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SHARING THE TUNA PLATTER: A UNIFORM SYSTEM OF ASSESSMENT FOR CLINICAL EDUCATION

Melina A. Healey*

Legal education's current methods for the measurement of student achievement in clinics, and the measurement of a clinic course's effectiveness, are often unsatisfying, unreliable, and incomplete. This article presents a methodology for uniform and integrated systems of assessment across clinical programs that can provide more reliable evaluation of student progress and achievement, and better feedback to clinical programs on their effectiveness. It also shares how Touro University Jacob D. Fuchsberg Law Center's Clinical Program applied these strategies with both success and challenges.

Introduction

As the tuna sandwich platter is passed around another clinic faculty meeting, the subject turns to grades. One clinician marvels that the clinical program was recently accused at a full faculty meeting as the covert source of pernicious grade inflation. The clinics have now been deemed responsible for the student body's mistaken belief that they are prepared to take the bar exam. Meanwhile, another clinician wishes he didn't have to assign grades at all, as the students are indistinguishable. An immigration professor has a different problem, that the comparison is apples-to-oranges: "How can I compare students who won asylum for their client to students whose client was convicted of fourteen felonies and who spent the semester going to three prisons just to interview their client?" An adjunct wonders whether, if he gives any grade other than an "A," he will tank his course evaluations and not be asked back. "Speaking of the school's course evaluations," says yet another, "why are we being judged based on whether we taught doctrine effectively? That's not my job!" One clinic faculty member, a distinguished professor with tenure, didn't attend the meeting at all because he has his staff attorney assign grades.

* Melina Healey, Director of Clinical Programs, Director of the Education Justice Clinic, and Associate Clinical Professor at Touro University Jacob D. Fuchsberg Law Center. I am grateful to Kathleen Gill for her partnership in assessment and to the editorial staff of the Clinical Law Review for their guidance and edits.

Legal education's present methods for the measurement of student achievement in clinics, and the measurement of a clinic course's effectiveness, are often unsatisfying, unreliable, and incomplete.[1] This article presents a methodology for uniform and integrated systems of assessment across clinical programs that can provide more reliable evaluation of student progress and achievement, and better feedback to clinical programs on their effectiveness. It also shares how Touro University Jacob D. Fuchsberg Law Center's Clinical Program applied these strategies with both success and challenges.

Legal education has long been criticized for a failure to clearly and systematically articulate educational goals.[2] This failure has also been attributed specifically to clinical legal education. The authors of *Best Practices for Legal Education* warned "we need to improve our methods for determining whether supervised practice courses are achieving their goals."[3]

This imperative is twofold: we must be able to identify whether students are achieving appropriate learning outcomes in clinic courses *and* whether the clinic courses themselves are adequately staffed, resourced, and designed to provide the appropriate learning opportunities. This fundamental problem has not been remedied in the years since the publication of *Best Practices.* We can begin to address it through intentional and systematic inter-clinic collaboration in standardized assessments of clinic student performances and standardized assessments of the effectiveness of clinical courses. In this way, I build on arguments I have made in prior scholarship that clinics have become unnecessarily siloed.[4] However, I do not argue for elimination of the wonderful course and faculty-specific assessments and feedback methods that clinicians use in their courses. Rather, I advocate that clinical programs add to these assessments a program-wide scheme that mirrors advances

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[1] As used in this article, "clinics" refer to individual clinic courses that are offered within a broader "clinical program" that contains multiple such clinics.

[2] *See* Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map 40 (2007) ("The educational goals of most law schools in the United States are articulated poorly, if at all.").

[3] *Id.* at 193; *see also* Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 Clin. L. Rev. 807, 807-08 (2007) ("After more than thirty-five years of growth and diversification, [clinicians] have failed to articulate and demonstrate the important learning that occurs uniquely or can be accomplished best in clinical courses. Consequently, it is questionable whether most clinical teachers are focusing their time and energy on achieving educational goals that can be most effectively and efficiently accomplished through clinical courses."); *but cf.* Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 Vand. L. Rev. 321, 325 (1982) (providing an independent "andragogical" justification for clinical education as an adult teaching methodology distinct from any explicit learning outcomes that might be articulated).

[4] *See generally* Melina A. Healey, *Opening Up the In-House: A Model for Collaborative Holistic Services and Education in Law School Clinical Programs*, 25 Wash. U. J. L. & Pol'y 152 (2024).

in clinical education from other disciplines. Finally, I share experiences developing, executing, and analyzing these standardized assessments and evaluations in the clinical program I direct.

