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CLINICAL LAW REVIEW

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CLINICS AND EMERGENCIES

Sabrina Balgamwalla and Elizabeth Keyes*

Clinical programs—and the clinicians who run them—are regularly called upon to respond to emergency situations. These engagements can be rewarding, personally and professionally. But, as we know from our own work as immigration clinicians, emergency lawyering also presents pressure points for clinicians. Our hope in writing this article is to surface and critique the dynamics that arise when clinicians are called upon to engage in emergency work. Specifically, we aim to expand on the literature of clinics and emergency responses by reflecting on the ways in which emergency responses have drawn significant energy and time from clinicians, including ourselves. As a path forward, we offer a framework to evaluate whether and how to undertake an emergency response, allowing clinicians to more comprehensively evaluate the impact of such work on ourselves as well as our programs, institutions, clients, students, and communities.

Introduction

Across the many fields of law practiced by clinics, emergency situations arise and call out for our attention, time, and energy: an impending foreclosure crisis, conditions in prisons at the height of COVID, devastation following a natural disaster, the need for large-scale deportation defense. Law schools generally,[1] and clinicians in particular, have sound reasons to engage students in crisis work, from satisfying pressing community needs, to engaging students in work responsive to issues in news headlines.[2] Increasingly, clinicians have documented their experiences and reflections to share knowledge with other clinicians on designs and processes for crisis response, and developed increasingly

* Sabrina Balgamwalla is Assistant Professor and Director of the Asylum & Immigration Law Clinic at Wayne State Law School. Elizabeth Keyes is a Professor of Law at University of Baltimore, where she directed the Immigrant Rights Clinic between 2012 and 2022. Both Sabrina and Liz thank the clinical law program at University of Baltimore, where we workshopped the very beginnings of this project; Jeff Baker, Davida Finger, Lindsay Harris, Brendan Roediger & Sarah Rogerson for their early feedback and Tim Casey, Annie Lai, Amber Baylor, Jessica Gadea Hawkins, Liz Cooper and Anita Weinberg, for their insights at the 2023 Clinical Law Review workshop which vastly improved our draft. Any errors are entirely our own. We are grateful to share this product of our years-long conversations about how best to do the important work that we love, for and with our students and communities.

[1] *See* Latisha Nixon-Jones, *Beyond Response: Reimagining the Legal Academy's Role in Disaster Recovery and Preparedness*, 71 Clev. St. L. Rev. 571 (2023).

[2] We address even more benefits and opportunities in Part II.A, *infra.*

robust pedagogies to support doing so.[3] We acknowledge and embrace these contributions as we reflect on the clinic responses to emergencies.

In this article, we want to introduce two strands to the cloth being collectively woven. The first is largely uncontroversial. We offer our own experiences as immigration clinicians to expand the conversation beyond discrete natural disasters, allowing us to consider responses to "manufactured" emergencies that emerge from systemic breakdowns or ruptures.[4] Some has been written about the experience, for example, of leading alternative spring break trips to the border or to detention facilities.[5] Less has been written about how, within existing clinics, clinicians have diverted—or simply added—attention to unrelenting emergencies, from the "surge" of unaccompanied migrant children in 2014, to the Afghan parole crisis of 2021. This article folds such issues in to the conversation.

More controversially, we also offer a framework for considering *whether* clinics should undertake such work. While earlier work has done an excellent job of considering *how* clinics can capably engage in this work, the question of whether to respond has been largely unexplored. Our institutions—and we, as professionals and as human beings—face limited capacity. As such, a choice to place our energy in one form of legal work necessarily limits the energy we can devote to other matters. A choice to engage in crisis lawyering can be sound on any number of levels, but as know from our own work, there are also significant pressures to do the work; some are clear, while others are more

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[3] *See, e.g.* Elora Mukherjee, *The End of Asylum Redux and the Role of Law School Clinics,* Yale L. J. Forum (Dec. 4, 2023), https://www.yalelawjournal.org/forum/the-end-of-asylum-redux-and-the-role-of-law-school-clinics, Jeffrey R. Baker, Christine E. Cerniglia, Davida Finger, Luz Herrera & JoNel Newman, *In Times of Chaos: Creating Blueprints for Law School Responses to Natural Disasters*, 80 La. L. Rev. 421 (2020); Lindsay M. Harris, *Learning in Baby Jail: Lessons in Law Student Engagement in Family Detention Centers*, 25 Clinical L. Rev. 155 (2018); Davida Finger, Laila Hlass, Anne S. Hornsby, Susan S. Kuo & Rachel A. Van Cleave, *Engaging the Legal Academy in Disaster Response,* 10 Seattle J. Soc. Just. 211 (2011). When we expand the lens to include COVID-response clinics, we see an even broader scope of emergency response pedagogy. *See, e.g.* Natalie Netzel, Ana Pottratz Acosta, Joanna Woolman, Katherine Kruse & Jonathan Geffen, *Mitchell Hamline School of Law Summer 2020 Covid-19 Legal Response Clinic*, 28 Clinical L. Rev. 301 (2021); Rachel Kohl & Nancy Vettorello, *How Serving Jobless Workers During the Pandemic's Economic Recession Grounded Students: A Reflection from Michigan's Worker's Right Clinic,* 28 Clinical L. Rev. 169 (2021). The Clinical Legal Education Association (CLEA) and the American Association of Law Schools (AALS) Section on Clinical Legal Education (the two main associations of clinical law professors) also addressed some of the challenges of the COVID era in their 2023 joint report. AALS Policy Committee & CLEA Committee for Equity and Inclusion, *Clinicians Reflect on Covid-19: Lessons Learned and Looking Beyond*, 28 Clinical L. Rev. 15 (2021).

[4] Both "natural disaster," "crisis," and "emergency" are contentious terms, as we explain in Part I.A, *infra.* Nonetheless, for clarity of reading and for lack of a less awkward description, we will use the term "crisis" throughout the article.

[5] Harris, *supra* note 3, at 155.

subtle and easy to miss. Our hope in writing this article is to recognize and critique the pressures upon clinics and clinicians to engage in crisis work, to make the tradeoffs more transparent, and to offer a framework for deciding when to do such work.

We do this for two interconnected reasons. First, in recognition of the many incentives to do crisis work, it is possible for clinics to leap from one emergency to another, in ways that deplete us over time. Second, the fact of ongoing "emergency" framework thinly masks the reality we all know so well: that emergencies are just one manifestation of the deep structural injustices that our clinics work to address every day.[6] For many immigration clinicians, this never-ending story of acute need has been abundantly clear in the cascading series of migration crises from 2014 through the present. But we are also aware that climate change has produced its own series of emergencies in terms of disaster response, and the housing crisis has contributed to astronomical need for eviction defense.

In this article, we proceed as follows. Part I clarifies what we mean by crisis legal response and describes the places it happens within the law school, particularly (but not exclusively) in clinics. Part II contrasts the tremendous opportunities inherent in doing crisis work with the framework of scarcity. Crisis response within law schools is exciting, engaging, and important, but it also comes with significant, often under-recognized costs. To extend a familiar aphorism, if we think about our clinics as boats in a mighty storm, it is true that from institution to institution we are in different boats in the same storm. But even the sturdiest boat has its *own* limits as to what it can weather.

Part III is the heart of the article. Here, we share a framework for accounting for the tensions between the opportunities and the scarcity of capacity. The first, crucial step in that framework is understanding our own tendencies when it comes to responding to acute needs. Here we lean on insights from psychology, legal ethics, and clinical pedagogy itself, to insist upon an individual-level reckoning with our own instincts before we enter into difficult choices regarding emergency response. This section continues with an expansive checklist that then helps us

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[6] *See generally* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clinical L. Rev. 37 (1995) (describing the encounters with deeply broken systems which students experience in law school clinics). Professor Rob Rubinson sharply criticizes the crisis-framing of those broken systems: "As far as civil litigation is concerned, this has been called 'crisis' for so long that the 'crisis' appears to be never-ending. This, in fact, means it is not a crisis at all because a 'crisis' is 'an unstable or crucial time or state of affairs in which a decisive change is impending.'" Robert Rubinson, *There Is No Such Thing As Litigation: Access to Justice and the Realities of Adjudication*, 18 J. Gender Race & Just. 185, 197–98 (2015) (quoting Merriam-Webster's Collegiate Dictionary 296 (11th ed. 2004).

engage in that problem-solving, including assessments related to competence, capacity, fit, and design.

Our project is not intended to dissuade clinics from providing legal services in times of acute legal need. On the contrary, we hope this critical perspective and decision-making framework will lead some clinicians to more confidently identify and structure responses that are beneficial to their programs, their students, and the community. But we also hope that naming the problematic framing of emergencies and the expectations for lawyers' responses will serve as a supportive counterweight to the enormous pressures—both internal and external—that clinicians face when confronted with the question of engaging in such a response. To clinicians who may ultimately conclude that an emergency response is not appropriate or that the scope should be limited, we hope this piece will reassure them that their work on the whole has enormous value, even if they decided after careful consideration that they are not positioned to respond to the crisis of the day.

I. Defining (and Critiquing) Emergencies

A. Acute Needs with Long-Term Roots

When we say "emergency," the situations in the immigration context likely jump into mind for our readers: the large number of unaccompanied children arriving at the U.S. border (2014); the "Muslim ban" (2017); separation of families at the border (2018); the remain-in-Mexico policy with attendant humanitarian horrors at the Southern border (2019); the use of COVID to close down the border for asylum-seekers under Title 42 (2020); and the need to protect Afghans in the wake of a disorderly U.S. departure (2021). The list is both exhausting and incomplete. It makes clear that there is no one moment of crisis—it is possible to do nothing *but* emergency work in the field of immigration, which truly exposes how problematic the word "emergency" is.[7]

Indeed, the word "emergency" masks a fundamental feature true of each of these events: while the needs and pain were overwhelming in discrete moments of history, they arose from well-understood,

[7] This phenomenon is not in any way unique to immigration law. Just as there has been an unending litany of immigration crises, so too have we seen, for but one example, foreclosure and eviction crises in various waves over the past 15 years. See, e.g. Karen Tokarz et. al., *Addressing the Eviction Crisis and Housing Instability Through Mediation*, 63 Wash. U. J.L. & Pol'y 243 (2020); Nathalie Martin & Max Weinstein, *Addressing the Foreclosure Crisis Through Law School Clinics*, 20 Geo. J. on Poverty L. & Pol'y 531 (2013); Robin S. Golden & Sameera Fazili, *Raising the Roof: Addressing the Mortgage Foreclosure Crisis Through a Collaboration Between City Government and A Law School Clinic*, 2 Alb. Gov't L. Rev. 29 (2009).

predictable systems, policies, and forces.[8] What is labelled a "crisis" or "emergency" is really a very raw exposure to longstanding, structural inequality.[9] They are the tip of the proverbial iceberg, which captured notice and attention, but each crisis stretches in time and cause well below that obvious surface. Professor Jaya Ramji-Nogales has critiqued this phenomenon particularly effectively with a metaphor:

> A crisis is like the whistle of a boiling kettle. The terrible high-pitched shriek demands immediate attention. The instinctual response is to yank the kettle off the stove to quell the wailing. Crisis averted. But we could stop it from happening again by removing the whistle and using a timer, buying an electric kettle, or using the microwave to heat the water. Yet once the noise has died down, we forget about the other options and return to the path of least resistance. Crises and their symptoms tend to overshadow formative processes, which are largely systemic in nature. An urgent short-term problem obscures a larger and deeper-rooted systemic problem, and suggests myopic solutions that avoid examining core causes.[10]

Professor Stephen Lee has also urged a rethinking of the timeframe over which crises occur. In *Family Separation as Slow Death,* Lee draws from humanitarian and social science literature to ask us to consider the harms that occur outside the window of any given crisis moment.[11] Furthermore, the "crisis" of any given moment has an unfortunate habit, precisely because of the systemic roots of crises, of reappearing like the prodigal bad penny.

Both Ramji-Nogales and Lee's critiques resonate with our experience as immigration clinicians. Each of the attention-grabbing events listed above wrought profound hardships on large numbers of people. Yet the hardships were worse because they occurred in the context of the deeply broken immigration system—broken from the borders to the courts—as well as larger global phenomena such as overseas wars, failed policies toward Central America stretching back decades, labor exploitation schemes, and more. The longstanding humanitarian issues produced within this history and these systems, along with the

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[8] Jaya Ramji-Nogales, *Migration Emergencies*, 68 Hastings L.J. 609, 612-13 (2017) ("The migration flows that result in mass influx are foreseeable responses to cycles and structures of violence as well as cyclical labor migration flows. In the former case, the migration stream grows steadily over time with ample warning, but at some point, is transformed into a "crisis" that grabs public attention. In the latter case, these migration cycles have often occurred for many years and meet predictable labor needs within destination countries.")

[9] Finger et. al., *supra* note 2, at 212 ("Whether the disaster is a flood, hurricane, fire, tornado, or riot, preexisting social inequality and vulnerability will affect how severe and how lasting the damage will be.").

[10] Ramji-Nogales, *supra* note 8, at 623.

[11] Stephen Lee, *Family Separation as Slow Death*, 119 Colum. L. Rev. 2319 (2019).

exclusionary dynamics of immigration law, already make it challenging for many immigration attorneys to effectively represent their clients. Political developments may unleash a crisis in the public's perception, but the slow-onset horror story of these systems themselves are neglected. Poverty lawyers who engage with bureaucratic institutions like the Social Security Administration, Veteran's Affairs, and Housing Authority will recognize these struggles: the real crisis is the dysfunctional system that makes it necessary to have lawyers for even the most basic human needs. Any of these longstanding issues is as worthy of attention as the crisis that hits the headlines, and all of them are connected to broken pieces that causes tremendous human suffering. As we move through this article questioning where clinics can respond to emergencies, we are therefore mindful of the complementary value of the slower, less visible, important work of fixing (or abolishing) the broken system itself.[12]

We are also cautious about using the terms "crisis" and "emergency" because historically such framing has justified state intervention, sometimes in aggressive and questionable ways,[13] including violence.[14] The rationale of emergency in the aftermath of 9/11 enabled infamous encroachment on civil and human rights, including indefinite detention of enemy combatants at Guantanamo,[15] torture and extraordinary rendition,[16] and government surveillance.[17] Indeed, our immigration policies

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[12] The choice between reform and abolition is well beyond the scope of our article, and we believe our critique helps creates space for *either* approach as clinics design their structures and dockets. For an excellent overview, *see* Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 Calif. L. Rev. 1597 (2022), which itself credits the conceptual groundwork laid by Angélica Cházaro, *The End of Deportation*, 68 UCLA L. Rev. 1040, 1113-16 (2021). For an examination of the choice to do abolition work in the clinical space, see Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 NYU Rev. L. & Soc. Change 159 (2019) (offering a complex view of the necessity of teaching and practicing abolition alongside client representation).

[13] *See, e.g.* Naomi Klein, The Shock Doctrine: The Rise of Disaster Capitalism (2007) (critiquing neoliberal responses that exploit crises moments in pursuing policies that would ordinarily be met with opposition); Rebecca Solnit, A Paradise Built in Hell: The Extraordinary Communities that Arise in Disaster (2009) (challenging the narrative of chaos and panic that is often used to justify controversial state responses to emergencies).

[14] *See* Noa Ben-Asher, *The Emergency Next Time*, 18 Stan. J. C.R & C.L. 51, 57-58 (2022) (introducing the concept of "Emergency Violence," in which the state justifies extraordinary measures that "amend[], suspend[], or cast aside" everyday rules, practices, and standards).

[15] *See, e.g.* Baher Azmy, *Twenty Years Later, Guantánamo Is Everywhere*, Boston Rev. (Jan. 11, 2022), https://www.bostonreview.net/articles/twenty-years-later-guantanamo-is-everywhere/ (last visited July 30, 2024).

[16] *See, e.g.* Memorandum from Office of Legal Counsel, U.S. Department of Justice, to Alberto R. Gonzalez, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002); Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 Case W. Res. J. Intl. L. 309 (2006).

[17] *See, e.g.* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56 (2001) (with

still reflect the state's emergency response to the "war on terror."[18] As we move through this article questioning where clinics can respond to emergencies, we are therefore mindful of the complementary value of the slower, less visible, urgently-important work of fixing (or abolishing) the broken system itself.

Finally, as we move through our article, we will strive to avoid another aspect of this work we find problematic: using natural disaster terminology to describe these situations. We have seen migrants described in terms of tsunamis, surges, and floods. From the longstanding failure to reconcile immigration policy and humanitarian imperatives and historical flows of migrants and the political science and political economy of migration, these are not natural disasters. Consistent with our view that there is nothing natural or unexpected about these events, we reject terminology—however easy and familiar—that takes the structural causes and policy origins of these hardships out of the discourse.

B. Where the Work is Happening in Law Schools

Examples of experiential education programs' response to urgent immigration developments are abundant. Immigration clinicians were among those providing emergency assistance at airports during the Muslim ban,[19] and accompanying law students to the border[20] or detention centers[21] to assist with the mass representation of asylum-seekers. Crisis response has come in the form of clinic cases and projects, alternative spring and winter breaks, summer and remote internships, and long-term volunteer work with ad hoc networks or with pro bono projects.[22]

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provisions expanding domestic and international wiretapping, creating expanding the reach of Foreign Intelligence Surveillance Act, and expanding government access to information personal financial information, student information, and information from internet search providers); Amna Akbar, *National Security's Broken Windows*, 62 UCLA L. Rev. 834 (2015) (describing the FBI's use of the countering violent extremism (CVE) program to gather intelligence on Muslim communities).

[18] *See, e.g.* Ben-Asher, *supra* note 14, at 68 (connecting Trump's Muslim ban to post-9/11 policies targeting nationals of Arab and Muslim countries).

[19] Muneer I. Ahmad & Michael J. Wishnie, *Call Air Traffic Control!: Confronting Crisis as Lawyers and Teachers*, in Crisis Lawyering (Ray Brescia and & Eric K. Stern, eds., 2021).

[20] Al Otro Lado—an immigrant rights organization that assists asylum-seekers, refugees, and deportees on both sides of the border in Tijuana, Mexico and San Ysidro, California—was among the organizations hosting law student volunteers. *See* Al Otro Lado Border Rights Project, https://alotrolado.org/border-rights-project/ (last visited July 30, 2024).

[21] *See generally* Harris, *supra* note 3.

[22] SIFI, a program of the Southern Poverty Law Center, was created toto address the representation gap for immigrant detainees held in the large detention facilities located in rural Georgia, Louisiana, and Mississippi—jurisdictions known for their high rates of deportation. The program was disbanded in June 2024. *See* Emily Wu Pearson, *Immigrants in Georgia Detention Centers Lose Access to Sole Local Pro Bono Law Clinic*, WABE (Jul. 3, 2024), https://www.wabe.org/immigrants-in-georgia-detention-centers-lose-access-to-sole-local-pro-bono-law-clinic/ (last visited July 30, 2024).

In this section, we organize moments like these into formal curricular offerings (through clinics and externships), co-curricular initiatives, and personal service by faculty, staff, and students alike. As the above examples highlight, many clinicians may feel compelled to respond to a local or national emergency out of personal conviction. But there is the potential for institutional pressure as well. We have both experienced requests from colleagues for help with individual cases, and have been urged to respond to national developments in immigration law. This raises important questions, particularly for pre-tenure or contract clinicians, about professional expectations and how we allocate our time. On an institutional level, public law schools may similarly encounter a special presumption of availability and willingness to assist, particularly in a local emergency, as we discuss in the following section.

1. The Experiential Curriculum: Clinics and Externships

Interest in immigration law caused a boom in the existence of immigration-focused law school clinics and externship placements. The number of schools offering such clinics increased roughly 50% between AY 2013-14 and AY 2019-2020,[23] and existing clinics have frequently expanded their offerings and capacity through increased internal and external funding, or through voluntarily-increased supervision loads (bringing on the maximum number of advanced clinic students, for example).[24] Within existing clinics, many have made efforts to respond to crises in an ongoing way. For example, Professor Lindsay Harris estimates that, as of 2018, seven of 40 clinics involved with family detention emergencies had incorporated that work into the clinics' long-term structure, instead of seeing the issue as a one-off opportunity.

While immigration clinics rallied in interventions responding to the Trump Administration's policies, clinicians have also regularly responded to urgent issues facing local immigrant communities, many of which fail to garner widespread media attention. JoNel Newman and Melissa Gibson Swain, for example, documented the University of Miami's mass assistance—both short-term and long-term—to Haitians

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[23] Center for the Study of Applied Legal Education, CSALE 2019-20 Survey Results, https://www.csale.org/#results (last visited July 30, 2024) ("CSALE").

[24] We have been unable to locate similar data for externships, but surmise that externship placements likewise reflected this increased interest and need. As Professor Jeff Baker and his co-authors point out, externships offer a nimbleness like no other in connecting students with legal service organizations desperate for effective assistance, so we assume externship placements offered at least comparable opportunities. Baker et al., *supra* note 3, at 483 ("[A]n externship program that is nimble to respond to disaster needs allows eager students to engage in the response while also increasing the capacity of the field office."),

seeking temporary protected status following the January 2010 earthquake.[25] Rebecca Sharpless, also at the University of Miami School of Law, worked quickly alongside her students to halt the deportation of shackled and abused asylum-seekers to Somalia.[26] Albany Law School clinician Sarah Rogerson helped mobilize and coordinate representation and supportive services to more than 300 asylum-seekers after an unexpected mass transfer to the Albany County Correction Facility.[27] In 2021, six clinicians at five law schools collaborated to file a class action lawsuit on behalf of the many immigrant women sexually assaulted at Georgia's Irwin County Detention Center. [28] While these crises may receive little attention in the national media, clinicians have played a critical role in meeting urgent community need.

2. Service-Learning and Co-Curricular Offerings

Beyond formal curricular offerings, law schools are also increasingly offering spring break trips focused on immigration, from Penn State or Maryland Law students spending spring break doing detained work in Pennsylvania and Georgia, respectively, to multiple schools sending students to family detention centers or to Tijuana to handle border issues.[29] The first of these immigration-focused initiatives that we are aware of was the roving clinics in Florida aimed at registering Haitians who were eligible for Temporary Protected Status[30] after the 2010 Haitian earthquake.[31] Professor Harris's work documents the exceptional efforts she and many others have undertaken in response to family immigration detention, including ensuring that such co-curricular offerings are pedagogically and ethically rich. Closer to home, as individual asylum-seekers gained release to have their cases heard at immigration courts, clinics, immigration law associations, and other service organizations began

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[25] Melissa Gibson Swain & JoNel Newman, *Helping Haiti in the Wake of Disaster: Law Students as First Responders*, 6 Intercultural Hum. Rts. L. Rev. 133 (2011).

[26] Rebecca Sharpless, Shackled: 92 Refugees Imprisoned on ICE Air (2024).

[27] *See generally* Sarah Rogerson, *Preparation, Crisis, Struggle, Ideas*, in Crisis Lawyering (Ray Brescia and & Eric K. Stern, eds., 2021).

[28] D'lorah Hughes, *Announcing the Recipients of the 2021 CLEA Awards*, Clinical Law Prof Blog (Apr. 22, 2021), https://lawprofessors.typepad.com/clinic_prof/2021/04/announcing-the-recipients-of-the-2021-clea-awards.html (last visited July 30, 2024).

[29] Professor Harris states that "[t]he scale of law student involvement in family detention centers, particularly in Texas, has been massive, with approximately 40 schools engaging in some way in the first three years [since 2014] alone." Harris, *supra* note 3, at 158.

[30] Temporary Protected Status offers work authorization and a time-limited reprieve from deportation. For an analysis of its strengths and weaknesses, *see* Elizabeth Keyes, *Unconventional Refugees*, 67 Am. U. L. Rev. 89 (2017).

[31] Swain & Newman, *supra* note 25. We are confident that other clinics have done similar response in prior eras, and warmly seek feedback on our intentional omissions. Swain & Newman themselves offer useful history on such initiatives in other contexts, including the formation of the Law Students Civil Rights Research Council in 1963. *Id.* at 137.

supplementing overwhelmed nonprofit staff-power with on-site intake and counseling. Liz and her students at the University of Baltimore undertook such projects first with Esperanza Center (the local Catholic Charities), and later at Johns Hopkins Hospital, the Kennedy Krieger Institute, and other local service providers overwhelmed with client and patient legal needs.

Since the burst of activity flowing from mass family detention of migrants in the mid-2010s, the Trump Administration brought a slew of further assaults on due process that led to even greater bursts of activity. One of the most well-known interventions was the 2017 airport response, which heavily featured the work of Yale Law School's Immigrant Rights Clinic. In an example that beautifully illustrates the point made above about the necessity of pre-existing relationships, that clinic was able to respond in stunning speed to the Muslim ban in collaboration with, among others, an alumna and colleagues at civil rights organizations to respond with one of the first habeas petitions challenging the ban.[32] Clinics soon began turning to the acute needs at the border, echoing the earlier responses to family detention, as various policies attempted to restrict people's access to the ability to file for asylum at all.[33]

3. Personal Service by Faculty and Students

When all these official law school-affiliated offerings made but a tiny dent on situations of overwhelming need, many faculty and students felt an inescapable pull to personally do more. Outside of official institutional opportunities and service projects, many students involved themselves in national efforts, including the airport legal clinics established immediately during the Muslim ban of 2017, detention abolition work, and Afghan parole applications. Unlike the extraordinary legal organizing done by students in the wake of Hurricane Katrina, who created the Student Hurricane Network to coordinate across many law schools,[34] the responses to the various immigration moments of the past decade have led to more personalized and *ad hoc* volunteer work for organizations like the International Refugee Assistance Project (critical to the travel bans and Afghan parole), Al Otro Lado (helping

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[32] *See* Yale Law School, *How Yale Law Students, Faculty, and Alumni Mobilized to Fight the Executive Order on Immigration* (Feb. 1, 2017), https://law.yale.edu/yls-today/news/challenging-refugee-and-travel-ban.

[33] See generally, Mukherjee, *supra* note 3 (examining models of immigration clinic involvement during the Trump and Biden administrations).

[34] *See* Finger et al, *supra* note 3, at 223 (2011) (Part III: The Student Hurricane Network). The now-archived site for the organization says that an average of 170 law student volunteers per *month* gave time to the diverse legal-work needed post-Katrina. https://www.probono.net/shn_old/. See also Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.L. Sch. L. Rev. 561, 586 (2012).

asylum-seekers stuck in Tijuana with preparing their asylum applications), and local nonprofits whose scope of work expanded in volume.

When emergencies conflate with the deep gap in access to justice, *pro bono* work inevitably beckons. Three University of Baltimore Law students who began their service with Esperanza Center as clinic students in 2014 continued to try to meet legal needs with such passion and energy that they won the Maryland State Bar Association Young Lawyer Section Award in 2018.[35] Each of us took on many *pro bono* matters[36] during this period, separate from anything we ever assigned to clinic students; it was not unusual during the Trump Administration to have as many as 20-30 pro bono hours *monthly* (the aspiration for annual pro bono being 50 hours for lawyers).[37] We also observed colleagues spending precious days and weeks organizing community workshops, traveling to the border, and training pro bono lawyers alongside running their clinics. Any conversation with an immigration clinician during these times—and there were many, as we are an inherently and necessarily collaborative community—began with moments of connecting over our communal exhaustion. And yet, no matter how creatively we used our time and resources, no matter how many excited students we engaged to leverage our efforts, we grew only more aware of the excruciating levels of unmet need.[38]

4. Our Stories

We offer moments from our own experiences to provide specificity for the framework that follows in Part III. We do so knowing that ours are only two of any number of comparable experiences shared by our fellow clinicians over the years. Our personal stories lay bare the choices that we made in the midst of navigating the ongoing state of emergency for migrants in the U.S. over the past decade.

Liz starts her emergency clock in 2014, when Central American children began crossing into the United States in large enough numbers that their situation captured the public's attention. She was ten years

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[35] Maryland Pro Bono Resource Center, *Maryland Pro Bono Service Award Recipients, 1991 to Present*, https://probonomd.org/wp-content/uploads/2024/06/Maryland-Pro-Bono-Service-Award-recipients-1991-to-present.pdf (last visited July 30, 2024).

[36] Individual cases; leading trainings; organizing workshops to involve volunteers; leading community-based talks to share high-quality information with nervous migrants; and so forth.

[37] The Model Rules of Professional Conduct, which largely mirror state rules, make this pro bono standard aspirational. Model Rules of Prof'l Conduct R6.1 (Am. Bar Ass'n, 2019).

[38] Sometimes, the need was placed directly in front of us by colleagues or alumni of our institutions, which can feel extremely precarious for people within the academy of lower status, as clinicians often are, and as pre-tenure clinicians are even when clinicians *generally* have status at an institution.

into asylum practice, and had been increasingly working on the special visas available to migrant children who had experienced abuse, abandonment, or neglect by one or both of their parents.[39] These skills were at the crosshairs of the needs of the community in 2014, and she organized a large gathering of government officials, Baltimore nonprofits, and funders, to consider a holistic response. Within the clinic, she added a project for students to do a weekly intake at a local legal services organization, in addition to their asylum casework. The project met an acute need, and offered students the opportunity to rapidly improve their interviewing, counseling, and legal analysis skills, while feeling like they were responding to an issue in the news.[40] This evolved over time to doing similar work at a hospital that had immigrant-specific programming. Despite being extra work, the model worked well because it complemented existing work, did not add many new cases to our already-full docket, and allowed for solid clinical pedagogy throughout. This, with occasional screening workshops run through University of Baltimore's tireless Immigration Law Association, was sustainable and exciting. Liz complemented this by serving on the executive committee of the Maryland State Bar Association's immigration committee, and taking on leadership—and eventually the presidency—of the Maryland Immigrant Rights Coalition. Law school service and scholarship continued throughout, as she was pre-tenure for this period.

The balance shifted in November 2016, with the election of the most explicitly anti-immigrant president any of us had ever seen.[41] The day after the election, when many were understandably struck by devastation, Liz organized a call with other clinicians to start brainstorming our response, and organized neighbors to think through local responses. This quickly yielded countless urgent invitations to come speak to terrified groups of immigrant parents at schools and churches, explaining the new reality, offering screenings for immigration relief, and urging preparation for all that we knew about then President-elect Trump's plans. These meetings, on nights and weekends, happened too

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39 The eligibility requirements for this special immigrant juvenile visa can be found at 8 U.S.C. § 1101(a)(27)(J) (2023).

40 Three of the students continued with the work after clinic, and won a pro bono award years later for their sustained efforts.

41 One historian confirms our impression: "As a historian who specializes in the study of anti-immigrant sentiment, I know that Trump is not the first president to denigrate newcomers to the country. But Trump has attacked and scapegoated immigrants in ways that previous presidents never have — and in the process, he has spread more fear, resentment and hatred of immigrants than any American in history." Tyler Anbinder, *Trump Has Spread More Hatred of Immigrants Than Any American in History*, Wash. Post (Nov. 7, 2019), https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html (last visited July 30, 2024).

quickly and required too much sensitivity to involve students, and Liz did almost of all these solo in the early months.[42]

Meanwhile, we realized families needed powers of attorney, so Liz worked with other service providers to come up with draft documents, and design and hold pro se workshops, first for the powers of attorney, and later—controversially at the time—for asylum applications. This was all happening in the first weeks of the new semester—not an ideal time to involve students. Along with other clinicians in ad hoc support groups, Liz wondered about how to balance the desire to engage highly-motivated students with the ferociously short timeline of community need. In retrospect, it would have been worth slowing down for two weeks to create the model for involving students, but slowing down did not feel like an option at the time. When the Muslim ban happened in late January, students had airport protests and pop-up legal clinics as an outlet, and Liz left those efforts to the newly-enraged and kept plugging away at the community education piece.

All of this happened, unfortunately, in the context of a very full existing docket of asylum cases, many of which had been bounced around the court calendar for years before settling on 2017 for trial dates. In the fall 2017 semester, the Baltimore immigrant rights clinic had *ten* individual hearings, with only ten students. That meant Liz and Nickole Miller (the superb new clinical teaching fellow in the clinic) had to take on more work individually, supervise the maximum number of advanced clinic students we were permitted, and even supervise a research assistant to prepare the litigation (even if she was not allowed to argue in court). This maelstrom is a classic example of the kind of emergency that occurs in a broken system—these cases had been shuttled around for so long, through no fault of ours or our clients—that planning a reasonable docket was not something within our control. Liz also happened to be on the appointments committee that fall, and an ad hoc committee to find a career office director, service she did not think to say no to (hindsight, as a former boss once said, both incorrectly and absolutely truly, is fifty-fifty). Despite this being objectively a *lot* of work, at the time Liz was comparing herself to admired colleagues who seemed to be—and were—doing even more, pioneering new ways of working with law students at the border, engaging in impact litigation, showing up in the news as experts, and so on. The vibrancy and power of the clinical community was astonishing, and it also had the effect of skewing her sense of what was enough, what was possible.

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[42] While it was lot, the opportunity to make nervous people smile, and sometimes laugh, while leaving with solid information gave her enormous professional and personal satisfaction.

In January 2017, Liz received troubling results from a routine mammogram. When the radiologist and her primary care doctor could not seem to share records, she tried to fix the problem, but figured it was less important than everything else happening—and dwelling in both a broken health-care system *and* a broken immigration system was too much. So she neglected that, and by October, it was obvious that she had a serious issue, which she eventually learned was inflammatory breast cancer in November. She had to step back, and only worked part-time in the spring 2018 semester. She had to offload her pro bono cases, say no to community education work, and cut everything back to bare essentials as she went through intense cancer treatment. That moment of stepping back is the true genesis of her interest in this article—because when she stepped back, others stepped forward. She realized in a profound way that while she was important, she was not indispensable, and that other ways of working were possible. Thanks to letters from former students, she also realized that her *teaching* was a contribution she had seriously undervalued, and she began to trust that "only" teaching students to be effective, compassionate, creative lawyers, was enough impact for a lifetime.

Sabrina traces her own involvement in emergency response back to 2017. She had been directing an immigration clinic at the University of North Dakota, and felt isolated from the immigrant rights advocacy happening throughout the country once President Trump was elected. She made a sudden but welcome move to Detroit in July 2017, and hit the ground running as the incoming director of the Asylum & Immigration Law Clinic (AILC) at Wayne State University Law School. The sizeable Arab-American community in Detroit was in turmoil over Trump Administration's policies, including the Department of State's negotiations to resume deportations to Iraq. The ACLU of Michigan filed suit to halt the removal of 1400 Iraqi nationals with removal orders, many of whom had initially entered the United States as refugees and feared persecution and torture upon their return.[43] Eager to connect to community efforts and supplement the limited nonprofit legal assistance available for people in removal proceedings in Michigan, Sabrina agreed on behalf of the clinic to take on representation of two class members who were being detained in Youngstown, Ohio, and continued to pick up additional cases when pro bono counsel could no longer handle them.[44] Navigating practices in a new court, working with clients detained more than three hours away, and getting students up to

[43] For background on this case, *see* ACLU of Michigan, *Hamama v. Adducci*, https://www.aclumich.org/en/cases/hamama-v-adducci.

[44] The timeline of immigration proceedings being what they are, the clinic still represents three former *Hamama* class members, including one of the original clients from 2017.

speed with the evolving strategies for these cases was challenging, but Sabrina was proud of the work her students were doing and glad to be in a position where she could be helpful. As the litigation wore on, however, some of it began to feel very personal—she acutely felt the ways in which Muslims and Arabs were targeted by the Trump Administration, with her own family members wary of becoming victims of hate crimes. This emotional toll was compounded as her clients remained detained when others received bond; later her clients were participants in a detention center hunger strike, and one was eventually hospitalized.

In January 2019, Sabrina got a call from the Michigan Immigrant Rights Center (MIRC), the community partner organization with which the clinic collaborated most closely. The managing attorney told her that a number of asylum-seekers had been transferred from the southern border to Battle Creek, on the western side of Michigan. MIRC staff screened these individuals and found that some of them had contacts and resources to be able to seek bond, and many of them had strong claims for immigration relief as well. But MIRC did not have the capacity to take on these additional removal cases, and asked if the clinic could help. Sabrina had a full case docket, but she presented the opportunity to three advanced clinic students. The students (all deeply committed) responded enthusiastically; they wanted to represent all seven detainees referred to the clinic. In her heart of hearts, Sabrina did not want to say no to the asylum-seekers or to the students. Besides, seven detained clients did not seem like too much—weren't there clinics that represented many more? The next ten weeks were incredible to witness, but more exhausting than Sabrina or her students could have contemplated. When bond options fell through, the students worked to find alternative options to secure release. They reached out to bond funds, drew up contracts with community members to post bond, found places for people to live while their cases were heard locally, and even arranged to have new clothes and shoes waiting for detainees when they were finally released into the arms of family and newfound friends. The students took turns staffing the phones—including the one in Sabrina's office—to make sure that there were no calls missed from the detention facility, and they coordinated handoffs of paperwork to the next person scheduled to make the nearly two-hour drive to Battle Creek. They were also in court constantly, sometimes leaving a merits hearing at 5pm, going to the office to work on the next filing until security kicked them out after midnight, and coming back at 7:30am to stand in the security line for an hour for a bond hearing the next morning. In addition to securing release for detainees, the students did four expedited merits hearings.

Most days, Sabrina doesn't regret it. She fondly remembers clients passing the phone around as they called from the jail to wish students a happy Valentine's Day, a Unitarian Universalist congregation packing

the courtroom to support a bond claim, and crying at breakfast after the last asylum-seeker won relief. Modest as the results were, she remains in awe of her students and what they accomplished, and in that work, she felt dialed into her sense of purpose as an advocate and a teacher. The fellowship in the clinic and with the wider community was something beautiful and inspiring when immigration policy seemed to offer nothing but ugliness and despair. But the toll these efforts took on her physical and mental health was notable and persisted long after the hearings were over. Sabrina was depressed, but also restless and afflicted with the constant compulsion to work. Her digestive system was tied up in knots, and she had fatigue and brain fog that would not go away. As the COVID-19 pandemic ramped up, Sabrina leaned out of her caseload. But she felt guilty, thinking about how hard many of her colleagues were working—seeking injunctions against horrific Trump-era policies, advocating for mass release of detainees as COVID-19 ravaged jails and detention centers, and taking on much higher caseloads than her clinic ever would.

Leading up to the drafting of this article, Sabrina saw four different therapists, dealt with stress-related health diagnoses, and sought to repair personal relationships damaged by overwork. She was also painfully aware that her law school colleagues were pleased with her service work but also monitoring her scholarly productivity as she transitioned to a tenure-track position. She reasoned that, to set herself up for success, she would need to set limits on the number and types of cases she took on for her clinic in order to show up in the way she wanted to for her students and clients while still devoting adequate time to her research and scholarship.

II. Opportunity and Scarcity

A. The Opportunities Offered in Meeting Acute Needs

Among the many opportunities offered by engaging in emergency work, three rise to the top for us, but we will consider others. The three biggest opportunities are (1) the chance to meet acute community needs, (2) the ability to leverage and engage student interest, and (3) the fulfillment of our own sense of purpose.

1. Meeting Acute Community Needs

Acute can refer both to problems of a severe degree and to sudden-onset problems.[45] This factor thus does not immediately distinguish emergency work from other kinds of work being done in clinics across

[45] *Acute*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/acute (accessed Jul. 12, 2024).

the country, as the shortage of legal services for low-income persons is acute in the sense of severity, and these are often the clients our clinics aim to serve.[46] Indeed, Best Practices in Clinical Legal Education notes the general duty "owed by educators to the public," and the more specific duty clinicians have to "respond to the legal services needs of the communities in which they operate."[47] In a very real sense, crisis lawyering is exactly what clinicians *do*: clinical work often involves responding to client emergencies, and crisis response is but magnified variation of this.[48] We note in Part III.B, *infra*, why it is important to question lawyers' primacy as crisis-solvers, but here we note that our ability to handle client emergencies that present themselves somewhat routinely in our ongoing clinical work offers clinicians a large well of insight to draw from in considering crisis lawyering.

We use the term acute here in the sense of "sudden-onset:" in a *crisis* context, acute signifies a need anchored to a particular event or moment in time. In this sense, there are aspects of the community need singular enough to be worth foregrounding. Before we do so, we also acknowledge that right here, in this dual meaning of the term "acute," we foreshadow a major cost of doing crisis work: devoting resources to one area of acute need (sudden-onset legal needs), almost always at the expense of other acute needs (the long-term unavailability of the legal system to many).

The visibility presented by acute (sudden-onset) legal needs drives the sense of opportunity. Just as whistling tea-kettles attract attention from both the person making a cup of tea and the unfortunate family members and pets who hear the kettle as well, emergencies attract the attention of not just the legal experts, but the community that is neither directly nor personally affected by the emergency.[49] One of us had, for example, taken on an immigration case for a young teenage girl from Central America in 2010, trying to gain expertise in a slightly different area of immigration practice from our usual asylum and domestic

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[46] *See generally* Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 Fordham L. Rev. 997 (2004)

[47] Roy Stuckey, Best Practices for Legal Education: A Vision and a Road Map (2007), at 145, available at https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf.

[48] Ahmad & Wishnie, *supra* note 19, at 313; *see also* Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 How. L.J. 135 (1994).

[49] Swain and Newman describe the importance of this moment to "harness and channel the energy of both the victims and the responders…when legal service providers [are] overwhelmed… Non-profit providers wanted to assist applicants in a fast and organized capacity…Volunteer hotline numbers rang off the hook with persons who were willing to help. This initial surge only happens immediately post-disaster and inevitably dies down even though the need still exists." Swain & Newman, *supra* note 25, at 162.

violence work: work with "unaccompanied minors."[50] That case led to others, and by 2014, we had become quite competent in the area, and all-too-familiar with the dynamics of working with young migrants. Then, in 2014, the numbers of these cases rose dramatically and suddenly enough to attract widespread attention in the news. Interest in the area exploded, from scholars, from the media, from leaders in our own institutions, and from the public, all of whom were gratified to know we were already doing this work; we discuss this in more detail in part A.3. and A.4 *infra*. As new situations rose to the forefront of public attention in the ensuing years, this visibility remained a striking opportunity.

The sense of purpose in the acute context also offers meaningful opportunity. While in many respects demanding and exhausting, the work offers its own energy, as Baher Azmy states so beautifully, reflecting on his work representing Guantanamo detainees:

> This legal effort exposed incompetence, cruelty, torture, and deeply misguided executive policies; it narrated the experiences of humans who would otherwise have remained voiceless and demonized; it captured the attention of the highest decision makers in the land and across the world; and it led to the release of 750 men from the brutality and dignity of indefinite detention. Personally, it was the most meaningful, morally engaging, and challenging work I have ever done.[51]

The work also allows those concerned with an issue to "look for the helpers," to use the phrase now associated with Mr. Rogers,[52] or to persist in what our students increasingly call "optimistic nihilism."[53] Guantanamo lawyer Azmy notes how the work of lawyers in the

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[50] Unaccompanied minors are defined as those who cross the border without a parent, prior to age 18. 6 USC § 279(g)(2).

[51] Baher Azmy, *Crisis Lawyering in a Lawless Space: Reflections on Nearly Two Decades of Representing Guantánamo Detainees*, in Crisis Lawyering 67-68 (Ray Brescia and & Eric K. Stern, eds., 2021). We note the irony of a two-decade legal project (still ongoing as of this writing) being an example of "crisis" lawyering; see part I, *supra.*

[52] For a critique of the "fetishization" of this phrase, *see* Ian Bogost, *The Fetishization of 'Look for the Helpers,'* The Atlantic (Oct. 29, 2018), at https://www.theatlantic.com/technology/archive/2018/10/look-for-the-helpers-mr-rogers-is-bad-for-adults/574210/.

[53] Whether this is a true offspring of Nietzschean nihilism is beyond our expertise and beyond the point of this article, but optimistic nihilism, as used by our Gen Z students, can be defined as "Optimistic nihilism is the ability of a person to create his own meaning after fully accepting that the universe is a large place of meaninglessness." Iyalo Durmonski, *Optimistic Nihilism Explained: Turn Meaninglessness Into Determination*, Medium (July 30, 2023), at https://durmonski.com/well-being/optimistic-nihilism-explained/#:~:text=What%20is%20Optimistic%20Nihilism%3F,can%20create%20our%20own%20path. In our effort to understand our students better, we found this thought piece that helped us understand: https://www.centreforoptimism.com/blog/everything-everywhere-all-at-once-perfects-optimistic-nihilism.

otherwise lawless space "produce[s] hope in systems that are otherwise dependent on desolation and despair."[54] This work of hope-production certainly exists in the act of lawyering through crises and emergencies.

The acute moment may also benefit from and deepen collaborations that far outlast the initial "sudden-onset" phase of response. Professor Sarah Rogerson's organization of mass representation for detainees in Albany was recognized with the 2019 AALS Clinical Section's M. Shanara Gilbert Award; her work drew on and strengthened her abolitionist praxis.[55] She writes:

> [I]f we cultivate a strong foundation of relationships and collaborations around a known threat, crisis can serve as the birthplace of transformative ideas…When this crisis subsides and there is time to assess our impact, a small group of lawyers and advocates will have coordinated legal, religious, medical, and translation services to more than 300 individuals from more than thirty different countries, speaking nineteen different languages. We will have organized hundreds of volunteer attorneys, clergy, and interpreters from across the country and leveraged their collective effort to restore a modicum of due process to an immigration system designed to separate individuals from individual constitutional rights.[56]

This has also been our experience. Indeed, the 2014 interest in unaccompanied migrant children gave rise in Baltimore to a meeting with every stakeholder in a then-small community of legal service providers, foundations, and the immigration courts to develop a community-wide response. The response led to the creation of the vitally-necessary and still strong Unaccompanied Children Project with the Maryland Pro Bono Resource Center. There may be a chicken-and-egg quality to this, where the collaborations cannot happen without some pre-existing degree of connection, but the collaborations may lack urgency and depth until the crisis-moment itself. Regardless, the importance of relationships is a constant theme in the literature on crisis response.[57]

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54 Azmy, *supra* note 51, at 69.

55 Rogerson, *supra* note 27, at 180.

56 *Id.* at 180-81.

57 *See* Newman & Swain, *supra* note 25; *see also* Baker et al., *supra* note 2, at 429 ("When a law school is located in the affected community, law clinics and perhaps local pro bono programs most often have the strongest relationships with vulnerable populations, potential client groups, and with bar leaders and legal aid organizations that will be central to coordinating post-disaster legal services.").

2. *Engaging Students*

For some students, the opportunity for collaboration and community-centered work represents their highest hope as to what they can achieve with their law degrees. Law school can be a profoundly frustrating experience for students who entered the study of law with the hopes of making a positive difference in vital issues of the day. Students who applied to law school after watching the inspiring work of lawyers at the airports fighting the Muslim ban found themselves immersed in the 1L curriculum, learning (necessarily) to think like lawyers by studying cases that seemingly had nothing to do with their reasons for entering law school at all. Professor Bill Quigley's wonderful *Letter to a Law Student Interested in Social Justice* contains the powerful, all-too-familiar insight of a student who tells him, "You know…the first thing I lost in law school was the reason that I came."[58] That quotation goes on, however, to reflect that after time spent working in a neighborhood ruined by Hurricane Katrina, "this will help me get back on track."[59] Like that student, many, many law students are hungry for the experience that will connect them with the reasons they came to law school.

As Professor Fran Quigley has written, "disorienting moments" in lawyering offer enormous possibility for engaging law students.[60] Reflecting on Quigley, Jane Aiken notes that the best learning from such moments requires planning and reflection,[61] which may be more difficult in times of overload, as we discuss in Part B, *infra*. But in terms of the opportunity, such moments can be fertile ground for learning and, potentially, transformation. Laurie Morin and Susan Waysdorf broaden Quigley's prism to disorienting generational moments.[62] We posit that many of the highly-visible immigration moments of the past decade rise to that level of generational disorientation, particularly the scenes of airports in January 2017, when lawyers looked to be the ones visibly, forcefully, and *en masse* blocking the Trump Administration.

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[58] William P. Quigley, *Letter to A Law Student Interested in Social Justice*, 1 DePaul J. for Soc. Just. 7, 8 (2007).

[59] *Id.*

[60] Quigley, *supra* note 6.

[61] Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 Clinical L. Rev. 1, 26 (1997) ("[W]e must help our students in reflecting on why the moments are "disorienting." This requires students not only to analyze the world outside of them but also to turn inward and analyze themselves. They must seize the moment of their disorientation and deconstruct it.

[62] Morin & Waysdorf, *supra* note 34, at 588 ("Just as individuals may experience a disorienting moment when faced with a particular incident of injustice, we believe that seminal events like Hurricane Katrina can trigger a 'disorienting moment' for an entire generation.").

3. Institutional Opportunities

The series of immigration crises created opportunities for our clinical programs as well. Nonclinical colleagues who knew about our work in a general way knew with much more particularity when they connected the work to the relentless news headlines about migration. Immigration clinicians often served as experts for those same news stories, increasing their visibility and, by proxy, the visibility of their clinics and their institutions. Students applied in greater numbers to our clinics, and we were able to connect students to community partners in greater numbers as well, including for externships and volunteer events. Alumni wrote to us wanting to know what we are doing, and were presumably content to know we were in the thick of the response. And so on.

In small but important ways, different parts of our institutions could lean on the clinics' work for meeting the needs of both the institutional mission and institutional constituencies. Admissions staff could entice applicants with the prospect of being part of such valuable and meaningful work. Timely sessions on public events, open to the public, supported the institutional mission and added vibrancy to the law school community. Stories on the clinical work made for good law school magazine articles to appeal to donors and alumni alike. For publicly-funded institutions, this response at a time of high visibility seemed especially important. Most public institutions (and, of course, many private ones) have community service at the heart of their missions, and reporting on that service can be useful to meeting the expectations of taxypayers[63] and, even more crucially, legislators who control important aspects of our institutional finances.

In less utilitarian terms, the work also clearly supported the social justice and access to justice mission at the heart of so many clinical programs.[64] Not all law school clinical programs have publicly available mission statements, but a sampling of large and small, public and private schools, secular and religious, foreground the importance

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[63] This came as a surprise, but Liz received plentiful calls and emails from people otherwise unaffiliated with the University of Baltimore, wondering how we were responding to the situation. (Unsurprisingly, she also received plentiful calls and emails from people who disliked that we did anything whatsoever in the immigration law space.)

[64] See generally, Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 Clinical L. Rev. 489, 495-6 (2013); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 Fordham L. Rev. 1929, 1935 (2002) ("The founders of the clinical legal education movement, responding to the social ferment and legal rights explosion in America during the 1960s, envisioned clinical legal education not only as a way of enriching legal education with professional training, but as a means of stimulating law schools to attend to the legal needs of the poor and minorities, and engaging students in the pursuit of social justice in American society.")

of social justice to clinical education. One of the most comprehensive in this regard is that of University of St. Thomas School of Law:

> [I]nspired by its social justice mission, is committed to preparing students to become accomplished servant leaders in the practice of law who seek to address the needs and improve the conditions of the disadvantaged and underserved. Our state, nation and world need passionate lawyers to help close the Justice Gap and tackle the inequities and inequalities that persist in our legal system and society.[65]

As Davida Finger and others wrote in the context of natural disasters, emergency response work "can serve as a lens for a broader inquiry into social injustice, an inquiry that the legal academy is obliged to make as part of its educational mission…Disasters can offer a useful context for the type of dynamic, social justice-oriented learning advocated by the Carnegie Report."[66]

4. Personal Opportunities

Exciting and cutting-edge legal work can also inform our scholarship. Generally, that's what we do. We have the deepest admiration for our asylum clinician colleagues who have expanded the law's imagination through their tremendous scholarship. Karen Musalo, individually and through the Center for Gender and Refugee Studies that she founded and leads, has produced extensive scholarship and other writing that expanded the ability for women to seek asylum related to gender violence.[67] David Baluarte and Kate Evans turned their caselaw frustrations into powerful scholarship aimed at dismantling one of the

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[65] St. Thomas School of Law, *Public Interest and Social Justice*, https://law.stthomas.edu/jd-program/areas-of-study/public-interest-social-justice/. *See also* Howard Law School, *Clinical Law Center, Mission Statement*, https://law.howard.edu/academics/clinical-law-center (describing the clinics "a nerve center in Howard's social justice operations"); Maine Law, *Clinics and Centers*, program https://mainelaw.maine.edu/academics/clinics-and-centers/ ("the Clinic represents a defining program of Maine Law… helping fulfill long-standing commitment to social justice"); Santa Clara Law School, *Center for Social Justice and Public Service, Mission Statement*, https://law.scu.edu/socialjustice/ ("promoting and enabling a commitment to social justice through law."); and Berkeley Law, *Clinical Education Program*, https://www.law.berkeley.edu/experiential/clinics/ (referencing the program's "mission to advance racial, economic, and social justice").

[66] Davida Finger et. al., *supra* note 3, at 212.

[67] *See, e.g.* Karen Musalo & Stephen Knight, Gender-Based Asylum: An Analysis of Recent Trends, 42 Interpreter Releases 1533 (Oct. 30, 2000); Karen Musalo, *The Struggle for Equality: Women's Rights, Human Rights, and Asylum Protection*, 48 Sw. L. Rev. 531 (2019); Karen Musalo, *Matter of R-A-: An Analysis of the Decision and its Implications,* 76 No. 30 Interpreter Releases 1177 (Aug. 9, 1999).

bars to asylum.[68] Annie Lai as well as Chris Lasch, whom we all lost far too soon, put scholarly heft to the urgent need for sanctuary and the disentanglement of law enforcement and the immigration system.[69]

Crassly, moments of crisis created real opportunities for us personally. We could showcase our strengths, make visible our clinical work,[70] channel our words into scholarship and out to a hungry media. As we climbed the rungs of academia or entered the job market process, where law review publications, media mentions, and public visibility are all forms of currency, this moment was *helpful*. No, that was not our motivation. Yes, we hate to acknowledge this. And it is nonetheless true.

It was also inescapably true that doing this work, and being relevant and necessary at such a crucial moment, met certain needs in our own temperaments. Like so many of our students, we went to law school to develop the skills to help real people, to "repair the world" (in the spirit of *tikkun olam*).[71] As the beautiful rabbinical text says, "It is not your duty to finish the work, but neither are you at liberty to neglect it."[72] Although neither of us is Jewish, this wisdom drives us, and at moments of acute need, our ability to do the work satisfied something deep within us.

B. Supply Side Scarcity

With such real opportunities available to us, it is easy to assume the right answer is to jump in as best we can. This impulse is often grounded in a beautiful optimism (driven often by experience) about our ability to handle enormous amounts of complex challenges, along with the

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[68] David Baluarte, *Refugees Under Duress: International Law and the Serious Nonpolitical Crime Bar*, 9 Belmont L. Rev. 406 (2022); Kate Evans, *Drawing Lines Among the Persecuted*, 101 Minn. L. Rev. 453, 455 (2016).

[69] Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 Santa Clara L. Rev. 539, 541 (2017); Christopher N. Lasch, *Sanctuary Cities and Dog-Whistle Politics*, 42 New Eng. J. on Crim. & Civ. Confinement 159 (2016); Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 Wm. Mitchell L. Rev. 164, 165 (2008).

[70] Rebecca Sharpless has written a powerful critique of the gendered ways direct-services work is generally less valued. Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 Clinical L. Rev. 347, 356 (2012) ("Within the universe of progressive lawyers, direct service lawyers are usually paid the least. Moreover, the aesthetic of direct service work resembles traditional women's work. Direct service lawyering involves extensive contact with and service to others, and it involves repetitive tasks and patience for the mundane. It entails being responsive to concrete instances of people's pain and suffering. It involves helping to sustain life. Like raising children, caring for others, and running a household, direct service work is invisible and devalued even though more public and highly valued work depends upon it.")

[71] *See, e.g.* Jonathan Krasner, *The World is Broken, So Humans Must Repair It: The History and Evolution of Tikkun Olam* (May 22, 2023), https://www.brandeis.edu/jewish-experience/history-culture/2023/may/tikkun-olam-history.html.

[72] Pirkei Avot, 2:15-16.

justice-seeking imperatives of our temperaments. We turn to a framework in Part III, *infra*, for slowing down that understandable impulse. But before turning to that, it is equally critical to name the ways in which these opportunities co-exist in a framework of scarcity and limitation. Justice-seekers too seldom account for our limitations.

1. The Access to Justice Crisis Generally

Little need be said for our audience about the limitations people have in seeking and finding competent legal representation. For completeness, we do note this factor, and especially because (as we discuss in Part III.A, *infra*) we sometimes will ourselves into believing we can individually rectify what is clearly a systemic problem.

A 2022 Report shows that low-income Americans (defined as at or below 125% of the federal poverty level) did "not get any or enough legal help for 92% of their substantial legal problems."[73] In the criminal system, despite the guarantee of counsel under *Gideon v. Wainwright*, many accused lack counsel at the bail stage, and as the head of the DOJ Office of Access to Justice notes, " when public defense is available, lack of resources and staff can make fulfilling the guarantees of the Sixth Amendment difficult, or even impossible –leading to the effective denial of counsel."[74] In the immigration context, in 2016, only 37% of immigrants facing removal proceedings in court have lawyers (a mere 14% have representation when facing removal from within a detention facility).[75]

Clinics, of course, play an important role in meeting the justice gap. The Center for the Study of Applied Legal Education (CSALE) estimates that clinics nationally aided roughly 200,000 client matters (civil *and* criminal) during the 2018-19 year.[76] Impressive though that is, as of December 2023, there were 1,101,819 asylum cases *alone* in the immigration court system (a figure that does not include other forms of relief from deportation, or other immigration services needed outside the deportation context).[77] If *every* clinic across the country—not just immigration clinics—did only asylum work for a year, we would only cover 25% of that need (and at the obvious expense of doing other

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[73] Legal Services Corp., The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans 7 (April 2022), https://lsc.gov/initiatives/justice-gap-research.

[74] U.S. Dep't of Justice, *Director Rachel Rossi Delivers Remarks at the 2023 Texas Poverty Law Conference* (Sept. 1, 2023), at https://www.justice.gov/opa/speech/director-rachel-rossi-delivers-remarks-2023-texas-poverty-law-conference.

[75] American Immigration Council, Access to Counsel in Immigration Court (2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

[76] CSALE, *supra* note 23, at 38.

[77] TRAC, *Immigration Court Asylum Backlog*, https://trac.syr.edu/phptools/immigration/asylumbl/ (last checked July 17, 2024) (providing data through December 2023).

critical work in the civil and criminal spheres). We simply are not a great enough force to individually lawyer our way through the access to justice crisis.

2. Capacity of Clinical Programs

At least on a short-term basis, our clinical programs have significant limitations in how they can expand capacity. The numbers of students we may admit is generally set in a fixed ratio to available faculty for supervision, to ensure the kind of supervision which yields impressive student learning and growth. Adding faculty requires either fundraising or long-term commitments from our institutions, both of which demand additional time and energy; 53% of clinics reported the lack of hard money to support clinics as a major challenge their clinical programs faced, as of 2019-20.[78] Though the need for legal services was overwhelming, the median number of clinics nationally did not change over the surveys done by CSALE from 2013 through 2019 (although the mix in the substance of the clinics did change over that time).[79] We do acknowledge that an individual clinic could increase its capacity through hiring of fellows, staff attorneys, adjunct faculty, and so forth, and from 2009 through 2019, capacity did increase by roughly 25%.[80]

Beyond financial and staffing constraints, other factors limit the capacity of clinicians to engage fully in emergency and disaster response. First among these is the attention required for our existing clients. In immigration clinics, like many others whose client matters last across multiple years, most clinics have pre-existing commitments to many people. Our active docket in any given semester might include five court cases for ten students, with dozens more clients in the pipeline who have hearing dates in the following semesters, or who have next steps with opaque processes and timelines determined by the U.S. Department of Homeland Security. Unless our clients can afford private counsel, there is no way to remove them from our dockets, and our ethical duties to them continue unabated.

In the University of Baltimore Immigrant Rights Clinic, we did an exercise on competence and diligence with our students each semester for a decade, asking them to deliberate on a dramatic choice that came from a real situation. Situating ourselves in an immigrant rights organization, we tell them they have an existing docket full of cases in active litigation, when an immigration raid affects the community, and their executive director wants them to spend the entirety of the following three

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78 *Id.* at 6.
79 *Id.*
80 *Id.* at 17-18.

weeks handling the emergency. The students quickly work through their desire to help in the emergency, and how that desire is tempered by the duties to clients with upcoming court cases. They inevitably seek to problem-solve, trying to generate more capacity or create some hitherto unknown efficiency in their work distribution. Typically, a large percentage will decide it is worth it to simply work long hours for the confined time period (with a smaller percentage recognizing that their personal commitments or limitations of time and energy preclude that solution).

We fully acknowledge the satisfaction that comes from throwing oneself into this kind of urgent project, and honor the many clinicians who have beautifully articulated the value our students find in the work, in addition to the value delivered to the clients and communities. If immigration emergencies were like this semi-fictional one in the class exercise, it is likely that we, too, would simply find a way. What we know from long and hard experience, though, is that few emergencies actually last a short-enough time for this "double the work" strategy to be feasible. This is especially true at schools with large numbers of students whose financial situations require them to work full-time, despite being full-time students. Even if the barrier were not economic, many of our students have health limitations or family obligations that make such strategies difficult at best.

At times of emergency, pedagogy can feel like a distant priority. In 2017, Liz was part of a group of immigration clinicians trying to articulate which aspects of pedagogy could potentially be sacrificed in the effort to do more for the immigration crises we saw all around. We knew some aspects had to remain, but wondered where compromise was feasible, at least temporarily. In hindsight, as described in Part I.A *supra*, the crises were going to be a permanent feature of the immigration landscape, which changes the question from temporary accommodations to something more permanent, which would have challenged our thinking at the time.[81] We still have duties to our students and to the legal profession to teach our existing students as well as we possibly can. We willingly acknowledge there may be some countervailing positives for the students themselves, who gain so much from feeling useful in a

[81] Here, we see some value in distinguishing between natural disasters where the nature of the crisis is truly unexpected, and in its crisis-phase, of somewhat shorter duration. However, even those disasters tend to inflict the most damage on populations who face long-standing structural injustices. Matthew Scott, Climate, Change, Disasters, and the Refugee Convention 15 (2020) ("The widespread notion of the 'natural disaster' therefore fails to be disaggregated. The occurrence of a natural hazard event or profess is a necessary, but not sufficient, condition for the unfolding of a 'natural' disaster. Without exposed and vulnerable human settlements, a flood will not engender disaster.") *See also* Harold A. McDougall, *Hurricane Katrina: A Story of Race, Poverty, and Environmental Injustice,* 51 How. L.J. 533 (2008).

time of a great need. But when we allow crisis to erode our standards too far, we can do both audiences a profound disservice.

3. Capacity of Students

It is critical as well to note where and how our own students have limitations, especially when the students themselves are so eager to do more and be more involved in the same ways we are eager. Many students *do* have the time and ability to do extraordinary work. We remain awed by the students Michael Wishnie and Muneer Ahmad supervised at Yale, who filed those earliest lawsuits in the first weekend of the Muslim ban in 2017. In only modestly less dramatic ways, hundreds of law students gave up spring breaks every year to do grueling work at the Southern border or at isolated detention centers. Our own students did the maximum they reasonably could, and then did a little more.

We also recognize, though, that not all law students are alike. Many of our students work almost full-time jobs despite being full-time law students. Many have significant family care obligations. Others have found law school academically or emotionally challenging, or have mental and physical health needs, and are trying to focus on simply getting the degree as the critical stepping stone to their longer-term dreams. By contrast, not all, but many of the people who become law professors had easier times academically and fewer short-term financial stressors—our own energy and time as law students was likely more expansive than that of our students. Being engaged in meaningful, timely work like these "emergencies" provided comes at a considerable cost to other important, and sometimes indispensable, priorities. As professors, we need to honor those limitations.

III. A Framework for Deciding

All of these competing opportunities and demands on our time are worth reckoning with before crisis hits. We understand from our own experience how our best, most-sophisticated understandings of the various tradeoffs can vanish in the rush to "do the thing." With a critical perspective on the emergency framework, and self-awareness about the demands on our time and energy, it becomes easier to contemplate whether and how to engage in emergency response work. As a structure, we offer the steps and questions below as a structure to facilitate reflection and decision-making around clinic emergency response work.

A. Know Yourself

In the introduction to the critical volume Crisis Lawyering, Ray Brescia and Eric K. Stern introduce a series of challenges that define

crisis leadership: preparing, sense-making, decision-making, meaning-making, terminating and accounting, and learning.[82] These steps are certainly germane to the response of clinicians and clinical programs to crisis. But crisis lawyering is notably different from "traditional lawyering" in its level of risk and complexity.[83] For clinical programs that are not regularly engaged in emergency response,[84] and for students who may have limited or varying exposure to crisis situations, we are suggesting a complementary framework that introduces self-knowledge, assessment, and reflection to a crisis response framework as a preliminary process to decide whether and how a clinic will assist in an emergency situation. This is a natural outgrowth of the skills and practices we foster in our students as clinicians.

Specifically, unless we become more intentional and reflective about *whether* to engage, with special emphasis on the humbling question of whether others might be better suited to engage, we are apt to center ourselves in a response. There are many possible reasons why we might find ourselves gravitating towards involvement. As previously noted, the work can be extremely fulfilling. But as immigration lawyers, we also experienced a rise of visibility in our work during the Trump era; work that was previously noted within a small community of practitioners was now squarely in the public eye. The central role of lawyers in the fight against unjust policies replicated a narrative we are familiar with because it is lionized in the profession: lawyers intervene swiftly and competently, bringing about just outcomes with their advocacy. This feeling of power and efficacy idealized within this lawyer archetype may be part of what drives us as well. As we work through a decision-making in a crisis response, this tendency to center lawyers—ourselves specifically—in the process is worth questioning.

Digging deeper, this may go beyond ego. Grandiosity (i.e., an over-inflated sense of importance), as well as the sense that one can never do enough, are among the signs of secondary trauma.[85] Clinicians of all stripes encounter trauma in their work; many who work in the immigration space find the representation of asylum-seekers and engagement with the deep dysfunctions of the immigration system to be inherently traumatic.[86] Many immigration professionals report signs of secondary trauma and burnout, citing—among other things—feelings

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[82] Ray Brescia & Eric K. Stern, *Introduction: Lawyers as Problem-Solvers in Crisis*, in Crisis Lawyering 13 (Ray Brescia and & Eric K. Stern, eds., 2021).

[83] *Id.* at 15.

[84] Ahmad & Wishnie, *supra* note 19, at 374.

[85] Laura van Dernoot Lipsky & Connie Burk, Trauma Stewardship: An Everyday Guide to Caring for Self When Caring for Others (2009) at 111-113.

[86] *See generally* Lindsay Muir Harris and Hillary Mellinger, *Asylum Attorney Burnout and Secondary Trauma*, 56 Wake Forest L. Rev. 733 (2021).

of complicity in a racist system,[87] a sense of powerlessness to protect clients,[88] and being haunted by stories of torture and abuse.[89] Whereas we usually think of secondary trauma and burnout producing avoidance, it can actually drive us toward work—particularly work that can be seen as efficacious—and can lead us to think about our necessity to that work in a potentially distorted way. A contemplative approach to crisis response may therefore be a critical way of hedging against that thinking, attending to our trauma, and supporting our boundaries.

This contemplative approach fits well with where we stand as clinicians: as participants in and observers of legal systems. As Carrie Menkel-Meadow suggests, "[a]s both a working professional and a scholar or expert on the legal system, the clinician can view the aggregate impact of the individual lawyer on the legal system *and, conversely, the legal system on the lawyer*."[90] Attention to the ways we respond to the exigencies of the legal system is part of what we heed *as* clinicians.

As clinicians, we are lawyers but also educators, and we must thus also consider the teaching and modeling aspects of our role with students as our focus.[91] As we regularly encourage clinic students to develop and engage with their professional identities, values, and boundaries, it is also important to consider how we model our own consideration of the same, particularly in the fast-paced and high-stakes conditions of emergency response.

B. Four Questions: An Emergency Response Checklist

From experience we have had, we suggest using the four questions below—concerning competency, capacity, fit, and design—to identify questions and unknowns around a potential response. We hope that this process brings interests, concerns, and gaps in knowledge to the surface. More importantly, students have reported that this template was useful when they entered the world of nonprofit practice after law school and had to make decisions about intervening in urgent situation.

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[87] *Id.* at 752-53; *see also* Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 Geo. Immigr. L.J. 207, 209–56 (2012).

[88] Harris & Mellinger, *supra* note 86, at 796, 798.

[89] *Id.* at 752, 795.

[90] Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering,* 29 Clev. St. L. Rev. 555, 569 (1980) (emphasis added). We found this quotation in the thought-provoking essay by Sameer Ashar and Wendy Bach, *Critical Theory and Clinical Stance*, 81 Clinical L. Rev. 90 (2019).

[91] *See* Jill C. Engle, *Taming the Tigers: Domestic Violence, Legal Professionalism, and Well-Being*, 4 Tenn. J. Race, Gender, & Soc. Just. 1, 5, 12 (2015); Ronald Tyler, *The First Thing We Do, Let's Heal All the Law Students: Incorporation Self-Care into a Criminal Defense Clinic*, 21 Berkeley J. Crim. L. 1, 35 (2016).

1. Competence

The first question for a clinician to consider is *what would it take for me to be competent in this area?*

The rules of professional responsibility give primacy to the question of competence—a combination of "legal knowledge, skill, thoroughness and preparation" necessary for representation.[92] In the context of an emergency response, competence requires not only identifying legal needs and issues, but also placing them in context[93] and recognizing the different perspectives, values, and relationships in play.[94] Institutional knowledge and relationships are also part of a basis of competence.[95]

Clinicians may find themselves competent—sometimes extremely so—due to knowledge and experience they developed long before crisis shown a light on a particular issue. For example, Muneer Ahmed and Michael Wishnie, of the Yale Law School Worker and Immigrant Rights Advocacy Clinic, had extensive experience pursuing habeas for detained noncitizens. When the clinic was tapped to pursue a national injunction against the Muslim ban, they observed that "longitudinal, non-crisis lawyering enabled us to engage in latitudinal, crisis lawyering," and the clinic obtained an injunction within twenty-four hours.[96]

Conversely, if a clinician does not have a pre-existing skill set, there is a question of how that competency will be developed. The professional rules contemplate that lawyers can become competent through training or study.[97] Latisha Nixon-Jones offers the example of the Southern University Law Center's response to the Baton Rouge floods of August 2016, in which nine clinical faculty were able to get up to speed via quick online trainings.[98] The availability of trainings and other resources provided by local and national partners may dramatically increase potential for developing competency in the wake of an emergency. For example,

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92 Model Rules of Prof'l Conduct R1.1 (Am. Bar Ass'n, 2019).

93 *See* Baker et al., *supra* note 3, at 428-21.

94 Ray Brescia and Eric K. Stern refer to the crisis leadership skill of "sense-making," which "refers to the challenging task of developing an adequate interpretation of what are often complex, dynamic, and ambiguous situations. This entails developing not only a picture of what is happening, but also an understanding of the implications of the situation from one's own vantage point and that of other important stakeholders." Brescia & Stern, *supra* note 82, at 13.

95 *See, e.g.* Rogerson, *supra* note 27, at 149-53 (discussing developing a relationship with the local jail created a foundation of trust that was critical to mobilizing for assistance to detainees after a sudden mass transfer).

96 Ahmad & Wishnie, *supra* note 19, at 333.

97 Model Rules of Prof'l Conduct R1.1, Comment 2 (Am. Bar Ass'n, 2019).

98 Latisha Nixon-Jones, *Beyond Response: Reimagining the Legal Academy's Role in Disaster Recovery and Preparedness*, 71 Clev. St. L. Rev. 571, 607 (2023).

the Austin, Texas-based legal nonprofit VECINA provided training to organizations and individuals to assist Afghan arrivals, dramatically increasing the pro bono capacity for representation.[99]

Of course, given the structure of our programs, clinicians must not only consider their own competence, but how to bring law students into that knowledge as well. Many clinicians have reflected on the struggles—but also the joys—of learning alongside students.[100] Some clinicians posit that, because students regularly respond to client emergencies and develop the competence to do so, crisis response is contemplated in the clinical model.[101] Other clinicians point out that, because of time constraints in an emergency, law schools must teach emergency response as part of a permanent curriculum. Nixon-Jones is among the proponents of this approach, arguing that law schools should commit to crisis-preparedness for the future of the legal profession.[102]

Clinic students may themselves hold important potential for competence; most will have completed at least one year of law school coursework, and they benefit from a classroom seminar component to the course that can be used to teach needed substantive law and skills. However, among the eye-opening aspects of competence development for students is that emergencies do not allow for extensive research and preparation. To this end, the ABA Model Rules contemplate that "in an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical," but caution that such assistance "should be limited to that reasonably necessary."[103] In Lindsay Harris's survey of immigration service-learning opportunities, Denise Gilman, at the University of Texas School of Law, noted,

> We talk to the students about how different [triage in immigration detention] is from the deliberate thoughtful way we practice in the clinic when representing clients. By making the difference explicit, we hope to show them the value of the more deliberative model of representation while also exposing them to the reality of representation for many service providers.[104]

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99 VECINA, *Representing Afghan Nationals in Affirmative Asylum Proceedings*, https://vecina.teachable.com/p/afghan-aslyum.

100 *See, e.g.* Sharpless (2024), *supra* note 26; Newman & Swain, *supra* note 25.

101 Ahmad & Wishnie, *supra* note 19, at 329.

102 Nixon-Jones, *supra* note 98; *see also* Newman & Swain, *supra* note 25, at 4 (noting that volunteer agencies and legal services providers have begun providing training and materials to volunteer lawyers preemptively, in order to improve the availability and quality of legal assistance following an emergency).

103 Model Rules of Prof'l Conduct R1.1, Comment 3 (Am. Bar Ass'n, 2019).

104 Harris, *supra* note 3, at 35 (excerpt from survey response of Denise Gilman).

In preparing students for crisis response, clinicians can similarly provide context for the flexible, adaptive approach to competence taken within the confines of an emergency.

2. *Capacity*

The second question for a clinician to consider is *what is our capacity to respond?*

The authors of *In Times of Chaos* identify capacity as a key question for clinicians, balancing a response against the commitments to existing clients and the workload of students.[105] In considering this question of capacity, clinicians should estimate the time commitment and assess deadlines or other tasks that urgently need to be undertaken. Some existing commitments may be flexible, or can be postponed or delegated to prioritize response to an emergency.

This capacity question has been a particular concern for immigration law clinicians. Lindsay Harris identified at least 40 schools that sent law students to assist detainees between 2015 and 2018, the vast majority of them led by immigration law clinic directors.[106] She reports that, given their clinics' commitments to existing clients, many found the pivot to representing detainees challenging.[107] As highlighted previously, active immigration dockets include years-long commitments to clients and frequent court dates, and work on these cases—particularly when students are first chair—requires time and supervision capacity.

Along these lines, the capacity of students should be considered as well. Depending on when an emergency occurs, students may already be enrolled in a clinic course and have expectations around time commitments and workload.[108] As part of setting this work up for students, a clinician will also need to consider how the varying and at times unpredictable work should be assigned to students, particularly if the change in direction for the clinic comes after the start of the semester. Clinicians should also consider their role and their capacity for student supervision. Most clinicians supervise eight students in a typical semester,[109] but in the context of fast-paced emergency response, both clinicians and

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105 Finger et al., *supra* note 3, at 432.

106 Harris, *supra* note 3, at 186.

107 *Id.* at 187-88.

108 The American Bar Association defines a "credit hour" as one hour of instruction and two hours of out-of-class work per week or the equivalent amount of work for other academic activities, based on a fifteen-week semester. ABA Standard 310. CSALE data from 2019-20 indicates that the number of academic credits most students receive is fixed (rather than variable based on the amount of hours devoted to their work), with most clinics awarding three credit hours for legal work. CSALE, *supra* note 23, at 31.

109 *Id.* at 30.

students may find it beneficial to have a lower student-to-faculty ratio.[110] Some clinicians have found that they are better able to maximize their capacity by serving as facilitators rather than direct supervisors.[111]

A less obvious question that might emerge when considering capacity is *what might we be giving up by taking on this work?* In addition to considering trade-offs in case work and community partnerships, the frenetic energy of emergency response often means giving up a more relaxed pace—or even downtime and rest—over the course of the semester. This premise may seem antithetical to the engaged social justice work of clinicians, but social justice activists and thinkers such as Tricia Hersey[112] and adrienne marie brown[113] have sought to change our thinking around rest and other pleasures, framing them as necessary for our humanity and life force as we take on difficult work. Clinicians have incorporated these teachings into our curriculum to support students' development as healthy, grounded, and resilient advocates.[114] In assessing capacity, we should thus consider the effect on our students' well-being as well as our own well-being over the long term.

3. Fit

The third question is: *is this work a good fit for what my program has to offer?*

For many clinicians, the question of "fit" will immediately go to the questions of our personal and programmatic values, knowledge of community institutions and the vital work they do, and what is important to our school and our students. The first aspect of crisis leadership—preparation—also requires the identification of players, roles, and relationships poised to respond.[115] Clinicians are experts in taking inventory of their programs and, as the authors of *In Times of Chaos* point out, programs will be able to determine their core competencies and the ways they can uniquely contribute to meet the needs of an emergency.[116] Having a strong sense of these programmatic assets—and regularly

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110 *See, e.g.* Harris, *supra* note 3, at 210 (observing that many clinicians preferred to supervise only four students, and that some students who responded to the survey reported not having adequate supervision or being supervised by someone other than an attorney, raising concerns about unauthorized practice of law).

111 *Id.* at 99, fn 136.

112 *See* The Nap Ministry, *Rest is Anything that Connects Your Mind and Body,* https://thenapministry.wordpress.com/2022/02/21/rest-is-anything-that-connects-your-mind-and-body/ ("Rest pushes back and disrupts a system that views human bodies as a tool for production and labor."); Tricia Hersey, Rest is Resistance: A Manifesto (2022).

113 *See* adrienne marie brown, Pleasure Activism: The Politics of Feeling Good (2019).

114 *See* note 3, *supra*.

115 Brescia & Stern, *supra* note 82, at 13.

116 Baker et al., *supra* note 3, at 431.

taking stock of them—will leave us well-prepared to decide whether and how to be involved when an emergency arises.

Many of the clinicians who have written about disaster response emphasize that successful partnership programs should have a connection to the affected community.[117] Social networks are critically important following an emergency, and individuals with community connections are best able to recognize and honor those networks.[118] These community connections also hedge against the possibility that a clinic will engage in "voluntourism"—a scenario in which volunteers enter the community with the intent to help, but may take more than they give and move on quickly.[119] Depth of understanding of the social context, as well as an ongoing commitment to the community, will ensure a good fit for a clinic's involvement in crisis response.

This question of fit also asks us to consider whether there another group better situated to spearhead a response. There is the potential for valuable insight here about the role of lawyers generally in crisis situations. As Christy E. Lopez succinctly advises in her "lessons learned" after the DOJ investigation in Ferguson, Missouri: "recognize that you're not all that."[120] Liz's own happy experience of being "not all that" happened early in the months after Maryland saw record numbers of accompanied Central American children arriving; armed with some expertise and good intentions, she entertained the idea of somehow expanding the clinic to be the nerve-center of the local response. Instead, she facilitated the meeting described in Part I.B.4, *supra,* that resulted the creation of new funding sources that gave rise to a much more sustainable project folded into the already strong structure of the Maryland Pro Bono Resource Center.

Sometimes the "other group" better placed consists of nonlawyers. Models for lawyer intervention are often distorted in that they automatically center the role of lawyers. In crises, some of the work is inevitably legal in nature, yet lawyers are seldom the only players in responding. Community organizers often play a vital role in problem-definition and response-design, plugging lawyers into their efforts—as opposed to having lawyers assume the lead in these stages.[121] As Professor Laila Hlass writes,

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117 *See* Finger et al, *supra* note 3, at 222-23; Harris, *supra* note 3, at 200.

118 *See, e.g.* Jennifer Seidenberg, Cultural Competency in Disaster Recovery: Lessons Learned from the Hurricane Katrina Experience for Better Serving Marginalized Communities, (2005), http://wwwlawberkeleyedulibrarydisastersSeidenberg.pdf, at 62-63, 102.

119 Harris, *supra* note 3, at 188, 193-94.

120 Christy E. Lopez, *Responding to the (Dual) Police Crisis in Ferguson*, in Crisis Lawyering (Ray Brescia and & Eric K. Stern, eds., 2021), at 118.

121 For seminal work critiquing lawyer-supremacy, see, e.g. Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. Pa. J. L.& Soc. Change 25 (2011);

> Traditional lawyering—in immigration and in other contexts—has been critiqued for reifying lawyers, disempowering clients, legitimizing violent legal systems by participation in them, and obscuring community and systemic harm by an overly narrow focus on individual remedy. . . "reinstantiat[ing] the lawyerly idea of the client's individuated 'problem' in ways that undermine collective power-building."[122]

As clinics consider engaging in crisis response, it is worth remembering Hlass's recommendation to "recalibrate[e] legal relationships to take the lead from directly impacted clients and communities, understanding individual harms to be part of larger systemic injustice, and shining light on unjust legal systems."[123]

Nor must lawyers always be the only actors in providing support for legal representation. State unauthorized practice of law statutes make nonlawyer assistance in legal representation complicated at best, but sometimes exceptions exist permitting work to be done capably—even exceptionally—by nonlawyers. This is especially true in immigration law, whose tribunals permit nonlawyer representation. The VIISTA program at Villanova University that trains immigration advocates,[124] the use of BIA-accredited representatives in community organizations to serve more clients,[125] and the staffing of Immigration Court helpdesks[126] offers examples of the vital immigrant rights work being done by nonlawyers.

Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 444 (2001).

122 Hlass, *supra* note 12 at 1646 (quoting Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 Stan. L. Rev. 821, 870 (2021)). *See also* Margaret Martin Barry, *A Question of Mission: Catholic Law School's Domestic Violence Clinic*, 38 How. L.J. 135, 135–36 (1994) ("Litigation…frequently fails to solve the problems facing the poor people served by clinics…[I]n practice, clinics too often provide only a fix for the immediate problem of a particular client. While clinical programs and poverty lawyers do not hold the key to deliverance, their role must be more expansive than litigation of isolated issues in the lives of their clients.").

123 Hlass, *supra* note 12 at 1647.

124 Villanova Interdisciplinary Immigration Studies Training for Advocates (VIISTA) is an online a holistic, interdisciplinary, online program focused on training immigrant rights advocates to serve migrants and refugees. *See VIISTA—Villanova Interdisciplinary Immigration Studies Training for Advocates,* https://www1.villanova.edu/university/professional-studies/academics/professional-education/viista.html.

125 Individuals accredited by the Board of Immigration Appeals (BIA) may represent noncitizens before the Department of Homeland Security and, if accredited ad a higher level, before the Executive Office for Immigration Review. 8 C.F.R. § 1292.1(a)(4).

126 The Immigration Court Helpdesk program, funded by the Executive Office for Immigration Review and administered by the Vera Institute of Justice, funds legal service organizations to help unrepresented noncitizens navigate proceedings and understand their legal options. The Helpdesk program operates in thirteen Immigration Courts across the country. Vera Institute of Justice, *Immigration Court Helpdesk*, https://www.vera.org/projects/immigration-court-helpdesk.

This is not to say that lawyers cannot contribute meaningfully—or have not done so—in an emergency response situation. But placing the role of lawyers front and center can communicate to students as part of their course of professional education that intervention is the sole provenance of legal professionals. As clinicians, we must consciously address this misperception as in our teaching. As discussed below, there are many ways to structure a crisis response to highlight a specific role that can be played by lawyers to support larger community efforts.

4. Design

If the questions above yield positive responses, one more question remains for the clinician to consider: *how will we do this work?*

Before answering this, we acknowledge the necessary critique of our own and many other clinics offered by Sameer Ashar, who first called upon clinicians to consider different kinds of clinics in these pages in 2008. Ashar notes how "[p]oor people are not served well by the kinds of advocacy currently taught and reinforced in most law clinics."[127] Among other aspects of his critique of the "canonical" models of clinics, he shows how client-centered lawyering tends to "overlook the relationship between the legal action and the pre-existing political engagements of both lawyer and client."[128] Ashar adds, "[c]ase-centered clinics are primarily accountable to students and law school administrators, rather than clients, and fail to serve political collectives."[129] As shown in our critique, *infra,* of systemic failures that produce emergencies, Ashar's insistence on considering political collectives is all the more important. He personally went on to create movement lawyering clinics at University of California—Irvine and later UCLA—and many other clinicians, particularly in the community development space, incorporate this work as core to their design.

