

# USE OF CLINIC STUDENTS' EXTANT TALENTS: NEGATIVE EXPLOITATION OR A PEEK AT THE FUTURE OF LEGAL EDUCATION?

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## ABSTRACT

*The New Jersey Law Journal (October 21, 2013) reported the takeaway of a 'Law Journal' Survey: New Jersey firms and branches most actively hiring associates are targeting prospects with real-world experience, making it tougher for new graduates to get a foot in the door. A major participant in the Survey added, "every major firm in the country is doing the same thing."*

*This new normal in the legal marketplace has significant implications for legal education and particularly for law school clinic programs with their emphasis on experiential learning through live-client representation.*

*It is not uncommon for lawyers to be proficient in disciplines and skills other than law. Students arrive at law school with a variety of such extant talents. An unexplored challenge facing law school clinic programs is determining when and how to use clinic students' extant talents as part of a response to the new normal in the legal marketplace. The potential for claims of exploitation of students whose extant talents are employed provides a useful framework for addressing this issue.*

*Rutgers School of Law—Newark's prominence as one of the most diverse law school campuses in the nation, including in the area of students pursuing a second career, provides a model laboratory to explore this important challenge.*

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## INTRODUCTION

*The modern teacher of law should be a student of sociology, economics and politics as well. He should know not only what the courts decide and the [legal] principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied. . . . It is, therefore, the duty of American teachers of law to . . . give to their teaching the color which will fit new generations of lawyers.<sup>1</sup>*

- Roscoe Pound

A lot has been said about two particular challenges that face law school clinical programs: managing student diversity and managing the potential conflicts between clinic students and clinic clients.<sup>2</sup> This

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1. Roscoe Pound, *The Need for a Sociological Jurisprudence*, 31 ABA REPORTS 911, 917-21, 925-26 (1907) (quoted in Anita Weinberg & Carol Harding, *Interdisciplinary Teaching and Collaboration in Higher Education: A Concept Whose Time Has Come*, 14 WASH. U. J. L. & POL’Y 15, 15 (2004)).

2. See, e.g., Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 63 (2000) (“Clinical educators will need to respond to this challenge by expanding and refining already-existing pedagogical approaches for instructing students on how to interact with clients who are different from them.”); see also Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 34-37 (2001). See generally Gerald P. López, *Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

Peter Joy and Robert Kuehn describe the latter challenge as follows:

Clinic faculty also face unique ethical issues, such as defining their relationship with clinic clients who are being represented by students, and balancing their ethical duties to clients and teaching obligations to law students while attempting to maximize both the educational experience for the students and the competent representation of clinic clients.

Peter A. Joy & Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 CLINICAL L. REV. 493, 494 (2002).

Article attempts to answer an unexplored question that sheds light on both of these concerns: when and how should clinic students' extant talents be employed to assure positive student outcomes without compromising client interests? Throughout this piece, "extant talents" means the law-related and non-law-related skills, abilities, and professional experience that clinic students already possess at the time they enroll in a clinic.

We can explore the question through a variety of established tests and the guidelines the tests establish.<sup>3</sup> One such test—determining whether a particular use of a student's talents amounts to negative exploitation—involves a number of factors, which have been debated, discussed and written about frequently.<sup>4</sup> This Article

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David F. Chavkin responds to this challenge by saying, "[it is] not about the clients." David F. Chavkin, *Spinning Straw into Gold: Exploring the Legacy of Bellow and Moulton*, 10 CLINICAL L. REV. 245, 259 (2003) [hereinafter Chavkin, *Spinning Straw into Gold*]; see also David F. Chavkin, *Am I My Client's Lawyer?: Role Definition and the Clinical Supervisor*, 51 SMU L. REV. 1507, 1508-13 (1998) [hereinafter Chavkin, *Am I My Client's Lawyer?*].

I later describe this position as a "zealous teaching" model. See *infra* notes 35-40. For other perspectives on this debate, see George Critchlow, *Professional Responsibility, Student Practice and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415 (1990); Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284 (1981); Ann Juergens, *Teach Your Students Well: Valuing Clients in the Law School Clinic*, 2 CORNELL J.L. & PUB. POL'Y 339 (1993); Margaret Martin Barry, *Clinical Supervision: Walking That Fine Line*, 2 CLINICAL L. REV. 137 (1995); Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047 (1985).

In his article *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, Wallace J. Mlyniec offers six "truths" related to clinic teaching models including that, "client and student needs are equally important in a clinical program and that neither need be sacrificed for the other." Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLINICAL L. REV. 505, 510-11 (2012).

3. David Chavkin, for example, sets forth the following guidelines for sound clinic supervision: 1) Place the student in ambiguous learning situations that confront the student with problems he or she must address; 2) Allow the student to make choices and to own the consequences of those choices; 3) Encourage the student to reflect on his or her choices; 4) Provide the student with feedback on the process he or she used to develop a theory and the way he or she implemented that theory; 5) Encourage the student to acknowledge mistakes and to consider lessons learned from those mistakes. Chavkin, *Spinning Straw into Gold*, *supra* note 2, at 279.

Peter Joy and Robert Kuehn point to student practice rules and Rules of Professional Responsibility in each jurisdiction as defining the obligations of faculty supervisors. See Joy & Kuehn, *supra* note 2, at 514-15.

4. Any dictionary source will reveal that there is both a positive and a negative connotation for the word "exploitation." The American Heritage Dictionary, for example, provides the following definitions: 1) "[t]he utilization of another person or group for selfish purposes"; and 2) "[t]he act of employing to the greatest possible advantage." AMERICAN HERITAGE DICTIONARY 626 (4<sup>th</sup> ed. 2000). This Article attempts to encourage benefits associated with definition two and discourage negative

attempts to synthesize the literature to enable law school clinic supervisors to better know when and how to employ students' extant talents.<sup>5</sup>

Like lawyers, students are subject to disciplinary concerns when they are asked to aid a client, or others, through talents other than those of a lawyer/clinical law student. The exploitation issue arises when clinic faculty put a student in a situation where she would employ her extant talents for the primary benefit of a person or party other than herself. Interests apart from a student's own educational benefit might include clinic clients, other clinic students, clinic faculty, the clinical program, and other sectors of the university. While such dual roles or interdisciplinary practices are not prohibited,<sup>6</sup> exposing clinic students to these practices also exposes them to the same ethical issues faced by practicing attorneys in similar situations. For example, practice in dual or ancillary business roles heightens the likelihood of violations of the Rules of Professional Conduct (the "RPCs") related to conflicts of interest and confidentiality.<sup>7</sup> The practice also raises issues related to lawyer independence and the potential loss of the lawyer-client privilege.<sup>8</sup>

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consequences associated with definition one. Throughout the Article, exploitation associated with definition one is referred to as "negative exploitation" and exploitation associated with definition two is referred to as "positive exploitation."

5. The only reference to the possibility for exploitation of law school clinic students was found in Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying With the Law to Produce Scholarship With Integrity*, 5 CLINICAL L. REV. 271 (1998). In her article, Professor Tarr relies on a definition of "exploitation" offered by Professor John Lawrence Hill. *Id.* at 273-74. In Professor Hill's words, "exploitation is a psychological, rather than a social or an economic, concept. For an offer to be exploitative, it must serve to create or to take advantage of some recognized psychological vulnerability which, in turn, disturbs the offeree's ability to reason effectively." John Lawrence Hill, *Exploitation*, 79 CORNELL L. REV. 631, 637 (1994).

6. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 9 (2004):

A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

See also *Ibanez v. Florida Dep't of Bus. and Prof'l. Regulation*, 512 U.S. 136 (1994) (holding that a state cannot bar an attorney from truthfully representing that she has other professional qualifications); LAWRENCE A. WOJCIK, RAJ N. SHAH & ERIN E. KREJCI, CAN YOU EVER TAKE OFF YOUR LAWYER HAT?, 4-5 (2005); Tarr, *supra* note 5, at 273-78.

7. MODEL RULES OF PROF'L CONDUCT, *supra* note 6, at R. 5.7; see also C. Evan Stewart, *Ethical Issues For Business Lawyers: Lawyer-Directors: Just a Bad Idea*, 13 N.Y. B.S.L.J. 31 (2009); Christa A. Arcos, *Wearing Two Hats: Dual Practices and Ancillary Businesses*, BOARD OF BAR OVERSEERS (Dec. 2003), <http://www.mass.gov/obcbbbo/hats.htm>.

8. See WOJCIK, SHAH & KREJCI, *supra* note 6, at 3-5.

When lawyers or students are proficient in, and engaged by, a client for interdisciplinary assistance, supervising clinic faculty must determine which professional rules apply when the applicable rules for similar circumstances are not the same for both disciplines.

These ethical minefields expose the risks of using students' extant talents without careful planning and a firm understanding of jurisdictional rules.<sup>9</sup> As noted by Professors Joy and Kuehn, whether or not these risks result in actual harm to a clinic student, such as being subjected to a malpractice or ethical action, will depend in large part on the student practice rules and ethics rules in effect in the jurisdiction in which the particular clinic program practices.<sup>10</sup>

By focusing on exploitation and related theories as a framework, this Article demonstrates that harm is not the only standard for revealing ill-advised clinic teaching and supervisory practices. The Article recommends that clinic faculty should neither disregard nor take students' extant talents for granted, nor should they ignore the benefits associated with employing students' talents. Rather, the concern addressed here is that clinic faculty routinely uses students' extant talents without a plan and without an appropriate regard for the potential negative consequences.<sup>11</sup>

This Article posits that clinic teaching and supervision should contribute to the likelihood that law students secure employment after graduation, particularly in a law-related field. In light of the significant changes currently taking place in the legal marketplace, clinic faculty should take a fresh look at practices comprising sound clinic supervision, including when and how to exploit students' extant talents.<sup>12</sup>

This Article is divided into five principle parts. In Part One, I provide examples from my own experience as a teacher in a

9. See Joy & Kuehn, *supra* note 2, at 512-17.

10. *Id.* at 515.

11. See Mlyniec, *supra* note 2, at 527 (stressing the need for "intentionality" in a new clinic teacher's preparation for challenges associated with clinical teaching).

12. I recognize that much has been written about a move in both the legal profession and lawyering instruction toward multidisciplinary practice. See Barry, Dubin & Joy, *supra* note 2, at 66-71 (discussing the impact on clinical education of changes in the practice of law and move towards multi-disciplinary practice); see also Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 WASH. U. J. L. & POL'Y 195 (2003); V. Pualani Enos & Lois H. Kanter, *Who's Listening? Introducing Students to Client-Centered, Client-Empowering, and Multidisciplinary Problem-Solving in a Clinical Setting*, 9 CLINICAL L. REV. 83 (2002). In this regard, I favor the school of thought that suggests "[i]nterdisciplinary clinical programs offer many opportunities for the acquisition of valuable skills by means of collaboration with and exposure to the culture, professional strengths, and limitations of other disciplines in a group setting." Barry, Dubin & Joy, *supra* note 2, at 69. This Article, on the other hand, offers caution when the multiplicity of talents or professional disciplines are held by a law school clinic student.

transactional clinic, and describe how the need to manage students' existing talents arises.<sup>13</sup> By presenting a fictional "super student"—one who has a plethora of extant talents—in a variety of challenging situations, the Article will explicate the need to plan for the use of students' extant talents as well as how to provide a framework for identifying contemporary goals of clinical legal education.

In Part Two, I examine theories of exploitation and identify relevant factors for validating a claim of exploitation when using students' extant talents. In addition to expanding upon existing literature relative to the potential for harm to students or clients associated with poor clinic teaching or supervisory practices, a discussion of exploitation and related theories provides a basis for considering the moral implications of such practices with fairness rather than harm as a baseline. Assessment of the moral force of an ill-advised teaching or supervisory practice can be used to determine whether new rules are justified to regulate or restrain that practice.<sup>14</sup> The exploitation framework also allows for an assessment of the logic "it's for your own good" embedded in the paternalistic approach to clinic teaching and supervision.

