Arnetha F. Ball, *Toward a Theory of Generative Change In Culturally and Linguistically Complex Classrooms*, 46 AM. EDUC. RESEARCH J. 45, 50–51 (2009).

¹⁸⁷ Megan Loef Franke, et al., *Capturing Teachers' Generative Change: A Follow-Up Study of Professional Development in Mathematics*, 38 AM. EDUC. RESEARCH J. 653, 655–656 (2001).

¹⁸⁸ *Id.* Generative learning is distinct "from cognitive theories of the storage of information in several ways. First, the focus in learning is on generating relations, rather than on storing information." At the essence of generative learning is the use of processes to actively and dynamically "generate meaning for events by constructing relations between new or incoming information and previously acquired information, conceptions, and background knowledge." Merlin C. Wittrock, *Generative Learning Processes of the Brain*, 27 EDUC. PSYCHOL. 531, 532 (1992).

¹⁸⁹ See Schwarcz, *The Role of Lawyers*, *supra* at note 31, at 5–7 (arguing the negative impact of complacent, or stagnant, corporate lawyers in the events leading to the financial crisis).

¹⁹⁰ Freire, *supra* note 92, at 72 (describing "education and knowledge as processes of inquiry.").

¹⁹¹ Murray, *supra* note 150, at 69 ("[T]he modern enemy poised to destroy the moral and ethical fiber of young lawyers is a vast network of corporate clients that enlist legal assistance to circumvent accepted business and accounting practices . . . [and] young law-

serves as an example of higher order thinking but also invites law students into a struggle with the legal material that produces and requires students' critical thinking by challenging preconceived notions of the law.¹⁹² Incorporating critical legal theory disrupts conventional legal education by exposing the students to literature that challenges not only existing distributions of power, but also envisions how the legal system could facilitate equity.¹⁹³ Linking corporate law to normative issues of equity and justice is rarely present in the pantheon of business law courses. Thus, students focusing on business law courses are less likely than their peers in other areas of legal practice to have engaged with the notions that are fundamental to our legal system and indispensable to understanding it.

Critical legal theory analyzes the ideology of law and questions the ways law facilitates justice. Maintaining skepticism regarding the dominant legal and social discourses is a consistent characteristic throughout the critical theory literature. Engaging with critical legal theory challenges law students to recognize that justice is not a by-product that emerges *ipso facto* from the established legal system.¹⁹⁴ When law students explore that the legal system often recreates and perpetuates subordination, it can cause them to pause and reconsider the function of law. In this way, critical theory is a powerful pedagogical tool because it stimulates students to ask tough questions by exposing them to inconsistencies and inequalities within our legal doctrine.¹⁹⁵ The formulation of questions that challenge dominant understanding alone signifies the students' intellectual growth because it means the students are struggling with the new concepts presented in critical theory.¹⁹⁶ Challenging students to question their preconceived

yers are ill equipped to resist the directives issued by unscrupulous partners and clients.”). See also Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 33 HARV. L. BULL. 36, 36–37 (1981) [hereinafter *Rebels from Principle*] (describing corporate lawyers as “nouveau riche businessmen” who “greas[e] the wheels of the system” and “make deals between giant corporations . . . without objection or attempt at evasion, because when they joined the firm they were ‘impliedly’ agreeing that they would represent the firm’s clients, within the limits of the canons of ethics, no matter how repulsive the client’s behavior.”).

¹⁹² Johnson, *supra* note 120, at 162 (explaining that critical “frameworks enable students to deconstruct assumptions they, persons within institutions, and broader society make about the students’ clients and their lives.”)

¹⁹³ Rhodes, *supra* note 139, at 619.

¹⁹⁴ Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1936 (2002).

¹⁹⁵ “For by doubting we come to inquire, and by inquiring we perceive the truth.” PETER ABAILARD, *SIC ET NON: A CRITICAL EDITION* (Blanche B. Boyer & Richard McKeon, eds, 1976) quoted in THOMAS CAHILL, *MYSTERIES OF THE MIDDLE AGES* 196 (2006).

¹⁹⁶ Mitchell, *supra* note 46, at 302 (“[T]he clinic is a place where students and instructors regularly break down and assess elements of lawyer performance and students are pushed to challenge their own assumptions.”).

assumptions can awaken new and independent thought within them. When their own assumptions are surfaced and brought “to the center of consciousness,” it further enables students to identify “the assumptions underlying the culture of law and of our larger culture,” where they can be studied and criticized.¹⁹⁷ Identifying, studying, and analyzing the underlying assumptions of our legal system requires the students to utilize their higher order thinking skills.

Promoting higher order thinking is a difficult task for law professors. Generally students do not enjoy the process of deeper learning and the practice of struggling with new theoretical concepts that challenge their preconceptions. Law students are trained in traditional legal education to focus on rules and broadly accepted doctrine as the basis of their legal analysis, and thus, can be resistant to grappling with ambiguities and inconsistencies brought to the surface in critical theory scholarship. An advantage working for the business law clinician is that “[s]tudents are almost universally enthusiastic about their clinical experience both during and after training.”¹⁹⁸ Students come to business law clinics enthusiastic about the rare transactional training they will receive. This provides business law clinicians opportunities to demand more from their students than a doctrinal professor may be able to elicit. This is facilitated by the reflective practice implemented in business law clinics because “analyzing your own experience is psychologically more stimulating than analysis in the abstract.”¹⁹⁹ In other words, while students may be challenged to think more deeply in business law clinics, students can be more receptive because the process is often enjoyable.²⁰⁰

4. *Develops Professional Character*

Business law clinics are opportunities for law students to develop their professional identity and exposure to critical theory strengthens the clinical experience.²⁰¹ The role that business law clinics play in developing professional identity is particularly important to a successful transactional career because rules of professional conduct often

¹⁹⁷ James Boyd White, *Doctrine in a Vacuum: Reflections on What a Law School Ought (And Ought Not) To Be*, 36 J. LEGAL EDUC. 155, 165 (1986).