It is safe to say, however, that most clinics still have the lawyer-client dyad at the center of their design, and it is for these clinics that our design question is intended. As part of a response, clinicians might assess whether our priorities are appropriate in the first place. We suspect that after doing emergency work, many more clinicians will consider ways of challenging or adapting the canonical approach. In the meantime, we offer some thoughts for the harried period of entering the emergency fray.

In planning a response, it is worth attending to that aspect of crisis leadership that Brescia and Stern refer to as "meaning-making"—the

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127 Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clinical L. Rev. 355, 357 (2008)

128 *Id.* at 382.

129 *Id.* at 387.

need to consider how a crisis and responses are understood or perceived.[130] Legal clinics are not always situated for optimal meaning-making, and may be better situated to assist as part of a collective effort. Not only does such an approach provide valuable professional lessons collaboration and an important demonstration to students of the importance of professional humility, it is also about pushing back on a reflexive, trauma-reinforced response that many clinicians will recognize: *if we don't do it, nobody will.*

The answers to the previous three questions in this checklist will thus be instructive when designing a response. For example, the scope of a project can be adjusted to reflect a clinic program's zone of competence and capacity. Clinics may opt to take on work in partnership, or responsibilities delegated by community organizations or institutions, as part of a collaborative response. Institutions may find creative ways to involve students outside of clinics, incorporating alternative models such as alternative breaks or student volunteer networks.[131] Other considerations may include whether all aspects of the work will be assigned or whether students might have the choice to opt in; whether the work will be taken on individually or by a group; and who ultimately decides what course of action will be taken.

Another design question concerns how teaching and clinical methods will operate in the potentially fast-paced context of an emergency response. Clinical education has long-standing precedents, for example about the role of teamwork[132] and non-directive supervision.[133] Clinicians acknowledge that, in a rapidly-unfolding emergency situation, clinicians themselves may ultimately take on a larger role in the work and some of these longstanding principles of clinical education may need to be modified.[134] Such considerations may include whether all aspects of the work will be assigned or whether students might have the choice to opt in; whether the work will be taken on individually or by a group; and who ultimately decides what course of action will be taken. While tradeoffs in the short-term are recognized by many clinicians as necessary, the rationale for these tradeoffs deteriorates in the face of protracted crises or legal fields where crises emerge regularly.

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130 Brescia & Stern, *supra* note 82, at 14.

131 *See* Section IB. *supra*.

132 *See, e.g.*, David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 Clinical L. Rev. 199 (1994-1995).

133 *See, e.g.* David F. Chavkin & Elliot Milstein, Clinical Legal Education: A Textbook for Law School Clinical Programs (2001); Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 Clinical L. Rev. 505, 518 (2012); Serge A. Martinez, *Why are We Doing This? Cognitive Science and Nondirective Supervision in Clinical Teaching*, 26 Kansas J. of Law & Pub. Policy 24 (2016).

134 *See* Ahmad & Wishnie, *supra* note 19, at 328-332; Harris, *supra* note 2, at 190.

Given the potential effects of emergency response on the well-being of clinicians and students alike, reflection is a particularly important aspect of clinical teaching to incorporate into the design of an emergency response. Clinicians cite reflection circles,[135] debriefing sessions,[136] journaling,[137] and student presentations[138] as important sites of learning and personal meaning-making for students. In particular, Lindsay Harris notes the importance of teaching students about secondary trauma in order to hedge against the development of symptoms, and notes that clinicians created reflective space for students working at detention centers to process their experiences and identify their emotions, in some cases with the support of a mental health professional.[139] As Dr. Rachel Naomi Remen says, "The expectation that we can be immersed in suffering and loss daily and not be touched by it is as unrealistic as expecting to be able to walk through water without getting wet."[140] In planning for involvement in a crisis, we must prepare our students and ourselves for the difficult work of witnessing suffering and confronting systemic harm, and the compassion fatigue and trauma responses that may follow. This best practice in response design also brings us full circle: a grounded approach that recognizes the emotional toll that crisis can take will help us recognize potential trauma for ourselves. This approach can leave us more self-aware when we contemplate intervention in the next emergency—because there will always be a next emergency.

C. Lessons Learned

Sabrina developed and first implemented the four-question framework above alongside her Fall 2021 students in the Community Advocacy Clinic (CAC). The CAC is an evening clinic at Wayne State Law School, with enrollment geared towards evening- and part-time students. Sabrina was poised to consider whether she would shift the focus of the CAC to address the need for legal representation for Afghan and Ukrainian asylum-seekers. She and her students considered all four questions in

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135 Morin & Waysdorf, *supra* note 34, at 607-08.

136 One form of debriefing is "the Big Table," developed as a practice by Stephen Manning of Innovation Law Lab for volunteer attorneys at the Artesia Detention Center. *See* Stephen Manning, The Artesia Report (2015) Ch. 10, *The Mechanics of Artesia* https://innovationlawlab.org/thertesia-report/the-artesia-report/ ("Big Table was a nightly meeting of all the advocates on-the-ground that would last until the early morning hours. It was a meeting held in round-table fashion in which each advocate at the table spoke in equal measure on the day's successes and failures, on critiques of the arguments and case theories, on mapping strategy for difficult fact patterns, and on setting a plan for the next day."). *See also* Harris, *supra* note 2, at 215.

137 Harris, *supra* note 3, at 170-83 (describing journaling assignments for students participating in representation efforts at detention centers).

138 *Id.* at 215-16.

139 *Id.* at 206-07.

140 Rachel Naomi Remen, Kitchen Table Wisdom: Stories That Heal (1996).

this framework together. The elephant in the room was capacity: nearly all the students had full-time jobs, and many had young families. They were (rightfully) concerned that they would not be able to manage the demands of full-scale representation. Sabrina and the students decided to return to a model that the ACLU used in the *Hamama* litigation, opting to support legal service providers engaged in legal representation by developing a database with country conditions information and legal research to support Afghan asylum claims. While it felt painful at the time to not respond as a direct service provider, Sabrina is grateful now as she reflects on the more limited role the clinic decided to take, which made it possible to navigate the changes in case scheduling and procedures for existing AILC clients in the aftermath of the pandemic.

Liz did not have the opportunity to deploy this framework before she transitioned out of clinical teaching entirely. When she learned about it from Sabrina, she immediately recognized that the immense value was doing the very thing we do in our clinical teaching with students: slowing things down and questioning assumptions. The framework does not lead clinicians toward singular answers—it may push some to do more or different work, and it may give others courage to moderate the extent of the work they are already doing. Sabrina's radical action was simply to acknowledge that there was more space around that decision-making than many of us, Liz included, had perceived. Her hope is that clinicians on unsustainable paths might avail of that increased reflective space to make choices that let them do this work well for many years to come.

IV. Conclusion

This article adds to the existing literature on clinicians and crisis response by asking questions that we as clinicians have the unique luxury of asking. What are the systemic critiques of emergency frameworks and how do we calibrate our clinics' responses accordingly? How do we shepherd our resources, serve our existing clients as well as the community, and support student learning in the face of crisis? And what expectations do we encounter—from ourselves, from our institutions, from our profession—when confronted with the question of whether and how to respond to an emergency? We believe that our understanding of emergencies in clinical education has the potential to evolve in ways that are more contemplated, trauma-informed, and sustainable. In particular, we believe that crisis response needs to account for the toll—physical and psychological—that this work takes, and the need to incorporate existing literature on the long-term effects of traumatic work into our understanding of emergency intervention.[141] In doing so, we model a different vision

[141] *See, e.g.* Harris & Mellinger, *supra* note 86.

of clinical work for each other in the teaching community, and a more holistic conception of public interest lawyering for our students. We also recognize that these processes are organic and will reflect the realities of a specific time and place—the phases of our careers, the shifting of our personal boundaries, the energy and aspirations of our students, how acutely the present emergency is felt and whether it stands alone or is preceded by other crises. But it is important to remember that our clinics are not the only sites of community response or student learning, and we should evaluate our responses holistically.

As part of introducing this critical dimension to emergency intervention, we must ask the age-old question of who benefits. Some of the beneficiaries are well-identified: ideally the affected communities and our students. We clinicians may also benefit, if the work fortifies our spirit, builds our reputations and secures our positions, and even deepens our scholarship. Our own institutions benefit as well, and it is important to note that at times they may do so at clinicians' expense. The value of our work is evident to law schools and universities, who regularly highlight clinics and personal engagement of clinicians in recruitment, admissions, and public relations generally. It is especially problematic when clinical work is used to burnish a school's otherwise poor levels of commitment to the wider community—a complaint we have heard from many of our clinical colleagues around the country. This dynamic may result in pressure—direct or indirect—for clinicians to intervene in local emergencies or embrace models to respond to national ones. Where these expectations are not balanced by secure status, representation in faculty governance, and programmatic support, this imbalance of cost (borne by clinicians themselves) and benefit (to institutions) is especially acute.

The benefits to the institution do offer a potential source of leverage for clinicians at institutions that do not yet fully support clinical programs with durable status for professors, with coverage support for those required to do scholarship, and more. While we believe the less attention-grabbing work done daily deserves recognition regardless, the valorization of emergency work may create an opportunity for clinicians to seek the institutional support they deserve.

The ruptures and rot revealed by emergencies also create an opportunity for clinicians to think proactively about what supports would be necessary to do this work well—to provide the benefits we lay out above, while diminishing some of the toll caused by scarcity of resources. As we envision the kinds of broad-scale legal challenges coming toward us in coming decades, we can think *now* about the clinics we wish to have in place when those challenges manifest.

FINDING OUR WAY: TEACHING LEGISLATIVE ADVOCACY CLINICS

Elizabeth B. Cooper & Anita Weinberg*

Legislative advocacy clinics are excellent vehicles for teaching lawyering skills, for achieving broad-based social change, and for imparting to law students the important roles they can play in preserving and strengthening our democracy. Notwithstanding their growth over the last 15 years, there has been little scholarly reflection about the pedagogy of teaching such clinics. This Article helps to fill this gap.

We provide a roadmap through the challenges that come with teaching legislative advocacy clinics—some inherent to working within legislative bodies and some that accompany working with organizational clients and advocacy partners—identifying ways that clinicians can ensure an excellent learning experience for our students while achieving essential and systemic social change for our clients and the communities they serve. We discuss four features of clinic design—project selection, supervision, the seminar, and project rounds—and explore how best to reinforce four key clinical learning goals—taking responsibility and self-reflection, client-centeredness, collaboration, and pursuing social justice—in these contexts.

We also share stories from our own clinics' legislative advocacy projects, trusting that clinicians can learn from our successes and our struggles. We conclude by encouraging our colleagues to more actively consider offering legislative advocacy clinics—or to mindfully incorporate such projects into their existing clinics.

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* Elizabeth B. Cooper is a Professor of Law at Fordham University School of Law and the Geraldine A. Ferraro Research Scholar. She founded and directs the Law School's Legislative Advocacy Clinic. She is Faculty Director of Fordham Law's Feerick Center for Social Justice and Co-Director of the Stein Scholars Public Interest Program. Anita Weinberg is the Curt and Linda Rodin Clinical Professor of Law and Social Justice at Loyola University Chicago School of Law. She co-directs the *Civitas* ChildLaw Center, is director of the ChildLaw Policy Institute, and founded and directs the Law School's Legislation & Policy Clinic. We are enormously grateful to the numerous participants in the AALS Legislation Working Group and the NYU Clinical Law Review Workshop who, over many years, have brainstormed with us about running legislative clinics and given us guidance about what needed to be written about our work. We also add our deep thanks for their critique, insights, encouragement, and edits to Susan Brooks, Tim Casey, Marcy Karin, Wendy Seiden, and Ann Shalleck. Thank you to our Research Assistants Marlee Burridge, Kevin Hurtado, Margaret (Greta) Kaufman, Kaitlyn Ries, and Nafeeza Subhan for their skilled research, insights and suggestions. Professor Weinberg thanks former post-graduate teaching fellows Soledad McGrath, Amy Meeks, and Eve Rips who, over the years, helped to envision and build the Loyola clinic and read early drafts of this article. Professor Cooper also is grateful to Fordham University and Fordham Law School for their generosity in supporting this project. We both are appreciative of all the ways we learned from each other throughout this process and for the impact it already has had on our teaching and scholarship.

Introduction

We teach legislation clinics because we consider them an excellent vehicle for equipping students with the lawyering skills necessary to do systemic social justice work. Focusing on social justice is not new to clinical education.[1] In fact, the law school clinical model evolved out of the work of legal services providers who sought to involve law students in providing legal services to un- and underrepresented communities and to change the traditional model of legal education.[2] But law schools only recently have begun to integrate a legislative focus into their curriculum,[3] including in clinics.[4]

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[1] *See generally* Stephen Wizner & Jane H. Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 Fordham L. Rev. 997 (2004); David Barnhizer, *The Justice Mission of American Law Schools*, 40 Clev. St. L. Rev. 285 (1992); Haywood Burns, *Bad News, Good News: The Justice Mission of U.S. Law Schools*, 40 Clev. St. L. Rev. 397 (1992).

[2] *See* Wizner & Aiken, *supra* note 1, at 998 ("Clinics were about skills training, providing services, influencing policy, and developing future legal aid and civil rights lawyers."); Michael Meltsner & Philip G. Schrag, *Report from a CLEPR Colony*, 76 Colum. L. Rev. 581, 582 n.2 (1976) (identifying the purpose of early clinical funding "to improve legal education by making it more relevant to community needs, and to enable law students to learn better by affording them some contact with the reality of legal practice"). *See generally* Louise G. Trubek, *U.S. Legal Education and Legal Services for the Indigent: A Historical and Personal Perspective*, 5 Md. J. Contemp. Legal Issues 381 (1994) (providing a history of legal services through the perspective of a clinician); Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin,* 33 J. Legal Educ. 619 (1983); Robert J. Condlin, *Clinical Education in the Seventies: An Appraisal of the Decade*, 33 J. Legal Educ. 604 (1983).

[3] *See generally* William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond & Lee S. Shulman, Educating Lawyers: Preparation for the Profession of Law (Carnegie Foundation for the Advancement of Teaching 2007) (hereafter cited as "Carnegie Report"); *see also* Jacob Williams & Sydney Grell, *The State of Democracy Education in Law Schools*, ABA (May 6, 2024), https://www.americanbar.org/groups/public_interest/election_law/american-democracy//resources/state-democracy-education-law-schools/ ("[L]aw schools focus much more on the judicial branch than the legislative branch. This juris-centric curriculum does not teach about democratic government."). Ever since Christopher Columbus Langell created the casebook method to teach law in the 1870s, law school pedagogy has focused primarily on what happens in the courtroom. *See Christopher Columbus Langdell*, Britannica, https://www.britannica.com/biography/Christopher-Columbus-Langdell#ref144837 [https://perma.cc/H7ES-L495] (last visited Aug. 26, 2024). As is evident from the casebooks used to teach Legislation & Regulation, even these courses typically focus on statutory interpretation, and not on the legislative and regulatory drafting and political processes.

Pop culture also contributes to the perception that lawyers are litigators. *See, e.g.*, *Law & Order* (NBC television broadcast) (police procedural including criminal trials that has aired for decades), *Suits* (USA Network television broadcast) (syndicated series following the life of a young associate working in a high-stakes New York City law firm who uses his photographic memory to litigate and win cases all while hiding his college dropout past).

[4] We credit Chai R. Feldblum with starting the first in-house legislative advocacy clinic at Georgetown Law School in 1993. *See* Chai R. Feldblum, *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*, 34 McGeorge L. Rev. 785, 786 (2003); *cf*. Steven H. Leleiko, *Clinical Law and Legislative Advocacy*, 35 J. Legal Educ. 213, 213-30 (1985) (describing a legislative clinic that now would be described as an externship). We count ourselves as early developers of this clinical model. Professor Cooper created

Recent challenges to American democracy have driven home the important roles lawyers can—and must—play in the legislative process.[5] Legislative advocacy clinics can introduce students to this responsibility to protect a robust democracy and to pursue systemic social justice reform. In turn, students gain critical lawyering skills and learn both the strengths and weaknesses of using the legislative arena for creating change.

In our clinics, students work as legislative lawyers on behalf of community-based organizations, multi-party coalitions, task forces, or other entities.[6] We use a client-centered and critical theory lens to enable our students to understand the role and power of the law, especially as it affects underserved and underrepresented communities. Students also gain an understanding of the challenges to changing bad laws and preserving good ones, and the skills to make meaningful change on a broad landscape. Through this work we also teach our students to effectively

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an earlier version of the Legislative Advocacy Clinic in Fall 2005. In 2010, Professor Weinberg converted a two-credit legislation seminar with mock exercises to the four-credit Legislation & Policy Clinic she teaches. Other early innovators include Marcy Karin (2009) and Kevin Barry (2008). The 2022–23 CSALE survey reported that 16% of schools offer a clinic where the "substantive focus" is legislative/policy. *See* Robert R. Kuehn, David A. Santacroce, Margaret Reuter, June T. Tai & G. S. Hans, *2022–23 Survey of Applied Legal Education*, Ctr. for the Study of Applied Legal Educ. 7 (2023), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/64fb7bd82fdee48e57e8ef04_Report%20on%202022-23%20CSALE%20Survey.rev.9.8.23.pdf [https://perma.cc/G5JS-23UU]. Contrast this with 11% of schools offering such a clinic in 2013–14 and 1% in 2007-2008. *See id.* at 7–8 (discussing data from 2022–23 and 2013–14); Robert R. Kuehn & David A. Santacroce, *Report on the 2007–2008 Survey*, Ctr. for the Study of Applied Legal Educ. 8 (2008), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/64fb7bd82fdee48e57e8ef04_Report%20on%202022-23%20CSALE%20Survey.rev.9.8.23.pdf [https://perma.cc/HJY9-FCEL]. From concurrent sessions we have led for many years at the AALS Annual Conference on Clinical Legal Education we know that many more clinics have taken on legislative advocacy projects in their litigation-oriented clinics. We do not explicitly address such hybrid clinics, but hope this Article will be helpful to those taking that approach.

[5] At its Democracy Summit in August 2024, the American Bar Association's Task Force for American Democracy concluded that our country and democracy face a wide variety of serious threats, including authoritarianism, and that "[t]oo many of us have taken our democracy, our rule of law, our civic norms and our freedoms for granted and have not done the hard work required to keep a free and fair democratic republic." ABA, Task Force for American Democracy 5 (2024), https://www.americanbar.org/content/dam/aba/administrative/news/2024/aba-democracy-task-force.pdf. The Task Force recommendations included "improving civic knowledge and understanding among Americans." *Id.* at 6–7. *See also* Williams & Grell, *supra* note 3 (noting that "[e]xperiential solutions such as law school student clinics … would be effective in igniting interest in both democracy and civics" and that "potential experiential highlights" include "[w]orking with Policy Makers").

[6] Chai R. Feldblum first coined the term "legislative lawyer." *See Feldblum, supra* note 4, at 786. While Feldblum offers a narrow view of the legislative lawyer role, we found our students are involved in the broad range of activities she identifies as necessary for legislative advocacy, including legislative lawyer, lobbyist, strategist, policy analyst, communications expert, and, at times, grassroots organizer. The Loyola clinic also engages in policy work that may not result in legislative change. The focus of this article, however, is specific to legislative work.

determine when legislative change is the appropriate or most effective means to address a client's problem. We want our students not only to understand the importance of changing unjust laws, but also to develop a sense of their responsibility to use their capacity to do so.[7]

Legislative clinic students work with their clients to learn about how a particular, yet complex, social injustice affects individuals or communities, and provide guidance or find possible legislative solutions to address the problem. Once students have a handle on the problem-definition, their further outreach to stakeholders and their research result in their developing a suitable solution and translating it into statutory language. From there, students help to create and execute a legislative advocacy campaign to convince the legislature to pass a bill and the governor to sign it.

Notwithstanding the growth of legislative advocacy clinics over the last fifteen years, there has been little scholarly reflection about the pedagogy of teaching such clinics.[8] This article fills this gap.[9] In Part I, we introduce our clinics, discussing our learning goals and describing some of our legislative advocacy projects. While some of our learning goals are specific to the legislative advocacy context, we focus on those shared by almost all clinicians,[10] including to develop self-reflective and invested

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[7] For students who choose not to pursue legislative work, our clinics provide them with a stronger understanding of statutory law, the legislative process, and the capacity to seek social justice in this context, as well as legal skills readily transferrable to other forms of lawyering.

[8] *See generally* Rex D. Frazier, *Capital Lawyering & Legislative Clinic*, 55 Duq. L. Rev. 191 (2017); Kevin Barry & Marcy Karin, *Law Clinics and Lobbying Restrictions*, 84 U. Colo. L. Rev. 985 (2013); Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 Clin. L. Rev. 505 (2012) [hereafter Mylniec, *Where to Begin*]; Jayashri Srikanthiah & Jennifer Lee Koh, *Teaching Individual Representation Alongside Institutional Advocacy: Pedagogical Implications of a Combined Advocacy Clinic*, 16 Clin. L. Rev. 451 (2009); Leleiko, *supra* note 4.

[9] Other clinical offerings, particularly those representing organizational clients (e.g., community economic development, intellectual property, and impact litigation clinics), also have had to adapt clinical pedagogy to pursue their clients' goals. *See generally* Jennifer Li, *Teamwork Makes the Dream Work: Improving Community Lawyering Through a Policy and Transactional Law Clinic Partnership*, 20 Clin. L. Rev. 187 (2023); Karen L. Tokarz, Nancy L. Cook, Susan L. Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 Wash. U. J. L. & Pol'y 359 (2008). We have adopted many of the practices described by these authors, as explained *infra* Part III (Our Pedagogy).

[10] There are countless potential learning goals for clinical law students. *See generally* Susan Bryant, Elliott Milstein & Ann Shalleck, *Learning Goals for Clinical Programs*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014); Carnegie Report, *supra* note 3; Roy Stuckey and Others, Best Practices for Legal Education: A Vision and A Road Map (Clinical Legal Education Association 2007) (hereafter cited as "Best Practices Report"); ABA Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development – An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (1992) (hereafter

lawyers, who are client-centered, and who understand the power of collaborative work and the structural issues that create and perpetuate the problem(s) faced by the client.

As we explain in Part II, there is much about the legislative process, and the complexities of working with organizational clients and other amorphous advocacy partners, that create specific challenges and, in turn, opportunities for us to pay close attention to our pedagogical choices. Unlike disputes filed in courts and administrative settings that are governed by specific sets of federal or state rules that are intended to guide the course of litigation, there are no such rules in the legislative arena. These challenges also include the number and diversity of decision-makers involved in moving forward legislation; the extent to which existing relationships among advocates, legislators, and other stakeholders can influence access and outcomes; and the uncertainty and unpredictability involved in legislative work.

In addition, the "client" may be more than one group that has come together to pursue a specific legislative initiative. They may be community-based organizations, loosely formed—or formally established—working groups or coalitions, legal advocacy or not-for-profit organizations, and task forces sometimes appointed by the legislature or governor. Because we do not represent individuals, students can struggle with envisioning a big picture solution and grasping the deep tangible, psychological, and personal impact of bad law.

This constellation of challenges, along with our learning goals, requires us to build upon and sometimes reframe traditional clinical pedagogy. In Part III, we spotlight four areas in which we do this: the criteria for selecting projects, supervision of student teams, the ways we structure our seminars, and how we conduct project rounds.

We conclude that clinical pedagogy is resilient. Legislative clinics provide an exciting and effective forum to challenge students to problem solve and think creatively; to teach essential lawyering skills, including to be thoughtful, reflective, collaborative and client-centered advocates; to gain insight into the structural issues that harm underserved and underrepresented communities; and to address social injustices through legislative change.

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cited as "MacCrate Report"); Wallace J. Mlyniec, *Developing A Teacher Training Program for New Clinical Teachers*, 19 Clin. L. Rev. 327 (2012); Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 Law & Social Inquiry 620 (2011); Angela O. Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 Clin. L. Rev. 15 (2004).

I. Legislative Advocacy Clinics

Legislative clinics are part of the movement that has diversified clinical education from its original focus on representing individual, low-income and otherwise disenfranchised clients in litigation to seeking broader, more structural changes.[11] Working under the supervision of clinic faculty, our students work with community-based organizations, loosely formed—or formally established—working groups or multi-party coalitions, legal advocacy or not-for-profit organizations, or task forces appointed by the legislature or governor,[12] whom we consider clients.[13] Our clients typically seek statewide legislative solutions[14] to problems that have a disproportionate and negative impact on communities and individuals of color, those who are impoverished, and those who are otherwise disenfranchised. To achieve these goals, our students also collaborate with advocacy partners who, like our clients, may have many different formal or informal structures.

Students are challenged to make connections between the client's identified problem (i.e., an individual or group's experiences on the ground) and systemic solutions that will address the client's concerns. This requires the students to focus on questioning, challenging, and

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[11] *See generally* Margaret Martin Barry, John C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 Clin. L. Rev. 1 (2000); Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 Clin. L. Rev. 489 (2013); Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 Clin. L. Rev. 39 (2013). We recognize the good fortune we have in being able to direct legislative advocacy clinics. We both teach in private law schools that respect academic freedom and that, particularly as Jesuit institutions, are focused on the imperative to do social good. We realize this is not true for all. *See generally* Robert R. Kuehn and Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 Fordham L. Rev. 1971 (2003); Robert R. Kuehn & Bridget M. McCormack, *Lessons From Forty Years of Interference in Law School Clinics*, 24 Geo. J. Legal Ethics 59 (2011); Barry & Karin, *supra* note 8.

[12] Loyola's Legislation & Policy Clinic will also sometimes work at the request of a legislator.

[13] Not all of our "clients" would identify themselves as clients, and instead might describe themselves as an advocacy partner. Regardless, however, our students treat them as clients, observing the rules of professional responsibility. Fordham's clinic is increasingly using a Memorandum of Understanding (MOU) to outline the clinic and the entity's responsibilities, including our commitment to maintaining confidentiality, recognizing that in an unlikely evidentiary challenge, attorney-client privilege may not be respected. Loyola's clinic sometimes partners with formal and informal groups to seek legislative change where there is not an identified "client."

[14] An important advantage to seeking statewide social justice reform is achieving the same beneficial policy for all residents of the state, rather than proceeding locality by locality. Consider, for example, the importance in New York State of enacting a statewide ban on discrimination against trans, non-binary, and gender non-conforming individuals. Many counties and localities had enacted these provisions, but this patchwork approach meant a person might be protected against discrimination at home but not at work.

addressing structural, racial, and economic disparities,[15] and may require working to reform or overhaul systems.

Legislative advocacy campaigns rarely achieve a client's goal within one academic year, let alone within the one semester most students are enrolled in our clinics. As a result, our student teams often work on different stages of a legislative campaign,[16] which can include: early efforts to research and appropriately define the problem the client wishes to fix; convening and/or participating in coalition building; drafting a bill and supporting advocacy documents; writing policy papers and reports; preparing and presenting testimony; and reaching out to legislators and their staff to obtain sponsors and get a bill passed.[17] Students also participate in a weekly seminar and in project rounds, both of which supplement their learning and serve a significant role in their acquiring lawyering and legislative advocacy skills.[18]

With this background about our clinics, we turn to a brief discussion of our learning goals and then describe how these goals are met in a sampling of our clinic projects.

A. Learning Goals

Our legislative advocacy clinics are designed to share many of the same pedagogic tools and learning goals as other clinics.[19] First, we seek

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[15] *See generally* Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 Denv. L. Rev. 399 (2019); William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DePaul J. Soc. Just. 7 (2007). These goals align with Loyola University Chicago School of Law Mission Statement: "to educate students to be responsible and compassionate lawyers, judges, and law-related leaders in an increasingly diverse and interdependent world; to prepare graduates who will be ethical advocates for justice and equity, who will lead efforts to dismantle the legal, economic, political, and social structures that generate and sustain racism and all forms of oppression, and who will advance a rule of law that promotes social justice; to contribute to a deeper understanding of law, legal institutions, and systems of oppression through a commitment to transformation, intersectionality, and anti-subordination in our teaching, research, scholarship, and public service." *See Mission*, Loyola University Chicago School of Law, https://www.luc.edu/law/about/mission/ [https://perma.cc/N8KL-QN6P] (last visited July 12, 2024).

[16] Am. Inst. of Architects, Speak Up: Five Elements of a Legislative Campaign 2 (Oct. 2016), https://higherlogicdownload.s3.amazonaws.com/AIA/UploadedImages/7b49d399-29f9-427e-a1eb-2c7ae403905a/Advocacy/Five_Elements_of_a_Legislative_Campaign.pdf [https://perma.cc/FQA4-4MEL] ("Building a campaign to win a policy issue requires several crucial elements: research, a winning message, reliable allies, knowledge of the legislative and political landscape, and teamwork.").

[17] Not all our projects result in legislative change: along the way it may be determined that legislation will not be the most effective approach, or the goal of the project may be to develop a policy brief or report to better educate stakeholders and legislators rather than move legislation forward. *See infra* Part I.B.1. (Loyola's Legislation & Policy Clinic).

[18] *See infra* Part III for discussion of how we structure our project selection, supervision, seminar, and project rounds.

[19] Most of our learning goals reflect those identified in the Standards adopted by the ABA Section on Legal Education and Admissions to the Bar and look similar to those

to teach students to self-reflect and integrate critique from others.[20] This facilitates four crucial outcomes for our students: thinking deeply and strategically in a way that is not possible without this investment;[21] improving lawyering skills and enhancing the capacity to transfer abilities to other lawyering contexts;[22] developing sound professional

adopted by other clinicians. *See* ABA Section on Legal Education and Admissions to the Bar, ABA Standards and Rules of Procedure for Approval of Law Schools 2023-2024 (2023) (specifically Standard 302 (Learning Outcomes), Standard 303 (Curriculum), and Standard 304 (Experiential Courses), and Standard 206 (Diversity and Inclusion)).

The pedagogy of clinical legal education, which is drawn from the work of learning theorists, requires that students—under the supervision of clinical faculty—be given the opportunity to step into lawyer role, take responsibility for achieving their clients' goals, and learn to adapt to the uncertainty inherent to lawyering. *See generally* David A. Kolb, Experiential Learning: Experience as the Source of Learning and Development (2d ed. 2014); Donald A. Schön, The Reflective Practitioner: How Professionals Think in Action (1983). For more information about learning theory in the clinical context, *see* Anthony G. Amsterdam, *Clinical Legal Education—A 21st Century Perspective,* 34 J. Legal Educ. 612, 616 (1984) (describing how "[s]tudents bore the responsibility for decision and action to solve the problem" and that the critical review sessions that followed were the "beginning of the students' development of conscious, rigorous self-evaluative methodologies for learning from experience—the kind of learning that makes law school the beginning, not the end, of a lawyer's legal education"). *See also* Ann Shalleck & Jane H. Aiken, *Supervision: A Conceptual Framework*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy 172 (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014) ("Supervision makes it possible for students to have responsibility for representing clients."); Jaime A. Lee, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. 227, 266 (2020) (describing how "the metacognitive process is a revolutionary tool for law teaching [that] explicitly puts the power to achieve excellence into the students' own hands"); Alistair E. Newbern & Emily F. Suski, *Translating the Values of Clinical Pedagogy Across Generations*, 20 Clin. L. Rev. 181, 182 (2013) (discussing non-directive teaching, reflection, immediate supervision, learning from experience, and a commitment to social justice as enduring principles in clinical teaching); Mlyniec, *Where to Begin*, *supra* note 8 (explaining how clinical pedagogy is intentional, experiential, reflective, and highly dependent on the kind of faculty supervision provided and the interactions between faculty and students).

[20] We expect our students both to be self-reflective and to integrate critique from others (e.g., classmates, supervisors), as both are integral to the adult learning cycle (i.e., the ability to learn and also to be capable of transferring learning from one context (clinic) to another (practice). *See* John Dewey, How We Think 72-78 (1910) (describing what we now characterize as experiential education); Kolb, *supra* note 19, at 28 ("[L]earning is a" continuous process grounded in experience[;] it implies that all learning is relearning"); Shalleck & Aiken, *supra* note 19, at 185 ("[S]tudents' capacity to learn through reflection … is at the core of all clinical pedagogy."). As students gain experience and expertise, they increasingly are able to observe themselves in action—becoming all the more cognizant of ways in which their execution of their plan is—or is not—working. *See* Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 Vt. L. Rev. 1, 57 (1998–99) ("Each person must come to his or her own personal combination of knowledge and experience to lawyer").

[21] Shalleck & Aiken, *supra* note 19, at 184 ("[I]n representing each client, the student confronts the meaning of having responsibility for that person's well-being" which "also entails feeling the weight of consequences for another."); *Id.* at 177 (observing that "[a]t the core of supervision is the importance of helping students treat lawyering as a process imbued with uncertainty").

[22] *See* Amsterdam, *supra* note 19, at 617 (describing how clinical legal education involves review sessions with faculty and others where they focus on "understanding past

judgment;[23] and appreciating the importance of being a lifelong learner—an attorney always capable of growth.

Second, we want our students to be client-centered advocates[24] who have the skills to research and assess the client's problem, propose creative solutions, and develop effective arguments and messaging, orally and in writing, while recognizing that clients are experts about their own lives.[25] Keeping the client and their goals at the front of the students' consideration also facilitates their investment in the outcome of the case/project—and therefore, as noted earlier, in their learning.[26]

Third, we seek to instill in our students the power of collaboration, both within the clinic and in the context of the formal and informal coalitions in which many of them work.[27] In these analogous contexts, we focus on developing clear lines of communication; setting forth explicit, jointly-developed expectations; and following-through on commitments.[28] These elements allow students (and our community-based

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experience and for predicting and planning future conduct"); Tonya Kowalski, *True North: Navigating for the Transfer of Learning in Legal Education,* 34 Seattle U. L. Rev. 51, 53, 87 (2012) (stating that learning for transfer includes "metacognitive reflection" that "helps students encode knowledge for future transfer").

[23] *See* Shalleck & Aiken, *supra* note 19, at 172 ("With responsibility, students have a stake in the representation that affects their motivation and commitment to learn. They learn so they can do a good job for clients and become comfortable in their new identities as student attorneys. Responsibility deepens reflection on their actions as they identify, evaluate, and incorporate into their self-understanding the consequences of their choices and actions for their clients and for others. Having responsibility for clients also contributes to taking responsibility for learning. Students come to understand that effective lawyering requires continuous learning."). This process also facilitates the student's forming their professional identity. *See id*. at 189–90.

[24] Client-centered lawyering is so deeply grounded in clinical legal education that it can almost be taken for granted. *See* David A. Binder, Paul B. Bergman, Paul R. Tremblay, Ian S. Weinstein, Lawyers as Counselors: A Client-Centered Approach 1 (3d ed. 2011) ("[C]lient-centered counseling has become one of the most broadly shared conceptions of lawyering in the country"); Stefan H. Krieger, Richard K. Neumann Jr., Renée M. Hutchins, Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis 26 (6th ed. 2020) ("'client-centered lawyering' … means focusing our efforts around what the client hopes for … and treating the client as an effective collaborator"); Shalleck & Aiken, *supra* note 19, at 179 ("The client is the touchstone for representation in each case or project."). We have wondered whether it may be easier to keep students client-centered when representing individual clients.

[25] Shalleck & Aiken, *supra* note 19, at 177 (describing how a client may have many reasons for pursuing legal representation, only some of which may be readily evident to the student); *id.* at 179 ("[T]he client's experience with a matter has different boundaries.").

[26] *See id.* at 172, 183–84 (observing that "empathy, the capacity to think about the world from the perspective of another and to imagine how another person experiences the world, is basic to the lawyer-client relationship").

[27] *See* Susan Bryant, *Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession*, 17 Vt. L. Rev. 459, 460–61 (1993) ("if lawyers use a collaborative process … their joint effort will result in a better work product and more satisfying work").

[28] *See generally id*.; David Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 Clin. L. Rev. 199 (1994–95).

advocacy partners) to build trust and psychological safety,[29] two of the most important elements of successful collaboration and coalition-building.

Finally, the pursuit of social justice—a founding tenet of clinical legal education[30]—remains a guiding principle for us—in our case, seeking broad changes available through the legislature. We want our students to obtain a deep understanding of the structural issues that created and perpetuate the problem(s) faced by the client. This understanding should encompass barriers based on race, gender, disability, poverty, among others, and the capacity to engage in critical, thoughtful analyses of these obstacles, as well as to use this information to hone advocacy efforts in tactically and strategically effective ways to create social justice.[31]

Many of the lawyering skills we teach also are familiar to other clinical law professors: legal and factual research and analysis; problem solving; oral and written communication and advocacy; and adaptability as facts, information, and circumstances change.[32] At the same time,

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[29] *See* Amy Gallo, *What is Psychological Safety,* Harv. Bus. Rev. (Feb. 25, 2023), https://hbr.org/2023/02/what-is-psychological-safety [https://perma.cc/GB5Q-79CL] (defining psychological safety as the belief that one can express oneself, speak up, and admit mistakes without consequences).

[30] Clinical legal education, in part, grew out of the desire to increase access to legal services (and justice) to increasing numbers of people living in poverty. *See* Meltsner & Schrag, *supra* note 2, at 582 (describing how the original funding of clinical programs came about). Clinics around the country continue to take this commitment seriously, seeking to increase access to justice, raise students' awareness about the complexity and nuances of structural disadvantages, challenge them to question the disparities experienced by their clients, and identify ways (within the legal system or through other mechanisms) to obtain social justice. *See generally* Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014) and Jean Koh Peters & Susan Bryant, *Talking about Race*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014). State regulation of student practice also may require law school clinics to provide legal services solely to those who otherwise may be unable to obtain counsel; further, clinics often are barred from charging a fee. *See also* Loyola Law School Mission Statement, *supra* note 15.

[31] The benefits of developing a critical lens through which to analyze existing law and policy are enormous, and include improved lawyering and strategizing; a greater grasp of structural mechanisms of oppression within the law and otherwise; a better capacity to engage in critique based in critical theory; and increased capacity to dismantle and disrupt such structures, especially when perpetuated by the legal system; an enhanced understanding and relationships among students and between students and clients, including the impact of implicit bias; and a healthier learning environment for students of color and others. *See generally* Bryant & Koh Peters, *supra* note 30; Koh Peters & Bryant, *supra* note 30. That said, we also must discuss with students the potential limitations of legislative change on improving the status quo.

[32] Common pedagogical tools and learning goals include legal and factual research and analysis; problem solving; oral and written communication and advocacy; organization and management; and adaptability as facts, information, and circumstances change. *See* Shalleck & Aiken, *supra* note 19, at 13–31 (identifying seven key goals (and many more sub-goals)

our clinics operate in contexts that differ from the litigation-based or transaction-based practices with which students more often have become familiar through their early classes, externships, and jobs. This contrast lies in the nature of legislative advocacy, the characteristics of our organizational clients, as well as the types and range of roles students in legislative advocacy clinics assume. These may include legislative lawyer, lobbyist, policy analyst, communications expert, and at times, grassroots organizer.[33]

To ensure our students can step into these roles, we have additional learning goals that include: (1) obtaining a sophisticated understanding of legislative structures and political realities, including how to move the political levers of power; (2) being able to identify relevant stakeholders, legislators, and staffers to advance the client's interests; (3) developing a critical lens through which to analyze existing law and policy and to advocate for change from the status quo, recognizing the potential impact of legislation as well as its limitations; (4) drafting bills and crafting supporting materials; and (5) understanding different ways to approach systemic change and the reasons and potential for varied approaches.

When our learning goals come together, a legislative clinic teaches law students to interact with the law in a critical way, resulting in their being more sensitive to legal language and its purposes. The result is that they analyze and scrutinize the law more carefully throughout their careers, regardless of practice area. In addition, they are more likely to incorporate legislative advocacy into their legal practices. Lawyers are in the best position to know how the law can negatively impact their clients. Legislative clinics provide them with the skills to use legislative advocacy to change those laws.

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for clinical programs, including developing a professional identity; understanding how law functions in the lives of people, particularly the most marginalized; improving one's capacity to manage uncertainty and exercise good judgment; expanding one's capacity for critical and creative thinking; building respect for and commitment to metacognition and learning in professional settings; developing empathy, self-knowledge, and self-regulation; and building lawyering skills); MacCrate Report, *supra* note 10 (identifying ten skills including problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization, and recognizing and resolving ethical dilemmas; also identifying four key values including provision of competent representation, seeking to promote justice, fairness, and morality, striving to improve the profession, and professional self-development); Shultz & Zedek, *supra* note 10 (identifying twenty-six lawyering effectiveness factors); and regarding legal education more generally, Carnegie Report, *supra* note 3. *See also* Marcy Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Justice Advocates*, 17 Clin. L. Rev. 563, 565 (2011) (describing how the integrated law clinic model has been widely adapted and how it can be developed in both rural and urban settings).

[33] Feldblum, *supra* note 4, at 791. Although Feldblum assumes different individuals or organizations will fulfill the six roles that she identifies, we tend to operate on a smaller scale and with fewer resources; therefore, clinic students and our clients often take on a combination of these roles.

While Fordham and Loyola's legislative advocacy clinics share these learning goals for our students, our clients and the types of projects we undertake are more varied. To provide further understanding of how our clinics operate, the next section describes some of the projects our clinics have pursued.

B. Our Clinic Projects and Their Impact

Our clinics are designed to provide students with a client-centered and critical theory lens through which to understand the role, power, and impact of the law, especially on underserved and underrepresented communities. We select projects based on several factors (discussed in Part III), but they typically originate through an existing client, a legislator, an advocacy partner, or our outreach to others based on our own interests.[34] While Fordham and Loyola's legislative advocacy clinics share similar learning goals for our students, we take on more varied types of projects and clients.[35] Both clinics, however, require that each project expands our capacity to fight poverty or to create justice.

Below we describe several of our projects in order to enhance the understanding of who our clients are and the political context in which projects arise; to explain how we may become involved in the work and how it evolves; to explore the roles of the client, faculty supervisor, and students; and to share the impact of our work. Within the discussion of each project, we highlight at least one of the learning goals and some of the skills students developed.

1. Loyola's Legislation & Policy Clinic

The projects undertaken by Loyola's clinic seek to reform or transform systems that impact marginalized and underrepresented children, families, and communities—mainly focusing on child welfare, education, and juvenile justice, and sometimes on issues related to children's

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[34] On occasion, the Fordham clinic will select a project based on student interest, so long as it meets the clinics other needs. When Loyola's clinic first began, it allowed students engaged in a particular effort to turn it into a legislative clinic project; we no longer do this because we found that we could not effectively plan ahead for the semester, and because students were not in a position to determine if their proposal would offer the learning opportunities we seek. That said, a student's proposal may lead to a project at a later time. *See infra* Part III.A. (Project Selection and Design).

[35] Student opportunities can also vary because of differences in our legislative processes. For example, most bills in Illinois only move forward if a committee hearing is held. This process provides students with the opportunity to prepare and give testimony in support and/or opposition. In New York State, hearings are rarely held on individual bills and thus students seldom have the opportunity to testify before the state legislature. One exception, described *infra*, is when a student testified about the importance of creating a financial hardship exemption to New York State law permitting an individual's driver's license to be suspended if they owed $10,000 or more in back taxes. *See infra* notes 84-88 and accompanying text.

health and to immigration.[36] The projects often entail tackling multi-system issues and require students to consider whether—and if so how—responses other than legislation might be more effective.

One of Loyola's longest-term partners—for over 15 years—is the Statewide Youth Advisory Board (SYAB or Board)[37] to the Illinois Department of Children and Family Services (DCFS). We support the youth leaders in creating their own policy agenda and in drafting bills, preparing advocacy materials and testimony, and advocating for the legislation.[38] Often with legislative projects, it is difficult for students to regularly meet with individuals directly impacted by the issues we are addressing.[39] We are often working with groups representing those individuals and communities. The SYAB ongoing partnership works particularly well because it allows the clinic students to hear directly from youth involved in the child welfare system, and then provides the students with the opportunity to apply their learning and developing expertise to help the youth achieve their goals. Our partnership with the SYAB provides an ideal opportunity to meet all of our key learning goals—self-reflection, client-centered counseling, collaborative work, and social justice.[40]

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[36] Loyola's Legislation & Policy Clinic is housed within the Law School's *Civitas* ChildLaw Center. The Center equips students with interdisciplinary knowledge and practical skills to advocate on behalf of vulnerable children and families in both the litigation and policy realms. As part of its mission, the Center "advocates for laws, policies, and practices that advance children's rights, creates greater public awareness of children's circumstances, needs, and rights; and strengthens the quality of justice for children." Civitas ChildLaw Center, https://www.luc.edu/law/academics/centersinstitutesandprograms/civitaschildlawcenter/ [https://perma.cc/LU33-FY79] (last visited July 6, 2024). Much of this work is done through the Legislation & Policy Clinic and through the clinic's faculty. We also have worked on issues impacting the general population, including providing support for a coalition seeking to amend the Illinois Constitution to allow for a progressive income tax.

[37] The mission of the Statewide Youth Advisory Board, which is statutorily mandated, is to educate, advocate for, and empower all youth in care. The youth members, 15–21 years of age, are or have been in foster care. The executive boards of the four Regional Advisory Boards make up the statewide board. As described by the state's Department of Child and Family Services, the youth participate in workshops "designed to prepare [them] to become advocates for transformative change and give them tools they will carry into adulthood." *See Statewide Youth Advisory Board*, Ill. Dept. Child & Fam. Servs., https://dcfs.illinois.gov/brighter-futures/independence/statewide-youth-advisory-board.html [https://perma.cc/W8J8-5G6W] (last visited July 21, 2024).

[38] Our approach to working with the youth on different projects often depends on the challenges and the youth engaged in that particular effort. Usually, the student teams brainstorm with the youth, then share drafts of fact sheets, bills, and advocacy materials with the youth to get their input, and then finalize the documents. The youth draft their own testimony and we then work with them on refining it. The youth and students do the advocacy.

[39] *See generally* Katherine R. Kruse, *Biting Off What They Can Chew: Strategies for Involving Law Students in Problem-Solving Beyond Individual Client Representation,* 8 Clin. L. Rev. 405 (2002).

[40] "The clinic taught me coalition building, working across different sectors, centering the voices of those who will live with the consequences of your work, and finding ways to compromise when compromises are needed." Testimonial of Niya Kelly, Director of State

In this partnership, the youth board shares with the student team policies or practices in the child welfare or foster care system that they have identified that may be harmful to youth in foster care or to their siblings and families. The youth may or may not have already identified specific legislative goals. Often the students must first discern the youths' underlying interests before being able to help them determine their goals. The students then assess whether the goals are feasible, and in the context of the legislation clinic, whether a legislative response is the appropriate—or best—way to address the issue. If it is, they also determine whether the political and legal landscape can support such an effort.

Once the student team and the youth decide that it makes sense to move forward, the students will undertake further legal, policy, and political research and data analysis to help formulate the best legislative response. Because one of the goals of this partnership is shared learning—for the youth board members to also learn about legislative advocacy—the students will guide the youth and work side-by-side in consulting with additional community members.[41] Together, they create an advocacy strategy and materials for the initiative, and move the advocacy forward. What follows is a description of one of our projects with the Statewide Youth Advisory Board.

During summer 2023, the Board informed the clinic that they wanted to work on legislation that would recognize the significance of hair maintenance and style to self-expression, identity, and connection to race, culture, and gender, and to the mental health of youth in foster care.[42] The issue was of special concern to the youth because Black youth and LGBTQ+ youth are disproportionately represented in the child welfare system and many felt that they were not only losing their family, but also their culture and identity when removed from their families. While they were clear about their goals, the Board was uncertain about how to achieve their goal through legislation.

During fall 2023, a team of clinic students met with the SYAB members to discuss their goals and to learn more about their experiences in care as it related to hair maintenance and styling and its impact on

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Legislative Policy, Equity, and Transformation at Chicago Coalition for the Homeless (Aug. 25, 2022) (on file with authors) (describing her work on a project with the SYAB as part of the Loyola Legislation & Policy Clinic).

[41] These may be other youth in care, birth parent or foster parent groups, child welfare agency stakeholders, and legislators and their staffers.

[42] *See generally Strands of Inspiration Exploring Black Identities through Hair,* Nat. Museum of Afr. Am. Hist. & Culture, https://nmaahc.si.edu/explore/stories/strands-of-inspiration#:~:text=In%20some%20cultures%2C%20they%20convey,to%20express%20their%20personal%20style [https://perma.cc/REY2-2LF4] (last visited Aug. 28, 2023).

self-expression, identity formation, and cultural heritage.[43] The students assessed whether there were similar efforts elsewhere in the country, researched the history of the CROWN Act,[44] reviewed Illinois law to determine which child-related statutes could be affected, and drafted legislation. A new student team continued to meet with the youth during spring 2024 to refine the draft bill and ensure that it reflected the Board's goals. In addition, they pursued leads about relevant non-legislative efforts to address the haircare of youth in foster care, penned a letter to the editor on behalf of the House sponsor,[45] and prepared the youth for ongoing negotiations with DCSF to seek their support or at least their neutrality.[46]

That spring, the House and Senate held hearings at which two students and three youth testified in support of the bill. As the students worked on their testimony to describe the substance of the bill, they also guided the youth in preparing their testimony, which focused on youth experience in foster care regarding haircare and the potential significance of the bill on their mental health. The final bill, which was supported by DCFS and passed both chambers in the spring, requires that every child in foster care have a haircare plan that accounts for their cultural, racial, religious, gender and/or other identities.[47] The legislation also requires that the plan be reviewed regularly with the youth, and that DCFS develop training and provide resources in culturally competent haircare for caregivers.[48] Although most of our projects take several semesters to complete, the haircare bill passed in just two terms.

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[43] This issue offered important opportunities for student self-reflection. While diverse, no members of the student team were Black. It took some time for the students to grasp the significance of this issue. The discussions with the youth, the research the students undertook, and hearing the responses of Black legislators to the bill, raised awareness and challenged the students to consider their own life experiences and their assumptions.

[44] CROWN stands for Creating a Respectful and Open World for Natural Hair. The CROWN Act, first passed in California in 2019, prohibits hair-based discrimination in the workplace and at school. As of 2023, it has been passed in 24 states. *See* Jasmine Payne-Patterson, The CROWN Act (2023), https://www.epi.org/publication/crown-act/#:~:text=The%20CROWN%20Act%20is%20law,Texas%2C%20Virginia%2C%20and%20Washington [https://perma.cc/P4CJ-AHSH].

[45] Kim Du Buclet, Letters to the Editor, *Black Youth in Foster Care Deserve Hair Care Plans to Build Self-worth, Cultural Identity*, Chicago Sun Times (Apr. 30, 2024), https://chicago.suntimes.com/letters-to-the-editor/2024/04/29/hair-care-black-children-foster-care-dcfs-j-d-vance-women-reentry-letters [https://perma.cc/LSH8-38GK].

[46] Because DCFS was proposing to include all the detail from the bill in Departmental rules instead of a law, the student team also researched the rule making process and any current rules relevant to the issue to help the youth decide if they would support DCFS' proposal. Ultimately the youth did not agree to move all requirements in the bill into rules out of concern that rules could be too easily changed.

[47] P.A. 103-0850, 103rd Gen. Assemb., Reg. Sess. (Ill. 2024), https://www.ilga.gov/legislation/publicacts/103/PDF/103-0850.pdf.

[48] *Id.* The clinic also successfully worked with the Board to pass a law to statutorily mandate its existence. Before that, the Board was a free-standing organization dependent

Loyola's work on a bill to establish a standard for competency of juveniles to stand trial is an example of a longer-running initiative that has been underway for almost five years. It also is a project where Loyola assumed responsibility for the research and drafting of legislation but arranged for a partner to advocate for the bill in Springfield, Illinois' capital.[49] This project illustrates how students can learn to be self-reflective and client-centered even when not working with clients directly impacted by the problem being addressed, the effort spans several years, and we are not taking primary responsibility for advocating with legislators. It also serves our learning goals of instilling in students the power of collaborative work and the pursuit of social justice.

Beginning fall 2019, in response to a request by the multidisciplinary Illinois Children's Mental Health Partnership (the Partnership),[50] the

on the Department of Children and Family Services to choose to fund them each year. P.A. 98-0806, 98th Gen. Assemb., Reg. Sess. (Ill. 2014), https://www.ilga.gov/legislation/publicacts/98/PDF/098-0806.pdf. Other successful past projects with the SYAB include: a House resolution declaring the General Assembly's goal of eliminating the use of restraints and seclusion from all child-serving state agencies, H.R. Res. 0088, 101st Gen. Assemb., Reg. Sess. (Ill. 2021), https://ilga.gov/legislation/102/HR/PDF/10200HR0088lv.pdf; a law requiring DCFS to maintain the names and contact information for guardians *ad litem* appointed to represent children in care and making that information available to the youth and their caregivers, P.A. 102-0208, 102nd Gen. Assemb., Reg. Sess. (Ill. 2021), https://ilga.gov/legislation/publicacts/102/PDF/102-0208.pdf (until passage of this law, there was no identified central place to obtain this information); a law facilitating contact between youth in care and siblings who have been adopted, P.A. 97-1076, 97th Gen. Assemb., Reg. Sess. (Ill. 2012), https://ilga.gov/legislation/publicacts/97/PDF/097-1076.pdf; and an accompanying booklet for youth in care about their rights, Ill. Dep't of Child & Family Servs., How to Connect with Your Brothers and Sisters – Information for Youth, Parents and Caregivers (2014), https://dcfs.illinois.gov/content/dam/soi/en/web/dcfs/documents/loving-homes/foster-care/documents/cfs_1050-95_sibling_visitation_rights_booklet.1.0.pdf [https://perma.cc/V4NP-75U8] (emphasizing the responsibility of DCFS and private agency child protection, permanency and adoption staff to help children stay connected to their siblings).

[49] Because of the goal of the bill—which in effect would prevent some children from being tried as adults and others from ever being tried—we anticipated a small but consistently vocal and strong opposition that would require a daily presence in the State Capitol, which is over three-and-a-half hours from Chicago. We knew we would not be able to be present as much as would be needed to lead in-person advocacy on the bill. We therefore partnered with a child-serving organization that delegated one of its state lobbyists to lead advocacy and negotiations.

[50] The Illinois Children's Mental Health Partnership was created by the Children's Mental Act of 2003 and is committed to improving the mental health and well-being for all children and families. The Partnership members, appointed by the governor, represent families, child advocates, and experts in education, early childhood, health, mental health, child welfare, juvenile justice, substance abuse, violence prevention, and others, as well as state legislators, and representative from state agencies and departments including child welfare, public health, mental health, education, and corrections. The Partnership is made up of appointed members, as well as a management team, staff, and volunteer committee and work group members who work to advance the key priorities identified in the Strategic Plan for Children's Mental Health. *Children's Mental Health Partnership*, State of Ill., https://govappointments.illinois.gov/boardsandcommissions/details/?id=6715cb5e-2007-ee11-8f6d-001dd8068008 [https://perma.cc/7RP4-37SA] (last visited July 12, 2024).

clinic agreed to draft legislation that would require courts to recognize child development and emotional maturity when deciding a child's competency to stand trial. This bill is intended to support children through practices that are trauma-informed, protect children's and young adult's rights and dignity, and consider a child's maturity.[51] Currently, in Illinois, a child's competency is assessed using the adult criteria that are included in the criminal statute, but these criteria do not recognize that children and young adults are substantially different from adults.

During the first year of the project, the student team's work included meeting with the Partnership's leadership to discuss the project and its goals, studying national guidelines for juvenile competency,[52] completing a 50-state survey identifying and comparing state juvenile competency laws and their differences from the national guidelines, and reviewing Illinois' adult criminal and juvenile court acts to understand how they address competency. The team met often with the Partnership's leadership to present the information being learned about other states' laws and the national guidelines.

In the second year, the Partnership convened a working group to continue reviewing the information compiled by the student team and provide expertise as we drafted a bill. The diverse working group included representatives from the statewide state's attorney association,[53] which prosecutes these cases, several county public defender offices and defense attorneys who represent youth, mental health practitioners and forensic evaluators, and social service providers. The student teams drafted amendments to current law, and then presented the language to the working group, explaining their drafting recommendations. The working group either approved the language or provided further direction. The drafting process continued over two semesters before a final bill was approved by the Partnership and legislative sponsors were brought on board. The bill has been introduced two out of the past three

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[51] We debated taking on this issue, concerned that it might conflict with a project we were supporting to raise the age of criminal responsibility for youth. The concern among some advocates about legislating juvenile competency standards is that such standards would still hold young people accountable for delinquent acts for which they should be provided services rather than be locked up. After extensive conversations with advocacy partners, we decided to pursue the project, believing that it will take more time to get an acceptable bill passed establishing a minimum age of criminal responsibility in Illinois, and in the meantime, youth not competent to stand trial need protection. For more discussion about efforts to establish a minimum age, *see infra* Part III.A.3. (Likelihood of Success and the Timeframe for Achieving a Client's Goals).

[52] *See generally* Kimberly Larson & Thomas Grisso, Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers (Nov. 2011).

[53] State's Attorneys are the chief prosecuting officers in each county. *See* Ill. Ass'n of Cty. Bd. Members & Comm'rs, *Inside the Courthouse: State's Attorney*, https://ilcounty.org/upload/files/States-Attorney-Fact-Sheet.pdf [https://perma.cc/LLQ7-265E].

legislative sessions. While discussions with opponents are underway, it has not yet moved forward.[54]

While students were not meeting with the individuals whose lives would be directly impacted by the bill, they regularly met with the practitioners working with those directly impacted. Through the stories of defense attorneys, evaluators, and psychologists working with the young people, they were able to grasp the significance of their work, reflect, and collaborate within their teams and with the Partnership or working group. In addition, students had the opportunity to develop strong legal and factual research and analytical skills, to problem solve challenges that arose when working group members had different perspectives, and to participate in meaningful change.[55] These meetings happened throughout the project.

2. Fordham's Legislative Advocacy Clinic

The Fordham Legislative Advocacy Clinic partners with a variety of community-based and legal advocacy organizations to expand their capacity to achieve their legislative goals, chiefly on a statewide level. In contrast to Loyola's clinic, it does not focus on a particular population or field of study.

For many years, the Fordham clinic has worked on consumer rights issues as a means of changing New York State laws that have had particularly harmful effects on low-income families and individuals.[56] These projects typically address policies that exacerbate hardships experienced by individuals and families carrying debt, which is often related

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[54] This is an example of a project that has required clinic faculty to continue with the work after students were no longer involved because of the learning curve involved in catching up on the research, relationships, politics, timing of the legislative process, the distance to the Illinois State Capitol from the law school, and the need to be there for extended periods of time.

[55] "As Clinic students, we served as a sort of legislative counsel to the coalition. … As someone interested in health policy, it was enlightening to hear feedback and thoughts from professionals who had a wide range of experiences working with mental health, including mental health practitioners, public defenders and prosecutors, and children's advocates. These conversations helped me understand the relationship between law, policy, health systems, and the criminal justice system in our state." Testimonial of Scott Hulver, Policy Analyst at KFF (Aug. 29, 2022) (on file with authors) (describing working on the juvenile competency project as part of their work in the Legislation & Policy Clinic).

[56] The clinic is enormously grateful and fortunate to have worked with Carolyn Coffey, Director of Litigation for Economic Justice, Mobilization for Justice; Tashi Lhewa, former Supervising Attorney, Consumer Law Project, Legal Aid Society; Susan Shin, Legal Director, New Economy Project; and Dora Galacatos, Executive Director, and Karuna Patel, former Deputy Director, Feerick Center for Social Justice, Fordham Law School. Ms. Coffey provides direct legal services and engages in legislative and regulatory advocacy. Mr. Lhewa did the same. Ms. Shin conducts both impact litigation and legislative advocacy. The Feerick Center works with a wide-ranging network of consumer advocates to improve the lives and well-being of low-income New Yorkers.

to health care, tuition, or rent arrears. Notwithstanding the large percentage of New Yorkers who fall within this category,[57] it is a challenging area in which to achieve reform. For this reason, it was particularly meaningful when, in 2021, in partnership with consumer advocates and a broad coalition brought together on this issue, we succeeded in lowering the statutory consumer debt judgment interest rate[58] in New York State from 9%, where it had been since 1981, to 2%, slightly above the average rate from 2000-2021.[59]

Over the four years the clinic worked on the project, students conducted significant legal and policy research,[60] interviewed experts, and drafted a model bill[61] carefully negotiating their way around existing state law.[62] As important, they were deeply involved in the strategizing necessary to get the bill passed by both houses of the legislature. Indeed,

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[57] *See DiNapoli: New Yorkers' Debt on the Rise,* Office N.Y. State Comptroller (Sept. 22, 2022), https://www.osc.ny.gov/press/releases/2022/09/dinapoli-new-yorkers-debt-rise [https://perma.cc/X3J8-HE72] (describing how "average household debt in New York climbed to a new high of $53,830 at the end of 2021," the fourth highest in the nation).

[58] Our clients originally sought to reduce the 9% interest rate on all judgments. Pushback from key legislative allies (in meetings and phone calls that students led or in which they took part) made it clear that such broad legislation would not be possible, as the legislators considered the higher rate necessary to get corporate and government entities to pay their debts.

[59] N.Y. C.P.L.R. § 5004. The 2% rate statutorily applies prospectively and retrospectively, but a group of sheriffs (responsible for collecting on judgments) have challenged the retrospective application of the rate. *See* Greater Chautauqua Federal Credit Union v. Hon. Lawrence K. Marks, 600 F. Supp. 3d 405 (S.D.N.Y. 2022). The look-back would not permit any refund of payments and would not touch the original judgment, but instead would recalculate the interest owed on the initial judgment, permitting thousands of New Yorkers to start paying down on the principal—giving them a genuine opportunity to get out of debt. *See generally* Karuna Patel*, Dismantling Unjust Interest Rates for Debt Collection Judgments*, Regulatory Rev. (Mar. 30, 2022), https://www.theregreview.org/mission-and-values/ [https://perma.cc/2XLM-Z37L].

[60] Students conducted legal research including a 50-state survey of judgment interest rates and policy research assessing which federal interest rate to use as an appropriate barometer. They also interviewed numerous consumer law experts around the country.

[61] For each relevant term to be used in the bill, the students recommended their ideal New York State statute to the clients, as well as other options, and explained their reasoning. Following numerous substantive and strategic conversations, our clients gave the students the go-ahead to draft the bill, adopting almost all their recommendations.

[62] When we began work to modify the interest rate on consumer debt judgments, New York State law already defined "consumer credit transaction" as "a transaction wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes." N.Y. C.P.L.R. § 105(f). The new statute ultimately referenced the earlier law when defining "consumer debt" as "any obligation or alleged obligation of any natural person to pay money arising out of a transaction in which the money, property, insurance or services with the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment, including, but not limited to, a consumer credit transaction, as defined in CPLR § 105(f)." N.Y. C.P.L.R. § 5004.

the students and the clients were thrilled when the bill sponsors[63] were able to introduce the legislation. But, its journey from there became an object lesson in legislative unpredictability.[64] For example, based on extensive research and discussion with the students, the clients decided that the bill should incorporate an adjustable interest rate, obviating the need to update the bill in the future.[65] Although our legislative sponsors agreed, legislative staff rejected this approach, requiring us to quickly propose an appropriate flat rate and muster compelling supporting arguments.[66]

In total, eight student teams of two to four students worked on this complicated project.[67] As the bill gained traction, the students' investment in the project deepened along with the clients' faith in them. Indeed, the students were involved in virtually every step of the bill's development, drafting, and related advocacy[68]—including working with one of the largest and most complex coalitions with which the clinic has had the opportunity to partner.[69] This reciprocity of trust reflected

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63 The bill sponsors and their legislative counsel were extraordinary advocates for passage of the bill, as well as for ensuring that the students had an excellent learning opportunity.

64 *See infra* Part II.A.4. (Unpredictability).

65 *See supra* notes 58-59 and accompanying text (describing the New York State Legislature's 40-year gap in updating the consumer judgment interest rate).

66 Our earlier attempts (by students, and then by our clients) to clear certain provisions, including the variable interest rate, with relevant state agencies never yielded a response. Ironically, the stable 2% rate has benefitted consumers following the unexpected increase in interest rates over the last two years.

Originally, the clients and students (and Professor Cooper) were extremely frustrated by this change. While never pleasant to deal with (potential) setbacks, the clients consistently modeled for the students the importance of persevering—and to looking for new opportunities even when advocacy seemed to not be going in a good direction.

67 On occasion, a student from one semester continued with the fieldwork part of the clinic for another term. This was crucial to helping to manage transitions and to maintain consistency.

68 Unfortunately, the end of the legislative session fell one month after classes ended and our clients took the lead for the final push. The students felt very good about all they had contributed and were thrilled their efforts paid off even after the term ended. For example, working from an op-ed drafted by the student team, the clients identified constituencies likely to hold sway with the governor, asking community leaders to adapt the essay and submit it for publication in local newspapers, shepherding this process throughout. Ultimately, we placed two op-eds and were in the process of placing a third when Governor Kathy Hochul signed the bill. *See* Ron Kim & Ray Brescia, *Viewpoint: Shield New Yorkers from Predatory Debt Collectors*, Times Union (Dec. 20, 2021), https://www.timesunion.com/opinion/article/Viewpoint-Shield-New-Yorkers-from-predatory-debt-16712879.php; Mark E. Blue & George F. Nicholas, *Another Voice: Debt Law Would Fix an Economic and Racial Injustice*, Buffalo News (Dec. 2, 2021).

69 These organizations included, but are not limited to AARP, Consumers Union, and the Federation of Protestant Welfare Agencies (FPWA), all of whom command significant attention in New York State. In recent years, Professor Cooper has incorporated readings and additional discussions in both the seminar and fieldwork about the complexity of building and sustaining coalitions. *See infra* Part III.C. (Seminar).

and fostered excellent collaboration and led the students to develop the self-confidence to push themselves in new directions. We were thrilled when the bill passed both houses in the waning days of the session and again when the governor signed the bill at the end of the year.[70]

For the last few years we also have worked with a small group of advocates to advance the rights and bodily autonomy of people born with intersex attributes.[71] All too often, and counter to emerging medical, ethical and human rights standards,[72] surgeons will recommend sex-assignment surgery and other procedures on very young children to cosmetically conform their genitals to appear more traditionally male or female.[73] These interventions can cause long term physical and psychological harm, requiring follow-up surgeries, leading to future infertility, and assigning a sex that may not conform to the individual's gender identity.[74] Not surprisingly, many intersex individuals oppose these procedures, wanting to have a voice in what is done to their bodies.[75]

We were asked whether we could draft a bill to prohibit invasive procedures on intersex minors without their consent.[76] This required the team to research a range of possible ways to address the goal, and

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[70] New York State law gives the governor 10 days to consider legislation from the date at which it is transmitted by the legislature. N.Y. Const. art. IV, § 7. Traditionally, the governor controls this timing, often requesting non-controversial bills first. Our bill was among the last called up for consideration and it was signed on Dec. 31, 2021. While waiting for Governor Hochul to ask for the bill, we no longer had a team on the project. The clients again took the lead. They drafted a 25-page memo to counter one submitted in opposition, originally without our knowledge, and conducted much of the advocacy with the governor's assistant counsel.

[71] We worked with three extraordinary advocates: Scout Silverstein, consultant to interACT (an education and advocacy organization for people living with intersex traits) and public health expert; Erika Lorshbough, Executive Director, and other staffers, interACT; and Allie Bohm, Senior Policy Counsel, New York Civil Liberties Union. We consulted at times with a larger, informal group of individuals living with intersex traits. *See FAQ*, interACT, https://interactadvocates.org/faq/ [https://perma.cc/FV6Y-V6SW] (last visited July 15, 2024).

[72] *See* National LGBTQIA+ Health Educ. Ctr., Affirming Primary Care for Intersex People 5–7 (2020), https://interactadvocates.org/wp-content/uploads/2020/10/Affirming-Primary-Care-for-Intersex-People-2020.pdf [https://perma.cc/SV7Q-2YZ8]; Luke Muschialli, Connor Luke Allen, Evelyn Boy-Mena, Aiysha Malik, Christina Pallitto, Åsa Nihlén, Lianne Gonsalves, *Perspectives on Conducting "Sex-normalising" Intersex Surgeries Conducted in Infancy: A Systematic Review*, 6 PLOS Glob. Pub. Health (2024), https://doi.org/10.1371/journal.pgph.0003568 [https://perma.cc/H3A9-N92W] (Aug. 28, 2024).

[73] National LGBTQIA+, *supra* note 72, at 5–7.

[74] Jehad Almasri et al., *Genital Reconstructive Surgery in Females with Congenital Adrenal Hyperplasia: A Systematic Review and Meta-Analysis*, 103 J. Clin. Endocrinology & Metabolism 4089 (2018); National LGBTQIA+, *supra* note 72, at 5–7.

[75] National LGBTQIA+, *supra* note 72, at 5–7.

[76] This project held particular resonance for Professor Cooper given her work in informed consent as an attorney working on legal issues affecting people living with HIV/AIDS and her writing. *See generally* Elizabeth B. Cooper, *Social Risk and the Transformation of Public Health Law: Lessons from the Plague Years*, 86 Iowa L. Rev. 871, 878 (2001); Elizabeth B. Cooper, *Testing for Genetic Traits and Life-Threatening Conditions: The Need for a New Legal Doctrine of Informed Consent*, 58 Md. L. Rev. 346 (1999).

then to assess the strengths, weaknesses, and potential risks of each approach. Ultimately, the students hit roadblocks with every approach. This led them to step back to consider how to share this information with the clients and to continue to be supportive of their aims, as well as to attend to the students' own disappointment.[77]

Interestingly, we continued to work with the same client group to focus instead on mandating the state health department "to conduct a public information and outreach campaign on medically unnecessary treatments on persons born with intersex traits or variations in sex characteristics."[78] After two years of persistent advocacy, both legislative houses passed the bill.[79] The Governor, however, insisted on a Chapter Amendment,[80] which required the bill to be amended by the legislature retroactive to its original effective date; thereafter,[81] we were all thrilled that she signed the legislation and it immediately went into effect.[82]

The intersex advocacy projects, perhaps more than most, required the students to be exceptionally client-centered, as well as aware of the

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[77] Admittedly, these research roadblocks and some of our clients' competing responsibilities made it more challenging for some of the students to fully invest in the project. *See infra* Part III.A. (Project Selection and Design). Another interesting attribute of this project was that the members of the client group did not have a hierarchy or mechanism for making decisions. This was mitigated by their general agreement on most issues, but it was challenging at times for the students to engage with the responsibility of moving the agenda forward. *See infra* Part II.B.1. (The Client).

[78] N.Y. Pub. Health L. § 207(r). Student work on this project included figuring out how best to construct factsheets to educate legislators and staffers about the relevant medical information, as well as about the ways in which intersex minors were being harmed. Some legislators leapt quickly to assuming this was a trans-rights bill, while others immediately understood the issues and the need for the legislation. The students also conducted state-by-state research only to learn about the dearth of legal protections for intersex minors.

[79] The clients and Professor Cooper all thought the bill would pass in the first year of its consideration. Although the Senate voted the bill through, it did not make it onto the Assembly's overstuffed final legislative agenda. We do not know whether this was because we had not lined up enough co-sponsors of the bill, Assembly leadership had not otherwise heard from members on the issue, a powerful organization objected to the bill—or some, none, or all of these reasons. Perhaps one of the most frustrating aspects about legislative advocacy is not necessarily knowing where things go awry, largely due to lack of transparency. When we do not know why the unexpected has happened, it also can hamper making course corrections moving forward.

[80] *See Everything You Ever Wanted to Know About "Chapter Amendments,"* Reinvent Albany (Oct. 16, 2023) https://reinventalbany.org/2023/10/everything-you-ever-wanted-to-know-about-chapter-amendments/ [https://perma.cc/3LF3-6MEZ] (last visited Aug. 28, 2024). This website describes how the governor can request amendments to the bill. Upon consent of the legislative leadership, the houses will then pass the amended version of the bill, after which the governor signs the chapter amendment, making the amended bill law.

[81] *See* S8016/A8482, 2023-2024 Leg., Reg. Sess. (N.Y. 2024) (Summary of Provisions, describing the Chapter Amendments, and Justification stating that "[t]his legislation is a negotiated change to the underlying chapter"). On this bill, the Governor altered the type of consultative process that would be required of the State Department of Health. *Id.*

[82] N.Y. Pub. Health L § 207(r), *supra* note 78. Although there are three paragraphs denoted "(r)," only one addresses the intersex public education program.

wishes of a larger group of community members who had diverse policy preferences.[83] The students also experienced the effect of legislators (decision-makers) sponsoring more bills than they could possibly move in a session—a reminder of how, in the absence of rules, a legislature may not consider all proposals ripe for consideration.

In 2017, my colleague Professor Elizabeth Maresca, who teaches Fordham Law's Federal Tax Clinic, asked if my clinic could pursue a legislative fix to a law that was causing great harm to her clients, namely: the ability of New York State to suspend the driver's license of any individual who owed $10,000 or more in back taxes (of any kind) to the state.[84] The statute had been enacted a few years earlier with no viable financial hardship exemption and her attempts to create this safety net through litigation had stalled.

For four semesters, student teams worked on this project, conducting research about the law's legislative history, sending out extensive Freedom of Information Law requests to the N.Y. State Department of Taxation and Finance to understand the impact of the law, drafting op-eds,[85] speaking with other advocates seeking to remove oppressive fees, fines, and suspensions, and collaborating with other tax law clinics and attorneys around the state. For the last semester we worked on the bill, Professor Maresca and I co-taught a Tax, Poverty, and the Law Clinic, which allowed us to devote appreciably more time and energy to getting the bill passed.[86]

As the bill was gaining increasing support, we were stymied when committee staffers determined that its enactment would cost the state

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[83] Although our clients knew one another, this was a new and different type of opportunity for collaboration.

[84] N.Y. Tax L. § 171-v. This arrangement was unusual as the Fordham clinic typically works with external clients, at least in part so that students acquire skills of client interviewing and counseling. In this situation, although there was less client counseling, having our client—Professor Maresca—be so generous with her expertise and clinical supervisory skills, was a remarkable opportunity.

[85] *See* Elaina Aquila & Gabrielle Kornblau, *Tax Debt Law Harshly Affects Low-Income Earners*, Times Union (May 1, 2018), https://www.timesunion.com/opinion/article/Tax-debt-law-harshly-affects-low-income-earners-12879619.php (editors permitting only two of the students to be listed in the by-line); Elizabeth Cooper, Joshua A. Liebman, Christopher Ziemba, *Death, Taxes and Driving Uncertainty*, N.Y.L.J. (May 10, 2017), https://www.law.com/newyorklawjournal/almID/1202785817096/ [https://perma.cc/Y69D-F8X8] (editors insisting that the byline include a professor's name; otherwise, only the students would have been listed as authors).

[86] Our five-member student team, all of whom already had worked on the project for one semester, were extraordinary advocates. Due to student demand for clinics, Fordham clinical faculty cannot typically permit students to continue in a clinic absent exceptional circumstances. In this case, the necessity of working with returning students was evident. I continued to teach my legislative advocacy clinic, but did so with only five students.

$10 million.[87] Although we were unable to change this anticipated budgetary impact, the student teams' unusual dedication to the project and quality of research, advocacy, and collaboration, were highly effective, and led legislators and staffers to treat them as if they were long-term advocacy partners, including them in sensitive communications and high-level meetings. We were thrilled when both houses of the legislature passed the bill and the governor signed it into law in 2019.[88]

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Over the years, our clinics have worked on many more projects that have provided us with opportunities to engage in social justice projects and meet our learning goals. For Fordham's clinic these have included partnering with the New York Civil Liberties Union to enact the Gender Expression Non-Discrimination Act (GENDA) to add gender identity and expression as a protected category to the New York State Human Rights Law;[89] the Model Alliance to create wage protection mechanisms and safeguards against sexual harassment;[90] and a coalition of organizations supporting legislation to better protect the safety and well-being of trans and gender-non-conforming people who are incarcerated.[91] For

[87] Notwithstanding valiant efforts, we were never able to learn how committee staff arrived at this figure and remained convinced that they had not accounted for savings the state would accrue given that, by being able to drive, more low-income individuals would be able to keep their jobs and care for their families.

[88] N.Y. Tax L. § 171-v(5)(g). This bill also was subject to Chapter Amendments issued by the governor. *See supra* note 80 (describing Chapter Amendments).

[89] Finding no compendium of scientific, political, or social information about gender identity or expression, a student team drafted a 30+ page report to provide basic medical and psychological information, as well as data about the extent of then-existing discrimination on the basis of gender identity or expression in New York State, to legislators and the general public. They also conducted legislative information sessions and helped to produce educational materials. We ultimately stopped working to get the bill passed because, at the time, the Republican-led state senate would not allow it to come to the floor for a vote. Once Democrats won a majority of senate seats, the pipeline opened for consideration of many bills that had stagnated. In Spring 2019, the legislature passed GENDA and Governor Andrew Cuomo quickly called it up for consideration, then signed it into law. *See* S1047/A00747, 2019-2020 Prior Sess. (N.Y. 2019) (codified at N.Y. Exec. L. § 290); https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A00747&term=2019&Summary=Y&Actions=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y [https://perma.cc/NXR3-BW2L] (noting that the bill passed the senate and the assembly on Jan. 15, 2019, was delivered to the governor that day, and was signed on Jan. 25, 2019).

[90] For a variety of reasons, we did not continue with this project; however, the Model Alliance is continuing to seek passage of the Fashion Workers Act, which would provide a broad array of protections for individuals working in the fashion industry, especially in relation to management agencies. *See* Model Alliance, https://www.modelalliance.org [https://perma.cc/EJ42-LY57] (last visited on Aug. 30, 2024).

[91] Gender Identity Respect, Dignity and Safety Act (GIRDS), S02860/A00709, 2023-2024 Reg. Sess. (N.Y. 2023), https://nyassembly.gov/leg/?bn=A00709&term=2023 [https://perma.cc/BSV6-5CAE] (last visited Aug. 28, 2024).

Loyola's clinic, additional projects have included forming and leading a coalition to successfully challenge legislation that would have expanded Illinois' mandated reporting requirements to require that every adult in Illinois report suspicion of child abuse or neglect;[92] responding to a request from a grassroots advocacy organization following the Trump administration's 2017 decision to deport undocumented parents[93] to develop a guide for parents who were undocumented to assist them in understanding and thinking through the options for their children if the parents were detained or deported;[94] and partnering with the University of California Berkeley Policy Advocacy Clinic and Stand for Children Illinois, to successfully eliminate fees and fines in delinquency cases.[95]

These projects required students to engage in legal, policy, factual and political research described throughout this section, as well as draft advocacy materials, engage in coalition meetings, meet with legislators and their staffers, strategize with clients and other advocates on best approaches to take, and participate, and sometimes lead, negotiation sessions.

With this understanding of our projects, in Part II we shift to identifying and discussing unique attributes of legislative advocacy that can make it more difficult for students to step into their role as advocate,

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[92] H.B. 3288, 100th Gen. Assemb., Reg. Sess. (Ill. 2017-2018), https://ilga.gov/legislation/100/HB/PDF/10000HB3288.pdf (last visited July 12, 2024).

[93] In 2016, then President-elect Donald Trump vowed to fulfill his campaign promise of immediately deporting 2 million to 3 million undocumented immigrants. *See* Amy B. Wang, *Donald Trump Plans to Immediately Deport 2 Million to 3 Million Undocumented Immigrants*, Wash. Post (Nov. 14, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/13/donald-trump-plans-to-immediately-deport-2-to-3-million-undocumented-immigrants/. He effectuated his plan after being sworn in as President in early 2017. Executive Order 13767, issued in January 2017, laid out the administration's plan to secure the border, including the framework to expedite deportation procedures. Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 25, 2017).

[94] *See* Guide for Parents in Illinois who are Undocumented – Planning for your Children in Case of Detention or Deportation (Oct. 2017), https://www.luc.edu/media/lucedu/law/centers/childlaw/pdfs/Immigration%20Safety%20Planning%20Guide_LS_10-4-17.pdf [https://perma.cc/N28F-XCXV]. The Guide also was translated into Spanish. *See* Una Guía para los Padres Indocumentados en Illinois – Planificación para Sus Hijos en Caso de Detención o Deportación (Oct. 2017), https://www.luc.edu/media/lucedu/law/centers/childlaw/pdfs/Gu%C3%ADa%20de%20Planificaci%C3%B3n.pdf [https://perma.cc/8YCQ-TEUH]. When writing the Guide, students were especially sensitive to the language they used, to the emotional toll families likely would experience while reading the Guide, to recognizing the risks for families regardless of which avenue they pursued, and to acknowledging those risks in the material.

[95] P.A. 103-037, 103rd Gen. Assemb., Reg. Sess. (Ill. 2023), https://ilga.gov/legislation/publicacts/103/PDF/103-0379.pdf. The clinic is now working with the same coalition to enact legislation to prohibit the use of charging fees and fines as a disciplinary measure against students for behaviors that may violate school rules.

and create challenges for clinic faculty to meet their learning goals when teaching legislative advocacy clinics.[96]

II. Legislative Lawyering: Challenges

Legislative reform is complex: even a seemingly simple bill will require students to conduct extensive legal and policy research, to confer with their client and other allies, to engage with a variety of decision-makers, and to employ ever-changing strategies to achieve their client's goals.

Students may have difficulty connecting the harm suffered by an individual (or group of individuals) to the scope of legislative reform that may be necessary, at first not readily understanding the range of systems and laws conspiring to create the underlying problem.[97] The focus of legal education (and popular culture) on litigation exacerbates this experience.[98] Legislative advocacy, and the complications that arise when working with complex clients and advocacy partners, influence the ways we structure and teach our clinics.

The nature of legislative advocacy encompasses four attributes: (1) the "invisible," less formalized, or shifting, rules that students must learn (become comfortable with) in contrast to the written rules with which they already are familiar, specifically, rules of procedure and rules of evidence; (2) the numbers and diversity of decision-makers, including staffers, legislators, members of the executive branch; (3) the role of long-standing relationships; and (4) the unpredictability of the process and its lack of transparency. The complications related to complex clients and advocacy partners include (1) clients whom we interview, counsel, and guide through decision-making; and (2) the broad range of advocacy partners with whom we work on a legislative campaign.

While clinicians teaching other types of lawyering may need to address some of these attributes, when taken together, they reveal the unique dynamics of teaching legislative advocacy clinics and the ways students can be challenged and frustrated, especially when they do not understand how these systems work, do not have prior lobbying/

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[96] Students, their faculty, and new professionals in a range of disciplines that pursue legislative advocacy face similar challenges. These professions include public policy and social work. In this article, however, we are focused on the law student and law school clinical education and pedagogy.

[97] By systems, we include the laws governing, and the policies and practices of government agencies (e.g., department of children and family services, department of financial services) and private entities (e.g., debt settlement companies) that too often work against one's capacity to raise one's own children, to avoid engagement with criminal law, or to get out of debt.

[98] *See* Carnegie Report, *supra* note 3, at 6 (describing legal education's overemphasis on litigation) and at 4-6 (discussing the focus in popular culture on lawyers who litigate).

advocacy experience, or have pre-conceived notions of how a problem should be solved.

In this Part, we explain the impact of the attributes identified above, with a particular focus on the challenges they pose in our clinics. In Part III, we describe how these challenges also create opportunities to think about clinical pedagogy and our learning goals, and how they inform our selection of projects, supervision of students, shaping of seminars, and methodologies for conducting project rounds.

A. Working with a Legislative Body

Notwithstanding the meaningful social justice goals that legislative advocacy can achieve, and the myriad learning opportunities provided by legislative advocacy clinics, this work also presents teaching challenges due to the ways most legislatures function. This section describes these challenges and touches on the ways they may complicate our teaching methodologies.

1. Invisible (or Less Formalized) Rules

Perhaps more than any other attribute, the lack of rules governing legislative advocacy distinguishes this work from most other lawyering and legal clinics. Courts and administrative settings are governed by specific sets of federal or state rules—particularly rules of procedure and rules of evidence—that are designed to guide the course of litigation.[99] Students are immersed in these rules early in their legal education, making them more likely to be familiar with the basic framework, rules, and patterns of their clinic cases.[100]

By contrast, there are no analogous rules defining the scope and methodology of legislative advocacy.[101] Although this can facilitate much creativity, it also presents challenges to students who, until now,

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[99] The existence of rules does not mean that all judges interpret them correctly, that litigants regularly abide by them, that there are no surprises, and that bias and other fairness disruptors do not infect the process. The presence of rules, however, creates a fundamentally different arena in which to seek change.