In Part Three, using factors identified in Part Two, I examine from the perspective of clinic students how claims of inappropriate uses of students' extant talents might arise. With regard to the issues of consent and vulnerability, the Article explores the relevance of clinic enrollment and student evaluation policies. Information contained in this section supports the possibility, if not the likelihood, of unplanned uses of students' talents resulting in an objective view that the practice amounts to taking unfair advantage

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13. The Community Law Clinic, founded in 1987 (by the author) is now called the "Community and Transactional Lawyering Clinic" (CTLCL). The clinic represents non-profit organizations, small and start-up businesses, and charter schools across a wide range of corporate and transactional practice areas, including intellectual property. As of the 2013 fall semester, the intellectual property element of the CTLCL has been established as a separate elective called the "Intellectual Property Lawyering Clinic (IPLC). The CTLCL and the IPLC continue to work collaboratively on client matters and seminar presentations. The CTLCL has two faculty supervisors; the IPLC has one clinic supervisor; both clinics are offered on a single semester basis for eight credits. See *Master Course List*, RUTGERS SCH. OF L.—NEWARK, <http://www.law.newark.rutgers.edu/node/307/view#Clinics> (last visited Aug. 21, 2014).

14. See, e.g., Alan Wertheimer & Matt Zwolinski, *Exploitation*, STAN. ENCYCLOPEDIA PHIL. (Dec. 21, 2012), <http://plato.stanford.edu/entries/exploitation>. The authors say in part:

The moral force of harmful and nonconsensual exploitation is relatively unproblematic. Whatever the added moral importance of the gain to A from the harm to B, it is certainly at least *prima facie* wrong for A to harm B and it seems that the state is at least *prima facie* justified in prohibiting or refusing to enforce such transactions. Mutually advantageous transactions present a more difficult set of problems.

*Id.*

of students. It is in this section of the Article that my definition of negative exploitation for use in determining when and how to use students' extant talents begins to take shape. The definition is based on fairness, as opposed to harm, as a baseline; accepts that the relationship can result in mutual advantage; presumes that clinic students are vulnerable due to the asymmetrical relationship between students as subordinates and clinic supervisors as superordinates;<sup>15</sup> and because of their vulnerability, posits that apparent assent by clinic students to the use of their extant talents is in all situations potentially flawed.<sup>16</sup> This section also explores how regard for the interest of clinic clients factors into developing appropriate standards for employing students' talents.

Little guidance is available to clinic faculty from the courts, student practice rules, ABA Standards, or the Model Rules relative to the use of students' extant talents. Therefore, in Part Four, I seek to identify sources of needed guidance in related contexts. The contexts chosen are related to exploitation theory and to each other in terms of their focus on the legal and moral implications of the misuse of a person's labor, talent or experience apart from, and in addition to, the harm such misuse can cause.

In Part Five, I reiterate that clinic faculty should pursue the positive exploitation of students' extant talents in accordance with guidelines. Drawing on lessons learned from the various contexts discussed in the Article, I propose a test for determining when the use of students' extant talents amounts to negative exploitation and propose guidelines to avoid this outcome. I then return to the vignettes presented in Part One and apply the proposed guidelines to demonstrate how they might work.

#### I. CONTEXTS FOR USE OF STUDENTS' EXTANT TALENTS

The overall student body at Rutgers School of Law—Newark, beginning in the fall of 2013, includes students from twenty-one states and twenty-eight countries. This group of future lawyers speaks a total of twenty-two languages and has a combined total of eighty-seven graduate degrees, including advanced degrees in Business Administration, Public Administration, Public Health, Medical Science, and Environmental Management among others. During their college years, this diverse group served as Congressional interns, presidential campaign workers, newspaper

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15. See Mlyniec, *supra* note 2, at 507-08 (“[A] clinical teacher must be acutely aware of the strange hierarchy that exists when the professor is both a partner in strategizing about a case or project and the hierarchical source of all power in the class.”).

16. See Hill, *supra* note 5, at 680 (“exploitation does not require—indeed, sometimes is altogether incompatible with—the victim’s awareness of the exploitative nature of the transaction.”).

editors, members of town councils and planning boards, teachers and translators. Others were deeply involved in a vast array of civic and charitable work.<sup>17</sup> While clinic enrollment is not mandatory at Rutgers—Newark, about fifty percent of our students elect to participate in the clinical program.<sup>18</sup> Thus, after students have completed required courses, it is almost certain that the clinic program will receive a cross-section of the student body reflective of the law school's rich diversity.

The possibilities for utilizing clinic students' legal and non-legal extant talents in the context of law school clinical programs are varied and extensive. The following charts support this point. The charts, representing a partial list of already-existing Rutgers—Newark student talents, are divided into three categories.<sup>19</sup>

#### CHART I

##### Legal, Law Enforcement, Government and Military

Patent Agent	Paralegal	Legislative Lobbyist	Police Officer
Legislative Aide	Counselor	Law Firm Intern	Military Officer

#### CHART II

##### Social Work, Health Professions, and Advocacy

Social Worker (MSW)	Nurse	Union Representative	HR Manager
Teacher	Real Estate Agent	Tenant Organizer	Doctor

#### CHART III

##### Business and Industry

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17. Data relative to diversity of student enrollment is derived from a compilation of reports provided to faculty by the Director of Admissions. Data for the current three-year enrollment period are typical.

18. The Clinical Program serves on average 110 students each semester (fall and spring) across ten clinic electives. Because it is not dependent upon the availability of students for court appearances, the CTLC is offered during the summer semester primarily for the benefit of part-time evening students.

19. See *supra* note 17.



Certified Public Accountant	Property Manager	Bank Officer	Construction Manager
Night Club Manager	Civil Engineer	Restaurant Owner	Priest

The following vignettes are intended to illustrate challenges associated with using students' extant talents and to provide a foundation for developing principles and guidelines for responding to these challenges:<sup>20</sup>

Students with a Non-Licensed and Non-Law-Related Talent

1. The student ("Stu") is fluent in French. The clinic has a nonprofit client that seeks to sell a parcel of real estate to a clinical research company based in France. A draft Contract of Sale is delivered to the clinic in French. The student wants to be responsible for the translation into English.
2. Stu is pursuing a joint degree in the law school and the school of social work. He hopes his experience in the law school clinical program will provide him with an opportunity to explore and better understand how the two disciplines can be coordinated to bring both to bear on an individual client matter that originates as a legal matter. In his initial discussion with his faculty supervisor ("Faculty"), he wants to know whether he will be permitted to practice the skills he is concurrently acquiring through his social work curriculum while carrying out his responsibilities as a clinic student.

Students with a Non-Law-Related Talent That Is Licensed

3. Stu comes to the clinic with a recently acquired MSW degree. He has taken steps necessary to become a licensed social worker. Stu is in the process of deciding on a career path and would prefer to put aside his social work skills while in law school.

Students with a Law-Related Talent That Is Licensed

4. Stu comes to the clinic as a patent agent. Throughout his law school career he has focused his electives on intellectual property courses. He has been attracted to the transactional clinic because it has an intellectual property practice area headed by the law school's most prominent intellectual property expert. He believes the transactional clinic

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20. I recognize that different clinic practice areas may produce a different set of challenges. These vignettes, arising in the CTLC, are both illustrative and real. While I do not vigorously distinguish between law-related and non-law-related talents, I generally consider there to be more leeway in decisions by clinic faculty to employ clinic students' law-related talents.

represents a wonderful opportunity to advance his skills in his chosen area of focus. Before committing to enrolling in the clinic, he wants some assurance from Faculty that he will be allowed to bring the full benefit of his patent agent talent to bear on appropriate client matters and that he will be allowed to work exclusively on intellectual property matters so long as there is client demand for the same.

Students with Extensive Business Experience

5. Stu comes to the clinic with a deep experience in a variety of businesses that he has owned and/or managed. He currently owns and manages a very successful restaurant business. He has taken a course in Professional Responsibility and wants to understand from the perspective of the RPCs and the clinic's rules whether it is mandatory or permissive that he offer his extensive business knowledge to the clinic's business clients.

Students with Knowledge or Skill Beyond the Scope or Range of Supervising Faculty

6. Faculty recognizes that Stu has unique talents and knowledge that go beyond the knowledge of Faculty. Stu is also known for his outstanding oratory skills having recently won a national moot court competition. Faculty ponders whether to have Stu make a special presentation to the class as well as to businessmen in residence at a nearby business incubator.

Students with Skills and Experience That Lend Themselves to Performing Dual Roles

7. Stu has extensive experience with nonprofit organizations, having served as executive director and as a member of the Board of Directors of several such organizations. Stu believes he can serve some of the clinic's clients best by providing requested legal assistance while also serving on their governing boards or by serving as a volunteer to assist in advancing their mission.

Students with Exceptional Clerical Skills

8. Before attending law school, Stu worked as a legal secretary in a number of law firms of varying sizes. Stu has exceptional typing skills and can take dictation effectively. With some reluctance, Stu appears to be amenable to using these skills to facilitate the clinic's work.

These examples by no means represent the full spectrum of possibilities for utilizing students' talents in the context of a law school clinic program. On the other hand, they represent enough of a cross section of examples to meaningfully explore the subject.

## II. THEORIES AND ELEMENTS OF EXPLOITATION

The disposition not to take unfair advantage of one's fellows may be among the more important moral virtues, and a condition of civilized life, even if there are also good reasons for not penalizing the failure to display that virtue.<sup>21</sup>

In modern usage, the concept of exploitation has both a positive and negative connotation as well as a highly subjective nature. Scholar and philosopher Richard J. Arneson expressed it this way: "[t]here will . . . be as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment."<sup>22</sup> For those who have practiced in the area of sports and entertainment law, for example, the idea of fully "exploiting" the client's talent does not have a negative connotation. On the contrary, it describes the upper limits of the lawyer's efforts to advance the client's interest. It means getting the best deal possible for the client or otherwise assisting the client in making the most of her talent. This is, after all, consistent with the lawyer's obligation to provide zealous advocacy. Students are not clients and teaching is not advocacy. But might "zealous teaching"<sup>23</sup> include strengthening a student's existing talents, and in particular those talents that can contribute to a student's future as a competent practitioner in an increasingly competitive marketplace?

Both zealous teaching and zealous advocacy have limitations. The ABA Model Rules governing lawyers' professional behavior have, for example, relegated any mention of "zeal" to the Preamble and to a non-binding comment related to Rule 1.3.<sup>24</sup> The reduced status of "zeal" or "zealous advocacy" in defining a lawyer's duty to a client is also reflected in what appears to be a trend among states to remove zealous advocacy as a standard altogether or to relegate the standard to a formulation that is merely precatory. We learn from a contributor to the New York Law Journal that: (1) New York is among the states that have completely removed any mention of "zeal" in its Rule; (2) six states adopted the Model Rule but without the comments (for example, the the-non-binding comments included in the ABA Model Rules); (3) two other states adopted the Model Rules but eliminated the reference to "zeal" in the comments; and (4) only two jurisdictions, Massachusetts and the District of Columbia,

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21. See ALAN WERTHEIMER, *EXPLOITATION* 32 (1996); see also DAVID GAUTHIER, *MORALS BY AGREEMENT* 321 (1986).

22. Richard J. Arneson, *Exploitation*, in *ENCYCLOPEDIA OF ETHICS* 350, 350 (Lawrence C. Becker eds., 1992).

23. See *infra* notes 35-40.

24. Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, 245 N.Y. L.J. No. 47 (2011); see also Anita Bernstein, *The Zeal Shortage*, 34 *HOFSTRA L. REV.* 1165, 1167 (2006).

include “zeal” in their Disciplinary Rules, and only one, the District of Columbia, affirmatively requires zeal.<sup>25</sup>

The reduction in the importance of zeal as a standard for lawyers’ loyalty to a client’s cause appears to have gone through phases. The words “warm zeal” appeared in the very first ABA Canons of Professional Ethics in 1908 (“1908 Canons”) under the heading, “How Far a Lawyer May Go in Supporting a Client’s Cause.”<sup>26</sup> The 1908 Canons contemplated a commitment by lawyers to both clients and society and considerable discretion in ethical compliance that might be contrary to the wishes of the client.<sup>27</sup> The 1908 Canons provide in part: The lawyer “must obey his own conscience and not that of [the] client.”<sup>28</sup> The 1970 Code of Professional Responsibility retained Roscoe Pound’s social engineer conception of the lawyer’s role, and states that, “[l]awyers, as guardians of the law, play a vital role in the preservation of society.”<sup>29</sup> By 1983, the Model Rules reflected a very different view of a lawyer’s role in society by identifying the lawyer’s primary role as a “representative of clients” and secondarily as “a public citizen having special responsibility for the quality of justice.”<sup>30</sup> The new conception of a lawyer’s role in society reflected a recognition of the fact that lawyers had become “hired guns” expected to “function as extreme partisans without moral accountability for their own conduct or even [the conduct] of their clients so long as both have not definitively crossed the bounds of the law.”<sup>31</sup> Such a lack of moral accountability might ordinarily result in tighter regulation of the offenders.<sup>32</sup>

In this latest phase, the legal profession appears to have made a bargain with society regarding the significance of zeal in defining a lawyer’s role: society permits the profession to be self-regulated in exchange for a commitment by the profession to return to a time when lawyers’ behavior reflected a commitment to both clients and society.<sup>33</sup> This commitment and bargain could not be honored under the precept of zealous advocacy as that term evolved.<sup>34</sup>

Like the legal profession, law school clinic faculty appears to be struggling with the matter of zeal as the term relates to clinic

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25. Saunders, *supra* note 24.