¹⁹⁸ See Pertnoy, *supra* note 22, at 171.

¹⁹⁹ See *id.*, at 183.

²⁰⁰ *Id.* at 171 (noting that “[t]he clinical experience is normally one of the most memorable and valuable experiences [for students in] law school.”)

²⁰¹ See Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395 (2012) (examining how experimental learning helps students develop their professional identity); see also Neil W. Hamilton, *Empirical Evidence that Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11 (2012).

contemplate adjudication and, thus, fall short of providing adequate guidance to corporate lawyers.²⁰² Professional responsibility courses, which focus on individual representation under the Model Rules of Professional Conduct,²⁰³ rarely focus on transactional issues nor encourage students to address the conflicts between their personal and professional identities.²⁰⁴ Moreover, in conventional legal education, Professors Sturm and Guinier observe that “[s]tudents detach their personal and professional commitments from their academic learning, encouraged by classroom inquiry that deemphasizes the importance of context and the relevance of personal reactions and goals.”²⁰⁵ For this reason, “[t]he formation of students’ professional identities, as well as their personal values and goals, is thus disaggregated from the academic process.”²⁰⁶ Having internalized legal education’s dominant culture of conformity, law students are often desensitized to their internal ethical compass and independent sense of professional direction.²⁰⁷ Critical theory challenges law students to see the world around them differently and to constantly reassess their own roles as lawyers in either facilitating justice or entrenching subordination.

How future transactional attorneys are challenged through their application of critical theory facilitates a matured view of professional responsibilities. Mikhail Bakhtin’s theory of “ideological becoming”²⁰⁸—which refers to how we develop our way of viewing the world through exposure to new perspectives—provides a methodological explanation of the process that law students undergo when they engage in the struggle of considering and reconciling the analysis within critical legal theory.²⁰⁹ The process of ideological becoming, scholars have explained, is what leads the adult learner to a sense of confidence, ownership, and personal efficacy in their subsequent professional ca-

²⁰² Norman Veasey and Christine T. DiGuglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 *BUS. LAW.* 1, 35 (2006) (“Corporate counsel, especially general counsel, face substantial professional challenges in managing the tensions created by various aspects of their positions.”).

²⁰³ *Redefining Human Rights Lawyering*, *supra* note 117, at 384 (explaining that legal ethics, as defined by the Model Rules of Professional Conduct, are not a sufficient lens for examining the diverse ethical dilemmas within legal practice).

²⁰⁴ See *The Law School Matrix*, *supra* note 61, at 537. See also William Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 *WASH. U. J.L. & POL’Y* 101 (2006) (“Current professional responsibility courses do not address justice or fundamental inequality and the lawyer’s role in fashioning and maintaining that inequality.”).

²⁰⁵ See *The Law School Matrix*, *supra* note 61, at 535.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 540.

²⁰⁸ Mikhail M. Bakhtin, *Discourse in the novel*, in C. Emerson & M. Holquist (Eds.), *TIRE DIALOGIC IMAGINATION: FOUR ESSAYS BY M. M. BAKHTIN*, 259–422 (1981).

²⁰⁹ Ball, *supra* note 159, 54.

reer.²¹⁰ Regardless of whether new perspectives become internally persuasive to the learner or not, Bakhtin explains that it is the process of struggle with these new perspectives, views, and ideas that is an essential element for personal and ideological growth. “It is in these places and at those moments of struggle that we develop our expanded, ever changing ideologies.”²¹¹ Bakhtin asserts that who we interact with in person and in print determines what we learn and defines the contours of what we believe.²¹² According to Bakhtin, the educational interactions that are most effective in promoting learning are those that are filled with tension and contradiction. Committed to identifying and interrogating tensions and contradiction within the law, critical legal theorists provide fertile ground for developing that ideological becoming of law students. “Engaging students in critical theory, while building on the value of client-centered lawyering that predominates in clinical legal education, provides students with valuable opportunities to struggle with conceptions of justice, morality, and their own assumptions as they develop their professional identity.”²¹³

Critical legal theory invites students to reassess their values, histories, and understanding of the law in light of new analysis and narratives of the legal system. The process of ideological becoming occurs in business law clinics where the students are exposed to critical legal theory and encouraged to struggle with the tensions between this literature and traditional legal doctrine. In struggling with these different perspectives and new ideas, students in business law clinics develop their own ideologies and new understandings, which create consciousness and self-awareness.²¹⁴ The process of ideological becoming is significant because it indicates that students have not merely taken on the status quo understanding or learned how to “walk the walk” of corporate lawyers, but through the business law clinic have covered new intellectual ground in becoming their own person. In this way, the law students are not simply learning to practice in the style of the business law clinician but are learning and developing their own professional persona.

What a student accepts ideologically will direct their actions and decision-making process in lawyering. Thus, business law clinicians

²¹⁰ Paoletti, *supra* note 58, at 332.

²¹¹ Bakhtin, *supra* note 58, at 342.

²¹² See *infra* Part III. See also Bloch, *supra* note 73 (explaining that adult learners need to have some experience that motivates them to know that something is important to them). See Ball, *supra* note 159.

²¹³ Paoletti, *supra* note 58, at 440.