[100] To a more limited extent, deal-making and transactional work also is restricted by federal and state statutes, and students receive some exposure to these rules through traditional law school courses (e.g., contracts, corporations). *See generally* Lynnise E. Pantin, *Deals or No Deals: Integrating Transactional Skills in the First Year Curriculum*, 41 Ohio N.U. L. Rev. 61 (2014).

[101] Few rules guide the actions of legislative advocates, beyond lawyers' rules of professional responsibility or a state's rules about ethical lobbying. *See* N.Y. Comp. Codes R. Regs. tit. 19, §§ 943.1-943.14, https://ethics.ny.gov/system/files/documents/2023/05/part-943_revised-as-of-5_16_23.pdf; 25 Ill. Comp. Stat. 170/1-12, https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=465&ChapterID=6 [https://perma.cc/KR5Y-XTCA].

have been taught that following the rules is foundational to lawyering and to thinking like a lawyer.

a. Rules of Procedure

Rules of procedure govern who may be a party to an action, who may intervene in a proceeding, and what information can—or must—be shared.[102] They are foundational and far-reaching in their impact—and there are no similar rules governing legislative advocacy. The rules that do exist may be inconsistently enforced and subject to change without notice.[103]

For example, in litigation or administrative proceedings, the parties are known. The group may be large, as in a class action lawsuit, but there are guidelines as to who may be considered a party.[104] The same is true regarding who may intervene in an action.[105] In legislative advocacy, there are no rules about who—or how many—may participate in the advocacy efforts, or the timing of their attempts, whether in support or opposition. So long as an individual or group can get the attention of a coalition, a legislator, or the media, they can discuss the issues, engage in negotiations, and may be able to testify at hearings. The only limitation may be whether a given legislator or staffer wishes to meet with the advocate.[106]

Rules of procedure also guide how certain information is gathered, what information must be disclosed, and what happens if information is not disclosed.[107] Not so in the legislative arena, where there are no restrictions on how information is gathered or with whom it may be shared. And, as there is no formal way for one to file one's advocacy documents (in contrast to a complaint, motion papers, or brief in litigation), there is no way to mandate notice to those opposing one's position that advocacy documents have been delivered to a legislator or executive. As a result, advocates may not know whether any individual

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102 *See generally* FED. R. CIV. P. This section cites to the federal rules instead of analogous state rules.

103 Some legislatures may have procedural rules, but usually they relate to the legislative process and not advocates supporting or opposing legislation. *See generally* RULES OF THE SENATE OF THE STATE OF ILL. (103rd Gen. Assemb.) (2023-2024), https://ilga.gov/senate/103rd_Senate_Rules.pdf; RULES OF THE ILL. HOUSE OF REPRESENTATIVES (103rd Gen. Assemb.) (2023-2024), https://ilga.gov/house/103rd_House_Rules.pdf.

104 FED. R. CIV. P. 23.

105 FED. R. CIV. P. 24.

106 In contrast to litigation, where there are explicit rules requiring judges to engage all sides before reaching a decision on a motion or a ruling in a trial, legislative decision-makers have no obligation to meet with advocates. *See infra* notes 109-10 and accompanying text (discussing the prohibition on *ex parte* communications).

107 FED. R. CIV. P. 26.

or organization has shared information with the decision-makers—or what their arguments may be.[108]

This inherently raises another significant contrast to litigation. State statutes, court rules, or rules about professional responsibility, prohibit—with rare exceptions—*ex parte* communication.[109] No such rules exist in the legislature. In fact, *ex parte* advocacy is the accepted norm and success in legislative and policy advocacy often is dependent on those conversations.[110] Not surprisingly, any new players—including our students—may initially be at a disadvantage in gaining access to powerful decision-makers.[111]

b. Rules of Evidence

Judges use the rules of evidence to assess the admissibility of information (whether testimonial or documentary), including who may testify before the court.[112] To be admissible, information must be relevant, helping to prove or disprove a fact, presented by someone with knowledge of the facts or expertise on the issues being raised, and may not be unfairly prejudicial.[113] The trier of fact—whether judge or jury—is supposed to be impartial, free of any conflict of interest, and base their decision on the facts presented and principles of law.[114] Further, findings

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108 Although submissions by advocates may be subject to freedom of information laws, pragmatically, such a request would not be resolved during the legislative session.

109 By rule, *ex parte* communication is not permitted in litigation. *See generally Ex Parte* Communications, 28 C.F.R. § 76.15 (2024); Model Code of Jud. Conduct R. 2.9(A) (2020). Attorneys may not speak to the opposing parties without the permission of their attorney. *See, e.g.,* Model Rules of Prof'l Conduct R. 4.2 (2024). For examples of state rules of professional conduct *see generally* N.Y. Rules of Prof'l Conduct, https://www.nycourts.gov/legacypdfs/rules/jointappellate/NY-Rules-Prof-Conduct-1200.pdf and Ill. Sup. Ct. Rules, https://www.illinoiscourts.gov/rules/supreme-court-rules?a=viii.

110 This includes backdoor deals where, unbeknownst to others, advocates communicate with legislative leadership, reaching agreements in private. Many years ago, Professor Cooper was involved in advocacy to stop a bill from passing. The coalition with which she was working had been informed that the governor did not want to see the bill go to a floor vote; at the last minute, and for reasons unknown, he changed his mind. This secrecy, however, can also work to advocates' advantage. The Loyola clinic benefitted several years back when, due to an unexpected private meeting with a state senator (a larger meeting of proponents and opponents was cancelled at the last minute), Professor Weinberg was successful in convincing him to not move forward a bill to expand the sex offender registry while the clinic was working on a report specific to the issue, summarized *infra* Part III.A.3. (Likelihood of Success and the Timeframe for Achieving a Client's Goals).

111 As noted *infra*, Part II.A.3., long-standing relationships that clients (or the faculty supervisor) may have with legislators and staffers can, at times, yield information that would not otherwise be available. Students often feel both frustrated and relieved when this occurs.

112 Fed. R. Evid., art. IV & VI. This section cites to the Federal Rules of Evidence rather than to various, analogous state rules.

113 Fed. R. Evid. 401, 602, 403.

114 *See* 28 U.S.C. § 455 (requiring the court to be impartial and bias free); U.S. Const. amend. VI. *See also How Courts Work*, ABA (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/

of fact are known to the parties, whether on a motion or at the end of a trial.[115]

In contrast, there is no official fact finding by a legislator or legislature[116] and no rules or limitations restrict the information a legislator can consider when determining whether to support a bill. There is no "judge" of relevance. While individual legislators will decide whether they are interested in a particular fact, or trust a specific witness testifying in a committee hearing, or an advocate seeking their vote, they are free to consider whatever information they choose, regardless of how—or from whom—they learned it; nor are they limited by its (lack of) probative value, whether it comes from someone with first person knowledge or expertise, or whether it is prejudicial. They may weigh the "evidence" (i.e., arguments and facts advocates have submitted) in any way they choose.[117] Each of these factors, as well as shifting agendas, current events, and advocate or legislator relationships, may affect why a bill may, or may not, move forward. Yet these reasons may never be known to the advocates.[118]

This general absence of rules in the legislative arena can profoundly impede students from achieving our learning goals. For example, students can become flummoxed when practicing in an unfamiliar arena that also does not have the rules they have been taught will guide them, making it challenging for them to invest in the advocacy. Second, the broad range of potential participants can make deliberations, discussions, and negotiations challenging. Third, without clear rules, students may feel hampered when counseling clients (particularly those without legislative advocacy experience), as the students may not be able to guide the clients with clear next steps in the advocacy process.

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juryinstruct/ (last visited Sept. 5, 2024) (stating that the jury is "the sole judge of the facts and of the credibility (believability) of witnesses" and that juries "are to base their conclusions on the evidence as presented in the trial").

115 *See* Fed. R. Civ. P. 52 (court must make findings of fact and rulings of law). *See generally Finding of Fact*, Legal Information Inst., https://www.law.cornell.edu/wex/finding_of_fact [https://perma.cc/W29Q-D8P9] (last visited Aug. 30, 2024).

116 Some states may require a rationale for a bill when it is introduced. For example, in New York State, the Sponsor Memo accompanying each introduced bill may, but need not, include statements of fact or information about the intent of the legislation; it becomes part of a bill's legislative history. Rules of the Assembly, N.Y. State Assembly, https://nyassembly.gov/Rules/?sec=r3 [https://perma.cc/VM9W-HMCV] (last visited July 17, 2024).

117 A decision-maker is not automatically free from bias just because they are based in the judiciary. Advocates in this context also must consider the actual or perceived viewpoints of a judge or jury.

118 *See* Seymour Lachman, Failed State 57–85 (2017) (describing how the New York state legislature does not function transparently).

2. Decision-Makers

Although law students must learn to be concise and direct (yet tactful) advocates in all environments, the legislative context requires them to learn how to communicate their legal research and analysis—in writing and orally—to a diverse range of decision-makers and influencers.[119] When appearing before judicial bodies, advocates know who the decision maker is: the judge, jury, or administrator with authority to decide the matter. In contrast, at least five types of decision-makers can be found in the legislative process: (1) legislators who agree to sponsor the bill; (2) legislators sitting on relevant committees considering the bill; (3) legislative leadership (e.g., the leaders of each legislative chamber, committee chairs), who can kill or green light a bill; (4) the members of the legislative bodies, all of whom will vote on a bill; and (5) the governor, who decides whether to sign into law a bill passed by the legislature. Each of these decision-makers may be influenced not only by lobbyists, advocates, and their constituents, but also by their staffers, counsel, media, and often-shifting political realities.

In litigation, one typically can assess one's strategy with some knowledge about a defined decision-maker. In legislative advocacy, if a bill progresses, the pertinent decision-makers will change throughout the legislative session. It can move from the original legislative sponsor of a bill (or their staff), to the relevant committee chairs, to the leadership of the legislative chamber,[120] and ultimately to the executive. This range of decision-makers and considerations requires students to develop unusual agility regarding strategy and messaging.

Before interacting with legislators—or their staffers—students must develop insight about whether the elected representatives or their staff are familiar with the goal of the bill, have a strong opinion about it, or already have decided to support or oppose the proposal—and the reasons for doing so. For example, students will need to discern if the issue is one that is especially important to the legislators' constituents or whether it personally affects the legislator. The message one develops for a legislator who cares about a topic can be quite different from how one talks with a legislator who likely is voting a party line, doing a

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[119] In contrast to litigation, where court rules may dictate questions the parties must address, or may issue technical guidelines (e.g., page limits, formatting style), such guidance (or admittedly, limitations) rarely exists in the context of legislative advocacy. The availability of rules is explored in greater detail as a unique attribute *infra* Part II.A.1. (Invisible (or Less Formalized) Rules).

[120] In New York, when leadership allows a bill to come to the floor of the legislature for a vote, it typically is a signal either that members of their party should vote in support or that there is an existing consensus in support from the members. *See* Lachman, *supra* note 118.

favor for a colleague, or is fearful of the response of their constituents.[121] Also, the messaging will vary if the lawmaker is being asked to be a key sponsor of a bill or is more simply being asked to support the initiative. Similar attention to messaging must be paid when approaching legislative leadership or the governor for support. These decision-makers, in particular, will consider not only their own votes, but also how a party-line vote will impact their members. These concerns are particularly heightened in an election year.[122]

All of this can require advocates to develop a speed and agility with advocacy and messaging that differs from other law practices, where the lawyer is writing to address individual judges, magistrates, or law clerks.[123]

The range of decision-makers and the nature of the legislative process also requires students to develop different types of written materials including concise legislative proposals of one to two pages, memos in support of or opposition to legislative proposals, and op-eds and statements for the press about pending legislation.[124] They may also need to write in-depth reports or translate research into digestible summaries for legislators or key decision-makers and create short, easy-to-read educational documents (e.g., fact sheets, FAQs) geared toward legislators, staffers, or the general public.[125]

In addition to written advocacy, legislative advocates always need to be ready to engage with the myriad decision-makers they encounter, whether presenting information at scheduled meetings with legislators,

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121 Litigators, too, may seek information about the judge or tribunal before whom they are appearing, whether by reading past opinions, observing them in a courtroom, reviewing media coverage of the judge, or speaking with colleagues who practice in the area.

122 Austin C. Jefferson & Rebecca C. Lewis, *The Issues Most Likely to Dominate the 2024 New York Legislative Session*, City & State NY (Dec. 18, 2023), https://www.cityandstateny.com/policy/2023/12/issues-most-likely-dominate-2024-new-york-legislative-session/392807/ [https://perma.cc/HTL8-RPMJ] (observing that "lawmakers [are] well aware that one vote could result in attack ads or election losses, [and that] there will be more factors at play in Albany this year than just legislation").

123 *See* Feldblum, *supra* note 4, at 811–13. A legislative lawyer should expect to draft a range of different documents for audiences with varying levels of knowledge, sophistication, time, and patience. *Id.* at 812.

124 Op-eds drafted by students often are published under their own names. Strategically, however, we may draft a "model" op-ed to be edited by and published under the name of influential community or political leaders (e.g., from unions, religious communities, or not-for-profit heads). Professor Cooper's clinic took this latter approach when advocating in support of the reduction in consumer debt judgment interest rates. *See supra* Part I.B.2. (Fordham's Legislative Advocacy Clinic).

125 Litigators also may need to take different approaches when drafting a trial brief, or appellate brief, but do not need to produce these documents simultaneously on the same matter. Further, there often are clear deadlines for when they must be completed. That said, being able to use and adapt the theory of the case/project for different contexts is a consistent strength counsel must seek to develop.

during impromptu off-the-floor/elevator pitches with elected officials or staffers, or giving testimony at a legislative hearing.

Each of these examples of oral advocacy requires constant preparedness and a quick mind, requiring the student to emphasize different points of an argument, or different data, or even distinct reasons to support or oppose a particular bill to different players.[126]

3. Long-Standing Relationships

Successful legislative advocacy sometimes is facilitated by—and may be dependent on—the longstanding relationships a faculty supervisor or the client share with an advocacy partner, legislator, or staffer. By definition, students will not have access to these key relationships. Legislators and their staffers, well-established lobbyists serving as advocacy partners, and others, may be reluctant to share with a student confidential or closely-held information they might be ready to share with a faculty supervisor they have known for a long time. Similarly, they might be uneasy working with students who rotate in and out of a project each semester.[127] Instead, these individuals may be inclined to rely on their long-term relationships with the faculty member even for day-to-day communications or may neglect to respond to the student team until prodded by the faculty supervisor. It is for these reasons that we identify long-standing relationships as a unique attribute of legislative advocacy.

4. Unpredictability

All lawyers need to adapt to changing circumstances.[128] Learning-in-context and dealing with unpredictability[129] are core principles of

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126 The variety of types of documents, the range of stakeholders for whom the materials are developed, and the extent to which all the materials may need to be drafted around the same time, distinguish legislative advocacy from litigation.

127 Community lawyering and transactional law clinics have also identified the challenge of having clients and partners who grow particularly invested in working with trusted allies and who may then be uncomfortable working with students they do not know. *See generally* Tokarz et al., *supra* note 9; Li, *supra* note 9. This may not differ from a dynamic that develops in litigation clinics when a case goes on for an extended time and the client gets to know the supervisor, especially over the summer or semester breaks.

128 Changed circumstances can occur in litigation when a witness or a document mysteriously appears or disappears, a new discovery schedule is implemented, or there is the prospect of settlement on the eve of trial. Similarly, a venue may change, defendants or respondents or claims may be added, or a case may be thrown out of court. But again, there are guidelines or rules to follow when this happens. In transactional work, such changes might involve a new investor—or one who has lost interest.

129 *See* Serge A. Martinez, *Why Are We Doing This? Cognitive Science and Nondirective Supervision in Clinical Teaching,* 26 Kan. J. L. & Pub. Pol'y 24, 43–44 (2016) (citation omitted) (describing the students' experience transitioning from an "artificially neatened"

clinical learning but they take distinctive form in the legislative context, where unpredictability, exacerbated by a lack of transparency, pervades the entire enterprise. The basic mechanics of how a bill ideally moves through the legislature is not difficult to understand.[130] How a bill actually makes its way through this process, however, is unpredictable.

For example, the priorities of the legislator carrying your bill may change, but as advocates, you may not know this until it is too late in the session to find another primary sponsor, and you may never know why the legislator's priorities changed. Legislative staffers may assign a cost to a bill that requires new, complex, and unplanned research—and that causes the bill to be put off until the next session, which may be months or a year away.[131] A bill on track toward passage may not be taken up by the legislative body because leadership (i.e., the gatekeepers) determines (for any number of reasons or for none) that it is not a priority; or, perhaps they do not want their members voting on a particularly sensitive issue.[132] The opposite also can occur when a bill has not moved from committee, but suddenly does, requiring a realignment of advocacy priorities.[133] All this, and more, can occur without notice and behind closed doors, notwithstanding open government laws.

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environment into the ill-structured, "'indeterminate, inexact, noncodifiable, nonalgorithmic, nonroutinizable, imperfectly predictable'" practice of law).

130 While the basic mechanics of the legislative process may be straightforward, it may be unfamiliar or feel mysterious to students. Typically, bills will be considered by one or more committees in each legislative chamber before being voted on by the respective bodies. A bill does not become law until approved by both chambers and signed by the governor. *See, e.g.*, Legislative Research Unit, How A Bill Becomes Law in Illinois, https://www.ilga.gov/commission/lis/98bill_law.pdf [https://perma.cc/MFS6-Y4AV]; *How Laws Are Made*, USA Gov. (Feb. 14, 2024), https://www.usa.gov/how-laws-are-made [https://perma.cc/S2DS-P9H9].

131 This occurred when the Fordham clinic was working to create a financial hardship exemption to the state's power to suspend the driver's license of those owing $10,000 or more in back taxes. We had determined that there should be no cost to the bill and perhaps even a cost savings to the state since it would no longer need to pursue fruitless recoupment from individuals without the ability to pay. We therefore were surprised and dismayed to see that committee staffers calculated a financial impact of $10 million. *See supra* note 87 and accompanying text.

132 Loyola's clinic was caught by surprise when a Senate Committee chair held a lead poisoning prevention bill that had passed the House unanimously without any opposition from stakeholders. We later learned that the Illinois chapter of the National Rifle Association had quietly informed the Chair that they would be opposing the bill. The reason: the bill included a provision that prohibited the sale of children's products containing a certain amount of lead, or required a warning label. The NRA was concerned the bill would prohibit the sale of ammunition because the ammunition was used by youth in hunting. We had to then negotiate with an unanticipated, and influential, player. *See* P.A. 094-0879, 94th Gen. Assemb., Reg. Sess. (Ill. 2006).

133 Sometimes an inquiry to a supportive staffer can dislodge a bill that had been stuck or that the prime sponsor was not pushing as much as advocates had hoped. This is always good news, but it can require a reallocation of resources. Further, sometimes the governor or a legislative leader determines that they want to move a long-simmering issue off of the public's (or, perhaps more accurately, the media's) radar and will therefore try to move it quickly, most often at the end of a session. This occurred when Governor Mario Cuomo decided to let

While unexpected twists and turns can happen in litigation settings, surprises or changes are governed by rules and procedure—rules on changes of venue, new claims, discovery, depositions, witness lists, and more. And if things go awry, there often is the opportunity to seek reconsideration or to appeal.[134]

Finally, when a bill "gets legs," a huge amount of work often must be done in a relatively short time. Indeed, changes in scheduling in the legislative arena is at the whim of leadership, or possibly the action or inaction of a sponsor, the efficacy of other lobbyists, or wholly external events.[135]

When engaging in legislative advocacy, the students may feel they are just learning the landscape within which they are working when something significant wholly changes their focus and priorities.[136] Adjusting—strategically and emotionally—can be challenging, especially for students more accustomed to the rules governing litigation.

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The four characteristics of legislative advocacy described above require clinical faculty to make mindful choices about their clinical projects and teaching, which we discuss in Part III. There are two additional factors, however, that also affect these decisions: the client and the advocacy partners with whom we work. These are discussed in the next section.

B. The Nature of the Client and Advocacy Partners

The focus on systemic social change, which is one of the most compelling aspects of legislative advocacy clinics, also presents challenges. Our clients[137] may be part of a broader network or coalition seeking

through a bill mandating the testing of all newborns for HIV-antibodies, essentially revealing the mother's serostatus without providing her with the pre-test counseling she would have received had she been tested directly. The governor had held off the bill for a number of previous legislative sessions. N.Y. Pub. Health L. § 2500-f.

134 Although a bill can be reintroduced, the opportunity to pass it may be lost because the political winds have changed and legislators no longer want to expend political capital in its support.

135 Although state legislatures may post calendars, *see, e.g., Senate Schedules*, Ill. Gen. Assemb., https://ilga.gov/senate/schedules/default.asp (last visited on July 16, 2024); *House Schedules*, Ill. Gen. Assemb., https://ilga.gov/house/schedules/default.asp (last visited on July 16, 2024), *Legislative Session Calendar*, N.Y. State Gen. Assemb., https://nyassembly.gov/leg/calendar/ (last visited July 16, 2024), they are subject to change, especially as the session draws to a close.

136 The complexity and ever-changing nature of legislative strategy can be very hard for students to keep up with if they do not have prior legislative lobbying/advocacy experience.

137 As discussed *supra* notes 12-13 and accompanying text, our clients may be community-based organizations, loosely formed—or formally established—working groups or coalitions,

to achieve legislative change, or they may want assistance building a broader network or coalition. Indeed, it is essentially impossible to attain legislative success without a broad-based collection of groups and individuals working towards a goal. The vibrancy of this work, however, does not mean that it is without its challenges.[138]

1. The Client

Legislative advocacy projects often start with a client identifying a social or economic injustice that is disproportionately harming their members, clients, or service-users that cannot be solved through piecemeal litigation or other means of advocacy (e.g., community organizing and educational outreach), and that they think may be better solved through the legislative process.[139] It should not be surprising, then, that our clients often have complex structures and histories and their compositions can vary, including as loosely formed coalitions, working groups, or non-hierarchical grassroots organizations that may not have a designated or binding decision-maker.[140]

Client-centered counseling—keeping the client informed of any updates, discussing any potential changes in strategy or expected (or desired) outcome, and obtaining client consent for moving forward,[141] which may require a sophisticated balancing of a broad range of members' interests and concerns—can be particularly challenging. Indeed,

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legal advocacy or not-for-profit organizations, and task forces sometimes appointed by the legislature or governor, or combinations thereof.

138 Other clinics also work with organizational clients and they, too, may face similar challenges. *See generally* Tokarz et al., *supra* note 9; Li, *supra* note 9; Sarah Davis & Kathleen G. Noonan, *Law in Action: Learning Health Law Through Experience With Stakeholders at the Patient and System Levels*, 9 IND. HEALTH L. REV. 559 (2012).

139 *See supra* Part I (Legislative Advocacy Clinics).

140 The Fordham clinic partners almost exclusively with grassroots organizations and working groups of advocates, at least some of whom are attorneys. The Loyola clinic works with similar groups as well as a broader array of partners, including state-established commissions, legislators, and working groups. *Id.*

141 Depending on the organization/coalition/working group's nature, the decision-maker may be the executive director of the organization(s), a consensus of coalition members, or a sense of those present at a given meeting. At Fordham, when our advocacy partners have disagreements, we typically rely upon them to work it out on their own, although we have, on occasion, facilitated a group's processing of the issues. Loyola's clinic more often may have responsibility for helping a client to work through these disagreements by conducting relevant research to inform the discussion. Analogous questions of "who is your client?" also arise in community lawyering clinics. *See* Tokarz et al., *supra* note 9, at 386-389 (noting that a key to solving these complex issues is continuous open communication among all parties involved, allowing expectations to be managed, goals to be clear, trust to build, and continuity over time to be a possibility); Scott L. Cummings, *Movement Lawyering*, 27 IND. J. GLOB. LEGAL STUD. 87, 102-105 (2020) (discussing ways in which lawyers must consider their approach to counseling and managing conflicts that arise when they represent individuals in the broader context of the movement and what they should do when there is no, or weak, organizational leadership).

students may struggle with fundamental questions of "who is the client?" and "to whom am I accountable?"[142]

Difficulties may occur especially if the client wants legislation that turns out to be not politically workable or when quick decisions must be made (e.g., about potential amendments to a bill that could be the deciding factor in whether the legislation can progress to a vote).[143] Few students arrive in law school having worked in coalitions, presenting an added learning curve.[144]

Students also may have to negotiate potential power and information differentials with their clients. For example, when working with grassroots organizations, students may not recognize the importance of lived experience (or do not have a similar lived experience) when discussing strategy and desired outcomes. Conversely, they may simultaneously need to learn the mechanics and intricacies of the legislative process and explain these realities to their client.[145]

On other projects, the clients may be attorneys or individuals with legislative, policy, or other types of expertise who have a more sophisticated understanding of the underlying systemic issue or advocacy dynamics.[146] It is challenging in these contexts for students to not simply defer to the client, potentially neglecting to properly counsel them, even when the students have developed expertise through their own research.[147]

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142 While students often learn from discussions among clients with more than one leader, they can find it discouraging when a non-hierarchical client is unable to make a decision. *See infra* Part III.B.2. (Working with Clients).

143 More specifically, if a client is too idealistic about what may be possible, they may end up losing the opportunity to get a good, if not perfect, bill passed. This struggle—and disappointment—is not unique to the client, as legislative lawyers also can experience this frustration. Similarly, such tensions can arise when settling litigation and finalizing the terms of a transaction.

144 *See generally Developing Effective Coalitions: An Eight Step Guide*, Prevention Institute, https://www.preventioninstitute.org/publications/developing-effective-coalitions-an-eight-step-guide [https://perma.cc/8GK6-Q9RD] (last visited on July 19, 2024); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clin. L. Rev. 355 (2008).

145 A good example of this is Loyola's ongoing work with the Statewide Youth Advisory Board to the Illinois Department of Children and Family Services, where students often teach information to the youth as they are learning it. *See supra* Part I.B.2. (Loyola's Legislation & Policy Advocacy Clinic).

146 Some clients may have strong existing relationships with legislators or staffers, giving them a level of procedural—as well as substantive—expertise. *See supra* Part II.A.3. (Longstanding Relationships).

147 Students in Loyola's clinic faced this challenge when working with a group convened by the Administrative Office of the Illinois Courts to consider redrafting a provision in the Juvenile Court Act. While the group members knew how the provision was used in their jurisdiction, and were far more familiar with the Act generally, the students, through their research and interviewing other stakeholders, had developed expertise in the legislative history, the impact of the provision on youth, and potential legal challenges to the provision. *See infra* note 169 and Part III.A.4. (Complexity of the Project).

Finally, as we bring in new students each semester—and doing so can be exciting due to the fresh perspectives they bring to the work—it can be difficult for the new team to maintain a client-centered approach, particularly when they are skeptical about well-considered and established client goals or strategy.

2. *Advocacy Partners*

As noted earlier, legislative advocacy campaigns are rarely successful without working with a larger group of advocates.[148] Regardless of the client with whom the clinic is partnering, there is a strong likelihood that to achieve their goals, the students also will be working with a broad array of other individuals, loosely formed groups, or more formally structured coalitions, which for the purpose of this Article, we refer to as advocacy partners.

Like our clients, any one of our advocacy partners may themselves be comprised of complex groups—having many different and connected entities aligned with their work. These can include grassroots groups, legal advocacy organizations, practitioners and professionals from different disciplines, and people with lived experience.[149] They may have come together to address a specific problem or exist to react to a range of issues under a particular topic.[150] As with our clients, students must manage the breadth of knowledge and expertise that the advocacy partners bring to the table.

Adding to these challenges, depending on how formally the coalition is structured, it may be unclear to the students—or other advocates—whom the group represents, or whether they are even speaking on behalf of a large or impacted constituency. The representative at the table may or may not be in a position to speak for the entire group. In fact, the representative may be uncertain of what—or whose—position they are representing, or from whom they need agreement to take a position. Working with several advocacy partners—which we often are—can multiply the complexity.

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148 One of the first questions a legislator will ask advocates is who else they are working with and perhaps whether specific other organizations or coalitions support or oppose the bill. Transactional clinics, among others, may also work with diverse and complex coalitions. *See generally* Tokarz et al., *supra* note 9, at 378, 396; Li, *supra* note 9, at 193.

149 *See generally* Tokarz et al., *supra* note 9, at 386-387; Li, *supra* note 9, at 192-193, 201.

150 For discussion of the reasons coalitions come together, *see generally Developing Effective Coalitions*, *supra* note 144; Bernice Johnson Reagon, *Coalition Politics: Turning the Century in* Home Girls: A Black Feminist Anthology (Barbara Smith, ed. 1983).

Working with clients and advocacy partners can require advanced skills, including managing complex negotiations, navigating shared deliberations and decision-making, and making hard compromises. As a result, it can be particularly challenging to adapt clinic structure and pedagogy to support students in assuming positions of responsibility when working with clients and advocacy partners, as well as with external individuals or groups including legislators (and their staff) and legislative opposition.[151]

III. Our Pedagogy

We have made deliberate choices about project selection, student supervision, seminar content and organization, and the structure of project rounds, to ensure that we meet our four learning goals of self-reflection, client-centered lawyering, collaboration, and the pursuit of social justice, and to address the challenges of teaching legislative clinics. In this Part, we discuss these choices.

A. Project Selection and Design

Student investment in a project and opportunities to engage in self-reflection and obtain critique from peers and the client, are essential for learning in context, developing professional judgment, and creating a foundation from which our students can transfer their learning to future practice.[152] Therefore, these learning goals, as well as a project's ability to facilitate client-centeredness, create opportunities for collaboration, and to further social justice are our priorities.[153] Similarly, any project we take on must be one that allows us to mitigate some of the challenges described in Part II. To ensure we meet these goals, when selecting and designing projects we are guided by four criteria: the willingness of the client to engage with students, the availability of substantive opportunities for student involvement, the time required to see the project through to its successful end, and the complexity of the project.[154]

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151 *See infra* Part III.B. (Supervision).

152 *See supra* Part I.A. (Learning Goals) and Part I.B. (Our Clinic Projects and their Impact).

153 In particular, we will seek out those projects that facilitate conversations of structural inequality.

154 A legislative advocacy clinic can look very different depending on how geographically close the clinic is to the state capital or the decision-making body with whom the clinic will be interacting. If the capital is nearby, students likely will have many more opportunities to interact with other advocates and legislators, and to see the legislature in operation.

As both of our clinics are at least three-plus hour train rides from our respective state capitals, we must structure our projects such that communication and advocacy can occur both remotely (via Zoom and emails) and in person, and consider whether the client or the

1. An Engaged Client

Our clinic projects must be identified as priorities by underserved and underrepresented communities, or by our clients who often represent these communities. Our clients also must share our goal of creating good learning opportunities for the students, be willing to accept our teaching model,[155] and be able to make the time necessary to support the students' work on the project.[156]

The question arises: what is the role of the clinical professor and what is the role of the client? We both engage deeply with our students: requiring them to do all that is necessary to provide their client with high quality lawyering. This means that we will urge (and at times participate in) our students' brainstorming and planning, guiding them towards ideas and resources that may be unknown to them (in part due to their lack of familiarity with the legislature and the uncertainty that comes from operating in a venue with few written rules). Further, we require our students to share their plans and outlines with us to provide early feedback that helps keep them on track. Finally, we review all student drafts (from emails to one-page advocacy documents to legislative memos)—often many times.

This leads us to an interesting difference between our clinics. Professor Weinberg and the Loyola clinic faculty are recognized experts on many of the subjects on which the clinic works.[157] Therefore, clinic faculty are particularly well-equipped to provide students with insight and perspectives about on-the-ground implications of different ideas or proposals, even as they learn alongside the students about many of the intricacies of the issues involved. As a result, Loyola's relationship with their client often involves shared decision-making.[158] Because Professor

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clinic is better able to carry out the on-the-ground advocacy in the state's capital. This can vary from project to project. *See supra* Part I.B.1. (describing Loyola's decision to not take on primary responsibility for the part of a specific advocacy project that required being in the state capital regularly).

155 Clients are informed that students must have substantive roles in the development and execution of strategy. This can be challenging both for grassroots groups (who understandably wish to amplify the voices of directly impacted individuals and who may be skeptical of law students' ability to truly understand the conditions the organization is seeking to change) and attorneys (or professional-led) organizations (who, while grateful for student partners, may find frustrating their slower pace or difficulties with producing work products).

156 Students can become impatient with the heavy workload being carried by our clients, such as when they are unable to provide timely feedback.

157 *See generally* Anita Weinberg, *Seeing the Forest through the Trees: Rethinking the Meaning of 'Child Welfare,' in* Reflections on Child Welfare Areas of Practice, Issues, and Service Populations (Rachel Adams ed., 2020) (providing a retrospective of some of her work in the child welfare arena).

158 Loyola's relationship with its clients also leads to the clinic faculty staying actively involved in projects during semester and summer breaks, in addition to generating scholarship

Cooper takes on varied subjects about which she may be learning along with her students, the Fordham clinic's relationship with a client is more akin to a traditional lawyer-client relationship, meaning the students counsel the client, but the decision-making stays with the client.

Potential clients may have their own concerns about partnering with a clinic. Some may reasonably determine that it is faster and easier for them to get the work done on their own. Given that many of our potential clients are public interest attorneys or community organizers, their own heavy workload may lead them to conclude that they may not want or be able to sufficiently engage with our students. The challenge is that we often work at a slower pace than the client or advocacy partners because students are learning as they are doing the work.[159]

2. Opportunities for Students

We place significant weight on whether the issue already is a priority of other advocacy groups and experts such that students will have less opportunity to play an important part in the substantive decision making and advocacy, or to interact with or make presentations to coalitions and impacted populations, as well as legislators and their staffers.[160] That said, Loyola's clinic sometimes will take responsibility for discrete parts of projects, collaborating with a client and advocacy partners on a larger legislative campaign. This may include assigning students to research issues, interview stakeholders, review data or file Freedom of Information Act requests to gather needed information for the larger campaign, and draft the bill and accompanying materials. In all cases, regardless of which parts of a campaign the students are working on, they remain involved in strategy sessions, negotiation discussions, and critiquing draft bills. While they may not have primary responsibility for all aspects of the campaign, they are engaged in collaboration with other

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and attending to administrative responsibilities. Professor Cooper remains involved in projects through the end of the legislative session, which typically occurs in early to mid-June. As a tenured professor on a nine-month contract, Professor Cooper is encouraged to engage in scholarship over the summer; were she not tenured (or tenure-track), there would be a greater expectation that she would remain actively involved in the clinic projects during breaks.

159 Our partners then may move ahead faster than the students, not waiting for student drafts. This sometimes requires restructuring a planned project, when, for example, over winter break, partners drafted a bill the Loyola clinic had agreed students would draft. In that case, the student role shifted to critiquing and making changes to the initial draft bill.

160 Professor Cooper, for example, opted against pursuing a marriage equality project (notwithstanding her work on the issue) because many LGBTQ+ advocacy organizations were already occupying this space, which would have minimized the students' opportunity to engage in substantive advocacy.

advocacy partners,[161] a critical skill for legislative and policy work. The Fordham clinic does not initially take on discrete parts of a project, instead working step-by-step with the client to identify ways in which the clinic can best help to craft and execute a given legislative campaign.[162]

3. Likelihood of Success and the Timeframe for Achieving a Client's Goals

Paraphrasing long-time Chicago-based advocate John Bouman: There is no such thing as a legislative failure, only long-term initiatives.[163] In our experience, ideally, most legislative projects are completed in a maximum of three-to-four-years.[164] Because there are many unknowns when we take on a project, we must consider ahead of time what can be accomplished during a semester, often working with our clients to identify realistic work products and creating worthwhile learning goals. In addition, our legislatures do not meet during our fall semester and students therefore are less likely to meet with lawmakers or staffers or to travel to the state Capitol. These unknowns, and the arc of the legislative calendar, lead us to structure the seminar to ensure that students will also obtain legislative advocacy skills through simulation, even when

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161 Because legislative campaigns are rarely accomplished in one or two semesters, individual student teams are not at a disadvantage when they work on only a discrete part of the campaign. An example of this type of collaboration is Loyola's work to pass legislation to amend the Illinois School Code to prohibit fining students or family members for students' behaviors in school. One advocacy partner assumed primary responsibility for analyzing data returned from a Freedom of Information Act (FOIA) request; another partner, based near our state Capitol, carried primary responsibility for daily lobbying activities. Loyola's students drafted the FOIA requests, bill language, and supporting materials. We met with the advocacy partners at least weekly to update one another, discuss questions and concerns, and reach agreement on next steps.

162 There are times when the client (and the Fordham clinic) will reach out to others to play significant roles in a campaign (e.g., to be more present in Albany, to edit and sign op-eds, to reach out to legislators with whom they have a relationship).

163 Bouman was a legal services attorney, served as the advocacy director and then President of the Shriver Center on Poverty Law, and is now the founding director of Legal Action Chicago. He has worked on individual and class action representation, and on state and federal legislative and policy initiatives throughout his career. *Staff,* Legal Action Chicago, https://legalactionchicago.org/who-we-are/staff/ [https://perma.cc/WX4U-3JD9] (last visited Aug. 30, 2024).

164 Typically, the first year is spent doing background research to determine if a project is legally and politically feasible, and with luck, drafting a bill. During this phase, the students and the clients often will be in touch with the legislator (and their staff) who will be sponsoring (i.e., introducing and taking significant responsibility to pass) the bill. During the second year, students meet with additional directly-affected individuals, advocates, legislators, and legislative staffers. The information they glean from these meetings allows them to amend the bill, if necessary, to address unforeseen objections and to further shape messaging and advocacy. In the third year, clients and students work hand-in-hand to bring on additional bill sponsors, to ensure that the legislative leadership is on board, and to push for a vote on the bill before the legislature adjourns.

not through live-client work.[165] We hesitate to take on clinic projects that we expect will last more than three or four years.

While we may agree to work on a project that is challenging and may not become law in this timeframe, we are more likely to do so when it is important to commence a campaign to educate the public and the legislature before moving forward with legislation.[166] Loyola's clinic has adopted several projects with this purpose in mind. For example, the Clinic undertook two significant research and writing projects with the intent of laying the groundwork for later advocacy with community-based groups, stakeholders, advocacy organizations, and public officials to rethink how the state responds to children in conflict with the law.

These reports—examining the minimum age at which children should be held responsible for criminal behaviors[167] and assessing the impact of sex offender registries on youth[168]—made recommendations for policy and legislative reforms. All participants thought it was premature to bring these issues before the legislature but believed the reports would deter harmful legislation from being passed and enable legislation to eventually move forward.

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165 *See infra* Part III.C. (Seminar).

166 We recognize, of course, that even in the best of circumstances, a project may become too politically complicated, or a client ultimately may not have the bandwidth to support the work. For example, the Fordham clinic partnered with the New York Civil Liberties Union (and aligned with a broader coalition of individuals and organizations) for about two years, trying to get the Gender Equality Non-discrimination Act (GENDA) passed. We drafted a 30-plus page report, a four-page glossy brochure, and other advocacy materials to increase the significant need for this bill. Ultimately it became clear that the Republican-led Senate would not permit the bill to come to a vote and advocates suspended (public) work on this project until the Democrats took over the Senate majority. Notwithstanding this trajectory, this was a very worthwhile learning experience and opportunity to advance support for the bill.

In a different situation, the Fordham clinic and its clients had sought to make it easier for low-income and immigrant New Yorkers to start small businesses as LLCs; ultimately, this campaign ended because we learned the goal (allowing LLCs to publish statutorily mandated information online instead of in local publications) was both not politically feasible (some of our anticipated allies did not want to undermine financial support for local newspapers) and would have required far more community organizing than the clients had the capacity to support.

167 *See* Eve Rips et al., Legislation & Policy Clinic, Civitas Childlaw Center, Loyola University Chicago School of Law, Incapable of Criminal Intent: The Case for Setting a Minimum Age of Criminal Responsibility in Illinois (2021). https://www.luc.edu/media/lucedu/law/centers/childlaw/pdfs/incapable_of_criminal_intent.pdf. The Loyola clinic was asked by the co-director of Loyola's Center for Criminal Justice, Research, and Practice, to take on researching and writing a report examining the minimum age at which children should be held responsible for criminal behaviors.

168 *See* Illinois Juvenile Justice Commission, Improving Illinois' Response to Sexual Offenses Committed by Youth: Recommendations for Law, Policy, and Practice (2014), https://www.luc.edu/media/lucedu/law/centers/childlaw/pdfs/improving_illinois.pdf [https://perma.cc/FR4Z-J3BT]. The Illinois Commission on Criminal Justice asked the clinic to partner with the Commission and Northwestern University's Children and Family Justice Center to prepare this report.

These projects provided students with opportunity for self-reflection as they collaborated with partners and stakeholders: they delved into controversial subjects, having to understand opposing positions, and brainstormed effective approaches to addressing the issues. As the students participated in drafting the report, they also gained legal research, writing, and communication skills that will transfer to any legal workplace.

4. Complexity of the Project

The question of timeframe often is inherently linked to questions about the complexity of the project. Sometimes a project is complex because it requires a very broad range of research. For example, it may require analysis of social science research and data, an in-depth study of our existing state laws and accompanying rules, a 50-state comparison of relevant laws as well as review of international law, and key stakeholder interviews. Or a project may be complex because of the subject matter, necessitating a command of an especially difficult topic or issue.[169] While we do not shy away from these projects, we focus on ensuring that students are capable of diving into the work and investing in the outcome, facilitating both a positive outcome for the client and a positive learning experience for the students.[170] More specifically, faculty work with the students to break the project into meaningful, yet more finite issues that can be completed in a semester. A project is likely to be meaningful not only because of its desired goal, but also because it provides an opportunity for the student to invest in the work.

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In sum, both clinics serve unique roles as legislative lawyers and advocates for our clients, notwithstanding the different types of projects we may take on. Professor Cooper typically looks for niche initiatives that can make a difference in the lives of disenfranchised New Yorkers,

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169 Loyola's clinic has been working on amending one paragraph in Illinois' Juvenile Court Act for several years. The project was first proposed by a youth formerly in care. While our focus is only three run-on sentences, the project is complex because: (1) it is difficult to grasp the meaning of the three sentences; (2) it is difficult to explain the meaning to others; (3) there are different recollections and legislative histories available to identify the original purpose behind the provision; (4) it is politically fraught; and (5) it is challenging to identify realistic solutions if the sentences are removed. Each semester that a new group of students takes on responsibility for this project, they must review all the materials already gathered and move forward. Why do we continue the project? Because our advocacy partners have become more committed to the issue and engaged in the discussion, and we consider it an important due process matter that should be addressed.

170 *See supra* Part III.A.2. (Opportunities for Students).

but which are not the focus of other advocates, and which do not contain budgetary requests.[171] Professor Weinberg will take on projects that can improve the lives of children and families, even when higher profile advocacy organizations are part of the movement for change. As described in the next section, this difference can affect the ways we supervise our students. We both, however, prioritize ensuring that the students are able to immerse themselves in the legislative campaign, assuming significant responsibility for its success.

B. Supervision

Much of what we do through supervision is similar to most clinicians and reflects best practices. We work to ensure students feel ownership of their work, build relationships and learn to collaborate with their team members, client, and advocacy partners, and learn to manage unpredictability. In this section we highlight additional approaches we have found helpful when supervising students and addressing the challenges we identify in Part II.

First, some context. Our clinics are fairly similar in size and number of credits.[172] We teach one semester clinics, although some students may continue for a second semester.[173] Because we place a premium on the power of collaboration[174]—for its own attributes and because successful legislative advocacy requires the ability to work effectively with others—teams of two to four students work with a client, staying on the same project with the same teammates throughout the semester.[175] Students are expected to devote an average of 12-15 hours per

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171 If a project has a relatively small budgetary impact (e.g., a fraction of the state's overall budget), however, we would consider working on it.

172 Fordham's clinic has ten students and awards five credits for the clinic: two for the seminar and three for project work. Loyola's clinic has 12-15 students and awards four credits total for seminar and project work.

173 At Loyola, students are allowed to remain in clinic if they are interested in doing so and their project is continuing; on average two to four students will stay on. At Fordham, students are permitted to continue for an additional semester on complex projects where having more continuity between semesters would be especially helpful. In both of our clinics, when students stay for a second term, they are expected to attend those seminar classes with guest lecturers, project rounds, and final project presentations.

174 *See* Bryant, *supra* note 27, at 460 (observing that the collaborative process is likely to yield new ideas "rather than to a simple summation of ideas"; "[maximizes] use of the experiences and knowledge that each collaborator brings to the joint work;" and "cherishes differences and recognizes that conflict can be constructive and valuable"). Fordham also encourages collaboration with students taking clinics that are a part of Lincoln Square Legal Services, Inc., as the bounds of maintaining client confidentiality apply within the entire law firm.

175 Professor Cooper requires her team to meet at least twice during the week amongst themselves (in addition to their 60–90-minute weekly supervision meeting with her) and that one of these meetings be in person. In addition to the 90-minute supervision meeting with clinic faculty, Professor Weinberg expects students to meet at least once per week amongst

week to their project, and additional time for work related to the clinic seminar.[176]

All of our supervision seeks to ensure that after a semester, students leave the clinic not only with lawyering skills, but also in the words of cognitive scientist Guy Claxton, with the ability "'to monitor [their] progress; . . . to measure it; to mull over different options and courses of development; to be mindful of [their] own assumptions and habits, and to be able to stand back from them and appraise them.'"[177]

1. Seeing the Big Picture

Because we do not represent individuals, and instead represent one or more client organizations, students sometimes struggle to connect the problem(s) identified by the client (i.e., an individual or group's experiences on the ground) and the systemic solutions that will address the clients' concerns. They also may have difficulty grappling with problem definition and project goals, especially at the beginning of a project.[178] Our task is to help our students bridge this gap. This requires us to familiarize the student with the systems within which they will be working, and with the structural, racial, and economic disparities that influence these systems and their clients' lives. Understanding these disparities also can help the students grasp the significance of the work they are doing.

When focusing on the larger concerns, however, some students may lose sight of the impact these systems have on the lives of individuals and families. To help students make this connection, when working on a child welfare related project, for example, Professor Weinberg uses system maps and flow charts to help the students understand when a child or family might first come into contact with the child welfare system, how they move through the system, and where and when are the system's decision points. They also discuss how and why families of color

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themselves and as many more times as necessary to complete their work. For both our clinics, supervisory team meetings take place in person. Students are expected to try to resolve differences within the team—whether about next steps or work styles or anything else—but faculty stay attuned to potential problems and provide guidance in resolving them when appropriate.

176 The Loyola clinic is co-taught and the student-faculty ratio ranges from 6:1 to 10:1. The Fordham student-faculty ratio is 10:1. The lower Loyola student-faculty ratio reflects the administrative responsibilities carried by Professor Weinberg, and that until recently, the clinic was co-taught with a post-graduate teaching fellow or no additional faculty.

177 Best Practices, *supra* note 10, at 66–67 (originally quoting Guy Claxton, Wise Up: The Challenge of Lifelong Learning 14 (1999)).

178 *See, e.g.,* Susan Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 Clin. L. Rev. 45, 62 (2002). Problem definition and clarification of law and facts can continue to be complex with new students joining the clinic each semester.

are disproportionately represented in the system.[179] They return to these questions throughout the life of the project.

To help students understand the potential impact of their systemic work on the lives of individuals, Professor Cooper, for example, requires her students to engage with the clients or members of their organizational clients' early in the semester. Students on a consumer rights advocacy team may attend or volunteer at CLARO, a limited-scope program providing legal advice and services for unrepresented defendants with consumer debt cases.[180] Students working to protect the rights of intersex individuals may attend or volunteer at open forums/town halls where their presence would not be inappropriate or intrusive.

Students also may struggle with understanding where their work on the project fits into the overall legislative campaign, or may be impatient and frustrated that they are working on early phases of a campaign and will not be involved in what they perceive as the more exciting aspects of legislative advocacy. To deal with this, in a supervisory meeting, we map out with students the plans for the full campaign (to the extent it is known), review what we hope to gain from each strategic step,[181] and discuss how the students' work fits into the whole.

We turn now to describing how we help students build relationships with their clients—and counsel them—and with the many advocacy partners and decision-makers who are part of a legislative campaign.

2. Working with Clients

This section focuses on what we do to help our students work productively with clients who often represent a group of individuals or organizations. The structures of the organizations often are complex, having many different types of members and decision-making processes.

a. How Faculty Support Student-Client Relationship Building

Students sometimes express confusion about the role of the faculty supervisor vis-à-vis the client, especially when the client is an attorney

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[179] We ask the students to brainstorm why and what they think, even with their limited knowledge, could be done to prevent contact with the child welfare system. They are sometimes at a loss to understand why the system is not focused on the family's basic underlying needs, which are often directly related to poverty.

[180] *See CLARO*, Fordham Law School, https://www.fordham.edu/school-of-law/centers-and-institutes/feerick-center-for-social-justice/programs/civil-legal-advice-and-resource-office/ (last visited Sept. 6, 2024) (describing the Civil Legal Advice Resource Office supported by the Feerick Center for Social Justice in the Bronx, Manhattan, and Staten Island, and by other law schools and organizations around New York State).

[181] When starting a new project, significant foundational work often must be done. These early efforts can include statutory and case law research, stakeholder interviews, data gathering and analysis, Freedom of Information Act requests, as well as coalition building.

(or there is an attorney among a client group). Even though we may have different types of relationships with our clients, in both of our clinics we are the primary vehicle for teaching students to plan, execute, self-reflect, and accept—and give—critique.[182]

We also place high value on the students developing a close relationship with the clients, which admittedly can be challenging if we have worked with the clients for some time. In the past, to foster students' independence and their investment in the project, further the client's investment in the students, and support their relationship-building, we both required students to hold their first client meeting without us. Notwithstanding extensive preparation with the students before this meeting,[183] students frequently left these initial meetings quite confused and frustrated. We realized that most new clinic students do not sufficiently understand the range and depth of what they do not know or are not aware of the assumptions they are making and therefore would not ask follow-up questions—or were too insecure to do so. At the same time, the client did not always grasp the complexity of the project, or did not perceive the students' confusion, and did not effectively convey their goals.

We therefore now attend each team's first meeting with their client. We still engage in detailed preparation with the students and expect them to take the lead in these meetings. But we may ask clarifying questions, encouraging them to unpack any assumptions they have made about the client, the project, or the legislative process.[184] We seek to ensure that the students have a reasonably clear vision of both the client's goals and their own next steps by the end of this initial discussion.[185]

Although we use the project selection process to head off any tension that might develop between students' and clients' expectations of how their relationship will develop—specifically by discussing with potential clients the goals for student learning and the timeframes within

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182 *See supra* Part I.A. (Learning Goals). *See also supra* Part II.B.1. (The Client), Part III.A.1. (An Engaged Client), and note 141 (describing Fordham and Loyola's clinic faculty relationships to their clients).

183 This included the students identifying their goals for the meeting, preparing a proposed agenda for the client, drafting an internal outline for the meeting, and our stressing the importance of reviewing any existing files.

184 Students sometimes hesitate to ask follow-up questions of the client (and, at times, of us), both during a meeting and afterwards. We seek to increase their self-confidence to ask questions in the moment; or, if that does not occur, to use the next supervisory team meeting to reinforce the importance of asking questions.

185 Some clinicians would assert that the students' failure to ask the appropriate questions in the first meeting would be an excellent teachable moment: that from this experience they would learn to be more prepared and more assertive. We do not argue with this, but have discovered that in a one-semester clinic we cannot afford to wait until the client and our students can get in the same room (or Zoom) again. Rather, early intervention better serves our learning goals and allows the students to better meet the client's legislative goals.

which we can work—there may be occasions we need to engage with clients who wish the student team could grasp the scope of the project and the client's goals more rapidly. Similarly, we use our team supervision meetings to encourage the students to develop empathy for the client's experience and, when relevant, to identify ways they can be better prepared for the client or to communicate their preparedness.[186]

b. Client Counseling with Complex Clients

All clinic students need to be focused on their client's interests, values, and goals. The difference for students in legislation clinics is that the client is not one person, but rather can be one or more individuals representing a broad range of people and communities who will be impacted by the decisions the client is making. When considering options and counseling their clients, students must consider the impact and implications of any path taken on this broader group.[187] This can be especially difficult, as students typically are novices in counseling only one client; now they need to help their client consider not only the options, but also how their decisions may impact much larger groups. Students also must be prepared to consider the potential conflicts that might arise with the client group, as well as between the client and its advocacy partners.

We often ask our students: how and why they think the client group, advocacy partners, and other stakeholders (supporting and opposing groups), as well as legislators and the media, may react to recommendations they are making, advocacy materials they are preparing, or provisions they are including in a draft bill?[188] This series of questions forces the student to think differently than in most clinic litigation matters

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[186] Professor Cooper typically interacts with the clients only if there is a concern about the project or the student work. Loyola's clinic faculty often has regular contact with the clients and may be working with them on several non-clinic-related projects as well. *See* Part II.B.1. (The Client) and *supra* note 141 (describing Fordham and Loyola clinic faculty's relationships to their clients). For this reason, Professor Weinberg may find herself caught in unexpected conversations on a project topic with clients or advocacy partners, without the students. Ordinarily she will stop the conversation to bring in students. When this is not possible, she ensures that the students are updated on the conversation and understand all that was discussed.

We inform our clients and the legislative staffers that it is our practice to include students in all communications. There also may be exigencies, however, when they reach out to us or they reach out to clients with whom they have a long-standing relationship. If this happens, afterwards we will explain to the students why this occurred and fill them in on what was discussed.

[187] *See supra* Part II.B.1. (The Client). The client counseling concerns present in legislative advocacy may be more like those in class action and impact litigation.

[188] Even though the students rarely are involved in the implementation of a law, proper client counseling requires that they understand potential challenges—both pragmatic and legal—to implementation and that they consider them while drafting, negotiating, and counseling their client about a piece of legislation. For this reason, we focus students on considering these concerns.

where the client's focus typically is on their own needs (and perhaps those of their family). Rather, our students must learn not only about their client, but also about all of the complex players present in a legislative campaign.[189] (Due to this complexity, there may be times when we suggest creative solutions to unexpected problems that are beyond the ken of even the most prepared student.)

3. Working with Advocacy Partners

Students often are not familiar with the role of advocacy partners—those individuals and organizations who may be actively involved in helping to move a legislative campaign forward, engaging in strategic planning, raising awareness about the issue within their own groups, advocating, and lobbying legislators. Students need to learn about the constituencies they represent, their goals, their relationships to the client and to one another.

We discuss with the students these organizations' interests as they relate to the legislative effort. Questions that we may wrestle with include: Who does the advocacy partner represent? Do they have the authority to make decisions when they sit at the table? What knowledge, capacities, expertise, or relationships do they bring to the effort? How might the advocacy partners react to recommendations under consideration? What power and influence do they carry in this effort?

To help students identify the role of the advocacy partner and their significance to the larger campaign, we may introduce a power mapping tool, which helps advocates identify those "individuals with the greatest likelihood of helping make change being sought [and] the pathways or connections that can help" us gain access to them.[190]

4. Working with Decision-Makers

Legislative work requires us to address the concerns and interests of a broad array of decision-makers. To prepare students for this work, we help them understand how to identify the relevant legislative decision-makers (e.g., those with the power or authority to support or oppose our initiative, who can influence the votes of others, and who we may be able to influence). Students may need to research these

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[189] Especially when students are preparing to counsel long-term clients, we will share relevant information from past collaborations or campaigns. Students also will conduct online research and interview stakeholders to learn more about the underlying issue.

[190] Union of Concerned Scientists, Power Mapping Your Way to Success (Apr. 2018) https://www.ucsusa.org/sites/default/files/attach/2018/07/SN_Toolkit_Power_Mapping_Your_Way_to_Success.pdf (describing power mapping as "a visual exercise that helps you to identify the levers and relationships you can take advantage of to gain access to and influence over your target").

decision-makers' roles and assigned responsibilities within the legislative body, their professional interests, their constituent concerns, their values, and even sometimes their hobbies and family. All of this can be relevant both to project strategy and to messaging.

We ask the students what they think might influence any given decision-maker whose support we need. We reiterate that, like anyone, they can be influenced by their own life experiences, or the response of a colleague or even a relative—as well as by their constituents' concerns, their party's values or leadership directives to vote a certain way. In contrast to courts and juries, they are not governed by rules of evidence (e.g., regarding relevance, hearsay).[191]

That said, concerns about relevance and credibility influence our conversations with students when strategically considering what information to share with decision-makers. Some factors might even mirror those weighed in litigation (e.g., Would laws from other states be sufficiently persuasive? Which witnesses testifying about a bill will be the most credible?). We return to these discussions throughout the project because decision-makers can change, as can the political winds, which may affect a decision-maker's ability to help move forward or defeat a bill, their interest in a bill, or their thinking and position on the bill. We may, in this context as well, encourage students to use power mapping.

5. Teaching about Written and Oral Advocacy

Legislative advocacy requires the ability to perfect a range of written and oral communications. This can include bill language; supporting memos and fact sheets to educate legislators, advocacy partners, and the public; Frequently Asked Questions packets to assist legislators when debating their bill on the floor of the chamber; extensive reports; a two-minute elevator pitch; or an hour-long meeting with a legislator.

Students often are surprised and frustrated by the range and complexity of what must be included in these documents, even (or especially) if they must be simple and brief. It may be counterintuitive to some students that being concise requires them first to master the material. Others may feel overwhelmed with information and unsure of how to determine what material is relevant for which audiences. Finally, some students are challenged by needing to adjust their "voice" to address non-lawyers.

In each of these contexts, we ask students to go back to basics, inquiring about their client's goals, their audience, and their timetable. We may pose questions that help them to understand that they need to have

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[191] *See supra* Part II.A.1.b. (Rules of Evidence).

a deep understanding of the project before they can determine what information to include and how to present it.[192] We also encourage them to share their drafts (or their elevator pitch) with a friend or relative to assess whether their material is accessible and effective.[193] Students may also seek feedback on these brief materials or "conversations" in project rounds.

To familiarize students with the range of written and oral formats, in addition to the specific work they may need to do for their clinic project (which we critique), we incorporate exercises in the seminar and provide feedback on these assignments not only for substance but also for style, conciseness, and persuasiveness.[194]

Professor Weinberg often uses "live-critiquing" when reviewing written materials.[195] She will briefly review the materials the team sends her but instead of providing feedback on paper, she reviews the documents with the team during a supervisory meeting, asking questions about the choices they made and directing them to consider the benefits and disadvantages of the phrasing or the structuring they have used.[196] The live give-and-take provides an opportunity for clinic faculty to ask questions that help them understand why the students drafted a document as they did, engages the students to think deeply about these

192 We may also ask students to review some of the samples of prior advocacy materials the clinic has produced to assess what may be most relevant and appealing to different audiences.

193 When sharing draft materials with others, students in the Fordham clinic need to be careful to not disclose confidential facts or strategies with those who are not part of the Lincoln Square Legal Services, Inc. law firm.

194 As with many other clinicians, we often find ourselves dealing with a time crunch in which to provide students feedback on their written work or their outline for an oral presentation. We model, and build into our supervision, the use of "backwards planning," asking students to look at the calendar to estimate how long it will take to complete a draft for our review, how long we will need to provide our feedback (often expecting to go through this process *at least* twice), and how long the clients will need to provide their critique (again, often going through this process more than once) before the final work product must be completed. *See* Ryan S. Bowen, *Understanding by Design*, Vanderbilt Univ. (2017), https://cft.vanderbilt.edu/guides-sub-pages/understanding-by-design/ (describing the work of Grant Wiggins, pioneering the use of backwards design in course design) (last visited Sept. 3, 2024) [https://perma.cc/97FX-7YQS]. This process may be more complicated than in litigation where a lawyer may not seek client review of their written work product.

195 *See* Hillary A. Wandler, *Pacing Beside the Pool: Coaching Champion Writers to a Strong Finish in Clinic (Without Jumping in and Finishing for Them*, 1 J. L. Teaching & Learning 56, 75-78 (2024) (summarizing the discussion among clinical law professors about directive and non-directive supervision and discussing the benefits for both the student and the clinician in participating in live-critiquing, including efficiency, immediate feedback, engagement, reflection, and creativity).

196 This has proven especially helpful when critiquing draft bill language and one- or two-page fact sheets since students are less familiar with drafting these documents.

issues, and allows and facilitates faculty providing guidance with an understanding of the students' thinking.[197]

6. Handling Unpredictability

Uncertainty and unpredictability are inherent in legislative and policy work. To help students to understand and manage the unpredictability, we share examples of times when we were certain something was not going to happen and it did, and vice versa. Sometimes this means a bill passes when we did not expect it to, though more often it means that we must wait until the next legislative session to pursue our client's goals. Admittedly, this is not that different from what happens in other law practice areas. That said, we work with the students to anticipate surprises that could occur: to ask why and how they might happen, whether there is anything we can do to protect against it, or to plan our course of action if the unexpected happens. Perhaps most challenging is when there appears to be no rational basis for things going awry. Regardless of how we work with students to handle the unpredictable nature of this work, some students discover this type of work is not for them.

C. Seminar

In an ideal world, we would teach year-long clinics offered for six or more credit hours and our schools would be located near the state capital. Given our realities of credit allocation and geography, however, these parameters inform not only our project selection, but also our choices regarding the content of our seminar.

Throughout this Article, we have focused on our many commonalities: We work on projects seeking to disrupt institutional and structural racism, poverty, and disenfranchisement; further, government budgets and implementation challenges create complexities that test the availability of readily-identified solutions for our clients. As important, we

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[197] While the "live-critiquing" usually is a deliberate form of feedback for the Loyola clinic, it also has been helpful when students were unable to meet a deadline to get materials to faculty in time for written feedback.

Professor Cooper employs a somewhat different approach (Professor Weinberg also uses this approach depending on the writing assignment), providing comments to students on early drafts, which she and the team then discuss during a supervisory team meeting. She also will do some line editing to draw the students' attention to stylistic concerns (e.g., using conclusory, rather than factually specific language, using passive voice too often or in a manner that omits critical details). When preparing final documents, there is a fine line—not easily negotiated—between providing helpful feedback that results in a top-notch document or presentation that continues to capture the students' voices and becoming too directive, such that the students start to disengage from the project. More than almost any other supervisory role, this dilemma challenges our best intent to facilitate student responsibility for the project.

both use the learning goals set forth in Part I, are mindful of the challenges to legislative advocacy described in Part II, weigh similar factors when choosing projects, use similar supervision tools, and want our students to develop similar lawyering capacities.[198] Yet, we take different approaches to crafting our seminars.[199]

Loyola's clinic seminar is structured to ensure that students develop skills in reading and critiquing legislation and develop an understanding and appreciation for the potential of legislative advocacy—and their role as advocates—to achieve systemic change. To the extent the student team projects do not offer the opportunity to develop specific skills needed by lawyers engaged in legislative advocacy, simulated exercises fill in the gaps. Professor Cooper uses the seminar to help students hone their advocacy, messaging, and strategizing skills in the context of their legislative projects. This foundation allows students to adjust or acquire other context-specific skills that can be developed more deliberately in supervisory team meetings. As clinic projects typically are in different stages of development, both professors rely on project rounds to expose students to the range of anticipated legislative lawyering activities.[200] The remainder of this section will describe our goals for seminar work in greater detail.

1. The Loyola Legislation & Policy Clinic Seminar

I am often struck by students' expectation that there is a "correct" answer to problems presented in clinic. Yet, in legislative advocacy, there isn't one right solution; each option may be fraught with new challenges or uncertainties. Even within the client group, individuals and communities may be affected differently by both the underlying problem and potential solutions. To support students in becoming (more) creative and strategic thinkers, I structure the clinic to introduce them to legislative lawyering, to teach context-specific skills, and to provide opportunities for them to struggle with legislative interpretation, observe problems with implementation of past laws, and expose them to the ways legislative initiatives can evolve.[201]

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198 As will be evident throughout this section, we both prioritize our students' developing essential lawyering skills including: legal and factual research and analysis, fact-finding, problem solving, and oral and written communication. *See supra* note 32 and accompanying text.

199 Not surprisingly, as a result of collaborating on this Article, we both are considering making modifications to our syllabi based on what we have learned from each other.

200 *See infra* Part III.D. (Project Rounds).

201 *See Legislation and Policy Clinic: Learning Goals and Outcomes*, Loyola Univ. Chicago, https://bit.ly/LegisGoalsAssessment (last visited Sept 1, 2024). This document is shared with students at the start of the semester to help put into context the work they will be doing during the semester, and the expected outcomes.

Students enrolled in Loyola's clinic are introduced to the clinic and legislative policy work in a six-hour orientation.[202] The orientation provides students with a "tasting" of a range of advocacy skills through four hands-on exercises that introduce them to some of the key skills required in legislative work, as well as the challenges, and the excitement of the work. The exercises include one to help students reflect on what makes for a good story;[203] a board game to understand the legislative process and advocacy;[204] an excerpt of a statute to focus on statutory interpretation and the role of legislative history;[205] and a hypothetical scenario during which the students "experience" what it is like to "lobby" for a bill.[206] While not all students will need to apply these skills in their project work, the orientation provides an exciting entry into clinic.

During orientation, we also discuss clinic responsibilities and address professionalism. This includes a review of the clinic manual, issues of confidentiality and professional responsibility, and an engaging discussion about planning agendas, convening and facilitating meetings,

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202 The orientation usually is held on the first Friday of the semester in lieu of our two-hour class. Loyola does not hold classes on Fridays and students are informed early in the summer about orientation, so they know to hold the date open.

203 The idea for this exercise is adapted from Deborah Epstein, Jane H. Aiken & Wallace J. Mlyniec, Teaching the Clinic Seminar 283-370 (2014) (discussing the importance of storytelling and describing a class exercise used in Georgetown University Law Center's clinics).

204 The hypothetical is based on a bill that has been introduced over several legislative sessions that allows students to consider different perspectives and to practice clearly articulating information and positions, and to tailor their messaging to reach different decision makers. Students are assigned roles representing different interest groups. Former clinic students play the role of legislator who the students must meet with in anticipation of a committee vote. I originally developed the board game—which includes dice and pawn pieces—to use with youth in foster care to explain the legislative process. Over time it became clear it was an effective teaching tool for law students as well. Six or seven minutes of playing the game is sufficient time for some students to see their imaginary bill passed, and others to "experience" the frustration of a bill being held in committee or amended and thus losing a turn (the equivalent of a bill being slowed down while deadlines loom), or the disappointment of successfully getting one's bill through the legislature only to have the executive veto the bill. Following the game, I review the legislative process, including the role of advocates at the different stages (e.g., leading up to introduction of a bill, preparation for a committee hearing, the hearing itself, and preparation for floor consideration and vote).

205 This exercise is borrowed from Abner J. Mikva & Eric Lane, Legislative Process 673-678 (2009). Students mull over the meaning of the word "forthright" in a New York State Law; we then discuss the significance of a particular word choice, understand the role of ambiguity in statutory language, and consider ways to clarify the language.

206 The hypothetical is based on a controversial bill that has been introduced over several sessions in the Illinois General Assembly. Students are provided brief background information reflecting different perspectives on the bill. They are assigned roles representing different interest groups. Former clinic students play the role of legislators who meet with the advocates. The students "lobby" each legislator for three to four minutes to try to convince them to support their position on the bill. The exercise requires students to consider different perspectives, to form and clearly articulate a position, and to tailor their messaging to reach decision-makers with different values and interests.

and taking minutes—skills students will use during the semester and throughout their careers.

The seminar is an essential component of the clinic. The course is taught through lecture (including guest speakers) and discussion, peer instruction through "project rounds," and individual and group presentations. Assignments provide an opportunity to integrate and apply course material. In addition, when relevant to specific projects, faculty work with the individual student teams to integrate and apply class discussions to their projects.[207]

Because most students have not taken a course on legislation, early in the semester the seminar introduces students to reading and critiquing legislation, understanding the challenges in drafting and advancing legislation, and appreciating the complications that can arise with implementation and enforcement.[208] We do this by examining the evolution of a federal omnibus child welfare reform law that Congress enacted in 1980 and has amended several times over 40+ years. Students read excerpts of the legislation, floor debates, and news clippings, and learn about both the legislative process and the political and social reasons that laws may be amended. Later in the semester, students engage in a drafting exercise to clarify a phrase in the law ("reasonable efforts") that has been controversial since it was first included in the 1980 legislation.[209]

We provide several opportunities throughout the semester for students to build their legislative advocacy skills—drafting fact sheets, giving elevator speeches, and negotiating. For example, students are assigned to create a fact sheet or develop an elevator speech based on one of the federal child welfare laws described above, proceeding as though

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[207] We rely on these assignments to ensure that all students not only are introduced to different skills, but also have an opportunity to apply them. This is because student projects can be at very different stages of a legislative campaign and require different skills or work products. As discussed *infra*, Part III.D., project rounds also provide an opportunity for students to learn about a range of different advocacy projects, become familiar with the varied stages of a campaign, brainstorm solutions to possible obstacles, and reflect on what they are learning.

[208] *See supra* note 188.

[209] By this point in the semester, students have read legislative history related to the laws and understand the intended goals. We spend part of the class discussing how they think "reasonable efforts" should be defined and identifying several possible approaches to defining the phrase. The students are then divided into small groups to work on drafting language focused on their priority for the definition. The following week the drafts are shared with the class and the groups critique each other's draft language, asking clarifying questions and making suggestions. I will offer feedback as well when I think important points have not been raised. The exercise not only illustrates the difficulty in drafting clarifying language, but also brings home the challenge of finding language that does not raise more questions or open the door to opposition.

the law were still pending as a bill.[210] This gives students the opportunity to begin to develop skills preparing fact sheets and elevator speeches. It also ensures they have completed the week's reading assignment. Clinic faculty provide written feedback on the fact sheets outside of class. We use class time for students to present their elevator speeches, with the other students providing constructive feedback on what was effective and what was vague, and sometimes suggesting a different approach.

Because all of the systems within which we work disproportionately impact children and families who are overwhelmingly Black persons and other people of color, student understanding of the impact any legislative solution may have on communities disproportionately impacted is especially critical. We devote a class session early in the semester to learning about the Racial Equity Impact Assessment (REIA) tool[211] and engage in an exercise we developed applying the tool to a particular hypothetical scenario. Students are then encouraged to apply the tool to their own project work, thinking about the issues they are addressing and potential solutions through an equity lens and identifying racial equity implications.

We spend one class session on a negotiation skills tutorial, which includes a brief lecture, and then in fishbowl style, students practice negotiating a hypothetical scenario.[212] Through the tutorial, students begin to develop, apply and understand basic negotiation tactics.

Because few students will be involved in a legislative campaign from start to finish, we devote at least two classes to presentations (offered by faculty and guest speakers) describing the evolution of a legislative campaign in which each speaker has been involved. Each campaign has different twists and turns, so the students are introduced to a variety of approaches and perspectives on advocacy successes and challenges.

Most teams will not have had an opportunity to engage in the broad range of skills used in legislative advocacy by the end of a semester. Our final classroom project, therefore, gives students the opportunity to develop some of the skills they have not yet been able to practice. About two-thirds of the way through the semester, building on their project work, each team chooses whether their final class presentation will be

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210 Half the students are assigned to each draft a fact sheet on the law they are reading as if the law is still pending as a bill and the other half is assigned to each develop an elevator speech that they would give to a legislator when advocating for the bill. They then switch roles to ensure that everyone gets both learning experiences.

211 *See* Race Forward, *Racial Equity Impact Assessment* (2009), https://www.raceforward.org/sites/default/files/RacialJusticeImpactAssessment_v5.pdf [https://perma.cc/T7ZH].

212 While Loyola offers Negotiations and Advanced Negotiations courses, most students who take the class are interested in using negotiation skills in litigation. But negotiation is critical to legislative work as well. Professor Weinberg is appreciative of the time adjunct Loyola faculty members Jamie Michel and John Liston contribute every semester to facilitate this negotiation exercise.

a mock legislative hearing, floor debate, or coalition meeting about the draft legislation or policy proposal they have been working on throughout the semester. Their decision of which activity to pursue is usually based on skills the student team has not yet had an opportunity to hone during the semester, or materials they will be continuing to develop for their project. Students are assigned roles and take part as members of the legislative committee or coalition. The presentations take place the last day of the seminar, with each team allotted about 45 minutes.

Once the decision is made on which final presentation to pursue, clinic supervisory meetings focus on this work too. Faculty meet with students to guide their efforts, set deadlines for written assignments, and critique at least two-to-three drafts of the materials.[213] It is expected that some of the drafted amendments or materials, even if the issue is not yet ripe for passage in this year's General Assembly, will be introduced in a later legislative session or otherwise used to advocate for legislation or policy reform.

We also set aside time in this last class[214] for students to reflect and respond to two prompts: (1) What did you learn about policy and legislative work that you did not know or expect; and (2) How will you view the policy and legislative process going forward?

2. The Fordham Legislative Advocacy Clinic Seminar

When I first started teaching a legislative advocacy clinic, I was struck by how difficult it was for some students to deeply grasp the details of their project. This challenge, in turn, interfered with their ability to make sound strategic decisions and to be effective legislative advocates. This realization led me to establish an arc of increasingly challenging exercises in the seminar, virtually all of which require the students to strategize or communicate about their clinic projects. These homework assignments, done by the project team, are attached to more substantive lessons about how the New York State legislature, and legislatures more generally, function.

I use our first few classes[215] to introduce students to foundational principles—the value and types of collaborations and work styles,

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213 As part of their assigned roles, the student team members share responsibility for drafting bill language, but split responsibility for drafting testimony and fact sheets in support of or opposition to the bill. This reinforces to students the importance—and challenge—of considering their proposals through different lenses, including the perspectives of those who may oppose the bill.

214 The last class is three-to-four hours long; students are asked at the start of the semester to set aside this additional time.

215 We meet twice each week, allocating two class hours to the seminar and one to rounds/fieldwork, which the students can include in the 12-15 hours/week they are expected to devote

cognitive and experiential learning principles, and the importance of recognizing and challenging implicit biases—as well as the most relevant expectations of Lincoln Square Legal Services, Inc. (the corporate structure that houses most of our in-house clinics), the Legislative Advocacy Clinic, and the Rules of Professional Responsibility. We then move on to learning about the legislative process: both the official version and more realistic descriptions.[216]

Within the first three weeks of the semester, the teams draft a Project Mission Statement, which requires them to grapple with fundamental information about their projects: What is the problem your project is trying to fix?[217] What is the goal of your project?[218] Why should someone care?[219] What obstacles might you face?[220] Although students often feel like they are starting to understand their project at this point, pushing them to respond in writing forces them to identify (and try to fill) holes in the narrative they have been creating, helps them to better understand their client's goals (i.e., to be client-centered), and aids in linking the project to its social justice mission.[221] Further, it allows me to better assess how well the teams are grasping the basics of their project.

Shortly thereafter, we hold our first project rounds, when each team is given up to 40 minutes to introduce their project to the class and

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to their fieldwork. Students are introduced to interviewing, counseling and negotiation skills in a three-credit pre- or co-requisite course entitled Fundamental Lawyering Skills.

216 I base this approach on lessons learned long ago in high school history class: there always is a good (public facing) reason and a real (true) reason why things happen. It is important to understand both. This analysis invites students to start to grapple with how advocacy does—and does not—develop when there are no rules to look up, where there are many decision-makers, and when the legislative process is unpredictable. *See supra* Part II.A.1., 2., 4. (Invisible (or Less Formalized) Rules; Decision-Makers; Unpredictability). Professor Cooper recently introduced Professor Weinberg's board game (with great success) to help her students to understand the legislative process and advocacy. *See supra* note 204 and accompanying text.

217 The question, "What is the problem your project is trying to fix?" has two sub-parts: Why is this a problem? And for whom? This deeper inquiry should prompt students to examine structural barriers to equity; if it does not, it is a question I raise.

218 Asking "What is the goal of your project?" requires the team to be able to articulate the proposed solution, including whom it is designed to help and how it would work.

219 Asking why a person should care about the underlying problem (and, perhaps, the proposed solution) has a number of goals. It requires the students to consider their audience (which for purposes of this exercise, I identify as people likely to support their cause), summarize their main argument, and set forth a secondary argument if there is one.

220 Inquiring what obstacles the proposal may face asks the students to identify and describe any procedural complications (e.g., it has been challenging to identify a bill sponsor) and substantive complications (e.g., the opposition has compelling arguments), and to assess the strength of these obstacles.

221 *See supra* Part I.A. (Learning Goals). After receiving some very long Project Mission Statements, I capped the exercise at 750-1000 words. This also forces students to be mindful how, not just what, they are communicating. Because this exercise is directly related to the students' project work, I allow them to bill two hours of their time spent on it (though it should take appreciably longer) towards the 12-15 hours they are expected to devote to project work each week.

respond to questions.[222] Requiring students to orally present their project has three effects: (1) it requires them to learn their project even more deeply, especially from the client's perspective;[223] (2) it introduces them to oral advocacy in a legislative context; and (3) it allows me to gain insight into how each individual student is faring and how well the collaborative process seems to be working.[224]

The teams then redraft their Project Mission Statement and share it with the class. Students are required to give substantive, written feedback on the other teams' documents. In class, we break into small groups where each team is represented and each person provides feedback to the other teams.[225] This interaction allows the students to learn more about the other projects, practice giving and receiving peer-to-peer feedback (which they experience differently from my comments), and notice different communication styles.

To complement the students' increasing investment in and knowledge about their projects, we read and talk about political strategizing, focusing on the roles and tasks that must be filled in a legislative campaign as articulated by Chai Feldblum in *The Art of Legislative Lawyering and the Six Circles Theory of Advocacy*.[226] During an in-class discussion, the students discuss how they, their clients, and their advocacy partners may fulfill these responsibilities.

We also examine the importance of identifying stakeholders in a legislative campaign (i.e., those with interests in seeing the legislation pass or fail)[227] and the importance of using power mapping to strategize

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222 These introductory rounds are the first of three rounds conducted over the semester. The Loyola clinic runs introductory rounds in a similar manner. *See infra* Part III.D. (Project Rounds).

223 *See supra* Part I.A. (Learning Goals).

224 I require students to divide their presentation roughly equally, with no student having solely introductory or conclusory roles, which tend to be less substantive. This forces each student to invest in the exercise and gives me a sense of how the team's collaboration is going. Further, because one of the few drawbacks of emphasizing collaboration is that it can be challenging to evaluate how well each student is doing, the oral presentation facilitates this assessment and more readily permits intervention if needed.

225 As we typically have three projects, this means the students are required to review and give substantive feedback on two other documents. I recommend, though do not mandate, that students revise their Project Mission Statement after receiving these comments and then share the document with their client for further feedback.

226 To learn about roles in a legislative campaign, students read Chai Feldblum's *The Art of Legislative Lawyering and the Six Circles of Advocacy*, *supra* note 4. Feldblum's six roles are: the strategist, the lobbyist, the legislative lawyer, the policy researcher, the outreach strategist, and the communications director. In class, we also discuss the role, at times, of the litigator, who may be bringing either individual cases or an impact lawsuit to achieve the same goal as the legislative campaign and, implicitly, to bring more attention to the issue. We also discuss the importance of funding such campaigns and foreshadow the importance of coalition building, which is covered in class a few weeks later.

227 Lori Fresina & Diane Pickles, M+R Strategic Services, Pathways of Influence: Steps to Turn a Little Bit of Knowledge into a Whole Lotta Power (2014), https://www.

next steps in a campaign (i.e., analyzing which stakeholders have sufficient interest and power to help advance our client's goals).[228] To make the value of power mapping more concrete, the class identifies a policy or practice they would like to change at the law school. We then use this technique to reveal how a campaign to achieve that goal might proceed. As a homework assignment, each team must identify the stakeholders in their project and indicate where they sit on a power map, a process that can help guide the team's strategic priorities.[229]

Having established this foundation, we move onto reading a bill and gleaning the depth and breadth of political information that can be found in a pending bill's legislative history.[230] I have the class examine two different versions of the Gender Expression Non-Discrimination Act (GENDA)—the one that was enacted and a previous version. We look not only at the formal structure of the bills, which is the same, but also at their substantive differences. The students share their perceptions of the differences, but as GENDA was a clinic project, I am able to reveal the actual reasoning and political values leading to the amendments. This process helps the students to understand the complexities that lie behind the passage of bills that may look fairly straightforward on their face.

We also devote class time to the theory and practice of coalition-building, using a reflection exercise to prompt the students to think more creatively about the coalition-related work of their legislative campaign.[231]

We talk about race, economic disenfranchisement, identity, and structural oppression throughout the semester, but we spend two classes specifically addressing the ways the law school, the clinic, and the legislature are "white spaces." These conversations allow us to revisit important questions about who is the client; the role of race, identity, and

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mrss.com/wp-content/uploads/2014/01/M+R_Pathways_of_Influence.pdf [https://perma.cc/JTQ4-HB8X].

228 *See Power Mapping: Charting Strategic Relationships* (Ch. 14), *in* Democracy for America (DFA) Training Manual (2013), DFA Training Academy, https://greenlining.org/wp-content/uploads/2013/02/PowerMapping.pdf [https://perma.cc/5ULV-C7AQ]; *supra* Part II.B.2. (Advocacy Partners), *supra* note 190 and *infra* note 229 and accompanying text (discussing power mapping).

229 Because this assignment is so intricately linked to deepening their project work, I permit students to bill up to two hours of their preparation time to project work; the assignment should take appreciably longer to complete.

230 As it often takes many sessions to move a bill successfully through the legislature, the bill's history (made available online by the legislative houses) can identify where the bill has gotten stuck in prior sessions, whether additional sponsors have joined in support of the bill or it seems moribund, whether legislators have changed their vote, and similar data that can influence advocacy strategy and messaging.

231 These readings and conversations can be very helpful to students who have not had the opportunity to work with complex advocacy partners, including coalitions, prior to taking the clinic.

poverty in creating the problems we are seeking to rectify and some of the resistance to our legislative goals; and the ways in which such factors must be considered when strategizing for a legislative campaign.[232]

I use the final weeks of the semester to re-focus the class on strategic written and oral advocacy, particularly on how they can use media to advance the goals of their legislative campaign. We spend two classes discussing use of media and messaging,[233] including the nuts and bolts of drafting op-eds and preparing for a media interview.[234] Each team is required to draft an op-ed, which I critique and review with them and which can be published if the substance and timing is helpful to the campaign.[235] Then, each student—in the role of legislative lawyer for their client—is interviewed by a student from a different project who represents a media source of their choosing.[236] This is a time-intensive simulation that functions as each student's opportunity to share how

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232 We read and discuss Professor Bennett Capers' essay, *The Law School as White Space*, 106 Minn. L. Rev. 7 (2021), and Professor Norrinda Brown's essay, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 Clin. L. Rev. 149 (2021). Having learned from Professor Weinberg about the Racial Equity Impact Assessment tool, *supra* note 211, I will be using it to prompt student preparation for our conversations exploring how racism, identity, and poverty have created the need for their project and, in all likelihood, have created obstacles to the remedy. At this stage in the semester, the teams prepare for and execute the hour-long Project Rounds discussion they will be leading. *See infra* Part III.D. (Project Rounds).

233 The Opportunity Agenda has created an innovative methodology for helping students (and all social justice advocates) to develop "values-based messages that engage core audiences, disrupt dominant narratives, and help shape the public dialogue." *See Vision, Values, and Voice: A Communications Toolkit*, The Opportunity Agenda (TOA), https://opportunityagenda.org/our-tools/communications-toolkit/ [https://perma.cc/P95S-VP6Y] (last visited on Aug. 28, 2024). I ask students to develop two sets of values-based messages: one that their clients might adopt and one that the opposition might embrace. Only by knowing what the opposition might argue can an advocate create truly effective messaging.

234 For one of these classes, I ask students to watch a brief news episode in which I am interviewed about marriage equality and to come to class identifying three things I did well and three things I could have done better. As described *infra* note 236, this should help to prepare them for their simulated media interview and critique.

235 In many ways, the op-ed is a more sophisticated version of the Project Mission Statement (PMS) each team drafts earlier in the semester. In this iteration, though, they must focus on the primacy of an effective advocacy message, integrating in the facts and context that were in the forefront of the PMS assignment.