I. Program-wide Standardized Assessment of Students: A Tool for Improving Clinical Education and Illustrating Its Essential Role

Clinicians resist standardized assessment of student performance,[5] yet most will ultimately assign a final grade to all students at the semester's end.[6] Unlike most law school courses, which involve prepared simulations, doctrinal multiple choice and essay exams, or final papers, the majority of a student's work in clinic is based on a real client's present needs and goals.[7] This work is commonly regarded as too subjective and "idiosyncratic"[8] to permit uniform evaluation of performances. Complicating matters, clinicians, and law faculty generally, receive no

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[5] *See* Stuckey and Others, *supra* note 2, at 193 ("The authors do not know if there is a typical way in which students in [clinical] courses are graded."); *id.* at 238-39 ("In many in-house clinics and externships, grades are based mostly on the subjective opinion of one teacher who supervises the students' work. Grades in these courses tend to reflect an appraisal of students' overall performance as lawyers, not necessarily what they learned or how their abilities developed during the course.").

[6] Robert R. Kuehn, Margaret Reuter & David A. Santacroce, *2019-20 Survey of Applied Legal Education,* Ctr. for Stud. Applied Legal Educ. (CSALE) 35 (2020), https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/5f8e46e59e39d4dc82e70a54_Report%20on%202019-20%20CSALE%20Survey.10.19.20.pdf ("Sixty-nine percent of clinics award a mandatory letter/number grade for casework, while 24% awarded mandatory pass/fail grades, 4% give students the option of a pass/fail or letter/number grade, and 3% give mixed pass/fail and letter/number grades."). This article does not address the merits of assigning a letter or number grade to clinic students. However, grading on a scale has historically helped clinicians gain ground in the academy. *See, e.g.,* Stacy L. Brustin & David F. Chavkin, *Testing the Grades: Evaluating Grading Models in Clinical Legal Education*, 3 Clin. L. Rev. 299, 307 (1997) ("[G]rading is also used to recognize exceptional performance, to penalize unacceptable performance, and to provide employers with a way of distinguishing among students."); Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 Clin. L. Rev. 505, 572-75 (2012) (observing that "grading can serve political purposes within an academic institution" but cautioning against discussing any specific quantitative grade during mid-semester feedback sessions because "evaluation sessions are about growth, not grades.").

[7] *See* ABA Standard & Rules of Proc. for Approval of L. Schs. 2023-2024 Standard 304(b) (2023) [hereinafter ABA Standard 304(b)] ("A law clinic provides substantial lawyering experience that . . . involves advising or representing one or more actual clients or serving as a third-party neutral.").

[8] *See* Margaret Martin Barry, Martin Geer, Catherine F. Klein, Ved Kumari, *Justice Education and the Evaluation Process: Crossing Borders*, 28 Wash. U. J.L. & Pol'y 195, 227 (2008) ("[T]he clinical experience is often idiosyncratic, and this can make the application of specific criteria problematic."); Stuckey, *supra* note 3, at 808 ("Clinical teachers in the United States have not focused much on assessment issues, and the methods that most of us use for assigning grades are neither valid nor reliable.").

systematic training on how to provide feedback and grade.[9] Moreover, there are no national standards against which clinical competence in lawyering is assessed[10] that can be used as a template for clinic assessment.[11]

Clinicians can remedy these deficiencies at the program level, and by doing so lead the way toward more effective assessment and licensing systems that better measure a lawyer's competency for practice. The adoption of uniform clinical program-wide rubrics to evaluate students is a valuable first step. Uniform and universal clinical program student assessments facilitate consensus among the program's clinicians about the basic learning outcomes that all clinics should achieve. The use of any assessment scheme in turn influences what is taught and how much value students and institutions attribute to the various *types* of work the students engage in.[12] In acknowledgment that clinical teaching is intended "for transfer,"[13] student achievement of lawyering skills can benefit from our collaboration across practice areas to develop these uniform program-wide assessment tools. This collaboration also helps ensure that, in addition to basic lawyering skills, core clinical principles such as "justice education,"[14] social justice[15] lawyering, anti-racist

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[9] *See* Barry et al, *supra* note 8, at 196. For an example of an exception, *see* Mlyniec, *supra* note 5, at 568-79 (describing the training of clinic fellows at the Georgetown University Law Center in the art of evaluation, feedback, and grading).