²¹⁴ Wizner, *supra* note 12, at 328 (“Assuming the role of advocate, under proper supervision by a clinical teacher, can change a student’s perspective about her client and the world in which her client lives.”).

facilitating ideological becoming is necessary not only for the clinical experience so students can recognize and respond to ethical issues that arise in the clinic, but also because they structure a process for how the students can continue to develop and hone their professional ideologies throughout their legal careers.²¹⁵ Through engaging with critical theory, students gain a mechanism for personal evolution that will prepare them for the ever-changing landscape of corporate law and the different roles they will play throughout their professional careers, regardless of whether they are at a private firm, solo-practice, in-house at a company, or influencing corporate law policy. The ability to think critically about legal issues is not sufficient to produce action. The transactional lawyer must be able to engage in higher order thinking to recognize issues and have experienced the ideological becoming that develops moral courage to take the risky steps²¹⁶ that define a distinguished legal career.

III. DESIGNING DISRUPTION

The previous section explains why engaging law students in critical theory encourages them to be contextual, creative, critical, and reflective in their transactional lawyering and explores how those competencies promote a distinguished legal career. It is not mere exposure to critical theory but deep engagement with the new perspectives that critical scholarship provides that produces the competencies outlined above.²¹⁷ This section proposes the strategic selection of clients as business law clinicians' most effective methodology to encourage law students to meaningfully engage critical theory. Student leadership is often most pronounced in the development of the work product, investigation of the legal issues, and representation of clients.²¹⁸ Business law clinicians' strategic client selection is an effective pedagogical tool to promote critical learning because it is the interactions with their clients that will ultimately determine the students' learning experience.²¹⁹ Students engage more deeply in those inquir-

²¹⁵ EDUCATION OF LAWYERS, *supra* note 101, at 263 (“We cannot possibly prepare students for every lawyering task with every new client. Instead, we teach students deep understanding and flexible use of knowledge about how lawyers function and a process for integrating new knowledge as they develop as lawyers.”).

²¹⁶ *Rebels from Principle*, *supra* note 191, at 38 (describing a lawyer’s inability to take action, not even a “riskless step,” though he was aware of his client’s immoral actions).

²¹⁷ See Johnson, *supra* note 120, at 172 (noting “that even students familiar with critical theory were not always able to generalize their knowledge to their client work.”).

²¹⁸ “Students should begin to explore the law on their own, and then engage in a professor-directed process of investigation, input, assessment, and feedback.” Daniel J. Dye, *Debunking the Socratic Method?: Not so Fast, My Friend!*, 3 PHOENIX L. REV. 351, 352–53 (2010).

²¹⁹ “Education, in contrast to a learning opportunity, consists of a designed, managed,

ies that correlate to their needs and readiness within their zones of proximal development.²²⁰ In other words, business law clinicians can select clients that set the stage for student learning.

A. *Clinician Client Selection and Critical Theory*

When I began designing the SEEE Clinic, a business law clinic at Hastings, I was already convinced that incorporating critical theory into my clinical course would increase the intellectual strength of my students. I experienced firsthand the benefits studying critical theory had on my intellectual development while I was law student at UCLA School of Law specializing in Critical Race Studies (“CRS”). The law came alive in my CRS classes and had more relevance than in any of my other classes. The first question I asked myself was where to incorporate critical scholarship in the course syllabus. I started this process as I did the other course readings by questioning which literature was particularly helpful and covered the substantive areas of law in the progression of the seminar. I found several excellent pieces I was excited for the students to read and discuss in seminar. But as the first semester of the clinic progressed, I realized two factors I had not considered while planning my course. The first is that the classroom did not provide sufficient time for the students to develop or critically analyze the materials. The second lesson learned was that the students’ interest in becoming proficient on issues related to client work far exceeds their interests in preparing for seminar class.

Few critical theory articles are comprehensive enough to adequately represent everything the students needed to know on that topic. Articles often offer useful information and perspectives for students to apply to their own experiences or understanding of the law. If students, however, fail to bring their own questions and perspectives to the classroom discussions, then it can be unclear what they are gaining from relatively brief conversations on complicated legal scholarship.

Moreover, as the semester progresses, students are increasingly more focused on their client work, which is appropriate given the finite time they have in the semester to complete their work product. While students can complete the critical theory reading for a specific

and guided experience.” James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71, 78 (1996) (citation omitted).

²²⁰ See Ball, *supra* note 159, at 59. L.S. VYGOTSKY, *MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES* 86 (1978) (defining the zone of proximal development as “the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance, or in collaboration with more capable peers.”).

class, they may be committing just enough intellectual effort to participate in a two-hour class. On the other hand, students often dedicate much more conceptual thinking to their client work and view their investment in preparing for client matters as a multi-month commitment. As a result, students can delve much deeper into their client-related research than they do into their seminar readings.

The moment of inspiration occurred for me when a student, who distinguished himself by routinely preparing for and substantially contributing to class discussion, came to my office hours to tell me about how excited he was about a book he had just discovered.²²¹ The student could not stop sharing how interesting the book was and connected it to the work he was doing for his client. While I encouraged the student's enthusiasm, I was confused by the student's discovery because excerpts from the book were part of the assigned reading just weeks before. Although the topics addressed in the book had been explicitly raised in the assigned reading, it was not until the student's client work aligned with the subject matter that the student conducted his own research within the book he was now raving about. Scholarship that directly assisted with his client matter was absorbed, internalized, and incorporated into his work product in meaningful ways. While the reading that I assigned for class—if read—seemed to be quickly forgotten. When the student was ready and saw the application to a matter he was interested in exploring, the student connected with and deeply engaged with the reading in a way that produced not just a different relevance but a completely different learning experience. The quality and complexity of the client matter caused this student to ask the questions that inspired him to do the critical theory reading; and having done the reading, the lessons resonated, as it was relevant to a specific experience.