236 The interview lasts approximately 12 minutes after which we engage in a reflection session: the interviewee begins, followed by the interviewer, then members of the class, and I address points not yet raised. Thereafter, the students switch roles and following this interview, we again engage in a critique session. For this exercise, students must draft a planning memo, identifying the three themes they want to reiterate as they are interviewed and drafting six questions they expect to be asked and their answers. They also must draft at least six questions they plan to ask during the interview and the answers they expect to receive. After the simulation, the students watch the video recording in which they were an interviewee/interviewer, identifying three things they executed well, three things they would do differently, and reflecting on the relationship between their preparation and how they fared in each role.

much they have learned about their project and the legislative strategy they have helped to develop, as well as their capacity to be an effective oral advocate for their cause.[237]

Our seminar ends with two classes devoted to the students' reflections on their learning, their project, their client, and anything else they wish to share related to their fieldwork, as well as their reflections on the seminar and overall clinic experience.[238]

* * *

We both meet one-on-one with our students at mid-semester and at the end of the term for their reflections and self-assessments and for us to provide feedback beyond what they already may have received in supervisory team meetings. To prepare, they will complete a reflection memo, which provides ample material for us to discuss, whether about the project itself, the collaboration process, the client, the seminar, career development or, sometimes, something personal that the student is going through.

The mid-semester meeting allows us, if necessary, to guide our students in course correction. The final meeting gives both student and supervisor the chance to reflect on the entirety of the clinic experience. Each year, we are grateful that we learn new things, which we then use moving forward to modify the seminar, as well as our project supervision.

D. Project Rounds

As clinicians, we are committed to using rounds, a "signature pedagogy" of clinical legal education.[239] We have found, however, a need to adapt the case rounds model designed primarily for clinics representing

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[237] A student who is an effective interviewee will be deeply invested in the project and the client (having maximized their opportunity to learn not only for the client's benefit, for also for the student's ongoing ability to transfer their analytic, strategic, and advocacy skills to other contexts), will be client-centered, and will cast the social justice goal in a way that is audience-appropriate.

[238] If at all possible, I will invite in guest speakers (e.g., staffers for legislators, professional public interest lobbyists) and we may take a field trip to meet with New York City Council legislative staff or to Albany (more likely to occur in the spring semester when the legislature is in session, and we can advocate to support our projects).

[239] *See generally* Susan Bryant & Elliott Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education*, 14 Clin. L. Rev. 195 (2007). Professors Bryant and Milstein set forth a five-stage means of teaching students the importance of being reflective and ethical practitioners who learn collaboratively from topics "they need and want to address." Susan Bryant & Elliott Milstein, *Rounds: Constructing Learning from the Experience of Peers*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy 117 (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014). *See generally* Susan Bryant and Elliott Milstein, *Generating Conversations: Planning and Facilitating Rounds*, *in* Transforming

individuals in litigation, to accommodate the differing needs of our project-based legislative advocacy clinics.[240] More specifically, because our students work with organizational clients on projects that can last years and that are in different stages of progression, they do not share the attributes that allow the original model to succeed.[241] As it would be unusual for a student team to be involved in many stages of a legislative campaign, project rounds make it possible for students to learn from their classmates about different approaches and challenges to legislative advocacy at various stages. Further, we have unique learning goals for our students that include the capacity to lead meetings and make engaging presentations to clients, advocacy partners, and decision-makers.[242]

Both of us hold "introductory rounds" within the first few weeks of the semester.[243] This is designed to help the students learn more deeply about their project, develop their presentation skills, and enhance their team's collaboration skills. It also facilitates their starting to connect their work to systemic social justice inequities.

Around the mid-point of the semester, each team is again asked to lead rounds. This time, perhaps more in sync with Bryant and Milstein's conception of rounds, we ask the teams to identify a problem or dilemma with which they are wrestling and about which they would like guidance

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THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 131 (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014).

240 *See* Elizabeth B. Cooper, *The Case for Structured Rounds*, *in* TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 151 (Susan Bryant, Elliott Milstein & Ann Shalleck, eds. 2014) (describing an earlier iteration of how Professor Cooper adapted rounds for her clinic).

241 Based on Bryant and Milstein's writings, and experiences in sessions they have led at AALS Clinical Legal Education Conferences and elsewhere, the commonalities present that contribute to the efficacy of their model of rounds include students representing individual clients in the same type of time-limited case (e.g., access to benefits, asylum petitions). *See also* Cooper, *Structured Rounds*, *supra* note 240, at 151-52 (contrasting "a core level of commonality of experience or subject matter" that may be absent in legislative advocacy clinics with the "common backdrop against which to discuss the unsettling experiences that may occur when interacting with individual clients").

242 *See* Cooper, *Structured Rounds*, *supra* note 240, at 153 (recognizing that although litigation requires "a strong sense of timing and the ability to speak convincingly," the absence of rules and the unstructured flow of community-based meetings requires the development of a different set of skills).

243 By this time, the students in Professor Cooper's clinic will have prepared their project mission statement. *See supra* Part III.C. (Seminar). Both Professors Cooper and Weinberg provide the students with prompts for the first rounds. These include: What is the problem your project is trying to fix—explaining why and for whom it is a problem; What is the goal of your project—including the proposed solution and whom it is designed to help; Why someone should care about this issue—requiring students to select an audience and to prioritize their arguments; and What obstacles will you face—including reasons why these hurdles can be overcome. Professor Cooper gives each team approximately 40 minutes to present and to respond to their classmates' questions while Professor Weinberg gives the teams about 20-30 minutes for the first project rounds.

or advice from the class.[244] Not surprisingly, the subject of these rounds often is related to our learning goals (investment in and responsibility for the project, client-centeredness, collaboration, social justice) or the particular challenges they are facing as legislative advocates (the lack of rules, the abundance of different decision-makers, the benefits and detriments of long-term relationships, unpredictability, or the client or advocacy partner).[245]

We encourage the students to use creative or interactive techniques to challenge themselves and to engage their audience in active learning.[246] We work with each team to ensure they develop their session in a manner that will allow their classmates to give productive feedback. For example, preparation involves ensuring that the issue is neither wholly theoretical nor too detailed; the assigned reading or homework exercise is not so onerous that it does not get done; and the time allotted to each segment of the class is appropriate to the team's goals. Regardless of the topic, the second set of scheduled rounds further ensures that all students will learn from and about the other projects and that the presenting students will deepen their understanding of their own project. We discuss all of this with each team during a post-rounds reflection that takes place during the next supervisory team meeting.[247]

Finally, Professor Cooper leads a third rounds conversation during the last two classes of the semester, asking each team and each student to reflect on their clinic experience.[248] This allows us to take pride in all that has been accomplished and to identify aspects of the experience (e.g., the project, the seminar) that could be improved, particularly in light of our learning goals and the challenges posed by engaging in legislative advocacy. Professor Weinberg addresses these questions and asks for these reflections in her final team supervisory meetings and individual evaluation meetings.

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244 Both Professors Cooper and Weinberg encourage their teams to design their rounds around an inflection point in their project or to explore issues such as their relationship with their client, the client's relationship to the individuals and communities they represent, or the project's connection to broader social justice issues (e.g., anti-racism, anti-poverty).

245 *See supra* Parts I and II.

246 Teams have developed games, used role plays, and created simulations, among other techniques to strategically elicit feedback on issues of concern to them. Professor Cooper allots approximately 50 minutes to each team for these more significant rounds. Professor Weinberg devotes only half the class time (one hour) to Project Rounds and has teams present on different days. Teams usually have 30-45 minutes each.

247 This process also allows us to discern if there are collaboration issues or differing levels of investment in the project work that we need to raise with the team or individually.

248 Professor Cooper distributes a series of questions for the teams to reflect on together, as well as some questions for individual responses.

Conclusion

Legislative advocacy clinics provide a unique opportunity for students to pursue systemic reform of the social justice problems that disproportionately affect the clients of most clinics: low-income individuals and families, communities of color, and others who have been disenfranchised due to their identity or circumstances. Our students obtain an array of lawyering capacities, both specific to the legislature and transferrable to other venues. As important, they better understand the role and power of legislatures—including the strengths and weaknesses of the legislative process—and the critical role lawyers can play in preserving our democracy.

Our foundational learning goals are familiar to all and achievable in our clinics: the importance of investing in the project (case) and self-reflection, being client-centered, remaining dedicated to collaboration, and embracing social change. We acknowledge there are challenges to teaching legislative advocacy—a setting with far fewer rules, a broad range of decision-makers, long-standing relationships, and a reputation for unpredictability, as well as complex clients and advocacy partners. Yet, by focusing on project selection, supervision, seminar structure, and project rounds, we have creatively adapted our pedagogy to ensure our students obtain essential lawyering skills while learning how the power to change laws can positively change society.

After many years of teaching legislative advocacy clinics, we hope more law schools and faculty will embrace this clinical model that equips students to become thoughtful, reflective, client-centered attorneys who understand the power of effective legislative advocacy to achieve systemic social justice reform.

IMPACT LITIGATION RECONSIDERED: NAVIGATING THE CHALLENGES OF MOVEMENT LAWYERING AT THE BORDER AND BEYOND

MELISSA E. CROW*

While acknowledging the potential tension between impact litigation and movement lawyering, this Article examines their synergies. Through the lens of a class action lawsuit on behalf of migrants unlawfully deprived of access to the U.S. asylum process, the Article explores how impact litigation, if thoughtfully conducted, can help mobilize directly impacted individuals, while catalyzing a broad spectrum of stakeholders to support their struggle. Some scholars argue that such broad-based litigation concentrates power in the hands of lawyers and fails to hold them accountable to affected constituencies, accentuating the underlying inequities of the U.S. legal system. Others point to rigorous procedural rules of litigation that restrict certain types of claims, the limited nature of the relief that can be obtained, and the diversion of scarce resources away from collective action and leadership development within directly impacted communities. In the immigration context, the obstacles to organizing—including language barriers, cultural differences, after-effects of trauma, and physical fragmentation of migrant communities along and across the U.S.-Mexico border—are particularly pronounced. While movement lawyering has emerged as a critical mode of advocacy in the immigrant rights arena, most campaigns have been led by powerful grassroots movements of directly impacted individuals, while lawyers have played a supporting role. This Article posits a model of progressive lawyering that relies on the impact litigation process, in conjunction with other advocacy strategies, to bring together members of fragmented communities in support of a common goal and to create the infrastructure needed for collective action.

* Director of Litigation, Center for Gender & Refugee Studies, University of California College of the Law, San Francisco. Many thanks to Erika Pinheiro, Nicole Elizabeth Ramos, and the rest of the Al Otro Lado team for their visionary thinking, their unwavering commitment to migrants at the border and beyond, and their invaluable partnership; to Conchita Cruz, Laura Peña, and Joanna Williams for their fierce advocacy, their willingness to share the lessons of their experience, and their enthusiasm for this project; to Baher Azmy, Hilda Bonilla, Richard Boswell, Scott Cummings, Nadia Dahab, Lisa Graybill, Kate Jastram, Jamila Johnson, Elizabeth Jordan, Ori Lev, Jules Lobel, David Lopez, Stephen Medlock, Karen Musalo, and Jayesh Rathod for their thoughtful comments and encouragement during the writing process; to Savannah Carter, Natalie Lerner, and Tatiana White for their invaluable research assistance; and to my co-counsel and our courageous clients in *Al Otro Lado v. Mayorkas*, who have always understood that the fight to preserve access to the U.S. asylum process extends far beyond the courtroom.

Introduction

The increased visibility of grassroots activism in recent years, exemplified by the Black Lives Matter movement and an increasing number of prison-abolitionist, environmental, Indigenous, and feminist collectives,[1] has reinforced the importance of movement lawyering in dismantling systems of oppression. Rejecting hierarchical models of lawyering where clients defer to their attorneys' perceived expertise, movement lawyers work in close collaboration with politically marginalized groups and other stakeholders to address root causes of inequality and pursue a vision of justice co-generated with their clients.[2] Through a myriad of strategies, both legal and non-legal, movement lawyers typically support campaigns designed to advance diverse objectives, including power-building among directly impacted individuals, whose input and experience are critical to ensure that the movement is responsive to their needs.[3]

Scott Cummings has identified representation of mobilized clients and use of integrated advocacy as the hallmarks of movement lawyering.[4] His premise is that mobilized clients, by virtue of their engagement with and leadership of affected communities, exercise legitimate authority, have the capacity to influence politics, and are well-positioned to hold lawyers accountable for carrying out the movement's objectives.[5] Such objectives can be most effectively achieved through integrated advocacy, in which lawyers collaborate with advocates outside the legal arena on a range of strategies to advance movement goals, promote policy reform,

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[1] *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 Yale L. J. 2497, 2511–12 (June 2023); Black Lives Matter, https://www.blacklivesmatter.com (last visited Aug. 28, 2024); Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, The Guardian (July 19, 2015), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement.

[2] *See* Scott L. Cummings, *Movement Lawyering*, 2017 U. Ill. L. Rev. 1645, 1648 (2017); Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating With Humility, Love and Courage*, 23 Clin. L. Rev. 663, 664 (2017); *see also* Ascanio Piomelli, *The Challenge of Democratic Lawyering*, 77 Fordham L. Rev. 1383, 1383 (2009) (similarly defining democratic lawyering as "a broad movement that stresses the importance of lawyers' working collaboratively with (not simply on behalf of) low-income and working-class people, people of color, and their groups and communities to push for social change"); Jeena Shah, *Community Lawyering in Resistance to Neoliberalism*, 120 Mich. L. Rev. 1061, 1075 (2022) ("Transformation requires shifting power, particularly by building oppressed people's power to dismantle systems of their oppression and replace them with structures that meet their collective needs.").

[3] *See* Cummings, *supra* note 2, at 1690 (defining movement lawyering as "the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define") (italics omitted).

[4] *Id.* at 1689–1716.

[5] *Id*. at 1691–92.

and transform public opinion.[6] Accordingly, movement lawyering typically happens in contexts where a powerful grassroots movement exists, and lawyers employ various tactics to support ongoing campaigns initiated by directly impacted individuals.[7] While these tactics may include litigation, it is usually de-emphasized or narrowly tailored to obtain specific relief—such as remedies for retaliation against movement leaders, compensation for wrongful deprivation of rights or property, or permits needed for mass actions—rather than systemic change.

Movement lawyering has emerged as a critical mode of advocacy in the immigrant rights arena. Key examples include:

- The central role of immigrant-youth-led networks in advocating for and later fighting to preserve the Deferred Action for Childhood Arrivals program;[8]
- The critical collaboration among the National Day Laborers Organizing Network, litigators, and other advocates on Freedom of Information Act litigation that led to the demise of the Department of Homeland Security's ("DHS") insidious S-Comm enforcement strategy;[9]
- The massive organizing campaign across Arizona to resist SB 1070's sanctioning of racial profiling by law enforcement officials;[10]

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[6] *Id.* at 1695–1716.

[7] *See* Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 Ann. Rev. L. & Soc. Sci. 17, 23 ("lawyers often are not only, or even primarily, litigators; they negotiate, counsel, coordinate, and even sometimes work to educate and mobilize movement constituents and resources"); Cummings, *supra* note 2, at 1716 ("By repositioning the role of lawyers within a broader framework of social movement activism, movement lawyering holds out the promise that deepening connections—among organizations, tactics, and institutions—will ultimately yield more accountable and enduring change.").

[8] *See* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. Rev. 1464, 1474–76, 1488–90 (2017); Veronica Terriquez, *Intersectional Mobilization, Social Movement Spillover, and Queer Youth Leadership in the Immigrant Rights Movement*, 62 Soc. Probs. 343 (Aug. 2015) (explaining how DREAMers adopted multiple identity strategies to promote intersectional mobilization of LBGTQ youth).

[9] *See* Christine Cimini & Doug Smith, *An Innovative Approach to Movement Lawyering: An Immigrant Rights Case Study*, 35 Geo. Immigr. L.J. 431, 468–90 (2021); Ashar, *supra* note 8, at 1478–82. Secure Communities, which many advocates renamed "S-Comm," was a DHS program that authorized collaboration between federal immigration officials and local law enforcement officers to identify noncitizens in U.S. jails who could be deported based on immigration offenses. Michele Waslin, Executive Summary of The Secure Communities Program: Unanswered Questions and Continuing Concerns (Nov. 2011), https://www.americanimmigrationcouncil.org/sites/default/files/research/SComm_Exec_Summary_112911.pdf. The program, which was discontinued in November 2014, was widely criticized for incentivizing race-based arrests, targeting low-level offenders, and undermining community policing, among other problems. *Id.*

[10] *See* Kathryn Abrams, Open Hand, Closed Fist: Practices of Undocumented Organizing in a Hostile State (1st ed. 2022); Ashar, *supra* note 8, at 1476–78.

- The organizing and advocacy efforts by the National TPS (Temporary Protected Status) Alliance, a coalition of TPS beneficiaries from across the United States, to save TPS in the short term and to obtain a path to permanent residency in the long term;[11] and
- The labor trafficking campaign by a coalition of former Indian guest workers against Signal International, which prompted a multimillion-dollar settlement agreement, lawful status for the affected workers, and an unprecedented apology from Signal's Chief Executive Officer.[12]

Each of these successful campaigns was led by a powerful grassroots movement of directly impacted individuals, while lawyers provided technical expertise and other support. While litigation played a role in each case, the court battles were among a panoply of strategies used to advance broader movement goals.

Movement lawyers have traditionally viewed legal tactics as a means to an end—namely, empowering marginalized communities to chart their own course and pursue campaigns to achieve their goals—rather than relying solely on favorable court rulings to solve pressing social problems.[13] Indeed, much of the scholarship on movement lawyering tends to be critical of litigation, including class actions and other systemic challenges of unjust laws or policies. Some critics argue that such litigation concentrates power in the hands of lawyers and fails to hold them accountable to affected constituencies, accentuating the underlying inequities of the U.S. legal system.[14] Others emphasize the rigorous procedural rules of litigation that restrict certain types of claims, the limited nature of the relief that can be obtained, and the diversion of scarce resources away from collective action and leadership development within directly impacted communities.[15] Synthesizing

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11 *See* Nat'l TPS All., https://www.nationaltpsalliance.org/ (last visited Aug. 26, 2024).

12 *See* Saket Soni, The Great Escape: A True Story of Forced Labor and Immigrant Dreams in America (2023).

13 *See* Jules Lobel, *Participatory Litigation: A New Framework for Impact Lawyering*, 74 Stan. L. Rev. 87, 92 (2022); Jennifer Gordon, *Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 Calif. L. Rev. 2133, 2141 (2007).

14 *See, e.g.*, Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L. J. 470, 482–87, 512 (1976) (suggesting that "some civil rights lawyers … are making decisions, setting priorities, and undertaking responsibilities that should be determined by their clients and shaped by the community"); Michael Grinthal, *Power With: Practical Models for Social Justice Lawyering*, 15 U. Penn. J. L. & Social Change 25, 31 (2011).

15 *See, e.g.*, Cimini & Smith, *supra* note 9, at 440, 445; Joseph Phelan, *Purvi & Chuck: Community Lawyering*, Convergence (June 1, 2010), https://convergencemag.com/articles/purvi-amp-chuck-community-lawyering/; Charles Elsesser, *Community Lawyering – The*

many of these caveats, Catherine Albiston has warned that "litigation strategies, whatever their outcome, have the potential to deradicalize a movement, reshape it in ways that marginalize less-privileged communities, and inadvertently reinforce structures of domination and inequality."[16]

While recognizing the limitations of impact litigation, a handful of scholars have posited that it can be instrumental in building power within and among grassroots communities[17] and aid in movement-building.[18] Given the substantial obstacles to organizing confronting certain marginalized communities, this more expansive approach to movement lawyering deserves more attention and analysis.

Through the lens of a class action lawsuit on behalf of migrants unlawfully deprived of access to the U.S. asylum process, this Article explores how impact litigation, if thoughtfully conducted, can help mobilize directly impacted individuals, while catalyzing a broad

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Role of Lawyers in the Social Justice Movement, 14 Loy. J. Pub. Int. L. 375, 376–77 (2013); Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy,* 96 Iowa L. Rev. Bull. 61, 62 (2010–11); Jeena Shah, *Rebellious Lawyering in Big Case Clinics*, 23 Clin. L. Rev. 775, 787–89 (Spring 2017).

[16] Albiston, *supra* note 15, at 77. Scholars outside the social justice arena have also criticized the use of impact litigation to effect systemic change. *See, e.g.*, Edward T. Schroeder, Note, *A Tort by Any Other Name? In Search of the Distinction Between Regulation Through Litigation and Conventional Tort Law*, 83 Tex. L. Rev. 897, 897-98, 922-28 (2005) (summarizing criticisms of "regulation through litigation").

[17] *See, e.g.,* Lobel, *supra* note 13, at 94 ("While litigation is not a plausible vehicle for fulfilling abolitionist goals such as dismantling oppressive, hierarchical institutions, a participatory demand requiring some empowerment of and dialogue with the oppressed group can provide the seeds of a different, more egalitarian model of social relations."); Grinthal, *supra* note 14, at 52–56 (even where litigation is the primary strategy for achieving a group's demands, it may be "conducted in such a way as to maximize opportunities for organizing in the shadows or margins of the case"); McCann, *supra* note 7, at 26 ("[F]ormal legal actions like litigation can work initially to expose systemic vulnerabilities and to render legal claims sensile or salient to aggrieved citizens. As marginalized groups act on these opportunities, they often gain sophistication and confidence in their capacity to mobilize legal conventions to name wrongs, to direct blame, to frame demands, and to advance their cause.").

[18] *See* Cummings, *supra* note 2, at 1694–95 (proposing that impact litigation can, in the absence of existing movement infrastructure, "help spark a movement"); Piomelli, *supra* note 2, at 1397 (referencing democratic lawyers' use of various tactics and strategies, including litigation, "to try to form an engaged public (where none initially exists) that can collectively pursue the shared goal of equal justice"); Baher Azmy, *Crisis Lawyering in a Lawless Space: Reflections on Nearly Two Decades of Representing Guantánamo Detainees*, *in* Crisis Lawyering: Effective Legal Advocacy in Emergency Situations 32, 34, 47 (Ray Brescia and Eric K. Stern, eds., 2021) (discussing the Center for Constitutional Rights' coordination of a mass mobilization of lawyers, activists, and civil society groups, both nationally and globally, to demand an end to Guantánamo following the Supreme Court's authorization of legal representation for Guantánamo detainees); Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 211 (2004) ("The civil rights experience provides the clearest demonstration that legal tactics—even with reluctant legal leaders—can release energies capable of initiating and nurturing a political movement.").

spectrum of stakeholders to support their struggle. The case, *Al Otro Lado, Inc., et al. v. Alejandro Mayorkas, et al.*,[19] concerns asylum seekers who attempted to present themselves at ports of entry along the U.S.-Mexico border in the hope of seeking protection, as permitted by U.S. and international law, only to be turned back to dangerous border towns in Mexico. In this context, the obstacles to organizing—including language barriers, cultural differences, and after-effects of trauma, all of which may inhibit communication and undermine trust—were particularly pronounced. By contrast with the immigrant communities who drove the above-referenced campaigns—all of whom resided in the United States despite varying levels of uncertainty about their ability to remain—these barriers, combined with the physical fragmentation of migrant communities along and across the U.S.-Mexico border, make organizing particularly challenging. Moreover, the sprawling immigration enforcement infrastructure that many recently arrived noncitizens are forced to navigate—including detention in remote locations, unconscionable agency backlogs in adjudicating cases and processing benefits applications, and bars on entry to the United States—pose additional physical and practical barriers to mobilization in the immigration arena.

During the time the *Al Otro Lado* case has been pending—more than seven years at the time of this writing—many class members have succeeded in entering the United States, with the result that those affected by the government's unlawful conduct are geographically separated by an international border. Although the transnational context makes organizing even more difficult, this Article posits a model of progressive lawyering that relies on the litigation process, in conjunction with other advocacy strategies, to bring together directly impacted individuals in support of a common goal and create the infrastructure needed for collective action.

This Article is divided into four parts. In Part I, I trace the evolving tension that some scholars have identified between impact litigation and movement lawyering and suggest that impact litigation can actually facilitate movement-building in contexts where organizing is challenging. In Part II, while heeding the risks cited by movement lawyering scholars, I introduce the *Al Otro Lado* case study to illustrate how impact litigation can be used to mobilize, empower, and foster solidarity among a highly transient population of asylum seekers on both sides of the U.S.-Mexico border. In Part III, I draw on principles of movement lawyering to outline strategies that were—or, in some cases, should have been—used to maximize the potential for engaging directly impacted

[19] No. 3:17-cv-02366-BAS-KSC (S.D. Cal.).

individuals and their allies in the fight to restore access to the U.S. asylum process. In Part IV, I explore the mechanics of movement-building and the important role that Al Otro Lado and other grassroots-focused organizations have played in this endeavor. I conclude that impact litigation, in conjunction with other strategies, can help to build critical movement infrastructure.

I. Tensions Between Impact Litigation and Movement Lawyering

Despite its shortcomings, litigation has been a longstanding component of social change lawyering strategies. The Supreme Court's landmark 1954 decision in *Brown v. Board of Education*[20] initially generated optimism about the prospect of using impact litigation to advance broad social reforms.[21] For the next two decades, dedicated public interest lawyers worked diligently to use class actions and other systemic litigation to challenge unjust laws and policies in other areas.[22] Over time, however, a variety of concerns about this type of "cause lawyering" emerged. These concerns fell into two primary categories—the lack of lawyer accountability to directly impacted communities and the inefficacy of legal remedies in producing social change.[23] As Lani Guinier and Gerald Torres have eloquently noted, "[t]o be sustainable and compelling, a declaration of rights needs to be connected to remedies as well as to the lived experience of those on whose behalf they are named by shifting norms of fairness and justice, not just changing the rules governing their conduct or status."[24]

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[20] 347 U.S. 483 (1954).

[21] Lobel, *supra* note 13, at 98–103; Cummings, *supra* note 2, at 1654.

[22] Joel F. Handler, Ellen Jane Hollingsworth & Howard S. Erlanger, Lawyers and the Pursuit of Legal Rights 22–23 (1978) ("In the era of the Warren Court, it seemed as though every year following the *Brown* decision, reformers could count on not one, but several Supreme Court decisions on behalf of the disenfranchised of American society.").

[23] *See, e.g.*, Cummings, *supra* note 2, at 1655–56; Grinthal, *supra* note 14, at 31–33, 39 (attributing impact litigators' lack of accountability to concerned constituencies and continuing marginalization of those constituencies to concentration of power in hands of lawyers).

[24] Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 Yale L. J. 2740, 2759 (2014). *See* Bell, *supra* note 14, at 514 (citing Comment, *The New Public Interest Lawyers*, 79 Yale L. J. 1069, 1077 (1970) (interview with Gary Bellow) ("'[R]ule' change, without a political base to support it, just doesn't produce any substantial result because rules are not self-executing: they require an enforcement mechanism.")); Azmy, *supra* note 18, at 52 ("Without corresponding political legitimacy, any jurisprudentially recognized rights can be taken away soon thereafter.").

Critics focused on accountability argue that cause lawyering permits progressive lawyers to pursue their own vision of the public good without taking into account their clients' views.[25] Admittedly, clients intimidated by the legal complexities of impact litigation may instinctively defer to their lawyers' judgment, complicating the task of meaningful attorney-client consultation.[26] Moreover, as Derrick Bell has noted, the realities of class action litigation, "where the original plaintiffs may have left the system and the members of the class whose interests are at stake are numerous, generally uninformed, and, if aware of the issues, divided in their views," pose additional challenges.[27] Yet consultation with clients is critical because the lawyers' concept of "justice" may differ substantially from the perspectives of those whose interests they purport to serve.[28] Other critics emphasize that impact litigation generates judgments that are difficult to enforce without broad political support,[29] fails to address root causes of injustice,[30]

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[25] *See, e.g.,* Bell, *supra* note 14, at 489, 492–93; William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 Yale L. J. 1623, 1624–25 (1997).

[26] *See* Grinthal, *supra* note 14, at 31–33 (characterizing groups represented in impact litigation and class actions as "atomized, dispersed and passive").

[27] Bell, *supra* note 14, at 504. Bell suggests that courts could help to reduce conflicts among class members through more rigorous application of existing class action standards; his recommendations include individual notice to known class members in class actions seeking injunctive relief under Federal Rule of Civil Procedure 23(b)(2) (as well as class actions under Rule 23(b)(3), where such notice is required), preliminary hearings on class certification in instances where certain class members raise objections to the adequacy of class representation or relief sought, limiting the use of class actions to particular issues, dividing a class into subclasses where necessary to increase manageability, and permitting intervention more liberally. *Id.* at 508–09 & n. 124.

[28] *See id.* at 489–90 (arguing, in the context of desegregation litigation, that NAACP lawyers were pursuing integration in response to elite funders and organizational supporters, whereas African American community members preferred quality schools even if they remained segregated); Albiston, *supra* note 15, at 74 (noting that risks of litigation include "subtle dynamics that reshape the goals and message of the movement, often without the explicit choice or awareness of movement participants").

[29] *See, e.g.*, Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? 562 (3d ed. 2023) ("Relying on litigation to produce progressive social change without political support and a robust social movement makes change unlikely even with headline-making judicial victories."); McCann, *supra* note 7, at 33–34 ("[E]ven when courts act favorably for disadvantaged groups, injustice in most institutional settings will go unchallenged in the absence of well-organized constituencies willing to mobilize legal resources for change."). *See generally* David Cole, Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law (2016).

[30] *See, e.g.*, Scheingold, *supra* note 18, at 218 ("legal tactics, even in connection with political mobilization, hold little or no promise of 'fundamental' change"); Guinier & Torres, *supra* note 24, at 2749 ("political, economic, or social minorities cannot simply rely on judicial decisions as the solution to their problems").

threatens to undermine burgeoning social movements,[31] and may even prompt backlash.[32]

The limitations on relief that can be obtained through impact litigation also call into question its value as an instrument of social change. Only certain types of controversies are amenable to judicial resolution, with the result that disputes, including those that are inherently political in nature, must be transformed into "legally cognizable issues" in order to pass muster in court.[33] Judicial remedies also run the risk of entrenching the systems that are being challenged, as well as the assumptions that undergird those systems—as in the context of litigation regarding immigration detention conditions, which almost always results in additional government expenditures on detention facilities rather than the closure of such facilities.[34] Complicating matters further in the immigration context, the Supreme Court's 2022 decision in *Garland v.*

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[31] *See, e.g.*, Scheingold, *supra* note 18, at 214 ("fixation on litigation as a tool of policy implementation … fractionalize[s] political action—dividing rather than uniting those who seek change"); Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction, in* Cause Lawyers and Social Movements 12 (Sarat & Scheingold, eds., 2006) ("the mobilizing capacity of litigation may not survive a string of judicial defeats that make the law less and less resonant to movement activists"); Albiston, *supra* note 15, at 77 ("litigation strategies, whatever their outcome, have the potential to deradicalize a movement, reshape it in ways that marginalize less-privileged communities, and inadvertently reinforce structures of domination and inequality"); McCann, *supra* note 7, at 30 ("[E]ventual defeat in official forums can sap movement morale, undercut movement bargaining power, and exhaust movement resources."). *See generally* William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 Ohio N. U. L. Rev. 455 (1994).

[32] *See, e.g.*, McCann, *supra* note 7, at 35 ("[L]egal rights claiming and appeals to official legal institutions have generated far more backlash or countermobilization from reactionary political forces in the United States.") (internal citations omitted); Bell, *supra* note 14, at 515 ("[T]he relief sought and obtained in [school desegregation class action] suits has helped to precipitate a rise in militant white opposition and has seriously eroded carefully cultivated judicial support."); Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. of Am. Hist. 81, 91 (1994) ("By propelling southern politics toward racial fanaticism, *Brown* set the stage for the violent suppression of civil rights demonstrations in the early 1960s, which in turn aroused previously indifferent northern whites to demand federal legislative intervention to inter Jim Crow.").

[33] *See* Cimini & Smith, *supra* note 9, at 433–34. *See also* Grinthal, *supra* note 14, at 57 ("Issues are cut, timing is chosen, goals are defined, arguments are formed, and plaintiffs' stories are told at the lawyers' discretion.").

[34] I am grateful to Elizabeth Jordan, Visiting Assistant Professor, Sturm College of Law, Denver, CO, for flagging this point. *See generally* Sharon Dolovich, *How Prisoners' Rights Lawyers Do Vital Work Despite the Courts*, 19 U. St. Thomas L. J. 435, 436 (Spring, 2023) ("[E]ven when lawyers win on behalf of their incarcerated clients, things don't tend to change on the ground as much as they should."). Many immigration advocates have concluded that the immigration detention system is so inherently flawed, oppressive, and racist that it cannot be reformed, but rather must be abolished. *See, e.g.*, Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 Calif. L. Rev. 1597, 1623–36 (2022); Det. Watch Network, Ending Immigration Detention: Abolitionist Steps vs. Reformist Reforms, https://www.detentionwatchnetwork.org/sites/default/files/Abolitionist%20Steps%20vs%20Reformist%20Reforms_DWN_2022_0.pdf (last visited Aug. 27, 2024).

Aleman Gonzales interpreted a remedy-stripping provision in the Immigration and Nationality Act to bar injunctive relief in certain types of immigration-related cases, leaving declaratory relief as the only available option.[35]

In response to concerns about lawyer accountability in the cause lawyering model, a new body of scholarship promoting "client-centered" lawyering emerged.[36] Client-centered lawyering recognizes that problems have both legal and non-legal dimensions and emphasizes the importance of clients' expertise in resolving them.[37] In this model, clients actively work with their lawyers to identify problems, formulate possible solutions, and make decisions based on their personal goals, interests, and values.[38] Despite the laudable goal of promoting greater client autonomy, client-centered lawyers do not always succeed in this endeavor. Due to unconscious racial biases, class differences, or cultural barriers, lawyers may fail to understand critical aspects of a client's legal claim or unnecessarily limit the legal alternatives presented, thereby undermining the client's ability to engage fully in resolving their problems.[39] Some clients balk at their lawyers' pretense of neutrality, which they perceive as an effort to hide the ball.[40] Even at its best, client-centered lawyering focuses on realizing the goals of a particular individual rather than on building power to address deep-rooted social problems.[41]

These concerns gave rise to an alternative "community lawyering" model, which extends the core principles of client-centeredness to the community level, with the goals of "empowering communities,

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[35] 596 U.S. 543, 550 (2022) (vacating previously granted injunctive relief in two class action habeas suits on the basis that "[8 U.S.C.] § 1252(f)(1) generally prohibits lower courts from entering injunctions that order federal officials to take or to refrain from taking actions to enforce, implement, or otherwise carry out the specified statutory provisions [8 U.S.C. §§ 1221-1232]," other than on an individual basis). For a more detailed explanation of *Garland v. Aleman Gonzales*, *see infra* Part III.

[36] Alan K. Chen & Scott L. Cummings, Public Interest Lawyering: A Contemporary Perspective 290 (2013). Client-centered lawyering is often associated with two casebooks used in many law clinics. *See* Gary Bellow & Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy (1978); David A. Binder, Paul Bergman & Susan C. Price, Lawyers as Counselors: A Client-Centered Approach (1991). *Id.*

[37] Binder, Bergman & Price, *supra* note 36, at 17–18.

[38] *Id. See* Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 Ariz. L. Rev. 501, 507 (1990); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 Clin. L. Rev. 369, 371–72 (2006).

[39] *See* Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 346, 391 (1997); Dinerstein, *supra* note 38, at 589 (arguing that client-centered model undermines client autonomy by focusing almost exclusively on lawyer-perceived alternatives).

[40] *See* Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 Buff. L. Rev. 71, 84–88 (1996).

[41] Chen & Cummings, *supra* note 36, at 302–04.

promoting economic and social justice, and fostering systemic change."[42] Like client-centered lawyering, community lawyering rejects the hierarchical lawyer-client relationship that often characterizes cause lawyering, but shifts the focus from problems affecting an individual to issues affecting a client community.[43] While legal tactics, including litigation, may still be relevant, proponents of community lawyering believe that directly impacted individuals should be partners in such endeavors.[44] Yet concerns about lawyer-client domination persisted because community members have diverse perspectives, and lawyers—whether consciously or not—influence their clients' judgments about what is in their best interests.[45] Moreover, while community lawyers may prioritize long-term systemic change over short-term benefits, some of their clients may see things differently.[46]

Movement lawyering, which aspires to be both client-centered and politically transformative, offers a solution to some of these problems.[47] Movement lawyers typically take their lead from mobilized clients, collaborate on a wide range of advocacy strategies to achieve movement goals, and de-emphasize litigation except where necessary to achieve broader campaign objectives.[48] And movement lawyers measure their success based on benchmarks set by their clients, thereby ensuring the lawyers are accountable to those they represent.[49]

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[42] Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 J. L. & Pol'y 359, 364 (2008).

[43] *Id.* at 363. *See generally* Gerald P. López, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice (1992); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 Yale L. J. 2107 (1991); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 Wis. L. Rev. 699 (1988).

[44] *See generally* Gerald P. Lopez, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 Geo. L. J. 1603 (1989); 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 (1987–88); Anthony V. Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. Rev. L. & Soc. Change 659 (1987–88); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 Clin. L. Rev. 427 (2000).

[45] *See* William H. Simon, *The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era*, 48 U. Miami L. Rev. 1099, 1102–08 (1994); Michael Diamond & Aaron O'Toole, *Leaders, Followers, and Free Riders: The Community Lawyer's Dilemma When Representing Non-Democratic Client Organizations*, 31 Fordham Urb. L. J. 481, 528–29 (2004).

[46] *See* Simon, *supra* note 45, at 1102 ("[C]ollective practice involves commitments to multiple clients with potentially differing interests."); Stephen Ellman, *Client-Centeredness Multiplied: Individual Autonomy and Collective Mobilization in Public Interest Lawyers' Representation of Groups*, 78 Va. L. Rev. 1103, 1122 (1992) (noting that "individual and group interests may diverge").

[47] *See* Cummings, *supra* note 2, at 1689–95; Ashar, *supra* note 8, at 1495–1506; Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & Soc. Inquiry 360, 388–390 (2018).

[48] *See* Cummings, *supra* note 2, at 1689–91; Gordon, *supra* note 13, at 2135–37.

[49] *See* Cummings, *supra* note 2, at 1691–95; Lobel, *supra* note 13, at 101–03; Gordon, *supra* note 13, at 2141.

In the absence of movement infrastructure, however, Cummings and others have suggested that impact litigation can help to lay a foundation for movement-building.[50] The question, of course, is how. Cummings offers the example of the anti-sweatshop movement in the Los Angeles garment industry, which was "sparked" by a civil lawsuit to recover unpaid wages and overtime for seventy-two imprisoned Thai garment workers discovered through a 1995 law enforcement raid of a compound in El Monte, California.[51]

The case, framed as a collective action under the Fair Labor Standards Act, targeted not only the owners of the company, but also several high-profile manufacturers and retailers under a joint employer theory.[52] Following a critical ruling denying the defendants' motion to dismiss the case and affirming that the plaintiffs had sufficiently pleaded their claim of manufacturer control over the employees, the team amended their complaint to include additional claims on behalf of Latina garment workers employed by the same company; this strategy emphasized the widespread nature of the abuses and fostered cross-racial solidarity among Thai and Latina workers.[53]

After the manufacturers settled in 1997 for over two million dollars, the lead lawyers from the Asian Pacific American Legal Center ("APALC") worked to leverage their legal success by suing other significant industry actors, launching a media campaign, and reconstituting a former anti-sweatshop advocacy coalition as Sweatshop Watch, which later succeeded in codifying joint employer status for garment manufacturers under California law.[54] In 2000, with support from APALC, Sweatshop Watch, and other organizations supporting immigrant workers, the Garment Worker Center was created as the organizing arm of the Los Angeles anti-sweatshop movement.[55]

APALC's case demonstrates how impact litigation can be used in conjunction with other types of advocacy strategies to build power among directly impacted individuals. But the engagement of affected workers appears to have occurred primarily outside the courtroom

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[50] Cummings, *supra* note 2, at 1694–95. *See* Albiston, *supra* note 15, at 63 ("Litigation can also create issues around which to organize a movement; attract media attention, financial resources, and participants to a movement; provide leverage in informal negotiations; and publicly embarrass a movement's opponents into capitulation."); Guinier & Torres, *supra* note 24, at 2748 ("Rights can also provide an agenda for group mobilization, translating local complaints to a more generalized cause.").

[51] Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 Wis. L. Rev. 441, 452–60. *See generally* Julie A. Su, *Making the Invisible Visible: The Garment Industry's Dirty Laundry,* 1 J. Gender Race & Just. 405 (1998).

[52] Su, *supra* note 51, at 409.

[53] Cummings, *supra* note 51, at 455–56.

[54] *Id.* at 455–57.

[55] *Id.*

rather than during the litigation itself.[56] According to Julie Su, who led the litigation, "The question for me as a lawyer is this: how are the workers made better off, even if we win this suit, if they do not feel like they have been participants in the process?"[57]

Jules Lobel, an accomplished civil rights litigator and scholar, proposes a "participatory" litigation framework, which seeks to empower clients through "collaborative, collective, and consensus-building interactions between the representative and those she represents."[58] Lobel's participatory framework rejects both lawyer-driven and strictly client-centered approaches to class representation in favor of "what William Simon has called 'nonhierarchical communities of interest,' which value 'communication among clients' and 'direct [client] participation' in the litigation."[59] Drawing on his experience representing a class of prisoners challenging solitary confinement at California's Pelican Bay State Prison, Lobel explains that the plaintiffs were actively involved in all aspects of the litigation, including selecting class representatives, deciding on claims, making key tactical and strategic decisions, negotiating and ratifying the settlement agreement, and monitoring compliance with the settlement; their collective engagement ensured that their firsthand experience with California's oppressive prison policies figured prominently in decision making and turned the traditional lawyer-client hierarchy on its head.[60] The lawsuit grew out of a pre-existing prisoners' movement that conducted mass hunger strikes and a written request from one of the strike leaders asking that the Center for Constitutional Rights ("CCR") file a class action lawsuit challenging California's inhumane use of solitary confinement.[61]

The migration context poses particularly daunting challenges to movement lawyering—and organizing more generally. For individuals who succeed in reaching the United States but lack legal status, the potential risks of political engagement, including arrest, detention, and deportation, may simply be too high.[62] Regardless of their location

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[56] *See* Su, *supra* note 51, at 408–09 (noting that U.S. Attorney's Office prohibited workers who testified in related criminal prosecution of operators of El Monte compound from speaking about abuses).

[57] *Id.* at 412.

[58] Lobel, *supra* note 13, at 94, 98.

[59] *Id.* at 153, citing William H. Simon, *Visions of Practice in Legal Thought*, 35 Stan. L. Rev. 469, 486–87 (1984).

[60] *Id.* at 92–93.

[61] *Id.* at 91 ("The CCR took the prisoners' case because the prisoners represented a powerful grassroots movement challenging a torturous policy of prolonged solitary confinement.").

[62] *See, e.g.*, Amended Complaint for Declaratory, Injunctive, and Habeas Relief, Ragbir v. Homan, No. 1:18-cv-01159-PKC (S.D.N.Y. filed July 17, 2018), https://www.law.nyu.edu/sites/default/files/2018%2007%2017%20Amended%20Complaint%20%28Ragbir%29.pdf (alleging that federal authorities had targeted prominent immigrant rights activists, including

in Mexico or the United States, linguistic and cultural differences frequently impede communication among people of different nationalities and among members of Indigenous communities who speak different dialects.[63] Psychological trauma resulting from events that prompted individuals to flee their home countries or harrowing experiences during their journeys to the United States may cause further isolation. And noncitizens may lack familiarity with the systems at the root of their oppression or harbor a deep-seated distrust of such institutions based on past experiences in their home countries that led them to flee.

Other formidable obstacles to mobilizing many migrant communities is their geographic instability and dispersion, both from each other and from potential allies. This is true for both recently arrived noncitizens inside the United States (who may, for example, be detained in remote locations and transferred from one facility to another) and those who remain outside the country (due to discriminatory travel or entry bans or health-related restrictions, among other factors). Moreover, directly impacted noncitizens—such as individuals seeking asylum or workers subject to labor trafficking—may be located both inside and outside the United States, which further complicates mobilization efforts.[64]

This Article provides a blueprint for using impact litigation, in conjunction with other strategies, to facilitate movement-building within and among fragmented communities, including those separated by borders. Even in the event of a favorable court decision, impact litigation alone cannot address deep-rooted social inequities. However, regardless of how the court rules, the litigation process has the potential to highlight the injustice of such inequities, humanize and empower directly impacted individuals, establish structures for collaboration that transcend linguistic and cultural differences, foster leadership, and

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Ravi Ragbir, the executive director of New Sanctuary Coalition, based on their speech and advocacy for immigrant rights and social justice).

[63] *See* Tom Jawetz & Scott Shuchart, Language Access Has Life-or-Death Consequences for Migrants 7 (2019) ("[Guatemalan] indigenous languages—K'iche', Mam, Ixil, Chuj, Q'anjob'al, Q'eqchi', and many others—are spoken in an array of dialects, many of which are not understood by speakers of another."); Amnesty Int'l, U.S. Continues to Violate Indigenous and Human Rights at the Southern Border (Dec. 17, 2021) ("Indigenous peoples are disproportionately impacted by anti-asylum policies … due to the continued erasure of their Indigenous identities, Indigenous language exclusion within immigration services, anti-Indigeneity racism, and ongoing discrimination they face throughout their journeys.").

[64] Regarding the challenges of movement lawyering in a transnational context, *see generally* Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 Clin. L. Rev. 255 (2014) (proposing a "transnational collaborative lawyering" model to support indigenous communities in the Amazon in their struggle against multinational oil companies); Camila Bustos, *Movement Lawyering in the Time of the Climate Crisis*, 39 Pace Envt'l. L. Rev. 1, 24–29 (2022) (discussing challenges of accountability to clients and the broader movement in climate litigation context).

marshal allies in a manner that contributes to these broader objectives. The *Al Otro Lado* case, discussed below, illustrates these dynamics and demonstrates how impact litigation can help to mobilize directly impacted individuals and allies in a manner that has the potential to shift the balance of power.

II. Lawyering at the U.S.-Mexico Border

Every day at ports of entry along the U.S.-Mexico border, U.S. Customs and Border Protection ("CBP") officers inspect thousands of people in vehicles in the order that those vehicles arrive. Until 2016, CBP officers also inspected thousands of migrants who traveled to ports of entry on foot in the order they arrived. Most of those migrants had fled grave harm in their countries of origin and endured arduous and dangerous journeys to seek asylum in the United States.[65]

In May 2016, everything changed. Starting at the San Ysidro port of entry between Tijuana and San Diego, CBP officers began turning back substantial numbers of asylum seekers—and only asylum seekers—telling them that if they wanted to be inspected and processed—as required by the immigration statute[66]—they needed to return to the port "later" because the port was ostensibly "at capacity." Later that year, CBP expanded this "turnback" policy to other ports of entry along the southern border, instead of adapting as needed to fulfill their statutory obligations.

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[65] In crafting the statutory provisions governing asylum, which were codified in the Refugee Act of 1980, Congress adopted the international law definition of a "refugee"— a person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country, due to past persecution or a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." This definition is set forth in the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, which does not bind the United States, and the United Nations Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S. 267, which the United States ratified on November 1, 1968.

[66] Congress provided that all noncitizens who are "physically present in the United States" or who "arrive[] in the United States (whether or not at a designated port of arrival)" may apply for asylum, and set forth specific requirements for inspecting and processing those who come to ports of entry. 8 U.S.C. § 1158; § 1225(a)(3) (requiring immigration officers to inspect all noncitizens who are applicants for admission); § 1225(b)(1)(A)(ii) (requiring immigration officers to refer a noncitizen who indicates either an intention to apply for asylum or a fear of persecution for a credible fear interview by an asylum officer).

Although the Illegal Immigration Reform and Immigration Responsibility Act of 1996, which codified the expedited removal process, made obtaining asylum more difficult, Congress has continually preserved the U.S. government's international law obligations to inspect and process asylum seekers arriving at ports of entry. Studies by the U.S. Commission on International Religious Freedom ("USCIRF") indicate that the U.S. government does not have adequate safeguards in place to prevent improper removals of asylum seekers through expedited removal. USCIRF, Report on Asylum Seekers in Expedited Removal (Feb. 8, 2005); USCIRF, Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal (Aug. 2, 2016).

CBP officers used various tactics to turn back asylum seekers who attempted to present themselves at ports of entry.[67] These tactics included lies regarding the capacity of the port, threats, intimidation, misinformation, and the use of physical force to block access to the port. For example, immigration officers informed Dinora Doe[68] and her daughter, who had received death threats and been repeatedly raped by MS-13 gang members in Honduras, "that there was no asylum in the United States" and directed them "to go back to Mexico."[69] When they returned to the port a few hours later, one of the officers told Dinora "that if [she and her daughter] returned to the port again, they would transfer [them] to Mexican officials who would deport [them] back to Honduras."[70] The next morning, one of the officers threatened to separate Dinora from her daughter when they presented at the port. According to Dinora, "The officers told me that I could pass through the port, but that I had to leave my daughter behind…I told them that I could not leave her behind … [and] that what they were doing was illegal."[71]

Beatrice Doe, a Mexican national who fled with her children and nephew to Tijuana to escape death threats from a drug cartel and severe domestic violence, was similarly denied access to the U.S. asylum process.[72] CBP officers at the San Ysidro port of entry misinformed Beatrice that the U.S. government had no obligation to help her or her family, that they did not have a right to come to the United States because they were not born there, and that they should seek help from the Mexican government.[73] The officers later coerced Beatrice into recanting her fear and withdrawing her application for admission to the United States. According to Beatrice:

> They said that for my own good, I should sign the document and that it would not affect my record. When I asked the immigration officer what he meant by "record," he started banging the table and yelled at me that I had to sign the document. I was afraid and felt that I did

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67 The turnbacks were originally driven by longstanding racial animus toward Haitian asylum seekers and perpetuated based on a desire to deter asylum seekers more generally. Amicus Curiae Brief of the Haitian Bridge Alliance, et al. in Support of Plaintiffs-Appellees/Cross-Appellants, Al Otro Lado v. Mayorkas, Nos. 22-55988, 22-56036 (9th Cir. Feb. 28, 2023), https://ccrjustice.org/sites/default/files/attach/2023/03/37%20Haitian%20Bridge%20Alliance%20Amicus%202023.02.28.pdf (last visited Aug. 27, 2024).

68 To protect confidentiality, pseudonyms are used to refer to individuals seeking asylum in the United States.

69 Declaration of Dinora Doe in Support of Plaintiffs' Motion for Class Certification, Al Otro Lado v. Wolf, No. 3:17-cv-02366 (S.D. Cal. Jan. 14, 2020), ECF No. 390-14, ¶ 9.

70 *Id.* ¶¶ 11–12.

71 *Id*. ¶ 16.

72 Declaration of Beatrice Doe in Support of Plaintiffs' Motion for Class Certification, Al Otro Lado v. Wolf, *supra* note 54, ECF No. 390-12, ¶¶ 2–8.

73 *Id.* ¶ 12.

> not have another option but to sign the document. I told the officer that I did not understand what I was signing because the document was in English and I only speak Spanish.[74]

The next day, when Beatrice and her family returned to the San Ysidro port of entry, a CBP officer falsely informed her that she would be jailed for three years if she came back to the port.[75] Although Beatrice told the officer that she and her family feared for their lives in Mexico, the officer responded that "this did not matter."[76] Beatrice sought temporary refuge in Tijuana, where her abusive spouse later located her and coerced her and her children to return home with him.[77] Similar turnbacks have forced tens of thousands of other migrants, including young children, to live for months on end under precarious conditions in Mexico, in the hope of accessing the U.S. asylum process.[78]

Initially, CBP did not put the turnback policy in writing, keeping it in a self-admitted gray area that CBP used to justify turning back asylum seekers by various means. Then, in the spring of 2018, CBP and DHS issued memos memorializing aspects of the turnback policy—which the government referred to as "metering" or "queue management." In drafting these memos, CBP and DHS explicitly contemplated using them to turn back hundreds of asylum seekers at ports of entry each day and disregarded obvious signs that a humanitarian disaster in Mexico would result. They then denied CBP officers at ports of entry permission to inspect and process asylum seekers more quickly.

The efforts of Al Otro Lado, a binational organization that provides legal and humanitarian support to indigent refugees, deportees, and other migrants in Mexico and the United States, were critical in identifying and publicizing CBP's turnback policy, lifting up the voices of Dinora Doe, Beatrice Doe, and other directly impacted individuals, ensuring that they had access to basic necessities, and ultimately enabling them to pursue asylum in the United States. Established in 2014 as a volunteer project to support the deportee community in Tijuana, Mexico, Al Otro Lado has grown exponentially to meet the changing

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74 *Id.* ¶¶ 21–22.

75 *Id.* ¶ 24.

76 *Id.*

77 Second Amended Complaint, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (S.D. Cal. Nov. 13, 2018), ¶¶ 25, 125–32, https://cgrs.uclawsf.edu/legal-document/second-amended-complaint (last visited Aug. 27, 2024).

78 *See, e.g.*, Strauss Ctr. for Int'l Sec. and Law, Asylum Processing and Waitlists at the U.S.-Mexico Border (Dec. 13, 2018), https://www.strausscenter.org/publications/asylum-processing-and-waitlists-at-the-u-s-mexico-border/; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2019 (Nov. 1, 2019), https://www.strausscenter.org/publications/metering-update-2/; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2020 (Nov. 25, 2020), https://www.strausscenter.org/publications/metering-update-november-2020/.

needs of thousands of migrants traveling through Mexico to seek protection in the United States.[79] Al Otro Lado currently has offices in Tijuana, Los Angeles, and San Diego and more than sixty paid employees, including attorneys, accredited representatives, social workers, data and policy analysts, community coordinators, and organizers.[80] These diverse skills give the organization flexibility to adapt as needed to meet new challenges.

Al Otro Lado describes its approach as "multidisciplinary, client-centered, and trauma-informed, combining fierce legal advocacy with holistic support."[81] Al Otro Lado's Border Rights Project, established in 2017, provides legal orientation to refugees regarding the U.S. asylum process, empowering them with information about how U.S. law, policies, and border enforcement practices may affect them.[82] The Border Rights Project further assists asylum seekers in completing their asylum applications, translating evidence into English, identifying experts, finding legal representation, and facilitating access to emergency medical care, housing, food, and other services through their strong relationships with local humanitarian organizations,[83] including Refugee Health Alliance[84] and Espacio Migrante.[85] In addition, the Border Rights Project monitors and documents human rights abuses on both sides of the border to bolster their advocacy for more just migration policies.[86] The Project also regularly accompanies at-risk asylum seekers, including those who are medically vulnerable, experiencing mental health issues, unaccompanied minors, and LGBTQ+ persons, to the San Ysidro port of entry to advocate that CBP allow them to seek asylum

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79 *See* Al Otro Lado, *Beliefs and History*, https://alotrolado.org/beliefs-and-history (last visited Aug. 29, 2024).

80 Email correspondence from Erika Pinheiro, Co-Founder and Executive Director, Al Otro Lado, to author (July 18, 2024, 5:43 pm EST) (on file with author). While the full story of Al Otro Lado's evolution as a binational organization with in-house legal and organizing capacity deserves to be told, it is beyond the scope of this Article.

81 Al Otro Lado, *supra* note 79.

82 Al Otro Lado, *Border Rights Project*, https://alotrolado.org/border-rights-project (last visited Aug. 27, 2024).

83 *Id.*

84 Refugee Health Alliance is a nonprofit organization that provides holistic, trauma-informed, ethical care to refugees and other migrants in Tijuana and Reynosa, Mexico. As of this writing, Refugee Health Alliance assists in providing medical care for over thirty shelters, runs four clinics, and operates a hygiene station in Tijuana. Refugee Health Alliance, *Our Programs*, https://www.refugeehealthalliance.org/our-programs; *Our Clinics*, https://www.refugeehealthalliance.org/our-clinics (last visited Sept. 7, 2024).

85 Espacio Migrante is a binational community organization based in Tijuana that works with migrant communities to promote access to human rights such as education and health, provide comprehensive care, and raise awareness about the realities of migrants. Espacio Migrante, *Who We Are*, https://www.espaciomigrante.org/copy-of-quienes-somos (last visited Sept. 7, 2024).

86 Al Otro Lado, *supra* note 82.

in the United States.[87] According to Al Otro Lado's Co-Founder and Executive Director, Erika Pinheiro, "The metaphor of accompaniment goes far beyond escorting asylum-seeking migrants to ports of entry along the U.S.-Mexico border. It involves meeting people where they are without any preconceived ideas of where they should be, responding to their needs, and eventually building trust."[88] This approach has bolstered Al Otro Lado's credibility with the migrants they serve, who value their partnership and solidarity, and has been critical in shaping Al Otro Lado's holistic approach to representation and broad-based advocacy tactics.

In addition to providing support and services to asylum seekers in Tijuana, Al Otro Lado, as a binational organization, is able to continue supporting some of them once they reach the United States through its San Diego and Los Angeles offices. The organization also remains in contact with those it serves, regardless of their location, through the use of an online survey that is administered via WhatsApp. The survey, offered in seven different languages, includes questions about encounters with CBP, Mexican immigration officials, and other Mexican law enforcement officers, as well as questions that enable Al Otro Lado to identify people with particular vulnerabilities.[89] Between August 2022 and August 2023, the survey elicited over 45,000 unique responses from migrants stranded in border towns in northern Mexico.[90] This effort has been critical in identifying human rights violations committed by U.S. and Mexican officials at the southern border, connecting asylum seekers with needed resources, compiling data for advocacy purposes, and providing a reliable mechanism for communicating with asylum seekers more generally.[91]

Trusted service providers in other locations along the southern border, including the Kino Border Initiative (Nogales, AZ and Sonora, Mexico),[92]

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[87] *Id.*

[88] Telephone interview with Erika Pinheiro (June 8, 2021) (notes on file with author) (hereinafter "Pinheiro Interview"). The concept of accompaniment, which stems from liberation theology, "combines the action of walking together with reflection on the spiritual, practical, and political aspects of the joint struggle against oppression and suffering." Lobel, *supra* note 13, at 161 (citing Roberto S. Goizueta, Caminemos Con Jesus: Toward a Hispanic/Latino Theology of Accompaniment 206 (1995); Daniel G. Groody, *Reimagining Accompaniment: An Interview with Paul Farmer and Gustavo Gutiérrez*, *in* In the Company of the Poor: Conversations with Dr. Paul Farmer and Fr. Gustavo Gutierrez 161, 165 (Michael Griffin & Jennie Weiss Block eds., 2013)). *See generally* Staughton Lynd, Accompanying: Pathways To Social Change (2013).

[89] Declaration of Erika Pinheiro in Support of Plaintiffs' Motion for Preliminary Injunction, Al Otro Lado and Haitian Bridge Alliance, et al. v. Mayorkas, et al., No. 3:23-cv-01367 (S.D. Cal. Aug. 10, 2023), ECF No. 39-16, ¶¶ 5, 10.

[90] *Id.* ¶ 62.

[91] *Id.* ¶¶ 5, 10.

[92] The Kino Border Initiative is a binational, inclusive Roman Catholic organization that promotes humane, just, and workable migration through humanitarian assistance and

Annunciation House and Las Americas (El Paso, TX),[93] and Texas Rio Grande Legal Aid (El Paso and Brownsville, TX),[94] also provide humanitarian support, know-your-rights education, legal representation, and other assistance to asylum seekers turned back at local ports of entry. Like Al Otro Lado, most employ a range of strategies that are intended not only to protect rights but also to uphold the dignity of asylum-seeking individuals.

In January 2017, a coalition of immigrant advocacy organizations submitted an administrative complaint[95] to DHS's Office of Civil Rights and Civil Liberties ("CRCL").[96] Although only a few border-based organizations signed the complaint, many more, including Al Otro Lado, contributed case examples and participated in preparing it. The complaint highlighted the experiences of numerous men, women, families, and unaccompanied children who had fled horrendous circumstances in their home countries and endured arduous journeys to seek protection, only to be denied access to the U.S. asylum process at ports of entry.

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holistic accompaniment of migrants, education and encounter between migrants and others, and policy advocacy in Mexico and the United States. Kino's strategies include community education, building leadership skills among migrants to facilitate mobilization, and educational programming that transforms indifferent communities toward empathy or activates key allies. Kino Border Initiative, *Mission and Vision*, https://www.kinoborderinitiative.org/mission-and-values (last visited Aug. 29, 2024).

93 Annunciation House is a non-profit organization that accompanies migrants, refugees, and economically vulnerable people in the border region through hospitality, advocacy, and education. Rooted in Catholic social teaching, the organization is run entirely by volunteers committed to an experience of transformative service and solidarity with the population they serve. Annunciation House, https://www.annunciationhouse.org (last visited Aug. 29, 2024). In May 1987, Ruben Garcia, the director of Annunciation House, and Delia Gomez co-founded Las Americas Immigrant Advocacy Center, to address the legal needs of low-income immigrants, including refugees and asylum seekers, in the El Paso region. Action Network, *Las Americas Immigrant Advocacy Center*, https://www.actionnetwork.org/groups/las-americas-immigrant-advocacy-center (last visited Sept. 7, 2024).

94 Texas Rio Grande Legal Aid ("TRLA"), the largest legal aid provider in Texas, provides low-income individuals with free legal services in a wide range of areas. In the immigration arena, TRLA's work includes securing immigration relief for individuals eligible for lawful status or U.S. citizenship, providing legal education and outreach to vulnerable communities, and collaborating with other teams to provide holistic services to noncitizen clients. Texas Rio Grande Legal Aid, *Practice Areas: Immigration*, https://www.trla.org/immigration-group (last visited Aug. 29, 2024).

95 American Immigration Council, et al., *Compl. RE: U.S. Customs and Border Protection's Systemic Denial of Entry to Asylum Seekers at Ports of Entry on U.S.-Mexico Border* (Jan. 13, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/general_litigation/cbp_systemic_denial_of_entry_to_asylum_seekers_advocacy_document.pdf (hereinafter "CRCL Complaint").

96 CRCL reviews and investigates administrative complaints from members of the public alleging civil rights and civil liberties violations resulting from DHS policies, activities, and personnel. DHS, *Make a Civil Rights Complaint*, https://www.dhs.gov/file-civil-rights-complaint (last visited Aug. 27, 2024). CRCL does not grant legal rights or remedies, but rather uses the complaint process to identify and internally address problems resulting from the implementation of DHS policies. *Id.*

The experience of L.R.G., a former community police officer in Mexico who attempted to seek asylum at the San Ysidro port of entry after being brutally attacked by a cartel and hospitalized, illustrates CBP's callous approach. Due to L.R.G.'s injuries and recent surgery, he was in a wheelchair when he and his daughter M.R. approached the port of entry in July 2016. When M.R. explained that her father wanted to seek political asylum in the United States, a CBP officer responded, "We're not accepting any more people." When M.R. insisted that her father could not return to Mexico, the following interaction ensued:

> The officer said, "If you want to go to a Mexican immigration center, there are 3,000 people on the waiting list." I told him that my dad was Mexican, so he did not need to go to any immigration center for non-Mexican citizens. The officer then said, "Go back, if you don't go back we're going to have to escort you out." My father then said, in Spanish, "They're going to kill or torture me, I can't go back." My father took off his cap and showed the officer his head injuries. The officer replied, "I'm sorry sir, we're not accepting any political asylum applicants anymore."[97]

In other cases, CBP officers used physical force to compel migrants to leave ports of entry. G.R.G., who sought protection for herself and her fourteen-year-old daughter in November 2016 after receiving death threats in Guatemala, recalled: "The Latino official [at the El Paso port] angrily yelled at me, asking what I needed and I responded that I needed help….I repeated to him that I needed help and tried to show him our documents but he demanded that I get out of here and go to Juarez." They left the bridge only after another officer pushed G.R.G. with both hands and pointed an automatic weapon at her. Desperate to find safety, G.R.G. and her daughter subsequently entered the United States by crossing the Rio Grande River a few days later.[98]

The administrative complaint urged CRCL to investigate and take immediate action to address CBP's illegal conduct. Despite these

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[97] CRCL Complaint, *supra* note 95, at 4.

[98] *Id.* at 6. Other asylum seekers who tried to navigate the Rio Grande were not as lucky as G.R.G. and her daughter. For example, on June 23, 2019, CBP officers turned back Oscar Alberto Martinez Ramirez, his wife, and their 23-month-old daughter Valeria when they presented themselves at the Brownsville, Texas port of entry. Bill Chappell, *A Father and Daughter Who Drowned at the Border Put Attention on Immigration*, Nat'l. Pub. Radio (June 26, 2019, 12:12 PM), https://www.npr.org/2019/06/26/736177694/a-father-and-daughter-drowned-at-the-border-put-attention-on-immigration. After aid workers in Matamoros, Mexico told Oscar there were hundreds of people in front of him waiting to be processed at the Brownsville port, Oscar waded into the Rio Grande River with his daughter on his back. *Id.* The rapid current swept Oscar off his feet, and he and Valeria drowned. *Id.*

efforts, increasing reports by nongovernmental organizations[99] and news outlets[100] of turnbacks at ports of entry along the southern border, and a related hearing before the Inter-American Commission on Human Rights,[101] CBP continued turning back asylum seekers at ports of entry. Seeing no other avenue to address the life-or-death consequences of CBP's illegal conduct, Al Otro Lado finally turned to the courts. The ensuing challenge was Al Otro Lado's first foray into impact litigation.

III. Impact Litigation Reconsidered

Having decided to proceed with litigation, Al Otro Lado became a critical partner in helping the litigation team—comprised of the Center for Constitutional Rights, the American Immigration Council, the Southern Poverty Law Center, the Center for Gender & Refugee Studies, and two pro bono law firms—navigate the potential pitfalls described in Part I. Impact litigators are frequently criticized for parachuting into marginalized communities, asking questions without providing answers, and abruptly departing after cherry-picking the most sympathetic plaintiffs they can find.[102] While plaintiff outreach can be time-consuming and resource-intensive, this impression—whether justified or not—must be avoided at all costs. Building a solid relationship with clients at the outset of a case is essential to establish productive long-term working relationships. The challenges inherent in this process were magnified when dealing with a highly transient population of recently arrived migrants on both sides of the border. In this context, the litigation team's alliance with Al Otro Lado, a trusted intermediary well-versed in the dynamics within and among migrant communities at the southern border, was critical.

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99 *See, e.g.*, Hum. Rts. First, Crossing the Line: U.S. Border Agents Illegally Reject Asylum Seekers (2017), https://humanrightsfirst.org/library/crossing-the-line-u-s-border-agents-illegally-reject-asylum-seekers; Amnesty Int'l, Facing Walls: USA and Mexico's Violation of the Rights of Asylum Seekers 19–22 (2017), https://www.amnesty.org/en/documents/amr01/6426/2017/en/.

100 *See, e.g.*, Joshua Partlow, *U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say*, Wash. Post (Jan. 16, 2017), https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html; Caitlin Dickerson & Miriam Jordan, *'No Asylum Here': Some Say U.S. Border Agents Rejected Them*, N.Y. Times (May 3, 2017), https://www.nytimes.com/2017/05/03/us/asylum-border-customs.html; Rafael Carranza, *Are Asylum Seekers Being Turned Away at the Border?*, The Republic (May 4, 2017, 10:55 PM), https://www.azcentral.com/story/news/politics/immigration/2017/05/05/asylum-seekers-being-turned-away-border/309398001/.

101 Inter-Am. Comm'n H.R., 161 Period of Sessions, Public Hearing: Policies that Prevent Access to Asylum in the United States (March 21, 2017), https://www.oas.org/en/iachr/sessions/hearings.asp?Year=2017&Topic=0.

102 *See, e.g.*, White, *supra* note 44, at 545.

A. Cultivating Attorney-Client Partnerships

Having shifted its priorities and thoroughly overhauled the operations of its Border Rights Project in response to CBP's turnback policy, Al Otro Lado had a strong basis for asserting claims on its own behalf in court.[103] Yet the organization's leadership felt strongly that the case should focus on the experiences of directly impacted migrants. The complaint was thus framed as a putative class action. However, in an abundance of caution, Al Otro Lado stepped forward as an organizational plaintiff to ensure that the litigation would continue even if the court did not certify the proposed class.[104]

This "hybrid plaintiff" structure, which incorporated both individual and organizational plaintiffs, proved instrumental in facilitating communication and building trust between the litigation team and the individual plaintiffs.[105] By the time Al Otro Lado embarked on this case, it had a well-earned reputation as a staunch ally of asylum seekers and other migrants in Tijuana and California. Al Otro Lado's client-centered approach and deep commitment to holistic representation—which extends far beyond the legal needs of the population it serves—reassured prospective plaintiffs that the planned litigation was in their best interests. In addition, the far-reaching expertise of Al Otro Lado's staff, many of whom have firsthand experience with the dysfunctional U.S. immigration system, helped the litigation team build cross-cultural

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[103] An organization has standing to bring claims for injuries that "directly affect[] and interfere[] with [their] core business activities" by "'perceptibly impair[ing] [their] ability to provide counseling'" or other services. FDA v. All. for Hippocratic Med., 602 U.S. 367, 395 (2024) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982)) (reaffirming *Havens*, but rejecting an expansive reading that would have provided standing to any organization that "diverts its resources in response to a defendant's actions," regardless of the effect on its mission). The Ninth Circuit has applied the *Havens* standard to assess organizational standing, holding that an organization may bring a claim when it suffers "a drain on its resources from both a diversion of its resources and a frustration of its mission." Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir. 2002). Immigration service providers have repeatedly established organizational standing on this basis. *See, e.g.*, East Bay Sanctuary Covenant v. Biden, 993 F.3d 640, 663–64 (9th Cir. 2021); East Bay Sanctuary Covenant v. Garland, 994 F.3d 962, 974–75 (9th Cir. 2020).

[104] A court will certify a proposed class only if the plaintiffs demonstrate that they meet the requirements of Federal Rule of Civil Procedure 23—numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a). To obtain injunctive or corresponding declaratory relief, the plaintiffs must also show that the defendant has "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2).

[105] Amaha Kassa, Executive Director, African Communities Together, coined the term "hybrid plaintiff" and eloquently highlighted the advantages of including both individual and organizational plaintiffs during a panel presentation on "Movement Lawyering During the Biden Administration," which was part of a virtual conference hosted by the UCLA Center for Immigration Law and Policy on April 30, 2021. UCLA Center for Immigration Law and Policy, *Movement Lawyering During the Biden Administration*, YouTube (Apr. 30, 2021), https://www.youtube.com/watch?v=Bjyy0liJ7Tg.

competence,[106] infuse trauma-informed practices into their work,[107] and better understand and respond to the needs of directly impacted asylum seekers both during the interviews and as the litigation progressed. Over time, Al Otro Lado remained an indispensable partner to the litigation team, routinely attending team meetings, providing updates regarding on-the-ground developments, facilitating communications with prospective class members, and weighing in on virtually every strategic decision.

Before the litigation team arrived in Tijuana, Al Otro Lado had notified asylum-seeking migrants of the visit and the team's interest in speaking to individuals who had been turned back at ports of entry. In the process, Al Otro Lado's staff educated local migrants about how litigation could help secure their long-awaited access to the U.S. asylum process and generated a sense of optimism about this potential strategy. Al Otro Lado also coordinated logistics—including office space, technology, transportation, babysitters, and refreshments—for group information sessions and several days of concurrent interviews, and they made arrangements with local shelters to facilitate additional outreach. Over the next several weeks, Al Otro Lado and members of the litigation team worked tirelessly to screen prospective individual plaintiffs and educate them about the goals of the planned litigation, the potential risks and benefits, the responsibilities entailed in becoming a named plaintiff in a class action lawsuit, and the prolonged duration of most such litigation. Many individuals were concerned about the possibility of reprisals by persecutors in their home countries against family members left behind, which was addressed by using pseudonyms in place of the plaintiffs' actual names in court pleadings. Through in-depth meetings with individuals willing to share their stories, the litigation team ultimately identified a group of willing plaintiffs whose experiences powerfully illustrated the range of tactics that CBP was using to limit the number of asylum seekers inspected and processed at ports of entry.

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106 *See* Susan Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, *in* Race, Culture, Psychology, and Law (Kimberly Holt Barrett & William H. George eds., 2005); Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference* and *Talking about Race*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy (Susan Bryant, Elliott S. Milstein & Ann C. Shalleck eds., 2014). For example, one litigation team member recalled the Al Otro Lado staff's emphasis on the importance of speaking with kindness and honesty, recognizing non-verbal cues, avoiding legal jargon, responding to asylum seekers' questions, and taking breaks as needed. Email correspondence from Hilda Bonilla, Legal Fellow, National Immigration Law Center, to author (Jan. 28, 2024, 6:12 pm EST) (on file with author).

107 *See* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clin. L. Rev. 359, 371 (2016); Hannah Fontaine, *Trauma and Activism on Los Dos Lados*, Latina Republic (Sept. 20, 2021), https://latinarepublic.com/2021/09/20/trauma-and-activism-on-los-dos-lados/.

Members of the litigation team subsequently ventured to Nogales, Arizona, as well as Nuevo Laredo, Ciudad Juarez, and the Rio Grande Valley to meet with other service providers, understand how CBP's turnback policy was playing out in those locations, and seek assistance in identifying additional plaintiffs to demonstrate the border-wide scope of CBP's unlawful practices. Despite previous conference calls and Zoom meetings with these advocates, the litigators' time on the ground was essential to better understand their work and build rapport. Whether driven by religious convictions, a commitment to protect human rights, or some combination of both, virtually all the advocates expressed a deep commitment to honoring the human dignity of the people they serve, giving them autonomy over decisions affecting their lives, and maintaining humility. Like Al Otro Lado, they were adept at accompanying migrants, both to ports of entry and more generally,[108] and they encouraged the litigators to take the same approach.

In collaboration with a growing network of advocates, the litigation team finalized its selection of individual named plaintiffs by June 2017. At that point, however, the draft complaint and related documents had to be substantially overhauled to incorporate the individual plaintiffs' voices and experiences. In addition to setting forth the facts required to substantiate the plaintiffs' legal claims,[109] the complaint would be used as a public education tool to generate greater awareness about the tragedy unfolding at the southern border. Fortunately, an emergency fundraising request enabled Al Otro Lado to house and support the individual plaintiffs and their accompanying family members in relative safety for the additional three weeks needed to finalize the complaint. During this period, Al Otro Lado remained the primary point of contact with the named plaintiffs, triaging their immediate needs, providing basic information about the U.S. immigration system, and facilitating conversations with the litigation team when necessary. In retrospect, the litigators realized that they should have anticipated the plaintiffs' need for temporary housing and proactively addressed it.[110] The lack of

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[108] *See, e.g.,* Kino Border Initiative, *Solidarity: Creating Community Across Borders and Defying Division* (July 13, 2020), https://www.kinoborderinitiative.org/solidarity ("As advocates for more just migration, one of the most powerful things that we can do to stand in solidarity with migrant communities is to bring them back into sight–we can make them seen and make them heard. We can listen to their stories and take the time to understand their realities, their needs, and their struggles so that we can be better educated, equipped, and strategic in how we support them. As the needs of migrant communities shift, so should our modes of expressing solidarity.").

[109] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (requiring that a complaint must allege "enough facts to state a claim to relief that is plausible on its face").

[110] The ethical rules of many jurisdictions, including California, prohibit lawyers from paying the personal expenses of a prospective or existing client. *See* Ca. R. Prof. Conduct 1.8.5 (Payment of Personal or Business Expenses Incurred by or for a Client).

a solution could have severely jeopardized their clients' safety, trust, and commitment to the case.

In mid-July 2017, Al Otro Lado and six individual named plaintiffs, acting on behalf of themselves and other similarly situated asylum seekers across the southern border, filed suit against several high-level DHS officials. The plaintiffs' experiences, together with voluminous documentation from other sources, demonstrated that CBP was using a variety of tactics—including misrepresentation, threats, intimidation, verbal abuse, physical force, coercion, and delay—to deprive asylum seekers at the southern border of access to the U.S. asylum process. Alleging violations of U.S. and international law, the plaintiffs sought to ensure that DHS and CBP complied with their legal obligations to inspect and process arriving asylum seekers going forward.

B. Capitalizing On Opportunities To Shift Power To Plaintiffs

Throughout the litigation, Al Otro Lado, the individual plaintiffs, and the litigation team constantly looked for opportunities to shift power from the government to those subjected to the draconian turnback policy.[111] For example, just days after the complaint was filed, the individual plaintiffs, through counsel, apprised the government of their intention to seek an emergency order mandating their inspection and processing at ports of entry—the paramount goal of the litigation. After reviewing a draft of the motion, which meticulously outlined the individual plaintiffs' dire predicament in Mexico and the life-threatening harm they were likely to suffer if forced to remain there, the government promptly agreed to facilitate their entry into the United States.[112]

The filing of the lawsuit also helped prospective class members, at least in the short term. For the next several months, CBP accelerated its processing of asylum seekers at several ports of entry including San Ysidro, the busiest land border crossing in the United States. Had this trend continued, CBP could have dissipated the rising anxiety among the thousands of asylum seekers who had been waiting indefinitely in Mexico.

In the ensuing months, Al Otro Lado's Border Rights Project redoubled its efforts to educate asylum seekers in Tijuana about the U.S.

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111 *Cf.* Su, *supra* note 51, at 411 ("The [El Monte] workers had to learn that even in this country, nothing is won without a fight, no power is shifted without a struggle, and no one is more powerful to stand up for them than they themselves. They—and I—have learned that mere access to the legal system and to lawyers does not ensure that justice will be served.").

112 Unfortunately, a few plaintiffs were unable to take advantage of this opportunity. For example, Plaintiff Roberto Doe tried to cross the border, but Mexican officials arrested him as he was walking onto the international bridge leading to the Hidalgo port of entry and subsequently detained him. Suppl. Decl. of Roberto Doe in Support of Pls.' Mot. for Class Certification, Al Otro Lado v. Wolf, ECF No. 390-97, ¶ 6.

asylum process and advise them on how U.S. policies and border enforcement practices could affect their cases. According to AOL Border Rights Project Director Nicole Elizabeth Ramos, "We believe that refugees are brave and resilient, but in order to fully assess the risks of seeking asylum in the United States, they must have all the information needed to assess that risk."[113] Al Otro Lado's leaders bore witness to the many ways in which the community of waiting asylum seekers mobilized internally, including by creating and disseminating video and audio recordings of CBP's abuses at the border to generate broader awareness of these practices, organizing protests to denounce discriminatory treatment of Black migrants, and educating newly arriving asylum seekers about their rights.[114] Despite the initial wariness of many asylum seekers toward people from different countries, most eventually came to appreciate the advantages of cross-cultural collaboration for purposes of organizing and community-building.[115]

In the spring of 2018, the Trump administration shifted its approach and announced a "metering," or waitlist, process designed to restrict the flow of asylum seekers.[116] Under the metering policy, CBP officers no longer permitted noncitizens without proper travel documents to access the port of entry but instead stopped them before they crossed the international border, falsely claiming that the government "lacked capacity" to inspect and process them.[117] Whether this shift was driven by the pending *Al Otro Lado* litigation, the anticipated arrival of a new "caravan" of Central American asylum seekers, or a more general desire by the government to deter migration was never clear.[118]

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113 Telephone interview with Nicole Elizabeth Ramos (Sept. 9, 2021) (notes on file with author) (hereinafter "Ramos Interview").

114 *Id.*

115 *Id.*

116 Memorandum from Todd Owen, Executive Assistant Commissioner, Office of Field Operations, CBP, *Subject: "Metering Guidance"* (Apr. 27, 2018), https://immpolicytracking.org/media/documents/2018.04.27_CBP_Metering_Guidance.pdf.

117 Damning evidence produced in discovery confirmed that the government's capacity-related justifications for turning back asylum seekers at the southern border were clearly pretextual. While many of the relevant documents remain under seal, DHS's Office of Inspector General released a report in October 2020 that reached the same conclusion. U.S. Dep't of Homeland Sec., Office of the Inspector Gen., OIG-21-02, *Subject: CBP Has Taken Steps to Limit Processing of Undocumented Aliens at Ports of Entry* (Oct. 27, 2020), https://www.oig.dhs.gov/sites/default/files/assets/2020-10/OIG-21-02-Oct20.pdf.

118 Whatever the cause, President Trump justified his administration's aggressive use of turnbacks by characterizing asylum seekers as "criminals" and "animals" seeking to "infest" and "invade" the United States, and by stating, via tweet, that the United States "must bring them back from where they came" and must "escort them back without going through years of legal maneuvering." Donald J. Trump (@realDonaldTrump), X (June 19, 2018, 6:52 AM), https://twitter.com/realDonaldTrump/status/1009071403918864385; Donald J. Trump (@realDonaldTrump), X (June 24, 2018, 8:02 AM), https://perma.cc/35AQ-NSDH; Donald J. Trump (@realDonaldTrump), X (June 30, 2018, 12:44 PM), https://x.com/realDonaldTrump/status/1013146187510243328.

By contrast with the turnback experiences recounted above,[119] Roberto Doe, a Nicaraguan father who had received death threats after participating in anti-government protests in his hometown,[120] was subject to the government's metering policy. When he attempted to seek asylum at the Reynosa-Hidalgo port of entry,[121] CBP officers stationed at the middle of the bridge between Reynosa, Tamaulipas (Mexico) and Hidalgo, Texas, informed him "that the port of entry was 'all full'" and that he "might have to wait for 'hours, days, or weeks' before [he] could apply for asylum."[122] Another CBP officer then contacted Mexican immigration officials, who escorted Roberto back down the bridge towards the Mexican side, where he was subsequently detained.[123]

The government's changing turnback tactics necessitated the filing of an amended complaint adding Roberto Doe and six other new individual plaintiffs who had been subjected to metering. Once again, the government agreed to facilitate the plaintiffs' entry into the United States rather than defending against their intended motion for emergency relief (and, presumably, the damning press reports that would likely have followed if the plaintiffs had been forced to file that motion). Confident that its newly formalized metering tactic—in which CBP stopped most migrants before they stepped onto U.S. territory—would survive judicial scrutiny, the government renewed its efforts to dismiss the case. But after extensive briefing by the parties and numerous *amici curiae*,[124] the court largely denied the government's motion to dismiss and allowed nearly all the plaintiffs' claims to go forward.[125]

Undeterred, the government continued to meter asylum seekers across the U.S.-Mexico border. In numerous Mexican border towns, many asylum seekers were allowed to place their names on waitlists run by other waiting asylum seekers or, in some cases, Mexican immigration officials. When CBP officers at a particular port of entry opted

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119 *See* Part II, *supra.*

120 Decl. of Roberto Doe in Support of Pls.' Mot. for Prelim. Inj., Al Otro Lado v. McAleenan, No. 17-cv-02366 (S.D. Cal. September 26, 2019), ECF No. 294-7, ¶¶ 2–3.

121 *Id.* ¶ 4.

122 *Id.* ¶ 5.

123 *Id.* ¶ 6.

124 Six *amicus* briefs—from Members of Congress, international law scholars, twenty states and the District of Columbia, Amnesty International, Kids In Need of Defense, and various other nongovernmental organizations—were filed in opposition to Defendants' motion to dismiss. Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (S.D. Cal. February 21, 2019), ECF Nos. 219-1, 221-1, 215-1, 216-1, 225-1, 223-2, https://ccrjustice.org/AOL (last visited Sept. 7, 2024).

125 Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, 1198–1205 (S.D. Cal. 2019). The district court endorsed Plaintiffs' legal theory that the Immigration and Nationality Act prohibits CBP from turning back asylum seekers in the process of arriving in the United States and triggers the government's statutory duties to inspect and process them. *Id.* On appeal, the Ninth Circuit found that this analysis was "likely correct" and had "considerable force." Al Otro Lado v. Wolf, 952 F.3d 999, 1011, 1013 (9th Cir. 2020).

to inspect and process asylum seekers, they would direct their Mexican counterparts to bring a designated number of individuals to the port. The Mexican authorities did so, typically using the waitlists. However, list managers frequently denied certain individuals—most notably, Black migrants—permission to add their names to the waitlists,[126] leaving them with no avenue to access the U.S. asylum process.[127] Outraged by such blatant discrimination, a sizeable group of Cameroonian asylum seekers waiting in Tijuana organized protests to demand a role in managing the local list.[128]

Even for migrants enrolled on the waitlists, waiting times ranged considerably depending on the situation at particular ports of entry.[129] Although the composition of the migrant population shifted over time, most individuals were forced to wait anywhere from a few weeks to several months to be inspected and processed. While they waited, migrants in and around Tijuana inevitably learned of Al Otro Lado, whose staff visited local encampments on a daily basis, and often sought out their services. These interactions helped to keep Al Otro Lado—and, in turn, the litigation team—apprised of ongoing changes to CBP policies and their impact on waiting migrants.