26. ABA CANONS OF PROF’L ETHICS Canon 15 (1908).

27. For a discussion of this issue, see Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence and Legal Ethics*, 75 FORDHAM L. REV. 1339, 1355-58 (2006).

28. ABA CANONS OF PROF’L ETHICS Canon 15 (1908).

29. MODEL CODE OF PROF’L RESPONSIBILITY Pmb. (1970).

30. MODEL RULES OF PROF’L CONDUCT Pmb. and Scope ¶ 1 (1983).

31. Pearce, *supra* note 27, at 1341.

32. See Wertheimer & Zwolinski, *supra* note 14.

33. See Pearce, *supra* note 27, at 1361.

34. See *id.* at 1361.

teaching.<sup>35</sup> Broadly stated, on one side of the struggle are those who describe a clinic supervisor's duty as ensuring "effective representation" for clinic clients.<sup>36</sup> This admittedly and deliberately low standard, according to this view, allows clinic supervisors to "give full rein to our educational goals for students."<sup>37</sup> This school of thought advances the following question as paramount in establishing guidelines for student supervision in the context of law school clinic teaching: "Is this being done to maximize educational gains for students or is it being done for some other reason?"<sup>38</sup> In answering this question, supporters of the zealous teaching view respond, "it's not about the clients."<sup>39</sup> On the other side of the struggle are those who are not prepared to render minimally effective representation to clients in the interest of maximizing the value of a law school clinic experience for students.<sup>40</sup>

Those who favor zealous teaching might offer the decline in zealous advocacy as supporting the appropriateness of deferring the client's interest to a higher public or moral interest, like educating future lawyers. Those who favor providing clients with something greater than mere effective representation might argue that zealous teaching, like zealous advocacy, should defer to a higher social good, like providing quality legal service to a poor and traditionally underrepresented population. I leave this debate to others. I focus in this Article on whether potential harm or unfairness to students associated with the misuse of students' talents militates against zealous teaching.

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35. See generally Chavkin, *Spinning Straw into Gold*, *supra* note 2 (noting the limitations of students as advocates); Chavkin, *Am I My Client's Lawyer?*, *supra* note 2 (examining the relationship between clinical supervisors, students, and their clients).

36. Chavkin, *Spinning Straw into Gold*, *supra* note 2, at 258; Chavkin, *Am I My Client's Lawyer?*, *supra* note 2, at 1510.

37. Chavkin, *Spinning Straw into Gold*, *supra* note 2, at 258 n.44.

38. *Id.* at 258.

39. See *id.* at 259-61.

40. See, e.g., Kenneth R. Kreiling, *Clinical Education and Lawyer Competency: The Process of Learning to Learn from Experience Through Properly Structured Clinical Supervision*, 40 MD. L. REV. 284, 286 (1981). In his work, *Am I My Client's Lawyer?* Professor Chavkin references Professor Kreiling's work as well as the work of others who oppose his position that clinic clients are entitled only to "competent representation." Chavkin, *Am I My Client's Lawyer?*, *supra* note 2, at 1527, 1508-12. In this regard, he states that it is some clinicians' goal to protect clients from "imminent error that would seriously damage a client," *id.* at 1510 (quoting Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1073 (1985)), and that a "large majority of clinicians endorse[] an ideal of providing clinic clients with the 'best possible' service." *Id.* at 1510 n.8 (citing James H. Stark et al., *Directiveness in Clinical Supervision*, 3 B.U. PUB. INT. L. J. 35 (1993)). Other clinicians suggest a model that is "something less than 'best practices' and something more than 'non-malpractice.'" *Id.* at 1510 (quoting Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 ANTIOCH L.J. 301, 312 (1986)).

While it is not likely that students will feel exploited, even when their talents are used for the benefit of another, the matter of exploitation is not necessarily determined through the eyes of the victim.<sup>41</sup> A student-athlete may view his unpaid efforts on the playing field as an opportunity to be trained and conditioned for a lucrative career as a professional. On the other hand, outside observers may consider the student-athlete to be exploited if, in their view, an inappropriate (and, therefore, unfair) imbalance exists between the value to the student of the athletic training provided and the value to the university of the student-athlete's talent.<sup>42</sup>

As the discussion of exploitation progresses, key questions emerge. Under what circumstances would it be "unfair" for a clinic faculty member to use a clinic student's talents? Is the potential for harm to the student relevant? Does it matter that the student gains something from the relationship? Does it matter whether the student consents? Does context matter? Returning to the student-athlete example, one might argue that there is a substantive difference between using the student-athlete in games (where she might receive notice by a scout) and using the student-athlete exclusively in the context of practice sessions. In the latter instance, with whom does the benefit lie: the student-athlete, the team and members of the team who will be playing in the game, or both?

Another popular context for exploring the possibility for negative exploitation in an educational setting is the unpaid internship.<sup>43</sup> Is it unfair exploitation or valuable training?<sup>44</sup> One final example of possible exploitation in an academic setting can be used to distinguish exploitation from abuse. The harsh words (verbal abuse) often endured by medical students are not necessarily examples of negative exploitation. The excessively long hours often spent on duty in a hospital may be exploitative since the hospital and its patients stand to gain at the expense of the students. This conundrum exposes and illustrates the numerous and debated elements comprising a modern-day workable definition of negative exploitation.<sup>45</sup> Such

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41. See Wertheimer & Zwolinski, *supra* note 14.

42. Expressed in terms of what the student athlete ought to get in return for what he or she gives. See *id.*

43. See, e.g., Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 440-41 (2013).

44. This element of the discussion is particularly significant and timely. A recent federal court decision discussed later in the Article challenges the legality of unpaid internships. See *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013). This ruling and the principles it advances will likely have a profound effect on externship programs heavily relied upon by law schools to satisfy experiential learning requirements imposed by the ABA. See *id.*

45. The context for discussions about exploitation familiar to most people is economic exploitation popularized by Karl Marx. Marx's macro-level theory of exploitation focuses on large segments of society in the context of free markets. See

elements include issues like vulnerability, potential for harm, relative advantage or benefit and consent.

In addition, noted commentators attempting to establish guiding principles for determining the presence of negative exploitation contend that the moral “fact” of exploitation is not by itself a sufficient test.<sup>46</sup> The “moral force” of exploitation must also be considered.<sup>47</sup> It is this latter part of the test, in their view, that is determinative of whether regulations or controls are warranted.<sup>48</sup> Commentators tend to agree that uses of a vulnerable person’s talents that are both harmful and nonconsensual are likely examples of exploitation of the type that warrant regulation and control.<sup>49</sup> But, beyond this level of agreement, commentators differ widely regarding the relevance of combinations of vulnerability, harm, mutual advantage and consent as proper considerations in finding a valid claim of negative exploitation.<sup>50</sup> The single theme common to these variations appears to be the element of unfair advantage.<sup>51</sup> But can a relationship that is consensual and mutually advantageous be deemed unfair?

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Jeffrey Reiman, *Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen*, 16 PHIL. & PUB. AFF. 3, 3-4 (1987). According to Marx, producers of goods (the proletariat) work for passive owners (the capitalist class) for less compensation than is equivalent to the actual amount of work done. Underlying this theory of exploitation is a Labor Theory of Value reasoning that all value is attributable to labor as opposed to, for example, ownership or management. Marx’s theory of exploitation focuses on the exploitation of an entire segment or class of society by another. *See id.* at 6-10. This macro-level or structural theory of exploitation can be compared to micro-level or organizational theories of exploitation also described as neoclassical theories. Under neoclassical theories, exploiters have unique bargaining power giving them the ability and opportunity to take advantage of others, including individuals. Under the Marxist theory, exploitation can be avoided by eliminating capitalism. Under neoclassical theories, exploitation can be avoided by way of competition and free markets. With their focus on asymmetrical bargaining power, that results in the vulnerability of one party relative to the other in a relationship. *See id.* at 14. The neoclassical theories for defining exploitation provide the better model for a discussion about exploitation in the context of clinic teaching and supervision. *See* Jonathan Wolff, *Karl Marx*, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta, ed., Summer 2011), <http://plato.stanford.edu/archives/sum2011/entries/marx/>; David L. Prychitko, *Marxism*, CONCISE ENCYCLOPEDIA ECON. (2008), <http://www.econlib.org/library/Enc/Marxism.html>; E. Roy. Weintraub, *Neoclassical Economics*, CONCISE ENCYCLOPEDIA ECON. (1993), <http://www.econlib.org/library/Enc1/NeoclassicalEconomics.html>; *see also* RUTH J. SAMPLE, *EXPLOITATION, WHAT IS IT AND WHY IS IT WRONG?* (2003) (arguing that, given society’s diverse moral views, labeling something as exploitative is subjective, and therefore should not be prohibited by the law).

46. *See* Wertheimer & Zwolinski, *supra* note 14.

47. *Id.* at § 4.

48. *Id.*

49. *See id.*

50. *See infra* notes 51-56 and accompanying text.

51. *See infra* notes 51-56 and accompanying text.

Examples of accounts of exploitation employing combinations of the various possible elements include the following: exploitation always involves gain to the exploiter;<sup>52</sup> exploitation always involves harm to the exploited party;<sup>53</sup> exploitation may or may not be harmful to the exploited party and may include some gain for the exploited party;<sup>54</sup> exploitation may treat another instrumentally or merely as a means;<sup>55</sup> exploitation must be coerced or otherwise nonconsensual;<sup>56</sup> and exploitation can be fully voluntary.<sup>57</sup>

An effective use of exploitation as a framework for measuring the benefits or harm associated with using students' extant talents requires a review of the potential exploiters and exploitees as well as a review of factors for identifying exploitation that are relevant to this inquiry. The primary relationship involves faculty supervisors as potential exploiters of clinic students. The secondary relationship involves faculty supervisors and students as potential exploiters of clients.<sup>58</sup> In both instances, there is an asymmetrical relationship between the parties that establishes a dependency and vulnerability on the part of the subordinate party. Consequently, there is a potential for harm as well as for a morally offensive imbalance in the level of benefits derived from the relationship.<sup>59</sup>

In exploring ways to discourage negative exploitation of students' extant talents, I have adopted the following elements: (1) vulnerability; (2) the potential for harm; (3) the potential for unfairness in the allocation of benefits; and (4) the existence and effectiveness of consent.<sup>60</sup> In terms of a fairness baseline, I deem it

52. See, e.g., Judith Farr Tormey, *Exploitation, Oppression and Self-Sacrifice*, PHIL. F. 206, 210; see also STEPHEN R. MUNZER, A THEORY OF PROPERTY 171 (Jules Coleman ed., 1990).

53. See, e.g., Reiman, *supra* note 45; see also ANDREW LEVINE, ARGUING FOR SOCIALISM: THEORETICAL CONSIDERATIONS 65-77 (1988).

54. See, e.g., 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 176-210 (1988); see also STANLEY BENN, A THEORY OF FREEDOM 137-39 (1988); John Brewer, *Exploitation in the New Marxism of Collective Action*, 35 SOC. REV. 84, 89 (1987).

55. See, e.g., ALLEN BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 88 (1985); WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989).

56. See, e.g., BARRINGTON MOORE, JR., REFLECTIONS ON THE CAUSES OF HUMAN MISERY 53 (1972); see also Nancy Holmstrom, *Exploitation*, 7 CAN. J. PHIL. 353, 360 (1997).