As an early career clinician, not surprisingly, it took this interaction with a student to recognize the link between client selection and higher order learning. But this connection is not new within clinical education literature.²²² Given the universality of client selection in clinical courses, it surprises that there is not more clinical education scholarship on client selection.²²³ Much of the student learning takes

²²¹ INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *THE REVOLUTION WILL NOT BE FUNDED: BEYOND THE NONPROFIT INDUSTRIAL COMPLEX* (2009).

²²² See generally Paoletti, *supra* note 58. See also Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 CLIN. L. REV. 357, 358 (2009) (noting that “[c]lient selection is a key learning moment worthy of reflection.”).

²²³ Clinical education scholarship focuses on three signature pedagogical tools of clinical education: supervision, seminar, and rounds, each of which is premised on and altered by the underlying client which the clinician has selected for the course. See DEBORAH EP-

place in the context of the client representation.²²⁴ Thus, selecting clients is an important aspect of business law clinics and where business law clinicians may spend a great amount of effort and energy. It is not the case that every business law clinician recruits each client within the clinic's caseload. Some clinics receive clients from a specific source that vets potential clients against certain predetermined criteria. Nonetheless, the clinician must determine the appropriate qualifying criteria for client eligibility and, therefore, is an integral decision-maker in the client selection process. Thus, the impact and significance, as well as effort the clinician places on client selection, is worthy of exploration and analysis because the clients selected for the clinical program are a significant factor in the student learning experience. Intentional client selection is particularly useful in business law clinics, where substantive areas of business law may not explicitly arise in critical theory literature.²²⁵

Notably, using client representation as the arena to individually draw students into a relationship with critical theory literature also allows the business law clinician to maximize the impact of critical topics that may arise in the classroom. Individual students who are interested in the link between their client matters and critical theory become well-versed in those specific subject matters. They are then able to recognize how the critical issues raised in the assigned readings apply to their client representation in advance of class. Students can then concisely make arguments in class about why an issue or topic is salient or otherwise connected to corporate representation. This approach allows individual students to become proficient in various areas of expertise. Thus, business law clinicians would not solely be responsible in the classroom for surfacing points and drawing the connection to their relevance.

STEIN, ET AL., *THE CLINIC SEMINAR* (2014); see also *EDUCATION OF LAWYERS*, *supra* note 101; Stephen R. Miller, *Field Notes From Starting a Law School Clinic*, 20 *Clinical L. Rev.* 137, 142 (2013); W. Warren H. Binford, *Reconstructing a Clinic*, 15 *Clinical L. Rev.* 283, 316 (2009); Patricia H. Lee & William H. Mellor, *Institute for Justice Clinic on Entrepreneurship: A Real World Model in Stimulating Private Enterprise in the Inner City*, 5 *J. Small & Emerging Bus. L.* 71, 80 (2001).

²²⁴ 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); "[T]he selection of cases and projects . . . when threaded together with other teaching pedagogies, form the foundation from which learning takes place." Paoletti, *supra* note 58, at 425.

²²⁵ Examples of the substantive law incorporated in a business law clinic include corporate law, nonprofit law, professional responsibility, entity formation, director and officer fiduciary duties, contract consideration, representations and warranties, intellectual property, federal and state securities regulations, and secured transactions.

B. *Suggestions for Client Selection*

There are a large number of potential entity clients for business law clinics. Business law clinicians must make tough decisions about which clients receive assistance from the clinic based on some multi-faceted evaluation of the client,²²⁶ which includes, among other factors, earned revenue, substantive nature of the legal issue, entity mission, and geographic location.²²⁷ Once a potential client has been screened against the relevant factors for determining clinic fit, business law clinicians should prioritize those clients and client matters that demonstrate the greatest potential for theoretical exploration. Building on the work of Professor Caroline Bettinger-Lopez,²²⁸ this section provides suggestions for how business law clinicians can intentionally select those clients and client matters that not only prepare students for the rigors of corporate practice but also serve as vehicles for engaging the students in the challenges and learning opportunities within critical theory scholarship.²²⁹

1. *Richly Layered Client Matters*

Business law clinicians evoke a foundational thesis of critical legal theory when they metaphorically “look to the bottom and acknowledge the richness there” in selecting clients for the clinic.²³⁰ “A narrow culture, history, and experience will [not only] limit imagination in the realm of law and theory,”²³¹ but also make it more difficult to incorporate critical theory to the client representation. Thus, business law clinicians should select “richly layered” client matters, which are those matters that do not lend themselves to obvious answers and require the exploration of various themes in order to competently address them.²³² A richly layered client matter will not only require the

²²⁶ *Enriching the Law School Curriculum*, *supra* note 2, at 114 (“While the overarching determining factor for transactional pro bono case representation is whether the client can afford to pay a lawyer, other factors include the nonprofit organization’s budget or the revenue from the microenterprise business, and the project’s impact, as well as successful lawyer-client relationship.”).

²²⁷ Schrag, *supra* note 82, at 183 (“Most clinics represent primarily or exclusively indigent people, and clinics are places where law students sometimes meet poor people for the first time in their lives.”).

²²⁸ See generally *Redefining Human Rights Lawyering*, *supra* note 117.