Another attempt at power-shifting occurred in July 2019, after the Trump administration promulgated a new "transit" rule that threatened to permanently deprive thousands of metered asylum seekers waiting in Mexico of access to the U.S. asylum process.[130] With very limited exceptions, the rule rendered any individual who had transited through one or more third countries en route to the U.S.-Mexico border ineligible for asylum in the United States unless they had sought and been denied protection in at least one of those third countries.[131] As panic gripped communities of waiting asylum seekers, the plaintiffs moved swiftly for, and ultimately obtained, a preliminary injunction exempting from the transit rule any individual metered before its implementation on July 16, 2019, but not inspected or processed until after that date.[132] In a subsequent order, the court clarified that the government must "make all

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126 *See* Amicus Curiae Brief of the Haitian Bridge Alliance, et al. in Support of Plaintiffs-Appellees/Cross-Appellants, Al Otro Lado v. Mayorkas, *supra* note 67.

127 Decl. of Nicole Ramos in Support of Pls.' Mot. for Prelim. Inj., Al Otro Lado v. McAleenan, 394 F. Supp. 3d 1168, ECF No. 294-6, ¶ 8 (noting frequent changes to documentation requirements for Black asylum seekers to enroll on the waitlist).

128 Ramos Interview, *supra* note 113.

129 *See, e.g.*, Strauss Ctr. for Int'l Sec. and Law, Asylum Processing and Waitlists at the U.S.-Mexico Border, *supra* note 78, at 7; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2019, *supra* note 78, at 5–14; Strauss Ctr. for Int'l Sec. and Law, Metering Update: November 2020, *supra* note 78, at 4–9.

130 Asylum Eligibility and Procedural Modifications, 84 Fed. Reg. 33829 (proposed July 16, 2019), *codified at* 8 C.F.R. § 208.13(c)(4).

131 *Id.*

132 *See* Al Otro Lado v. McAleenan, 423 F. Supp. 3d 848 (S.D. Cal. 2019).

reasonable efforts to identify," and provide notice of the preliminary injunction to, potential class members in proceedings or in DHS custody and "take immediate affirmative steps to reopen or reconsider" past determinations of ineligibility for asylum based on the transit rule; the plaintiffs and their counsel were tasked with notifying other class members, including those outside the United States.[133] This example of effective coordination among waiting asylum seekers, Al Otro Lado, and the litigation team, followed by the court's favorable ruling, reinforced the potential use of impact litigation to enable plaintiffs and putative class members to respond to policy changes in real time.

Recognizing that the court's order could restore asylum eligibility for countless class members who had been wrongly subjected to the transit rule, the litigation team worked diligently to advise affected individuals outside the United States. Their strategies included the creation of an informational flyer, which was translated into Spanish and six indigenous languages and posted in community centers and churches throughout Central America. Soon afterward, however, the stay-at-home mandates associated with the COVID-19 pandemic reduced the level of traffic in these previously popular gathering places, with the result that many eligible class members remained unaware that they could benefit from the injunction. Meanwhile, the government's slow pace of compliance shifted, at least temporarily, the balance of power back to the pre-injunction status quo. The plaintiffs' subsequent efforts to disseminate information about the injunction and identify and advise affected class members of their rights included outreach through WhatsApp to those whose contact information had been obtained through discovery, a Facebook page,[134] and radio broadcasts in various Central American countries.

To some extent, the power-shifting pendulum swung back in August 2020 when, based on declarations from the individual named plaintiffs, dozens of putative class members, and several experts, the court issued an order certifying the proposed class and designating the individual named plaintiffs as class representatives.[135] Legally speaking,

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133 Al Otro Lado v. Wolf, 497 F. Supp. 3d 914, 933, 935 (S.D. Cal. 2020).

134 Ayuda Lista de Espera – AOL v. Mayorkas, Facebook, https://www.facebook.com/ayudalistadeespera (last visited Aug. 27, 2024).

135 Al Otro Lado v. Wolf, 336 F.R.D. 494, 507 (S.D. Cal. 2020). The certified class consists of "all noncitizens who seek or will seek to access the U.S. asylum process by presenting themselves at a Class A [port of entry] on the U.S.-Mexico border, and were or will be denied access to the U.S. asylum process by or at the instruction of [CBP] officials on or after January 1, 2016." *Id.* The court also certified a subclass of "all noncitizens who were or will be denied access to the U.S. asylum process at a Class A [port of entry] on the U.S.-Mexico border as a result of Defendants' metering policy on or after January 1, 2016." *Id.* For a detailed timeline of the litigation and links to key pleadings, *see* Center for Constitutional Rights, *Al Otro Lado v. Mayorkas*, https://www.ccrjustice.org/AOL (last visited Aug. 27, 2024).

this development was a potential game-changer, ensuring that any favorable ruling in the case would cover asylum seekers turned back at ports of entry along the entire U.S.-Mexico border. Unfortunately, the decision had no immediate impact on the day-to-day lives of class members in Mexico. But for many, the reality of having a pending lawsuit challenging the U.S. government's obstructive conduct bolstered the legitimacy of their struggle and strengthened their resolve to keep fighting for a chance to seek protection in the United States.[136]

C. Developing More Inclusive Representation Structures

The interventions discussed in the preceding section were prompted by developments affecting asylum seekers in Mexico. Given the many thousands of miles that separated the litigators and most of the class representatives from the other class members' day-to-day experiences,[137] Al Otro Lado and other border-based service providers played a critical role in relaying reports from directly impacted individuals and tracking events on the ground in real time.[138] Through weekly calls, email updates, and WhatsApp videos, Al Otro Lado in particular kept the litigation team apprised of ongoing developments at the border, flagged crises that might warrant legal intervention, and offered input on potential strategies based on their experience on the frontlines. While Al Otro Lado's staff were well-positioned to play this role, the time-consuming responsibility of advising and updating the litigation team only added to their crushing workloads.

The circumstances of this case demonstrate certain potentially problematic class action dynamics. While individual named plaintiffs are selected in part because their claims are "typical" of those of a larger group of similarly situated individuals and raise "common questions of law and fact" that are capable of class-wide resolution, they may also be the beneficiaries of emergency relief that, as in this case,[139] disconnects them from the ongoing struggles of other class members. This disconnect can complicate a litigation team's efforts to stay abreast of

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136 Zoom interview with Joanna Williams, Executive Director, Kino Border Initiative, Oct. 6, 2023 (notes on file with author) (hereinafter "Williams Interview").

137 As discussed in Part III.B, *supra*, the government facilitated the entry of most of the individual named plaintiffs into the United States following the filing of both the initial and amended complaints.

138 Sameer Ashar has proposed that such "dialogic" relationships between lawyers and client organizations have the potential to facilitate a redistribution of power and "project new horizons for the work." Sameer M. Ashar, *Pedagogy of Prefiguration*, 132 Yale L. J. F. 869, 898 (2022–2023).

139 Although the government paroled most of the individual named plaintiffs into the United States shortly after they filed their complaint, *see* Part III.B, *supra*, this emergency relief did not render their claims moot or prevent them from serving as class representatives. Al Otro Lado v. Nielsen, 327 F. Supp. 3d 1284, 1295, 1302–04 (S.D. Cal. 2018).

developments on the ground and may require unconventional arrangements to facilitate the flow of accurate, updated information from directly impacted individuals.

The litigation team's relationship with the class representatives in the United States recalls the traditional attorney-client dyad, in which lawyers and clients communicate directly. Through the concerted efforts of several Spanish-speaking paralegals, the litigation team has stayed in regular touch with these eleven class representatives through monthly check-ins by phone or WhatsApp and, when necessary, additional conversations to troubleshoot housing, medical, legal, and other emergencies, in keeping with principles of holistic representation. The litigation team sends the class representatives regular updates about key developments in the case and solicits their input at critical junctures.[140] While most class representatives remain interested in case-related developments, the demands of their individual immigration cases—in which they are represented by separate counsel—and their need for stable employment understandably take precedence over their focus on impact litigation.

Moving beyond the attorney-client dyad, the litigation team collaborated closely with Al Otro Lado and other border-based service providers to facilitate communication with class members in Mexico, including through the use of innovative technology that has the potential to transform class action litigation. As the litigation team worked to develop proposed settlement terms following President Biden's election in late 2020, Al Otro Lado's staff began facilitating Zoom meetings with simultaneous live interpretation in English, Spanish, French, and Haitian Creole, which enabled the team to solicit input directly from class members in Mexico. By circulating simple flyers in Spanish and Haitian Creole (including via WhatsApp, most migrants' preferred mode of communication) to the many individuals who had sought their services, Al Otro Lado managed to get the word out quickly. Less than a week later, the litigation team met via Zoom with a diverse group of Tijuana-based asylum seekers to discuss litigation-related developments and gain a better understanding of these class members' priorities for settlement. Using the same technology, the litigators conducted similar

[140] Communication with Beatrice Doe and Roberto Doe, the two individual named plaintiffs who remained outside the United States after the others had been inspected and processed, proved more challenging, both technologically and logistically. In this regard, the assistance of Justice in Motion proved invaluable. Founded in 2005 to secure access to justice for migrant workers, Justice in Motion has established a Defender Network of human rights lawyers and nonprofit organizations throughout Mexico, Guatemala, El Salvador, Honduras, and Nicaragua, who partner with U.S. lawyers on legal cases, advocacy, and community education projects across the region. *See* Justice in Motion, *Our Story*, https://www.justiceinmotion.org/our-story (last visited August 27, 2024).

meetings with asylum seekers in other parts of Mexico, whose priorities were surprisingly consistent with those expressed at the Tijuana meeting.

The litigation team later repurposed the Zoom interpretation technology to enable class members to listen to court hearings. Given the ongoing pandemic, the court provided a phone line that members of the public could call to hear the arguments. The litigation team hired Spanish and Haitian Creole-speaking interpreters, who called into the hearing and provided simultaneous interpretation of the arguments that dozens of directly impacted individuals in Mexico (in addition to several class representatives in the United States) accessed through Zoom. Following the hearing, a member of the litigation team recapped the arguments and responded to attendees' questions. According to Al Otro Lado's Border Rights Project Director Nicole Elizabeth Ramos, concerted outreach by Al Otro Lado and others to Spanish and Haitian Creole-speaking asylum seekers in Mexico was essential to ensure turnout and send a strong message that this litigation was intended to provide "justice for all"—including "an absolute right to information regarding the legal process in which they are trying to engage to save their lives."[141]

These recent breakthroughs in communicating with class members in Mexico prompted numerous conversations among litigation team members and Al Otro Lado leadership about other ways to facilitate greater engagement of directly impacted individuals in the case. Suggestions included establishing a litigation steering committee of directly impacted individuals, possibly on a rotating basis, to provide regular input and guidance on the litigation; holding regular meetings with the litigation steering committee and periodic update meetings with broader groups of affected individuals; and collaborating with local service providers to disseminate periodic written litigation updates in Spanish, Haitian Creole, and other prevalent languages to a broad swath of class members (in addition to the class representatives, who regularly received them).[142]

While intriguing, the establishment of an on-the-ground litigation steering committee is not contemplated by the existing class certification requirements, which focus on the individual named plaintiffs' ability to represent the class.[143] Assuming the class representatives had been

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[141] Ramos Interview, *supra* note 113; email correspondence from Nicole Elizabeth Ramos to author (Apr. 8, 2024, 1:45 pm EST) (on file with author).

[142] Pinheiro Interview, *supra* note 88.

[143] *Cf.* Shauna I. Marshall, *Class Actions as Instruments of Change: Reflections on Davis v. City and County of San Francisco*, 29 U. S. F. L. Rev. 911, 948–49 (1995) (recommending amendment of rules of professional responsibility to encourage more robust communication among class counsel, class representatives, and class members and clearer delineation

interested in seeking the input of class members still waiting in Mexico, the litigation team and Al Otro Lado could conceivably have facilitated such communication and provided interpretation as needed. However, given the precarious conditions under which most asylum seekers in Mexico live and the exigencies of their day-to-day struggles to survive,[144] the scope of their capacity to provide reliable, consistent assistance to the class representatives was uncertain at best.[145]

D. Facilitating Parallel Momentums

Impact litigators can use the strategies outlined above—including partnerships with local intermediaries to build credibility and cultural competence, the hybrid plaintiff structure, strategic interventions to facilitate power-shifting in plaintiffs' favor, and recourse to innovative technology and other creative communication mechanisms—to foster greater engagement by directly impacted individuals in the litigation and, ideally, greater solidarity among class members. But the limits of litigation are undeniable. In the words of ACLU Deputy Legal Director Cecillia Wang, "Litigators act as firefighters to extinguish the [immediate] harm."[146] To maximize the potential for systemic change, a broad-based advocacy strategy—including, as appropriate, grassroots organizing, public protest, media campaigns, community education, and policy work—is essential.[147]

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of decision-making authority, along with amendment of Fed R. Civ. P. 23 to include court approval of plan for notifying and communicating with class members).

144 *See, e.g.*, Tom K. Wong, Seeking Asylum: Part 2, U.S. Immigr. Pol'y. Ctr. 4 (Oct. 29, 2019), https://bit.ly/31NbfCu; Sumiko Keil, *Migrant Shelter in Mexicali Desperate for Help Amid the Pandemic*, KYMA (Aug. 6, 2020, 2:43 pm), https://bit.ly/3mtKMC1; John Holman, *Mexico Fails to Provide Promised Jobs to Migrants*, Al Jazeera (Aug. 28, 2019), https://bit.ly/2HEovlQ; Julia Ainsley, *As COVID-19 Looms, Conditions for Migrants Stalled at U.S. Border are a 'Disaster in the Making'*, NBC News (May 12, 2020, 2:01 am), https://nbcnews.to/34ylKvy (reporting that although Mexican law purports to guarantee access to health care, many low-income people are turned away from hospitals and public health workers were blocked from visiting migrant shelters under COVID-19 stay-at-home orders).

145 For similar reasons, the involvement of directly impacted migrants in U.S.-based advocacy coalitions has been relatively minimal. Critical steps that U.S.-based advocates could take to facilitate such involvement include holding meetings online rather than in-person, scheduling meetings outside the workday, and consistently providing interpretation. Email correspondence from Nicole Elizabeth Ramos to author (Apr. 8, 2024, 1:45 pm EST) (on file with author). *But see* Refugee Council USA, *Constituent Leadership*, https://rcusa.org/impact-area/constituent-leadership/ (last visited Aug. 27, 2024) (outlining Refugee Council USA's efforts to expand opportunities for people with lived experience to directly shape humanitarian protection policy).

146 UCLA Center for Immigration Law and Policy, *Immigrant Rights Litigation in the Biden Administration: A Conversation with Cecillia Wang*, Youtube (Apr. 23, 2021), https://www.youtube.com/watch?v=i6-FhBPs7AI.

147 *See* White, *supra* note 43, at 765 ("[P]rofessional identification as a lawyer can narrow one's strategic imagination. Perhaps the best arrangement is for lawyer-outsiders to work side by side with outsiders trained in other fields.").

The *Al Otro Lado* case illustrates how integrated advocacy can generate parallel momentums that complement ongoing litigation.[148] When the original complaint was filed, only a few human rights organizations and a handful of journalists had reported on turnbacks of asylum seekers at ports of entry along the southern border. As the case progressed, both the litigation team and Al Otro Lado solidified channels of communication with advocates across the border, confirmed the pervasive nature of CBP's illegal conduct, and worked with local groups to identify class members and monitor trends. Meanwhile, an increasing number of immigration advocacy organizations issued reports confirming and denouncing CBP's unlawful policy and practice of turning back asylum seekers at ports of entry.[149]

The robust *amicus* curiae, or "friend of the court," briefing that occurred at various stages of the case amplified the chorus of stakeholders publicly denouncing CBP's turnbacks of asylum seekers. In addition to many of the national and border-based advocates with whom the plaintiffs' counsel had worked closely,[150] *amici* included 77 Members of

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148 *See* Cummings, *supra* note 2, at 1695 (noting that "[t]he essential thrust of integrated advocacy is to break down divisions associated with legal liberalism—between lawyers and nonlawyers, litigation and other forms of advocacy, and courts and other spaces of law making and norm generation—toward the end of producing more democratic and sustainable social change").

149 *See, e.g.,* Amnesty Int'l, *supra* note 99; Hum. Rts. First, *supra* note 99; Amnesty Int'l, USA: 'You Don't Have Any Rights Here': Illegal Pushbacks, Arbitrary Detention & Ill-Treatment of Asylum-Seekers in the United States (Oct. 11, 2018), https://www.amnesty.org/en/documents/amr51/9101/2018/en/; Josiah Heyman & Jeremy Slack, *Blockading Asylum Seekers at Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death*, Ctr. for Migration Stud. (June 25, 2018), http://cmsny.org/publications/heyman-slack-asylum-poe/#_ednref11.pdf; Adam Isacson, Maureen Meyer, & Adeline Hite, "Come Back Later": Challenges for Asylum Seekers Waiting at Ports of Entry (Aug. 2018), https://www.wola.org/wp-content/uploads/2018/08/Ports-of-Entry-Report_PDFvers-3.pdf.

150 *See* Amicus Curiae Brief of Nineteen Organizations Representing Asylum Seekers, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/organizations_representing_asylum_seekers.pdf (arguing that the administration's "lack of capacity" justification for denying individuals access to the U.S. asylum process was factually false, that migration was at historically low levels, that under the Obama administration CBP demonstrated a significantly greater capacity to process asylum seekers at ports of entry, and that CBP's turnback policy was driven by hostility to the asylum process and animosity toward asylum seekers); Amicus Curiae Brief of Amnesty International in Opp'n to Def's Mot. To Dismiss, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/amnesty_intl.pdf (arguing that U.S. legal obligations under domestic and international law require the prompt processing of asylum seekers, and that CBP's policy was a direct violation of these obligations); Brief of Amici Curiae Kids in Need of Defense, et al. in Supp. of Pls.' Opp'n to Mot. To Dismiss, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/kind.pdf (explaining severity of harms faced by juveniles denied access to the U.S. asylum process).

Congress,[151] 19 State Attorneys General,[152] and various immigration and refugee law scholars.[153] In some cases, an amicus strategy can provide an opportunity to engage and educate individuals and groups not involved in the litigation about the issues at stake and encourage them to offer their perspectives for consideration by the court.[154] Here, most of the *amici* were familiar with the issues and grateful for the chance to denounce CBP's unlawful conduct. Their diverse perspectives reinforced the importance of the fight, signaled to the court that its decision would impact a wide range of stakeholders, and generated greater awareness—and outrage—among immigration advocates across the country. In addition, the significant involvement of legislators and other government actors helped to build political support for the plaintiffs' positions. After the amicus briefs were filed, many of the nongovernmental organizations representing the plaintiffs posted them on their websites in an effort to reach an even broader audience.

As the case unfolded, more formal coordination among advocates took shape. The Border Working Group, which was established by the Women's Refugee Commission in early 2017 to facilitate information-sharing among national and on-the-ground advocates concerning border-wide trends (including metering),[155] continues to meet virtually on a biweekly basis to share regional updates and strategize about advocacy. Meanwhile, the Trump administration's insistence on metering,

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151 *See* Amicus Brief of Members of Congress, in Supp. of Pls.' Opp'n to Defs.' Mot. To Dismiss the Second Amended Complaint, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/members_of_congress.pdf (arguing that Congress's intent was to facilitate processing of asylum seekers at the border and that DHS's practice of deterring asylum seekers by limiting access to ports of entry and the U.S. asylum process was thus unlawful).

152 *See* Amicus Curiae Brief of the States of California, et al., Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/al_otro_lado_amicus_brief_filed.pdf (arguing that the administration's policy of turning back asylum seekers was subjecting them to severe trauma and would increase the needs of those who reached the United States for state-funded mental and physical health services).

153 *See* Brief of Immigration Law Professors as *Amici Curiae* in Supp. of Pls.' Opp'n to Defs' Mot. To Partially Dismiss the Second Amended Complaint, Al Otro Lado v. Nielsen, No. 3:17-cv-02366 (2019), https://www.splcenter.org/sites/default/files/documents/international_law_professors.pdf (arguing that migrants who have reached the U.S. border have clear rights under federal statutes, the Constitution, and international law to access the U.S. asylum process, whether they have stepped across the border or not).

154 Robert S. Chang, *The Fred T. Korematsu Center for Law and Equality and Its Vision for Social Change*, 7 Stan. J. Civ. Rts. & Civ. Liberties 197, 200–01, 205 (October 2011). *See* Robert S. Chang & Karin Wang, *Democratizing the Courts: How an Amicus Brief Helped Organize the Asian American Community to Support Marriage Equality*, 14 Asian Pac. Am. L. J. 22, 23, 25 (2008) (explaining how amicus brief filed by Asian American activists in marriage equality cases was "an effective tool to engage and educate community-based organizations and their constituencies" and helped to build a strong coalition that included both LGBT and allied members of the Asian American community).

155 Telephone interview with Leah Chavla, Former Senior Policy Advisor, Women's Refugee Commission (January 25, 2024) (notes on file with author).

among other draconian efforts to prevent migrants from accessing the U.S. asylum process, only reinforced the need for concerted pushback. In response, a broad-based coalition of more than ninety organizations, activists, asylum seekers, advocates (including litigators), and community members collectively established the Welcome With Dignity Campaign, which uses policy work, education, and media campaigns to "transform[] the way the United States receives and protects people forced to flee their homes to ensure they are treated humanely and fairly."[156]

The parallel efforts of such a broad spectrum of actors—including news media, federal legislators, state government officials, scholars, human rights investigators, advocates, and activists—heightened public awareness of the injustice of turning back asylum seekers and generated increased momentum to stop this practice. Initially, the litigation galvanized different stakeholders to participate in challenging turnbacks. Over time, many of these stakeholders came to view turnbacks as part of a more pervasive pattern of CBP misconduct, which has become the focal point of a broader campaign on behalf of individuals seeking asylum.

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As of this writing, the legal outcome of the *Al Otro Lado* case remains uncertain. In its September 2021 ruling on summary judgment, the court found that CBP's systematic turnbacks of asylum seekers arriving at ports of entry violated its mandatory inspection and processing duties, as well as class members' due process rights.[157] In the wake of this decision, the government rescinded its metering guidance.[158] By then, however, the COVID-19 pandemic was in full swing, and the government was relying on a different statute, 42 U.S.C. § 265 (known as "Title 42"), a related regulation, and a series of orders from the Centers for Disease Control and Prevention to justify its continuing rejection of asylum seekers at ports of entry along the southern border.

In its subsequent order on remedies, issued in August 2022, the *Al Otro Lado* court acknowledged the glaring need for broad injunctive relief prohibiting the government from continuing to turn back asylum seekers at ports of entry (absent independent statutory authority, such

156 Welcome With Dignity, *Our Vision & Mission*, https://welcomewithdignity.org/vision-mission (last visited Aug. 30, 2024).

157 Al Otro Lado v. Mayorkas, 2021 WL 3931890, at *18–20 (S.D. Cal. Sept. 2, 2021).

158 Memorandum from Troy A. Miller, Acting Commissioner, CBP, to William A. Ferrara, Executive Assistant Commissioner, Office of Field Operations, *Guidance for Management and Processing of Undocumented Noncitizens at Southwest Border Land Ports of Entry* (Nov. 1, 2021), https://www.cbp.gov/sites/default/files/assets/documents/2021-Nov/CBP-mgmt-processing-non-citizens-swb-lpoes-signed-Memo-11.1.2021-508.pdf.

as Title 42), but ultimately found that the Supreme Court's intervening decision in *Garland v. Aleman Gonzalez* precluded such relief.[159] In *Aleman Gonzalez*, the Court interpreted 8 U.S.C. § 1252(f)(1) to bar injunctive relief in certain types of cases challenging the "operation" of particular provisions of the immigration statute,[160] including 8 U.S.C. § 1225—one of the statutes on which the *Al Otro Lado* court relied. Clearly irked by these new constraints on its authority, the *Al Otro Lado* court issued a class-wide declaratory judgment affirming the illegality of the government's refusal to inspect and process asylum seekers arriving at ports of entry, which it noted would have the effect of perpetuating "preventable human suffering."[161]

The strong language of the *Al Otro Lado* remedies order, which criticizes the Supreme Court for giving immigration agencies "*carte blanche* to implement immigration enforcement policies that clearly are unauthorized by the statutes under which they operate,"[162] makes the court's frustration palpable. In a particularly sharp rebuke, the decision notes:

> It would be quite absurd if, in *Brown, Swann,* or *Milliken,* the lower courts were restrained to issue injunctive relief, schoolchild-by-schoolchild…. One can hardly think of a remedial methodology that is less economical, particularly where the members of a class raise indistinguishable claims and seek identical relief, and less effective. Yet that is precisely the approach the Supreme Court deems proper for remediating statutory and constitutional violations committed by immigration enforcement agencies.[163]

On a more encouraging note, the *Al Otro Lado* court issued a concurrent order converting its previously issued preliminary injunction to a permanent injunction, which allows certain individuals subjected to the government's metering policy and transit rule to renew their claims for asylum.[164] Outreach by the litigation team to *Al Otro Lado* class members

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159 Al Otro Lado v. Mayorkas, 619 F. Supp. 3d 1029, 1032–34, 1043–45 (S.D. Cal. 2022).

160 596 U.S. at 550. 8 U.S.C. § 1252(f)(1) states:

> Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

161 Al Otro Lado, 619 F. Supp. at 1040, 1049–50.

162 *Id.* at 1033.

163 *Id.* at 1044.

164 Al Otro Lado v. Mayorkas, 2022 WL 3142610, at *22–*24 (S.D. Cal. Aug. 5, 2022). *See* Am. Immigr. Council, Ctr. Const. Rts., Ctr. Gender and Refugee Stud. & S. Poverty Law Ctr., Frequently Asked Questions: Federal Court Issues Permanent Injunction

who could potentially benefit from the injunction—which the court found that *Aleman Gonzales* did not bar[165]—remains ongoing in various Central American countries at the time of this writing. Meanwhile, virtually all aspects of the district court's decision remain pending before the Ninth Circuit Court of Appeals.[166]

IV. Movement-Building Revisited

This Article expands the existing scholarship on movement lawyering by demonstrating how impact litigation can be used to engage and build power within and among previously fragmented communities, including those separated by borders. In this endeavor, Al Otro Lado's vision and guidance were critical. While litigation may not be the most strategic option to facilitate movement-building in every case, Al Otro Lado had the foresight to understand that it could provide a rallying point for both migrants and other key stakeholders outraged by CBP's unlawful conduct.

At the outset of the *Al Otro Lado* case, the putative class members were in no position to formulate collective goals or drive litigation strategy. However, Al Otro Lado repeatedly stepped in to share their ideas, ensure that directly impacted individuals' needs and priorities remained front and center, and provide opportunities for them to speak directly with members of the litigation team when necessary and feasible.[167] By this time, Al Otro Lado's longstanding engagement with the Tijuana migrant community had made them a trusted ally of waiting asylum seekers, who were willing to follow their lead by supporting and, in many cases, actively participating in the litigation.

As the *Al Otro Lado* case unfolded, it advanced the enterprise of movement-building in a number of ways. First, it helped to empower

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Restoring Asylum Eligibility for Certain Asylum Seekers Turned Back at Ports of Entry (POEs) Before July 16, 2019 (Dec. 4, 2019, updated Apr. 28, 2023), https://www.americanimmigrationcouncil.org/sites/default/files/other_litigation_documents/faq_update_final_4.28.2023.pdf.

165 Al Otro Lado, 2022 WL 3142610 at *23 (finding that the preliminary injunction "directly implicates" 8 U.S.C. § 1158(b)(2)(C), which is not covered by § 1252(f)(1)) (internal quotation marks omitted).

166 Docketing Notice, Al Otro Lado v. Mayorkas, No. 22-55988 (9th Cir. filed Oct. 25, 2022). Meanwhile, the Biden administration has effectively mandated a new form of "digital" metering, under which asylum seekers waiting in Mexico must obtain an appointment using a flawed mobile phone application in order to present themselves for inspection and processing at a port of entry. That policy is the subject of a separate challenge by Al Otro Lado, Haitian Bridge Alliance, and ten individual asylum seekers on behalf of a putative class. *See* Al Otro Lado and Haitian Bridge Alliance, et al. v. Mayorkas, No. 3:23-cv-01367-AGS-BLM (S.D. Cal.) (complaint filed July 27, 2023), https://cgrs.uclawsf.edu/legal-document/complaint-2.

167 Although the class members' needs—including housing, medical treatment, and legal assistance—sometimes extended beyond the scope of the litigation, both Al Otro Lado and the litigation team were committed to finding ways to address them.

asylum-seeking individuals—by affirming their dignity,[168] creating a shared narrative, amplifying their voices and concerns, educating them about their legal rights, engaging them in strategic decision-making, and building solidarity among them. Second, the use of innovative technology helped to build movement infrastructure by facilitating communication among directly impacted individuals in different locations and fostering connections between such individuals and the broader advocacy community—in addition to enabling ongoing attorney-client consultations. Third, recourse to integrated advocacy increased public awareness of the issues at stake, rallied a diverse constituency of allies, and transformed the case into a broader campaign on both sides of the border to restore and safeguard meaningful access to the U.S. asylum process. Regardless of the ultimate outcome of the *Al Otro Lado* litigation, the fight to protect migrants' access to asylum will continue. Yet its long-term success—and indeed legitimacy—will depend on the ongoing involvement and leadership of directly impacted asylum seekers and other stakeholders on both sides of the border.[169] While Al Otro Lado used impact litigation constructively to facilitate movement-building, the more daunting challenges of building and sustaining this effort require a variety of other skills, including leadership training and organizing expertise, which are not included in most litigation budgets—although perhaps they should be.[170]

On-the-ground service providers such as Al Otro Lado, Kino Border Initiative, and Espacio Migrante often step in to fill these gaps, and some have come to view power-building among directly impacted individuals as a critical part of their missions. Given the deep trust these organizations have cultivated with migrants by facilitating their access to basic needs, assisting in trouble-shooting problems, and providing other support, they are in a unique position to help those interested

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168 *See* Angela M. Gius, *Dignifying Participation*, 42 N.Y.U. Rev. L. & Soc. Change 45, 70–73 (2018); Su, *supra* note 37, at 413 ("Human dignity must be the measure of what we recognize as legal rights.").

169 *See* Cole, *supra* note 29, at 224 ("The courts are more often the culmination than the catalyst for constitutional change.").

170 Although, as Sameer Ashar has noted, "it is organizers who often help workers envision possible futures, above and beyond the ones in which they are mired," the prevailing ethical rules explicitly prohibit third-party involvement in client decision-making. Ashar, *supra* note 8, at 891 and n. 100 (citing Model Rules of Prof'l. Conduct 1.8, 5.4(c) (Am. Bar Ass'n 2021)). *See* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 513 (2001) ("The simplest strategy for averting conflicts is for the lawyer to avoid simultaneously serving as an organizer and a legal representative."). The improbability of recovering organizing costs under the Equal Access to Justice Act complicates matters further. *See* 28 U.S.C. § 2412(d)(2)(A) (defining recoverable "fees and other expenses" to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees").

in developing their voices as leaders and advocates. This may happen in different ways, including by connecting such individuals with sympathetic reporters interested in understanding their lived experiences or by creating opportunities for them to meet with U.S. officials who travel to the border to learn about the human impact of current border policies.[171] Asylum seekers must be thoroughly prepared for such encounters; many advocates encourage them to remain anonymous and avoid photographs, both for their own safety and to avoid any potential conflict with future court testimony, which could jeopardize their credibility.[172]

Border advocates report that the COVID-19 pandemic created conditions conducive to solidarity-building. With the implementation of the Title 42 policy in March 2020, the U.S. government blocked migrants from crossing the southern border, bringing asylum processing to a grinding halt for almost three years.[173] As a result, formerly transient migrant communities found themselves stranded in Mexico indefinitely, with an unanticipated opportunity for solidarity-building. The results include a clinic in a migrant encampment in Matamoros run by a group of residents with medical backgrounds; classrooms for child migrants in various Mexican border cities, including the Sidewalk School in Matamoros; and a migrant-run shelter for women and children waiting in Tijuana to seek asylum, with a vegetable garden, playground, and chicken and piñata-building cooperatives.[174] Some of these projects may be sufficiently entrenched to enable newly arriving migrants to carry them forward while waiting to present themselves at a port of entry.[175]

To encourage asylum seekers to remain politically engaged once they cross the border, some organizations, including the Kino Border Initiative, have hired staff to follow up with those who settle in certain parts of the United States and, where possible, engage them in ongoing advocacy on behalf of asylum seekers in Mexico. In other cases,

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171 I am grateful to Joanna Williams, Executive Director, Kino Border Initiative, for explaining how her organization actively works to create such "spaces of encounter." Williams Interview, *supra* note 136.

172 *See* Center for Gender & Refugee Studies, Florence Immigrant & Refugee Rights Project, & Welcome With Dignity, *Your Rights with the Media: A Guide for People Seeking Asylum* (May 10, 2023), https://cgrs.uclawsf.edu/our-work/publications/your-rights-media-guide-people-seeking-asylum.

173 Pursuant to the Title 42 policy, CBP officers turned away nearly three million migrants who came to the U.S. border, ostensibly to prevent the spread of COVID-19. Adam Isacson, *10 Things to Know About the End of Title 42*, Washington Off. on Latin Am. (May 9, 2023), https://www.wola.org/analysis/end-title-42/. The Title 42 policy remained in effect until May 11, 2023. *Id.*

174 Kino Border Initiative, *supra* note 108.

175 Email correspondence from Joanna Williams, Executive Director, Kino Border Initiative, to author (Mar. 18, 2024, 6:47 pm EST) (on file with author).

those who reach the United States end up connecting with similarly situated individuals and engaging in advocacy on issues that affect them more directly. They do so through innovative organizations like Migrantes Unidos, originally based in St. Louis, Missouri, which provides opportunities for asylum seekers to partner with policy experts on research projects regarding issues of concern.[176] Adriano Udani and Maria Torres Wedding co-designed Migrantes Unidos as a mutual support group based on the idea of political accompaniment, which intentionally centers asylum seekers in decision-making and cultivates a collective process that treats them as critical thinkers and problem solvers in pursuit of systemic change.[177] Migrantes Unidos members are compensated for their work, and the project received funding in 2021 to establish similar "social justice leadership hubs" in two other U.S. cities.[178] According to Udani, "Rarely have the people who are impacted by the system become part of th[e] conversations about changing it. I think the next level for asylum seekers is to be considered as experts, as leaders of work that centers on justice and equity."[179]

The Asylum Seeker Advocacy Project ("ASAP"), a nonprofit organization that provides legal and community support, similarly views its more than 600,000 members as experts on needed improvements to the U.S. asylum process and surveys them to determine the organization's priorities, identify possible solutions to problems facing asylum seekers, and solicit their views on advocacy proposals.[180] ASAP creates resources, answers members' legal questions, educates them about the systems that can be used to promote change, and employs litigation, policy work, and storytelling to advocate for a fair and just asylum

176 Steve Waletnick, *Migrantes Unidos Gives Voice to Asylum-Seekers Advocating for Policy Changes*, USML Daily (May 24, 2022), https://blogs.umsl.edu/news/2022/05/24/migrantes-unidos-gives-voice-to-asylum-seekers-advocating-for-policy-changes/.

177 Email correspondence from Adriano Udani, Associate Professor, Department of Political Science, University of Missouri, St Louis, MO, to author (Sept. 7, 2024, 5:47 pm EST) (on file with author) (hereinafter "Udani Email"). The earliest members of Migrantes Unidos began meeting via Zoom in November 2020 to discuss the trauma associated with ankle monitors, which most of them had been forced to wear since their arrival in the United States. These meetings led to the creation of a guide on how to effectively advocate for the removal of an ankle monitor. Waletnick, *supra* note 176. *See generally* Migrantes Unidos, Adriano Udani, Maria Torres Wedding, Ángel Flores Fontanez, Sara John, & Allie Seleyman, *Envisioning a World Without Prisons: Group Concept Mapping as a Collective Strategy for Justice and Dignity*, Pol., Groups, and Identities (2023) (discussing participatory research methods used to define Migrantes Unidos' priority areas).

178 Udani Email, *supra* note 177.

179 Waletnick, *supra* note 176.

180 Asylum Seeker Advocacy Project, *5 Ways to Change the Asylum Process*, https://help.asylumadvocacy.org/5-ways-to-change-the-asylum-process/ (last updated June 27, 2024).

process.[181] According to ASAP's Co-Executive Director Conchita Cruz, "Only an organized collective of asylum seekers has the power to fundamentally re-envision the asylum system and create a more welcoming United States. Their voices and vision must be centered in order to bring about transformative systemic change."[182]

Such efforts to uplift the voices and lived experience of people seeking asylum are critical to the enterprise of movement-building. Regardless of the strategy employed, advocates are well-served by partnering with directly impacted individuals, drawing on their expertise, and checking in regularly to ensure that their goals are aligned.

Conclusion

This Article demonstrates that impact litigation, undertaken in partnership with grassroots-focused organizations, can provide a forum for marginalized communities to contest problematic policy changes as they happen. In the process, such collaborations can help to build critical movement infrastructure. Depending on the context, movement-building may require organizing, media campaigns, education, storytelling, policy work, or other less conventional strategies—either in addition to or instead of litigation.[183] These strategies are not mutually exclusive, but rather part of a continuum on which progressive lawyers can draw as needed. Like Al Otro Lado, many grassroots-focused organizations favor a multidisciplinary approach that allows them to adapt to the changing needs of the communities they serve.

Where litigation is among the strategies employed to "spark a movement," the tactics proposed here—cultivating attorney-client partnerships, capitalizing on opportunities for power-shifting, developing more inclusive representation structures, and facilitating parallel momentums—may be helpful in achieving that goal, but they are not exhaustive. More conversations among advocates, organizers, members of directly impacted communities, funders, and other stakeholders are needed to fully explore the range of possibilities.

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[181] Email correspondence from Conchita Cruz, Co-Executive Director, Asylum Seeker Advocacy Project, to author (Apr. 15, 2024, 1:40 pm EST) (on file with author).

[182] Almost There, *Episode 7 with Guest Conchita Cruz, What if We Let Asylum Seekers Fix Our Immigration System?*, Emerson Collective (July 31, 2023), https://www.emersoncollective.com/articles/almost-there-podcast-episode-7-what-if-we-let-asylum-seekers-fix-our-immigration-system.

[183] *See* Scott Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. Rev. 1235, 1242 (2010) (characterizing "[e]fforts to isolate court-centered strategies from the broader advocacy context" as "artificial and antiquated").

To the extent that those involved in impact litigation are committed to using it to achieve movement-building goals, new ethical rules will be necessary to ensure that the lawyers involved remain accountable to those they seek to serve and empower, both in the class action context and more generally.[184] The Model Rules of Professional Conduct presume that lawyers are tasked with resolving discrete legal problems between individuals or organizations with a well-defined decision-making process, which may not be the case with client groups that are not yet mobilized.[185] Moreover, Lobel suggests that the traditional allocation of authority between the client, who is charged under the ethical rules with determining the objectives of representation, and the lawyer, who has primary responsibility for determining how to achieve those objectives, does not give proper credence to the client's lived experience and should be either modified or rejected.[186] Some scholars have suggested that ethical rules should be tailored to particular practice contexts, which may lend themselves to different types of relationships between lawyers and their clients.[187]

In the class action arena, individual named plaintiffs can be certified as class representatives only after demonstrating that their claims are sufficiently similar to those of putative class members that they can

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184 *See* Ann Southworth, *Collective Representation for the Disadvantaged: Variations in Problems of Accountability*, 67 Fordham L. Rev. 2449, 2465 (1999) ("In the area of representation most plagued by conflicts and accountability problems—injunctive class actions—the Model Code and the Model Rules have virtually nothing to say."); Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 Hofstra L. Rev. 11, 16 (2018) (highlighting need for new code of ethics on the social responsibility of lawyers "designed to facilitate conversations, to encourage interrogation of the status quo, and to revive the heart and soul of our profession," and drafted in collaboration with representatives of marginalized client communities).

185 Southworth, *supra* note 184, at 2465 ("Ethics doctrine … offers little guidance about representing groups that are just beginning to take shape and groups whose decision making processes fail to protect those whom the organization is designed to serve."); Grinthal, *supra* note 14, at 44 ("[C]anonical models of lawyer-group relationships often provide little guidance where client groups are still in the process of forming, and cannot yet easily engage in the unambiguous mechanisms of representation and accountability on which those models rely. Lawyers attempting to do this work fall into a gap in the lawyering paradigm."); Diamond & O'Toole, *supra* note 45, at 509–10.

186 Lobel, *supra* note 13, at 159. *See* William B. Rubenstein, *supra* note 25, at 1633–34 (noting ambiguity of "goals/means distinction"); Model Rules of Prof'l. Conduct 1.2 (Scope of Representation & Allocation of Authority between Client & Lawyer) (2023).

187 *See, e.g.,* Southworth, *supra* note 184, at 2449, 2468 ("Requiring lawyers to be accountable to clients and to respond to conflicts within groups may require different approaches for different types of collective representation, because the opportunities, pressures, and constraints of these various types of practice vary significantly."); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. Cal. L. Rev. 1145 (1993).

"fairly and adequately" represent their interests.[188] However, the applicable screening criteria do not always ensure that the perspectives of class representatives reflect the full range of views held by class members.[189] In fact, certified class representatives need not even consult with other class members before making critical case-related decisions on their behalf.[190] If litigation is intended in part to engage directly impacted individuals in a political struggle, the existing class certification framework may undermine this goal.

Moreover, as in the *Al Otro Lado* case, class representatives may be granted relief at a relatively early stage of the case—either as a result of an emergency motion or due to the defendants' efforts to moot out their claims. While class representatives' claims often remain legally viable under these circumstances,[191] their priorities and concerns may diverge from those of other class members—especially if they are living on opposite sides of an international border. In that scenario, effective communication between class representatives and class members becomes even more important to ensure that the class representatives remain attuned to the needs of those whose interests they represent. Innovative uses of technology, collaboration with local service providers or other intermediaries, and other information-sharing mechanisms can help to achieve this goal but come with their own logistical and practical obstacles.

While litigation can help to lay a foundation for movement-building, the challenges of sustaining long-term political engagement and fostering systemic change remain formidable. In this regard, Al Otro Lado's ongoing work and the innovative initiatives by the Kino

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188 Fed. R. Civ. P. 23(a) (requiring, *inter alia*, that claims of class representatives and putative class members present common questions of law and fact, and that class representatives are sufficiently invested in the matter to pursue it zealously and have a close enough connection to other class members to fairly and adequately represent their interests).

189 *See* Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. Rev. 846, 847 (2017) ("Concern over representational legitimacy permeates the development of modern class action law."); Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's "Adequacy of Representation" Requirement*, 2004 Mich. St. L. Rev. 671, 682 (2004) (noting that courts have "approved class representatives despite significant evidence that the representatives lacked even basic knowledge about the case"); Bell, *supra* note 14, at 505–07.

190 Lawrence M. Grosberg, *Class Actions and Client-Centered Decisionmaking*, 40 Syracuse L. Rev. 709, 734 (1989); Ellman, *supra* note 46, at 1118–19, Southworth, *supra* note 184, at 2468; Marshall, *supra* note 143, at 948-49.

191 Where an individual plaintiff seeks to represent a class, the class claims remain live as long as there is a "controversy … between a named defendant and a member of the class represented by the named plaintiff." Sosna v. Iowa, 419 U.S. 393, 402 (1975). In such cases, as long as the individual plaintiffs' claims were not moot when the lawsuit was filed, the class certification decision relates back to the time of filing. County of Riverside v. McLaughlin, 500 U.S. 44, 51–52 (1991).

Border Initiative, Migrantes Unidos, and the Asylum Seeker Advocacy Project[192] provide fertile ground for exploration. Even an unsuccessful lawsuit may provide critical leverage to achieve other types of progress that could ultimately shift public consciousness.[193] Perhaps more importantly, it can empower and embolden clients to chart their own course to obtain justice.

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192 *See* Part IV, *supra.*

193 *See* Lobel, *supra* note 13, at 147–48 ("We had lost in court, but the political mobilization surrounding our courtroom effort [in the Pelican Bay litigation], the recognition our effort received, and the achievement of forcing the defendants to meet with the plaintiff representatives in open court to discuss remedying the abysmal conditions in maximum-security California prisons made the effort successful from a long-term, political perspective."). *See also* Jules Lobel, Success Without Victory: Lost Legal Battles and the Long Road to Justice in America (2003); Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941 (2011).

DATA JUSTICE READINESS: AN ABOLITIONIST FRAMEWORK FOR TECH CLINIC INTAKE

Melodi H. Dinçer*

Within two decades, the tech industry has turned most of modern life into a real-time data stream, reducing human beings into trackable datasets. Gaps in government services—including benefits administration, education, transportation, and public health—have created new market opportunities for tech companies to profit off product solutions that classify, track, and discipline marginalized communities. Tech law and policy advocates have done little to thwart this development so far, supporting expert-driven reforms that may contain harmful downstream effects without touching the structural issues driving tech adoption in the first place.

Tech law clinics have a critical role to play in supporting those most harmed by these trends. This Article proposes a new framework for tech law clinics to assess whether potential clients and projects align with a data justice vision. Data justice concerns the intersection of data-driven technologies and social, racial, and economic justice issues. A data justice framework for client and project selection exposes students to the real impacts of these technologies on structurally-marginalized communities and enables them to elevate those communities' visions of change. Drawing on insights from prison industrial complex (PIC) abolitionists and movement lawyering, the framework prioritizes projects where students collaborate directly with these communities. This approach will help tech clinics inspire a new generation of legal advocates with the lawyering skills needed to build real, people (data) power.

Introduction

"This moment of global inequality demands incompetent subjects. The status quo and ever-intensifying versions of it require

* Policy Counsel, Tech Justice Law Project, and Affiliated Fellow & Lecturer, University of California, Los Angeles School of Law, Institute for Technology, Law & Policy. Former Clinical Supervising Attorney, New York University School of Law, Technology Law and Policy Clinic. The author wishes to thank Jason Schultz, Amanda Levendowski, Jacob Karr, Michael Weinberg, Vincent Southerland, and Hannah Bloch-Wehba for your input and feedback. Thanks also to my fellow Communities & Development Group members from the 2023 Clinical Writers' Workshop, and the participants of the 2024 Southern California Junior Faculty Workshop for your thoughtful comments and suggestions. Special thanks to Sejal Zota, Laura Moy, and Megan Graham for participating in my panel, "Transformative Tech Justice: Teaching Abolition in Tech Law & Policy Clinics," at the 2023 AALS Conference on Clinical Education. Your insights on movement lawyering, racial justice, and tech clinic fieldwork inspired this piece. Funding for this article was provided by the Alfred P. Sloan Foundation as part of the Knowing Machines Project.

> incompetent consumers who will learn to want technological solutions to their political problems."
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> Tressie McMillan Cottom, *Dying to Be Competent*, *in* THICK AND OTHER ESSAYS 96 (2019).

Current and future law students will be practicing law in an era of reckoning for the so-called artificial intelligence (AI) industry.[1] Massive investments into AI development have yet to generate returns, but that has not slowed various industries in their race for the earth-shatteringly transformative outcomes which technology companies have promised to deliver.[2] In this latest technophilic fervor, enthusiasts have compared AI to the early internet,[3] the advent of electricity,[4] and even the California gold rush,[5] when a mad drive for extractive profits devastated the natural environment and further destroyed indigenous communities.[6]

In this brave, new, AI-powered world, corporate success depends largely on one thing—data.[7] Despite the recent surge of popular interest, neither AI nor data are new constructs.[8] In the early 2010s, several people and groups began to grapple with the "Big Data" movement

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1 *See* Elizabeth Lopatto, *Artificial Investment*, THE VERGE (Feb. 22, 2024, 8:00 AM), https://www.theverge.com/24075086/ai-investment-hype-earnings ("The stage is set for 2024 to be a year of reckoning for AI, as business leaders home in on what AI can *actually* do right now."); *see also* Emily Tucker, Ctr. on Privacy & Tech., MEDIUM (Mar. 8, 2022), https://medium.com/center-on-privacy-technology/artifice-and-intelligence%C2%B9-f00da128d3cd (explaining why the Privacy Center will no longer use the terms "artificial intelligence," "AI," and "machine learning").

2 Lopatto, *supra* note 1 (quoting Bret Greenstein, Data and Analytics Partner at consulting firm PwC).

3 *See Why Generative AI is 'Like the Internet Circa 1996,'* C3.AI, https://c3.ai/why-generative-ai-is-like-the-internet-circa-1996/ (last visited Aug. 17, 2024).

4 *See* Will Daniel, *Wall Street Is Obsessed with AI. From the 'New Electricity' to the Next Gold Rush, Here's How Top Analysts See the Tech Revolution Playing Out*, FORTUNE (Oct. 28, 2023, 4:00 AM), https://fortune.com/2023/10/28/artificial-intelligence-bubble-or-real-wall-street-research-reports/.

5 *Id.*

6 *See* A GOLDEN STATE: MINING AND ECONOMIC DEVELOPMENT IN GOLD RUSH CALIFORNIA 105–121 (James J. Rawls & Richard J. Orsi, Eds., 1999) (discussing environmental impacts of the gold rush era); *Gold, Greed & Genocide*, INT'L INDIAN TREATY COUNCIL, https://www.iitc.org/gold-greed-genocide/ (last visited Aug. 17, 2024); *The Gold Rush Impact on Native Tribes*, PBS: AM. EXPERIENCE, https://www.pbs.org/wgbh/americanexperience/features/goldrush-value-land/ (last visited Aug. 17, 2024).

7 Mark Samuels, *Despite All the AI Hype, Success Depends on Just One Thing*, ZDNET (Jan. 22, 2024, 9:17 AM), https://www.zdnet.com/article/despite-all-the-ai-hype-success-depends-on-just-one-thing/ (describing the centrality of data collection and analysis in AI development); *see also* Joe McKendrick, *Data Is the Missing Piece of the AI Puzzle. Here's How to Fill the Gap.*, ZDNET (Jan. 15, 2024, 5:12 PM), https://www.zdnet.com/article/data-is-the-missing-piece-of-the-ai-puzzle-heres-how-to-start-filling-the-gap/ (discussing organizational data complexity as an obstacle to AI deployment).

8 *See generally* MATTEO PASQUINELLI, THE EYE OF THE MASTER: A SOCIAL HISTORY OF ARTIFICIAL INTELLIGENCE (2023); KATE CRAWFORD, ATLAS OF AI: POWER, POLITICS, AND THE PLANETARY COSTS OF ARTIFICIAL INTELLIGENCE 89–121 (2021).

dominating the development of technology products and systems.[9] Around the turn of the 21st century, advancements in data storage and processing, modern computing, and the internet, enabled developers to collect and process massive amounts of data based on peoples' behaviors, both online and off.[10] Soon, tech companies and developers had amassed mind-bogglingly large datasets that they used to build AI systems less than a decade later.[11]

Today, data-hungry machine learning processes crunch through massive amounts and types of data to produce untraceable inferences.[12] Understanding this path dependency between colossal datasets and seemingly "magical" AI capabilities helps pull back the curtain on the claims of companies selling AI products, like generative models, by grounding these technologies in their foundational reliance on data accumulation—most of which occurred without the knowledge or consent of people whose data was taken.[13] To stay competitive in this data race,

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[9] *See, e.g.*, Cathy O'Neil, Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy (2016); *Community Cleverness Required*, 455 Nature 1 (2008), https://www.nature.com/articles/455001a (special collection on Big Data); Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 Boston Coll. L. Rev. 93 (2014); Nick Couldry & Ulises Mejias, *Data Colonialism: Rethinking Big Data's Relation to the Contemporary Subject* (2018), https://eprints.lse.ac.uk/89511/1/Couldry_Data-colonialism_Accepted.pdf; Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 Am. Socio. Rev. 977 (2018), https://www.asanet.org/wp-content/uploads/attach/journals/oct17asrfeature.pdf; Sanjeev & Sandeep Sardana, *Big Data: It's Not a Buzzword, It's a Movement*, Forbes (June 27, 2014, 12:32 PM), https://www.forbes.com/sites/sanjeevsardana/2013/11/20/bigdata/; Gil Press, *A Very Short History of Big Data*, Forbes (July 17, 2019, 11:32 AM), https://www.forbes.com/sites/gilpress/2013/05/09/a-very-short-history-of-big-data/.

[10] *See* Press, *supra* note 9 (providing a brief history); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 N.W. J. Tech. & Intell. Prop. 239, 240 (2013) (defining Big Data to include personal data generated from a variety of sources).

[11] *See* Kate Crawford & Trevor Paglan, *Excavating AI: The Politics of Images in Machine Learning Training Sets*, https://excavating.ai/ (last visited Aug. 17, 2024).

[12] *See* M.C. Elish & Danah Boyd, *Situating Methods in the Magic of Big Data and AI*, Commc'n Monograph 1 (2018), https://par.nsf.gov/servlets/purl/10074339 (unpacking the histories and cultural claims in the interconnection between big data and AI); Andrew McAfee & Erik Brynjolfsson, *Big Data: The Management Revolution*, Harv. Bus. Rev. (Oct. 2012) https://hbr.org/2012/10/big-data-the-management-revolution (describing the shift to big data analytics and providing use cases).

[13] Pun intended. *See* Elish & Boyd, *supra* note 12, at 6–7 (discussing the common marketing technique of equating AI processes to "magic"); Crawford, *supra* note 8, at 121 ("Fundamentally, the practices of data accumulation over many years have contributed to a powerful extractive logic, a logic that is now a core feature of how the AI field works."). *See also* Crawford & Paglan, *supra* note 11; Olivia Solon, *Facial Recognition's 'Dirty Little Secret': Millions of Online Photos Scraped without Consent*, NBC News (Mar. 12, 2019), https://www.nbcnews.com/tech/internet/facial-recognition-s-dirty-little-secret-millions-online-photos-scraped-n981921; Jon Porter, *Facebook and LinkedIn Are Latest to Demand Clearview Stop Scraping Images for Facial Recognition Tech*, The Verge (Feb. 6, 2020, 12:22 PM), https://www.theverge.com/2020/2/6/21126063/facebook-clearview-ai-image-scraping-facial-recognition-database-terms-of-service-twitter-youtube.

corporate leaders must continue prioritizing a data-centric approach despite its ethical consequences.[14]

Luckily for AI companies and their investors, there is no shortage of data. Over the past 30 years—about the lifespan of an average U.S. law student—massive state surveillance programs, accessible internet, and new data-driven technologies have turned nearly every aspect of modern life into a potential data stream.[15] This trend, called datafication, has enriched tech companies, increasing their political and economic power.[16] And while tech companies were disrupting and innovating with minimal regulatory interference, governments across the globe were embracing austerity measures that cut back on providing social services.[17]

The resulting failures of the state to provide quality shelter, healthcare, education, transportation, and financial security at scale have opened new market opportunities for tech companies to profit from, resulting in the adoption of data-driven tools by governments to manage and discipline struggling communities.[18] This increased reliance on corporate tech solutions for complex, social issues drives the development and deployment of technologies of social control.[19] This so-called carceral tech—including facial recognition tech, location tracking devices, predictive policing programs, automated benefits administration

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14 *See* Wavestone, 2024 Data and AI Leadership Exec. Survey 16 (2024), https://www.wavestone.com/app/uploads/2023/12/DataAI-ExecutiveLeadershipSurveyFinalAsset.pdf; Thomas H. Davenport & Randy Bean, *Survey: GenAI Is Making Companies More Data Oriented*, Harv. Bus. Rev. (Jan. 15, 2024), https://hbr.org/2024/01/survey-genai-is-making-companies-more-data-oriented; Sanna J. Ali, Angèle Christin, Andrew Smart, & Riita Katila, *Walking the Walk of AI Ethics in Technology Companies*, Stanford Univ. Human-Centered A.I. (Dec. 2023), https://hai.stanford.edu/sites/default/files/2023-12/Policy-Brief-AI-Ethics_0.pdf (uncovering several obstacles to implementing meaningful ethics interventions within tech companies).

15 *See* Gabriel Kuris, *Advice for Older Law School Applicants to Consider*, U.S. News & World Rep. (Dec. 5, 2022, 9:34 AM), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/advice-for-older-law-school-applicants-to-consider (stating most law school applicants are under 25, with roughly 20% of applicants being 30 or older); Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, Time (Sept. 11, 2021, 7:00 AM), https://time.com/6096903/september-11-legal-history/ (describing expansion of domestic surveillance programs, including congressional enactment of the Patriot Act of 2001); Catherine Crump & Matthew Harwood, *Invasion of the Data Snatchers: Big Data and the Internet of Things Means The Surveillance of Everything*, ACLU (Mar. 25, 2014), https://www.aclu.org/news/national-security/invasion-data-snatchers-big-data-and-internet-things-means-surveillance-everything (discussing various modes of internet-connected data surveillance, including data-driven "smart" devices).

16 *See infra* Section I.A.

17 *See* Ali Bhagat & Rachel Phillips, *The Techfare State: Debt, Discipline, and Accelerated Neoliberalism*, 28 New Pol. Econ. 526 (2023); Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (2018).

18 *See* Bhagat & Phillips, *supra* note 17.

19 *See* Michelle Gilman, *Poverty Lawgorithms*, Data & Soc'y (2020), https://datasociety.net/wp-content/uploads/2020/09/Poverty-Lawgorithms-20200915.pdf.

tools, and more—punish social marginality by reproducing classifications that drive dispossession among structurally-marginalized communities, enabling carceral tech users to separate, contain, and exile the overpoliced, under-resourced, and undocumented.[20] They simultaneously grow the data power of companies selling or licensing these solutions while producing significant data-based injustices, deepening preexisting social, economic, and racial inequities.[21]

Directly-impacted communities experiencing the brunt of the harms rarely have a direct say in whether or how carceral tech will affect their lives.[22] Their voices are largely missing from formal tech law and policy discussions where expert-driven, down-field policy responses tweak existing technologies without disturbing the underlying structural issues that make them viable options.[23] As a result, government customers continue pulling public money away from community-based investment and enrich the private tech industry instead. This is also the case with many commercial tech products where ordinary people are the primary customers. For example, rideshare apps generate value directly from real-time data collection. So far, efforts to reign them in often fail to expand public transit options that low-income, working class, disabled, and other communities rely on. Instead, reforms focus on tweaking algorithms and quelling driver labor unrest so that business can continue as usual.[24] These are far from the disruptive tech interventions

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[20] *See infra* Section I.A. Similar to "historically marginalized", I use "structurally marginalized" to shift focus to structures and institutions that unevenly distribute opportunities along racial, economic, gender, sexuality, religious, and other lines. *See* John A. Powell, *Deepening Our Understanding of Structural Marginalization*, 22 Poverty & Race 3 (2013), https://belonging.berkeley.edu/sites/default/files/Sept-Oct%202013%20PRRAC%20Disparities%20Article.pdf.

[21] *See* Gilman, *supra* note 19; Eubanks, *supra* note 17.

[22] *See generally* Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code (2019).

[23] *See infra* Section I.B.

[24] *See* Cory Doctorow, *No, Uber's (Still) Not Profitable*, Medium (Aug. 9, 2023), https://doctorow.medium.com/no-ubers-still-not-profitable-2b8054e375ea; *How Uber Uses Data Science To Reinvent Transportation*, ProjectPro.io (Apr. 11, 2024), https://www.projectpro.io/article/how-uber-uses-data-science-to-reinvent-transportation/290#mcetoc_1faunm6rca; Heather Somerville, *The Answer to Uber's Profit Challenge? It May Lie In Its Trove of Data*, Reuters (May 9, 2019, 1:30 AM), https://www.reuters.com/article/us-uber-ipo-profit/the-answer-to-ubers-profit-challenge-it-may-lie-in-its-trove-of-data-idUSKCN1SF0O5/; Steven Hill, *Ridesharing Versus Public Transit*, Am. Prospect Mag. (Mar. 27, 2018), https://prospect.org/infrastructure/ridesharing-versus-public-transit/; E. Tammy Kim, *How Uber Hopes To Profit From Public Transit*, N.Y. Times (May 30, 2019), https://www.nytimes.com/2019/05/30/opinion/uber-stock.html; Diana Furchtgott-Roth, *Out With Buses, In With Rideshare*, Forbes (Apr. 4, 2022, 3:58 AM), https://www.forbes.com/sites/dianafurchtgott-roth/2022/03/31/out-with-buses-in-with-rideshare/; Sebastian Klovig Skelton, *Uber CEO Denies Pricing Algorithm Uses 'Behavioural Patterns*,' ComputerWeekly.com (Feb. 20, 2024, 2:49 PM), https://www.computerweekly.com/news/366570421/Uber-CEO-admits-pricing-algorithm-uses-behavioural-patterns; Mike Scarcella, *Uber Loses Challenge to California*

that reformers need to resist data injustice, and they rarely come from those experiencing the additional traffic congestion, increased bus fares, and other negative consequences of rideshare products on mass transit accessibility.

Law schools across the country have tried to keep pace with this digital transformation, offering clinics in which students work on real-life cases raising emergent technology law and policy issues.[25] In the clinical tradition, many aim to serve the public interest through curated fieldwork opportunities that prepare their students to be justice ready.[26] This requires tech clinicians to make pedagogical choices that are most likely to expose students to injustices in the technology ecosystem as experienced within their client communities, operant legal systems, and broader society.[27] But what does it mean to be justice ready in a technology ecosystem where corporate innovation and government need converge through the datafication of complex social issues, deepening social, racial, and economic inequities? As a community, tech clinicians do not yet have a shared understanding of how client and project selection can advance a vision of data justice, one where individuals harmed by technologies of classification and control build people power to limit or eliminate their use altogether.

Tech clinics are uniquely positioned to train future lawyers with the skills to advocate against carceral tech by uplifting the needs of directly-impacted communities in selecting clients and projects intentionally. Client and project selection is a foundational part of clinic pedagogy that determines critical parts of student learning objectives and can reinforce a clinic's commitment to justice.[28] When clinicians are

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Gig Worker Law in US Appeal Court, Reuters (June 10, 2024, 12:50 PM), https://www.reuters.com/legal/uber-loses-challenge-california-gig-work-law-us-appeals-court-2024-06-10/.

[25] *See* Jake Holland, *From Harvard to Berkeley, Clinics Train Next-Gen Tech Lawyers*, Bloomberg L. (Aug. 25, 2021, 4:01 AM), https://news.bloomberglaw.com/privacy-and-data-security/from-harvard-to-berkeley-clinics-train-next-gen-tech-lawyers.

[26] Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J.L. & Soc. Just. 231, 232 (2012).

[27] *See* Amanda Levendowski, *Teaching Doctrine for Justice Readiness*, 29 Clin. L. Rev. 111 (2022) (discussing teaching legal doctrine to highlight social justice issues in IP and information policy, especially when clinical fieldwork may not raise them directly).

[28] *See* Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 Clin. L. Rev. 1, 39–48 (2015); *id.* at 39 ("[Strategic client selection] is an effective pedagogical tool to promote critical learning because it is the interactions with their clients that will ultimately determine the students' learning experience."); Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 Clin. L. Rev. 39 (2013); Sarah Paoletti, *Finding the Pearls When the World Is Your Oyster: Case and Project Selection in Clinic Design*, 5 Drexel L. Rev. 305 (2013); Adrienne Jennings Lockie, *Encouraging Reflection on and Involving Students in the Decision to Begin Representation*, 16 Clin. L. Rev. 357, 365 (2010) ("A clinic's identity plays an important role in clinic design; how the clinic conceives of itself is closely linked to client selection and the resulting docket of the clinic").

intentional about who students work with and why, they can help students better internalize classroom readings and discussions about unjust systems.[29] Cases and projects shape the skills students will practice, their perceptions on the relationship between law and society, and their sense of themselves as legal advocates, among other aspects of student learning.[30] Clinicians who adopt a clear vision of justice guiding their selection process and use consistent criteria for assessing client or project alignment can avoid the risk that a particular representation will dictate pedagogical methods, rather than the reverse.[31]

To guide tech clinics with intentional client and project selection, this Article offers a new framework driven by a data justice vision. This vision prioritizes case and project selection involving issues at the intersection of carceral tech and social, racial, and economic justice. As datafication expands technology's reach into ever more precarious systems of labor, healthcare, education, policing, social services, and family regulation, tech clinics can better prepare students to advocate for those whose needs rarely drive tech reform conversations. Data justice encourages clinicians to prioritize projects where students can engage directly with the needs and perspectives of communities harmed by carceral tech, allowing students to gain first-hand awareness of data injustices and the confidence to resist them. Data justice-aligned projects will help shape their perspectives on when, how, and if tech lawyers can support meaningful change that empowers those already suffering from intersectional, systemic inequities. Students will also be better able to recognize the socio-historical contexts behind contested carceral tech, consistent issues of marginalization affecting their clients, power structures, and when uniting law and organizing can help or hurt resistance campaigns.[32]

This Article brings together critical perspectives on data-driven technologies and scholarship on clinical pedagogy, specifically justice-oriented client and project selection.[33] Focusing on carceral tech that weaponize social precarity, it draws inspiration from organizers and clinicians who have adopted an abolitionist vision to shape reforms to oppressive systems like the PIC and related clinics' project choices, respectively.[34] The proposed data justice vision and selection framework incorporates several abolitionist criteria for assessing whether a

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[29] Ball, *supra* note 28, at 41.

[30] *Id.* at 46–47.

[31] Carpenter, *supra* note 28, at 62.

[32] *See* Ball, *supra* note 28, at 46–47; Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clin. L. Rev. 355 (2008).

[33] *See infra* Sections I.A, II.B, and III.A.

[34] *See infra* Section II.A.

potential representation will help transform data injustices by resisting carceral tech, or whether it will reinforce the status quo instead.[35]

Section I contextualizes the problem of data injustice by describing the relationships between corporate data power, carceral tech, and algorithmic violence experienced disproportionately by structurally-marginalized communities. It points to the ways that tech regulation and reform advocacy tend to ignore structural issues that predate the advent of data-driven technologies, which in turn exacerbate the inequities. The main way this happens is by inadequately representing the needs and perspectives of directly-impacted people, overvaluing technical and legal expert perspectives instead. This Section ends with a brief discussion of tech clinics and their advocacy so far, focusing on the missed opportunities for more radical tech reform work that stems from a general lack of explicit, justice-oriented vision.

Section II introduces how data justice readiness can inform tech clinics' pedagogical design, especially client and project selection. This Section first explores how a variety of clinicians have adopted a PIC abolitionist vision to drive pedagogy, providing a useful example for tech clinicians who have not adopted an explicit transformative vision. It then offers an example of a data justice vision that focuses on issues at the intersection of data-driven technologies and social, racial, and economic justice, prioritizing clients and projects that are most likely to inspire data justice readiness—students' commitment and capability to confront data injustice in their future practice.

Section III applies the concept of data justice readiness to the practical process of choosing aligned clients and projects for tech clinics. First, the section details the data justice framework step by step, providing further guidance on how to apply the draft intake form provided in the Appendix. Next, the Section briefly discusses potential obstacles to this approach, and it ends with an application of the framework to three tech clinic projects as case studies. The Appendix offers language for a data justice-aligned mission statement, as well as a draft intake form based on the data justice framework.

The data justice framework is not intended to be an exclusive approach to selection decisions for tech clinics. Instead, it is an opportunity for reflection, a call for more intentionality, and a jumping-off point for future conversations around who tech clinics choose to represent and why.

I. The Datafied Status Quo Deepens Structural Inequities

This Section explores the current landscape of data power—the companies, governments, and social relations that produce, use, and rely

[35] *See infra* Section III.A and Appendix.

on digital data in ways that deepen structural inequities.[36] The past two decades have been marked by data-driven technologies deepening social, racial, and economic injustices. In that time, nascent tech reforms have failed to alter the balance of data power, which is tipped in the favor of the tech industry today. Instead of pushing tech companies on whether to develop these harmful systems or state actors on whether to use them at all, the experts at the proverbial table remain stuck negotiating on the industry's terms, assuming technologies of social classification, control, and exile are a forgone conclusion.[37] While civil society organizations and regulatory bodies are increasingly aware of the need to include the voices of directly harmed communities, this has yet to translate into common practice in elite policy spaces. As a result, corporate data power remains largely unchecked by people power.

Tech clinics have been around for almost the same length of time and are growing in number and diversity.[38] These clinics provide students with learning opportunities to develop their tech law skills, and many also share a commitment to serving the public interest. While tech companies amass increasing data power and governments struggle to reign it back in, however, tech clinics must do more to align their clients and projects directly with the communities most harmed by data-driven technologies. They have an opportunity to turn away from fieldwork opportunities that advocate for the same, surface-level tech reforms that miss the deeper structural injustices reinforced by the datafied status quo.

A. Data Power, Carceral Technologies, and Algorithmic Violence

Tech companies have consistently promised that their commercial products would serve the public interest, advancing freedom, democracy, and social progress.[39] But with corporate technologies come corporate

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[36] I use "inequities" instead of "inequalities" because while not all inequalities are unavoidable, inequities are both avoidable and unnecessary. Inequity refers to an unjust or unfair state that often produces inequalities. For example, gender-based pay inequality stems from societal inequity among different genders. These social conditions are unjust, unfair, avoidable, and changeable. Improving equity ideally minimizes inequality among different groups or individuals. *See Health Equity*, World Health Org., https://www.who.int/health-topics/health-equity (last visited Aug. 17, 2024).

[37] *See* Frank Pasquale, *The Second Wave of Algorithmic Accountability*, LPE Project (Nov. 25, 2019), https://lpeproject.org/blog/the-second-wave-of-algorithmic-accountability ("[A] second wave of research has asked whether [existing systems] should be used at all—and, if so, who gets to govern them"). *See* J.J. McCorvey, *Workers Wrestled a Seat at the Table on AI This Year. Will It Be Enough?*, NBC News (Dec. 27, 2023, 7:00 AM), https://www.nbcnews.com/business/business-news/workers-wrested-seat-table-ai-year-will-enough-rcna129040; David Keil, *AI Is Eating the World. Grab a Seat at the Table*, Fast Co. (Feb. 28, 2024), https://www.fastcompany.com/91035988/ai-is-eating-the-world-grab-a-seat-at-the-table.

[38] *See* Holland, *supra* note 25.

[39] *See* Amba Kak & Sarah Myers West, AI Now, AI Now 2023 Landscape: Confronting Tech Power 6 (Apr. 11, 2023), https://ainowinstitute.org/wp-content/

incentives, including growth, profit, and neutralizing market threats by acquiring competitors.[40] In two short decades, a handful of tech companies—Alphabet (Google's parent company), Amazon, Apple, Meta, and Microsoft—have amassed immense economic and political power, enabling them to expand into a wide variety of industries, from healthcare and education to banking and credit decisions.[41] This power stems from their one-way accumulation of data, or digitally-configured information about peoples' actions, decisions, identities, opinions, and beyond.[42] The companies with the biggest troves of data have risen to the top of the tech industry food chain, building on network effects and infrastructural advantages to attain market dominance.[43] For many experts, the main problem is this immense concentration of data power.[44]

Data power is the ability to translate subjective, individual realities into a standardized pool of data, and to determine which forms that data should take, to what ends that data will be applied, and what values and meanings will be prioritized throughout the process.[45] Data is produced relationally, and who gets to produce and control data is both "socially and legally determined."[46] With any data-driven technology, there is the question of who is collecting data in a particular application and context, and whose data gets collected.[47] Put differently, who has the power to turn most peoples' lives into data, and whose life experiences become most vulnerable to datafication?[48]

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uploads/2023/04/AI-Now-2023-Landscape-Report-FINAL.pdf; *see also* Brian Merchant, *Column: Social Media Promised Us Democracy — But Gave Us Dictatorships*, L.A. Times (July 10, 2023, 5:00 AM), https://www.latimes.com/business/technology/story/2023-07-10/column-social-media-promised-us-democracy-and-gave-us-dictatorship.

40 *See* Kak & Myers West, *supra* note 39.

41 *Id.*

42 *See Becoming Data Episode 1: Data & Humanity*, Data & Soc'y (May 17, 2021), https://listen.datasociety.net/episodes/becoming-data-data-social-life.

43 *See* Kak & Myers West, *supra* note 39, at 23 (describing tech firms' data advantage as a "key source" of power).

44 *See id.* at 1.

45 *See* Michael Whitelaw, *Art Against Information: Case Studies in Data Practice*, 11 Fiberculture J. (2008), https://eleven.fibreculturejournal.org/fcj-067-art-against-information-case-studies-in-data-practice/ ("[Data is] a set of measurements extracted from the flux of the real. In themselves, such measurements are abstract, blank, meaningless. Only when organised and contextualised by an observer does this data yield information, a message or meaning."); *Becoming Data, supra* note 42, at 3:40 ("[D]ata are the things that a group measures and cares about, (1) things that can be measured and balancing that, too, with (2) the things that a group cares about.").

46 Amy Kapczynski, *The Law of Informational Capitalism*, 129 Yale L.J. 1460, 1499 (2020).

47 *Becoming Data*, *supra* note 42, at 18:00.

48 Data journalist Lam Thuy Vo provides a useful example to understand how the construction of data tends to value certain incentives and systems over others. In an interview, she asks listeners to imagine the data profiles of a single mother who is a woman of color. In her profile, there are many more datapoints documenting "bad" things she has done in the form of law enforcement interactions, unemployment benefits applications, eviction actions, and child

Datafication is the process of quantifying the "flux of reality" in a way that can be analyzed, usually by some form of computing technology.[49] Datafication renders aspects of reality into something machine-readable that previously were not or could not be easily captured. For example, words from literary works have been datafied so that large tomes can be easily searchable and, eventually, machine learning algorithms can be trained to predict a combination of words that would qualify as a poem, a novel, or an email draft.[50] Datafication is a two-part process: first, human experiences are transformed into data, and second, data and data-based insights are commodified.[51] This mass appropriation of information is a type of extractivisim, with corporations as its primary authors and beneficiaries.[52]

Today, the digital age is defined by corporate dominance over technology production, meaning that tech companies wield the greatest amounts of data power. In a couple of decades, tech companies have become infrastructural.[53] From cloud computing to digital advertising and payments, a small number of companies now control the means through which the wider technology ecosystem operates.[54] The tech industry's data power is built from collecting, controlling, and monetizing information necessary for a market economy. As various other industries integrate technology into their services, incumbent tech companies gain an additional source of economic power through the ability "to use their infrastructure, reach, and data assets to enter" new markets.[55] As a result, a handful of tech companies have become "*the* key intermediaries in our daily lives" by providing the hegemonic infrastructures much

services interactions, than datapoints demonstrating "good" things, like how she has tended to her family and the health of her community through paying rent, providing childcare, helping her neighbors, and more. This demonstrates how certain things are extremely difficult to capture as data, as well as how existing systems can determine the path of least resistance for what is datafied (and for what purposes). *See Becoming Data*, *supra* note 42, at 35:10.

49 Whitelaw, *supra* note 45; Ulises A. Mejias & Nick Couldry, *Datafication*, 8 Internet Pol'y Rev. 1, 2 (2019).

50 *See* Emily M. Bender, Timnit Gebru, Angelina McMillam-Major, & Shmargaret Shmitchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?: 🦜*, *in* FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and transparency 610 (2021), https://dl.acm.org/doi/pdf/10.1145/3442188.3445922.

51 Mejias & Couldry, *supra* note 49, at 3.

52 *Id.* at 7.

53 Kak & Myers West, *supra* note 39, at 8.

54 *See id.*; *see also* Karina Montoya, *Amazon Exploits Its Cloud Monopoly To Build Advertising Business*, Open Markets (Sept. 9, 2022), https://www.openmarketsinstitute.org/publications/amazon-exploits-its-cloud-monopoly-to-build-advertising-business.

55 Pete Swabey & Martin Harraca, *Digital Power: How Big Tech Draws Its Influence*, TechMonitor (Feb. 16, 2021), https://techmonitor.ai/policy/big-tech/power-of-tech-companies.

of society uses to access information, work, community, necessities, and leisure.[56]

With each use of a data-driven product, corporate data power increases at scale. By dint of existing in this environment, individuals are made legible through their everyday activities to the companies that make their devices and to data brokers, who package and sell digital data to various customers, including "governments, marketing firms, intelligence agencies, and political parties."[57] Data-driven technologies convert vast populations into "unexplored territory," and the ability to process their personal information becomes "the newest form of bio-prospecting," where all kinds of companies and interests race to identify patterns at scale and "extract their marketplace value."[58] Collecting massive amounts of data has become imperative to achieving dominance in the tech industry, producing a "new logics of governance[] as human beings become trackable datasets."[59] In this way, everyone is impacted whether or not they are direct users, as datafication increasingly diminishes the sense of control one has over important life decisions mediated by data-driven technologies.[60]

From activists[61] to legal scholars,[62] diverse thinkers agree that this unchecked, corporate data power is a capitalistic phenomenon.[63] Although datafication is unique to the 21st century, its logics stem from a familiar, neoliberal political economy. The idea is that with more data comes better

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[56] Kean Birch, *There Are No Markets Anymore: From Neoliberalism to Big Tech*, Transnat'l Inst. (Feb. 3, 2023), https://www.tni.org/en/article/there-are-no-markets-anymore; *see also* Salomé Viljoen, Jake Goldenfein & Lee McGuigan, *Design Choices: Mechanism Design and Platform Capitalism*, 8 Big Data & Soc'y 1 (2021), https://journals.sagepub.com/doi/10.1177/20539517211034312.

[57] Linnet Taylor, *What Is Data Justice? The Case for Connecting Digital Rights and Freedoms Globally*, 4 Big Data & Soc'y 1, 4 (2017), https://journals.sagepub.com/doi/epub/10.1177/2053951717736335.

[58] Julie E. Cohen, *The Surveillance-Innovation Complex: The Irony of the Participatory Turn* 7, *in* The Participatory Condition (Darin Barney et al. eds., 2015).

[59] Bhagat & Phillips, *supra* note 17, at 529.

[60] *See* Alfredo Lopez, Melanie Bush, Hamid Khan, and Ken Montenegro, *We Thought It Was Fiction,* Radical Ecological Democracy (Sept. 18, 2021), https://radicalecologicaldemocracy.org/we-thought-it-was-fiction/.

[61] *See Slavery, the Origin Story*, d4bl.org https://datacapitalism.d4bl.org/#chapter2-link (last visited Aug. 17, 2024) (describing activist group Data for Black Lives' position that "data capitalism" drives extractive, exploitative technologies and is rooted in corporate commodification of human beings under slavery, perpetuated through social classifications reproduced in data).

[62] *See* Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 5–6 (2019) (quoting Manuel Castells, The Rise of the Network Society 14–18 (2d ed., 2010)) (describing "informational capitalism"); Cohen, *supra* note 58, at 1 (describing the "surveillance-innovation complex" that renders surveillance "as a modality of economic growth").

[63] *Cf.* Yanis Varoufakis, Technofeudalism: What Killed Capitalism (2024) (arguing the current tech ecosystem has moved beyond capitalism towards a new form of technology-based feudalism).

solutions to complex, social issues, not through government services but exclusively through corporate innovations. This is a technosolutionst philosophy that assumes that most if not all human problems can be solved through technological innovation, especially in a "free-market" economy where companies compete to develop the most innovative and effective product solutions.[64] Various devices, platforms, users, developers, legal forms, practices of prediction, and state interventions "enable new forms of digital capital accumulation" through amassing data.[65] For example, rideshare companies position their services as a social good, enabling people to access transportation from wherever they are. But the real value for these companies derives from the real-time, expansive data generated from millions of users about traffic patterns and more. While deeply unprofitable, these companies still prosper because of this data power.[66] Meanwhile, the dominance of rideshare products fills the gap left open by disinvestment and de-prioritization of public mass transit options by government agencies.[67]

Corporate data power is not formed in a vacuum but stems in part from a lack of largescale oversight for the tech industry. Tech companies have been able to set the terms for a wide variety of technology-dependent markets,[68] avoid tax responsibilities,[69] and innovate forms of

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64 *See* Evgeny Morozov, To Save Everything, Click Here: The Folly of Technological Solutionism (2013); David Harvey, *Neoliberalism as Creative Destruction*, 610 Annals Am. Acad. Pol. Sci. 22 (2007) ("[H]uman well-being can best be advanced by the maximization of entrepreneurial freedoms within an institutional framework characterized by private property rights, individual liberty, unencumbered markets, and free trade").

65 Bhagat & Phillips, *supra* note 17, at 529; *see also* Richard Barbrok & Andy Cameron, *The Californian Ideology*, 6 Sci. Culture 44 (1996) (describing the "Californian Ideology" that powered early tech entrepreneurship as a "profound faith in the emancipatory potential of the new information technologies" whose advocates championed individual liberty within the digital marketplace and reduced power of the nation-state).

66 *See* Kevin Roose, *Farewell, Millennial Lifestyle Subsidy*, N.Y. Times (June 8, 2021), https://www.nytimes.com/2021/06/08/technology/farewell-millennial-lifestyle-subsidy.html ("Uber, which raised nearly $20 billion in venture capital before going public, may be the best-known example of an investor-subsidized service. During a stretch of 2015, the company was burning $1 million a *week* in driver and rider incentives in San Francisco alone"); Nikil Saval, *Uber and the Ongoing Erasure of Public Life*, New Yorker (Feb. 18, 2019), https://www.newyorker.com/culture/dept-of-design/uber-and-the-ongoing-erasure-of-public-life.

67 *See* Saval, *supra* note 66.

68 While falling from market capitalization of over $5 trillion in 2020, Big Tech companies still dominate: 81% of all general searches and 94% of all mobile searches use Google; 99% of smartphones use Android or iPhone operating systems; 80% of browsers are either Google Chrome or Apple Safari; Facebook, Instagram, Messenger, and WhatsApp have 2.47 billion daily active users between them; an estimated 50% of all U.S. e-commerce runs through Amazon; Amazon, Microsoft, and Google dominate cloud computing. Staff of S. Comm. on Antitrust, Commercial, and Admin. L. on the Judiciary, Rep. on Investigation of Competition in Digital Markets (Comm. Print 2020), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf.

69 *See, e.g.*, Jim Tankersley, *Tech Giants Shift Profits to Avoid Taxes. There's a Plan To Stop Them.*, N.Y. Times (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/us/politics/

labor exploitation.[70] But the notion that tech companies have evaded state control distracts from the crucial role of state power—especially through law—in structuring and legitimizing corporate data power.[71] From systemic tax evasion[72] to lobbying lawmakers,[73] corporate data

tech-giants-taxes-oecd.html; Rupert Neate, *'Silicon Six' Tech Giants Accused of Inflating Tax Payments by Almost $100bn*, Guardian (May 31, 2021, 3:01 AM), https://www.theguardian.com/business/2021/may/31/silicon-six-tech-giants-accused-of-inflating-tax-payments-by-almost-100bn; Matthew Gardner, *Amazon Avoids More Than $5 Billion in Corporate Income Taxes, Reports 6 Percent Tax Rate on $35 Billion of US Income*, Inst. Tax. & Econ. Pol'y: Just Taxes (Feb. 7, 2022), https://itep.org/amazon-avoids-more-than-5-billion-in-corporate-income-taxes-reports-6-percent-tax-rate-on-35-billion-of-us-income; Paul Hannon & Richard Rubin, *Big Tech's Love Affair With Low-Tax Nations Is Under Threat*, Wall St. J. (July 12, 2023, 2:55 PM), https://www.wsj.com/articles/negotiators-see-global-deal-on-taxing-big-tech-companies-within-reach-36b47b10; Vice Media, *Exposing How Apple and Nike Made Billions in the Bermuda Triangle*, YouTube (July 27, 2023), https://www.youtube.com/watch?v=cbD8F9j0pGk.

[70] *See, e.g.*, Ben Zipperer, Celine McNicholas, Margaret Poydock, Daniel Schneider, & Kristen Harknett, *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, Econ. Pol'y Inst. (June 1, 2022), https://www.epi.org/publication/gig-worker-survey/; Paris Marx, *Tech Giants Are Building a Dystopia of Desperate Workers and Social Isolation*, Jacobin (Jan. 4, 2023), https://jacobin.com/2023/01/tech-friction-service-work-dystopia; Michael Sainato, *Former Tesla Workers Claim They Were Fired for Using Maternity and Sick Leave*, Guardian (July 9, 2019, 2:00 AM), https://www.theguardian.com/technology/2019/jul/09/tesla-workers-terminated-claim-maternity-sick-leave.