57. See, e.g., FEINBERG, *supra* note 54, at 176-210; LEVINE, *supra* note 53, at 65-77.

58. Exploitation of a clinic program by a client is conceivable but too remote to include in this discussion.

59. See Mlyniec, *supra* note 2, at 507-08.

60. These factors are generally consistent with those offered by Robert E. Goodin. See Robert E. Goodin, *Reasons for Welfare: Economic, Sociological, and Political—but Ultimately Moral*, in RESPONSIBILITY, RIGHTS AND WELFARE: THE THEORY OF THE WELFARE STATE 19, 37 (J. Donald Moon ed., 1988). Goodin says:

There are four conditions, all of which must be present if dependencies are to



unfair, for example, for clinic faculty to use the non-law-related talents of vulnerable law students primarily for the benefit of another, whether or not there is apparent consent.<sup>61</sup> Similarly, I deem it unfair that in order to maximize the value of the law school experience for students, a vulnerable and potentially dependent clinic client's interest may be compromised.<sup>62</sup> This latter concern for the interest and well-being of clients represents an expression of a desirable moral norm necessary to restrain zealous teaching and is addressed in this Article only in that context.

To further explore these questions in the context of appropriate uses of clinic students' talents, it is useful to approach the issues in two parts: process and outcome. Process measures examine how a potentially unfair use of a student's talent came about—for example, with consent or by way of coercion, fraud, misrepresentation or manipulation.<sup>63</sup> Outcome measures examine the benefit or harm to a student as compared to the benefit intended to be created for a person or entity other than the student.<sup>64</sup>

### III. EXPLOITATION IN A LAW SCHOOL CLINIC CONTEXT

#### A. *Real Harm Can Be Done*

A discussion regarding the potential harm to students associated with ill-advised clinic teaching and supervisory practices might appropriately be labeled “what’s old is new.” While commentators may disagree about how clinic supervision should be conducted, for example, in terms of appropriate levels of supervision, timing of intervention, and the like, there is universal agreement that poor supervision can harm a student beyond merely depriving the student of a sound clinical experience. Potential harm to students identified by these commentators for myriad poor supervisory practices applies as well to the misuse of students’ extant talents.

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be exploitable. First, the relationship must be *asymmetrical*. . . . Second . . . the subordinate party must *need* the resource that the superordinate supplies. . . . Third . . . the subordinate party must depend upon some *particular* superordinate for the supply of the needed resources. . . . Fourth, the superordinate . . . enjoys *discretionary* control over the resources that the subordinate needs from him.

*Id.* (internal citations omitted).

61. In this regard, I take the position that there is an asymmetrical relationship between students, as subordinates, and clinic faculty, as superordinates. I also separate for possible different treatment law-related and non-law-related extant talents on the grounds that there is a greater likelihood that law-related talents will conform to pedagogical goals of the clinic supervisor.

62. In this regard, I take the position that there is an asymmetrical relationship between a large proportion of clinic clients, as subordinates, and clinic faculty/students, as superordinates.

63. Wertheimer & Zwolinski, *supra* note 14.

64. *Id.*

It has been observed, for example, that while high levels of anxiety are expected among law school clinic students, poor supervision can result in “defense mechanisms including distancing oneself from the role involvement that is the basis of the learning process” or in excessive dependence on the supervisor.<sup>65</sup> Poor supervision might also result in loss of interest in the clinic’s work with a concomitant negative impact on a student’s grade.<sup>66</sup> Poor performance by a clinic student could produce permanent harm in the form of a negative impact on the student’s reputation or on a student’s application for admission to the bar.<sup>67</sup>

Another commentator describes the potential for harm associated with poor clinic supervisory practices in terms of risks inherent in the supervisory relationship. Her examples include the risk of “destroying confidence in the very attempt of building it”; “[t]he risk of allowing creative tension to dissolve into hostility”; and “[t]he risk of permitting clinic precepts of social justice, commitment and professionalism to deconstruct into alienation, intolerance and mediocre performance.”<sup>68</sup> This same commentator describes her concern about the effectiveness of her supervision when a student “seemed physically ill” over the case.<sup>69</sup>

Harm caused by poor clinic supervision will likely be exacerbated by unplanned, or poorly planned, uses of students’ extant talents.<sup>70</sup> For example, if a student’s confidence is threatened as a result of poor supervision, the negative effect could be amplified if the loss of confidence is in a context the student believed he or she had already mastered.<sup>71</sup> Lack of success in a familiar area would surely add to the level of anxiety, resulting in heightened levels of negative outcomes of the type described above: withdrawal, loss of confidence, excessive dependence, and a poor grade.<sup>72</sup> If a student’s reputation is tarnished as a result of poor faculty supervision, the negative effect is worsened if the diminished reputation is in more than one role, and would be particularly destructive if the student had gained a favorable reputation in a professional or business role prior to entering the clinic program. Similarly, a negative impact on a student’s ability to obtain a license to practice in a professional or business role would be compounded if the impact was felt in more than one professional arena, or in the context of the student’s reputation in the business marketplace.

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65. Kreiling, *supra* note 2, at 287.

66. *See id.* at 287-88.

67. *See Joy & Kuehn, supra* note 2, at 503-04.

68. Barry, *supra* note 2, at 138.

69. *Id.* at 137.

70. Harm of the type described by numerous commentators. *See, e.g., id.* at 144-51.

71. Building on the observations of Barry, *id.*

72. Building on the observations of Kreiling, *supra* note 2, at 287-88.

The predominant modern-day theories of exploitation and other misuses of a person's talent regard harm to the alleged victim as a single factor in determining whether the person is a legitimate victim of unfair treatment for the unfair advantage of another.<sup>73</sup> In the instance of the use of students' extant talents, the unfair advantage might inure to the benefit of the clinic's clients, the clinical program, the faculty supervisor or others the faculty supervisor wishes to please or impress. It is likewise true that poor performance by a clinic faculty supervisor that harms a student is not necessarily exploitative. To reconcile this conundrum we have noted that commentators and philosophers agree that modern-day exploitation can involve both harmful and mutually advantageous exploitation.<sup>74</sup> For others, the matter is reconciled by positing that any act or transaction that is exploitative is also harmful.<sup>75</sup> In either case, a baseline other than harm is required to advance the discussion. The "fairness" baseline again emerges and the subjective nature of exploitation is again highlighted.

### *B. Significance of Mutual Advantage*

It is easy to delineate a series of advantages accruing to a clinic student whose supervisor chooses to exploit the student's extant talents. For example, the student will realize benefits associated with practicing and refining the extant talent. The additional skills, however limited when compared to benefits accruing to another party, will enhance the student's chances in an increasingly competitive legal marketplace. Beyond that, the student will receive academic credit for her effort; she will receive expert tutoring and supervision in the acquiring of new and advanced knowledge and skills; and she will likely enjoy an advantage over fellow students as a result of the confidence she will derive from working in a familiar realm. She might even receive a "bump up" in her grade.

Using "fairness" as a baseline for identifying exploitative relationships, a commensurability test in terms of benefits derived from the relationship would seem to offer the appropriate standard. On the other hand, the imprecise and subjective nature of "fairness" and relative advantage exposes critical flaws in this approach.<sup>76</sup> Two examples can be used to support this point. A lawyer may be guilty of

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73. Robert E. Goodin, *Exploiting a Situation and Exploiting a Person*, in *MODERN THEORIES OF EXPLOITATION* 166-200 (Andrew Reeve ed., 1987).

74. See, e.g., SAMPLE, *supra* note 45, at 129.

75. See Goodin, *supra* note 60, at 182 ("[T]o exploit people is to wrong them, however much or little they may lose or gain from the act."). But see *id.* at 172 ("[I]f the putative exploiter fails to realize some perceived benefits from the act, then either it was not a successful act of exploitation or else it was not an act of exploitation at all.").

76. See, e.g., *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 531-34 (S.D.N.Y. 2013).

overcharging a client for his services based upon conventional fee arrangements. The outcome for the client, on the other hand, might approach the level of priceless—for example, preserving the client's life or life savings. Similarly, a hardware store may overcharge a customer for a generator following a major storm. On the other hand, the value of the generator to the customer, under the circumstances, may far outweigh the inflated cost. Consistent with rejection of a "primary beneficiary" test, the relationship between exploitation and mutual advantage has been effectively summarized as follows: "we cannot evaluate the fairness of a transaction solely by comparing the gains of the parties. Rather, we must measure the fairness of their gains against a normative baseline as to how much the parties ought to gain . . ." <sup>77</sup> With respect to determining how and when to use students' extant talents, should the judgment be based on what students want or think they need or what the supervisor believes is in the students' best interest?

### *C. Issues Related to Consent/Vulnerability*

As discussed earlier, the fact that a relationship is consensual may not in and of itself insulate the relationship from a valid claim of negative exploitation.<sup>78</sup> Exploration of the issue of consent is only useful as a tool to determine whether a transaction or relationship—in this instance use of a student's extant talents—results, in the eyes of a reasonable observer, in an unfair gain to another.<sup>79</sup> There would be general agreement among commentators that clinic students should be protected against uses of their extant talents that are both non-consensual and harmful.<sup>80</sup> In these regards, the issue of the moral force of the potential exploitation can be explored in terms of the means used to secure consent if consent appears to be present in the particular relationship.<sup>81</sup> In the context of clinical programs, student consent to rules of engagement can be discussed in the context of the clinic program's enrollment and evaluation policies.

#### 1. Clinic Enrollment Policies and Practices

The Clinical Program at Rutgers School of Law—Newark does not screen its applicants but relies exclusively on the registration process to determine the composition of its ten individual clinic offerings.<sup>82</sup> In the event a particular clinic is oversubscribed, a lottery

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77. Wertheimer & Zwolinski, *supra* note 14.

78. See *supra* notes 51-58, and accompanying text.

79. See Wertheimer & Zwolinski, *supra* note 14.

80. See, e.g., *id.*

81. See *id.*

82. *Clinical Program Overview*, RUTGERS SCH. L.—NEWARK, <http://law.newark.rutgers.edu/clinics/clinical-program-overview> (last visited Aug. 21, 2014).

system is employed to determine the composition of the oversubscribed clinic.<sup>83</sup> In the lottery procedure, a priority status is given to third-year students.<sup>84</sup> Therefore, the presence of student talents potentially exploitable for the benefit of clients, other students, clinic faculty and others is potentially problematic. In the case of the program's transactional clinic<sup>85</sup>, for example, the clinic's ability to deliver some of its intellectual property legal services can be haphazard and unpredictable.<sup>86</sup>

Many law schools have doctrinal course prerequisites for admission to some of their clinics.<sup>87</sup> Evidence may, for example, be a required prerequisite for a litigation clinic; tax may be a prerequisite for a tax clinic; and so on. Because these prerequisite courses represent a general requirement, are known in advance by all potential clinic applicants, and are available for all to take, the issue of exploitation does not arise in these instances.

Other law schools employ a far more stringent selection process in determining the composition of their clinics. Georgetown, for example, selects clinic students on the basis of essays expressing the nature and extent of the applicant's interest in the particular clinic as well as the student's assessment of the unique contribution she might make to the clinic's purposes.<sup>88</sup> The Georgetown clinic application also requires submission of a resume detailing the student's relevant past experience.<sup>89</sup> Suffolk Law School's clinical program reserves the right to select students on the basis of foreign

83. *General Registration Instructions*, RUTGERS SCH. L.—NEWARK, <http://www.law.newark.rutgers.edu/general-registration-instructions> (last visited Aug. 21, 2014).

84. RUTGERS SCHOOL OF LAW—NEWARK, STUDENT HANDBOOK 2013-2014, at 45 (2013), *available at* <https://law.newark.rutgers.edu/files/Student%20Handbook%202013-2014Rev.pdf>.

85. *Community and Transactional Lawyering Clinic*, RUTGERS SCH. L.—NEWARK, <https://law.newark.rutgers.edu/clinics/community-law-clinic> (last visited Aug. 21, 2014).

86. Even among those who do not advocate for “zealous teaching,” there can be general agreement on the precept that the representation of live clinic clients should at all times involve students; however, work that might be done by a licensed patent agent cannot simply be taught to other clinic students. In this regard, including such work among a clinic's practice areas, while desirable, can also be problematic in a number of ways: a student possessing the requisite skills and credentials may not wish to use them, there may not be students in the enrollment pool with the requisite skill set, the lottery may exclude one or more students with the skill set.

87. *See e.g., Clinic FAQ*, GEORGETOWN L., <http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/clinic-faq.cfm> (last visited Apr. 1, 2014) (copy on file with the author) (“Course prerequisites and other eligibility requirements apply to some clinics.”).