[10] Lawyers in the United States do not receive any clinical competency screening as part of their licensure, and clinicians play very little role in defining the competencies that lawyers must achieve to be licensed for practice. Bar exams in every jurisdiction across the country currently test only for knowledge of substantive law. *See Jurisdiction Information*, National Conference of Bar Examiners, https://www.ncbex.org/jurisdictions (last visited Feb. 20, 2025). However, the National Conference of Bar Examiners, responsible for most of our nation's bar exams, has announced that it will incorporate certain lawyering skills into exams starting in 2026, which presents new and urgent opportunities for clinicians to contribute to licensure standards and gain essential standing in legal education by clarifying the goals and metrics of clinical education. *See* Cynthia L. Martin, Hulett H. (Bucky) Askew, Diane F. Bosse, David R. Boyd, Judith A. Gundersen, Anthony R. Simon & Timothy Y. Wong, *Overview of Recommendations for the Next Generation of the Bar Examination*, National Conference of Bar Examiners 1, 4 (2021), https://perma.cc/XP5Y-HRD9.

[11] *See* 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) (hereinafter cited as "Carnegie Report") (contrasting legal education with medical education, which has national standards).

[12] A course's method of evaluation, in turn, influences what is taught and what is retained from the classroom. *See* Lawrence M. Grosberg, *Should We Test for Interpersonal Lawyering Skills?* 2 Clin. L. Rev. 349, 350 (1996) (calling on law schools to focus their assessment on lawyering skills and noting that "[b]ecause of the impact of exams on grades, what is tested in the exams inevitably affects what is learned in the classroom. Each necessarily affects the success of the other.").

[13] *See* Shaun Archer et al., *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. Legal Educ. 258, 269 (2014).

[14] *See* Barry et al, *supra* note 8, at 200 ("By exploring how to make our goals for justice education a more explicit aspect of what and how we evaluate, we can establish them as functional aspects of our teaching agendas.").

[15] For discussion of the importance and history of the social justice mission in clinics, see Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. Rev. 1461 (1998);

lawyering, and cross-cultural competence,[16] among other "relational competencies,"[17] are presented universally[18] in clinical programs. At the program level, uniform assessments can also identify where the program suffers from gaps in providing students with exposure to or ability to achieve those commonly accepted learning outcomes.[19] This gives clinical programs actionable information to ensure they are providing quality education. It also helps clinicians participate more fully in the important task of school-wide development of institutional learning outcomes and curriculum mapping.[20]

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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, 38 (1995) (observing that "a complete legal education and, in particular, a complete clinical educational experience, should include lessons of social justice" and that "[c]linical 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."); 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 (2006) (proposing use of social work education models for fostering social justice in law clinic students); Stephen Wizner, *Beyond Skills Training*, 7 Clin. L. Rev. 327, 327 (2001); *but see* Praveen Kosuri, *Clinical Legal Education at A Generational Crossroads: X Marks the Spot*, 17 Clin. L. Rev. 205 (2010) (challenging social justice and public interest norms as primary justifications for clinical education and proposing "greater ideological neutrality" in providing "real life, practical" workplace skills through clinical education).

[16] *See* ABA Standards & Rules of Proc. for Approval of L. Schs. 2024-2025 Standard 303c (requiring law schools to "provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation."); *see also* 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 Education 349-374 (Susan Bryant, Elliott S. Milstein, & Ann C. Shalleck eds., 2014) (presenting teaching strategies for the authors' "5 Habits" approach to cross-cultural lawyering and suggesting new habits that address implicit assumptions and racial bias when they arise in client work).

[17] *See* Susan L. Brooks, Marjorie A. Silver, Sarah Fishel, & Kellie Wiltsie, *Moving Toward a Competency Based Model for Fostering Law Students' Relational Skills*, 28 Clin. L. Rev. 369 (2022).

[18] *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 Education 13, 30 *supra* note 16 (enumerating the learning goals of clinical programs, including professional identity formation, understanding of structural inequality, methodologies for new situations, contextual analysis, self-reflection, collaboration, and self-knowledge and self-regulation, and noting that while "[each] clinic will not be able to fulfill all of the many aspirations of clinical education," "the inquiry about our goals helps all see the many possibilities for transforming the project of legal education.").

[19] Ensuring that clinics provide sufficient opportunities and exposures is consistent with established goals of clinical education. Anthony Amsterdam articulated "one of the more insightful statements about the general goals of clinical education" by proving objectives for clinical education in terms of "exposing" students or "provid[ing] opportunit[ies]" for lawyering challenges and experiences rather than describing outcomes through a "teaching" and "learning" lens. Stuckey and Others, *supra* note 2, at 169.