[71] *See* Kapczynski, *supra* note 46; Amanda Parsons & Salomé Viljoen, *Valuing Social Data*, 124 Colum. L. Rev. 993 (2024) (providing examples from tax and data privacy law); *See also* Bhagat & Phillips, *supra* note 17, at 529 ("As legal scholars have argued . . . the emergence of the platform business model has required extensive state action, through the reworking of existing regulatory frameworks, the institutional reinforcement of pro-market ideologies, and the introduction of new laws."); Amanda Ballantyne, Patrick Woodall, Katie Corrigan, & Edward Wytkind, *Crafting an Innovation Ecosystem that Works for Working People*, 34 New England J. Pub. Pol'y 1, 6 (2022) (discussing the reliance of several corporate technologies today on innovations from billion-dollar government research initiatives funded by taxpayers).

[72] *See, e.g.*, Jon Schwarz, *CEO Tim Cook Decides Apple Doesn't Have to Pay Corporate Tax Rate Because It's 'Unfair*,' The Intercept (Aug. 16, 2016, 3:25 PM), https://theintercept.com/2016/08/16/ceo-tim-cook-decides-apple-doesnt-have-to-pay-corporate-tax-rate-because-its-unfair/ (quoting interview with Apple CEO Tim Cook where he warns that Apple's $181 billion tax liability stored in overseas tax havens will not be paid "until there's a fair rate" of taxation on corporate income); Jeffrey Dastin, *Amazon Receives 238 Proposals for Its Second Headquarters*, Reuters (Oct. 23, 2017, 8:15 PM), https://www.reuters.com/article/us-amazon-com-headquarters/amazon-receives-238-proposals-for-its-second-headquarters-idUSKBN1CS21O/ (noting Amazon's promise to invest over $5 billion and create up to 50,000 jobs for the new host city); *but see* Scott Cohn, *Amazon HQ2 Is Not Matching the Original Hype. The Economy Is Partly to Blame*, CNBC (June 20, 2023, 8:15 AM), https://www.cnbc.com/2023/06/20/amazon-hq2-is-not-matching-original-hype-economy-is-partly-to-blame.html (noting Amazon has largely failed to deliver on these promises).

[73] *See, e.g.*, Will Henshall, *There's an AI Lobbying Frenzy in Washington. Big Tech Is Dominating*, Time (Apr. 30, 2024, 1:05 PM), https://time.com/6972134/ai-lobbying-tech-policy-surge/; Put the Public in the Driver's Seat: Shadow Report to the US Senate AI Policy Roadmap 4, 7 (2024), https://static1.squarespace.com/static/66465fcd83d1881b974fe099/t/664e009cc00ce7596e9fff06/1716387997161/24.05.18+-+AI+Shadow+Report+V5.pdf ("During these forums, some of the loudest and most self-serving voices from industry, including Elon Musk, Sam Altman, Marc Andreesen, and Hoan Ton-That, were invited to share their views with lawmakers and their staff behind closed doors."); *See* Brendan

power preserves itself from political action designed to weaken or redistribute it for the public's benefit. In many cases, data power has taken on a structural element, where the state's massive investments of energy and public resources into tech companies' promised solutions have turned government into "an accomplice [] of the interests of big business."[74]

State actors are often eager customers for corporate tech products built through datafication. Data power flows further from the enmeshment of the state and tech industry in a neoliberal pact where the latter hoovers up data to produce and sell technologies that serve the former's needs. Both state and corporate actors share a desire for new methods of social control as a matter of "security" and discipline for the state, and as a matter of profit for the corporations.[75] So far, the complex relationship between state and digital power has been one of "deepening integration between the technology ecosystem and the carceral arm of the neoliberal state."[76] In the last decade alone, data-driven technologies have enmeshed private technology companies within policing,[77] immigration enforcement,[78] healthcare,[79] welfare administration,[80] and

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Bordelon & Alfred Ng, *Tech Lobbyists Are Running the Table on State Privacy Laws*, Politico (Aug. 16, 2023, 4:30 AM), https://www.politico.com/news/2023/08/16/tech-lobbyists-state-privacy-laws-00111363*; see also* Inci Sayki, *Big Tech Lobbying on AI Regulation as Industry Races to Harness ChatGPT Popularity*, Open Secrets (May 4, 2023, 9:35 AM), https://www.opensecrets.org/news/2023/05/big-tech-lobbying-on-ai-regulation-as-industry-races-to-harness-chatgpt-popularity/; Suzanne Smalley, *In Patchwork of State Privacy Legislation, Tech Lobby Sees a Single Battlefield*, The Record (Jan. 30 2024), https://therecord.media/state-data-privacy-legislation-technology-industry-lobbying; Todd Feathers & Alfred Ng, *Tech Industry Groups Are Watering Down Attempts at Privacy Regulation, One State at a Time*, The Markup (May 26, 2022, 10:33 AM), https://themarkup.org/privacy/2022/05/26/tech-industry-groups-are-watering-down-attempts-at-privacy-regulation-one-state-at-a-time (noting that in 31 states considering privacy bills in 2021 and 2022, 445 active lobbyists and firms representing Amazon, Meta, Microsoft, Google, Apple, and industry groups shaped the final bills).

74 6 John Dewey, The Later Works, 1925–1953: Essays, Reviews, and Miscellany (1931-1932) at 163 (Jo Ann Boydston ed., 2008).

75 Hannah Bloch-Wehba, *Algorithmic Governance from the Bottom Up*, 48 B.Y.U. L. Rev. 69, 82 (2022).

76 Bhagat & Phillips, *supra* note 17, at 535; *see also* Bloch-Wehba, *supra* note 75, at 82 ("The expansion of algorithmic governance is a logical consequence of policy that values efficiency, markets, and privatization.").

77 *See* Elizabeth E. Joh, *The Undue Influence of Surveillance Technology Companies on Policing*, 92 N.Y.U. L. Rev. 19 (2017); Katie Hawkins, *NYC Police Have Spent Millions on Tech Company That Claims It Can Use AI to Monitor Social Media and Predict Future Criminals*, Bus. Insider (Sept. 10, 2023, 10:07 AM), https://www.businessinsider.com/nypd-new-york-police-voyager-labs-social-media-surveillance-crime-2023-9.

78 *See* Sarah R. Sherman-Stokes, *Immigration Detention Abolition and the Violence of Digital Cages*, 95 U. Colo. L. Rev. 219 (2024).

79 *See* Sai Balasubramanian, *Google Is Rapidly Becoming a Healthcare Powerhouse*, Forbes (Aug. 21, 2023, 7:48 AM), https://www.forbes.com/sites/saibala/2023/08/21/google-is-rapidly-becoming-a-healthcare-powerhouse/?sh=3000fcc43e8e.

80 *See* Thomas McBrien, Ben Winters, Enid Zhou, & Virginia Eubanks, Elec. Privacy Info. Ctr., Screened & Scored in the District of Columbia (2022), https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf.

more,[81] challenging the state's monopoly on force as state actors increasingly rely on these companies' products to classify, track, and secure structurally-marginalized groups.[82]

While our everyday dependence on data-driven technologies helps cement data power, their development and sale are often specifically geared towards facilitating the state's program of classifying, tracking, and disciplining certain populations over others.[83] The profit-seeking priorities of the tech industry are brought into alignment with the priorities of the state to "discipline[e] and manag[e]" populations experiencing social insecurity due, in large part, to the shrinking of government care.[84] According to activist Sarah T. Hamid of the Carceral Tech Resistance Network (CTRN), carceral tech are data-driven technologies used by the state in the process of policing, border enforcement, and ongoing commercial partnerships. They are fundamentally technologies of classification, containment, and social control of structurally-marginalized groups.[85] Carceral tech includes, but is not limited to, predictive policing technologies, facial recognition applications, anomaly detection algorithms, DNA and biometric databases, acoustic gunshot detection, drones, digital location monitoring, and criminal risk profiling algorithms.[86]

Carceral tech is particularly dangerous in law enforcement, prison, and detention contexts, where its harms fall hardest on specific communities bound up in systems of carceral control. They do not threaten everybody equally—this mischaracterization may be well-intentioned coming from data privacy advocates, but it shifts attention away from what directly impacted communities are experiencing and want to contest.[87] When carceral tech proves to be effective on a local scale, it can later "travel to other contexts" through a cycle of mass

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[81] *See* Nadiyah J. Humber, *A Home for Digital Equity: Algorithmic Redlining and Property Technology*, 111 CAL. L. REV. 1421 (2023) (discussing the advent of property technology, data-driven products used primarily by landlords to assess prospective tenants).

[82] *See* Bhagat & Phillips, *supra* note 17, at 526.

[83] *Community Defense: Sarah T. Hamid on Abolishing Carceral Technologies*, LOGIC(S) MAG.: CARE (Aug. 31, 2020), https://logicmag.io/care/community-defense-sarah-t-hamid-on-abolishing-carceral-technologies.

[84] Bhagat & Phillips, *supra* note 17, at 527; *see also id.* (discussing how the "void left by social welfare retrenchment" has engendered "workfare (which entails forced participation in unstable and poorly paid employment as a condition for receiving social benefits), prisonfare (which entails a criminalization of poverty and the crafting of policies that extend the reach of police, courts, jails, and prisons), and debtfare (which normalizes and encourages reliance on private sources of credit to augment wages and regulate social insecurity)"). The authors offer "techfare" as the next iteration of this process, part of a "broader project of governing social insecurity and marginality in advanced capitalist countries." *Id.*

[85] *Abolishing Carceral Technologies*, *supra* note 83. *See* Powell, *supra* note 20.

[86] *Id.*; *see also* Bhagat & Phillips, *supra* note 17 (describing carceral technologies in relation to the PIC).

[87] *Abolishing Carceral Technologies*, *supra* note 83.

commercialization.[88] But these technologies first and foremost affect the poor, racialized, and overpoliced, whose voices are often missing in discussions of privacy rights and tech policy. This has historically affected communities of color because carceral technologies further the work of the racist institution of policing, meant to limit populations that are already disadvantaged in a country built on the legacy of slavery.[89] Corporate, carceral tech have become the default tools for state violence, and their integration into situations already "fraught with power disparities" has increased corporate data power while disempowering structurally-marginalized groups further.[90]

As tech companies enact their data power through carceral tech, structural inequities deepen.[91] Carceral tech present new methods to sort, profile, exploit, and discriminate, with seemingly no way for targeted communities to impede their deployment or even know about their deployment before a critical mass of people have been harmed.[92] These harms often rise to the level of algorithmic violence.[93] Algorithmic violence refers to the violence that data-driven, automated processes inflict by preventing people from meeting their basic needs. It results from the incorporation of huge datasets into computation systems producing a more hierarchical and unequal society. Algorithmic violence has the "power to cloak and amplify" existing inequities that suddenly feel new just because of the digital context.[94]

Algorithmic violence strikes most intensely where social, racial, and economic injustices linger, largely because the lack of adequate social services equates to potential business opportunities for data-driven "solutions." People who experience algorithmic violence most acutely are often part of multiple marginalized communities; intersectional

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[88] *Id.* ("[I]f you are organizing from an abolitionist perspective, you recognize that the private rollout of this technology is still a carceral technology. These technologies never exist without their carceral counterpart.").

[89] *See id.* ("Carceral technologies are racist because the institutions that develop and use them are intended to manage populations in a country that has a white supremacist inheritance."); s*ee generally* Benjamin, *supra* note 22.

[90] Bloch-Wehba, *supra* note 75, at 82.

[91] *See* J. Khadijah Abdurahman, *FAT* Be Wilin'*, Medium (Feb. 24, 2019), https://upfromthecracks.medium.com/fat-be-wilin-deb56bf92539 ("[I]t's not just that classification systems are inaccurate or biased, it is who has the power to classify, to determine the repercussions / policies associated thereof and their relation to historical and accumulated injustice?").

[92] *See Data Harm Record (Updated)*, Data Justice Lab, https://datajusticelab.org/data-harm-record/ (last updated Aug. 2020) (surveying various data harms).

[93] *See* Mimi Onuoha, *Notes on Algorithmic Violence*, Github (Feb. 8, 2018), https://github.com/MimiOnuoha/On-Algorithmic-Violence; Anna Lauren Hoffman, *Data Violence and How Bad Engineering Can Damage Society*, Medium (Apr. 30, 2018), https://medium.com/@annaeveryday/data-violence-and-how-bad-engineering-choices-can-damage-society-39e44150e1d4.

[94] Onuoha, *supra* note 93.

identities introduce multiple axes for social stratification through automated processes. Data-driven carceral tech in schools,[95] workplaces,[96] overpoliced communities,[97] under-resourced neighborhoods,[98] credit-dependent ventures,[99] elder care facilities,[100] and beyond worsen social conditions for impacted members of IBPOC communities,[101] the poor and economically underserved,[102] 2SLGBT+ communities,[103]

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[95] *See, e.g.*, Ctr. for Democracy & Tech., Hidden Harms: Targeting LGBTQ+ Students (2022), https://cdt.org/wp-content/uploads/2022/10/2022-10-14-Civic-Tech-Hidden-Harms-Targeting-LGBTQ-Students-Brief-final.pdf; Simon Coghlan, Tim Miller, & Jeannie Paterson, *Good Proctor or "Big Brother"? Ethics of Online Exam Supervision Technologies*, 34 Phil. & Tech. 1581 (2021).

[96] *See, e.g.*, Annette Bernhardt, Lisa Kresge & Reem Suleiman, *The Data-Driven Workplace and the Case for Worker Technology Rights*, 76 I.L.R. Rev. 3 (2023).

[97] *See, e.g.*, Cory Doctorow, *Why Big Tech, Cops, and Spies Were Made for One Another*, The Intercept (Oct. 16, 2023, 6:00 AM), https://theintercept.com/2023/10/16/surveillance-state-big-tech/; Edward Gates, *Predictive Policing in LA: LAPD Employs Palantir for Surveillance*, Am. Jud. Sys. (Apr. 29, 2023), https://www.ajs.org/predictive-policing-in-la-lapd-employs-palantir-for-surveillance/; Matene Toure, *In New York City, Surveillance Technology Expands the Carceral State*, Prism (Apr. 5, 2023), https://prismreports.org/2023/04/05/new-york-surveillance-technology-carceral/; *but see* Patrick Sisson, *In (and Above) Beverly Hills, Police Are Watching*, Bloomberg (Jan. 23, 2023, 9:10 AM), https://www.bloomberg.com/news/features/2023-01-19/in-beverly-hills-police-surveillance-technology-takes-off.

[98] *See, e.g.*, Erin McElroy, Paula Garcia-Salazar, & Manon Vergerio, Landlord Technologies of Gentrification: Facial Recognition and Building Access Technologies in New York City Homes (2022), https://static1.squarespace.com/static/52b7d7a6e4b0b3e376ac8ea2/t/63601bd6c1d8e23287357db0/1667242990765/AEMP-LLTech-Final-r2.pdf.

[99] *See, e.g.*, Humber, *supra* note 81; Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back from Tough Times*, Consumer Reps. (Mar. 11, 2021), https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times/; Jennifer Miller, *Is An Algorithm Less Racist Than a Loan Officer?*, N.Y. Times (Sept. 18, 2020), https://www.nytimes.com/2020/09/18/business/digital-mortgages.html.

[100] *See, e.g.*, Clara Berridge & Alisa Grigorovich, *Algorithmic Harms and Digital Ageism in the Use of Surveillance Technologies in Nursing Homes*, 7 Frontiers Socio. 1 (2022); Alisa Frik, Leysan Nurgalieva, Julia Bernd, Joyce Lee, Florian Schaub, & Serge Egelman, *Privacy and Security Threat Models and Mitigation Strategies of Older Adults*, USENIX 21 (2019), https://www.usenix.org/system/files/soups2019-frik.pdf.

[101] *See Our Cities*, Our Data Bodies, https://www.odbproject.org/our-cities/ (last visited Aug. 18, 2024)*; see generally* Benjamin, *supra* note 22. I use the terms "IBPOC" and "2SLGBT+" to center indigenous identities. *See* Elizabeth (Dori) Turnstall, Decolonizing Design: A Cultural Justice Guidebook 18 (2023).

[102] *See* Karen Hao, *The Coming War on the Hidden Algorithms that Trap People in Poverty*, MIT Tech. Rev. (Dec. 4, 2020), https://www.technologyreview.com/2020/12/04/1013068/algorithms-create-a-poverty-trap-lawyers-fight-back/.

[103] *See* Morgan Klaus Scheuerman, Jacob M. Paul, & Jed R. Brubaker, *How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis Services*, 3 Proc. ACM Human-Computer Interaction 1 (2019); Alejandra Caraballo, *Remote Learning Accidentally Introduced a New Danger for LGBTQ Students*, Slate (Feb. 24, 2022, 9:00 AM), https://slate.com/technology/2022/02/remote-learning-danger-lgbtq-students.html; James Vincent, *Transgender YouTubers Had Their Videos Grabbed to Train Facial Recognition Software*, The Verge (Aug. 22, 2017, 9:44 AM), https://www.theverge.com/2017/8/22/16180080/transgender-youtubers-ai-facial-recognition-dataset.

incarcerated folks,[104] migrants and asylum seekers,[105] people with disabilities,[106] and laborers, especially in gig economy jobs,[107] sex work,[108] factories,[109] and agricultural work.[110] Carceral tech do not serve these communities' needs because they are not designed or deployed to do so. So long as they enhance corporate data power while furthering the neoliberal state's project of classifying and controlling certain populations, they are working as intended. Underlying systemic issues remain unchanged.

Ultimately, tech companies datafy certain groups and shore up their data power. Through the deployment of carceral technologies, their products drive data-based forms of inequity. Algorithmic violence is the result of this process, and while structurally-marginalized communities experience this violence most directly, every data subject is complicit in the classifications-based insights produced through data analysis. Currently, communities are subjected to corporate data power but lack largescale people power to counter the tech industry's fixation with commodifying daily life into data, converting social problems into product solutions, and placing immense profits that result into shareholders' pockets instead of investing them back into communities' backyards.[111] In order to stand outside of datafication, one must first understand how

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104 *See* Matt Burgess, *This Surveillance System Tracks Inmates Down to Their Heart Rate*, Wired (June 11, 2023, 2:00 AM), https://www.wired.co.uk/article/prison-wristband-talitrix-tracking.

105 *See* Mordan Meaker, *The UK's GPD Tagging of Migrants Has Been Ruled Illegal*, Wired (Feb. 29, 2024, 7:01 PM), https://www.wired.com/story/gps-ankle-tags-uk-privacy-illegal/; Tonya Riley, *How a Private Company Helps ICE Track Migrants' Every Move*, Cyberscoop (Sept. 26, 2023), https://cyberscoop.com/ice-bi-smartlink/; Johana Bhuiyan, *Poor Tech, Opaque Rules, Exhausted Staff: Inside the Private Company Surveilling US Immigrants*, Guardian (Mar. 7, 2022, 7:48 PM), https://www.theguardian.com/us-news/2022/mar/07/us-immigration-surveillance-ice-bi-isap.

106 *See* Meredith Whittaker, Meryl Alper, Cynthia L. Bennett, Sara Hendren, Liz Kaziunas, Mara Mills, Meredith Ringel Morris, Joy Rankin, Emily Rogers, Marcel Salas, & Sarah Myers West, AI Now Inst, Disability, Bias, and AI (2019), https://ainowinstitute.org/wp-content/uploads/2023/04/disabilitybiasai-2019.pdf.

107 *See* Zephyr Teachout, *Surveillance Wages: A Taxonomy*, LPE Project (Nov. 6, 2023), https://lpeproject.org/blog/surveillance-wages-a-taxonomy/; Shruti Sannon, Billie Sun, & Dan Cosley, *Privacy, Surveillance, and Power in the Gig Economy*, Chi Con. Hum. Factors Comp. Sys. (2022).

108 *See* Thomas Brewster, *Amazon, Ashton Kutcher and America's Surveillance of the Sex Trade*, Forbes (Dec. 9, 2022, 7:00 AM), https://www.forbes.com/sites/thomasbrewster/2022/12/09/amazon-ashton-kutcher-sex-work-surveillance/; Olivia Snow, *Are You Ready to Be Surveilled Like a Sex Worker?*, Wired (June 27, 2022, 10:44 AM), https://www.wired.com/story/roe-abortion-sex-worker-policy/.

109 *See AI-Enabled Monitoring of Factory Workers*, Vantiq.com, https://vantiq.com/connect/solution/ai-watching-system-for-factory-workers/ (last visited Aug. 20, 2024).

110 *See* Gabriela Calugay-Casuga, *Ontario Farm Workers' Health Threatened by Surveillance Technology*, Rabble.ca (Oct. 19, 2023), https://rabble.ca/labour/ontario-farm-workers-health-threatened-by-surveillance-technology/.

111 *See* Swabey & Harraca, *supra* note 55.

the promises of tech companies have failed to materialize for the most disempowered, further deepening structural inequities rather than solving them. This requires reformers to ground tech advocacy in their experiences of harm, in their own voices.

B. Expert-Driven Tech Reforms Often Fail to Represent Communities Experiencing Algorithmic Violence Adequately

In the U.N. Secretary-General AI Advisory Body's latest report, the Body recognizes that the perspectives of communities directly impacted by new technologies "have been largely missing" from governance discussions.[112] Whose voices typically dominate conversations about the datafied status quo? Expert academics, researchers, lawyers, and policy professionals whose "first wave" concerns largely focus on "improving existing systems" without altering the data power disparities underneath.[113]

The conventional tech reformist agenda often revolves around fairness, accountability, and transparency suggestions that attempt to improve or "fix" data-driven technologies, focusing regulatory efforts on "adjudicating" negative "downstream impact[s]."[114] These suggestions often do not come from communities experiencing algorithmic violence directly. Instead, they come from technocratic experts and result in further investments into the tech industry, shoring up its power, legitimacy, and resources.[115] For example, calls for reform around data curation or algorithmic auditing require further funding and resources to enhance systems used in surveillance and policing, most often targeting structurally-marginalized communities.[116] Despite the indeterminacy[117]

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112 AI Advisory Bd., United Nations, Interim Report: Governing AI for Humanity 5 (2023), https://www.un.org/sites/un2.un.org/files/ai_advisory_body_interim_report.pdf (calling for a "more cohesive, inclusive, participatory, and coordinated approach").

113 Pasquale, *supra* note 37.

114 Julia Powles & Helen Nissenbaum, *The Seductive Diversion of 'Solving' Bias in Artificial Intelligence*, Medium (Dec. 7, 2018), https://onezero.medium.com/the-seductive-diversion-of-solving-bias-in-artificial-intelligence-890df5e5ef53. A full discussion of fairness, accountability, and transparency reforms is beyond the scope of this article but has been skillfully dissected by others. For a comprehensive analysis of these popular reforms and their shortcomings, see Bloch-Wehba, *supra* note 75.

115 *See Abolishing Carceral Technologies*, *supra* note 83 ("We have to recognize that technological innovation, and the reformism that animates it, is a carceral tactic. It's a means by which these systems have expanded over time."); Bloch-Wehba, *supra* note 75, at 73 ("[L]egal scholars and policymakers have largely overlooked grassroots opposition to these arrangements.").

116 Yadren Katz, Artificial Whiteness: Politics and Ideology in Artificial Intelligence 142 (2020).

117 *See* Ryan Heath, *Everybody Wants to Audit AI, But Nobody Knows How*, Axios (Feb. 7, 2024), https://www.axios.com/2024/02/07/ai-regulation-biden-openai.

and ineffectiveness[118] of AI auditing, companies and organizations are forming a cottage industry to potentially "audit-wash" harmful carceral tech.[119]

In part, this is because critical experts are often "enmeshed in the corporate world," which tends to limit their criticisms.[120] This is exacerbated by the "revolving door" between the tech industry and regulatory personnel.[121] All but one member of the European Commission's expert group on AI represent business interests.[122] All twelve former U.S. national security officials who warned against pursuing antitrust enforcement of big tech companies are connected to those same companies.[123] Under former White House Chief Science Advisor Eric Lander, more than a dozen staff members of the Office of Science and Technology Policy had some relationship to Eric Schmidt, the ex-CEO of Google, or were on his payroll.[124]

In these top-down discussions, experts propose reforms that might tweak the technology in question through minimal reporting or ethics requirements, largely ignoring the root issue of corporate data power's impact on structural inequities. Their suggestions do not question whether the tech industry should have so much power over what gets built, how, and why in the first place.[125] Their focus on ethical AI, algorithmic accountability, and unbiased tech ignores the needs of the communities who experience these entities' "violent decisions" and the underlying conditions that enable such violence to occur.[126] They advocate for subtle policies that assume that with minimal interventions, the vast and complex tech industry can be reformed.[127] These dominant approaches are technocratic and fail to consider how popular mobilization can support a more radical vision of change that benefits those

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118 Alex C. Engler, *Independent Auditors Are Struggling to Hold AI Companies Accountable*, Fast Co. (Jan. 26, 2021), https://www.fastcompany.com/90597594/ai-algorithm-auditing-hirevue.

119 *See* Ellen P. Goodman & Julia Tréhu, *AI Audit-Washing and Accountability*, German Marshall Fund (2022), https://www.gmfus.org/sites/default/files/2022-11/Goodman%20%26%20Trehu%20-%20Algorithmic%20Auditing%20-%20paper.pdf; *see also* Caitlin Andrews, *New Association Wants to Professionalize the AI Auditing Industry*, IAPP (Dec. 20, 2023), https://iapp.org/news/a/a-new-association-wants-to-professionalize-the-ai-auditing-industry.

120 Katz, *supra* note 116, at 133.

121 Kak & Myers West, *supra* note 39, at 58.

122 *See* Camille Schyns, Greta Rosén Fondahn, Alina Yanchur, & Sarah Pilz, *How Big Tech Dominates EU's AI Ethics Group*, EU Observer (Nov. 3, 2021, 1:03 AM), https://euobserver.com/investigations/153386.

123 *See* Emily Birnbaum, *12 Former Security Officials Who Warned Against Antitrust Crackdown Have Tech Ties*, Politico (Sept. 22, 2021, 6:28 PM), https://www.politico.com/news/2021/09/22/former-security-officials-antitrust-tech-ties-513657.

124 *See* Alex Thompson, *A Google Billionaire's Fingerprints Are All Over Biden's Science Office*, Politico (Mar. 28, 2022, 4:30 AM), https://www.politico.com/news/2022/03/28/google-billionaire-joe-biden-science-office-00020712.

125 Bloch-Wehba, *supra* note 75, at 111.

126 Katz, *supra* note 116, at 128–29; *see also generally* Bloch-Wehba, *supra* note 75.

127 Katz, *supra* note 116, at 134.

lacking data power today.[128] Their narrow focus on improving carceral tech "reaffirm powerful actors' control over algorithmic design, use, and policy."[129] These reforms reach for the low-hanging fruit—tweaking technologies on the surface level without engaging with more systemic issues that predate the datafied status quo.[130]

Even well-meaning nonprofit and civil society organizations struggle to adequately represent directly impacted communities effectively. When it comes to data issues, civil society activity has been "relatively fragmented" due to a misperception that digital rights and social justice have "separate agendas."[131] This perceived separation is the root of the issue, with technology-focused, digital rights organizations remaining too isolated from directly impacted communities, unable to incorporate their lived experiences of social, racial, and economic injustices into their tech reform agendas.[132] Recently, in the wake of a so-called racial reckoning,[133] several groups have begun to bridge the gap by supporting racial justice and tech issues, with many civil liberties and privacy organizations endorsing civil rights-styled policies.[134] Still, these organizations often lack diverse experts internally and are weary to speak for or over communities with whom they lack strong connections.[135]

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128 Bloch-Wehba, *supra* note 75, at 73.

129 *Id.* at 110; *see also Abolishing Carceral Technologies*, *supra* note 83 ("In many ways, saying that you need a more diverse, minority-sensitive tech company is like saying you need more diverse prison guards.").

130 *See Technology Can't Fix This*, 2 Natu. Mach. Intel. 363 (2020), https://www.nature.com/articles/s42256-020-0210-5 (focusing on structural racism).

131 Arne Hintz, Lina Dencik, Joanna Redden, Emiliano Treré, Jess Brand, & Harry Warne, Data Justice Lab, Civic Participation in the Datafied Society: Towards Democratic Auditing? 165 (2022), https://datajusticelab.org/wp-content/uploads/2022/08/CivicParticipation_DataJusticeLab_Report2022.pdf

132 *See id.*

133 *See* Michele L. Norris, *Don't Call It a Racial Reckoning. The Race Towards Equality Has Barely Begun*, Wash. Post (Dec. 18, 2020, 1:41 PM), https://www.washingtonpost.com/opinions/dont-call-it-a-racial-reckoning-the-race-toward-equality-has-barely-begun/2020/12/18/90b65eba-414e-11eb-8bc0-ae155bee4aff_story.html; *The Racial Reckoning That Wasn't*, NPR: Code Switch Podcast (June 9, 2021, 1:46 AM), https://www.npr.org/transcripts/1004467239.

134 *See, e.g.*, *Coalition Letter to Senate and House Leaders on Privacy and Civil Rights Principles,* (Feb. 13, 2019), https://civilrightsdocs.info/pdf/policy/letters/2019/Roundtable-Letter-on-CRBig-Data-Privacy.pdf (coalition of organizations supporting privacy legislation in line with "Civil Rights Principles for the Era of Big Data" that would protect "against uses of consumer information that concentrate harms on marginalized communities while concentrating profits elsewhere.").

135 *See generally* Tsion Tesfaye, Public Knowledge, Diversity in Early-Career Tech Policy Roles: Challenges and Opportunities 6 (2021), https://publicknowledge.org/wp-content/uploads/2021/11/Diversity-in-Early-Career-Tech-Policy-Roles_PublicKnowledge.pdf (one commenter stating, "[i]t is sad to see that there are so few people [in tech policy organizations] who look like the majority of the consumers they claim to advocate on behalf of."); *see also id.* at 7 (one commenter stating, "[j]ust because you care about people of color doesn't mean that you know what's best for people of color.").

Many of these organizations recognize the importance of seeking direct contact with affected individuals, gathering their stories first to better understand how datafication negatively impacts specific communities, and second, to better reach, represent, and work on behalf of these groups.[136] When direct contacts are hard to nurture, advocates still strive to understand their lived experiences through social case workers, debt counselors, and others working directly within local communities.[137] But these efforts cannot replace the need for communities to share their perspectives directly to inform tech policy choices. These same organizations acknowledge the need to "better represent affected communities in relation to data governance and data harm."[138]

Instead of pushing tech companies on whether to develop carceral tech or state actors on whether to use them at all, the tech reform conversation remains stuck on the industry's terms, assuming adoption of carceral tech as a forgone conclusion.[139] While civil society organizations and regulatory bodies are increasingly aware of the need to include the voices of directly harmed communities, this has yet to translate into common practice in elite policy spaces. As a result, corporate data power remains largely unchecked by people power.

C. Tech Clinics Can Do More to Challenge the Datafied Status Quo

Tech clinics have been around for a couple of decades, but more recently law schools offering tech clinics have grown about 58% from around 21 programs in 2013–2014 to around 36 in 2022–2023.[140] Tech clinics are difficult to place into one, unified category. They all expose students to live tech law issues, but they do so through a broad variety of topic areas, client types, and legal services. There are the intellectual property (IP)-forward clinics, which prioritize clients with IP issues as new technologies push the boundaries of traditional IP rights.[141] These

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136 Hintz et al., *supra* note 131, at 117.

137 *See id.* at 116.

138 *Id.* at 165.

139 *See* Pasquale, *supra* note 37 ("[A] second wave of research has asked whether [existing systems] should be used at all—and, if so, who gets to govern them").

140 Robert R. Kuehn, David A. Santacroce, Margaret Reuter, June T. Tai, & G.S. Hans, *2022–2023 Survey of Applied Legal Education*, Ctr. for the Study of Applied Legal Educ. 7 (2023), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/64fb7bd82fdee48e57e8ef04_Report%20on%202022-23%20CSALE%20Survey.rev.9.8.23.pdf (surveying 185 law school participants, or 96% of law schools). *See* Holland, *supra* note 25 (describing the incidence of intellectual property-focused clinics since the 2000s and the increased need for training in technology law practice in intervening years).

141 *See, e.g.*, *Intellectual Property and Information Policy Clinic*, Geo. L., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/intellectual-property-and-information-policy-clinic/ (last visited Aug. 20, 2024) (guiding students "through a range of non-litigation work on behalf of non-profits, coalitions, and fellow students who engage with IP or information policy issues" from a "social justice perspective"); *Intellectual Property*

clinics often serve small businesses and legally underserved clients navigating rights acquisitions and other challenges, especially concerning trademark and copyright.[142] Then, there are a few emergent social justice-forward clinics representing cases at the intersection of tech law and social justice issues,[143] with at least one clinic overlapping with the IP camp.[144] Finally, there are the generalist tech law and policy clinics, which often handle a combination of IP and informational privacy, telecommunications, and accessibility matters.[145] The generalist clinics also

& Technology Law Clinic, Geo. Wash. Univ. L. Sch., https://www.law.gwu.edu/intellectual-property-technology-law-clinic (last visited Aug. 20, 2024) (giving students the chance to practice "as intellectual property law counsel on behalf of individual inventors, entrepreneurs, authors, artists, and other clients"); *Intellectual Property and Technology Law Clinic (IPTLC)*, USC Gould Sch. L., https://gould.usc.edu/academics/experiential/clinics/iptlc/ (last visited Aug. 20, 2024) (describing how copyright and trademark laws "are more complex than ever" due to the globalized technology economy); *Brooklyn Law Incubator & Policy Clinic*, Brook. L. Sch., https://www.brooklaw.edu/academics/clinics%20and%20externships/in-house%20clinics/blip (last visited Aug. 20, 2024) (positioning the Clinic as a "modern, technology-oriented law firm" and primarily serving start up and business clients, including through a patent law practice); *Glushko-Samuelson Intellectual Property Law Clinic*, Am. Univ. Wash. Coll. L., https://ipclinic.org/ (last visited Aug. 20, 2024) (advising "artists, non-profit organizations, small inventors and entrepreneurs, scholars, traditional communities, and others" on "copyright, patent, trademark," and related legal matters); *New Media Rights' Intellectual Property Arts, and Technology Clinic*, Cal. W. Sch. L., https://www.cwsl.edu/experiential_learning/clinics/new_media_rights.html (last visited Aug. 20, 2024) (enabling trimester-based legal interns to represent the nonprofit New Media Rights' cases, involving contract drafting, IP analysis, and IP policy analysis); *Internet & Intellectual Property Justice Clinic*, Univ. S.F. Sch. L., https://www.usfca.edu/law/engaged-learning/law-clinics#chapter=chapter-22517-Internet-and-Intellectual-Property-Justice-Clinic (last visited Aug. 20, 2024) (representing individuals and startups on patent, trademark, and copyright cases).

142 *See* Univ. S. Cal. Gould Sch. L., *supra*, note 141 (describing Clinic clients with copyright and trademark issues as "budding filmmakers, artists, game developers, entrepreneurs and nonprofits," many of whom are "minority-owned or women-owned business").

143 *See Communications & Technology Law Clinic*, Geo. L., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/communications-technology-law-clinic-ipr/ (last visited Aug. 20, 2024) (representing matters that raise questions about how society will "harness [technology] to promote justice and equity" and conducting "technology-related advocacy to advance social justice" on behalf of "people of color, people with disabilities, children, and other underrepresented groups."); *Technology Law & Policy Center*, N.C. Cent. Univ. Sch. L., https://law.nccu.edu/academics/techlawcenter/ (last visited Aug. 20, 2024) (seeking to "facilitate meaningful technology-related policy discussions" that ensure emergent technologies and legal responses "do not result in the further marginalization of the African American Community and are used to create a more just society").

144 *See Communications & Technology Law Clinic*, Geo. L., *supra* note 143.

145 *See Cyberlaw Clinic*, Harv. L. Sch., https://hls.harvard.edu/clinics/in-house-clinics/cyberlaw-clinic/ (last visited Aug. 20, 2024) (describing the Clinic's "broad-based practice", including IP, privacy, online speech, and several other areas of practice); *Technology Law and Policy Clinic*, N.Y.U. Sch. L., https://www.law.nyu.edu/academics/clinics/technologylawandpolicy (last visited Aug. 20, 2024) (representing "individuals, nonprofits, and other public-interest clients in addressing cutting edge issues at the intersections of technology and free speech, privacy, surveillance, and transparency," with half of the students representing the American Civil Liberties Union's Speech, Privacy & Technology Project); *Samuelson Law, Technology & Public Policy Clinic*, Berkeley L., https://www.law.berkeley.edu/experiential/clinics/samuelson-law-technology-public-policy-clinic/our-work/ (last visited Aug. 20, 2024)

represent civil liberties and civil rights challenges to emergent technologies, but may be less explicitly committed to social justice issues when these areas overlap.[146]

Notwithstanding these distinctions, tech clinics often describe their work as serving the "public interest,"[147] but they seem to lack a shared, explicit understanding of what this means in the context of their doctrinal teaching or fieldwork.[148] According to one survey, most tech clinics do not choose fieldwork opportunities based on the fit between their social missions and that of the potential client or project.[149] For 40 to 50% of surveyed clinics, it was "not at all important" if their clients represented a larger class, presented a unique question of law, or brought a larger policy issue to the forefront.[150] This may make sense for the myriad IP-forward tech clinics, whose clients may be individual artists or small businesses in IP rights acquisition cases. For generalist tech clinics that characterize their work as serving the public interest, however, it is unclear whether their work systematically serves underrepresented clients, with students working directly with harmed communities.[151]

(describing three main focus areas: "protecting civil liberties, promoting balanced intellectual property laws and access to information policies, and ensuring a fair criminal legal system."); *Samuelson-Glushko Technology Law & Policy Clinic*, Col. L., https://www.colorado.edu/law/academics/clinics/samuelson-glushko-technology-law-policy-clinic (last visited Aug. 20, 2024) (emphasizing student opportunities in tech policy advocacy before various administrative agencies on "telecommunications, intellectual property, privacy, accessibility, and other policy and regulatory matters with substantial technology dimensions"); *Technology Law and Public Policy Clinic*, Univ. Wash. Sch. L., https://www.law.uw.edu/academics/experiential-learning/clinics/technology-law (last visited Aug. 20, 2024) (focusing work on the "intersection of public policy and technology" through in-depth studies of current tech policy issues).

146 *See, e.g.*, N.Y.U. Sch. L., *supra* note 145 (committing around half of clinical students to ACLU matters and highlighting the "increasingly complex and critical questions for civil liberties and civil rights" raised by technological advances); Berkeley L., *supra* note 145 (emphasizing protecting civil liberties in the digital age).

147 *See, e.g.*, N.Y.U. Sch. L., *supra* note 145 ("[The Clinic involves a mixture of fieldwork and seminar discussion ranging from technology law and policy to the ethical challenges of lawyering in the public interest"); *Intellectual Property, Arts, and Technology Clinic,* UCI L., https://www.law.uci.edu/academics/real-life-learning/clinics/ipat.html (last visited Aug. 20, 2024) ("Clinic students gain important legal skills while examining the role of the public interest in intellectual property and technology law"); USC Gould Sch. L., *supra* note 141 (quoting client testimonial describing clinic's "efforts in public interest advocacy").

148 *Cf.* Levendowski, *supra* note 27 (discussing teaching legal doctrine to highlight social justice issues in IP and information policy, especially when clinical fieldwork may not raise them directly).

149 Cynthia L. Dahl & Victoria F. Phillips, *Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics*, 25 Clin. L. Rev. 95, 131 (2018) ("[F]or the majority of clinics, furthering their own missions by choosing clients with social missions is only 'slightly' or 'moderately' compelling.").

150 *Id.*

151 *Id.* at 132. While rare, generalist tech clinics do provide fieldwork opportunities focused on providing direct representation for underrepresented communities within a larger suite of projects and clients. *See* Harv. L. Sch., *supra* note 145 (offering "*pro bono* legal services at the intersection of technology and social justice"); Kendra Albert, kendraalbert.

In generalist tech clinics committed to the public interest, clients are often sophisticated actors or nonprofits with expertise in tech law[152] or other relevant areas,[153] who serve as middlemen for clinical students to engage indirectly with the communities these organizations serve.[154] More often than not, this gap influences the types of work product and case outcomes students produce during their clinical experiences, namely filings in strategic litigation cases, public comment drafts, or strategic counseling for sophisticated clients based on state and/or federal legal research.[155] Because direct input from those harmed by carceral tech rarely pass through the nonprofit or expert-client filter, students are limited to advocating "in theoreticals about the disproportionate impact[s]" on marginalized communities.[156] Their fieldwork experiences tend to suffer the same representation limitations as top-down, tech reformist posturing.[157] Worse, students may not develop culturally aware lawyering skills mandated by the ABA and core to clinics that represent low-income, immigrant, and/or other underserved clients.[158]

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com (last visited Aug. 20, 2024) (describing former Harvard Cyberlaw Clinic instructor's work representing sex worker art collective protesting digital gentrification).

152 *See Technology Law & Policy Clinic*, N.Y.U. L. Engelberg Ctr., https://www.nyuengelberg.org/projects/technology-law-and-policy-clinic/ (gathering recent NYU Technology Law & Policy Clinic projects, including representing technology law expert nonprofits ACLU, EFF, and EPIC); *Clinic Teams w/ Cathy O'Neil for HUD Comment re: Algorithmic Discrimination*, Cyberlaw Clinic, https://clinic.cyber.harvard.edu/2019/10/21/clinic-teams-wcathy-oneil-for-hud-comment-re-algorithmic-discrimination/ (last visited Aug. 20, 2024) (describing public comment collaboration with data scientist and AI expert Cathy O'Neil); *Cyberlaw Clinic Files Comment for CDT Urging the U.S. Dept. of Ed. to Protect LGBTQI+ Students from Discriminatory Tech*, Cyberlaw Clinic, https://clinic.cyber.harvard.edu/2022/09/22/cyberlaw-clinic-files-comment-for-cdt-urging-the-u-s-dept-of-ed-to-protect-lgbtqi-students-from-discriminatory-tech/ (Sept. 22, 2022) (describing public comment submitted on behalf of the Center for Democracy and Technology).

153 *See NAACP to the D.C. Circuit: Nobody Should Have to Pay to Read the Law*, NYU Engelberg Ctr., https://www.nyuengelberg.org/news/naacp-to-the-d-c-circuit-nobody-should-have-to-pay-to-read-the-law/ (Feb. 1, 2023) (representing racial justice organization NAACP); *Protecting the Right of Public Access to Court Records and Stored Communications Act Warrant Materials*, Berkeley L., https://www.law.berkeley.edu/case-project/rcfp-sca-warrant-materials/ (Apr. 22, 2024) (representing press' First Amendment rights organization Reporters Committee for Freedom of the Press).

154 *See* Jennifer Ceema Samimi, *Funding America's Nonprofits: The Nonprofit Industrial Complex's Hold on Social Justice*, 1 Colum. Social Work Rev. 17 (2010) (describing the Nonprofit Industrial Complex as a phenomenon that institutionalizes nonprofits by forcing them to professionalize operations and compromise on providing robust social services to secure government and foundation funding).

155 Of course, this is in addition to practical considerations that may shape and/or limit final work products, including the amount of students enrolled in the clinic, the credit load, and the amount of time allotted (for example, semester vs. year-long).

156 Hintz et al., *supra* note 136.

157 *See supra* Section I.B.

158 *See* Am. Bar Ass'n, ABA Standards and Rules of Procedure for Approval of Law Schools 2022–2023 18 (2022), https://www.americanbar.org/content/dam/aba/administrative/

II. Data Justice Readiness

Data-driven carceral technologies are increasing the scale, power, and violence of the technology industry alongside the scale, power, and violence of the carceral state. These technologies operate on a logic of social control, reducing people to dataflows and subjecting certain groups to ceaseless surveillance, separation, and containment. As government care and social services are outsourced to corporations, data-driven innovations turn structural inequities into potential market opportunities. The datafication of programs affecting structurally-marginalized communities unites tech companies' profit-seeking and the state's cost-saving priorities. Carceral tech thus deepen social, racial, and economic injustices as data injustices.

Many have written that law clinics have a special duty to promote justice.[159] This Article argues that tech clinics are uniquely positioned to promote data justice by challenging the datafied status quo. Data justice centers the needs and voices of structurally-marginalized communities targeted by carceral tech. It is a means of redress for the ways that data has been weaponized against IBPOC, 2SLGBT+, and other communities to fortify oppressive systems that silence, harm, and weaken them.[160] Data justice readiness is a pedagogical approach that aims to maximize student learning opportunities by treating tech law and policy issues as data justice issues fundamentally.

This Article focuses on client and project selection as one entry point into data justice readiness. By adopting a data justice vision, clinicians can help identify and select projects that stem from community needs, giving students direct exposure to data injustices and expanding their perspectives beyond narrow tech reformism. This can inspire a generation of advocates who are able to imagine new strategies and interventions to disrupt data power disparities.

Clinicians interested in adopting a data justice vision can learn from colleagues who are preparing future legal advocates to question oppressive systems and dismantle them. This Section uses various clinics' shared vision to abolish the prison industrial complex (PIC) as

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legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-standard-ch3.pdf (requiring law schools to provide education on cross-cultural competency).

159 *See* Stephen Wizner, *Beyond Skills Training*, 7 Clin. L. Rev. 327 (2001); Stephen Wizner and Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 Fordham L. Rev. 97 (2004); Frank S. Bloch and M.R.K. Prasad, *Institutionalizing a Social Justice Mission for Clinical Legal Education: Cross-National Currents from India and the United States*, 13 Clin. L. Rev. 165 (2006); Margaret M. Barry, A. Rachel Camp, Margaret Ellen Johnson, Catherine F. Klein, & Lisa V. Martin, *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 Clin. L. Rev. 401 (2012).

160 *See* Coalition of Communities of Color, *Research & Data Justice*, https://www.coalitioncommunitiescolor.org/-why-research-data-justice (last visited Aug. 8, 2024).

inspiration for a data justice vision rejecting carceral tech. Drawing from abolitionist lawyers, it situates data justice readiness in the tradition of movement lawyering, a form of critical lawyering that puts social movements in control of legal advocacy and reform decisions, and draws on scholarship highlighting the creative opportunities for student learning that attend clinical representation of movement actors.[161] By prioritizing communities most affected by and mobilized against carceral tech in project selection, tech clinics can better train future advocates to be data justice ready.

A. PIC Abolitionist Clinics Show How Vision Can Drive Pedagogy

Legal education can play a significant role in shifting law students' trajectories from their stated goals of working on behalf of the public good.[162] Law schools tend to reflect the power structures already enshrined in modern legal doctrines and precedents, helping to entrench the status quo of a society with staggering levels of wealth inequality and mass incarceration.[163] More often than not, they mold graduates to "serve political and economic elites" in a landscape where corporations are the default legal structure for economic production and their shareholders are its default beneficiaries.[164] Through both structure and

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[161] Scholars have used various terms to describe forms of representation and advocacy favoring mobilized and/or collective clients to pursue social justice aims, including political lawyering, rebellious lawyering, and community lawyering. For simplicity, I use critical lawyering as an umbrella term for these approaches. *See* Amna A. Akbar, Sameer Ashar & Jocelyn Simonson, *Movement Law*, 73 Stan. L. Rev. 821, 840 n. 68 (2021) (gathering sources).

[162] *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Educ. 591, 601 (1982) (describing how law schools tend to funnel students into corporate practice jobs in the hierarchy of the bar based on their standing in the hierarchy of schools); Rebecca C. Flanagan, *Anthrogogy: Towards Inclusive Law School Learning*, 19 Conn. Pub. Interest L.J. 93, 106–07 (2019) (discussing empirical research finding how law schools turn students from "justice-oriented" to "game-oriented" and cause several first-year students to abandon hope by the end of their 1L years). *See* Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. Rev. L. Soc. Change 101, 125 (2021) ("For too long law schools have encouraged the education of lawyers in an ostensibly value-neutral way.").

[163] *See Wealth Inequality in the United States*, Inequality.org, https://inequality.org/facts/wealth-inequality/ (last visited Aug. 20, 2024); *United States Profile*, Prison Pol'y Initiative, https://www.prisonpolicy.org/profiles/US.html (last visited Aug. 20, 2024). *See also* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clin. L. Rev. 37, 40 (1995) (describing lawyers' roles in crafting "taxation schemes, regulatory policies, government budgets, criminal laws, public benefit programs, election laws and constitutional rulings" that directly result in widespread oppression).

[164] Angela Harris, *Foreword: Racial Capitalism and Law*, *in* Histories of Racial Capitalism vii, xi, xxii (Destin Jenkins & Justin Leroy eds., 2021); *see also id.* at viii ("'Capitalism' doesn't exist in [law-and economic] fields. There are only markets and economic analysis, abstract systems obeying rules that are elegant, timeless, and inherently disconnected form matters of 'distribution.'").

substance, U.S. law schools are inherently political spaces that rarely make large-scale institutional and/or pedagogical changes to repair the harmful legacies of settler colonialism and slavery.[165] In this environment, it is no surprise that several students lose their motivations to serve structurally-marginalized communities by 2L fall.[166]

Since their inception, clinics have served an important corrective function for the traditionally hierarchical and insufficiently critical law school experience.[167] Clinicians often embrace specific and explicit visions of justice, committing their legal advocacy to serving the needs of communities overlooked and underserved by traditional legal practice.[168] The eradication of systems of oppression is a core lawyering value that drives both their clinical teaching and dockets.[169] As Deborah Archer notes, "[e]very clinical program makes a political decision in deciding which cases to take or not to take, as each decision has political

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165 Several scholars have argued that law schools serve racial capitalism by crystallizing structural inequities as doctrine that are in fact socially determined, meanwhile limiting students' views of what kinds of societal change are (and are not) possible. *See* Sameer Ashar, Renee Hatcher, & John Whitlow, *Law Clinics and Racial Capitalism*, LPE Project (Nov. 7, 2022), https://lpeproject.org/blog/law-clinics-and-racial-capitalism/ ("The basic 1L curriculum is steeped in our country's history of settler colonialism and slavery, and the law taught in the first year largely constitutes a legal infrastructure [of racial capitalism]"); Anne D. Gordon, *Cleaning Up Our Own Houses: Creating Anti-Racist Clinical Programs*, 29 Clin. L. Rev. 49, 50 (2022). Scholars point to the law-and-economics approach in legal academy as a key factor. *See* Harris, *supra* note 164. An in-depth discussion of racial capitalism is beyond the scope of this Article. For more information, *see generally* Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2152, 2161 (2013).

166 Duncan Kennedy puts it best: "[l]aw schools are intensely political places, in spite of the fact that the modern law school seems intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be." Kennedy, *supra* note 162. *See also* Flanagan, *supra* note 162.

167 *See* Gordon, *supra* note 165, at 55, 72–75 (listing several reasons why clinics "are necessary (and ideal) locus of change" to combat "policies and practices in law school [that] mirror the racial hierarchies of the outside world").

168 *See* Quigley, *supra* note 163, at 38 ([A] complete clinical educational experience [] should include lessons of social justice. Clinical teachers should accept as part of their role the exposure of clinical students to experiences and reflective opportunities that will lead to social justice learning."); Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 Clin. L. Rev. 101, 141 (2012) ("Confronting values that diminish the autonomy and power of disadvantaged groups in society is the stated goal of some clinics. It does not matter, however, whether social justice is a stated goal or not. These issues will arise."); Gordon, *supra* note 165, at 73 ("The founding goals of clinical legal education were to provide law students the opportunity to learn the skills necessary to practice law and provide quality legal services to the poor."); Stephen R. Miller, *Field Notes from Starting a Law School Clinic*, 20 Clin. L. Rev. 137, 145–46 (2013) (describing the necessity of finding a political identity).

169 *See* Futrell, *supra* note 162, at 125; Gordon, *supra* note 165, at 73 ("While clinics engage in justice education in different ways and among different client populations, a common denominator for many clinics is a commitment to the difficult work of empowering subordinated people and/or promoting projects that challenge and change system norms.").

implications."[170] Clinics also hold great potential to nurture "new and evolving models of lawyering" that can fundamentally reshape public interest practice.[171] Through explicit commitments to justice and innovative pedagogy, clinics help many students salvage their initial desires to practice law for the public good.

For many, commitment to a particular vision of justice is an essential feature of clinical practice that informs pedagogy and fieldwork alike, reflecting "the operating ethos of self-conscious law practice" which clinicians hope to model for their students.[172] Adopting a critical lawyering vision, clinical legal scholars have demonstrated the fruitful collaborations that are possible through solidarity with justice movements organizing for large-scale social transformation.[173] One key area of injustice, and of movements organized for transformation, is the vast web of carceral institutions that disproportionately damage Indigenous, Black and brown communities.[174] One key vision of justice is the abolition of the prison industrial complex (PIC) that bolsters these institutions, and several clinicians find this vision increasingly helpful to drive their work.

A variety of clinicians from criminal defense, immigrant rights, and family regulation are embracing PIC abolition as a guiding principle both in the classroom and beyond it. Most recently following mass mobilizations against police brutality in the summer of 2020, several clinicians have turned their attention to the insights of abolitionist activists in challenging violent and oppressive systems.[175] PIC abolition "presents a clear set of values" for clinics to integrate into both pedagogy

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170 Deborah N. Archer, *Political Lawyering for the 21st Century*, 96 Denv. L. Rev. 399, 413 (2019).

171 *Id.*

172 Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 Harv. C.R.-C.L. L. Rev. 297, 301 (1996); s*ee also* Missy Risser-Lovings, *Designing an Emancipatory Clinic*, LPE Project (Nov. 15, 2022), https://lpeproject.org/blog/designing-an-emancipatory-clinic/ ("[L]aw school clinics can serve as important sites of critical pedagogy, helping students, partner organizations, and clients build towards an abolition democracy.").

173 *See* Akbar, Ashar & Simonson, *supra* note 161 (describing examples and listing clinical scholarship); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clinical L. Rev. 355, 391–97 (providing examples of methods used to identify collective mobilization cases in New York and in Baltimore by the CUNY Immigrant & Refugee Rights Clinic in 2002–03).

174 *See* Prison Pol'y Initiative, *Native Incarceration in the U.S.*, https://www.prisonpolicy.org/profiles/native.html (last visited Aug. 8, 2024); Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. Crim. L. & Criminology 613 (2012).

175 Although clinical attention may be recent, PIC abolitionist frameworks, Black queer feminism, and critiques of racial capitalism have been useful reference points for racial justice organizing since at least the 2014 Ferguson and 2015 Baltimore uprisings in response to police killings of Michael Brown and Freddie Gray. *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 U.C.L.A. L. Rev. 1544, 1548 (2022); Futrell, *supra* note 162, at 101 ("While abolitionist thought has long existed in organizing and

and fieldwork, countering law school's tendencies to leave students with the belief that the law is neutral and law schools are "instruments of oppression."[176] It also invites clinicians to center movement actors and campaigns in clinic projects, exposing students to ground-up organizing needs and expanding their skillset to include political, as well as legal, strategy.

The PIC represents the criminalization of poverty and the replacement of anti-poverty programs with policing and incarceration, serving state and corporate interests.[177] As Ruth Wilson Gilmore notes, incarceration addresses social issues involving the poor, with police perpetuating inequality through "violence, surveillance, death, and debt."[178] PIC abolitionists challenge the belief that criminalization benefits the public and that police ensure safety, advocating instead for divesting resources from the criminal legal system to support overpoliced communities. They aim to reduce reliance on prisons and police, envisioning an "abolition democracy" rooted in racial and social justice, where all communities have access to housing, education, work, healthcare, and childcare.[179] Abolitionist organizers promote "everyday abolition," encouraging community resilience and problem-solving without police intervention.[180] This challenges the inevitability of police and calls for reforms addressing the broader political, economic, and social ecosystem.

PIC abolitionists have also had to articulate an alternative reform agenda against the inevitability of police and prisons for ensuring public safety. They challenge "the footprint, power, resources, and legitimacy" of carceral systems as the core problem.[181] They situate the PIC as "the stuff of structural violence," built on a legacy of slavery and continued through profound social, political, and economic inequities.[182] For them, reforms should seek to "contest and then to shrink the role of the police," freeing up resources currently spent on carceral institutions to better provide basic needs.[183] Abolitionists seek to divert resources used to uphold the PIC to overpoliced communities directly, while other re-

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non-legal academic spaces, law students and legal scholars are increasingly considering how a carceral abolitionist perspective can inform legal education and practice.").

176 Gordon, *supra* note 165, at 55. *See also id.* at 73; Norrinda Brown Hayat, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 Clin. L. Rev. 149, 155 (2021); Futrell, *supra* note 162, at 132 ("[A]n abolitionist ethic requires us to recognize and relinquish the familiarity, privilege, and security that oppressive systems bestow upon a select few.").

177 *See generally* Angela Y. Davis, Are Prisons Obsolete? 84–104 (2003).

178 Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis and Opposition in Globalizing California 229 (1st ed. 2007).

179 Risser-Lovings, *supra* note 172.

180 Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 Cal. L. Rev. 1781, 1834 (2020).

181 *Id.* at 1788.

182 *Id.*

183 *Id.* at 1787.

formers seek only to minimize police violence through further restrictions and funding.[184]

There are two main forms of reform to the PIC: reformist reforms and non-reformist reforms. Reformist reforms legitimate the status quo by "failing to fundamentally challenge existing power relations."[185] They are often used by the state to insulate existing power disparities.[186] Reformist reforms are top-down and generated from "powerful insiders . . . that retain power within the insider class" but that cannot genuinely remedy carceral violence.[187] They often narrowly focus on strengthening federal constitutional rights and expanding procedural safeguards to disincentivize police brutality.[188]

An abolitionist reform agenda is much broader. PIC abolitionists approach reforms by connecting who is and was historically harmed by police to who has control over policing.[189] They aim to shift power, legitimacy, and resources away from the PIC to the communities trapped within it, increasing self-determination.[190] Non-reformist reforms help unwind "the net of social control through criminalization."[191] They are at odds with "capitalist needs, criteria, and rationales," and instead "advance[] a logic of 'what should be.'"[192] In contexts with immense power differentials, non-reformist reforms are "bottom-up", redistributing power among communities who have been historically excluded from various forms of power.[193]

Various thinkers have come up with ways to gauge whether a reform effort is non-reformist.[194] In general, they ask whether the reform

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184 *Id.*

185 Stahly-Butts & Akbar, *supra* note 175, at 1551.

186 *Id.*

187 *Id.* at 1560.

188 Akbar, *supra* note 180, at 1843.

189 Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 788 (2021).

190 *See id.* at 789 (describing this attention to power as working "at the meso-level of police reform: concentrating on governance and policymaking arrangements rather than outcomes or policies themselves.").

191 GILMORE, *supra* note 178, at 242.

192 Amna A. Akbar, Response, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 98, 101 (2020) (citing ANDRÉ GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL (1967)).

193 Stahly-Butts & Akbar, *supra* note 175, at 1560.

194 *See, e.g.*, Critical Resistance, *Abolition is Liberation: Marbre Stahly-Butts & Rachel Herzig in Conversation with Cory Lira*, YOUTUBE (May 14, 2020), https://www.youtube.com/watch?v=dpYc-WnmMBs ("Does this reform shift any money or power at all? Does it acknowledge past harm? Does improve material conditions? And does it create space for experimentation as a result?"); Butts & Akbar, *supra* note 148, at 1552 (a non-reformist reform also "shrinks the system doing harm; . . . relies on modes of political, economic, and social organization that contradict prevailing [power] arrangements," and improves material conditions for directly impacted communities); The Evergreen State College Productions, *Coming Together Speaker Series: Dean Spade*, YOUTUBE (May 4, 2018), https://www.youtube.com/watch?v=D1HtLMi-ELU (at 26:10) (asking whether the reform provides material

would: expand or shrink harmful systems; improve material conditions for impacted communities; and mobilize and/or strengthen forms of collective power and control—put differently, whether the reform is something that activists will have to "undo [] later."[195] Would the suggested reform shift (1) money, (2) discretion, (3) or power over carceral systems away from powerful actors to communities most harmed by them?

Non-reformist reforms come directly from social movements, labor, and organized collectives of people most impacted by the PIC.[196] Abolitionist lawyers and clinicians use these communities' experiences and perspectives to inform legal and political advocacy, in line with movement lawyering principles.[197] Movement lawyering is an approach that aligns legal and political strategies with social movements to help advance their goals and build their power, often through advising movement campaigns.[198] Campaigns can have various goals, including policy reform, public awareness, and building a movement's organizational capacity.[199]

Movement lawyers take their agenda directly from movement actors to inform advocacy efforts "inside or outside formal lawmaking spaces,"[200] prioritizing collective actions and empowering mobilized communities fighting against climate change, the PIC, wealth inequality, systemic oppression, and more.[201] This decades-old approach is experiencing renewed popularity as intensifying, systemic injustices deepen the rift between the cautious progress of public interest law and the

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relief, whether it mobilizes the most affected people for an ongoing struggle, and whether it legitimizes or expands a system the movement is trying to dismantle); *id.* at 34:10 (asking whether the reform will "expand the system that we're trying to dismantle," and if we will "have to undo this later.").

195 The Evergreen State College Productions, *Coming Together Speaker Series: Dean Spade*, YouTube (May 4, 2018), https://www.youtube.com/watch?v=D1HtLMi-ELU (at 34:10).

196 Akbar, Response, *supra* note 192, at 105.

197 *See* Futrell, *supra* note 162, at 125 ("Lawyering that is rooted in more radical strategies, such as movement lawyering . . . , emphasizes the idea that those most impacted by the systems we are fighting against are in the best position to lead and set the representation goals.").

198 Scott L. Cummings, *Movement Lawyering*, 27 U. Ill. L. Rev. 1645, 1646 (2017); Akbar, Ashar & Simonson, *supra* note 161, at 827.

199 Akbar, Ashar & Simonson, *supra* note 161, at 827.

200 Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 Geo. J. Legal Ethics 447, 452 (2018).

201 For further descriptions, *see* Cummings, *supra* note 198, at 1645–46 (providing examples of legal mobilization against antiterrorism policies following the September 11 attacks, restrictions on marriage equality for LGB individuals, bank bailouts during the subprime mortgage crisis, and more recently against police brutality and mass incarceration by the Movement for Black Lives beginning in 2015); Akbar, Ashar, & Simonson, *supra* note 161, at 824–25, 830–32 (providing further examples of social movements mobilizing against various contemporary crises, including fallout from the COVID-19 pandemic).

animated vigor of grassroots activism.[202] Especially where lawmakers have been too slow to regulate harmful industries, leaving judges to adjudicate complex, consequential issues, movement lawyering offers an alternative path for lawyers hoping to promote justice by furthering outcomes aligned with ground-up democracy and collective action—without depending on individualized client goals and the whims of judicial decision-making through impact litigation alone.[203] When a social movement is nascent or weakly organized, however, movement lawyers fall back on more traditional legal advocacy tools to raise issue-specific consciousness and connect that awareness to movement-building activities.[204]

Along with representing mobilized clients, another key feature of movement lawyering is the use of integrated advocacy. Movement lawyers consider all available strategies and use a variety of them, together or apart, linearly or concurrently, to inform advocacy that empowers their collectivist clients.[205] In this context, legal skills cover a broad swath of competencies that include traditional skills, like written and oral advocacy in litigation, as well as community education, media outreach, advising activists, crafting policy positions and advocating for policy reform, and counseling movement actors on legal strategies they can use to influence policymakers.[206] It essentially "reframes" what lawyering entails from a "narrow lens of technical legal skill" to the "broader art of persuasion."[207] This requires creative and strategic thinking skills to pull a wide variety of potential actions into an overarching strategy that is most likely to bring a movement-client's demands to life.[208] While more traditional legal representations also require some amount of strategic thinking, hallowed mechanisms like precedent and professional training tend to "preserve stability" and predictability in legal outcomes. In contrast, movement lawyering pushes lawyers to think outside the litigation box, placing legal strategy as defined by lawyers in service to a broader political strategy defined by the movement.[209]

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202 *See* Akbar, Ashar, & Simonson, *supra* note 161, at 825 ("This particular moment of political, economic, and social crisis demands that more of us consider how to work alongside social movements"); Cummings, *supra* note 198, at 1646. *See also* Carle & Cummings, *supra* note 200, at 452–59 (comparing movement lawyering and public interest lawyering in the 1970s).

203 Akbar, Ashar & Simonson, *supra* note 161, at 827 (noting that social movement clients often challenge existing authorities through "action that occurs outside of the domain of formally-sanctioned lawmaking or dispute resolution").

204 *See* Cummings, *supra* note 198, at 1694–95 (describing New York Civil Liberties Union's litigation and movement building opposing solitary confinement).

205 *Id.* at 1653.

206 *Id.* at 1691.

207 *Id.* at 1703.

208 *Id*. at 1704 (listing several movement tactics).

209 *Id.* at 1695.

Several clinicians working with overpoliced and criminalized communities have adopted a PIC abolition vision in their pedagogy, encouraging students to use integrated advocacy to push for movement-driven reforms in criminal defense, immigrant rights, and family regulation contexts. This vision allows students in criminal defense clinics to critically analyze and challenge our criminal legal institutions.[210] Similarly, in immigrant rights clinics, adopting this vision shifts focus from procedural reforms to challenging structural injustices like detention and deportation.[211] And clinics challenging family policing integrate PIC abolition to intervene as early as possible for their clients, ideally minimizing the chances of state encroachment and violence.[212] By fostering this critical perspective, students can reassess their roles as lawyers within oppressive systems, promoting social consciousness and responsibility.[213] Clinicians who prioritize non-reformist outcomes help shrink the carceral state's effect on the communities they represent and show students that transformative change is possible, even in the most entrenched and violent of legal systems.

A PIC abolitionist vision is beneficial for clinicians and their students, offering a foundation to reflect on the law's limitations and its role in legitimizing harmful systems. By embracing PIC abolition, clinics challenge the assumption that oppressive institutions are immutable parts of society.[214] Tech clinics can draw inspiration from this approach to challenge the relentless pursuit of data-driven innovation that so often results in carceral tech. As state and corporate entities amass immense data power through these innovations, tech clinicians risk perpetuating this status quo without a clear, critical vision guiding their work.

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210 Futrell, *supra* note 162, at 107.

211 *See, e.g.*, Sherman-Stokes, *supra* note 78; Laila L. Hlass, *Lawyering from a Deportation Abolition Ethic*, 110 Cal. L. Rev. 1597 (2022); Alina Das, *Immigration Detention and Dissent: The Role of the First Amendment on the Road to Abolition*, 56 Ga. L. Rev. 1433 (2022); Angélica Cházaro, *The End of Deportation*, 69 UCLA L. Rev. 1040 (2021).

212 *See* Wendy A. Bach, Prosecuting Poverty, Criminalizing Care (2022); Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World (2022); Dorothy Roberts, *Why Abolition* (2023), https://doi.org/10.1111/fcre.12712; Dorothy Roberts, *Building a World Without Family Policing*, LPE Project (July 17, 2023), https://lpeproject.org/blog/building-a-world-without-family-policing/ ("Family policing, like criminal law enforcement and prisons, is designed to serve the US racial capitalist power structure … by regulating and disrupting the most disenfranchised populations in place of meeting human needs."); Julia Hernandez & Tarek Z. Ismail, *Leveraging Law School Clinics Against Family Policing*, LPE Project (Nov. 8, 2022), https://lpeproject.org/blog/leveraging-law-school-clinics-against-family-policing/ (describing CUNY's Family Defense Program practicum approach of "radical early defense," involving representing clients at the earliest possible moment to restrict or eliminate the state's ability to harm them).

213 Futrell, *supra* note 162, at 107.

214 *Id.* at 109.

B. A Data Justice Vision

Data justice links data-driven technologies to a social justice agenda, focusing on the power dynamics inherent in our data-centric lives.[215] The concept highlights how datafication exacerbates existing inequities through pervasive data pipelines, shaping social relations and influencing what information is made valuable and actionable.[216] Data justice specifically examines the impacts of this process on structurally-marginalized communities, addressing how they become reduced, (mis)represented, and (mis)treated in data production.[217] It situates data within broader social conditions, questioning how social justice evolves amidst datafication and advocating for more equitable practices in a data-driven society.

Advancing a data justice vision dissolves the notion that data and surveillance issues are niche specialties, transforming them into core features of social justice.[218] By integrating data critique into a broader social justice agenda, data justice decenters the traditional, critical focus on specific technologies and how they function. Instead, it situates new technologies within broader systems of oppression and gives those with a history of struggle against these systems a special say in what constitutes data harms.[219]

Data justice moves away from a critical narrative on mass surveillance or mass data collection that implies everyone is equally impacted by highlighting how datafication harms are not experienced equally.[220] Through a systemic lens, it opens up a narrative space to inspire collective mobilization on data harms.[221] To put a data justice vision into action, advocates must prioritize collaborations and coalitions that unite tech-focused expertise with social justice movements to raise data consciousness, build solidarity, and support mobilization to resist corporate data power.[222]

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215 *See* Taylor, *supra* note 57.

216 *See supra* Section I.A.

217 *See* Angela Calabrese Barton, Day Greenberg, Chandler Turner, Devon Ritter, Melissa Perez, Tammy Tasker, Denise Jones, Leslie Rupert Herrenkohl & Elizabeth A. Davis, *Youth Critical Data Practices in the COVID-19 Multipandemic*, 7 Area Open (2021) (noting how specific communities are "made (in)visible, (mis)represented, and (mis)treated").

218 *See* Lina Dencik, Arne Hintz & Jonathan Cable, *Towards Data Justice? The Ambiguity of Anti-Surveillance Resistance in Political Activism*, 3 Big Data & Soc'y (2016) (spanning social, political, cultural, ecological, and economic justice).

219 Lina Dencik & Javier Sanchez-Monedero, *Data Justice*, 11 Internet Pol'y Rev. 1, 9 (2022).

220 *Id.*

221 *Id.*

222 *See* Hintz et al., *supra* note 136, at 165 (highlighting emerging coalitions between "digital rights networks and refugee networks, between social security workers, local activists and unions, between teachers, parent groups, anti-racism groups and migrants' rights organizations").

To train the next generations of advocates, tech clinics should embrace a data justice vision informed by direct representation of clients with a nexus to mobilized groups fighting carceral tech, just as other clinics serving overpoliced and surveilled clients embrace a PIC abolitionist vision to inform their advocacy.[223] This vision will help tech clinics deprioritize technocratic perspectives on making carceral tech fairer, more transparent, and more accurate. Clinics can move towards a deeper structural understanding of how these technologies "fit into the political system" characterized by mass incarceration, deportation, detention, poverty, and chronic health and financial insecurity.[224] A data justice vision pushes clinicians to take a more expansive view of the impact of tech law and policy advocacy by focusing on the underlying power arrangements that underrepresent harmed communities in tech reform conversations.[225] By amplifying their perspectives, tech clinics can help build countervailing power for those who currently have no say over what technologies are built, for which purposes, and how they are deployed in their own neighborhoods.[226]

Tech clinics can become more effective partners in building people data power to resist stopgap caracal tech by centering the perspectives of impacted communities.[227] Through fieldwork opportunities that bring them in direct conversation with these communities, clinicians can expand students' learning opportunities and ensure students become data justice ready.

C. Data Justice Readiness

In her seminal piece, Jane Aiken argues that clinics must not only prepare students to practice law but to be justice ready as well.[228] A student who is justice ready is both aware of and dedicated to fighting injustice, and they becomes so when their clinical instructors commit to revealing injustices with their client communities, operant legal systems, and broader society.[229] Aiken urges the clinical community to create

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223 *See supra* Section II.A.

224 Katz, *supra* note 116, at 132.

225 *See* Howard Erlanger, Bryant Garth, Jane Larson, Elizabeth Mertz, Victoria Nourse & David Wilkins, *Is It Time for a New Legal Realism?*, 2005 Wis. L. Rev. 335, 339–40 (2005).

226 *See* Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 Women's Rights L. Rep. 7 (1989).

227 *See* Brown Hayat, *supra* note 174, at 162 ("[I]f you are directing an immigration clinic, cite immigrants. If you are directing a criminal clinic, cite incarcerated people. If you are directing a clinic that represents indigenous people, consider populating your syllabus with the intellectual production of Native peoples.").

228 Aiken, *supra* note 26.

229 *Id.* at 234.

strategies that ensure future lawyers appreciate justice, noting that the "key to transformation is critical reflection."[230]

To facilitate critical reflection, clinicians must choose clients and projects that are likely to have an emotional impact on students.[231] A similar insight comes from clinicians serving poor, disabled, elderly, and otherwise marginalized clients, whose students regularly question their prior notions of social justice through their clients' interactions with deeply unjust legal systems.[232] The well-known "disorienting moment" follows when a student's prior notions of social reality fail to explain the clients' situation, inviting a moment of rupture for the student to critically reflect on the dominant societal norms she had internalized.[233] Crucially, clinicians must design learning opportunities that will likely lead to disorienting moments.[234] Many students are so moved by these emotional, transformative moments that they change their career goals, their perception of what lawyers owe to marginalized communities, and/or their attitudes on the state's role in ensuring the social and economic security of all people.[235]

While data justice readiness can be partially achieved through reflections on critical reading materials in clinics with a seminar component, clinicians can increase the emotional impact of data injustices through fieldwork involving carceral tech.[236] By selecting clients and projects where students have more direct contact with communities affected by and/or mobilized against carceral tech, clinicians can supplement seminar discussions with real-life examples of how data-driven technologies tend to worsen unjust social conditions rather than resolve them. Students will gain first-hand knowledge of how the technology ecosystem is more often disempowering than liberatory by seeing how

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230 *Id.* at 237, 239.

231 *Id.* at 242.

232 *See* Quigley, *supra* note 163.

233 *Id*. at 46–47, 51–52.

234 *Id.* at 51.

235 *Id.* at 56.

236 Building on Professor Aiken's insights, Amanda Levendowski offers tech clinicians a roadmap for preparing students to be justice ready by teaching doctrine to supplement casework for clients, especially useful when cases and projects may be limited or too variable to provide consistent opportunities for students to develop their justice orientation. Levendowski, *supra* note 27. She challenges the common misconception held by students that these areas of law do not implicate issues of social justice, highlighting several intellectual property and information policy issues that push students to reflect on and ultimately transform currently unjust legal regimes. *Id.* at 111–12. In offering a doctrinal channel for teaching justice readiness, however, she acknowledges that not all casework opportunities necessarily raise issues of justice in tech clinics. *Id.* at 112 n.6. While this Article focuses solely on client and project selection, clinicians can read both pieces together for a more comprehensive data justice pedagogy.

their clients struggle against social, racial, and economic oppression amplified by datafication.

When students work on data justice issues through their fieldwork, they also expand their skillset to include integrated advocacy. Representing groups fighting carceral tech requires students to consider how best to support their actions, above and beyond traditional litigation skills like brief writing and oral advocacy. While their clients may choose to bring or join active litigation, more often these types of projects will push students to advocate for specific, non-reformist policies by researching and drafting proposals, providing written legal opinions to support clients' positions, and counseling the client on different negotiation tactics in meetings with policymakers or private actors. They will learn when and how to engage the media, increase public awareness, and develop community education materials. Beyond supporting actions and campaigns, students will also learn the importance of coalition-building skills, including navigating substantive disagreements among different movement actors.

Giving students this knowledge through direct experience is a powerful way to encourage data justice readiness, regardless of whether students go on to practice tech law. As tech companies enmesh their product solutions in more diverse industries and markets, being data justice ready is essential for all future lawyers and advocates. So, how can tech clinics choose clients and projects to cultivate data justice readiness?

III. Using Data Justice Readiness to Guide Client and Project Selection

As public concerns over data-driven technologies grow, tech clinics are starting to include more data justice issues in their clinical teaching.[237] Beyond seminar discussions, however, clinicians are uniquely positioned to adopt an explicit data justice vision to guide their pedagogy and to select prospective clients and projects in alignment with that vision.[238]

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[237] *See, e.g.*, Luona Lin, *A Quarter of U.S. Teachers Say AI Tools Do More Harm than Good in K-12 Education*, Pew Rsch. Ctr. (May 15, 2024), https://www.pewresearch.org/short-reads/2024/05/15/a-quarter-of-u-s-teachers-say-ai-tools-do-more-harm-than-good-in-k-12-education/; Michelle Faverio & Alec Tyson, *What the Data Says About Americans' Views of Artificial Intelligence*, Pew Rsch. Ctr. (Nov. 21, 2023), https://www.pewresearch.org/short-reads/2023/11/21/what-the-data-says-about-americans-views-of-artificial-intelligence/ (finding over 50% are more concerned than excited); Michelle Faverio, *Key Findings About Americans and Data Privacy*, Pew Rsch. Ctr. (Oct. 18, 2023), https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/ (finding over 70% are concerned about personal data collection).

[238] To the author's knowledge, the only programs dedicated explicitly to representing data justice issues are Georgetown Law's Communications & Technology Law Clinic and Intellectual Property and Information Policy Clinic.

Clinicians who adopt an explicit data justice vision will have a principled, transparent guide for picking matters that prioritize issues at the intersection of data-driven technologies and social, racial, and economic justice. Like most clinicians, tech clinicians often have a gut feeling about how much of the clinic's time and resources should be allocated to advocating for a particular group or cause, and who the clinic views as optimal "winners and losers" on a particular tech law issue.[239] These considerations, both practical and substantive, bear out in their choices of which clients to represent on which types of cases. But when a clinic lacks an explicit vision of justice or theory of change, selection decisions may overvalue clients with a certain level of prestige, expertise, and/or organizational consistency, even when those clients may not be in solidarity with communities harmed by carceral tech. At best, students may represent civil society groups or coalition members that routinely advocate on behalf of these communities but could be more representative of community needs themselves.[240] These projects may also lack opportunities for integrated advocacy skill-building.[241] As a result, students may reproduce traditional legal outputs parroting incremental reform suggestions that do not go as far as they could to resist carceral tech.

This Article argues that tech clinics should instead be explicit about their priorities and consider adopting a data justice vision to guide their pedagogy. Data justice involves shifting power back to mobilized communities currently harmed by carceral tech, which are technologies of social control that compound structural inequities. Data justice readiness requires clinicians to prioritize fieldwork opportunities that increase students' exposure to these communities' experiences, perspectives, and needs, especially where they advocate against carceral tech.

This Section walks interested clinicians through the process of selecting clients and projects aligned with a data justice vision. During this process, tech clinics should focus on the intersection of mobilized client goals, broader movement goals, and student learning opportunities. The assessment should ensure a close fit between these three variables, emphasizing how this client or project would further a data justice vision. This Section draws from the Appendix, which provides a draft clinical mission and intake form. The following discussion further describes each step of the intake form and highlights key questions for clinicians to consider. It then applies the framework to three prospective projects to demonstrate how these questions can guide intake decisions in real scenarios.

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239 Miller, *supra* note 168, at 146.

240 *See supra* I.B.

241 *See id.*

Ideally, the framework will be applied proactively in assessing potential clients and projects, but clinicians can also apply it retroactively to past projects to help measure the extent to which their fieldwork opportunities are already aligned with a data justice vision. There are also several practical considerations involved in client and project selection that are not captured by this framework, including the scope of the project, whether one or two semesters is enough time, and whether students will be interested. For the sake of simplicity, this Section assumes away any practical hurdles to focus attention solely on the data justice framework.

A. The Data Justice Framework

First, prioritize projects involving mobilized clients. Such clients can be mobilized in or have a nexus with any social justice movement organized to confront oppressive, unjust, and undemocratic systems including racial inequity, economic exploitation, and cultural exclusion. During selection, the client should be able to articulate which movement(s) they are involved in, and give examples of current or past work advancing movement goals. Ideally, prospective clients will also serve a structurally-marginalized community, like IBPOC or other minority communities, poor and economically disinvested communities, 2SLGBT+ communities, immigrants, People with Disabilities, laborers, and more.

Clients may already be engaged in activism against a carceral tech or program raising data justice issues, especially when their communities are directly harmed. Such tech or programs can include biometric surveillance technologies (facial recognition, emotion/affect recognition, automated gender recognition, DNA/genetic information tracking); predictive policing programs and databases; private-public partnerships; e-carceration; automated license plate readers; drones; smart border technologies; gig work and work-related surveillance; education surveillance; and public benefits technologies (including automated fraud detection programs used in housing, childcare, and healthcare systems).

These nascent movements serve as a necessary counterweight to the datafied status quo that has funneled immense power into the boardrooms of technology companies and their government customers. They attempt to shift that power back to the people to realize a participatory vision that Hannah Bloch-Wehba calls "the democratic vision of algorithmic governance."[242] By applying a power lens to the technology

[242] Bloch-Wehba, *supra* note 75, at 73.

ecosystem, these movements fight to build a contestatory democracy.[243] Through mobilization and boots-on-the-ground activism, the goal is to "introduce a bit of friction" between the technology ecosystem of today and what could be possible in the future.[244] For example, activists from the Stop LAPD Spying Coalition, a grassroots community group building local people power to abolish police surveillance, articulate their cause simply: "[W]e oppose government and corporate surveillance of all kinds, we will never support it, and we will not work with anyone who does."[245] Meanwhile for CTRN, a grassroots movement resisting carceral technologies, their cause is to organize against "carceral institutions, actors, and systems—not surveillance" because they are skeptical of the ways that privacy advocates have been ineffective in stopping surveillance practices by focusing on their "creepiness."[246] CTRN sees their work as opposing "a category of violence—legally sanctioned violence by the carceral state—that has a long history of radicalized surveillance, and a short history of digital surveillance."[247] Carceral tech are inherently violent, so their movement's goal must go beyond making them less invasive.[248] Although they may articulate their causes differently, these and several other emerging resistance groups understand that data justice requires organizing against the conditions that make carceral tech possible.[249]

Alternatively, the client may be part of a social movement whose main cause(s) are impacted by data-driven technologies, regardless of whether the client and/or impacted community members are aware of that tech or impact. As data justice is a relatively new concept, clinicians need not solely focus on existing activism in this space, or worse, wait for explicit data justice movements to form. Data power has deepened preexisting inequities that affect already-mobilized communities, including overpoliced and criminalized communities, immigrants and undocumented people, poor people, queer and trans people, sex workers, laborers and gig workers, and many more. Tech clinicians can prioritize matters representing social, economic, and racial justice movement actors as they grapple with carceral tech affecting their communities—including those that may impede effective organizing in the first place.

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243 Simonson, *supra* note 189, at 787. *See also* Bloch-Wehba, *supra* note 75, at 75 (giving them the power to determine "whether, how, and when we ought to be governed by technology").

244 *Abolishing Carceral Technologies*, *supra* note 83.

245 Lopez, Bush, Khan & Montenegro, *supra* note 60.

246 *Abolishing Carceral Technologies*, *supra* note 83.

247 *Id.*

248 *Id.*

249 *Id.*

Clinics can help inform a variety of movement actors and their communities on data power and resisting carceral tech, raising data consciousness of the ways that data-driven technologies may be causing harm without assuming that people already have this knowledge. Students will be able to develop a deep understanding of the gaps between data consciousness and social justice consciousness within certain movements, ideating new and creative campaigns that use community members' lived experiences of injustice as an entry point into tech policy advocacy from the bottom-up. These types of projects also invite cross-clinical collaborations, as other clinics often have deep connections to local communities experiencing social precarity and may be better positioned to help tech clinics analyze the effects of carceral tech on these communities.

Second, prioritize projects that support non-reformist tech reform goals. A data justice vision includes shrinking the tech industry's unwieldy data power by enhancing people power in areas that carceral tech are used in place of collective care. Practically, that means the intended outcomes of a clinic project will help remove a technology from a harmed community altogether, like the bans on police use of facial recognition technology that spread throughout the country because of organized resistance.[250]

Social movements often advocate for a very different vision of tech reform than those embraced by academics, experts, and policymakers. While experts tend to ask incidental questions that accept the inevitability of data-driven products, data justice activists tend to ask foundational, structural questions that challenge it. They reject "bureaucratic oversight, legal accountability, and electoral safeguards" as the main ways to curtail carceral tech and embrace direct resistance techniques like walkouts and protests instead.[251] They organize around data politics, asking how and why society has come to rely on private technologies to address complex social issues in the first place.[252] By fighting to limit or prohibit the use of certain technologies by the state in low-rights, high-risk contexts, they naturally oppose common technocratic policy suggestions. For example, Stop LAPD Spying produced a report on the Los Angeles Police Department's use of predictive policing technologies that contained reforms inspired by directly impacted people.[253] Those

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[250] *See* Tate Ryan-Mosley, *The Movement to Limit Face Recognition Tech Might Finally Get a Win*, MIT Tech. Rev. (July 20, 2023), https://www.technologyreview.com/2023/07/20/1076539/face-recognition-massachusetts-test-police/.

[251] Bloch-Wehba, *supra* note 75, at 89.