88. *Id.*

89. GEORGETOWN LAW, APPELLATE LITIGATION CLINIC, CLINIC REGISTRATION 2013-2014 9 (2013) (copy on file with the author).

language fluency as well as completion of relevant doctrinal course work.<sup>90</sup>

The use of a “learning contract” is another clinic enrollment practice that has the effect of screening applicants.<sup>91</sup> “A learning contract has been described as a ‘document drawn up by the student in consultation with [an] instructor specifying what and how the student will learn in a given period of time.’”<sup>92</sup> As the concept has evolved, subscribers have tended to move from students as drafters of the contract to instructors as drafters with student comment and ultimate agreement.<sup>93</sup> Inasmuch as applicants can be dissuaded from enrolling in a clinic because of the requirement of a learning contract, or be inclined to compromise their position with respect to the upcoming clinic experience, the concept represents a screening process, albeit incidental. One of the highly touted advantages of the learning contract is a presumed shift in the hierarchy between student and faculty thereby imbuing the student with a greater sense of independence and responsibility.<sup>94</sup> In terms of both the need for firm retention of control over fundamental educational precepts and students’ fixation on grades, it is unlikely that learning contracts can ever overcome the asymmetrical nature of the student-faculty relationship that virtually all philosophers contend is at the root of exploitation.

## 2. Student Evaluation Policies

Attempting to discuss grades with students provides a classic example of the idiomatic expression “talking past each other.”<sup>95</sup> I have, for example, given up on my effort to convince students that by the time they reach my clinic, so near to moving into the real world, grades are no longer important.<sup>96</sup> I do still use the common

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90. *Housing Clinic*, SUFFOLK U. L. SCH., <http://www.suffolk.edu/law/academics/clinics/21855.php> (last visited Aug. 21, 2014).

91. Jane H. Aiken et al., *The Learning Contract in Legal Education*, 44 MD. L. REV. 1047, 1048 (1985).

92. *Id.* (quoting R. M. Barlow, *An Experiment with Learning Contracts*, 45 J. HIGHER EDUC. 441, 441 (1974)).

93. *See id.* at 1073-75 (describing non-intervention provisions).

94. *Id.* at 1049.

95. It is perhaps fitting that the phrase derives from a debate between Thrasymachus and Socrates on the subject of justice. *See* PLATO, *THE REPUBLIC*, 22-31 (B. Jowett trans., 1945); *see also* Paul McLaughlin, *Notes on Talking Past One Another*, ACADEMIA.EDU, 11-12 (Feb. 28, 2008), [https://www.academia.edu/5674565/Notes\\_on\\_Talking\\_Past\\_One\\_Another\\_2008](https://www.academia.edu/5674565/Notes_on_Talking_Past_One_Another_2008).

96. Results of a survey at Catholic University of students revealed that while law students were not likely to avoid clinic enrollment in instances in which numerical grades were not provided, a significant majority favored numerical grades over a pass/fail student evaluation system. Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 CLINICAL L. REV.

expression, “minimum in, minimum out.” I, of course, am referring to the relationship between effort and learning. They, on the other hand, being fixated on grades, implore me to quantify the expression: “Does it mean the more client matters I work on, the better my grade?” “What if I handle fewer but more complex matters?” is a question that might be very relevant if the talents of a uniquely skilled student are important in the representation of a client and even more relevant if the uniquely skilled student was admitted to the clinic through a selective process. I also urge students to spend as much time in the clinic area as possible because “much of the learning spontaneously occurs there.” “Will I be penalized (in terms of my grade) if I work on client matters away from the clinic area?”

Questions and responses from students in the context of discussions about grades further confirms the asymmetrical nature of the relationship between clinic students and their supervisors and highlights the students’ dependency and subordinate bargaining power in these regards.<sup>97</sup>

#### *D. Factoring in the Client’s Interest*

Returning to Goodin’s prerequisite conditions for exploitation,<sup>98</sup> law school clinic clients are particularly susceptible to this unfair treatment. The relationship is asymmetrical; the client has a need; the client has limited options for addressing the need; and the clinical program (which might well represent a last resort for the client) enjoys discretionary control over the resources needed to address the need.<sup>99</sup>

Potential harm to clients who receive ineffective or even minimally effective legal representation from law school clinic programs can take both a material and a psychological form. Examples of potential material harm include monetary loss (money not received or money having to be paid out); less than full enjoyment of rights or privileges (social security benefits, for example); or losses affecting the client’s quality of life (an eviction or loss of a home, for example).

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299, 316 (1997). Brustin and Chavkin point to evidence supporting the fact that “a generalized pass/fail system can be implemented without sacrificing motivation or performance,” but conclude that “[w]ithin the law school environment as it currently exists, grading sends a message to students . . . about the intellectual rigor and emotional demands of clinic and motivates students utilizing the reward system that is dominant in that environment.” *Id.* at 326-27, 326 n.70.

97. See Mlyniec, *supra* note 2, at 512; see also Jerry R. Foxhoven, *Beyond Grading: Assessing Student Readiness to Practice Law*, 16 CLINICAL L. REV. 335, 335 (2009) (pointing out that it is a clinical law professor’s experience with law practice that uniquely qualifies him/her to supervise clinic students).

98. See Goodin, *supra* note 60, at 37-38.

99. See *id.*

To this list of unambiguous possibilities a number of less obvious possibilities can be added. These might include loss of the timely resolution of a matter (and attending harm) due to students' inexperience and need for time consuming supervision and feedback; loss of continuity in the representation due to transitioning between semesters; and the increased risk of a loss of privacy and confidentiality due to the standard clinic practice of conducting rounds in the presence of students other than the students assigned to handle the matter.<sup>100</sup>

Psychological impacts are more difficult to assess or to illustrate. To explore this aspect of potential harm to clinic clients we might look to Gerald Lopez and an analogy involving his preference for "rebellious lawyering" over "regnant lawyering."<sup>101</sup> Lopez's rebellious lawyer has, with practice and experience, learned to minimize psychological harm to clients by deemphasizing the asymmetrical relationship between lawyer and client in favor of a relationship that seeks to give clients some level of control over the matter – an approach that will tend to preserve the client's dignity, self-esteem and control over the client's own life.<sup>102</sup>

Experience with indigent clients may provide a rebellious lawyer with a basis for having some level of empathy with a client from an

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100. See Juergens, *supra* note 2, at 358-62.

101. GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE, 23-29 (Robert W. Gordon & Margaret Jane Radin eds., 1992).

102. *Id.* Client-centered lawyering intended to empower and promote respect for traditionally underrepresented communities through a joint problem-solving approach was not invented by Gerald Lopez. Lopez's "rebellious lawyering" is just one among many labels to describe this aspect of critical lawyering theory. This rich history led by scholars like Gary Bellows and Bea Moulton began in the 1970's and initially focused generally on the appropriate role for lawyers in society. GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY (1978). A second wave led by scholars like David Binder and Susan Price challenged the dominant conception of lawyers as expert decision makers while encouraging instead a role for lawyers that encourages clients to play the central role, not only in setting the ultimate objectives of the representation but also in making important decisions throughout the representations as they arise. DAVID BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (3d ed. 1991). A third wave led by Gerald Lopez, Lucy White and Anthony Alfieri began to analyze the effects of perceptions of hierarchy and relative power between lawyers and clients. See, e.g., LOPEZ, *supra* note 101; Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 546-47 (1988); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2125-38 (1991). Scholarship produced from leaders of this third wave encourages lawyers for the poor to avoid perceiving their clients as victims in need of rescue and to view them instead as potential partners in solving their own problems. See also Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427, 439 (2000) (discussing history of collaborative lawyering).



economic, social, or ethnic background that is totally unlike his own.<sup>103</sup> From the lack of experience and practice, the typical clinic student lacks the skill-set required to mitigate the psychological harm associated with dependencies inherent in a lawyer-client relationship that are compounded by an added dependency based on poverty. Whether material or psychological, potential harm associated with student representation will be exacerbated if a student is allowed to test emerging talents that are outside of the normal realm of the clinic's practice or marginally within the scope of the supervisor's competencies.

As is the case with clinic students, a number of advantages accruing to clinic clients can be readily enumerated: the client's legal need is addressed; if the student assigned to the matter is properly supervised, the client has the benefit of greater attention to a matter than could be provided by a solo practitioner or even by a small law firm;<sup>104</sup> and the client might find personal satisfaction and enjoyment from participating in the educational process.<sup>105</sup>

On the other hand, particularly for those who favor "zealous teaching," any gain to clinic clients might be considered to be incidental since the clinic supervisor's primary obligation is to students.<sup>106</sup> A large segment of law school clinics' client pools are derived from populations of poor and traditionally underrepresented persons coming to clinic programs individually or in organized groups.<sup>107</sup> These clients fit Professor Hill's description of individuals who are particularly susceptible to exploitation because of their "psychological vulnerability, which" subsequently serves to disturb their "ability to reason effectively."<sup>108</sup>

Model Rule 1.0 reads in part, "[i]nformed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."<sup>109</sup> Poor and underrepresented clients are not likely to be aware of the particular arrangement between

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103. See Barry et al., *supra* note 2.

104. See Juergens, *supra* note 2. Professor Juergens points out that "[m]ost private law firms do not provide comparable training and supervision of their new practitioners." *Id.* at 347. She goes on to advise that "two out of three lawyers nationwide practice solo or in firms of under five lawyers." *Id.* at 347-48 n.25. She warns, however, that "[t]o measure a clinic's worth to clients simply in contrast to what might happen had they no lawyer at all promotes carelessness." *Id.* at 349. In my view such carelessness would include unacceptable exploitation.

105. See *id.* at 347.

106. See *id.*

107. See *id.* at 363.

108. See Hill, *supra* note 5, at 637.

109. MODEL RULES OF PROF'L CONDUCT R. 1.0 (e) (2011).

clinic faculty and clinic students on the matter of supervision; for these clients, the matter of alternatives may be totally improbable. In the end, what may appear facially to constitute consent on the part of such clients may be flawed in ways that “makes the assent . . . fictional and the bargain meaningless.”<sup>110</sup>

Given the potential for exploitation of clients that might accompany a misuse of clinic students’ extant talents, the likelihood of such an outcome should be factored into judgments made by clinic faculty in these regards.

#### IV. WHEN HARM IS NOT THE ESSENTIAL STANDARD: MORAL FORCE AND GUIDING PRINCIPLES IN OTHER CONTEXTS

##### A. *The “New Normal”<sup>111</sup> in the Legal Marketplace*

Exploration of the issue of appropriate uses of students’ extant talents is part of a much larger issue that is beyond the scope of this Article, but important enough to discuss briefly in order to establish an overall context for the core discussion. In recent years there have been significant changes in the marketplace for the legal profession that will, or should, have a ripple effect on law school teaching programs.<sup>112</sup> This ripple effect begins with the evolution of clients as they become more sophisticated and more demanding in terms of

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110. See MODEL RULES OF PROF’L CONDUCT R. 1.0 cmt. 6 (2011) (“In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client . . . is experienced in legal matters generally and in making decisions of the type involved, and whether the client . . . is independently represented by other counsel in giving the consent.”); see also U.C.C. § 2-302 (2013).

111. The “new normal” is a phrase used from early 2010 to describe the shift in the legal industry to accommodate drivers for change including an increase in client awareness, sophistication and demands; a glut of lawyers for elite clients and the 2008 economic downturn in the United States. See Terri Mottershead, *The Business Case for Talent Management in Law Firms—Are People Really Our Greatest Asset?*, in *THE ART AND SCIENCE OF STRATEGIC TALENT MANAGEMENT IN LAW FIRMS* 21, (Terri Mottershead ed., 2010); see also Neil W. Hamilton et al., *Encouraging Each Student’s Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW. 1 (2012).