²²⁹ See Paoletti, *supra* note 58, at 453 (discussing the need for clinicians to “[a]ssembling the docket of cases and projects that will (1) engage students in the rich complexity of the real world and the dynamic nature of people’s lives and goals and (2) serve as effective vehicles for teaching the full range of competencies identified as core to the making of a lawyer is an unending challenge.”).

²³⁰ Matsuda, *supra* note 142, at 344.

²³¹ *Id.*

²³² *Redefining Human Rights Lawyering*, *supra* note 117, at 380–81 (explaining that in the context of human rights clinics richly layered cases “provide opportunities to pressure

students to exercise various lawyering skills such as counseling, negotiating, problem solving, factual investigation, legal research and analysis, case management, advocacy, and legal drafting; but it will also likely incorporate multidisciplinary issues, ethical concerns, various client voices, both legal and non-legal issues, and intersect conflicting areas of law. A richly layered client matter presents an intellectual challenge for the students, as well as multiple opportunities for the students leading the representation to develop their own professional character. This is one of the primary goals of clinical education, “to provide a rich learning experience, an experience that is contextually, ethically, and intellectually dynamic.”²³³

A richly layered client matter will at its core include a complicated substantive legal issue. A complicated legal issue will require the student to deeply explore the topic through legal research and analysis.²³⁴ It will likely require them to compose a written memorandum on the legal issues, construct arguments and, identify strengths and weaknesses of those arguments as they relate to the client. As the answers to richly layered client matters are not readily apparent or found in a case book, the representation will require the students to engage with and learn from the client representatives.²³⁵ Frequent interaction with, and reliance on client representation places students in the position where they are encouraged to suspend their own disbelief and preconceived notions to develop the client’s narrative. Richly layered client matters will also require students to learn and incorporate historical information and to understand a contentious area of thought outside of the confines of their client. Examples of contentious issues that arise in business law clinics are the misdistribution of wealth,²³⁶ lawyering for rights versus power,²³⁷ social construction of

hegemonic power and the consequences of the ideology of neoliberalism.”). *See also* Laurie Hauber, *Commentary: Complex Projects in a Transactional Law Clinic*, 18 J. AFFORDABLE HOUSING 247, 249–251 (2009) (describing transactional projects “riddled with complexity” as containing complex legal concepts, ethical issues, relationships with multiple stakeholders, and ambiguity); Alicia E. Plerhoples, *Representing Social Enterprise*, 20 CLIN. L. REV. 215, 255 (2013) (arguing that “representing a social enterprise client, in particular, can require an additional skill worth highlighting—solving novel and unstructured legal problems.”).

²³³ Schlossberg, *supra* note 28, at 205.

²³⁴ “Students learn more when they work hard, and they are more likely to work hard on an interesting assignment. When the assignment is interesting to both students and the teacher, it is a win-win solution.” Brian Martin, *Marking Essays: Making it Easier and More Fun*, (Sept. 8, 2014), available at <http://comments.bmartin.cc/2014/09/>.

²³⁵ Client representatives are those individuals (officers, directors, incorporators, managers, etc.) who have the authority to speak and act on behalf of the entity client.

²³⁶ Incorporated in this is considering the ways in which standard economic structures contribute to the divestment in communities of color and other economically marginalized communities. *See* John A. Powell, *The “Racing” of American Society: Race Functioning as*

financial systems,²³⁸ business law incentives, and the value of ownership. Consequently, at some point in the representation, the richly layered client matter will also surface for the students the limits and ambiguities of corporate law, the obligation for corporate lawyers to employ non-legal skills to reach their clients' objectives, and the necessity for the students to develop their own critical thinking skills.

Richly layered client matters can be generated from the client itself, the nature of the legal issues, or a combination of both. For example, a company that provides free, culturally-competent health and wellness services to a wide diversity of races, ethnicities, sexual orientations, gender identities, and immigration statuses within a given community or neighborhood will lend itself to producing richly layered client matters. Strategic relationship agreements and memoranda of understanding composed for this organizational client will require the students to not only reflect on the legal matters but also the client's history within its community, commitment to cultural-competency, and the social dynamics of the client's patient population. Thus, what could be a standard contract drafting or analysis assignment for another client, presents nuanced and complicated issues that challenge the students' thinking in the context of working for this free clinic. On the other hand, the legal issues intertwined in a client matter where the students are drafting licensing agreements with local property owners for security cameras in a low-income, crime-ridden neighborhood are another example of the rich layers business law clinicians should integrate into their case docket.

In this way, business law clinics become laboratories for the production and testing of students' new thoughts and analysis. As the students work their way through the various layers of the client matter, they are not only learning and testing their assumptions as they go, but they are also witnessing first-hand the complexity of the practice of law. "In the hand of clinical educators, experience can generate theory which can circle back to inform experience, which in turn

a Verb before Signifying as a Noun, 15 *LAW & INEQ.* 99, 110 (1997); David Dante Troutt, *Ghettos Made Easy: The MetaMarket/Antimarket Dichotomy and the Legal Challenges of Inner-city Economic Development*, 35 *HARV. C.R. C.L. L. REV.* 427, 473–75 (2000); Cassandra Jones Harvard, *Democratizing Credit: Examining the Structural Inequalities in Subprime Lending*, 56 *SYRACUSE L. REV.* 233 (2006); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Succession of Laws*, 89 *OR. L. REV.* 453 (2010).

²³⁷ Michael Diamond, *Community Economic Development: A Reflection of Community, Power and the Law*, 8 *J. SMALL & EMERGING BUS. L.* 151, 158–161 (2004) (discussing lawyering for power within low-income communities); see also Daniel Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 *CLIN. L. REV.* 217 (1999).