[252] *See* Simonson, *supra* note 189, at 809.

[253] *See* Before the Bullet Hits the Body: Dismantling Predictive Policing in Los Angeles, Stop LAPD Spying Coalition (2018), https://stoplapdspying.org/wp-content/uploads/2018/05/Before-the-Bullet-Hits-the-Body-May-8-2018.pdf.

responses differed starkly from reformist calls for "more interdisciplinary academic expertise, new public-private partnerships, or increased federal oversight."[254] Those surveyed instead sought more investments directly into their communities, an outcome that changing a predictive policing algorithm's threshold to make it more "fair" or less "biased" cannot achieve.[255]

These movements create a clear dichotomy between reformist tech reforms that prioritize making tweaks to carceral tech and non-reformist tech reforms that challenge the underlying conditions for their existence. The latter reforms target the conditions that enable carceral tech to be profitable and popular forms of social control—often advocating for their removal and rejection—while the former leave those conditions under-investigated and unchallenged.[256]

As with PIC reform, there is a shared danger that the conventional tech reform agenda is very far removed from movement voices, instead inviting further investments into the tech industry, and building its power, legitimacy, and resources.[257] Non-reformist tech reforms would instead shift power, legitimacy, and resources away from the tech industry and state actors to those currently affected by carceral tech. The data justice-aligned tech clinic should assess whether a prospective project's outcome is non-reformist, asking whether it works to shift (1) money, (2) discretion, (3) or power over the carceral tech or program to affected communities and away from industry and state actors.

(1) For shifting money, clinicians should ask: How does the project's outcome help redistribute funding and resources to targeted communities? And how does it improve the community's material conditions?
(2) For shifting discretion, clinicians should ask: How does it move authority from elite/specialist voices to the most marginalized members affected by the technology, program, or policy at issue? How does it empower community members to understand, redesign, and/or refuse the technology *before it is deployed*? And how does it create space for community-led experimentation with the technology, program, or policy as a result?
(3) For shifting power, clinicians should ask: How does it reduce the capacity for companies and/or state actors to target, classify,

254 Katz, *supra* note 116, at 146.
255 *Id.* (citing Before The Bullet Hits The Body, *supra* note 253).
256 *See* Malkia Devich-Cyril, *Targeted Surveillance, Civil Rights, and the Fight for Democracy*, MediaJustice (Oct. 13, 2015), https://mediajustice.org/news/targeted-surveillance-civil-rights-and-the-fight-for-democracy/ ("It's time to revolt and reject the use of technology to uphold the caste system in this country.").
257 *See supra* Section I.B.

> coerce, punish, and/or control structurally-marginalized communities, including people of color, women, queer and trans* folks, immigrants, poor people, people with disabilities, unhoused people, incarcerated or formerly incarcerated people, sex workers, and others? How does it reduce the scale of the technology's effect on structurally-marginalized communities? And how does it reduce the government's reliance on algorithmic violence?

These criteria, borrowed from various PIC abolitionists, emphasize the importance of making space for directly impacted people to control the regulation and oversight of carceral tech in their communities. Tech clinics can and should be an active partner in their struggle, supporting non-reformist tech reforms that disrupt the status quo. Clinics can prioritize projects whose outcomes align with such reforms, helping produce a more imaginative, transformative policy agenda centering the voices of mobilized clients in determining the future flow of data power away from industry and government and towards the disempowered.

Third, prioritize projects that allow students to practice integrated advocacy skills. To maximize student learning opportunities, tech clinics should gauge the likelihood that students will need to use strategic and persuasive skills to further the client and movement's goals. Beyond traditional litigation and policy advocacy skills, these also include: supporting organizing action by counseling the client on the risks and benefits of different kinds of political actions, raising public awareness through opinion pieces, creating community education resources on legal strategies and related project findings, drafting administrative or other strategic materials to advance the client's advocacy and outreach, and helping the client with coalition-building needs by facilitating meetings among relevant stakeholders. An additional benefit is if a prospective project invites cross-clinic collaboration opportunities, allowing students to coordinate their advocacy efforts with justice-oriented clinics in other substantive areas like environmental law, immigration, criminal defense, family regulation, poverty law, and labor.

B. Potential Obstacles for the Data Justice Tech Clinic

While there are numerous new skills that students can gain from these types of projects, there are also a few obstacles that may arise for tech clinicians interested in adopting a data justice framework.

First, they may not have the necessary skills, knowledge, and cultural competencies to select and supervise data justice projects. This is a productive obstacle that encourages tech clinicians to reflect on their own positionality within privileged, technocratic institutions like law

schools vis-à-vis the local communities they are situated within. Not all clinicians are well-positioned to adopt this framework, but some are, and many more can easily become so.

Second, assuming they are sufficiently culturally competent, tech clinicians may be used to an ad hoc client selection process where former colleagues, collaborators, and other experts from their practice days send them potential projects. This is an obstacle because it requires clinicians to step away from the comfortable flow of projects from often prestigious, well-regarded clients to instead trace potential projects from within social movements that clinicians may not have prior connections with. This can also be a positive challenge, though, because it encourages tech clinicians to invest their time and energy in developing critical consciousness, attending political actions and local movement meetings both to learn about community issues and ideate potential fieldwork opportunities. This also encourages tech clinicians to follow the work of other clinicians focusing on community lawyering, movement lawyering, and other social justice issues, to see if there are potential synergies where data-driven technologies are involved.

Finally, there may be institutional obstacles for clinics embracing a data justice vision explicitly. Institutional stakeholders may not associate technology law with social justice and may see this repositioning as threatening to the appeal of the law school's tech offerings externally, especially in states where social justice issues are deprioritized in higher education. While unfortunate, this obstacle may be harder to overcome and require organizing support from funders and potential clients before achieving leadership buy in. Ultimately, clinicians may choose to balance their traditional approaches to project selection with the data justice approach, ensuring a mixture of projects in which data justice issues are there but do not dominate students' fieldwork experiences.

C. Applying the Data Justice Framework

This section applies the intake framework to three potential projects. The first two projects were completed by student advocates at New York University School of Law's Technology Law and Policy Clinic in the 2022–2023 academic year.[258] The last project is a hypothetical inspired by ongoing advocacy by direct care workers and their clients against electronic surveillance. All three projects involve working with movements but vary in how the data justice framework applies. The first

[258] Examples used with permission. The Author directly supervised the first two projects as a Supervising Attorney with the Clinic. A large caveat is that we did not undertake the following representations after explicitly adopting a data justice vision and committing to representing mobilized clients.

project is least likely to pass muster, the second project could pass, and the last project passes easily.

1. Least Likely: Cyber Civil Rights Initiative

The first project represents two law professors involved with an advocacy group called the Cyber Civil Rights Initiative (CCRI).[259] CCRI envisions a world "in which law, policy, and technology align to ensure the protection of civil rights and civil liberties for all," and more specifically supports legislation, policy, and lawsuits challenging image-based sexual abuse (IBSA) online. To that end, the organization is comprised of some individuals who have experienced IBSA, working alongside scholars and lawyers with expertise in laws related to online IBSA.

For this project, students will work directly with expert law professors to assess a draft state bill regulating non-consensual deepfake pornography. The professors wrote and revised the draft bill at the request of a lawmaker and will act as intermediaries between her and the students. To assess the bill, students will immerse themselves in various First Amendment and other legal issues concerning online speech and privacy, becoming experts in deepfake technologies in the process. They will produce a series of memoranda supporting specific language revisions that could minimize First Amendment challenges to the bill before it is introduced.[260]

Though this project helps advocate for survivors of IBSA increasingly subjected to deepfake harms with the help of generative AI tools,[261] it does not meet many of the framework's requirements. The students would work directly with two experts on a discrete policy outcome—the drafting of a bill—who are part of a movement organization in solidarity with a marginalized community, those who have experienced online

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259 *See History/Mission/Vision*, Cyber C.R. Initiative, https://cybercivilrights.org/about/ (last visited Aug. 20, 2024).

260 The bill was officially introduced before the state legislature in early 2023 and was enacted in early 2024. *See Gong-Gershowitz Sees "Deepfake" Bill Pass House*, Jennifer Gong-Gershowitz (Apr. 12, 2023), https://www.gonggershowitz.com/gong-gershowitz-sees-deepfake-bill-pass-house/; *New Illinois Laws 2024: Full List of Laws in Effect on Jan. 1*, ABC7 Chi. (Feb. 12, 2024), https://abc7chicago.com/new-illinois-laws-2024-full-list-pritzker/14184011/ (listing HB 21213: Digital Forgeries).

261 *See, e.g.*, Matt Burgess, *The Biggest Deepfake Porn Website Is Now Blocked in the UK*, Wired (Apr. 19, 2024, 12:54 PM), https://www.wired.com/story/the-biggest-deepfake-porn-website-is-now-blocked-in-the-uk/; Kat Tenbarge, *Beverly Hills Middle School Expels 5 Students After Deepfake Nude Photos Incident*, NBC News (Mar. 8, 2024, 12:55 PM), https://www.nbcnews.com/tech/tech-news/beverly-hills-school-expels-students-deepfake-nude-photos-rcna142480; Nicholas Kristof, *Deepfake Porn Sites Used Her Image. She's Fighting Back*, N.Y. Times: The Opinions Podcast (Apr. 8, 2024), https://www.nytimes.com/2024/04/08/opinion/deepfake-porn-tech.html.

IBSA, 99% of whom are women.[262] Their choices in crafting the regulation were made with this community in mind, so students would learn how to analyze the legal consequences of certain draft provisions while centering the needs of this community. Despite this alignment with a social movement, however, the students are not developing integrated advocacy skills like community education or campaign strategy, as this project does not involve broader political activities outside of assessing a draft bill. The students would develop their legal reasoning and writing skills by working through First Amendment arguments against such legislation, but no more.

Finally, the project's outcome just marginally aligns with the non-reformist criteria of shifting money, discretion, or power over nonconsensual deepfake pornography away from deepfake developers or state actors to affected communities directly. If passed, the bill contains a private right of action that enables survivors of nonconsensual deepfakes to sue creators after the fact, slowly, through case-by-case litigation. At best, the proposed bill represents a first step in increasing state power to regulate the internet to prevent online IBSA, which could usher in survivor-led lawsuits that may eventually recompensate harm.[263] But for project selection purposes, that result may be too attenuated to pass muster.

2. Somewhat Likely: Just Futures Law

This project involves a conventional tech clinic output—a draft amicus brief—but for an unconventional client. Just Futures Law (JFL) is a movement lawyering organization committed to immigrant justice.[264] They seek to "transform how litigation and legal support serves communities and builds movement power," and they often work in coalition with community organizers and activist groups.

Students would work directly with the Co-Founder and Legal Director of the organization in a lawsuit against Clearview AI, a notorious facial recognition company who licenses its application to law

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262 Lucy Morgan, *It's Not Just Taylor Swift—*All *Women Are at Risk from the Rise of Deepfakes*, Glamour Mag. (Jan. 31, 2024), https://www.glamour.com/story/taylor-swift-all-women-are-at-risk-from-the-rise-of-deepfakes. 98% of all deepfake videos online are pornographic videos. *See 2023 State of Deepfakes*, Home Sec. Heroes, https://www.homesecurityheroes.com/state-of-deepfakes/ (last visited Aug. 20, 2024).

263 More recently, federal lawmakers are considering two competing bills regulating non-consensual deepfake pornography. One puts the burden on social media platforms to take down such content, while the other allows survivors to sue people who held, created, or distributed such content. *See* Emily Wilkins, *New AI Deepfake Porn Bill Would Require Big Tech to Police and Remove Images*, CNBC (June 18, 2024, 5:00 AM), https://www.cnbc.com/2024/06/18/senate-ai-deepfake-porn-bill-big-tech.html.

264 *See About Us*, Just Future L., https://www.justfutureslaw.org/about (last visited Aug. 20, 2024).

enforcement agencies throughout the United States.[265] The lawsuit represents several immigrant rights activists and organizations, including Mijente and NorCal Resist, who allege that Clearview's facial recognition app violated several of their privacy and First Amendment rights when local police departments licensed it to use in identifying protestors. Students will work on a draft amicus brief that challenges Clearview's spurious legal defenses.

Although students would produce an amicus brief, this project could still pass the framework for several reasons. First, it represents a movement-aligned client in JFL on a case that was brought to protect the ability of activists and organizers to continue to protest the state's treatment of their immigrant community members. Next, through its alignment with movement actors, the students will be able to practice integrated advocacy by drafting opinion pieces for a general audience derived from their legal research for the amicus brief, doing important translation work around the case that makes their technical and legal expertise more legible to interested readers. Because the lawsuit seeks an injunction on the police's use of Clearview's dangerous carceral technology, a supportive amicus brief could help bring about this outcome. An injunction banning police use is a non-reformist outcome that shifts money, discretion, and power directly away from the technology company and state actors involved—at least in the police jurisdictions involved in this case.

3. Most Likely: Domestic Care Workers Alliance & National Consortium for Independent Living

The last project represents a coalition of domestic care workers and care recipients, primarily people with disabilities and seniors. Students will work on the coalition's campaign to end Electronic Visit Verification (EVV) systems that track care workers' services, as required by federal law for care programs funded by Medicaid.[266] EVV systems vary depending on the technology company providing the platforms, but generally they are workplace monitoring tools that track a worker's time, location, and other personal data to confirm whether they are actually doing their job.[267] While originally sold as a time-keeping tool to reduce "fraud, waste, and abuse" in publicly-funded care services, in practice

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265 *See* Kashmir Hill, *The Secretive Company That Might End Privacy As We Know It*, N.Y. Times (Jan. 18, 2020), https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html.

266 *See* 21st Century Cures Act, H.R. 34, 114th Cong. § 12006 (2016).

267 *See* Serena Oduro, Brittany Smith, & Alexandra Mateescu, Data & Soc'y, Electronic Visit Verification: A Guide to Intersecting Harms and Policy Consequences (2021), https://datasociety.net/wp-content/uploads/2021/11/EVV_PolicyBrief_11162021.pdf.

EVV flags non-compliance with program rules to minimize costs—including the amount that workers deserve to be paid for their labor.[268] There is no clear limit federally to what EVV technologies can collect, incentivizing companies to design systems geared for invasive data collection.[269] EVV systems may use GPS location tracking, geofencing, and biometric data like facial and voice recognition to track care workers directly and recipients indirectly.[270] The mandated use of EVV has made both groups "feel[] criminalized," enforcing ableist assumptions that recipients are homebound which disability rights activists have worked hard to refute, with EVV "enforcing a state of de facto house arrest."[271]

While labor and disability rights groups oppose these systems, several companies profit from multi-year contracts to provide EVV systems in various states.[272] Labor and disability rights advocates continue to call on lawmakers to repeal the EVV mandate, but their calls have fallen on deaf ears. Meanwhile, the incidences of care worker fraud are far from widespread, despite the justifications for the mandate. In California, which has the largest care workforce in the country, one report found a fraud rate of 0.04% statewide.[273] Instead of investing in the care economy directly, enabling workers to receive higher than the poverty-rate salaries they make today and respecting the independence of care recipients, states complied with the mandate by investing in private companies' technology solutions—surveillance systems built off ableist assumptions that trap a largely woman-of-color, immigrant workforce in an inescapable stream of datafication.[274]

Working together with care workers' unions and disability rights activists, students will write a coalition letter to the Centers for Medicare and Medicaid Services, as well as lawmakers on the Committee on Health, Education, Labor, and Pensions, supporting the repeal of the

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268 *See* Virginia Eubanks & Alexandra Mateescu, *"We Don't Deserve This": New App Places US Caregivers Under Digital Surveillance*, Guardian (July 28, 2021, 6:00 AM), https://www.theguardian.com/us-news/2021/jul/28/digital-surveillance-caregivers-artificial-intelligence.

269 Oduro, Smith, & Mateescu, *supra* note 267, at 4.

270 *Id.*

271 *Id.* at 4, 6.

272 For example, Ohio rolled out their EVV program in 2018 after awarding a seven-year, $66.5 million contract to vendor Sandata Technologies and issued smartphones to service recipients without advance notice, training, or information on their data collection practices. *Id.* at 5.

273 Nat'l Council on Indep. Living, Electronic Visit Verification (EVV) Task Force Statement of Principles and Goals (2018), https://www.ncil.org/wp-content/uploads/2018/10/10-15-18-EVV-Principles-and-Goals.pdf.

274 *See* Carmen Roberts, *Recognizing Our Essential Workers: The Women of the Long-Term Care Industry*, Ms. Mag. (Apr. 18, 2023), https://msmagazine.com/2023/04/18/biden-child-care-caregivers-executive-order/ (women represent just over 50% of the population but make up 87% of the home care industry, 62% are people of color and 31% are immigrants).

federal EVV mandate. Additionally, they will work with on-the-ground activists to identify states, like California, where previous advocacy has pushed EVV systems into less invasive practices, using lessons learned from these efforts to create community education materials that the clients can circulate to their members.

This project easily passes the framework. It represents two movements—care workers and people with disabilities and seniors receiving care—and it represents a non-reformist outcome, banning EVV systems. This would shift discretion directly into the hands of activists, as well as funding away from tech companies providing these systems back into public coffers. It involves integrated advocacy skills and puts students in direct contact with those most affected by EVV today, inspiring disorienting moments crucial for data justice readiness.

Conclusion

With the steady stream of datacentric innovations in the past few decades, our current technology ecosystem has begun to feel inevitable. For each complex social issue, there is a tech company that has or will raise immense sums of capital to produce a reductive, data-hungry technology solution. As a result, corporate data power touches almost every economic sector, moving resources and investments away from communities who need them most to support the development of private technologies for state control purposes.

This is the datafied status quo, and it has only intensified in the couple of decades in which both tech clinics and many of their students have existed. So far, tech clinics have not explicitly committed to representing budding resistance movements that fight for more liberatory, democratic, and collective tech futures. This Article serves as a call to action for tech clinics to meet the moment by adopting a data justice vision to guide their pedagogy.

By representing mobilized clients on non-reformist tech reform projects that involve integrated advocacy skills, tech clinics can intentionally bring their work in alignment with a data justice vision and prevent their work—and their students—from falling in line with the status quo. Tech clinics could become incubators for participatory democracy in a technology ecosystem currently defined by massive power differentials between the tech industry and the state, on the one hand, and the public on the other.[275] Students will gain advocacy skills that go beyond litigation to include media strategy, campaign advising, and community education, to name a few. They will also gain critical thinking skills, including the ability to think critically about the role of the law and legal systems in their clients' oppression.

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[275] *See* Archer, *supra* note 170, at 412.

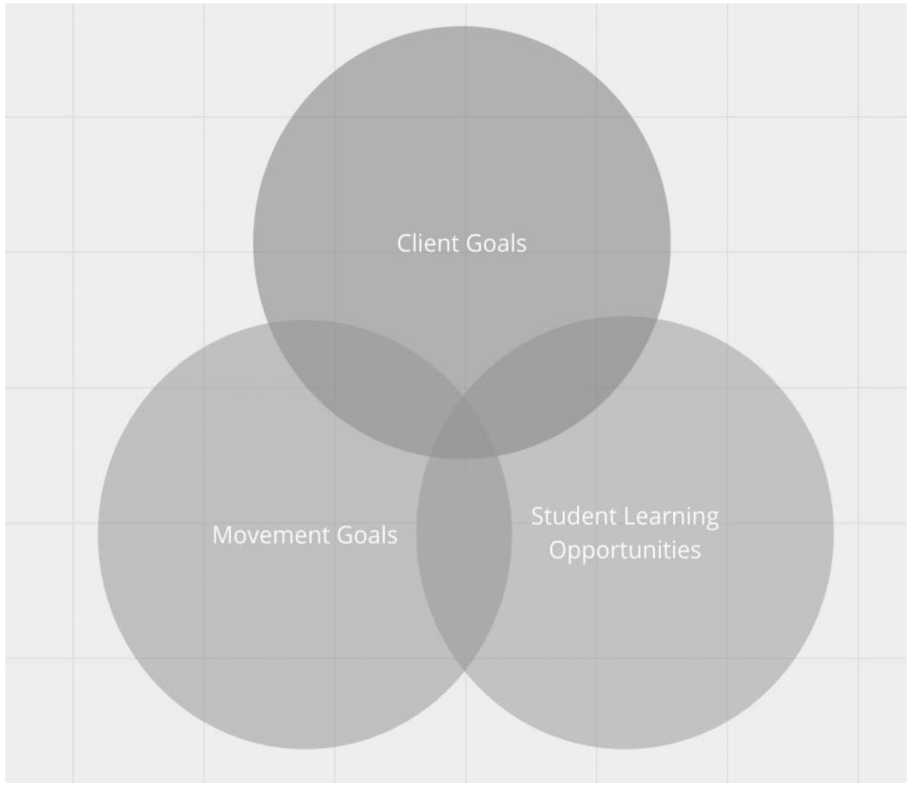
By working on data justice-aligned projects, students will help empower those who are most directly harmed by these technologies but who have the least political ability to transform them. Through one non-reformist tech reform project at a time, tech clinics can help build the transformative tech futures all people deserve.

Appendix

Draft Clinical Mission & Intake Form

The Technology Law and Policy clinic prioritizes clients who have a nexus with mobilized communities to confront, resist, and limit the harms of carceral technologies. These are data-driven tools that classify and control marginalized communities, especially through government programs that outsource social services to corporate technology solutions. The clinic centers marginalized groups affected by such technologies, programs, and policies that are often used to harm their communities, which already face systemic racial, social, economic, and political inequities. Carceral technologies may include biometric surveillance tools, predictive policing, automated decision systems, smart border and city initiatives, and more. We aim to create space within public-interest practice to work with movements to build grassroots power and better represent directly affected communities in tech policy advocacy, attending to clients' own methods of resisting algorithmic violence to shape responsive data justice outcomes.

Our students engage in advocacy that links legal and political skills, including brief writing and oral advocacy, community education, media relations, researching and drafting policy language, writing legal opinions to support policy positions, counseling movement organizations on legal strategy, and coordinating direct action. In the movement lawyering tradition, client needs and priorities shape clinical fieldwork and outputs. We prioritize projects whose outcomes may help shift money, discretion, and/or power over data-driven technologies to those most affected by their deployment. This approach reduces the scale of data harms and empowers mobilized clients to influence tech law and policy directly, challenging the tendency of professionalized experts to dominate the conversation and allowing new narratives beyond a privileged focus on fairness, accountability, and transparency tweaks that fail to reduce corporate data power. Students will have the unique opportunity to gain legal expertise in data justice issues that bridge tech and social justice, while learning about various movement lawyering strategies that legal advocates have developed in successful campaigns beyond the digital sphere.



Project Intake Assessment

The purpose of this assessment is to ensure a close fit between the potential client's goals, our clinic's mission, and student learning opportunities. The following questions are a guide for clinicians and students during and/or following client intake conversations to reflect, assess, and tweak potential projects as needed.

Prospective Client Information

Name (Direct Client):
Organization:
Phone:
Email:
Address:
Clinic Contact:

(1) Client Goals

Type of Client

Note: Any classifications should be made by the prospective client directly.

- ☐ Tech Justice Organization, Coalition/Collective, or Activist(s)
- ☐ Other Social Justice Organization, Coalition/Collective, or Activist(s)
- ☐ 501(c)(3) Nonprofit

Client's Advocacy Goals and Represented Communities

What are the client's goals in their advocacy? If they have a mission statement, please include it below.

For example, the organization Stop LAPD Spying has both a general mission statement and a zine gathering its organizing principles. At its root, the organization is abolitionist and "work[s] to build community power toward abolishing police surveillance."

Which communities does the client serve? Mark all that apply.

- ☐ BIPOC or other racial/ethnic minority communities
- ☐ Poor and economically underserved communities
- ☐ LGBTQ communities
- ☐ Immigrant/Asylum-seeking/Undocumented communities
- ☐ Disabled communities
- ☐ Laborers, especially in low-protection industries (i.e., gig economy, sex work, factory & agricultural work)
- ☐ Others:

(1) "Fit" Between Client & Movement(s) Goals

A social justice movement is a movement of people who believe, organize, and act to confront oppressive, unjust, and undemocratic realities including racial inequity, economic exploitation, and cultural exclusion. Several movements combat white supremacy and racial discrimination, gender and sexuality discrimination, socioeconomic oppression, and national origin discrimination integral to systems of segregated housing, the prison industrial complex, the military industrial complex, police brutality, immigration enforcement, surveillance and censorship, labor exploitation, violence against wom*n and sex workers, U.S. economic and military intervention globally, corporate malfeasance, and human-made climate catastrophes. Most movements are made up of several communities, organizations, and activists who form coalitions to leverage people power and affect change through legal, political, and social means, acting as a counterweight to corporate and state interests.

Is the client part of a broader social movement for racial, economic, social, and/or political justice?

Please specify (mark all that may apply):

- ☐ Racial Justice (BIPOC-focused)
- ☐ Economic Justice
- ☐ Immigrant Rights
- ☐ Labor/Worker Rights
- ☐ Prison/Police Abolition
- ☐ Education & Youth Advocacy
- ☐ Housing/Tenants Rights
- ☐ Civic Participation & Voting
- ☐ Other:

What are the goals of those movement(s) generally? Which communities are served by the movement, and which institution(s) and/or system(s) of injustice does the movement seek to confront, resist, and/or dismantle?

What are some examples of the client's past or current work advancing the goals of the movement(s)?

If applicable, who else does the client typically work with or align with in their advocacy (i.e., membership in coalition(s)).

(2) Student Learning Opportunities

1. What type(s) of technologies, programs, and/or policies is the client seeking help with? Is the client seeking to limit and/or resist a tech-based development (ex. increased surveillance targeting) that harms their community(ies)? Is the client's advocacy otherwise hampered or compromised by a particular technology, program, or policy? Please elaborate.
2. How does the specific technology, program, and/or policy at issue harm the client's members and broader community(ies)?
3. What is the client's desired outcome(s) or end product(s) for this project? How will such outcome(s) further the client's goals articulated above?
4. What forms of political legal advocacy will students undertake as part of their client representation? Mark all that may apply.

- ☐ **Litigation skills** – brief writing, oral advocacy, litigation strategy, etc.
- ☐ **Policy advocacy** – researching and drafting policy language, proposing policy solutions, supporting client's policy positions with written legal opinions, counseling client on different legal strategies and negotiation tactics in meetings with policymakers or private actors

- ☐ **Supporting actions** – advising and defending protestors, counseling client on benefits of different kinds of actions including legal risks
- ☐ **Public awareness & community education** – writing public-facing opinion pieces and other advocacy publications, creating educational resources on legal strategies and related project findings for community members, drafting administrative or other strategic materials to advance client's advocacy and outreach/scope
- ☐ **Coalition-building** – interfacing with relevant stakeholders, including affected community members, government officials, other organizations, movement actors (including lawyers), etc.

5. Would the outcome(s) or any substantive aspect of this project work to shift (1) money, (2) discretion, (3) or power over this technology to affected communities and away from industry and state actors?

(1) Money:

How does it redistribute funding and resources from company and/or state actors to targeted communities?

How does it improve the community's material conditions?

(2) Discretion:

How does it move authority from elite/specialist voices to the most marginalized members affected by the technology, program, or policy at issue?

How does it empower community members to understand, redesign, and/or refuse the technology *before it is deployed*?

How does it create space for community-led experimentation with the technology, program, or policy as a result?

(3) Power:

How does it reduce the capacity for companies and/or state actors to target, classify, coerce, punish, and/or control marginalized communities, including people of color, women, queer and trans* folks, immigrants, poor people, disabled people, unhoused people, incarcerated or formerly incarcerated people, sex workers, and others?

How does it reduce the scale of the technology's effect on marginalized communities?

How does it reduce the government's reliance on algorithmic violence? Algorithmic violence is the harm that algorithm-based systems inflict by preventing people from meeting their basic needs, resulting from and amplified by exploitative social, political, and economic systems.

Other Considerations

Are there other clinics at your law school or other law schools that work with the movement(s) this project is associated with? If so, does the project present interclinic collaboration opportunities that would maximize client goals, movement goals, and student learning opportunities?

Will this client/project likely require representation beyond one semester?

Are there any personnel, resources, conflicts, or other constraints that would impact the clinic's ability to represent his client/project?

If known, how did the client learn about the clinic? Have they worked with this or other law school clinics before?

Technology Guide

There are several examples of emergent technologies, programs, and policies that a social justice-oriented client may be seeking help with from the clinic. Under the "Student Learning Opportunities" section, the first question is meant to be open-ended to enable flexible fact gathering. Still, some clients may not have a specific example in mind or may not have the terminology or ability to describe the technology at issue.

If needed, below is a short list of emergent technologies that commonly raise data justice issues by compounding pre-existing economic, social, and political inequity. In this sense, "data justice" is a corrective approach to tech development and regulation that works to rectify data-driven harms to an individual or community within the broader context of structural inequalities inherent to racial capitalist systems.

- ☐ Biometric Surveillance (facial recognition, emotion/affect recognition, automated gender recognition, DNA/Genetic information tracking)
- ☐ Predictive Policing Programs & Databases
- ☐ Private/Public AI Partnerships
- ☐ E-Carceration (pre-trial & migrant digital detention)
- ☐ Automated License Plate Readers
- ☐ Smart Border Technologies
- ☐ Gig Work &/or Hiring, Workplace, Anti-Labor Organizing Surveillance
- ☐ Education Surveillance (Testing, Student Social Media Use, Gun "Safety", etc.)
- ☐ Public Benefits Technologies, Including Housing & Healthcare
- ☐ Other:

TEN EMPOWERING STRATEGIES FOR NONDIRECTIVE CLINICAL SUPERVISION

MICHELE ESTRIN GILMAN*

Nondirective clinical supervision is the signature pedagogy of clinical teaching. It encourages students to take ownership over their cases and assume their role as attorneys through a supported process of decision-making. While the goals of non-directive supervision are well developed, there is less discussion of how to achieve those goals. The scant literature on non-directive methodology focuses on Socratic dialogue. Socratic questions can help students unpack their assumptions, but they can also reinforce an educational hierarchy and create anxiety for students. Accordingly, this article sets forth a varied menu of ten techniques to deploy during supervision meetings: (1) moots and role plays; (2) brainstorming roundtables; (3) writing workshops; (4) decision-making frameworks; (5) quick writes; (6) rule review; (7) online fact investigation; (8) video review; (9) critical theory application; and (10) guided reflection. These non-directive methods empower students by building their confidence and developing their critical skills to assess and challenge the social context facing their clients. In addition, they leave students feeling energized at the end of a supervision meeting and eager to move their cases forward, while also gaining transferable lessons that can be applied to other lawyering tasks and cases.

Nondirective supervision is the signature pedagogy of clinical teaching.[1] It is based on adult learning theory, which posits that "adults learn best from experience."[2] Teachers using this pedagogy guide students to analyze problems and arrive at solutions without telling them the answers.[3] Nondirective supervision can be a very powerful and

* Venable Professor of Law, Associate Dean for Faculty Research & Development, and Director, Saul Ewing Civil Advocacy Clinic, University of Baltimore School of Law. Much appreciation to the University of Baltimore clinical faculty and the participants at the Mid-Atlantic Clinical Conference for their feedback on this article.

[1] *See* Justine A. Dunlap & Peter A. Joy, *Reflection-in-Action: Designing New Clinical Teacher Training by Using Lessons Learned from New Clinicians*, 11 CLIN. L. REV. 49, 84-85 (2004); James H. Stark, Jon Bauer & James Papillo, *Directiveness in Clinical Education*, 3 B.U. PUB. INT. L.J. 35, 35 (1993) ("Many clinicians are committed to supervising nondirectly, giving students broad authority to plan and carry out lawyering tasks and to learn from their own performance.").

[2] Frank Bloch, *The Andragogical Basis for Clinical Legal Education*, 35 VAND. L. REV. 321, 329 (1982).

[3] *See* Harriet N. Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315, 316 (2006) ("Clinical legal education theory links nondirective supervision to role assumption, in which law students perform their lawyering roles as independently as possible at every step and thereby learn skills while feeling the full weight of the lawyering responsibility.").

transformative experience for student attorneys. One clinic student wrote that her clinical professor's nondirective teaching style left her feeling "successful in developing not only my practical lawyering skills but also my self-reflection and analysis skills. This latter set of skills I am not sure I could have learned anywhere else."[4] However, nondirective pedagogy is a challenging mode of education for both students and teachers. It is quite different from how lawyers are trained in practice, where new lawyers primarily learn by following directions and observing how senior lawyers carry out tasks.[5]

In several decades of training and observing new clinical teachers, I have watched them struggle with the transition to nondirective supervision. I have taught in litigation, transactional, and policy clinics,[6] and my observations have revealed that nondirective supervision can often look and feel like a meandering series of Socratic questions, perhaps because clinical supervision lacks the built-in structure of the appellate case method that dominates in doctrinal courses. To be sure, Socratic questioning can be an effective method of nondirective supervision, but it is far from the only one. Yet clinical scholarship about pedagogy assumes it is the sole technique for supervision.[7] There is ample clinical scholarship making a case for -- or against -- nondirective pedagogy. This debate helps teachers understand the theory underlying clinical supervision and refine their own teaching philosophy, but it is less helpful in giving teachers concrete tools for supervision. Clinicians have a rich theory of *why* nondirective supervision is effective, but little guidance in *how* to carry it out. Accordingly, this Essay seeks to fill the gap in this scholarship by providing new and experienced clinical supervisors with a menu of techniques to deploy during supervision meetings.

This Essay urges clinical professors to think about their supervision sessions as sites for varied and intentional modes of being nondirective. It is inspired by a rich literature offering concrete and detailed methods for building effective seminars[8] and case rounds[9] – the two other main

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4 Jennifer Howard, *Learning to "Think Like a Lawyer" Through Experience*, 2 Clin. L. Rev. 167, 208 (1995).

5 Minna J. Kotkin, *Reconsidering Role Assumption in Clinical Education*, 19 N.M. L. Rev. 185, 199 (1989) (arguing that modelling can be a valid method of clinical supervision).

6 I also teach Evidence and Administrative Law and am thus familiar with the range of pedagogical approaches available to doctrinal professors.

7 Jane H. Aiken & Ann Shalleck, *The Practice of Supervision*, *in* Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy 205, 216-220 (Susan Bryant, Elliott S. Milstein & Ann C. Shalleck eds., 2014) [hereinafter Education of Lawyers] (providing an example of a supervision session that uses Socratic dialogue exclusively).

8 Deborah Epstein, Jane Aiken & Wallace J. Mlyniec, The Clinic Seminar (2014).

9 Susan Bryant & Elliott S. Milstein, *Rounds: A "Signature Pedagogy" for Clinical Education?,* 14 Clin. L. Rev. 195, 197 (2007).

components of the clinical experience.[10] By comparison, supervision pedagogy remains under-developed. The methods described below are all modes of being non-directive that are likely to leave students feeling energized at the end of a supervision meeting and eager to move their cases forward, while also gaining transferable lessons that can be applied to other lawyering tasks and cases. These strategies are equally effective in litigation, transactional, policy and other clinic models. This Article describes the following ten different non-directive supervision strategies: (1) moots and role plays; (2) brainstorming roundtables; (3) writing workshops; (4) decision-making frameworks; (5) quick writes; (6) rule review; (7) online fact investigation; (8) video review; (9) critical theory application; and (10) guided reflection. Ideally, this Article will spur other clinical professors to share their strategies for nondirective supervision so that the clinical community has a bank of nondirective teaching methodologies to draw from for the benefit of our students and clients. Part I provides a primer on clinical supervision theory. Part II delves into the ten techniques for nondirective supervision. Part III ends with a reflection on using Socratic questions effectively in supervision.

I. Supervision Theory

The over-arching goals of clinical legal education are for students to "understand the lawyer's role, learn to reflect on their practice, and become personally committed to the ethical and practical requirements of a high standard of professionalism."[11] Specific goals can include engaging in client-centered lawyering, developing a professional identity, nurturing a passion for social justice, reflecting critically on law and legal systems, building collaboration skills, refining decision-making skills, and more.[12] In a clinical course, there are three main sites of teacher-student interaction and instruction for achieving these goals: seminars, case rounds, and supervision. These sites reinforce and complement one another.[13] In seminars, the professor defines learning goals and brings the entire class together to learn a mix of lawyering skills, theory, policy, and doctrine – "providing students with a vocabulary and framework

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[10] *See* Alina Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 Clin. L. Rev. 1, 41 n.23 and articles cited therein.

[11] Katz, *supra* note 3, at 342.

[12] For a thorough list of clinical teaching goals, *see* Susan Bryant, Elliot Milstein & Ann Shalleck, *Learning Goals for Clinical Programs*, *in* Education of Lawyers, *supra* note 7, Ch. 2.

[13] *See* Bryant & Milstein, *supra* note 9, at 197 ("These pedagogical modes serve different purposes and, although they overlap, supplement and complement each other to maximize the educational benefits attainable from student practice.").

for their real practice experiences."[14] Case rounds also occur with the full class and typically involve a structured and facilitated discussion format about casework.[15] By contrast, in supervision, teachers typically meet with smaller groups of two to four students to talk specifically about their client-based work or projects.[16]

"Supervision is the essence of clinical education and all new teachers must learn appropriate intervention techniques to maximize student learning and client satisfaction."[17] Supervision meetings are central to the planning, performing, and reflection scaffolding on which clinical education is built.[18] In this structure, students plan for an activity; they meet with their professor and teammates to review their preparation for the activity; they perform the activity; and then, as a team, they evaluate and reflect on that activity.[19] This structure embodies metacognitive thinking, which Jaime Lee defines as "an intellectual strategy for mastering complex material that focuses on planning, performance, self-reflection, and self-correction."[20] Nondirective teaching encourages metacognition. The idea is to help students take ownership over their cases and assume their role as attorneys through a supported process of decision-making under conditions of uncertainty.[21] By pushing students to develop their decision-making skills, nondirective supervision results in transferable lessons that can apply well beyond the end of the semester into a student's long-term legal career. This pedagogy is grounded in

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14 Kate Kruse, *Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice*, 45 McGeorge L. Rev. 7, 33 (2013).

15 Bryant & Milstein, *supra* note 9, at 196.

16 *See* Paul Radvany, *Experiential Leadership: Teaching Collaboration Through a Shared Leadership Model*, 27 Clin. L. Rev. 309, 328 (2021) ("While many clinics routinely find that teams of two students work best, depending on the amount of work that needs to be accomplished for a particular case or project, a larger team is sometimes necessary.").

17 Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 Clin. L. Rev. 505, 517 (2012).

18 Ann Shalleck & Jane H. Aiken, *Supervision: A Conceptual Framework*, *in* Education of Lawyers, *supra* note 7, at 169, 192 ("Both teacher and student experience supervision largely through the concrete, regular form of meetings."). Although this article focuses on supervision meetings, there are many other encounters where supervision occurs, such as brief and unscheduled encounters, through written feedback on writing, email exchanges, and more. *See* Peter Toll Hoffman, *The Stages of the Clinical Supervisory Relationship*, 4 Antioch L.J. 301, 302 (1986).

19 William P. Quigley, *Introduction to Clinical Teaching for the New Clinical Law Professor: A View from the First Floor*, 28 Akron L. Rev. 463, 477 (1995). *See also* Jaime A. Lee, *Legal Education and the Metacognitive Revolution*, 12 Drexel L. Rev. 227 (2020) (describing the clinical model as a "cycle of 'plan, do, and reflect.'"); Kimberly E. O'Leary, *Evaluating Clinical Law Teaching – Suggestions for Law Professors Who Have Never Used the Clinical Teaching Method,* 29 N. Ky. L. Rev. 419 (2002) ("All clinical teaching involves some form of experiential learning that can be described in a three-step process: 1) the student learns to formulate an action plan; 2) the student enacts that plan through a structured experience; and 3) the student reflects about the experience and modifies future action accordingly.").

20 Lee, *supra* note 19, at 229.

21 Dunlap & Joy, *supra* note 1, at 67.

adult learning theory (also called andragogy), which recognizes "adults as self-directing learners"[22] who learn best through experience rather than as passive recipients of teacher-generated information.[23] In the supervision context, this means that "[r]ather than telling a clinic student what to do, clinical methodology calls for asking the student what he or she thinks needs to be done and why."[24] By contrast, "If supervisors just tell students what to do, they will not act for themselves or learn that effective action comes from thought and judgment."[25] Gautam Hans helpfully describes the supervisor's role as distinct from other models that students and faculty may have experienced; clinical supervisors combine a non-directive approach with a level of intimacy to guide students.[26]

While the nondirective model is an ideal,[27] it is also overly simplistic. It often comes into tension with the goal of providing high quality legal assistance to clients, as it is an inefficient means of practicing law.[28] Thus, most clinical professors – regardless of their pedagogical

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22 Bloch, *supra* note 2, at 338.

23 Anna Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 Clin. L. Rev. 39, 65 (2013). Adult learners are self-directed, have personal experience that serves as a basis for learning, are ready to learn when their performance is related to their role, and seek knowledge for immediate, rather than future, benefit. *See* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clin. L. Rev. 37, 38 (1995) (summarizing tenets of andragogy as set forth by Malcolm Knowles).

24 Dunlap & Joy, *supra* note 1, at 67. *See also* Yael Efron, *What is Learned in Clinical Teaching?*, 29 Clin. L. Rev. 259, 265 (2023) (clinical education "is not limited to transferring knowledge from the lecturer to the student, but bases its pedagogy on creating a direct experience for the learners, through which they are expected to put the knowledge to use.").

25 Aiken & Shalleck, *The Practice of Supervision*, *in* Education of Lawyers, *supra* note 7, at 205.

26 G.S. Hans, *Supporting Roles*, Clin. L. Rev. (forthcoming).

27 Carpenter, *supra* note 23, at 67 ("Non-directive supervision has been described as 'clinical orthodoxy.'").

28 Stark et al., *supra* note 1, at 50. The authors report on a survey of clinical professors: "Most respondents agreed that directiveness should vary based on a student's ability, the length of time a student has been in the clinic, the complexity of the case, and whether the case is new or ongoing. Concern for client interests helps explain each of these responses." *Id*. The perceived rigidity and dominance of the non-directive model has received pushback. *See* Katz, *supra* note 3, at 320-21 ("Although the superiority of nondirective supervision is asserted, some clinical scholars have also long acknowledged its limits on theoretical, educational, or practical grounds."). Scholars writing in the formative era of clinical education often envisioned a co-counsel role for students and teachers and highlighted the virtues of this collaboration. *See id.* at 322-23 (discussing the collaborative models described by Gary Palm and Frank Bloch). Similarly, in examining how novices learn from experts in professional settings, Brook Baker recommended "a model of guided participation in apprentice-like opportunities" as the best form of experiential education for new lawyers. Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 Clin. L. Rev. 1, 7 (1999). Harriet Katz, based on her experience overseeing externships, has argued for a greater role in clinics for modelling by and collaboration with experienced attorneys as effective supervision techniques. *See generally* Katz, *supra* note 3. Likewise, Minna Kotkin has also queried the centrality of role assumption to clinical education, arguing that some students might need to first observe and "critically examine"

commitments -- will use more directive methods at certain touchpoints, such as early in the semester when students are acclimating to law practice, or when an emergency deadline is pending, or if a student is struggling with a certain task.[29] Relatedly, Peter Hoffman recommends thinking about supervision in stages, where over the course of the semester or year, a teacher shifts gradually from directive to nondirective pedagogy as students gain experience and confidence.[30] Even the most devoted practitioner of nondirective pedagogy must acknowledge that all supervision is directive in the sense than the teacher must plan for and guide supervision with defined goals in mind.

Anna Carpenter reminds us that non-directiveness is not a goal in itself; rather, the goal "is to maximize student learning."[31] Thus, "we can make intentional choices about when and how to ask questions that guide students down a path of learning and realization, giving students as much room as possible to uncover insights on their own."[32] She adds, "The most important teaching method a supervisor can employ is to identify his or her goals for the student and map out a path that will lead to achievement of the goal, rather than worrying about using a particular supervision style or tactic."[33] Accordingly, it can be more helpful to view supervision along a spectrum of directiveness. As Wally Mylniec explains: "[I]n truth, all teaching is directive and it should be. That is why teachers exist… How a student is led to the knowledge or resolution involves the degree, not the existence, of directiveness . . . Experienced clinical teachers continue to act with that understanding, but now respond in ways that do not easily fit into the directive/non-directive dichotomy."[34] In other words, experienced clinical teachers understand that the goal is not being non-directive, but to identify how best to teach the student in front of them.

Recognizing a spectrum of directiveness also invites a reconsideration of supervision techniques. Socratic questioning is the dominant technique discussed in clinical literature.[35] Done well

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their supervisors engaging in lawyering tasks before they are able to act in role. Kotkin, *supra* note 5, at 187.

[29] *See* Dunlap & Joy, *supra* note 1, at 85.

[30] *See generally* Hoffman, *supra* note 18.

[31] Carpenter, *supra* note 23, at 69.

[32] *Id*.

[33] *Id*.

[34] Mlyniec, *supra* note 17, at 518.

[35] *See* Katz, *supra* note 3, at 321 ("descriptions of how to implement nondirective supervision sometimes reveal a directive agenda implemented by means of Socratic-style dialogue between student and supervisor."); Dunlap & Joy, *supra* note 1, at 85 (supervision is "the manifestation of the Socratic method within clinical teaching."). Written depictions of clinical supervision are typically in the form of a Socratic colloquy, *see generally* Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 154 (1993-94).

and with transparency, an intentional series of Socratic questions can help students uncover new ideas, reconsider assumptions, and reflect on all aspects of a representation. Done poorly, it can be stressful and unrewarding for students, akin to unpleasant experiences they may face in their doctrinal courses.[36] Simply put, it might not always be the best tool for all supervision objectives. It certainly should not be offered to new clinical teachers as the only tool for supervision. Notably, doctrinal pedagogy has undergone reforms in recent years, with an emphasis on bringing experiential tools into the classroom, largely influenced by clinical pedagogy.[37] It is somewhat ironic then that clinical supervision meetings have remained in their traditional conception.

There are at least six reasons to explore a variety of techniques for non-directive supervision. To begin with, varying teaching methods can increase student engagement, especially in an era where students have shorter attention spans due to the rise of social media and other technologies.[38] Clinical professors tend to spend a lot of time thinking about interactive and experiential methodologies in the seminar portion of their courses, but seemingly less so in the supervision component of the clinical experience. Using a variety of teaching modes raises the energy in the room, whether in the larger seminar group or the smaller supervision unit.

Second, using a variety of teaching methods helps to reach a broader range of students, as they have varying learning styles.[39] Supervision is a space where "practice and learning can be tailored to the individual capacities and needs of each student."[40]

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36 *See* Howard, *supra* note 4, at 173-74 ("Not only is the focus of the Socratic classroom painfully distant from the world of practice, but the psychological impact of this form of teaching simultaneously injures students and distorts their preparation for the interpersonal requirements of practice.").

37 *See* Judith A. Frank, *Lessons and Ideas: Skills Instruction in Large Law School Classes*, 3 T.M. Cooley J. Prac. & Clinical L. 307, 318 (2000); Cynthia Batt, *A Practice Continuum: Integrating Experiential Education into the Curriculum*, 7 Elon L. Rev. 119, 122 (2015).

38 On teaching to Gen Z students, see Olivia R. Smith Schlinck, *OK, Zoomer: Teaching Legal Research to Gen Z*, 115 L. Libr. J. 269, 280 (2023) ("Task-switching or multitasking has an impact on the attention span; the average Gen Z attention span is about eight seconds. This results in students who struggle to focus on long lectures or complex problems and may leave students struggling to prioritize their work.").

39 *See* O'Leary, *supra* note 19, at 495 ("Moreover, learning does not happen in the same way for all people. Individuals have different approaches to learning that influence how they learn most optimally. Good teachers, then, provide context-based learning opportunities, allow students to direct themselves and provide different kinds of learning environments"). Ian Weinstein writes about understanding different personality types to help reach students in supervision settings. Ian Weinstein, *Learning and Lawyering Across Personality Types*, 21 Clin. L. Rev. 427 (2015).

40 Susan Bryant, Elliott Milstein & Ann Shalleck, *The Whole Is Greater Than the Sum of Its Parts: Clinical Methodologies and Perspectives*, *in* Education of Lawyers, supra note 7, at 9.

Third, many clinical professors want students to develop a passion for social justice and a true path of enjoyment and fulfillment in the law.[41] At the same time, many clinic cases raise serious deprivations of human and civil rights. They can be emotionally draining and even result in vicarious trauma.[42] Socratic questioning can be less effective at bringing joy into supervision than alternate teaching methods because of its hierarchical nature in which the teacher drives the shape of the dialogue.[43]

Fourth, there are a variety of teaching techniques that advance the goal of teaching collaboration skills. Many clinics purposefully supervise students in teams (even if students are working on cases independently) to share client workloads, increase brainstorming capacity, and hone collaboration skills.[44] By working in teams, students can draw upon a greater range of life experiences and be exposed to more cases than if they were working alone.[45] Collaboration is a critical lawyering skill, as Susan Bryant states, it can "increase professional satisfaction and improve legal work product."[46] Moreover, "with the changed demographics of the profession, collaboration provides a process for integrating diverse people and their perspectives."[47]

Fifth, using a variety of teaching styles is more interesting and engaging for the teacher and pushes us to think more fully and intentionally about meeting our teaching goals. Regardless of teaching technique, all clinical supervision should be driven by specific teaching goals.[48]

Sixth, the supervision techniques described below are generally more student-driven than Socratic questioning, thus facilitating greater role assumption by students. They center the student as the generator

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41 *See* Deborah A. Maranville, *Passion, Context, and Lawyering Skills: Choosing Among Simulated and Real Clinical Experiences*, 7 Clin. L. Rev. 123, 125 (2000).

42 Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 Clin. L. Rev. 359, 368 (2016) ("Vicarious traumatization refers to harmful changes that occur in professionals' views of themselves, others, and the world, as a result of exposure to the graphic or traumatic experiences of their clients.).

43 Jeannie Suk Gerson writes that "the professor as Socratic questioner risks coming across like the ultimate arbiter of what is right or who is smart, ranking and sorting students into hierarchical statuses." Jeannie Suk Gerson, *The Socratic Method in the Age of Trauma*, 130 Harv. L. Rev. 2320, 2343-44 (2017) (reflecting on how to make Socratic pedagogy inclusive and collaborative to meet the learning needs of diverse student bodies).

44 Bryant, Milstein & Shalleck, *The Whole Is Greater Than the Sum of Its Parts: Clinical Methodologies and Perspectives*, *in* Education of Lawyers, *supra* note 40, at 9 (supervision involves "regular meetings between teachers and students, who work alone, in pairs, or in small groups.").

45 David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 Clin. L. Rev. 199, 213 (1994).

46 Susan Bryant, *Collaboration in Law Practice*: *A Satisfying and Productive Process for a Diverse Profession*, 17 Vt. L. Rev. 459, 463 (1993).

47 *Id*.

48 *See infra* notes 52 to 56 and accompanying text.

of ideas and driver of the agenda. Most clinical professors require their students to prepare an agenda for their supervision meeting.[49] Handing agenda-setting over to students supports ownership over their cases and teaches them how to prioritize pending issues in their cases. The strategies discussed below can be adapted to multiple agenda items and treats students as partners in seeking justice.

Overall, these methods are empowering to students both at the individual and social level.[50] As Ruthy Lowenstein Lazar explains, "the term empowerment raises a variety of associations: power, strength, change of consciousness, critical attitude, visibility, self-motivation, the ability to change, solidarity, community spirit, and sense of belonging, among others."[51] At the personal level, students move from uncertainty to building "confidence and trust in their ability to make decisions and exert influence, develop a critical sense toward the social, political, and economic reality in which they live, and are able to act accordingly."[52] These methods envision students as learners and questioners and actively engage them in their own knowledge and skill building. This builds student confidence, trains them to become independent problem-solvers, and generates transferable lessons for post-graduation. At the social level, clinical supervision generates student empowerment by guiding them to challenge norms and assumptions and to develop critical frames for transforming institutions and society. Students become situated to "challenge the existing power differences between various groups" and to identify "social, cultural, and economic power [structures] that serve as barriers."[53]

II. Supervision Strategies For Nondirective Teaching

The techniques described below are methods for engaging in nondirective supervision beyond Socratic questioning. It is essential to select a technique that is tied to and in service of a specific teaching and learning goal. As Wally Myleniec explains, "supervision is not a random process," rather, "all interventions should be planned to achieve a specific outcome and that the method chosen for the intervention should be specific to the context in which it occurs."[54] In their guide to supervision, Ann Shalleck and Jane Aiken describe how supervisors should be attuned to the arc of student learning and consider that trajectory

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[49] Shalleck & Aiken, *Supervision: A Conceptual Framework*, in Education of Lawyers, *supra* note 7, at 197.

[50] Ruthy Lowenstein Lazar, *Interdisciplinary Clinical Education — On Empowerment, Women, and a Unique Clinical Model,* 23 Clin. L. Rev. 429, 442 (2016).

[51] *Id*.

[52] *Id*. at 444.

[53] *Id*. at 445.

[54] Mlyniec, *supra* note 17, at 518.

within three frames: the specific matter assigned to the student; the student experience across all the clinic cases and projects they handle; and the supervision meeting.[55] Decisions about what to teach in the supervision meeting should be intentional, based on considerations about student capacities, the goals of supervision, and the need to manage meeting time – all of which fluctuate and change throughout the semester.[56] They further suggest organizing supervision meetings into discrete segments, which can reflect " a fundamental value, a theme of the clinic, an essential concept, or any other supervisory focus that the teacher wants to supervise."[57] The idea of breaking up a meeting into segments linked to specific goals also fits the idea of rotating different teaching techniques to serve those goals. Selecting among competing goals is the teacher's most important job in clinical supervision;[58] the techniques below are simply ways to advance those goals for student empowerment. These techniques are not inherently non-directive – all of them can be deployed along the spectrum from directive to non-directive. However, they are all suited to non-directiveness because they allow students to learn from experience.

1. Moots and Role Plays

An essential way to prepare for major lawyering tasks is to prepare for a moot, conduct a moot, to reflect on the moot, and to revise based on feedback. Typically, a clinic moot is a full or partial enactment of an upcoming lawyering experience with students and faculty playing the roles of different parties to the activity and staying in role before debriefing

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[55] Shalleck & Aiken, *Supervision: A Conceptual Framework*, in EDUCATION OF LAWYERS, *supra* note 7, at 172-73.

[56] *Id*. at 172. They state, "[f]ulfilling the immediate objectives of the meeting while attending to broader lawyering and learning within the frames of the case or project and the student's complete clinic experiences requires careful thought and planning." *Id*. at 195.

[57] *Id*. at 196.

[58] Aiken and Shalleck list the following "macro" goals for supervision:

- Students will have sufficient knowledge of the law to provide appropriate client representation.
- Students will begin to appreciate their roles as professionals.
- Students will listen to clients' stories from the perspective of the client.
- Students will learn to reflect meaningfully on their experience.
- Students will elicit feedback on their performances and demonstrate personal awareness of their strengths and weaknesses.
- Students will refine their ability to identify ethical issues and begin to know how to address them.
- Students will learn to exercise judgment.
- Students will learn to generate and evaluate strategies.
- Students will develop interpersonal, relationship-building skills.
- Students will recognize lawyering as a process of representing a client, not just a composite of skills.

Id. at 209.

on the performance. Supervisors can use moots to help students practice and refine countless lawyering skills. A litigation clinic might schedule several moots before a trial, with students playing the roles of judges, witnesses, and opposing counsel. A transactional clinic might moot a counseling session with an organizational client or a presentation to a board of directors on recommended legal steps, with teammates playing the client role. A legislative clinic might moot a legislative hearing with fellow students acting in the role of legislators. Moots are valuable in preparing for the upcoming event, anticipating likely scenarios, sharpening lawyering skills and case theory, and building student confidence. Roleplaying "foster[s] learning by putting students in active roles, engaging them in the messiness of facts, and requiring them to make decisions," and these learning opportunities benefit all participants.[59] For all these reasons, moots are a regular part of supervision sessions in many clinics.[60]

Role playing can be equally useful for less performative and more routine lawyering tasks as well. For example, many members of Gen Z are very nervous and inexperienced in making phone calls, and yet handling their cases may demand phone skills.[61] So, spending time in supervision meetings role playing a call to opposing counsel or to a potential witness or a government agency can help ease student anxiety and help them develop a working agenda for the call. Early in the semester, many students benefit simply from mooting their initial call to a client to set up the client interview. This can be a way to begin thinking about how to apply client-centered lawyering to real-world situations.[62] Teachers can assign students to different roles – as the client, the lawyer, and the "critiquer" of the moot. Students can rotate through different roles to experience multiple perspectives.

Student attorneys can also moot upcoming negotiations to test out their personal negotiating styles and to put them in the mindset of an opponent, which is a key part of negotiation strategy. Similarly, students can benefit from role plays involving all or portions of client interviews

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59 Binny Miller, *Teaching Case Theory*, 9 Clin. L. Rev. 293, 325 (2002).

60 Quigley, *supra* note 19, at 478 ("there often should be some form of practice, simulation or walk-through of the activity planned by the student with the teacher's participation."). Clinics also regularly engage in simulations in the seminar component of the course; these simulations are generally not focused on real cases. *See Report of the Committee on the Future of the In-House Clinic*, 42 J. Legal Educ. 511, 513 (1992). Helen Kang recommends bringing role playing into case rounds. Helen Kang, *Use of Role Play and Interview Mode in Law Clinic Case Rounds to Teach Essential Legal Skills and to Maximize Meaningful Participation*, 19 Clin. L. Rev. 207 (2012).

61 Schlinck, *supra* note 38, at 292 ("Gen Z students 'find email 'burdensome' and voice calls anxiety inducing.'").

62 David A. Binder, Paul Bruce Bergman, Susan C. Price & Paul R. Tremblay, Lawyers As Counselors: A Client-Centered Approach (2d ed. 2004).

and counseling sessions, particularly segments that might involve emotional, personal, or sensitive information. Many students are nervous when it comes to talking to clients about financial matters, even where that information can be essential to shaping case theory or negotiation strategies, such as in family or consumer law matters. Practicing these conversations beforehand, and taking feedback from the team, can help student attorneys ease their jitters and understand the propriety of these areas of inquiry. Almost any aspect of the client representation that is making a student anxious can be mooted beforehand. Moots serve many teaching goals, particularly engaging students in role assumption; developing and synthesizing legal skills; refining skills of giving, receiving, and incorporating feedback; building student confidence; gaining awareness of the interests of multiple parties engaged in a case or project; and generating and evaluating strategic choices.

2. Brainstorming Roundtables

One of the most helpful aspects of the team structure for supervision is the advantage of having multiple perspectives available for problem-solving. The adage of "two brains are better than one" comes to life in the team setting. Thus, the clinical teacher can call on all the team members to help students generate ideas at decision points throughout their cases. Studies of brainstorming "suggest that most people enjoy the process, believe it to be effective, and are more satisfied with their own performance than when working as individuals."[63] It has benefits "beyond merely generating ideas, in building group cohesion and increasing commitment to decisions that are made."[64] In brainstorming roundtables, the supervisor sets forth the brainstorming proposition and then calls on students to offer their insights – moving back and forth among team members also has the benefit of including all students in the discussion. A key aspect of brainstorming is throwing out ideas without pre-judging them. This frees students from worrying about the validity of their suggestions. They can generate ideas first, and then sort through the options as a team. For students struggling to move their cases forward, it can be very energizing to walk out of a supervision session armed with new ideas and options.

Consider these examples. A student who is preparing an interview agenda can benefit from a supervision session in which the entire team brainstorms about possible areas of inquiry for the interview and the reasons for exploring each topic. After an interview, students

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63 James H. Stark & Douglas N. Frenkel, *Changing Minds: The Work of Mediators and Empirical Studies of Persuasion*, 28 Ohio St. J. on Disp. Resol. 263, 333 (2013).

64 *Id*.

can brainstorm about possible claims or defenses worthy of further research. In terms of research strategies, students can toss out ideas for tackling a novel area of the law – from using Google, to treatises, to legal encyclopedias, to searching cases for certain terms in databases and more. Throughout this discussion, the supervisor (informed by their knowledge and experience) can guide students to consider the strengths and weaknesses of various research strategies, and the various phases of the case in which certain strategies might be more beneficial. As legal research develops, the supervisor might engage the team in listing various legal claims/defenses on the whiteboard and thinking about what facts support or undermine various claims. In developing a factual investigation strategy, the supervisor can ask the team to brainstorm various sources for finding facts to support different claims and theories.

There is almost no lawyering task in which the brainstorming process will not work. Students can test run case theories. They can brainstorm negotiation strategies; counseling options; persuasive arguments; anticipated arguments from the other side; and predict client reactions to different legal options. Brainstorming is also great for engaging students in parallel universe thinking, which Susan Bryant and Jean Koh Peters recommend for helping students seek "multiple explanations for a client's – or any other professionally significant person's – words or actions before planning an action strategy."[65] This is very powerful for questioning assumptions about clients, particularly negative ones, and is an important dimension of cross-cultural lawyering, "reminding the lawyer to suspend judgment and even interpretation of behavior about which she has insufficient information."[66] Overall, brainstorming serves the clinical teaching goals of collaboration; problem-solving; critical thinking; and learning for transfer.

3 Writing Workshops

Supervision meetings are an excellent opportunity to engage students in peer review on written drafts. Reviewing writing in a nondirective mode is challenging for many supervisors; often far more so than other lawyering tasks.[67] It is tempting to "red line" a document (or

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[65] Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching About Identity, Culture, Language, and Difference*, in Educating Lawyers, *supra* note 7, at 351-52.

[66] *Id.* at 352.

[67] Tamar Ezer, *Teaching Written Advocacy in a Law Clinic Setting,* 27 Clin. L. Rev. 167, 168-69 (2021) ("written advocacy in the law clinic setting highlights a central tension faced by clinical faculty: balancing responsibility to students with that to clients or partners.… clinicians tend to be more 'interventionist' and directive than for other aspects of the clinic work."). *See also* Cheri Wyron Levin, *The Doctor is In: Prescriptions for Teaching Writing in a Live-Client In-House Clinic,* 15 Clin. L. Rev. 157, 180-83 (2008) (describing how, as a clinical legal writing teacher, she chooses between directive and nondirective methods).

to write a memo to the student or use comment bubbles) to move it efficiently toward a final draft. However, this can undermine a student's learning process of refining their own work through multiple drafts. Thus, an advantage of inserting a peer review stage in the writing process is to break the direct line between the student attorney and the supervisor. Engaging students in the editing process benefits not only the author(s), but also the peer editors, who gain the opportunity to critically assess and improve written work, as "[s]tudents are better able to see gaps in writing when it is not their own."[68] In addition, "through their roles as readers and editors, students learn to focus on the needs of their audience, a sensitivity essential for successful writing to the courts, other lawyers, and clients."[69] Peer review also reinforces lessons about giving and receiving feedback that permeate clinical courses; "two of the greatest benefits are exposing students to collaborative work and providing them with tools for self-empowerment."[70] It prepares students for law office practice given that lawyers regularly review and comment on their colleagues' written work.[71] Putting students in the role of teacher is another way to cement learning.

To review writing in a supervision meeting, it is usually preferable if students can circulate and read the draft in advance of the meeting and come prepared to provide feedback. Teachers can provide the peer editors with a checklist to guide their feedback, and they might assign certain segments of the checklist to different students to focus their attention and allow them to go deeper in their comments.[72] The advantage of a group discussion over providing solely written comments is

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[68] Ezer, *supra* note 67, at 183. *See also* Tonya Kowalski, *Toward a Pedagogy for Teaching Legal Writing in Law School Clinics*, 17 Clin. L. Rev. 285, 343–44 (2010) (noting the benefits for both the author and the critiquer); Sheila Rodriguez, *Letting Students Teach Each Other: Using Peer Conferences in Upper-Level Legal Writing*, 13 Fla. Coastal L. Rev. 181, 186 (2012).

[69] Kirsten K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 Legal Writing: J. Legal Writing Inst. 1, 2 (2003). *See also* Patricia Grande Montana, *Peer Review Across the Curriculum*, 91 Or. L. Rev. 783, 785 (2013) ("Through peer review, students improve their legal analysis and writing, enhance their editing skills, learn to cooperate with others, manage and evaluate constructive criticism, and develop a deeper appreciation of audience."); Cassandra L. Hill, *Peer Editing: A Comprehensive Approach to Maximize Assessment Opportunities, Integrate Collaborative Learning, and Achieve Desired Outcomes*, 11 Nevada L.J. 667, 673 (2011) ("Students also open their minds to other possibilities when they see how different writers approach and analyze the same problem or task.").

[70] Kowalski, *supra* note 68, at 343-44.

[71] Montana, *supra* note 69, at 787-88 ("Attorneys will review and comment on all types of writing, including correspondence with clients or opposing attorneys, internal office memoranda, and procedural or substantive motions to a court. The reason is simple: writing is not a solitary activity, but a social collaborative one.").

[72] Hill, *supra* note 69, at 689. Hill provides sample peer editing checklists in Appendices B to D. *Id.* at Apps. B-D.

that the format lends itself to dialogue and allows the author to ask questions and clarify comments. Almost any draft is ideal for the workshop format, particularly in its early stages. A litigation clinic might review counseling letters to clients, demand letters to opposing parties, interrogatories and other discovery documents, motions, and briefs. A transactional clinic might review counseling letters to clients, a 501(c)(3) application, bylaws, contracts, employment agreements, and other corporate documents. A policy clinic can circulate white papers and policy analyses for peer input. By the end of the peer review, the author(s) will have ample feedback to improve a subsequent draft – all without direct editing by the supervisor. This nondirective and collaborative process moves the writing forward while improving the writing and editing skills of all participants.

4. Decision-Making Frameworks

Much of lawyering involves exercising judgment in conditions of uncertainty.[73] This is one of the most challenging and destabilizing aspects of the clinic for student attorneys, who often either bemoan their lack of legal experience or are overconfident in thinking there is a fixed "answer" to their questions. Clinical teachers help students "recognize decision moments they had not seen and to propose a course of action even though information is imperfect and the complexity of the variables sometimes difficult to grasp."[74] Learning to make decisions in a structured way is one of the greatest tools students gain from their clinical experience. In clinics, students learn to make decisions by (1) ascertaining goals; (2) identifying options to achieve those goals; (3) comparing strengths and weaknesses of options, including consideration of non-legal and ethical factors; (4) predicting outcomes; (5) generating factual and legal areas for further inquiry; and (6) selecting an option. This exercise of judgment involves a blend of "interrelated considerations including knowing about client goals, legal rules, legal institutions contexts within which problems arise, opponents' goals, and making predictions about how people and institutions will respond to taking or withholding action."[75] This structured format is particularly helpful after a more free-flowing brainstorming session.

Using the whiteboard or a large piece of paper or a computer-displayed document to help students visualize and keep track of the decision-making framework is a powerful, in-person tool that creates a "takeaway" for student attorneys. They will likely leave the

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[73] Robert D. Dinerstein & Elliott S. Milstein, *Learning to Be a Lawyer: Embracing Indeterminacy and Uncertainty*, in Educating Lawyers, *supra* note 7, at 327.

[74] *Id*. at 328.

[75] *Id*.

supervision meeting with various legal and factual issues to investigate to further refine the options. Their decision-making will be improved by fleshing out alternatives and outcomes they may not have initially identified. Most importantly, they will gain a sense of control over a previously chaotic situation.[76] Further, the entire team will have gained a transferable skill to deploy for the rest of their legal careers that will improve their decision-making in a range of settings.[77]

Kris Henning recommends walking through the framework with students early in the semester, and then as the semester progresses, expecting them to apply the framework on their own so that they arrive at a supervision meeting with a proposed plan of action.[78] Through this process, "Teachers … empower students with the tools they need to make good decisions on their own."[79] Notably, this structured process of decision-making is similar to how lawyers counsel clients, and a client counseling chart can also be generated in this model in the supervision setting. Using the decision-making framework teaches problem-solving, collaboration, critical and creative thinking, and transferable legal skills.

5. Quick Writes

Quick writes involve having students write a short response to a prompt and then sharing their ideas with the larger group.[80] Many clinicians use quick writes in the seminar portion of the course, and this tool is increasingly used in doctrinal courses as well. It works just as well in the smaller, more intimate setting of a supervision meeting. The benefit of a quick write is that it gives students time to gather their thoughts and think through an answer before speaking. This reduces student anxiety and improves the quality of the discussion. It also provides a quiet space for reflection in a group setting, which helps to vary the pace and energy of a supervision meeting. It permits a quieter or slower processing student to participate at the same rate as their louder and faster processing colleagues.

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[76] Kristin Henning, *Combatting Decision Fatigue in Supervision,* in EDUCATING LAWYERS, *supra* note 7, at 233. She states that "[a]n effective decision-making framework also reduces the student's anxiety and builds the student's confidence in dealing with the unknown." *Id*. at 240.

[77] It is important to teach for transfer, i.e., to "improve your teaching so that your students will understand, remember, and be able to later use what you teach them." Shaun Archer, James P. Eyster, James J. Kelly, Jr., Tonya Kowalski & Colleen F. Shanahan, *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. LEGAL EDUC. 258, 259 (2014).

[78] Henning, *supra* note 76, at 236.

[79] *Id*. at 235.

[80] Danxi Shen states that "[a] quick write is a 'brief written response to a question or probe' that requires students to rapidly explain or comment on an assigned topic." Danxi Shen, *Quick Write*, HARVARD U. https://ablconnect.harvard.edu/quick-write.

Quick writes are ideal for generating focused, and short responses. In teaching for transfer, Shaun Archer and his co-authors suggest quick writes to plan for lawyering tasks. For example, to prepare for a client interview, they pose quick write questions to students that draw on students' prior experiences in building rapport with new people.[81] Sample questions include: "Think of a recent situation in which you met someone new. What did you do to begin to establish a connection with that person? What did that person do to begin to establish a connection with you?"[82] After writing down their responses, the students share their recollections and discuss how those experiences can inform their client interviews.[83]

There are countless points where a quick write can be useful. It can be used to kick off a brainstorming session. Students might engage in a quick write to suggest language for the scope of representation in a retainer agreement, and then the team can discuss which version is most clear and accurate from the client's perspective. Student attorneys can generate a quick write setting forth a case theory, and then the team can compare and contrast their case theories and discuss their strengths and weaknesses. Student attorneys might draft a sample bylaw or interrogatory and compare the effectiveness and precision of the different versions. Prior to a negotiation, students can be asked about various strategic choices, such as whether they want to make the first offer or have the opponent put down the first offer, along with a sentence explaining their preference. The team can then debrief the various strategic choices. By the end of the discussion, the lead student attorneys will have seen and debated a range of options, which in turn, will help them with decision-making. Quick writes help students slow down their thought processes and prepare before speaking. They help vary the tempo of a meeting and ensure that all students respond to a prompt, which can also bolster the confidence of quieter or less assertive students.

6. Rule Review

Lawyers operate in a system of rules and laws. All lawyers work subject to the rules of professional conduct for their jurisdiction. For litigators, there are also cross-cutting rules of procedure and evidence, as well as statutory substantive laws setting forth possible claims and defenses. Statutes also govern how various real estate and transactional deals must be conducted. There are laws that are the basis for reform

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81 Archer et al., *supra* note 77, at 284.

82 *Id*.

83 *Id*.

in legislative clinics. In training student attorneys, we should emphasize the importance of reading rules carefully and closely. Guessing at or paraphrasing rules and laws can be a quick path to malpractice. Still, students can be tempted down these paths because much of the doctrinal curriculum hinges on having them memorize and regurgitate legal principles on exams. Thus, clinics are an important space for emphasizing the centrality of legal text to legal reasoning, which "is a subtle thinking process in which legal rules, as extrapolated from case law, are applied to facts, real or hypothetical, to predict outcomes."[84]

Thus, in supervision meetings, students can (and should) be pulling out paper or electronic copies of the relevant laws, rules, and cases under discussion and reading and analyzing them closely. The opportunities for reviewing legal texts are endless in clinical supervision. An emphasis on text can also surface whether students are struggling to find the relevant rules and laws. In turn, this is an opportunity to guide students in the importance of indexes and tables of contents to find rules efficiently, which is a transferable lesson in legal research skills.

Once a rule, law or case is identified, the team can parse the text, identify grey areas for further research and advocacy, and consider next steps. If an ethical issue is on the agenda, such as the propriety of contacting an unrepresented party, the entire team can identify and read relevant rule and commentary and analyze the proper course of action. If a complaint is about to be filed, the team can review the service rules and discuss and choose among options for serving a complaint. As a case theory is being developed, students can examine the substantive law to identify each element of a claim or defense. If students are considering how to get an out of court statement admitted at trial, they can parse the evidence rules to identify the hearsay rule and its exceptions. Students can benefit from discussing the governing rules in an IRAC format that transfers their legal writing instruction to the clinical setting – identifying the legal issue at stake, reading the text of the rule as a group, applying the rule, and arriving at a conclusion.

At the same time, law is often indeterminate. Rule analysis can help the team identify gaps and ambiguities in the law and think creatively how to use these grey areas for advocacy to benefit their clients. In short, every time case representation requires rule application, the students can pull out and examine the rules and work from the text. Rule review is a form of nondirective modelling that students will take with them into their careers.

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[84] Jess M. Krannich, James R. Holbroo & Julie McAdams, *Beyond Thinking Like a Lawyer and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 Denv. U. L. Rev. 381, 385 (2009).

7. Online Fact Investigation

Clinics are the main site in law school where students learn about fact investigation and the importance of facts to building a case. Carolyn Grose and Margaret Johnson highlight to students how facts "are the essential pieces of a coherent and compelling story,"[85] and "most case outcomes are driven by the facts."[86] Yet the rest of the law school curriculum focuses almost exclusively on analyzing law.[87] In reading appellate cases, students are handed the facts on a silver platter as if the facts were preordained. With this approach, students do not gain an appreciation of how the factual record was generated; the facts that the lawyers found informally or through discovery; the facts the lawyers never found because they failed to look or ask; and the facts that the lawyers discarded or emphasized as they shaped their case theory. Clinics are where students gain an appreciation for how facts win and lose cases; influence negotiation outcomes; set the terms of a transactional deal; and persuade legislators.

In the modern era, many facts can be found online. A supervision meeting can be a setting for exploring informal avenues for fact investigation, which also have the benefit of being cost-free and efficient as compared to discovery, FOIA requests, or other formal mechanisms for gathering information. If the team meets in a space with a computer and a screen, the student attorneys can brainstorm about the types of facts that can be found through internet sleuthing. They can look up an opponent's prior litigation history, examine a contested property on Google satellite, locate corporate records of an opponent or other parties, identify possible contacts on a government organization chart, peruse the social media accounts of witnesses, and explore all sorts of other freely available information on the internet. Finding and displaying this information to the team can generate a jolt of energy to a supervision meeting and spur a discussion for further avenues for factual investigation. In a litigation context, students can discuss what can be located via informal discovery and what requires formal discovery mechanisms. They can also begin a discussion of whether the evidence they locate on-line will be admissible in court. Conducting joint fact investigation as a team has the additional benefit of moving the case forward and propelling the student attorneys to develop a full factual investigation plan.

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[85] Carolyn Grose & Margaret E. Johnson, Lawyers, Clients & Narrative: A Framework for Law Students and Practitioners 128 (2nd ed. 2023) (describing the law school curriculum's failure to teach students about the importance of facts).

[86] *Id*. at 125.

[87] *Id*. at 127.

8. Video Review

Many clinics take advantage of recording technology to have students tape various real and simulated aspects of their clinic experience. Videos can be helpful tools for students to observe their own performances and to reflect on their strengths and weaknesses. Students might record client interviews (with client permission) to have a full record of the interview and to gain feedback, especially if they conduct interviews without a faculty member present.[88] Simulations might be recorded, such as trial advocacy exercises.[89] At the intersection of real and simulated, the clinic might record moots for trials or counseling sessions. Videos can be excerpted and shared in a supervision meeting for reflection. Further, post-pandemic technology makes excerpting and sharing video clips easier than ever.

Beryl Blaustone recommends a flexible six-step model for providing students with feedback that can be utilized for video review in a supervision meeting.[90] She cautions that feedback should be a "planned professional choice rather than a reactive choice made in moments of dissatisfaction or disappointment."[91] Bringing a video excerpt into a supervision meeting guarantees that the feedback will be planned. Her steps are as follows: (1) "the student identifies the strengths of the performance;" (2) "the peer or supervisor responds solely to those items raised by the feedback recipient;" (3) "the peer or supervisor identifies other strengths of the performance;" (4) "the student identifies difficulties and/or changes to be made;" (5) "the peer or supervisor responds to the identified difficulties;" and (6) "the peer or supervisor indicates additional difficulties."[92] The model is designed to help students learn to engage in self-critique and to emphasize moments of mastery given that "[s]olid areas of work need reinforcement if they are to be consciously used again in the further construction of the scaffolding for any lawyering activity."[93] The rigor of the feedback model helps counter the risk

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[88] Carolyn Grose, *Flies on the Wall or in the Ointment? Some Thoughts on the Role of Clinical Supervisors at Initial Client Interviews*, 14 CLIN. L. REV. 415, 417 (2008) (describing the reasoning for attending or not attending client interviews and noting that many professors who choose not to attend interviews will have student attorneys tape the interviews).

[89] Video review is a core component of many trial advocacy courses. *See* Christopher Behan, *From Voyeur to Lawyer: Vicarious Learning and the Transformational Advocacy Critique*, 38 STETSON L. REV. 1, 13 (2008).

[90] Beryl Blaustone, *Reflection on Supervision in Feedback Interactions: Reinforcement of Some Fundamental Themes*, in EDUCATING LAWYERS, *supra* note 7, at 223. *See also* Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317, 339 (2014) (recommending video performance review as part of a formalized process of reflection).

[91] Blaustone, *supra* note 90, at 224.

[92] *Id*. 225-26.

[93] *Id*. at 229.

that video performance review will focus on superficial critiques, such as style over substance.[94]

9. Critical Theory Frames

Ann Shalleck and Jane Aiken write that "fostering critical perspectives on how law functions [is] one of the goals of clinical education."[95] Supervision meetings can be an ideal space to bring critical theory frames to bear on casework.[96] While this can also be done in seminars and case rounds, there may be situations in which a specific student or team would benefit from situating a client representation within a larger social and cultural context.[97] In addition, students can benefit from reflecting on how their own identities impact their lawyering choices. "[T]his combination of conceptual thinking and practical action fosters integrative learning."[98] In recent years, clinicians have increasingly brought critical theory into the classroom,[99] such as critical race theory,[100] narrative theory,[101] feminist legal theory,[102] movement lawyering,[103] rebellious lawyering,[104] cultural humility,[105] and more. Alina Ball explains how bringing critical legal theory into clinical teaching facilitates "interdependent pedagogical goals: (1) contextualizing client

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94 Behan, *supra* note 89, at 13.

95 Shalleck & Aiken, *Supervision: A Conceptual Framework*, *in* Education of Lawyers, *supra* note 7, at 190.

96 Alina Ball states that "critical legal theory explains and theorizes how subordination of classes of people is perpetuated even absent formal systems of intentional discrimination." Ball, supra note 10, at 24. Shalleck & Aiken suggest bringing a frame of "inequality, injustice, or exclusion" into supervision meetings. Shalleck & Aiken, *Supervision: A Conceptual Framework*, *in* Education of Lawyers, *supra* note 7, at 179-80.

97 *Id.* at 179 ("While the seminar is often designed to build understanding of at least some of these [critical theory] issues, the context of each case or project invariably requires particular work in supervision.").

98 *Id*. at 181.

99 Ball, *supra* note 10, at 28. On clinical professors bringing theory into their scholarship, see Wendy A. Bach & Sameer M. Ashar, *Critical Theory and Clinical Stance*, 26 Clin. L. Rev. 81 (2019).

100 *See* Norrinda Brown Hayat, *Freedom Pedagogy: Toward Teaching Antiracist Clinics*, 28 Clin. L. Rev. 149 (2021); Anne D. Gordon, *Cleaning up Our Own Houses: Creating Anti-Racist Clinical Programs*, 29 Clin. L. Rev. 49 (2022).

101 *See generally* Grose & Johnson, *supra* note 85. *See also* Shalleck & Aiken, *Supervision: A Conceptual Framework*, *in* Education of Lawyers, *supra* note 7, at 181.

102 *See* Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 Am. U. J. Gender & Soc. Pol'y & L. 161 (2005); Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 Minn. L. Rev. 1599 (1991).

103 *See* Betty Hung, *Movement Lawyering as Rebellious Lawyering: Advocating with Humility, Love and Courage*, 23 Clin. L. Rev. 663 (2017).

104 *See* Jeena Shah, *Rebellious Lawyering in Big Case Clinics,* 23 Clin. L. Rev. 775 (2017).

105 Grose & Johnson, *supra* note 85, at 47-65.

work; (2) encouraging creativity; (3) promoting higher order thinking; and, (4) developing professional character and an ethical compass."[106]

In the supervision setting, the teacher can identify a relevant critical theory frame that would help a student or students contextualize their case. The teacher can assign excerpts of foundational readings to students before a supervision meeting and then engage the students in a discussion of how the theory better informs their understanding of the client's situation and can shape their lawyering. I have previously written about the ways that clinical professors are a vital link between legal scholarship and law practice. By sharing theory in a live client context, we send our students into the world with more sophisticated understandings of the structural underpinnings of the law and its impact on the lives of marginalized communities.[107] I described bringing into my supervision of public benefits cases Martha Fineman's theory of vulnerability as a shared human condition warranting greater state support.[108] Her theory sheds light on the harmful "welfare queen" stereotype that limits our clients' access to public benefits and stigmatizes single mothers of color. In bringing this theoretical frame to bear on real cases, "students can articulate why society has a shared responsibility to support families that do not conform to the patriarchal, marital household model. In turn, students can craft case theories and narratives that shift the fact finder's gaze away from individual blame and into a larger social context that stresses collective responsibility."[109] This has as a ripple effect outside the classroom; "as these students move into law practice and policymaking positions, they are able to apply these theoretical insights to other problems and to influence the course of public debate."[110] I teach in a general practice clinic, so while the entire class would have certainly benefitted from exposure to Fineman's theory, seminar time is limited, and it was particularly salient for a specific team handling a welfare benefits case.

Eduardo Ferrer and Kristin Henning explain how they use explicit critical frames to infuse every aspect of their juvenile justice clinic.[111] The chosen frames – adolescence; race; trauma; and sexual orientation, gender identity, and gender expression[112] -- provide a foundation for the course "through which students are encouraged to intentionally and

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106 Ball, *supra* note 10, at 23.

107 Michele Gilman, *The Future of Clinical Legal Scholarship*, 26 Clin. L. Rev. 189, 198 (2019).

108 *Id*.

109 *Id*. at 199.

110 *Id*.

111 Eduardo R. Ferrer & Kristin N. Henning, *Critical Clinical Frames: Centering Adolescence, Race, Trauma, and Gender in Practice-Based Pedagogy*, 30 Clin. L. Rev. 113 (2023).

112 *Id*. at 140.

critically examine and interpret everything they encounter in furtherance of their representation of their clients' expressed interests."[113] They selected the frames based on their personal and clinic values, as well as the frames' relationship to the clinic's advocacy.[114] They set forth the frames in the syllabus and cover them in seminar assignments and seminar discussions. In terms of supervision, the frames allow for critical reflection in which students can unpack their assumptions about clients and the law.[115] The supervision setting allows for an "explicit, intentional, and extensive analysis of the frames,"[116] in which students relate their casework "back to the research and theory they have learned."[117] Importantly, the frames allow for self-directed learning: "while the various pedagogical frames may aid the student with their analysis, it is ultimately the student who is directing the process."[118] Supervisors can also engage students in assessing the legitimacy or applicability of the frames and encourage additional or alternate frames to understand their practice area. In short, in making decisions about where to bring theory into the clinic, it is important to recognize supervision as an additional and appropriate site.

10. Guided Reflection

The metacognitive approach of clinical supervision stresses planning, doing, and reflecting.[119] The reflection stage can be done independently (such as through journaling), in the seminar (such as through case rounds), and in supervision, taking advantage of the team structure. The teacher can guide students through a reflection on the performance of their lawyering tasks. Tim Casey states that "[a] conscious and deliberate analysis of a lawyering performance can provide the new lawyer with insights into what choices were available, what internal and external factors affected the decision making process, and what societal forces affected the context of the representation."[120] Casey suggests a framework by which a teacher can guide the students through six stages of reflection that "move the student from an objective perspective to a relativistic perspective, and ultimately, to a contextual perspective."[121]

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113 *Id*. at 118. In this way, the use of pedagogical frames itself becomes a meta-frame – a methodology for confronting the false claims of neutrality, certainty, and replicability of the law and the systems and people that enforce it. *Id*. at 122.