112. The gap between a law school education and the new normal in the legal marketplace has been described as “a gap between what law schools think they’re doing and what law firms think they’re buying.” *Has Legal Education Gone the Way of the Auto Industry?*, NALP BULLETIN 1 (Feb. 2010), available at [http://www.nalp.org/uploads/0210\\_Roundtable.pdf](http://www.nalp.org/uploads/0210_Roundtable.pdf) (quoting Philip Bradley, Senior Vice President and General Counsel for Duane Reade). Another observer describes law schools as an essential part of the “value chain” dictated by more sophisticated clients who require “quick-to-deploy legal skills.” Sandee Magglozzi, *Bridging the Gap—From Law School to Law Firm*, in MOTTERSHEAD, *supra* note 112, at 74. With a colorful reference to professional baseball and a recognition that such teams would never consider advancing an untested player to the major leagues, Michael Schill, Dean of the University of Chicago Law School said, “[law schools] are your [law firms] farm team.” *Id.* at 57.

their need for legal services. Demands by clients create a more competitive environment for providers of legal services who respond by altering their business practices to remain viable in the short term.<sup>113</sup> To remain viable in the long term, for-profit legal service providers seek competencies in entry-level associates that can immediately assist in the effort to remain viable in an increasingly competitive marketplace.<sup>114</sup> The paradigm shift representing the new normal in the legal marketplace has seen law firms focus more on client development and retention than on associate development and retention.<sup>115</sup>

The ripple effect of changes occurring within the legal services industry is already felt by law schools in terms of reduced enrollment pools and reduced rates of job placements for graduates.<sup>116</sup> Most observers agree that the 2008 recession was less the cause of the new normal than a wake-up call announcing a need for change that was decades in the making.<sup>117</sup> The traditional business model based on an assumption that clients will insist upon the best legal talent is giving way to business models based on an assumption that clients are seeking the best bargain for their legal services expenditures.<sup>118</sup>

These competency-based business models impose pressure on law schools to provide law students with core competencies that will allow them to immediately provide added value to an employer's

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113. See Noam Scheiber, *The Last Days of Big Law*, NEW REPUBLIC 23 (July 21, 2013), available at <http://www.newrepublic.com/article/113941/big-law-firms-trouble-when-money-dries> (recognizing stingy legal spending by corporate America created a "substantial overcapacity," which now requires a "drive for efficiency").

114. This implicitly recognizes the fact that greed, as a driver for change, causes partners in law firms to place greater income-producing demands on new associates ahead of reducing their own per-share profits. See *id.*

115. See *id.* Furthermore, the New Jersey Law Journal, in its annual survey of New Jersey's twenty-four largest law firms, explains that "New Jersey firms and branches most actively hiring associates are targeting prospects with real-world experience making it tougher for new graduates to get a foot in the door." David Gialanella, *Laterals and Clerks Are Dominating New-Associate Ranks, Study Finds*, N.J. L.J., Oct. 21, 2013, at 1, 21. The survey relied upon in the Study revealed that of the 210 associates recruited at twenty-four bellwether firms during the 2011 hiring year, eighty-eight (41.9%) were lateral hires. *Id.* at 1. Another sixty-two hires (29.5%) were without practice experience but still had completed postgraduate clerkships before joining their firms. *Id.* Only sixty associates (28.6%) were hired out of law school. *Id.* In the same edition, Editor-in-Chief, Ronald J. Fleury, wrote that: "[e]vident from this bunch of arrivals is that a clerkship or prior experience is becoming the new normal." Ronald J. Fleury, *Associates Class of 2013: All Vital Signs Seem Strong for Lawyer Recruitment*, N.J. L.J. (Oct. 21, 2013, 12:57 PM), available at <http://www.njlawjournal.com/id=1202624248231>.

116. In 2008, during the recession, American law schools produced 43,600 graduates and 75% had positions as lawyers within nine months. In 2012, the numbers were 46,500 and 64%. See Scheiber, *supra* note 114, at 2.

117. See MOTTERSHEAD, *supra* note 112, at 376.

118. See Scheiber, *supra* note 114, at 5.

attempt to secure and retain clients.<sup>119</sup> With their focus on practical learning outcomes and a departure from a strict theory-based approach to law school teaching, clinic programs will be at the forefront of curricular changes that are responsive to the ripple effect created by market changes.<sup>120</sup> The use of students' talents can be factored into this broader challenge as part of a response to the following questions: (1) Keeping in mind the new normal for the legal marketplace, should clinic faculty "exploit" students' extant talents? and (2) keeping in mind risks to students and clients associated with poor clinic supervisory practices, what guidelines should be adopted for use of clinic students' extant talents?

### B. Unpaid Internships

Estimates set levels of unpaid internships offered in the United States each year at nearly one million.<sup>121</sup> The generally agreed upon driver for this high and increasing number is the recent dramatic downturn in the economy.<sup>122</sup> In the context of law school graduates, the downturn in the economy has resulted in fewer available jobs for graduates who often seek to avoid gaps in their resumes by accepting unpaid internships.<sup>123</sup> In addition, the new normal for the legal marketplace places greater demands than before on law school graduates to present evidence of skills and experience that will allow them to make an immediate contribution to the goals of an employer.<sup>124</sup> Such skills and experience are often sought through unpaid internships.<sup>125</sup>

The legality of unpaid internships has recently been addressed by the judiciary.<sup>126</sup> Court action has created anxious discussions about its impact on the use of externships by law school clinic programs in response to an ABA requirement that experiential

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119. Scheiber points out that tasks traditionally performed by new associates—like document review—are now "outsourced to a reserve army of contract attorneys, who toil away at one-third the pay." *Id.* at 4. Scheiber also points out that new associates are less often invited to meetings and conferences just for the experience. *Id.* at 2-3.

120. See Schlossberg, *supra* note 12, at 200-01.

121. Sam Hananel, *Unpaid Internships in Jeopardy After Court Ruling*, ASSOCIATED PRESS (June 13, 2013, 4:27 PM), <http://bigstory.ap.org/article/unpaid-internships-jeopardy-after-court-ruling>.

122. See *id.*

123. See generally Matt Bruenig, *Why Are Unpaid Internships on the Rise?* MATTBruenig.COM (Mar. 7, 2013), <http://mattbruenig.com/2013/03/07/why-are-unpaid-internships-on-the-rise/> (discussing the rise of unpaid internships across different industries in recent years).

124. See NALP BULLETIN, *supra* note 113, at 1.

125. See Bruenig, *supra* note 124.

126. See *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 522 (S.D.N.Y. 2013).

learning be a part of the law school curriculum.<sup>127</sup>

Notably, the word “exploitation” does not appear in Judge William Pauley’s Memorandum and Order related to his recent decision regarding unpaid internships.<sup>128</sup> In his ruling, the district court held that the defendant, Fox Searchlight Pictures, Inc. (“Fox”) should have paid two interns because “[u]sing unpaid interns to fill the interstices created by eliminating paid positions is a clear violation of the [New York Labor Law].”<sup>129</sup> The court further concluded that the interns were employees covered by both the New York Labor Law and the Federal Labor Standards Act.<sup>130</sup> While the *Glatt* decision is based on employment law, not exploitation theory, the case provides an illustration of a holding that a person’s talents can be misappropriated even in the absence of actual harm (unless we accept the theory that any exploitation is harmful), and with evidence of mutual advantage and consent.<sup>131</sup> In the absence of clear guidance from the courts, ABA Standards, Model Rules or other traditional sources of guidance, we might begin to identify guiding principles from analogous situations like this one.

In the case, four unpaid interns contended that Fox violated federal and state labor laws by classifying them as unpaid interns instead of as paid employees.<sup>132</sup> In so doing, the plaintiffs advanced a claim of exploitation—that their talents were unfairly employed for the benefit of another, in this case, the employer.<sup>133</sup> In his effort to classify the relationship between the interns and Fox, Judge Pauley weighed factors that are reminiscent of the discussion about the theory and elements of exploitation: Was the relationship asymmetrical?; Did Fox have full supervisory control over the interns?; Did Fox have control over performance evaluation and rewards?; and Did Fox enjoy a benefit from the intern’s work?<sup>134</sup>

Relevance of the moral force associated with unpaid internships as a form of unfair labor practices is embedded in a comment by an

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127. See, e.g., Fink, *supra* note 43; see also A.B.A., ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 20 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf) (standard 302(b)(1) sets out the requirement that law schools seeking A.B.A. accreditation must “offer substantial opportunities for . . . live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence”).

128. See *Glatt*, 293 F.R.D. at 516-39.

129. *Id.* at 536.

130. *Id.* at 538-39.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 525-34.

interested observer and commentator: “[t]he return on a college investment has fallen, students are facing higher and higher debt burdens, and the reaction of employers is to *make matters worse* for them by hiring more and more people without paying them.”<sup>135</sup> This observation and comment might be interpreted as viewing employers as adding insult to injury by being insensitive to the plight of graduates. This latter observation leads other commentators to point out the moral significance of unpaid internships related to favoring the rich over the poor. According to that view, “unpaid internships *unfairly* leave[] out students and graduates from lower economic levels who can’t afford to work for free.”<sup>136</sup> As with the application of exploitation theory, it is by reference to a “fairness baseline” and not a reference to harm per se that the use or misuse of a person’s talent should be measured. Judge Pauley’s decision offers some guidance in these regards.<sup>137</sup>

In his effort to determine whether the unpaid interns were “employees” under state or federal law, Judge Pauley was effectively making a determination as to whether the interns were being exploited.<sup>138</sup> Labor law has evolved; with the underlying purpose of the applicable state and federal employment laws being to prevent the exploitation of workers.<sup>139</sup> With a similar reliance on theories of exploitation, counsel for Fox attempted to advance a “primary beneficiary” test arguing that “the internship’s benefit to the intern outweigh the benefit to the engaging entity.”<sup>140</sup> In essence, Fox’s defense of the exploitation claim consisted of the following: that the interns suffered no harm, that they entered the relationship voluntarily, and that they enjoyed greater advantage than the alleged exploiter obtained from the interns’ work.<sup>141</sup> A primary beneficiary test, in Judge Pauley’s view, is subjective and unpredictable and is, accordingly, unmanageable since an employer could never know in advance whether it would be required to pay interns.<sup>142</sup>

In developing an alternative test, the court chose to rely on parameters established by the U.S. Supreme Court in *Walling v. Portland Terminal Co.*<sup>143</sup> In *Walling*, the Supreme Court determined

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135. Hananel, *supra* note 122, at 2 (emphasis added) (quoting Ross Eisenbrey, Vice President of the Economic Policy Institute).

136. *Id.*

137. *See id.*

138. *See id.* at 530-31.

139. *See N.L.R.B. v. Apollo Tire Co.*, 604 F.2d 1180, 1184 (9th Cir. 1979) (Kennedy, J., concurring).

140. *Glatt*, 293 F.R.D. at 531.

141. *See id.* at 530-32.

142. *See id.* at 532.

143. 330 U.S. 148 (1947).

that “trainees” were not covered employees under the Federal Labor Standards Act (“FLSA”).<sup>144</sup> The Court reached its conclusion in part on the basis of the fact that the trainee in the case did “not displace any regular employees, who [did] most of the work themselves, and must stand immediately by to supervise whatever the trainees do.”<sup>145</sup> The Court added to its test the fact that the trainee’s work “[did] not expedite the company business, but may, and sometimes [did], actually impede and retard it.”<sup>146</sup> The *Walling* Court concluded that the FLSA should not be interpreted to give employee status to a person whose work serves only his own interest.<sup>147</sup> Attempting to stay within the parameters set out by the Court in *Walling*, Judge Pauley found that the unpaid interns should have been given employee status because the benefit of their work measured from the employer’s perspective was unstructured, and was only incidental from the intern’s perspective.<sup>148</sup> The interns had been exploited—not because of any harm that had come to them as a result of the internship experience, but because of the unfairness of the exchange reflected in the relationship between the interns and Fox.<sup>149</sup>

### *C. Doctrine of Unconscionability*

Like the unpaid internship example, the doctrine of unconscionability is offered to explore alternatives to harm as a standard for evaluating the fairness and correctness of relationships and transactions. Again, the goal is to identify guiding principles for the use of students’ extant talents in view of the dearth of guidance from traditional sources. Because agreements for legal services between clients and lawyers can never be specifically enforced, this issue and the cases it invokes can only be examined for dicta and underlying reasoning.<sup>150</sup>

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144. *Id.* at 153.

145. *Id.* at 150.

146. *Id.*

147. *See id.* at 152.

148. *See Glatt*, 293 F.R.D. at 533.

149. *See id.*

150. Consideration of issues related to the formulation of a doctrine of unconscionability provides a dimension not present in the unpaid internship example. Debates surrounding the appropriate scope of the doctrine address the issue of its threat to traditional notions of freedom of contract. In the case of the possible need to regulate judgments made by clinic faculty relative to the use of clinic students’ extant talents, the issue of “academic freedom” might arise. This Article cannot resolve this debate. It can adopt the view that just as protecting individual consumers and small business enterprises constitutes a reasonable justification for not recognizing an “absolute” freedom of contract, protecting clinic students against exploitation constitutes a reasonable justification for not recognizing absolute “academic freedom.” *See* Clinton A. Stuntebeck, *The Doctrine of Unconscionability*, 19 ME. L. REV. 81, 85-86 (1967).