²³⁸ Anthony Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 *HARV. L. REV.* 1463 (1994).

can alter, refine, and improve the theory.”²³⁹ In this process, the exposure to critical theory is particularly helpful because it will illustrate for the students the complexities of issues that they are observing in their representation of a richly layered client matter. Critical theory may not enlighten every richly layered client matter. However, in the examples presented above there are clear connections to the themes raised in those client matters and the arguments presented in critical theory scholarship. These connections are more likely to exist for business law clinics in richly layered client matters, and students’ corporate representation will be enhanced in their exploration of critical theory scholarship. At the limits and ambiguities of corporate law and scholarship, the students can draw on analogies and allegories presented in critical theory to advance their thinking and problem solve. As critical theory is interdisciplinary, exposure to this literature can ignite the students thinking about other non-legal issues they need to consider in the representation.

2. *Client Matters Situated within Social Justice Issues*

Situating the clinical mission within a larger commitment to social justice is a common aspect of clinical legal theory.²⁴⁰ For example, “poverty law clinics have . . . long struggled with teaching students about the structural inequalities in which their individual clients are positioned.”²⁴¹ Unlike in poverty law clinics, criminal defense clinics, domestic violence, or human rights clinics, students participating in business law clinics are not likely to have selected it because of their desire to pursue careers in the social justice sector. In some instances, business law clinics are added to the clinical curriculum as an alternative to the explicit social justice clinics prevalent in clinical education. Thus, it may be difficult for these business law clinicians to apply a social justice lens to the corporate practice or engage students in abstract discussions of social justice. Under these circumstances, client selection is even more crucial to setting the tone that will lend itself to incorporating critical theory. By selecting client matters situated within issues of social justices, students see with new eyes and from a different perspective the inadequacies and complexities of the legal system.²⁴² Social justice issues also require students to acquire the

²³⁹ Goldfarb, *supra* note 14, at 721.

²⁴⁰ See Wizner, *supra* note 12.

²⁴¹ *Redefining Human Rights Lawyering*, *supra* note 117, at 380.

²⁴² Wizner, *supra* note 12, at 329 (“The student’s feeling of personal responsibility in representing an individual client can grow into a feeling of social responsibility for the provision of legal services to the poor. When the student realizes that, in all likelihood, the client would not have access to legal assistance but for the law student and the clinic, her consciousness is raised.”).

socio-historical context of the client and its work. Engaging in critical legal theory facilitates understanding the historical patterns and persistent issues of marginalization.

Recall the aforementioned free clinic client that provides health care grounded in social justice and advances equality by promoting wellness in various marginalized communities. In selecting this client, the business law clinician situates the client work students accomplish for this client within the context of its larger social justice mission. The students working with this client are likely to engage, for example, with Rickke Mananzala and Professor Spade's article, *The Non-profit Industrial Complex and Trans Resistance*, with a deeper understanding and have an immediate application for the theories discussed.²⁴³ In this way, both student learning and quality of client representation are heightened.

Moreover, if the client's business is geared towards social impact, then the students are tasked with understanding the significance of the social impact in the same manner as they would have to understand any other significant aspect of their client's business industry. Students would have an additional incentive for understanding social justice topics they might have otherwise dismissed in their legal education because of the clients they represent in business law clinics. Although future transactional attorneys may be enrolled in business law clinics to acquire transactional lawyering skills, the professor can still surface the aspects of their work that advance social and economic justice issues. In consultation with communities,²⁴⁴ business law clinicians can identify the priority social justice issues that the clinic should seek to advance.

4. *Long-Term Client Relationships*

Consistent with the commitment to select richly layered cases, is the commitment to cultivate long-term relationships with clients that will last well beyond the term of the semester or academic year. Long-term client relationships allow students to fully develop and unpack the issues within richly layered client matters without unnecessary time constraints of the academic calendar. Clearly, there may be elements of client matters that must be completed within a given timeframe. But the larger commitment of both business law clinics and clients should be to cultivate a long-term relationship in order to competently address the complicated elements of the client matter. This also requires the informed consent of the client, which may limit

²⁴³ Rickke Mananzala and Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 *Sexuality Research & Soc. Pol'y* 53, 61–69 (2008).

²⁴⁴ See *Redefining Human Rights Lawyering*, *supra* note 117, at 380–81.

the number of clients interested in working with business law clinics and the number of clients the clinic will serve during its tenure. One of the primary goals of clinicians is to structure the best learning environments for students. Thus, this trade-off may align well with a broader pedagogical mission.

Knowing from the beginning of their representation that business law clinics have a long-term commitment to the client not only allows the students the flexibility to dig deep into the issues but also provides space for self-reflective lawyering. It is in those moments of self-reflection that students can generate new questions and document their ideological becoming during the clinic. Long-term client relationships also require students to create, maintain and learn from client files. Each semester, the students will update the client information and their characterizations of the legal and non-legal issues as the client matter progresses. This allows students to learn from each other as they are tasked with documenting their work in the client files to transition the legal representation to another team of students.

C. *Reflections from the Trenches*

While potentially rewarding for both business law clinicians and the law students, incorporating critical legal theory into business law clinics also presents challenges and new considerations for the clinician. In this section, I reflect on my experiences working to incorporate critical theory into the SEEE Clinic at Hastings and the unintended consequences that have arisen in the process.