114 *Id*. at 142.

115 *Id*. at 147.

116 *Id*. at 146.

117 *Id*. at 147.

118 *Id*. at 121.

119 Lee, *supra* note 19.

120 Casey, *supra* note 90, at 319.

121 *Id*. at 321-22.

Casey also provides specific prompts for each stage of reflection.[122] These questions help students develop "professional judgment" while building the life-long skill of "reflective practice."[123] These prompts are not driven by any particular answer or outcome, and thus differ from a more Socratic approach.

Students should also engage in guided reflection on their roles in the justice system and the larger social context in which we practice law.[124] This helps students better represent their low-income clients and to engage as policy advocates in the future.[125] Spencer Rand warns that merely representing poor people will not open students minds to social justice imperatives; rather, "We must make clear to our students … that social justice means more than just giving the poor access to counsel. We must teach them a model by which they can practice in a way that brings social justice into their practice."[126] Jane Aiken details a model of "justice readiness," which involves helping "students learn how to reflect on their experience, place it in a social justice context, glimpse the strong relationship between knowledge, culture and power, and recognize the role they play in either unearthing hierarchical and oppressive systems of power or challenging such structures."[127] To help students understand "how oppression manifests itself in the law," she poses open-ended questions to them in supervision such as, "'Where do you see resistance to the solution you seek for your client?' and 'Who benefits if this solution is denied?'"[128] She explains that this guided reflection "should be directed toward encouraging the student to think about a situation in a new way, thus creating some kind of disorientation and opening the way

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122 *Id*. at 349. Casey states that "[i]n the first stage of reflection, the student must compare her performance to the standard of professional competence." *Id*. at 334. "In the second stage of reflection," Case continues, "we ask the student to identify different, equally successful ways to accomplish the lawyering performance." *Id*. at 338. In the third stage, "the student considers why she made a specific choice." *Id*. at 339. In the fourth stage, "the focus of attention shifts from internal context to external context. Students must be aware of the preferences, experiences, biases and characteristics of the other people involved in the lawyering performance." *Id*. at 341. "In the Fifth Stage," Casey states, "students consider not only case-specific factors that influenced their performance, but also systemic power dynamics, political and social realities, and economic forces that affect their decisions." *Id*. at 344. Finally, "at the Metacognitive [Sixth] Stage, we ask the student to consider how they think. Specifically, we ask them how they think differently, or, how their thinking process has changed, as a result of reflection on the lawyering activity." *Id*. at 346.

123 *Id*. at 319.

124 Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clin. L. Rev. 37, 38 (1995).

125 *Id.*

126 Spencer Rand, *Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach*, 13 Clin. L. Rev. 459, 461 (2006).

127 Jane H. Aiken, *Provocateurs for Justice,* 7 Clin. L. Rev. 287, 296–97 (2001).

128 *Id.* at 305.

for new meaning schemes."[129] As teachers, we "pull[] back the curtain and dethrone[] neutrality," and "[it] is then up to them what choices they make about the kind of lawyers they want to be."[130]

III. Supervision and Socratic Questioning

Existing models of clinical supervision in the pedagogical literature assume a Socratic dialogue. Without a doubt, there is a place for Socratic questioning in clinic supervision meetings. While this Essay strives to broaden our nondirective supervision toolkit, it is worth highlighting the advantages and disadvantages of the Socratic tradition in supervision meetings.

The Socratic method is the core pedagogy of legal education.[131] In most doctrinal classrooms, it involves a professor asking a selected student questions "to articulate gradually deeper understandings of a legal doctrine or theory."[132] The Socratic method, especially as it is used in the doctrinal classroom, has been heavily critiqued[133] for causing students psychological distress;[134] reifying race, class, and gender hierarchies;[135] being disconnected from lawyering skills and client representation;[136] turning the rest of the class into vicarious learners;[137] and fostering the notion that legal questions have single answers.[138] However, the Socratic method also has its defenders.[139] Beth Wilensky acknowledges that the Socratic method is "tremendously painful when done poorly," but has "tremendous value when done well…[I]t insists that students do the

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129 *Id*.

130 *Id*. at 289.

131 Elizabeth G. Porter, *The Socratic Method*, *in* Building on Best Practices: Transforming Legal Education in a Changing World 101 (Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kaas & Antoinette Sedillo López eds., 2015).

132 *Id*.

133 Orin S. Kerr, *The Decline of the Socratic Method at Harvard,* 78 Neb. L. Rev. 113, 118 (1999) (summarizing various critiques).

134 *See* Howard, *supra* note 4, at 173-74 ("Not only is the focus of the Socratic classroom painfully distant from the world of practice, but the psychological impact of this form of teaching simultaneously injures students and distorts their preparation for the interpersonal requirements of practice.").

135 *See* Gerson, *supra* note 43, at 2327; Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 Stan. L. Rev. 1547 (1993); Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. Legal Ed. 591 (1982).

136 Lisa T. McElroy, *From Grimm to Glory: Simulated Oral Argument as a Component of Legal Education's Signature Pedagogy*, 84 Ind. L.J. 589, 602–03 (2009) (recommending a variety of teaching methods to supplement the Socratic method).

137 Michael Hunter Schwartz, *Teaching Law by Design: How Learning Theory & Instructional Design Can Inform & Reform Law Teaching*, 38 San Diego L. Rev. 347, 351 (2001).

138 Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Realist Pedagogy*, 60 Vand. L. Rev. 483, 494 (2007).

139 Porter, *supra* note 131, at 101.

thinking themselves, as a means of learning how to think. At its best, engaging in Socratic dialogue requires students to reason through difficult propositions, confront inconsistencies in their conclusions, and rethink their prior stances."[140] Jeanne Suk Gerson explains how the Socratic method can model dialogue outside the classroom setting; it "should enable rigorous exploration of high stakes issues and disagreements through the reexamination of reflexive reactions, and nurture an attitude that is questioning and self-critical — the kind of civil discourse that would benefit our democracy."[141]

In a doctrinal course, Socratic questioning is generally about an appellate case. In a clinic, the client representation is the text. This dilutes many of the critiques of the Socratic method, which are also tied to the Langdellian method of case analysis.[142] In a clinic, the teacher is more likely attuned to downplaying professional hierarchies, centering student well-being, and teaching a wide range of lawyering skills. Thus, a Socratic dialogue in the clinic setting can achieve many goals of supervision. Still, the *exclusive* use of Socratic questioning in the clinic setting raises some critiques. Even in a small group setting, it centers the teacher in a hierarchical relationship. Under questioning, students often feel that the professor is "hiding the ball," and that they must guess a proper answer. It puts team members in role as subjects rather than collaborators. Moreover, it can be tedious to teach and learn through only one methodology, which is of course the reason that many doctrinal professors are borrowing from their experiential colleagues and expanding their techniques for classroom teaching. Thus, as with any teaching methodology, Socratic supervision can be done well or poorly, and even at its most skillful, it has its benefits and downsides.

Ann Shalleck provides a model for Socratic dialogue in supervision.[143] In a foundational article on clinical supervision, she provides a scripted colloquy of a supervision meeting in a domestic violence case and then explains intentional choices the teacher makes, as well as options the teacher considers and rejects. She describes the benefits and

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140 Beth Hirschfelder Wilensky, *Dethroning Langdell*, 107 Minn. L. Rev. 2701, 2709 (2023).

141 Gerson, *supra* note 43, at 2342.

142 On the history of this dominant form of legal education, see Rachel Gurvich, L. Danielle Tully, Laura A. Webb, Alexa Z. Chew, Jane E. Cross, & Joy Kanwar, *Reimagining Langdell's Legacy: Puncturing the Equilibrium in Law School Pedagogy*, 101 N.C. L. Rev. Forum, 118, 129–31 (2023). The authors explain that Langdell chose Socratic questioning to be more interactive form of instruction than a lecture format. *Id*. at 130.

143 Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. Rev. L. & Soc. Change 109, 112 (1993– 94) (Shalleck states that "[i]t is not an 'ideal' supervision, a model toward which to strive, nor a 'typical' supervision, a realistic portrayal of an actual supervisory experience. Rather, it is an heuristic device, providing a focus for discussing the fundamental concepts, techniques, and assumptions of supervision.").

costs of each teaching goal. This demonstration of Socratic questioning affirms the importance of connecting teaching goals to teaching strategies. It also reaffirms that nondirective teaching is a misnomer. "While any given interaction between teacher and student may have become very nondirective-either in the sense of being very free flowing, without a structured or predefined agenda, or in the sense of not leading to a particular answer or way of looking at things-the teacher was nonetheless both defining the educational agenda and making decisions in a self-conscious, directed manner."[144] In short, Shalleck provides a compelling demonstration and analysis of goal-driven, Socratic-style supervision. There are many situations in which Socratic questioning can help expand students' thinking and allow them to find their own path and identity as lawyers. It is one of many tools in our expansive teaching toolbox.

Conclusion

Supervision meetings are a core component of a student's clinical experience. They are a space where a teacher helps students question assumptions, build lawyering skills, learn to collaborate effectively, engage in strategic decision-making, consider critical perspectives on law, and prepare for lawyering tasks and reflect upon them. A nondirective teacher aims to achieve these goals by guiding student to find answers on their own, rather than providing them. Most new clinical teachers are instructed to use Socratic dialogue to achieve nondirective supervision goals. Yet there are multiple teaching techniques available to supervisors for advancing nondirective teaching objectives and using the small group format effectively. The ten teaching methods discussed in this article reach students with differing learning styles, center students in their own learning, raise the energy in meetings, and fit within the metacognition learning model that is the core of clinical teaching. These techniques should be selected and tied to specific teaching and learning goals and varied throughout the semester. A wide-ranging teaching methodology makes supervision meetings more engaging and enjoyable for teachers and students alike. As creative teachers, we can develop creative lawyers.

144 *Id*. at 179.

FIRST-GEN IN THE FIELD

Carolyn Young Larmore*

First-generation law students are often at a disadvantage in law school, having no family experience in higher education and few connections with attorneys or other professionals. These difficulties are only compounded when first-gen students leave the classroom and venture into the real world of legal externships, where professional identity formation may begin to take place, but where the landscape is even more foreign. The expectation that first-gen students should be able to navigate courtrooms and legal offices can be a heavy burden on these students, often leading to added stress and imposter syndrome.

This article examines the specific challenges first-gen students face in their externship placements, and what law schools, externship supervisors, and students themselves can do to overcome them. This inquiry draws on existing literature and survey data about first-gen students in higher education and is further aided by in-depth interviews with ten first-gen law students from around the country. In these interviews, first-gen law students reveal what aspects of their externship experience were positive, what could have been improved, and what assistance would have helped them to thrive.

I. Introduction

> *I did learn a lot [at my externship], a lot of terms, a lot of how to understand what wording should be in contracts. But then there were days where I definitely felt like I was walking through a room with no light, and I was, like, "I don't know where to go."*[1]

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* Carolyn Young Larmore is a Professor of the Practice of Law and the Director of the Externship Program at Chapman University, Dale E. Fowler School of Law. Professor Larmore thanks the administration of the Fowler School of Law for its continued support of her research interests, as well as Deans Justin Cruz, Susie Park, and Sarira Sadeghi, for their assistance with aspects of this article. She also thanks her small group at the 2023 Clinical Law Review Writers' Workshop – Kate Kruse, Sue Schechter, Jennifer Safstrom, Mia Jackson-Rosenthal, and Brett Montroy – for their insightful feedback on a draft of this article. Professor Larmore could not have done the research underpinning this article without her colleagues from the externship community – Nira Geevargis, Meg Reuter, Neha Lall, Halle Hara, Grace Parrish, Christine Szydlowsk, Janet Nalbandyan and Mitzie Vitela – who helped to connect her with recent graduates to interview. Carolina Roman also assisted tremendously in transcribing hours of interview recordings. Finally, as a first-generation college student herself, Professor Larmore thanks her parents for teaching her the value of education and hard work.

[1] Farnaz interview on file with the author, one of ten interviews conducted with 2023 law school graduates who were also first-generation college students. Quotations taken from the interviews have been edited or otherwise cleaned up for clarity, and names have been changed to protect anonymity. Brief descriptions of each of the interviewees can be found in Appendix A.

> *I was like, "oh, wow! These other externs actually know what they're doing!" And there's some students that have . . . grown up in this world . . . . I didn't have that. So, I think it's just crazy, comparing things that I'm seeing for the first time versus the person next to me, they're like, "yeah, this has been my life, like, I already knew I was going to do this." So, I think that's when imposter syndrome kind of hits.*[2]

The preceding reflections about externship experiences were shared by two recent law school graduates. These graduates have little in common with one another – they went to different law schools in different parts of the country, come from different ethnic backgrounds, and externed in different practice areas. What they have in common is this: they were both the first person in their immediate families to graduate college, let alone law school.

First-generation college students – those who do not have a parent with a college degree[3] – have been the focus of much study,[4] with various organizations dedicated to their success.[5] But much less has been examined about first-gen students when they enroll in professional school such as law school.[6] Still less is known about their experiences in externships, which provide hands-on experience in real-world legal settings, and can be pivotal for students' professional development and eventual

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[2] Lakshmi interview on file with the author.

[3] *See, e.g.,* the Higher Education Act of 1965, 20 U.S.C. 1070(f)(1), defining "First-Generation College Student" as "[a]n individual both of whose parents did not complete a baccalaureate degree" or "[i]n the case of any individual who regularly resided with and received support from only one parent, an individual whose only such parent did not complete a baccalaureate degree."

[4] *See, e.g.*, Rob Longwell-Grice, Nicole Zervas Adsitt, Kathleen Mullins & William Serrata, *The First Ones: Three Studies on First-Generation College Students*, 36 NACADA J. (2016); Jennifer Engle & Vincent Tinto, *Moving Beyond Access: College Success For Low-Income, First-Generation Students*, The Pell Institute (2008) https://files.eric.ed.gov/fulltext/ED504448.pdf; Carmen Tym, Robin McMillion, Sandra Barone & Jeff Webster, *First-Generation College Students: A Literature Review* (2004) https://files.eric.ed.gov/fulltext/ED542505.pdf; Jillian Ives & Milagros Castillo-Montoya, *First-Generation College Students as Academic Learners: A Systematic Review*, 90 Rev. Educ. Res. 139 (2020); Gary R. Pike & George D. Kuh, *First- and Second-Generation College Students: A Comparison of Their Engagement and Intellectual Development*, 76 J. Higher Educ. 276 (2005); Khanh Van T. Bui, *First-Generation College Students At A Four-Year University: Background Characteristics, Reasons For Pursuing Higher Education, And First-Year Experiences*, 36 College Student J. 1 (2002).

[5] *See* https://risefirst.org/(last visited March 4, 2024); https://firstgen.naspa.org/ (last visited March 4, 2024).

[6] Jacqueline M. O'Bryant & Katharine Traylor Schaffzin, *First-Generation Students in Law School: A Proven Success Model*, 70 Ark. L. Rev. 913 (2018); LSSSE, *Focus on First-Generation Students* 7, https://lssse.indiana.edu/wp-content/uploads/2023/10/Focus-on-First-Generation-Students-Final.pdf; Melissa L. Jones, First-generation Law Students: Barriers to Success (2021) (Doctor of Education Dissertation, University of Mississippi), *available at* https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=3109&context=etd.

success in practice.[7] This article delves into the particular issues faced by first-gen students during externships and explores how law schools and site supervisors can better support them in these valuable learning opportunities.

Section II of this article provides an overview of who exactly "first-gen" students are and their prevalence in law school. It also outlines the common characteristics shared by first-gen students and the challenges they often encounter in higher education, such as a feeling of imposter syndrome and lack of professional networks. It draws on research studies and other statistical data, as well as examples from the first-gen student interviews the author conducted.

Section III highlights the importance of externships for law students, especially for first-gen students. Externships serve as an ideal bridge between theoretical legal knowledge and practical application, allowing students to gain valuable exposure to the legal profession under guided supervision. For first-gen students, externships can play a pivotal role in building their professional identities and ultimately lead to post-graduation employment.

Section IV explores in depth the externship experiences of ten recent law school graduates who shared their insights and perspectives. These interviews were with recent graduates of six different law schools and covered a range of topics concerning the first-gen law school and externship experience. The results of these interviews serve as a valuable resource for understanding the needs and challenges of first-gen students in externships.

The next sections offer concrete advice on how to support first-gen externs. Section V focuses on what law schools can do to better assist their first-gen students during externships. It suggests various strategies, such as more directed recruiting of first-gen students for externship opportunities, allowing paid externships, fostering open discussions about first-gen issues, and addressing imposter syndrome. Section VI shifts the focus to site supervisors, emphasizing their vital role in supporting first-gen externs. It includes recommendations for mentoring and providing constructive feedback, facilitating networking opportunities, establishing first-gen affinity groups, and being empathetic and understanding of the unique challenges first-gen students may face. Finally, Section VII

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[7] *See* Alexi Freeman, *Don't Hire Me as a Token: Best Practices for Recruiting and Supporting Externs From Historically Marginalized Backgrounds*, 73 S. C. L. Rev. 357, 360-61 (2021) ("there does not appear to be scholarship, research, or best practices externally published that discuss how to best support the historically marginalized law student during a diversity-based clerkship program or during any other fieldwork, internship, or externship.") While Freeman's article focuses on the historically marginalized student of color, LGBTQ+ and disabled student, there is the same lack of scholarship about first-generation college students in legal externships.

considers the advice that the first-gen interviewees had for future first-gen externs on how to succeed in their fieldwork.

In conclusion, this article aims to shed light on the specific challenges that first-gen law students encounter during externships and advocates for a more inclusive and supportive environment within the legal profession. By providing guidance for law schools and site supervisors, it aims to support the creation of an environment that allows all students, including first-gen students, to thrive during their externships and throughout their legal careers.

II. Who Is "First-Gen"?

A. Definitions And Enrollment Statistics

The generally accepted definition of a first-generation ("first-gen") college student is one whose parents did not graduate with a 4-year college degree.[8] This is in contrast to "continuing-gen" students who have at least one college graduate parent.[9] And there are also "first-gen professionals," whose parents never worked in an office environment.[10] This article will focus on first-gen college students who have enrolled in law school,[11] many of whom are also first-gen professionals.[12]

According to the Law School Survey of Student Engagement (LSSSE), 26% of law students nationally identify as first-gen.[13] Thus, the needs of first-gen students, who make up more than one quarter of the law student population overall, is an important topic to be addressed.

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[8] *See supra* note 3.

[9] https://firstgen.naspa.org/files/dmfile/FactSheet-02.pdf (last visited March 4, 2024); *See also* Melissa A. Hale, *The Importance of Supporting First-Generation Law Students,* LSSSE Blog (Nov. 9, 2022), https://lssse.indiana.edu/blog/guest-post-the-importance-of-supporting-first-generation-law-students/.

[10] Martha Burwell & Bernice Maldonado, *How Does Your Company Support "First-Generation Professionals?* Harv. Bus. Rev. (Jan. 7, 2022), https://hbr.org/2022/01/how-does-your-company-support-first-generation-professionals.

[11] The focus of this article is not students who are the first in their family to go to law school but who nonetheless have college-educated parents, though many of the things that can help true first-gen students succeed in externships could also be of benefit to these students.

[12] Indeed, only four of the ten first-gen externs interviewed had parents with white collar jobs. *See* Merritt, Claire, Lakshmi and Emma interviews on file with the author.

[13] Chad Christensen, Jacquelyn Petzold, and Meera E. Deo, LSSSE 2023 Annual Report: Focus On First-Generation Students 7 (2023), https://lssse.indiana.edu/wp-content/uploads/2023/10/Focus-on-First-Generation-Students-Final.pdf.

B. First-Gen Characteristics

There is no one way to describe a first-gen student, as they come from a variety of backgrounds and experiences, with a range of intersectionalities.[14] But when considered in general, and in comparison to their continuing-gen peers, a picture can start to emerge.

Taken as a whole, first-gen students tend to be older than their continuing-gen counterparts. Fifty-four percent of first-gen students are over twenty-five years old during law school, as compared to 44% of continuing-gen students.[15] Of the first-gen externs interviewed for this article, ages at the start of law school ranged from twenty-one to thirty years old.[16]

First-gen students may also be immigrants or come from immigrant families. Approximately 10% of first-gen students in college are first-generation immigrants, and nearly 25% are the children of immigrants.[17] In contrast, 8% of continuing-gen students are immigrants, and 18% have foreign-born parents.[18] Of the ten first-gen students interviewed for this article, six mentioned being the children of immigrants, and one was an immigrant herself.[19]

Moreover, "[s]tudents of color from every racial group are more likely than White students to be first-gen."[20] Specifically, 53% of Latinx law students and 36% of Black law students are first-gen.[21] The same is true for undergrads: whereas only 26% of continuing-gen students identify as being from minority communities, 35% of first-gen students

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[14] First-gen students' membership in other groups described herein leads to an intersectionality of identities "that adds additional dimensions to both how a student navigates the postsecondary environment as well as how institutions provide support for these students." *First-Generation Students: Approaching Enrollment, Intersectional Identities, & Asset-Based Success* (Oct. 1, 2017), https://firstgen.naspa.org/blog/first-generation-students-approaching-enrollment-intersectional-identities-and-asset-based-success#:~:text=Identity%20%26%20Intersectionality&text=Often%2C%20first%2Dgeneration%20students%20are,worldview%20and%20college%2Dgoing%20experiences. *See also What is Intersectionality?* Center for Intersectional Justice, https://www.intersectionaljustice.org/what-is-intersectionality (last visited March 4, 2024) ("The concept of intersectionality describes the ways in which systems of inequality based on gender, race, ethnicity, sexual orientation, gender identity, disability, class and other forms of discrimination 'intersect' to create unique dynamics and effects.")

[15] Christensen, et. al, *supra* note 13, at 7 (this statistic is based on the age of the students at the time they responded to the LSSSE survey during their law school enrollment, not when they matriculated or graduated).

[16] *See infra* Section IV.

[17] Ilana Hamilton, *56% Of All Undergraduates Are First-Generation College Students*, Forbes Advisor (June 13, 2023) https://www.forbes.com/advisor/education/first-generation-college-students-by-state/.

[18] *Id.*

[19] *See infra* Section IV.

[20] Christensen, et. al, *supra* note 13, at 7.

[21] *Id.*

are from those groups.[22] The first-gen students interviewed for this article self-identified as White, Latina, South Asian, Chinese and Iranian.[23]

Family commitments are also more of an issue for first-gen students: 44% of first-gen law students "spend time caring for dependents, compared to 33%" of continuing-gen students.[24] Only one of the first-gen students interviewed had a child,[25] but others revealed responsibilities for parents or grandparents.[26]

First-gen students tend to take out student loans at a greater rate than continuing-gen students, with "24% of [continuing]-gen students anticipat[ing] graduating with no law school debt compared to only 12% of first-gen students."[27] They are also more likely to be from low-income backgrounds and need to work for pay during school.[28] In fact, not only are first-gen students more likely to be employed during law school, they "also tend to work more hours" than continuing-gen students.[29] Nearly half of the first-gen students interviewed explained that they needed to work for pay throughout their law school careers.[30]

Because of care responsibilities and the need to work, many first-gen students pursued their college degrees part-time, and 10% more of the first-gen students in law school are enrolled part-time as compared to their continuing-gen peers, though none of the students I interviewed had pursued a degree part-time.[31]

Finally, the need to work and family obligations may lead to first-gen law students earning lower grades and taking on fewer co- and extra-curricular activities like law review, moot court, and student organization membership while in law school.[32] The same study reveals "first-gen 1Ls study one hour more every week" than continuing-gen students, "and a full three more hours per week by the time they are 3Ls."[33] Though I did not inquire into my interviewees' co- and extra-curricular activities

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22 Engle & Tinto, *supra* note 4, at 8.

23 *See infra* Section IV.

24 Christensen, et. al, *supra* note 13, at 11. *See also* O'Bryant & Schaffzin, *supra* note 6, at 917.

25 Merritt interview on file with the author.

26 Nidhi and Lakshmi interviews on file with the author.

27 Christensen, et. al, *supra* note 13, at 10.

28 *Id.* at 10, 12. *See also* O'Bryant & Schaffzin, *supra* note 6, at 917-18; Engle & Tinto, *supra* note 4, at 8.

29 Christensen, et. al, *supra* note 13, at 12 (finding that '[a] full 54% of first-gen students report working, compared to 49% of non-first-gen students" and that "[t]hroughout law school, first-gen students average working about two hours more per week than non-first-gen students.")

30 Interviews with Ana, Emma, Sarah and Merritt on file with the author.

31 *See infra* Section IV. *See also* Christensen, et. al, *supra* note 13, at 7; Hale, *supra* note 9; Engle & Tinto, *supra* note 4, at 10.

32 Christensen, et. al, *supra* note 13, at 9, 14. *See also* O'Bryant & Schaffzin, *supra* note 6, at 934.

33 Christensen, et. al, *supra* note 13, at 12.

or the hours they studied, my interviews did elicit that the first-gen students earned grades in a range from graduating tenth in their class to being in the bottom twenty-fifth percentile.[34]

In addition to the picture the above statistics paint of first-gen students, studies have shown they have other important characteristics in common. First-gen students often lack networks and lack social and cultural capital and family support.[35] Nearly all those I interviewed commented that this was true for them as well.[36] First-gen students generally report a feeling of imposter syndrome, something all but one of the ten interviewees admitted to feeling.[37] And first-gen students and professionals are often unaware of the unwritten rules of the office,[38] as were at least a few of the students I interviewed.[39]

On the other hand, first-gen students should not be viewed through a lens that only sees their deficits. Studies have shown that first-gen students can be more proactive, resourceful, self-reliant, goal directed, and realistic than their continuing-gen peers.[40] They also exhibit grit and strategic thinking, are flexible, persistent, insightful, compassionate, grateful, and optimistic.[41] Each of these is a useful trait for a law student or extern to possess.[42]

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[34] *See infra* Section IV.

[35] O'Bryant & Schaffzin, *supra* note 6, at 920-21.

[36] *See generally* interviews on file with the author.

[37] Jones, *supra* note 6, at 15. *See also* David A. Grenardo, *The Phantom Menace to Professional Identity Formation and Law Success: Imposter Syndrome*, 47 U. Dayton L. Rev. 369, 371 (2022) (defining imposter syndrome as "creat[ing] a fear in an individual that they don't belong, and others that do belong will soon discover they are a fraud."). *See also* O.J. Salinas, *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 Minn. L. Rev. 2663, 2679 (2023) (writing that, as a first-generation student and person of color, the author "did not think I belonged in the law school classroom or in the legal profession."). *See also infra* Section IV.

[38] Tinisha L. Agramonte, *First-generation Professionals (FGP) Initiative, Designed to Unlock and Unleash FGPs' Full Potential* U.S. Dept. of Commerce (2018), https://www.hud.gov/sites/dfiles/ED/images/6.7.18-FirstGenerationProfessionalInitiativeGeneral20Oct20171700hrs.pdf (last visited March 4, 2024).

[39] *See, e.g.,* interview with Lakshmi on file with the author.

[40] Nancy J. Garrison & Douglas S. Gardner, *Assets First-Generation College Students Bring to the Higher Education Setting* (2012) at 26-47, https://files.eric.ed.gov/fulltext/ED539775.pdf.; *see also* Africa S. Hands, *Tapping Into the Assets of First-Generation Students During Times of Transition* 121 Info. & Learning Sci. 611 (2020).

[41] Garrison & Gardner, *supra* note 40, at 26-47. Interestingly, one of these characteristics – optimism – might be a detriment to law student success. *See, e.g.*, Emily Zimmerman & Casey LaDuke, *Every Silver Lining Has a Cloud: Defensive Pessimism in Legal Education*, 66 Cath. U. L. Rev. 823, 825 (2017) (exploring law student success and defensive pessimism, the strategy by which "anxious individuals set unrealistically low expectations" (relative to their past performance) and reflect extensively on potential pitfalls to prepare for upcoming events") (internal quotation, citation omitted).

[42] *See, e.g.,* Megan Bess, *Grit, Growth Mindset, and the Path to Successful Lawyering*, 89 UMKC L. Rev. 493, 522 (2021) (noting that grit is part of "the skill set necessary for success" in law school).

C. General Law School Support For First-Gen Students

Law schools have begun to put in place supports for first-gen students, whether they be administrative support programs or student-run organizations;[43] a quick internet search of "first-gen law school support" retrieves page after page of law schools with student groups and official administrative programs dedicated to helping first-gen students thrive.[44]

For example, Chapman University Fowler School of Law adopted a program for first-gen students in 2016 focused on their first year of law school.[45] The program concentrates on three pillars: social acclimation, academic achievement, and professional development, and contains seven to eight events each year, including "Law School 101," which focuses on introducing first-gen students to core aspects of law school life, and "Meet the Professors," which consists of a panel of law professors whose aim is to demystify interacting with them during office hours and beyond.[46] There is also one-on-one counseling through the Career Services Office and a "Network or Not Work" event during which first-gen lawyers talk to students about how they built their own networks, and first-gen students get a chance to practice networking skills.[47]

First-gen students can also find assistance beyond their campuses through at least one book. Melissa A. Hale, Director of Academic Success and Bar Programs at Loyola University Chicago School of Law, has published a 137-page guidebook for first-gen law students on such topics as preparing for and taking exams, health and wellbeing, and extracurricular opportunities.[48]

Finally, several organizations offer guidance to first-gen law students and lawyers. The ABA's Young Lawyer's Division has launched a first-gen initiative, the goals of which include "bridg[ing] the gap within the legal profession by fostering relationships, providing a community for our members to network comfortably, and creating outreach programs

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[43] *See* Gabriel Kuris, *Advice for First-Generation Law Applicants*, U.S. News & World Rep. (Dec. 6, 2021), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-first-generation-law-applicants-should-know#:~:text=Other%20law%20schools%20offer%20programs%20that%20provide%20peer,Program%20of%20New%20England%20Law%20Boston%20law%20school.

[44] *See, e.g.*, www.law.uci.edu/campus-life/student-organizations/orgs/fgpp.html (last visited March 4, 2024); https://gould.usc.edu/students/first-generation/ (last visited March 4, 2024); https://law.ucla.edu/life-ucla-law/student-organizations/first-gen-law-students-association (last visited March 4, 2024); https://law.ucdavis.edu/students/first-generation-advocates (last visited March 4, 2024).

[45] Interview with Sarira Sadeghi, Sam & Ash Assistant Dean for Academic Achievement at Chapman University Fowler School of Law (July 5, 2023); Interview with Susie Park, Assistant Dean for Career Services, Chapman University Fowler School of Law (July 7, 2023).

[46] Sadeghi Interview, *supra* note 45.

[47] Park Interview, *supra* note 45.

[48] Melissa A. Hale, A First-generation's Guide to Law School 120 (2022).

that create a sense of belonging."[49] Its website includes interview videos, articles, CLEs, and links to other resources.[50]

III. Why Externships?

Externships are the perfect place for first-gen students to learn about the practice of law because they straddle the line between classroom and courtroom or law office. Before going any further in prescribing how these experiences can better serve first-gen students, it would be helpful to take a look at what an externship is and what it usually entails.

A. Overview of a "Typical" Externship Program

Externship programs can vary widely from law school to law school, with different program structures tailored to each school and the needs of its student body. However, in the pedagogy of externship teaching that has developed, there are six broad characteristics "that all externship courses should share."[51] These are that an externship program include: (a) an externship placement site outside the law school, (b) teaching by both a faculty member and a site supervisor, (c) the transfer of learning from law school to law office or courtroom, (d) an opportunity for the student to participate in guided reflection on the experience, (e) inclusion of concepts relating to professional responsibility and professionalism, and (f) a focus on student self-determination and self-reliance, which leads to "professional identity formation."[52]

How this pedagogy must be put into practice as part of a law school curriculum is governed by the American Bar Association's Standards and Rules of Procedure for Approval of Law Schools.[53] In the Standards, the ABA defines an externship as a course that "provides substantial lawyering experience that. . . is reasonably similar to the experience of a lawyer advising or representing a client or engaging in other lawyering tasks in a setting outside a law clinic under the supervision of a licensed attorney or an individual otherwise qualified to supervise."[54] There must also be "a classroom instructional component, regularly scheduled

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[49] https://www.americanbar.org/groups/young_lawyers/about/initiatives/first-gen/about/ (last visited March 4, 2024).

[50] *Id.*

[51] *Id.*

[52] Gillian Dutton, Kendall Kerew, Kelly Terry, and Cynthis Wilson, Externship Pedagogy & Practice 10, 14-15 (2023).

[53] Standards and Rules of Procedure for Approval of Law Schools, Am. Bar Ass'n (2022-23) (hereinafter ABA Standards).

[54] ABA Standards Std. 304(d).

tutorials, or other means of ongoing, contemporaneous, faculty-guided reflection."[55]

Thus, a typical externship involves field work, where the student is guided by a practicing attorney or judge, and a classroom or similar component where faculty can support students in their learning experience. It is, to put it simply, the "modern iteration of the apprenticeship."[56]

As noted above, what this looks like at a particular law school can vary, as externship programs thrive on "creativity and flexibility in course design."[57] This diversity in program design is captured by the latest data from the Center for the Study of Applied Legal Education (CSALE).[58]

The 2022-23 CSALE survey revealed that nearly all schools offer externships in public interest law offices, judges' chambers, and government offices, while about two-thirds allow externships with in-house legal departments, and only half allow them in private law firms.[59] In addition, half of all law schools allow "full-time" externships of ten or more credits, with the rest offering only part-time externship positions.[60] Forty-six percent of law schools have adopted a paid externship program wherein students may earn compensation from their placement alongside academic credit from the school.[61]

Schools require anywhere from 42.5 to 60 hours of fieldwork per-credit, and most schools—89%—grade externships on a pass/fail basis.[62] Students are allowed to complete two or more externships at 63% of law schools, and of those schools, 86% allow students to complete the second externship in the same placement as the first, though some impose various conditions on the repeat experience.[63]

With regard to the ABA requirement that there be an "ongoing, contemporaneous, faculty-guided reflection," 73% of externship programs have a classroom seminar, 9% of programs offer regularly scheduled tutorials, and 17% meet the requirement through "other means of faculty-guided reflection."[64]

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55 ABA Standards Std. 304(a)(5).

56 Freeman, *supra* note 7, at 363.

57 Dutton et al., *supra* note 52, at 10.

58 Robert R. Kuehn, David Santacroce, Margaret Reuter, June Tai, & G.S. Hans, 2022–23 Survey of Applied Legal Education, Center for the Study of Applied Legal Education (CSALE) (2023), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/64fb7bd82fdee48e57e8ef04_Report%20on%202022-23%20CSALE%20Survey.rev.9.8.23.pdf.

59 *Id.* at 10.

60 *Id.*

61 *Id.* at 11.

62 *Id.* at 41, 42.

63 *Id.* at 45.

64 *Id.* at 43.

All this data comes together at each law school in any number of different configurations. For example, at Chapman, law students can work for state or federal judges, various government agencies, nonprofit law offices, in-house legal departments, or law firms.[65] Students may enroll in a single full-time judicial externship for ten credits, or they may complete a part-time externship for between one and five credits, for a total of three part-time externships for up to eight credits.[66] Students secure their own placements (i.e., they are not "matched" by the externship office) and repeat placements at the same office are allowed.[67] For most externships, one credit is awarded for every 50 hours of fieldwork, and the externship is graded on a "pass/no pass" basis.[68] There is no accompanying seminar, but students attend an orientation "bootcamp" in the first week of the semester, followed by setting learning goals for the semester, completing four-to-seven reflective journals (depending on number of credits) on which they receive faculty feedback, making daily time entries with detailed descriptions, submitting two samples of work product, and filling out a midterm and semester-end evaluation together with their supervisors.[69] Finally, Chapman allows students to be compensated by their placements while also earning course credit.[70]

B. Why Externships Are The Prefect Training Ground For Law Students, Especially First-Gen Students

So why are externships so important, especially to those with less familiarity with the professional and legal world? Externships are designed to introduce students to the practice of law in the 'real world' while providing them with the assistance and guidance of law school faculty.[71] In a well-designed externship, "[s]tudents' introduction to real life practice … [is] closely supervised by their externship supervisor and subject to evaluation and feedback from their law school instructor."[72]

Thus, "[f]ield placements offer an excellent platform from which to teach the skills law students need to be 'practice-ready'—not only knowledge and substance, and skills and practice, but also understanding

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65 Chapman University Fowler School of Law Externship Handbook, 3 (Mar. 2021), https://www.chapman.edu/law/_files/externships/secure/externship-handbook.pdf (last visited March 4, 2024).

66 *Id.* at 6–7.

67 *Id*. at 4–6, 11. Although most externships require 50 hours of work per credit awarded, lower credit externships require a higher hourly commitment: a 1-credit externship requires 90 hours of fieldwork, and a 2-credit externship requires 125 hours.

68 *Id*. at 6-7.

69 *Id*. at 7-9.

70 *Id.* at 4.

71 Charlotte S. Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*, 70 Md. L. Rev. 465, 480 (2011).

72 *Id.*

of professional identity, purpose, and legal ethics."[73] As one author put it, "[t]he hope is to facilitate acclimation into and participation in the real world of legal practice so that the student gains a solid comfort level in functioning effectively as an entry-level attorney."[74] This acclimation can involve putting "students in unfamiliar territory" where their "motivation to be an active participant in their learning enhances their externship experience."[75]

Externships are particularly important for first-gen students and professionals "who lack[] the benefit of professional parents and/or immediate family members, 'prep' programs, or other exposure that may have helped them successfully access and navigate the workplace."[76] This makes externships the perfect forum for first-gen law students to try on the professional identity of "lawyer." As one observer put it, "[t]here is no way for students to study up on these rules [of the profession], no matter how diligent or well-prepared they are, because they are acquired only through experience."[77]

Externships can be a particularly good fit for first-gen students who may not feel as comfortable in the classroom. As one interviewee explained when asked why she decided to do an externship:

> I've always been a big hands-on learner, and I know myself well enough to know that I've never been the top student. That's just not me. I feel like I have to work a little bit harder to do well. So, I figured, I always did okay in law school, but I knew the best thing to put me ahead was to get some experience and to make some connections. I just like doing that more than sitting there and studying. I guess it just sounded more fun.[78]

Indeed, when asked to rate whether the externship was a good experience on a scale of one to ten, most of the first-gen externs I interviewed rated the externship experience highly, giving it an eight or better.[79] As one extern explained, "[w]orking with the client and being able to advocate for the client, it felt so cool to, like, go into a room and be, like, 'these

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[73] Nancy M. Maurer & Liz Ryan Cole, *Design, Teach and Manage: Ensuring Educational Integrity in Field Placement Courses*, 19 CLIN. L. REV. 115, 128 (2012). *See also* Kelly S. Terry, *Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose*, 59 J. LEGAL EDUC. 240, 243 (2009).

[74] Anahid Gharakhanian, *ABA Standard 305's "Guided Reflections": A Perfect Fit for Guided Fieldwork*, 14 CLIN. L. REV. 61, 66 (2007).

[75] DUTTON ET AL., *supra* note 45, at 15.

[76] Agramonte, *supra* note 38, at 6.

[77] Hale, *supra* note 9, at 120.

[78] Claire interview on file with the author.

[79] Interview results on file with the author.

are my client's rights . . . and you can't violate those.' It was empowering, really empowering."[80]

Finally, the importance of externships as a pipeline to possible post-graduation employment cannot be overlooked when it comes to first-gen students. A National Association for Law Placement study revealed that only 73% of first-gen law students from the class of 2020 obtained post-grad legal jobs, compared to 84% of continuing-gen students.[81] Though all ten of my interviewees disclosed post-grad legal employment,[82] this stark national statistic helps to demonstrate why externships are so important: the experience that comes with an externship can help a student land a post-grad job, and succeed in it.[83] As others have noted, externship students "regularly report that they have gained valuable exposure to law practice and to specific legal issues that are useful topics for discussion in future employment interviews."[84] Moreover, a study I conducted regarding students in repeat externship situations revealed that, of students who were motivated to stay more than one semester at an externship by the hope of receiving a job offer at the placement, 62% did receive an offer of post-graduation employment.[85] In sum, if first-gen students are in need of help obtaining post-graduation law jobs, externships are a clear path to success.

IV. The First-Gen Extern Interviews

To better understand what first-gen externs go through and what can be done to aid them, I interviewed ten recent law school graduates about their experiences. These graduates from the class of 2023 responded to an email solicitation asking those who identified as first-gen to contact me if they were willing to be interviewed. I sent the email to my own former students and also asked Externship Directors at several other law schools to send the same email so that I might get a greater variety of respondents. Ultimately, I was able to interview ten first-gen student externs who had recently graduated from Chapman, Southwestern Law School, Loyola Law School Los Angeles, University of Baltimore

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80 Sarah interview on file with the author.

81 Debra Cassens Weiss, *First-Generation College Grads Find Fewer Jobs After Law School Than Their Peers, New NALP Data Says,* ABA J. (Oct. 20, 2021), https://www.abajournal.com/news/article/first-generation-college-grads-find-fewer-jobs-after-law-school-than-their-peers-nalp-says.

82 *See infra* Section IV.

83 *See infra* Sections V and VI.

84 James H. Backman & Jana B. Eliason, *The Student-Friendly Model: Creating Cost-Effective Externship Programs*, 28 Touro L. Rev. 1339, 1347 (2012).

85 Carolyn Young Larmore, *Second Time's The Charm: An Empirical Examination of the Benefits and Potential Drawbacks of Repeat Legal Externships*, 70 Wash. Univ. J. L. & Pol'y 161, 179 (2023).

School of Law, University of Missouri-Kansas City School of Law, and the University of California College of the Law, San Francisco (formerly UC Hastings).

I conducted the interviews over Zoom in August 2023, with a set list of questions approved by the Chapman University Institutional Review Board.[86] The questions included inquiries about basic biographical data (age, work experience, ethnicity, etc.) as well as topics such as the challenges they faced as first-gen student externs and what their school and placement could have done to improve the experience.

With the small sample size, the information obtained in these interviews is not offered as quantitative empirical evidence about first-gen law students, but rather is intended to paint a qualitative picture of the first-gen experience. These interviews bring the first-gen student experience out of the statistical realm, shedding light on what it was like for a handful of students to be a first-gen law student and extern.[87]

From the ten interviews, a number of themes emerged. They are: (a) almost all first-gen students felt imposter syndrome at law school or in their externships; (b) first-gen students feel they must work harder than their continuing-gen peers to "bridge the knowledge gap"; (c) first-gen students appreciate first-gen affinity groups and programs, even if the students were often too busy to make full use of them; (d) several first-gen students were under serious financial stress as law students; (e) the quality of training their placements offered varied widely; (f) the level of mentorship and feedback their field supervisors offered also varied widely; (g) first-gen students lamented their lack of networks in the legal field; and (h) there was a desire expressed by a few first-gen students for supervisors to be more understanding of the challenges they face.

A. Imposter Syndrome Is Nearly Universal

All but one of the first-gen externs interviewed reported feeling imposter syndrome[88] in law school in general and in their externships specifically. When asked about her experience as a first-gen student in law school, Claire said that she could "sum it up best" with her experience during orientation week:

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[86] IRB approval documentation on file with the author.

[87] Interviewees' names have been changed, and other details omitted, to maintain the promised anonymity. Some quotations taken from the interviews have been edited or otherwise cleaned up for clarity. Brief descriptions of each of the interviewees can be found in Appendix A.

[88] This article will use the term "imposter syndrome," as it is well known and commonly used, although other terms may be more accurate, such as "imposter phenomenon" or "imposter feelings." *See* Leslie Jamison, *Why Everyone Feels Like They're Faking It,* The New Yorker (Feb. 6, 2023).

> There are no lawyers in my family, and I don't really know lawyers and so I didn't realize that you had to read ahead and prep cases and stuff . . . Anyway, at the end of the day I cried because I was like, 'what am I doing? I have no idea what's going on!' We have good professors at [my law school], and we have good people there, but I always felt like I just didn't quite understand the next step every time and what it looks like, and how it was supposed to work.[89]

When asked if she felt she "fit in" at her externship placement doing criminal conviction expungements, Ana told the following story:

> There was a moment where it was like, "I'm obviously much closer to the clientele than my supervisor was." I had gotten my first assignment . . . and when I opened the file. I actually *knew* the person…. And then [my supervisor] said, "Oh, what are the odds that, out of all the people … you would know them?" … So that was just a really reflective moment.[90]

B. They Must Work Extra Hard To Bridge The Knowledge Gap

A couple of the first-gen students interviewed shared that they put in extra hours during law school and their externships in order to understand the legal landscape. For example, Lakshmi described watching YouTube videos at night to understand how law school worked and setting up "thirty-four informational interviews with attorneys" during her first semester in school to understand the practice areas she might want to pursue.[91] As she explained:

> I think it was a lot of self-learning as a first-gen student. I had to stay up late after my classes were done, not because I was doing homework, but because I had to figure out who I was going to talk to tomorrow [in an informational interview] and what questions I was going to ask them, and where I wanted my career to take me. I couldn't just go with the flow because I had to figure out what the flow was as opposed to having someone in my family to tell me . . . I had to pave the way for myself as opposed to someone telling me what the way was.[92]

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89 Claire interview on file with the author.
90 Ana interview on file with the author.
91 Lakshmi interview on file with the author.
92 *Id*.

C. Appreciation For Affinity Groups And Programs Even If They Couldn't Always Participate

All the interviewees attended law schools with programs or student groups focused on first-gen students, established during all or part of their tenure there.[93] Those who participated found these groups useful.[94] Nidhi, for example, shared that "it's helpful having that comfort of being able to talk to people [and ask] 'are you feeling this?' 'Did you perceive this the same way I did?' Or 'how is your experience?'"[95]

But there were varying levels of involvement in these groups and programs, in part due to constraints on the students' time or competing organizations, often related to the intersectionality of their other identities, or family responsibilities. For example, Lakshmi "was part of the woman of color collective, I was [] a research assistant and TA for every class possible. . . . I had so much on my plate on top of the externship that I didn't really utilize the first-gen program in the way I should have."[96] Similarly, Emma complained that while the first-gen program at her law school was "a great resource to have, and I did meet plenty of first-gen students that way," she faced the "challenge with all law school activities or groups of [having] the time to actually go to a lot of events and fully participate."[97] And Merritt, a married step-mother to a young boy, said that she would have liked to participate in her school's program because "I had no idea what I was doing," but she just "didn't participate in extracurriculars that much" due to time constraints.[98]

Other non-first-gen focused support groups could have benefited from a first-gen perspective as well, at least according to one interviewee. Claire related the story of her school's general peer mentorship program, in which she

> specifically requested [that the school] please give me someone else who's a first-gen because I just don't think I'd relate well to someone whose parents are lawyers and they're going to go work at their parent's law firm afterwards. And that's exactly who I ended up getting. We never really connected much, so I do think making that [program] a little bit more useful in school. . . would have been nice.[99]

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93 *See* interviews generally, on file with the author.
94 *Id.*
95 Nidhi interview on file with the author.
96 Lakshmi interview on file with the author.
97 Emma interview on file with the author.
98 Merritt interview on file with the author.
99 Claire interview on file with the author.

D. Serious Financial Pressure Affected Several Interviewees

As previously explained, first-gen students are more likely to be from lower-income backgrounds and need to work during law school and/or take out student loans.[100] That translates to feeling a lot of financial pressure during law school. One interviewee, Sarah, became teary during her interview when describing the stress of her financial situation.[101] She explained her issue with her "economic status" this way:

> The finances of law school were, I mean, so much stress. Constantly having to figure that out, especially cause my mom's not making any money cause she's disabled, my father probably made a maximum of $40,000 a year, so it was really on me.… So, even though there's opportunities like On Campus Interviewing, I was having to work during OCI and so that was really difficult as well.[102]

Financial considerations affected externship choice as well. When asked why she chose to extern, Sofia responded that "to be honest . . . I was trying to work so I could pay my bills because I live on my own . . . At the same time [I wanted] to work, get paid, and use that for school credit, so that I could balance . . . school life with all of that."[103] I asked her if finding a paying job that could also be an externship made a big difference, and she responded "Yes, it did."[104]

E. Placement Training is Inconsistent

Most externs received at least some orientation or training, but it varied by placement, and most externs said they could have used more. For example, Nidhi said that the Department of Justice orientation and training for her mostly-remote externship

> was great. I had some training in early August as far as the system, who I would be reporting to. I had two orientation calls, one with the main chief of the division I was in, and then one with my [externship] coordinators. . . . And then I think there was a third individual who had us onboard with specifically the system, and how to utilize our phones and laptops and IT and tech.[105]

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100 *See supra* Section II.B.
101 Sarah interview on file with the author.
102 *Id.*
103 Sofia interview on file with the author.
104 *Id.*
105 Nidhi interview on file with the author.

When asked if she needed more training, Nidhi responded that she "felt more than oriented at times, and I think it was great having it. Then again, I feel like, you know, there were so many people having to onboard you at times, that that's where it got a little overwhelming. So, that's the government for you."[106]

On the other hand, Claire described her desire for more training at a government agency this way:

> I had never been in a courtroom before, so I really didn't understand what anything was like. [I could have used] even just a basic rundown of "here's how the courts work and what this looks like." I don't know if they assume that maybe our first year of law school would teach us that. I don't really remember learning that, though. So, yeah, I think it would have been good to know, because I felt like I was playing catch up.[107]

Similarly, when asked if he received training at the outset of his in-house counsel's office externship, Eric answered "not much really. They threw me into the fire and thankfully, I didn't burn."[108]

F. Placements Offered Varying Level Of Mentorship, Feedback

Some interviewees found wonderful mentorship and received instructive feedback at their externships, while others found both lacking. For example, Emma, who worked in an in-house legal department, said that her supervisors were

> really great with spending time with me [and] giving really constructive feedback that was more widely applicable, as well as sharing with me about their career, what their law school experience was, . . . how they found themselves in their roles now, so it was really great to have that perspective.[109]

Nidhi, who worked at the Department of Justice, had great mentors in her supervisors, but also an attorney assigned to her specifically as a mentor.[110] She described the relationship as follows:

> I met for lunch with him and a few other division attorneys a few times throughout [the semester], and we also had biweekly calls where I could, just, you know, ask questions. I'm like, "I don't know what I'm doing on this" or "can you tell me more about this part of

106 *Id.*
107 Claire interview on file with the author.
108 Eric interview on file with the author.
109 Emma interview on file with the author.
110 Nidhi interview on file with the author,

> the division?" or "how should I be just interacting with folks as a remote intern?" . . . So, there was mentorship, I think, from multiple avenues. But I think, having that personal mentor where I could just have their personal number or just meet for lunch during the week, it was great having that.[111]

On the other hand, Farnaz worked at two externships, first with a firm that offered her great mentors and support, and then at a smaller firm where she did not find those things.[112] She described the difference this way:

> [My first externship] was just so great. I had great mentors. I had great learning experiences. And I thought, "wow . . . I've always heard that attorneys can be mean. And I've just had such a great time, so I guess it's not that way anymore." And then the next [externship] I was like, "oh, no, it's that way."[113]

G. Students Lack Networks, Networking Opportunities

A majority of the interviewees lamented that, being first-gen, they had no professional network to speak of. Sarah was typical, explaining that "the networking part [of law school] was really difficult because I didn't have connections."[114] That said, only a few of the externship placements seemed to make an effort to help students expand their networks of lawyers. This included taking students to bar events[115], meeting with other legal aid organizations[116], and meeting other attorneys and externs within the same organization whom they might not otherwise meet.[117] Many of the externships were remote because of COVID-19, which also hindered networking opportunities.[118]

H. A Need For Kindness

The need for understanding and consideration of the students' position from their supervisors was reflected in several of the interviews. As Ana explained, "I needed some validation sometimes because of my own personal insecurities . . . I don't want to say I needed more

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111 *Id.*
112 Farnaz interview on file with the author.
113 *Id*.
114 Sarah interview on file with the author.
115 Farnaz interview on file with the author.
116 Ana interview on file with the author.
117 Sarah interview on file with the author.
118 *See* Sofia, Ana, Nidhi, Emma interviews on file with the author.

handholding, but at times I wanted to just make sure that what I was doing [was right]."[119]

Farnaz described a similar experience:

> There were days where I felt very in the weeds, and I didn't know what I was doing, and I would ask questions, and the responses would kind of like be along the lines of, without directly saying it, like, "are you stupid?" like, "how do you not know that?" And I was like. . . "I'm sorry. I guess I'll just go try and figure this out."[120]

V. What Schools Can Do To Support First-Gen Externship Students

While law schools are doing much to support first-gen students in general, there is much more that can be done to help them succeed in externships in particular. This section sets out my ideas based on my research about first-gen students in general and the interviews conducted with recent first-gen law school graduates.

A. Recruit First-Gen Students to the Externship Program

To start, law schools must reach out to first-gen students and encourage them to extern in the first place. At Chapman, for example, first-gen students are underrepresented in the externship program: Whereas about 74% of Chapman's class of 2023 who were continuing-gen students participated in at least one externship while in law school, only 65% of those students who self-identified as first-gen did so.[121] As explained in Section III, externships are a vital path toward successful practice, all the more important for first-gen students without strong network connections or previous experience in the field. If imposter syndrome, for example, is making first-gen students hesitate to extern, that must be addressed.

To facilitate this communication, externship directors can do several things. They can reach out to their school's first-gen student organizations and programs to explore doing anything from forwarding an externship information flyer to its members to offering special programming about externships. The externship director could speak at a student meeting about the exciting opportunities externships offer and address any apprehensions the students may have about applying for one. Or she could create an externship information flyer specifically aimed at

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119 Ana interview on file with the author.

120 Farnaz interview on file with the author.

121 Data on file with the author.

first-gen students, in part using some quotes from graduates interviewed for this article, and share it with first-gen program students.

B. Allow Paid Externships

Second, schools should allow students to work in externships where they also receive compensation so that first-gen students, who are more likely to need to work for pay during law school and take out student loans, can more fully participate.

More than half of law schools still prohibit students from earning compensation for their externship work,[122] even though the ABA lifted the ban on paid externships in 2016.[123] When abolishing the ban was being debated, paid externships were opposed by the Clinical Legal Education Association,[124] the Society of American Law Teachers,[125] and the Association of American Law Schools Section on Clinical Legal Education.[126] The arguments against paid externships included the concern that allowing compensation would weaken the educational value of externships and incentivize students to place their financial needs before their professional goals when deciding which externship experience to take.[127] It was also feared that paid externships would result in "placing the student's educational goals second to what the supervising attorney is paying them to do."[128] Educators further worried that a paid extern may lose "the richness of their externship experience, particularly in the areas of diversity of assignments, opportunities to observe others in lawyering roles, and the quality of the supervision and feedback," in

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122 Kuehn et al., *supra* note 58, at 11.

123 ABA Standards and Rules of Procedure for Approval of Law Schools 2016–2017, at 16–18.

124 *CLEA Comments on Proposed Standard 304(c) & Retention of Interpretation 305-2*, Clinical Legal Educ. Ass'n (Jan. 22, 2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards_review/2016_jan_comments_rcvd_dec_15_notice_and_comment.authcheckdam.pdf (last visited March 25, 2024).

125 Letter from Sara Rankin& Denise Roy, Co-President of Soc'y of Am. L. Tchrs. (Jan. 22, 2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards_review/2016_jan_comments_rcvd_dec_15_notice_and_comment.authcheckdam.pdf(last visited March 25, 2024).

126 *AALS Section on Clinical Legal Education Statement of Position on the Proposed Revisions to ABA Standards 304 and 305 Relating to Field Placements and the Elimination of ABA Interpretation 305-2 Prohibiting Paid Externships,* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards_review/2016_jan_comments_rcvd_dec_15_notice_and_comment.authcheckdam.pdf (last visited March 25, 2024).

127 Carolyn Young Larmore, *Just Compensation: An Empirical Examination of the Success of Legal Externships for Pay and Credit*, 70 Drake L. Rev. 145, 151-52 (2022).

128 *Id.*

favor of work assignments that "flow from the needs of the office, not the students' educational goals."[129]

On the other hand, the best argument in favor of allowing paid externships, one advanced by the ABA Law Student Division[130] and the ABA Standing Committee on Professionalism,[131] was one of equity. Students are often faced with making the "tough choice . . . between an unpaid legal externship and a paid non-legal one, oftentimes choosing the latter that will supplement income but at the cost of the students' education," especially with rising tuition costs and student loan debt.[132] The result is that "students who can afford to take unpaid externships for credit may thereby lighten their class loads, whereas other students must take paid positions, and even paid non-law jobs, on top of a full schedule of classes."[133]

Thus, with first-gen students more likely to need to work for pay during law school and to have greater student loans, allowing paid externships becomes one way to level the playing field.[134] As first-gen students Sarah and Sofia revealed in their interviews, the financial pressure on first-gen law students can be intense, so allowing them to earn academic credit while also earning an income can be a lifeline to an otherwise struggling student.[135] This point is corroborated by an ongoing University of Baltimore School of Law study in which law students are

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[129] *Id.* at 150-51 (internal quotations, citation, omitted). This study examined many of the predictions about the negative consequences of allowing paid externships and found them generally not to have materialized. *Id.*, generally. For example, a review of hundreds of semester-end evaluations, in which students and supervisors described the work the student had performed, revealed that paid externs were doing higher-level research and writing assignments than their unpaid peers, though they were invited to slightly fewer observation opportunities. *Id.* at 176-85. Supervisors also rated paid externs as higher performing in every area of legal skills and professionalism than unpaid externs. *Id.* at 170-76. Finally, the study found that allowing paid externships attracts new students who had not previously been a part of the externship program, rather than "steals" students from more traditional placements like courts and non-profits. Thus, allowing paid externships can be viewed as yet another way to recruit more first-gen students to the externship program in the first place.

[130] *Comment on Standards 304 & 305*, Am. Bar Ass'n (Jan. 22, 2016), www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards_review/2016_jan_comments_rcvd_dec_15_notice_and_comment.authcheckdam.pdf (last visited March 4, 2024)

[131] E-mail from Scott Pagel, Am. Bar Ass'n Chair of Standards Rev. Comm. (Jan. 21, 2016), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards_review/2016_jan_comments_rcvd_dec_15_notice_and_comment.authcheckdam.pdf (last visited March 8, 2024).

[132] Larmore, *supra* note 127, at 150-151 (internal quotations, citation, omitted).

[133] *Id.*

[134] *See* Freeman, *supra* note 7, at 382 ("Students, regardless of diversity status, may perform better when juggling fewer priorities. When . . . credit and pay [can] be received simultaneously, students can enroll in fewer classes and devote the time necessary to their placement.")

[135] *See supra* Section IV.D.

being surveyed about their paid and unpaid externship experiences.[136] Preliminary results demonstrate that paid externships were preferred by those with high debt loads and those self-financing their studies, and that taking a paid externship mitigated the need to take on additional paid employment.[137]

C. Make Use Of – Or Create – A First-Gen Club Or Program

All ten of the first-gen students interviewed reported that their schools had first-gen programs or affinity groups.[138] The groups were often a vital support system, a space where students with similar backgrounds and challenges could connect, share experiences, and seek guidance. Externship faculty should encourage first-gen externs to participate in these groups during their externships, as they can be an additional source of support during the externship experience. The externship faculty should consider getting involved in the program as well, perhaps by putting on a presentation or hosting guest speakers, both to support current first-gen externs and recruit future ones.

It should be noted that some of the interviewees faced barriers to participation, such as time constraints and commitments to multiple groups related to their other identities and interests. To address this, schools should focus on creating an environment that allows students to "pop in and out" of the group's activities, which should be offered at different times and via different modalities, allowing students the flexibility to engage based on their needs and schedules.

And law schools that do not have a first-gen program, or even a student club, should work with their administration or student leaders to start one.

D. Discuss First-Gen Issues In Externship Seminar, Journals

Another way to support first-gen students in their externships is to discuss first-gen issues in the companion seminar or through reflective journaling. Externship programs should not rely on the first-gen student club or program alone to address issues useful to students, as

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136 Neha Lall, *Working for Pay, or Paying to Work? Using Paid Externships to Foster Meaningful Student Choice and Advance Equity*, Presentation to AALS Section on Empirical Study of Legal Education and the Legal Profession (Jan. 4, 2024).

137 *Id.*

138 *See* interviews generally, on file with the author. It is interesting to note, however, that allowing students to receive compensation for their work would only affect students' ability to enroll in externships with private law firms and in-house counsels that can afford to pay their externs; first-gen and other students interested in courts, non-profits and government agencies generally must still choose between paid non-externship positions and these placements.

the interviews revealed that many students are too busy to regularly attend.[139] Similarly, they should not count on other resources such as guidebooks to help first-gen students in their externships; the one book I found aimed at first-gen students in law school includes a three-sentence definition of an "externship," but offers no tips on how to succeed in one.[140]

Several interviewees mentioned that their externship professor raised issues related to first-gen students during their seminar, which they appreciated.[141] A professor might set aside a specific section of the syllabus to discuss first-gen issues like the kind raised in this article. Or they may simply weave in first-gen concerns whenever talk turns to topics like imposter syndrome or marginalized communities based on other characteristics like race, gender, or disability.[142] If the professor is first-gen herself and can share personal experiences that the students can relate to, even better. Finally, larger programs with multiple seminar sections for students to choose from could even designate one section for first-gen students to self-select.

Additionally, students can be given the opportunity to reflect on their first-gen status and its impact on their externship experience in writing. Most externship programs have journaling requirements in an effort to "train and prod students to be reflective and learn and internalize the skill of learning from the fieldwork experience."[143] I created a journal prompt that externs may choose, as follows: "Have you had any difficulties in your externship because you are a first-gen student? What were they, and how did you handle them? Are any of your supervisors/colleagues first-gen that you know of? Talk to one of them about their experiences as a first-gen student-turned-lawyer. What did you learn and how can you apply it to your own experiences?"

E. Address Imposter Syndrome

As the research shows and the interviews bear out, imposter syndrome is a problem for law students in general and first-gen students in particular.[144] It may be a particular problem in externships, as students are asked to leave the relative security of the law school building and put their skills and knowledge to the test in the real world of law practice.[145]

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139 *See supra* section IV.C.

140 Hale, *supra* note 54, at 120.

141 *See* Emma, Lakshmi, Sarah interviews, on file with the author.

142 Doing so may even help satisfy the new ABA Standard 303(c), which requires that a law school provide "education to law students on bias, cross-cultural competency, and racism . . . at least once again before graduation." ABA STANDARDS Std. 303(c).

143 Gharakhanian, *supra* note 74, at 86.

144 *See supra* Sections II.B and IV.A.

145 Grenardo, *supra* note 37, at 374.

After all, students with imposter syndrome "often mistake being inexperienced with being unqualified."[146] If first-gen students are to thrive in their externships, the very place they are meant to gain that experience, we need to help them address the fear that they don't belong in the law office or courthouse. Left unchecked, imposter syndrome can lead to anxiety, procrastination, perfectionism, depression, indecision, and ultimately poor performance.[147]

A law school externship program can address imposter syndrome in several ways, including making it the topic of classroom discussion and offering students reading material on the subject.[148] I have added reading on ways to overcome imposter syndrome[149], as well as added a prompt to the journal topics that externship students can choose from, so that they may reflect on any feelings of imposter syndrome they may have. The prompt reads: "Describe a time during your externship that you felt imposter syndrome. What triggered it? How did it make you feel? What did you do, or can you do in the future, to minimize the feeling? What are some of your strengths or accomplishments that demonstrate you are not an imposter?"[150]

VI. What Site Supervisors Can Do For First-Gen Externs

While there is much that an externship director can do for her first-gen externs, many of the gains that can be achieved for this group of students can only come from the placement. Previous research has shown that externship success is achieved or lost in the field.[151] Thus, there are a handful of things externship supervisors can do to support first-gen externs. They must offer these things to all externs, not just first-gen students, but they will be most appreciated by the latter.

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146 *Id.* at 372 (quoting Lacy Rakestraw, *How to Stop Feeling Like a Phony in Your Library: Recognizing the Causes of the Imposter Syndrome, and How to Put a Stop to the Cycle*, 109 L. Libr. J. 465, 473 (2017)).

147 *Id.* at 373.

148 I have begun sharing with my students excerpts from Grenardo, *supra* note 37.

149 *See* Grenardo, *supra* note 37.

150 Other journal topic prompts that address issues related to imposter syndrome are (1) "Everyone makes mistakes. Describe an error you have made, or something you wish you had done better. Did you discuss the issue with your supervisor, and if so, what was his or her response? What did you learn from the experience?" and (2) "Describe a situation in which you were confronted with an issue at your externship and didn't know how to proceed. How did you handle it? What did you do well? What could have been improved?"

151 Anahid Gharakhanian, Carolyn Young Larmore & Chelsea Parlett-Pelleriti, *Achieving Externship Success: An Empirical Study of the All-Important Law School Externship Experiences*, 45 S. Ill. U. L.J. 165 (2021).

A. Recruit First-Gen Students

The first thing that externship placements can do to support first-gen students in the field is recruit them to extern to begin with. Externship placements should "reach out directly to leadership associated with affinity organizations, diversity personnel at law schools,"[152] or at least identify "first-gen" as one of the groups they are seeking to attract with their recruiting materials. As explained in Section II.B., first-gen students have many desirable qualities such as self-reliance, compassion, proactivity, and resourcefulness. These are some of the same attributes identified in the IAALS Hiring Criteria Report as desirable in the legal profession.[153]

But they must do more than just recruit the first-gen student and then leave them to their own devices at the office: externship placements must familiarize themselves with some of the characteristics of first-gen students and professionals and prepare to support them throughout the externship.[154] Suggestions for how to do so are discussed next.

B. Offer More Orientation And Training

All externship placements should offer some orientation and training when their externs begin.[155] In a previous research study analyzing 234 student surveys and 172 supervisor surveys, my co-authors and I examined what factors lead to a successful externship.[156] The study found that 26% of students were not "provided an orientation at [their] placement at the start of [the] externship."[157]

Even where an orientation is provided, first-gen students may need more than a quick introduction to where the copy machine is located and what the Westlaw password is. For example, organizations should

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152 Freeman, *supra* note 7, at 380 (writing of the efforts externship placements should make to recruit from historically marginalized groups).

153 Alli Gerkman & Logan Cornett, *Foundations for Practice, Hiring The Whole Lawyer: Experience Matters* Inst. For The Advancement of the Am. Legal. Sys. (January 2017), https://iaals.du.edu/sites/default/files/documents/publications/foundations_hiring_guide.pdf (including qualities like taking responsibility, prioritizing and managing multiple tasks, having a strong work ethic, taking initiative, and demonstrating tolerance, sensitivity, and compassion).

154 This is similar to the advice Freeman gives externship placements about recruiting and then supporting historically marginalized students, as she suggests that law firms "earnestly trying to recruit students from historically marginalized groups must be informed about those students' experiences in law school and work to create learning spaces that support them." Freeman, *supra* note 7, at 362.

155 Southern California Externships Field Placement Supervision Manual (2023) 8, https://www.chapman.edu/law/_files/externships/socalex-manual2023.pdf (last visited March 4, 2024).

156 *Id.* at 187.

157 Gharakhanian, *et. al, supra* note 151, at 207-208.

"be mindful of language that may be unfamiliar to some individuals due to their background or status as first-generation law students, [such as the] overuse of acronyms [which] might favor students who have more familiarity with the law and the legal profession."[158]

First-gen students may also be first-gen professionals with little experience in an office environment. For example, several first-gen students I interviewed had only ever worked in food service before attending law school. Thus, site supervisors should be attentive; if the student seems confused or overwhelmed during the office tour or other orientation, take it slow, and be sure to let the student know to whom they can speak when they have questions. And consider creating written material such as an extern manual that students can read at their own pace.

C. Provide Mentoring And Feedback

Mentorship and feedback are key indicators of a successful externship experience. In our previous study, my co-authors and I found that "the most important factor that leads to measurable extern success is the student's relationship with [their] supervisor."[159] Not only was this proved empirically through statistical models, but qualitatively "students attributed their externship success to their relationship with their supervisor, with 82% choosing that as one of their top three factors contributing to their externship success."[160] Yet the study found that a significant percentage of students did not receive the kind of support from their supervisors that they needed to succeed. For example, 35% of students responded that their supervisors did not provide "detailed feedback on most [] assignments."[161]

To support first-gen students, supervisors should do more than merely supervise work product. They should offer more in-depth mentoring.[162] Mentoring can include things like coaching and advice, help with networking, as well as offering "acceptance and confirmation, counseling, friendship, and role modeling."[163] Mentors also "provide meaningful feedback, reinforce lessons learned from experience, and

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158 Freeman, *supra* note 7, at 380.

159 *Id.* at 166, 221.

160 *Id.* at 202; *see also* Neil Hamilton and Lisa Montpetit Brabbit, *Fostering Professionalism through Mentoring*, 57 J. Legal Educ. 1, 9-10 (2007) (reviewing empirical studies that found that mentored law firm associates were more likely to make partner, and that lawyers with mentors had higher job satisfaction).

161 *Id.*

162 *See* Neil Hamilton & Lisa Montpetit Brabbit, *supra* note 160, at 6-8 (describing the various functions of mentoring as 1) career mentoring, 2) psychosocial mentoring, 3) role model mentoring, and 4) professionalism mentoring).

163 *Id.* at 7.

provide solace and encouragement when setbacks occur."[164] A good mentor can also help a first-gen student extern "build self-confidence, a sense of self-worth, professional judgment, and intuition. Mentors offer acceptance and validation, confirm mentees' competence as professionals, and help mentees see that they have the ability to turn their aspirations into achievements."[165]

Even better, the placement might be able to match the student with a supervisor mentor who was also first-gen, giving the student a real role model to emulate and some insight into those "unwritten rules."[166] If the mentor is unsure whether their student is first-gen, mentors should be encouraged to reveal their own first-gen status, if they are indeed first-gen, to any extern they may seek to mentor, thus encouraging a possible first-gen extern to speak up about their own background and experiences. One interviewee revealed that her supervisors did so, to the benefit of their mentoring relationship.[167]

With regard to feedback, all students, not just first-gen, should receive more than a red-lined document or marked-up memo for feedback. Supervisors should take the time to explain not just what needs to be changed, but why.[168] As Blanco and Buhai explained:

> [m]eaningful feedback . . . involves careful observation of student performance or product and tactful honesty in communicating the supervisor's views. A student learns nothing constructive from comments such as "good job" or "you'll do better next time." The supervisor should provide specific examples of what the student said, did, or wrote with a clear and detailed explanation as to why the work was sufficient or inadequate. Good feedback assures that the student fully understands the strengths and weaknesses of his or her performance in order to build upon them in future assignments.[169]

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164 Ida O. Abbott, The Lawyers Guide to Mentoring 83 (2nd ed. 2018).

165 *Id.* at 84.

166 Such matching will only work if the student has revealed themselves to be first-gen, perhaps by listing their membership in a first-gen law school organization on their resume. *See* Grover Cleveland & Jenny Li, *Leveling the Playing Field: Helping First-Generation Associates Thrive,* NALP Bulletin (Feb. 2023), https://lessonsforsharks.com/wp-content/uploads/2023/02/NALP-PDQ-February-2023-Grover-Cleveland-and-Jenny-Li-next-generation.pdf.

167 Lakshmi interview on file with the author.

168 SoCalEx Field Placement Supervision Manual, *supra* note 155, at 11 ("Note that providing feedback is not merely pointing out strengths and weaknesses; truly productive feedback is a collaboration between the supervisor and student where both are responsible for thoughtful evaluation.").

169 Barbara A. Blanco & Sande L. Buhai, *Externship Field Supervision: Effective Techniques for Training Supervisors and Students*, 10 Clin. L. Rev. 611, 643 (2003).

D. Allow the Extern To Observe And Help Them To Network

Externships are a great way for students to get beyond the four walls of the law school and meet real lawyers who can begin to comprise their network, both inside the law firm and in the greater legal community. Networking and developing relationships within the legal profession are two of the twenty-six competencies of the legal profession described by Schultz and Zedeck.[170] Lawyers, especially new ones, need a "tent of professional relationships who both support them and trust them to do the work."[171]

Yet a study of professional identify development revealed that 32% of externships did not include "opportunities for professional development outside regular placement assignments," such as networking or bar events.[172]

Similarly, a different study I conducted on the benefits and drawbacks of paid externships revealed that, at most, only 37% of students were given "multiple or substantial opportunities for observation" of things like depositions and court appearances.[173] This type of observation is vital for most externs not familiar with the practice of law, but even more critical for first-gen students who may not have known a single lawyer before entering law school.

Thus, supervisors should make every effort to help first-gen students build their networks by inviting them to observe court proceedings, depositions and closings, introducing them to colleagues, taking them to bar events or continuing legal education (CLE) presentations, and inviting them to socialize with other lawyers. While some creativity may be needed if the externship is remote, as many have become since COVID-19, Zoom-coffee dates, brown bags, speaker series or other similar events can be created.[174]

E. Start A First-Gen Affinity Group

Larger externship placements may consider creating an affinity group for first-gen lawyers they employ, and to invite externs to

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170 Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 Law & Soc. Inquiry, 620, 661 (2011).

171 Neil W. Hamilton, *Student Professional Identity Formation and the Foundational Skill of Building a Tent of Professional Relationships to Support the Student*, 57 Wake Forest L. Rev. 865 (2023).

172 *Id.*

173 Larmore, *supra* note 127, at 204.

174 In May 2020, SoCalEx and BACE (the Bay Area Consortium on Externships), presented a webinar for supervisors on best practices for remote externships. The manual created as part of that webinar can be found at https://www.swlaw.edu/sites/default/files/2020-05/CalEx%20Remote%20Work%20Webinar%20Manual%20May%202020%5B3%5D.pdf (last visited March 4, 2024).

join.[175] An affinity group, also known as an employee resource group (ERG), is a voluntary organization formed by employees who share a common background, identity, or experience.[176] These groups can serve as a support network, providing a space for employees with shared characteristics to connect, collaborate, and advocate for their needs within the workplace. For first-gen students in an office environment, an affinity group can offer a sense of belonging, peer support and mentorship, and networking opportunities.[177]

F. Temper Expectations And Be Kind

Ultimately, the most important advice I might give to field supervisors is to go easy on their externs, especially first-gen students. It's simply hard to predict what a student knows or doesn't know about the practice of law, and externs are bound to make mistakes – that's what an externship is for, after all. As two experts on new lawyer success put it:

> "Most senior lawyers have long-since forgotten what it is like to be a law student or recent graduate. And increasingly diverse classes come to firms with an array of experiences and backgrounds. … [A]void assumptions about what incoming lawyers "should know," and if missteps occur, … offer specific feedback —and grace."[178]

This thought was echoed in some of the interviews. As Farnaz put it, "I think it's cliche, but I think they could have just remembered what it was like for themselves. You know, the first time they started working somewhere." [179] She continued that, "if somebody does mess up, it's not that … they're lazy. It's not that they're not trying. Maybe they're just confused or overwhelmed, or they're just learning."[180]

G. Communicating These Needs With Field Supervisors

The best way to communicate the needs of first-gen externs to site supervisors is through training on first-gen issues such as CLE presentations. SoCalEx, the Southern California Consortium of Externship

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175 Cleveland & Li, *supra* note 166.

176 *See* Mishell Parreno Taylor, *Today's Affinity Groups: Risks and Rewards*, SHRM (Oct. 11, 2019), https://www.shrm.org/topics-tools/employment-law-compliance/todays-affinity-groups-risks-rewards (last visited 3/424). *See also* Rebekah Bastian, *How to Foster Workplace Belonging Through Successful Employee Resource Groups,* Forbes (Feb. 11, 2019), https://www.forbes.com/sites/rebekahbastian/2019/02/11/how-to-foster-workplace-belonging-through-successful-employee-resource-groups/?sh=9d1b7f0dc73d.

177 Cleveland & Li, *supra* note 166.

178 *Id.*

179 Farnaz interview on file with the author.

180 *Id.*

Directors, did just this in spring 2023, when as part of a free CLE webinar for supervisors, the professors presented on first-gen issues such as the increased need for mentorship and networking assistance.[181] More than 75 supervisors from around Southern California attended the webinar.[182]

Because not all supervisors will be able to attend a webinar, and perhaps to be able to explore the issue more in depth, consortia or individual schools may want to include some information about first-gen students in their supervisor manuals, highlighting the various issues discussed in this article.[183]

Finally, first-gen students may themselves want to communicate their needs to their supervisors, if they are comfortable doing so.[184] For example, every Chapman extern is required to set three learning goals for the externship semester and discuss them with their supervisor, so that the supervisor may do their part to help achieve those goals. Common goals students choose are to improve research and writing, see all stages of a litigation, or make a court appearance under supervision. But first-gen students could include among their goals things like "exploring networking opportunities," as some students already do. By informing their supervisors that they would like to build their professional networks, first-gen students can let their supervisors know what guidance, and introductions, they need.

VII. What First-Gen Students Can Do For Themselves

The last question I asked each of the ten interviewees was if they had "any advice for future first-gen externs?" Their responses were heartfelt and, I think, helpful.

Farnaz urged future externs to believe that they "deserve to be there just as much as anybody else. Don't question it."[185] She continued to describe a scenario that a first-gen student may encounter:

> Maybe a kid of one of the partners works there, and you're like, "Oh, my gosh! This person is so much smarter, or they've been around this their whole life, and their work is probably better." But that's not always the case, you know. Hard work – it shows . . . Hard work will outwork connection any day. And just remember that you really do

181 https://www.swlaw.edu/SoCalExEvents (last visited March 4, 2024).

182 Webinar attendance list on file with the author.

183 SoCalEx has not done so yet, but I will be proposing this addition.

184 Blanco & Buhai, *supra* note 169, at 901 (noting that students may can "initiat[e] effective field supervision independently of that provided by the field supervisor….").

185 Farnaz interview on file with the author.

> deserve to be there just as much as anybody else. So, take that into every room you walk into.[186]

Ana and Emma both suggested that first-gen externs find someone to talk to, be it a lawyer at the placement, the externship professor, or just another first-gen student.[187] As Emma put it, "just speaking with somebody who can relate to [the experience] to give advice" helps relieve anxiety.[188] Emma noted that her externship professor volunteered that she herself was first-gen, and so she became someone with whom it was "comforting" to discuss her experiences.[189] Similarly, Sarah advised to "really lean on your professors that are there to make sure everything's going okay, and to facilitate the program. Don't be afraid to go to them with things that you're struggling with . . . ."[190]

Sofia and Nidhi both said that first-gen externs shouldn't be afraid to speak up.[191] Nidhi explained that, for her, "there's hesitation at times of reaching out, but I think each time I did I learned something from that experience, so I would just say, you know, instead of thinking or ruminating about an issue or something you did wrong, just [take the] initiative to address that and communicat[e]."[192] Similarly, Eric wanted to remind first-gen externs that "[t]hey don't expect you to know anything. And you're basically a white canvas. Your only job is to learn and try your best."[193]

Lakshmi suggested that seeking out externs who had worked at the same placement would be helpful.[194] She noted that:

> there were times where I was like, "I don't know what to do." So, I feel like if someone had told me "Oh, this is my experience, and here's what you should do," I wouldn't have felt so lost. So talking to students that have been in that position – and not just talking to one [but] talking to multiple students – and really understanding what they didn't like about the program or what didn't work for them, might help because you could probably improve that.[195]

Merritt said that, being first-gen, she wasn't aware of how prestigious her judicial externship was when she applied, so she "probably

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186 *Id.*
187 Ana and Emma interviews on file with the author.
188 Emma interview on file with the author.
189 *Id.*
190 Sarah interview on file with the author.
191 Sofia and Nidhi interview on file with the author.
192 *Id.*
193 Eric interview on file with the author.
194 Lakshmi interview on file with the author.
195 *Id.*

wouldn't have applied to that court had I had known how much of a big deal it was."[196] She continued that a first-gen student should "not limit yourself. What's the worst that can happen? They can always say 'no,' that's fine, but it's also a 'no' if you don't apply."[197]

Claire stressed the importance of networking, "because if you don't have any professional network within the legal community as a first-gen," you miss out on a "vital" resource.[198] She said that the attorneys she worked with at her government agency

> provided me with references. They were willing to talk to people for me. They said . . . "if you're looking for a job, call me, we'll figure something out." Otherwise, other than them and the school, I don't know who I would have turned to for those types of resources. . . . The more you meet people, the more you explore, I think it really does open a lot of opportunities.[199]

VIII. Conclusion

First-gen students face many obstacles during their law school externships, which this article hopefully has begun to address. Through literature review and interviews with ten recent first-gen graduates from around the county, this article has uncovered and illustrated many ways in which first-gen students are at a disadvantage in their externships, followed by ways that their law schools and externship placements can help them to thrive, as well as things that they can do themselves to succeed in their externship placements.

196 Merritt interview on file with the author.
197 *Id.*
198 Claire interview on file with the author.
199 *Id.*

Appendix A

The following paragraphs offer a snapshot of each of the ten class of 2023 first-gen law students interviewed. Their names have been changed, and other details omitted, to maintain anonymity as promised.

- Ana, 27, describes herself as Mexican and her parents work as a house cleaner and a handyman. She helped put herself through law school with federal work study and food and beverage service jobs on the weekends and holiday breaks; she had never worked in an office setting before her externship. Ana completed two externships, both with non-profits. The best part of her externships was when she got to work directly with clients.[200]
- Farnaz, 30, is the child of immigrants from Iran and Mexico who work as a chauffeur and a florist. She externed for two different private law firms, one litigation and one in entertainment transactions. She had a great experience at her first externship, including developing mentoring relationships, while at the second externship she felt less supported and did not receive much constructive feedback.[201]
- Emma, 24, completed college in just three years and went straight to law school. She is white, and her parents are European immigrants who work as a realtor and a construction worker. She externed in an in-house corporate legal department, which she says was one of the best things she did in law school, though the remote work aspect of the position was "one of the worst."[202]
- Eric, 26, is the child of Chinese-immigrants who work as janitors. He externed at a tech-startup during law school, where he "learned more in those three months than I did in the classroom." Eric is the only interviewee who reported never feeling imposter syndrome.[203]
- Lakshmi, 25, is the child of Indian immigrants who have done a variety of white-collar jobs. She spent many weekends during law school traveling 400 miles home to assist her mother and grandparents. Lakshmi externed in a corporate in-house legal department where she met a lot of

200 Ana interview on file with the author.
201 Farnaz interview on file with the author.
202 Emma interview on file with the author.
203 Eric interview on file with the author.

first-gen attorneys but would have liked more than the half-day orientation and training she received.[204]

- Sarah, 33, is white; her father is a truck driver while her mother doesn't work due to disability. She graduated in the top third of her class despite experiencing significant financial stress during law school, having to work in retail and take out significant loans. She externed for a civil rights nonprofit, and though she didn't feel much support from her supervisor, she felt very supported by her externship professor, who was also first-gen.[205]
- Merritt, 28, is white, and helped to take care of her stepchild during law school. She is an immigrant from an English-speaking country, and her parents are a mechanical/electrical engineer and a retired fashion agent. Merritt externed for a county counsel's office and a federal court and says the court externship involved a lot of orientation and training and was the best thing she did in law school.[206]
- Nidhi, 28, is of South Asian descent and her parents owned a pizza business. She completed two externships, one at a legal aid organization and the other at the Department of Justice. One of her externships was remote, and therefore felt a bit isolating, but when there were in-office events she really appreciated getting to meet many different attorneys. Nidhi put a lot of pressure on herself to do well in school and her externship because these were opportunities her parents never had.[207]
- Sofia, 25, is the child of Mexican immigrants who had no schooling at all, and who work as a handyman and a babysitter. Sofia has worked in food service and office environments since she was 15 to help support her family. She externed at a state agency for several semesters, where the best part of her externship was making connections with the attorneys, as she felt it was "one of the first places I actually felt like I fit in."[208]
- Claire, 29, is white, and her parents are a contracting estimator and a health care administrator. Claire joined the Army in order to pay for college and continued to serve

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204 Lakshmi interview on file with the author.
205 Sarah interview on file with the author.
206 Merritt interview on file with the author.
207 Nidhi interview on file with the author.
208 Sofia interview on file with the author.

in the National Guard during law school. She externed for a city attorney's office and the U.S. Attorney's office, and really enjoyed the latter. She most appreciated that her supervisors made sure to give her thorough feedback on her written work that they actually used in court.[209]

[209] Claire interview on file with the author.