While it does not involve the misuse of a person's talent or labor, the doctrine of unconscionability, like Judge Pauley's ruling in *Glatt*, represents a variation on the theme of exploitation theory. In this instance, the moral force associated with the exploitative behavior has already produced rules to regulate or restrain the undesirable behavior. Concepts included in the nearly universally adopted Uniform Commercial Code (UCC) combined with common law dating back as far as 1889 comprise the doctrine.<sup>151</sup>

Factors considered in formulating both the UCC and the common law affecting the doctrine track the principle elements of exploitation theory: vulnerability of the victim; an asymmetrical relationship between the victim and the exploiter; a grossly uneven bargaining position between the victim and the exploiter; issues related to the relative advantage gained from the relationship as between the victim and the exploiter; and questions regarding the validity of the victim's assent to the actions of the exploiter.<sup>152</sup> Once again, the matter of actual harm to the victim is not central to the analysis of whether the victim has been exploited or otherwise misused.

Section 2-302 of the UCC reads in part: "[i]f the court as a matter of law finds the contract or any clause . . . to have been unconscionable at the time it was made the court may refuse to enforce the contract."<sup>153</sup> A comment to this section reads in part: "The principle is one of *prevention of oppression and unfair surprise . . .*"<sup>154</sup> Under the UCC, oppression is found when there is apparent consent but surrounding facts and relative bargaining positions of the parties indicate "the possibility of gross over-reaching on the part of either party."<sup>155</sup> Unfair surprise is found when one party's circumstances, "perhaps his inexperience or ignorance, when compared with the circumstances of the other party, makes his knowing assent . . . fictional."<sup>156</sup> There is in these instances an absence of a meaningful bargain.

*Williams v. Walker-Thomas Furniture Co.* is the most often cited case employed to identify the elements of the doctrine of

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151. See *Hume v. United States*, 132 U.S. 406, 411 (1889); see also U.C.C. § 2. The UCC has been adopted by forty-nine states as well as by the District of Columbia and the Commonwealths of Guam, Puerto Rico, and the Virgin Islands. *Commercial Law: Express and Implied Warranties Under the Uniform Commercial Code*, CADDEN & FULLER LLP, <http://www.caddenfuller.com/CM/Articles/Articles34.asp> (last visited Aug. 21, 2014). Louisiana has yet to adopt the UCC provisions regarding the sale of goods. *Id.*

152. See, e.g., U.C.C. § 2-302 and cmts.

153. U.C.C. § 2-302; see also Stuntebeck, *supra* note 151, at 83.

154. U.C.C. § 2-302, cmt. 1 (emphasis added).

155. Stuntebeck, *supra* note 151, at 83.

156. *Id.* at 82.



unconscionability.<sup>157</sup> The *Williams* case establishes the following elements for a finding of unconscionability: 1) the absence of a meaningful choice on the part of a party to the contract; and 2) the presence of contract terms which are unreasonably favorable to the other party.<sup>158</sup> Consistent with exploitation theory, the court in *Williams* connects “meaningful choice” to the issue of bargaining power. However, unlike Judge Pauley in the *Fox* case, the *Williams* court relies on a primary beneficiary test as a prerequisite to applying the doctrine of unconscionability.

The principal appellant in *Williams* has a profile similar to that of a large segment of the poor and underrepresented population seeking legal assistance from law school clinic programs and other providers of free legal services.<sup>159</sup> She is a person of limited education who is separated from her husband and maintains herself and her seven children by means of public assistance.<sup>160</sup> According to the facts of the case, Mrs. Williams purchased a number of household items from Walker-Thomas Furniture Company over a five-year period.<sup>161</sup> Provisions contained in the purchase contract, structured as a lease, had the effect of keeping a balance due on every item purchased by Ms. Williams until the balance due on all items, whenever purchased, was liquidated.<sup>162</sup> The court points out that under this provision of the contract, “the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased . . . and each new item purchased automatically became subject to a security interest arising out of the previous dealings”<sup>163</sup>—a result the court found to be unconscionable.

#### D. “It’s For Your Own Good”

Another context in which behavior in an asymmetrical relationship can be explored is captured in the paternalistic words, “it’s for your own good.” The meaning and essential elements of this phrase can readily be compared to the earlier discussions about exploitation, unpaid internships and the doctrine of unconscionability. What, for example, in this context is the relevance of benefit or harm to another, harm to the subordinate, mutual advantage or consent? Does it matter whether the “good” embedded in the phrase is intended primarily for the subordinate or is only incidental to the subordinate’s interest?

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157. 350 F.2d 445 (D.C. Cir. 1965), *rev’d* 198 A.2d 914 (D.C. 1964).

158. *Id.*

159. *See id.* at 445.

160. *Id.* at 449.

161. *Id.* at 447.

162. *Id.*

163. *Id.* at 447.

In the language of exploitation theory, I would begin to answer these questions by first adopting the principle that “[p]aternalism is intended, by definition, to benefit those who are subject to it . . . .”<sup>164</sup> Coercive paternalism, then, can be defined as a behavior by a superordinate that is intended to restrict a subordinate’s autonomy, presumably for the subordinate’s own good, and against his will.<sup>165</sup>

Discussions and debates surrounding these philosophical concepts center on when coercive paternalism might be justified.<sup>166</sup> My inquiry seeks to understand when, in the context of using clinic students’ extant talents, coercive paternalism might amount to negative exploitation. It further seeks to determine whether there are instances in which both the restraint on autonomy and the exploitation it engenders can ever be justified.

In a law school clinic setting, clinic supervisors might employ coercive paternalism in two basic ways: 1) by preventing a clinic student from using an extant talent the student has determined is useful in his overall clinic experience; or 2) by preventing a clinic student from avoiding the use of an extant talent the student would prefer not to use. The potential for negative exploitation is only relevant in the latter example.<sup>167</sup>

Writings discussing paternalism by superordinates are most often inspired by the essay, *On Liberty*, by John Stuart Mill. Mill’s position in these regards, generally referred to as his “harm principle,” has been “simplified as ‘do what you will as long as you harm no one but yourself.’”<sup>168</sup> That is to say, according to Mill, superordinates cannot legitimately coerce subordinates if the only goal is to protect the subordinate from himself. In Mill’s words, “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm

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164. See SARAH CONLY, AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM 10 (2013).

165. See generally CONLY, *supra* note 164; see also Cass R. Sunstein, *It’s For Your Own Good!*, N.Y. REV. BOOKS (Mar. 7, 2013), <http://www.nybooks.com/articles/archives/2013/mar/07/its-your-own-good/?pagination=false>.

166. See, e.g., Sunstein, *supra* note 165. Examples used to illustrate modern examples of coercive paternalism include Mayor Michael Bloomberg’s proposed ban on the sale of sweetened drinks larger than sixteen ounces; seat belt and helmet requirements; and the individual mandate in the controversial Affordable Care Act. *Id.* at 1.

167. I believe it would be unreasonable to take the position that avoiding or overlooking an opportunity to advance positive exploitation on behalf of a clinic student amounts to negative exploitation of that student. It might, on the other hand, represent an example of exploitation of a client and would, in that context, deserve consideration in determining when and how to use clinic students’ extant talents.

168. See Jack Fruchtman & David M. Brown, Letter to the Editors, *In Response to It’s For Your Own Good!*, N.Y. REV. BOOKS (Apr. 25, 2013), <http://www.nybooks.com/articles/archives/2013/apr/25/its-your-own-good/>.

to others. His own good, either physical or mental, is not a sufficient warrant.”<sup>169</sup> Mill justifies this position by positing that individuals, because they are the most interested in their own well-being, are also in the best position to know what is good for them.<sup>170</sup>

Discussions surrounding Mill's harm principle highlight the challenge of reconciling the need for autonomy embedded in a teaching methodology that describes the instructor as a facilitator for self-directed learning, with the fundamental role of a teacher.<sup>171</sup> To aid or facilitate a student towards developing the student's full potential presumes a level of knowledge and experience on the part of the teacher that exceeds that of the student. While some level of autonomy may be granted to the student, through instructive feedback the teacher demonstrates that he ultimately knows what is best.

If the skill-set or knowledge-base of the student exceeds that of the teacher, resulting in elimination of the need for instructive feedback, the student-teacher relationship is effectively voided. In such instances, coercive paternalism, evidenced by the teacher insisting upon use of a clinic student's extant talent, against the student's will, would amount to negative exploitation.

Mill's harm principle is, however, not as absolute as generally presented. While Mill objects to paternalistic coercion to protect persons from harming themselves, he also suggests that it is reasonable—and at times obligatory—to restrain a person's freedom of choice in instances in which the outcome of the restraint is consistent with the restrained person's own desires.<sup>172</sup> In this regard, Mill might, for example, approve of a clinic supervisor's decision to use a clinic student's extant talent against the student's will if the facts surrounding the case indicate that the student and the supervisor are in agreement as to the student's ultimate goals with respect to his legal education. Scholars who fundamentally disagree with Mill's contention about the competence of human beings as choosers seize upon this exception to justify paternalism as a means

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169. Sunstein, *supra* note 165.

170. *See id.*

171. *See, e.g.,* Joy & Kuehn, *supra* note 2, at 493-94. These discussions also reanimate the ethical challenge of “balancing their ethical duties to clients and teaching obligations to law students while attempting to maximize both the educational experience for the students and the competent representation of clinic clients.” *Id.* at 494.

172. *See* Fruchtman & Brown, *supra* note 168. Fruchtman and Brown point out that in chapter five of *On Liberty*, entitled “Applications,” Mill offers the example of a person being restrained when he is about to cross an unsafe bridge. *Id.* This example is used to suggest that Mill might accept paternalism under circumstances in which the subordinate and the superordinate are in agreement as to the ultimate goal—in the case of the bridge crossing, that the pedestrian not fall into the river. *Id.*

rather than an end.<sup>173</sup> Writer, and Mill's critic, Sarah Conly, for example, justifies paternalism as follows: "the person left to choose freely may choose poorly, in the sense that his choice will not get him what he wants in the long run, and is chosen solely because of errors in instrumental reasoning."<sup>174</sup>

Other commentators justify a more expansive application of paternalism than Mill by arguing for a form of paternalism that preserves freedom of choice, but that also steers ("nudges" as opposed to mandates) the coerced parties in directions that will make their lives go better in terms of their own desires.<sup>175</sup>

Sarah Conly, with her paternalism of means rather than ends, offers four criteria for justifying coercive paternalism that can be adapted for use in the context of using clinic students' extant talents:<sup>176</sup>

1. "The activity the supervisor seeks to prevent must genuinely be opposed to [the student's] long-term ends as judged by [the student]."
2. The "coercive measure must be effective," not futile.
3. Benefits accruing to the student must exceed any measurable costs to the student.
4. The coercive measure "must be more effective than [any] reasonable alternative."

A determination that coercive paternalism is justified in the use of a clinic student's extant talents might alternatively be described as justifying exploitation in certain instances or as eliminating any claim of negative exploitation in the particular instance.

## V. AVOIDING NEGATIVE EXPLOITATION OF CLINIC STUDENTS

Development of guidelines to assist clinic supervisors in their effort to avoid negative exploitation of clinic students is not intended to supplant other standards intended to foster sound clinic teaching and supervision. For example, guidelines intended to shield clinic students from ethical dilemmas associated with dual roles and interdisciplinary practice might include incorporating within the clinic curriculum lessons related to these ethical considerations. Properly instructed about risks associated with dual roles and

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173. See CONLY, *supra* note 165, at 3; see also Sunstein, *supra* note 165.

174. Sunstein, *supra* note 165.

175. See Fruchtmann & Brown, *supra* note 168; see also Sunstein, *supra* note 165. Sunstein references RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (Yale Univ. Press 2008); Colin Camerer et. al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211(2003); George Loewenstein et al., *Asymmetric Paternalism to Improve Health Behaviors*, 298 JAMA 2415 (2007).

176. Sunstein, *supra* note 165.

interdisciplinary practice, as well as ways to avoid harm associated with those risks, clinic students have much to gain from live practice in both areas.

Guidelines for effective clinic supervision may need to be adjusted to allow clinic students to experience time in unfamiliar territory coupled with time spent further honing familiar talents. This way, exposing clinic students to ambiguous situations will challenge students to make choices with consequences and may better prepare students as they face the challenges and demands of the new normal in the legal market.

On the other hand, it may not be wise to allow Stu to translate a real estate contract from French to English if appropriate supervision and feedback cannot be provided, notwithstanding the likelihood that bilingualism will serve Stu well in his search for employment or clients after graduation. Likewise, it might be unwise to encourage Stu to provide non-legal business advice to a client that is beyond the competence of his supervisor in part because of the harm that practice might cause the client.