1. *Across the Curriculum Integration of Critical Theory*

Although client selection may be the primary methodology business law clinicians use to integrate critical legal theory, it should not be the only avenue. Business law clinicians should also infuse critical legal theory into the seminar, and supervision as well, to help support the student learning.²⁴⁵ Although this Article focuses on client selection as the point of entry to critical theory, writing as a pedagogical tool is also necessary in the formation of critical analysis and intellectual development.²⁴⁶ Students benefit immensely from writing opportunities to reflect on the readings, articulate their questions as they arise, and to interrogate on a deeper level their own preparedness,

²⁴⁵ See Johnson, *supra* note 120, at 175 n. 51 (observing that teaching critical legal theory “would be most effective if it were pervasively taught across the curriculum for each class.”).

²⁴⁶ See Ball, *supra* note 159, at 59; Arnetha F. Ball, *Toward a Theory of Generative Change in Culturally and Linguistically Complex Classrooms*, 46 AM. EDUC. RESEARCH J. 45 (2009).

lawyering, and professional goals. The permanence of writing also means that business law clinicians have a record illustrating student development over time. The primary method through which I incorporate self-reflective writing is student journal entries discussed in more detail below.

Students may be unlikely to dive deep into the seminar readings and struggle with the concepts in critical scholarship. Including even a light sampling of critical scholarship in the formal syllabus is helpful, as each semester several of my students have not been exposed to critical legal theory prior to taking my course. Readings assigned early in the semester help establish a foundation for students to build on independently and at their own pace during the semester. Including critical scholarship in the required readings for the seminar also allows business law clinicians to outline the main themes of critical theory that may spark the student's interest for further development.

There are two primary challenges that integrating critical theory across the curriculum evokes. The first is that business law clinicians are already pressed for time to cover a large amount of material in the course. I address this by having co-requisites for enrollment in the SEEE Clinic. Aware that I cannot cover in depth all the substantive areas that may arise in the client representation, I require students to show evidence of their enrollment in at least two other transactional law courses. I also use this information to help diversify the substantive expertise of the students admitted each semester into the clinic. This encourages students to see their peers as potential resources of information.

The second challenge posed by curriculum integration of critical theory is that many transactional law clinicians do not have formal training in critical legal theory and may find it difficult to explore some of these themes with their students. To further complicate this, most critical legal theory does not explore corporate practice and instead is situated around the deconstruction of appellate litigation.²⁴⁷ Thus, in addition to business law clinicians' potential lack of familiarity, the students may find it difficult to identify connections between the topics covered in critical scholarship and the transactional lawyering they are practicing. Although lack of familiarity may make business law clinicians vulnerable to student criticism, I find students appreciate and learn from watching clinicians struggle through the material themselves. Not only does this mirror for students the intel-

²⁴⁷ Critical race theory, for example, has been characterized as predominately analyzing and critiquing U.S. Supreme Court constitutional jurisprudence. *See, e.g.,* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997).

lectual rigor necessary to deeply understand the legal system and the complexities of lawyering, but it also underscores one of the pedagogical objectives; students' understanding that there are often times when no perfect answer exists. When students observe business law clinicians questioning and exploring the material alongside them, it reinforces the intellectual capacity we hope they will develop in the clinic. The possibility with cases such as *Citizens United*²⁴⁸ and *Hobby Lobby*²⁴⁹ in which the Supreme Court is tackling issues of corporate personhood and expanding the rights conferred to corporate entities, is that more critical theorists will incorporate issues of corporate law into their scholarship. There is also the possibility that one of the students in my class will be a scholar who confronts issues of corporate lawyering in their critical scholarship. While challenging and noteworthy, the benefits outweigh the drawbacks of integrating critical theory across the business law clinic curriculum.

2. *Time-Consuming Client Sourcing*

Having to search for richly layered client matters means that business law clinicians must methodically evaluate prospective clients before determining whether or not the clinic will ultimately represent a client. Indeed business law clinicians may have to devote a fair amount of time and attention to cultivating relationships with potential clients to determine whether or not the matter will lend itself to providing opportunities for students to engage in critical theory. While a consistent source for referring clients may more reliably provide predictable matters and projects, if business law clinicians only rely on these safe sources, then they may miss discovering those unique client matters that would provide rare and invaluable learning experiences for their students.²⁵⁰ The downside of not having a reliable client source is that business law clinicians have to dedicate more of their time and resources to recruiting and sorting through possible client matters.

One balancing act may be for business law clinicians to have several client sourcing relationships where community partners provide client referrals. Then business law clinicians maintain the discretion to take on the matter or not. In this way, business law clinicians would have a contained but diverse universe of possible clients and the flexibility to select those clients that would be most helpful to stu-

²⁴⁸ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (conferring First Amendment protection to nonprofit corporations).

²⁴⁹ *Burwell v. Hobby Lobby*, 134 S. Ct. 275 (2014) (recognizing a for-profit, closely-held corporation's claim to religious belief).

²⁵⁰ Paoletti, *supra* note 58, at 359.

dent learning.

3. *Evaluating the Application of Critical Theory*

One challenge I did not fully appreciate before embarking on the quest to design the SEEE Clinic, was that if I was going to integrate critical legal theory and encourage students to apply it to their lawyering, then I would have to develop methodologies for evaluating their application of critical theory in practice. While I had included critical thinking skills on the grading matrix from the launch of the course, I did not have clear assignments that would allow me to assess the students' growth during the semester. The question then becomes "how does the business law clinician assess the student's engagement of critical legal theory?" I have focused on evaluating critical thinking, creativity, reflectiveness and professional development—the core competencies that I have observed as the offspring of engaging with critical legal theory. Students in the SEEE Clinic must complete at least two reflective writing essays responding to their choice of six prompts.²⁵¹ Each reflective essay is graded based on creativity, critical thinking, application of course materials, and professional development demonstrated in their written response. Within each category, I evaluate the student's response as novice, competent or proficient. My goal is that through these writing assignments, students can identify their own intellectual growth as well as areas for potential development.