Avoiding negative exploitation of clinic students is uniquely significant in that it can contribute to avoiding the potential harm to clinic students associated with poor clinic supervisory practices, the potential harm to clinic clients associated with such practices, and clinic faculty taking unfair advantage of clinic students for the benefit of others.

Drawing from the guidance provided by theories of exploitation, prominent theories of sound clinic supervision, recent developments related to unpaid internships, the doctrine of unconscionability, and the principle of paternalistic coercion, some guiding principles can be advanced. In all instances involving the potential misuse of a student's extant talents, I assume that an apparent assent to the use is potentially flawed due to the asymmetrical relationship between clinic students and their supervisors that results in a dependency and vulnerability on the part of the students.<sup>177</sup> It is this dependency and vulnerability that establishes a foundation for negative exploitation of clinic students in the unplanned use of their extant talents. Because consent is always potentially flawed in these regards, it might be reasoned that any judgment to employ clinic students' extant talents is tantamount to a decision to exercise paternalistic coercion.

The following factors are relevant in determining the potential for a claim of exploitation in clinic supervisors' judgments regarding the use of clinic students' extant talents. Facts and circumstances influencing application of the guidelines to the vignettes presented in Part One are based on the organization and structure of my own

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177. See Mlyniec, *supra* note 2, at 507-08.

clinical program at Rutgers School of Law—Newark:

- A. There is a high likelihood that the primary beneficiary of the use of the student's extant talent is a person or entity other than the student.<sup>178</sup>
- B. The clinic curriculum does not include an element specifically assessing the educational value of employing the particular extant talents.<sup>179</sup>
- C. Employing the student's extant talent exposes the student to real harm.<sup>180</sup>
- D. The use of the student's extant talent requires little or no supervision.<sup>181</sup>
- E. Constructive feedback is problematic.<sup>182</sup>
- F. Employing the student's talent exposes the beneficiary of the talent—e.g., a client—to real harm thereby exposing the student to legal or ethical repercussions.<sup>183</sup>

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178. In this context, I favor a modified version of "zealous teaching" and adopt the primary beneficiary test rejected by Judge Pauley but underlying the doctrine of unconscionability. *See supra* text accompanying notes 137-40. The factor also meets the nearly universal test for modern-day negative exploitation under which some benefit flows to a person or entity other than the alleged exploitee. A letter from the Solicitor of Labor, in the U.S. Department of Labor, to the Immediate Past President of the American Bar Association, sets forth the following criterion in a test for determining whether or not an intern is effectively an employee: if "[t]he internship experience is for the benefit of the intern," an employment relationship does not exist under the Federal Labor Standards Act. Letter from M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor, to Laurel G. Bellows, Immediate Past President, A.B.A. (Sept. 12, 2013) [hereinafter Letter] (on file with author). In other words, so long as the primary benefit is enjoyed by the alleged exploitee, it is not likely that a case for negative exploitation can be made.

179. *See supra* text accompanying notes 147-48. In the absence of a plan for use of clinic students' extant talents, any benefit to a clinic student related to that use will be incidental and unpredictable, rather than structured.

180. The potential for actual harm is a commonly accepted element of modern-day negative exploitation. *See supra* notes 42-44 and accompanying text. If a lack of consent or flawed consent can be found, the combination represents an example of modern-day negative exploitation that is the easiest to describe and the most morally offensive. *See id.*

181. If a clinic student is so competent or experienced in a particular area of practice that little or no supervision is required, or even appropriate, one might reasonably question the educational value of the experience for the student.

182. If a clinic supervisor lacks the competence or experience necessary to provide a clinic student with constructive feedback following the use of the student's extant talent, the supervisor may be guilty of overreaching and the student may suffer unfair surprise as those terms are used in the context of the doctrine of unconscionability.

183. Given the vulnerability and dependency of many clients in their relationship with a law school clinic program, harm to such a client, resulting from an inappropriate use of a clinic student's extant talent, may constitute exploitation of the client. Such collateral harm also exposes the student to harm in the form of legal or disciplinary action taken by the injured client.

- G. Use of the student's extant talent does not have comparable analogues for other clinic students.<sup>184</sup>
- H. The use of a clinic student's extant talents requires the student to perform work that effectively displaces regular paid employees.<sup>185</sup>

In terms of a test for determining whether a claim of negative exploitation might arise out of a decision to employ a clinic student's extant talents, any single element among these factors would suffice. In most cases, multiple factors will apply.<sup>186</sup> As the number of applicable factors increases, clinic supervisors should be commensurably disinclined to use a clinic student's extant talents.

On the other hand, there may be instances in which one or more factors related to negative exploitation apply and a clinic supervisor in his/her professional judgment<sup>187</sup> nonetheless proceeds to use a student's extant talent. Consider, for example, instances in which the margin between the advantage to the student and the advantage to a

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184. Like potential harm to clients, this factor focuses on the potential for collateral harm caused by an inappropriate use of a clinic student's extant talent. In this instance, the collateral harm would be suffered by clinic students whose clinic experience would be less fulfilling than that of a clinic student with a special talent or by applicants to the clinic program who are rejected because they do not possess desirable special talents.

185. This factor may be controversial. Even in a clinical program setting that has adequate clerical support, a clinic supervisor might consider exposing clinic students to clerical tasks to have educational value. This finding might be based on the likelihood of many clinic students ultimately working in solo practices or small law firms in which clerical support may not be adequate. It might also be based on a finding that any additional skill will serve a law school graduate well in the new normal, highly competitive legal marketplace. However, unless the use of clinic students for such purposes applies to all students, the use of particularly well-qualified students for such work would likely constitute negative exploitation of those students. According to the letter from the U.S. Department of Labor to the Immediate Past President of the American Bar Association, if an intern "does not displace regular employees, but works under close supervision of existing staff," an employment relationship does not exist under the Federal Labor Standards Act. *See Letter, supra* note 177. The letter offers the following additional criterion for determining whether an intern is an employee: "The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded." *Id.* Under these standards, absent some compelling pedagogical argument, use of clinic students in capacities that do displace regular employees and thereby provide a benefit to the clinic program, may constitute acts of negative exploitation.

186. *See infra* Chart IV for an application of the factors using the vignettes presented in Part I.

187. *See, e.g.,* Neil W. Hamilton, Verna Monson & Jerome M. Organ, *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW. 1, 1 (2012); *see also* Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L. J. 325 (2011).

client resulting from use of a student's talent may not be significant enough to be described as constituting an unfair advantage for the client. Or perhaps there are justifiable reasons in certain instances to favor the client's interest over the interest of the student.<sup>188</sup> Further, notwithstanding the reasonableness of the presumption that a student's consent to having his extant talents used primarily for the benefit of another is likely flawed, under some circumstances it may be reasonable for a clinic supervisor to accept a student's assent as valid. Exercise of professional judgment in this instance might be buttressed by a finding by the supervisor that the decision to have a student employ his extant talent is reasonably characterized as positive exploitation because it is the student's best interest; i.e., for the student's own good.

In one of the vignettes offered as a basis to explore the subject of avoiding negative exploitation of clinic students' extant talents, the Model Rules of Professional Conduct do offer some guidance. Model Rule 2.1 reads, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."<sup>189</sup> Because the rule is permissive and not mandatory, these instances provide an opportunity for a clinic supervisor to regulate the level of autonomy given to a student.<sup>190</sup>

In addition to instances in which professional judgment might supersede a strict test for negative exploitation, cooperative arrangements might be made within a clinic program to address troublesome exploitation factors. In my case, for example, I often work collaboratively with a colleague with a social work degree.

#### Vignettes Revisited and Summarized

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188. See *supra* note 39.

189. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2012).

190. In their description of the scope of possible non-legal advice a lawyer might provide to a client and the circumstances under which it would be advisable for a lawyer to do so, comments to Rule 2.1 are also presented in permissive terms. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1-4 (2012). Whether permissive rules reflect a normative judgment that lawyer autonomy should be respected by regulators in legal and other contexts or "whether the drafters were simply unable to draft a mandatory rule that captured appropriate distinctions" is discussed in Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 315 (2007). In his article, *Who Should Regulate Lawyers?*, David B. Wilkins is critical of total self-regulation within the legal community and offers an analysis of alternatives to this model, including liability, institutional and legislative controls. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 803 (1992). From his critique of self-regulation, one might reasonably conclude that Professor Wilkins would favor clinic faculty making an independent judgment relative to employing a clinic student's talents pursuant to a permissive rule. *Id.* at 801.



1. Stu is fluent in French and wants to translate a Contract of Sale for the clinic.
2. Stu is pursuing a joint degree with the law school and the school of social work and wishes to use both pursuits in the clinic.
3. Stu recently acquired a master's in social work, but wants to set that aside and only use skills relevant to law.
4. Stu is a patent agent and wishes to participate in the clinic to advance these particular skills.
5. Stu is a business owner and wants to understand from the clinic's perspective whether or not he can offer his extensive business knowledge to clinic clients.
6. Stu has unique talents and knowledge beyond the faculty, as well as outstanding oratory skills. The faculty wonders whether they should use Stu's skills to serve the interest of the clinic.
7. Stu has extensive experience with nonprofit organizations and wishes to serve other nonprofit organizations, including clinic clients, by serving on the board of directors or by serving as a volunteer.
8. Stu is a former legal secretary, has exceptional typing skills, and can take dictation effectively.

CHART IV

		FACTORS							
		A	B	C	D	E	F	G	H
VIGNETTES	1		X	X		X	X	X	
	2								
	3				X				
	4				X				
	5	X				X			
	6	X							
	7								
	8	X			X	X			X

Using Chart IV as a guide and based on realities associated with the transactional clinic I manage, I would respond to the vignettes as

follows:

1. I would not allow Stu to translate the French contract into English.
2. I would allow Stu to use both legal and social work skills in the representation of clinic clients (assuming I had worked out a plan with my colleague who holds a MSW degree).
3. I would honor Stu's request to set aside his social work skills while learning and practicing legal skills.
4. I would allow Stu to use his skills as a licensed patent agent in the representation of clinic clients while at the same time insisting that the familiar patent work constitute only a relatively small portion of Stu's overall work in the clinic. If Stu, on the other hand, were reluctant to use his patent agent skills for the benefit of clinic clients, I would be inclined to "nudge" Stu toward consenting, ultimately accepting Stu's final decision.<sup>191</sup>
5. I would encourage Stu to exercise his own judgment in the context of Rule 2.1 of the Model Rules of Professional Conduct, coupled with a requirement that Stu, upon reflection, share with me the basis for his decision.
6. I would encourage Stu to make presentations to various audiences following general coaching relative to ways to avoid inadvertently creating a lawyer-client relationship.
7. Whether or not I can prevent Stu from joining a Board of Directors or serving as a volunteer for a non-profit organization is unclear. It is unlikely that I would be able to forbid such actions relative to organizations that are not clinic clients. In any case, since risks associated with such relationships are routinely discussed as part of the seminar component of the clinic, in select instances I would be inclined to favor these actions.
8. I would limit Stu's work in these contexts to efforts ancillary to client work in which Stu is directly involved.

#### CONCLUSION

Law school clinic students enter clinic programs with myriad

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191. I accept that this latter action might lead to a claim of negative exploitation since my decision to nudge Stu toward consent is not based on what is best for Stu but what is in the best interest of the clinic and the clients it represents. The nudge would not involve any special benefit for Stu—e.g., a bump up in his grade—but might instead involve some reference to the benefit Stu would likely receive in terms of honing a valuable skill and/or the importance of contributing to upholding the reputation of the clinic.

skills and talents that can potentially be refined to the benefit of the students. A broader skill set is becoming increasingly important to law school graduates as they enter a changing legal marketplace that is reluctant to expend resources to train new recruits and is seeking core competencies that can immediately translate into added value for demanding clients. In addition, a broader skill set expands employment options for law school graduates beyond the shrinking pool of law-related opportunities.

On the other hand, poorly handled use of clinic students' talents can have a harmful effect on students or the clients they represent, or present situations that are morally offensive to an objective observer. While no data exists to connect misuse of students' extant talents to harmful outcomes, including diminished employment opportunity, ABA guidelines are appropriate to serve as a policing mechanism to remind clinic faculty of the importance of the matter and to deter reckless behavior in this area of their work.

Until rules are promulgated to guide law school clinic supervisors in the proper use of clinic students' extant talents, planning, coupled with the exercise of professional judgment, will have to suffice.