4. *Student Resistance to Deeper Learning*

Inherent in all student-led learning is the possibility that not every student will actively engage in the difficult process of deeper learning. Some students will resist developing and challenging their understandings because it is hard and complicated work on top of all the other stresses of a law student's life. For those students who

²⁵¹ If business law clinicians would like students to reflect on how corporate lawyering may contribute to systems of economic oppression, the clinician could provide a provocative quotation such as the below expert from Professors Berkovitch and Gordon:

While legal accomplishments can sometimes challenge social structures, they are usually confined to mitigating the structure's excesses (i.e., unintended results that constitute violations). Consequently, they often also end up strengthening the system itself, since by correcting some of the structure's "dysfunctions," direct litigation helps produce the belief that there is an impartial system that adjudicates between parties and corrects wrongs. In this way it helps silence structural criticism.

Nitza Berkovitch & Neve Gordon, *The Political Economy of Transactional Regimes: The Case of Human Rights*, 52 INT'L STUD. Q. 881, 894 (2008). The prompt could ask students to respond to the quotation with examples of how the business law clinic may be strengthening economic marginalization and to also provide examples of how transactional lawyering is distinct from the adjudicative process and, thus, contrary to the quotation.

choose not to deepen their learning of legal issues through exploring critical theory, their consolation prize for participating in this theorized business law clinic will be a unique lawyering experience and acquiring several habits of practice to jumpstart their transactional career.²⁵² This consolation prize is not the ultimate goal of many business law clinicians and surely not the measure of their institutional contributions.

A significant factor that does not eliminate but mitigates student resistance is an educational environment that provides a wide variety of transactional learning opportunities. At Hastings, the overarching curricular goal is to create outstanding legal professionals to solve 21st century problems. Hastings accomplishes this goal by providing students with a curriculum that gives them a strong doctrinal and interdisciplinary knowledge base; enhances their analytical, cognitive, interactive, and communicative skills; develops their professional values; and hones their contextualized problem solving abilities.²⁵³ Over the last two decades, clinical education and experiential learning have played significant roles towards our achievement of these pedagogical goals. Thus, the SEEE Clinic is one of several non-traditional learning environments where students can develop transactional lawyering skills.²⁵⁴ Providing students with multiple options allows them to select the learning experience that best coincides with their zone of proximal development. Since opening the doors of the SEEE Clinic, students have been overwhelmingly receptive to deeper learning and willing to engage in critical legal theory. A diversity of learning environments within the law school is an important factor in the success of and reception to a theorized business law clinic. As more students seek to gather transactional law experience, law schools should continue to expand options for lawyering skills acquisition as well as courses that will strengthen student understanding of substantive corporate law.

²⁵² Schrag, *supra* note 82, at 185 (“A final goal . . . is to give students experience, guidance, and detailed personal feedback as they execute such standard legal activities as interviewing, case planning, investigating facts, counseling, legal writing, witness examination, and oral argument. This is the goal that non-clinical faculty most often attribute to clinics, sometimes not realizing how many more subtle skills clinics can teach along with traditional skills.”).

²⁵³ See ABA SELF-STUDY REPORT UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF LAW (2014) [on file with author].

²⁵⁴ See, e.g., *Hastings Startup Legal Garage*, which is a live-client, experiential course that provides students with exposure to transactional lawyering with an emphasis on intellectual property representing technology startups *available at* <http://innovation.uchastings.edu/focus-areas/startup-legal-garage/>.

CONCLUSION

Disruptive technologies introduce a new set of attributes from what the mainstream has historically valued.²⁵⁵ Thus, disruptive pedagogies will produce different results in law students; lawyers who are deeper thinkers, engage critically with the law, and have a stronger professional identity.

Business law clinics significantly enhance the legal academy by, among other things, providing law students with unique opportunities to acquire practical skills training and development as a transactional lawyer. Recognition of these contributions, however, should not diminish the intellectual contributions of business law clinicians. To promote higher order thinking and deepen the learning of their students, business law clinicians should employ disruptive pedagogies, such as incorporating critical legal theory into their clinics. Business law clinicians must also better explain the intellectual development they provide for students. It is important that business law clinicians speak more intentionally about the unique contributions they are making. Once we can articulate the complicatedness of our practice, we can more effectively share with each other our lessons learned and improve our pedagogies. It is also necessary that our institutions understand the broader project of intellectual development we engage in so it is clear how business law clinicians contribute to the legal academy. For those business law clinicians who are not currently incorporating critical legal theory into their clinic, hopefully this Article is an opportunity to explore methods to include it, as it will improve their contributions to students, clients, and academic institutions.

Integrating critical legal theory will certainly not be the only guiding principle for client selection but, as identified in this Article, it can be an important component of the business law clinic experience to prepare students for critical thinking and creativity in their legal career. There is fertile ground for future scholarship to demonstrate other ways business law clinicians intentionally use client selection to teach legal theories such as lawyering theory, law and economics or transactional engineering theory. Indeed the possibilities of disruptive pedagogy within business law clinics are expansive if investigated. Time will reveal if these methodologies are indeed disruptive, but these continued inquiries into business law pedagogies will undoubtedly uncover answers to help improve the corporate law profession.

²⁵⁵ Joseph L. Boner & Clay M. Christensen, *supra* note 5.