[20] *See id*. at 93. A curriculum map gathers the faculty's institutional learning outcomes and is a "wide angle view of a program of instruction," identifying "where in the curriculum students will be introduced to the skill, value, or knowledge: where in the curriculum the students will practice it; and at what point in the curriculum students can be expected to have attained the desired level of proficiency." *Id.*

Inter-clinic faculty assessment also improves the quality of the assessment of individual students. Multiple assessors enhance the reliability of assessments and reduce the effect of bias. Finally, clinicians can turn to these universal assessments, with common learning outcomes and measurements, to underscore the critically important role clinic plays in the development of professionals[21] and perhaps even contribute to necessary reforms in attorney licensure.[22]

Working together as a clinical faculty to develop learning goals and rubrics, and then complete the rubrics, is critical to the valid and reliable assessment of clinic students. This article refers to this approach as "collaborative assessment," and includes development of assessment tools and participation in using those tools through a team approach. This team can include the voices of clinical faculty, affected third parties, such as clinic peers, judges, and clients, as well as students through solicitation of their individual learning goals and self-assessments.

A. Collectively Developing Clearly Defined Learning Objectives and Standardized Program-Wide, Criteria-Based Rubric Assessments

Experiential learning, like all programs of legal education, must identify (1) clear learning objectives and (2) how students' achievement of these objectives will be measured. To accomplish this, "both faculty and students must be aware of and share a common set of instructional goals and objectives, which should be explicit, published, and widely disseminated."[23] However, clinicians have historically experienced difficulty coming to a consensus on the goals of clinical

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[21] *See* Gerald P. López, *Transform-Don't Just Tinker with-Legal Education*, 23 Clin. L. Rev. 471, 478 (2017) (explaining that "clinical programs already embody--certainly, at their best--an entirely alternative vision of legal education, of law practice, of continuing education for the bar.").

[22] Some jurisdictions are exploring the use of law candidates' work "portfolios" as an alternative to the bar exam for attorney licensure. A working group in California has proposed methods for creating valid and reliable assessments for candidates engaged in the disparate types of work that are performed in actual practice settings. The working group's recommendations include grade norming, anonymous grading, and convening a group of "entry-level practitioners, supervisors of entry-level practitioners, educators, and psychometricians to develop rubrics for that scoring." *See* Audrey Ching & Donna Hershkowitz, *Report from the Alternative Pathway Working Group: Request to Circulate for Public Commen*t, State Bar of Cal. 15-16 (Sept. 21, 2023), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000031526.pdf. The methods suggested by the working group mirror many of the proposals this article advocates for creating universal approaches to different types of clinic work. Clinicians can directly improve methods for attorney licensure by engaging in these kinds of collaboration within programs.

[23] Stuckey and Others, *supra* note 2, at 168; *see also* Mlyniec, *supra* note 6, at 577 ("[P]roper evaluation and proper grading will only occur if the teacher and the student are aware of the clinic's goals and expectations, and if the teacher's recorded comments about their interventions and the student's performance are keyed to the goals and expectations that we have conveyed to students at the beginning of the clinic.").

education.[24] Clinicians also have not developed uniform systems for assessing student competence against learning objectives.[25] Clinical faculty can reverse this trend by working together at the program level to develop standardized clinical rubrics[26] for student assessment.[27]

Across professional disciplines, in clinical practice, consistent programmatic-level assessment rubrics complement are critical to assessing student/trainee clinical performances.[28] Rubrics are "detailed written grading criteria, which describe both what students should learn and how they will be evaluated."[29] Clinic rubrics transparently announce to students how they are being assessed, what constitutes different levels of performance in practice, and what they can expect to engage in during their course experience.[30] Rubrics also reduce the effects of

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[24] David Barnhizer complained in 1977 that clinicians at the time had difficulty justifying clinical education because they could not articulate a unified vision of the distinct goals of their methodology. David R. Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U. L. Rev. 1025 (finding it unsurprising, given the competing demands on clinicians and the incompatibility of clinical education with traditional methods, "that whatever enthusiasm for reform has remained among clinical educators has often been expressed in a less than articulate and compelling manner"); *see also* Kelly Terry, Gerald F. Hess, Emily Grant, & Sandra Simpson, Assessment of Teaching and Learning: A Comprehensive Guidebook for Law Schools 136 (2021) ("Since program-level assessment has not yet become common in law schools, few examples of outcomes statements for experiential-learning programs have been published."); Stuckey, *supra* note 3, at 807 fn. 23 (sharing the history of clinical education's challenges in identifying specific common learning goals).

[25] While assessing clinical skills that encompass a student's professional responsibility and identity (common clinical learning outcomes among professions) is complex, evidence from medical education suggests that "some basic aspects of professionalism can be assessed and that, moreover, such assessments yield highly significant predictions about which students are likely to exhibit problematic behaviors as practitioners." Carnegie Report, *supra* note 11, at 176.

[26] A rubric is a "learning and assessment tool that articulates the expectations for assignments and performance tasks by listing criteria, and for each criterion, describing levels of quality." Berkeley Ctr. for Teaching and Learning, "Rubrics," https://teaching.berkeley.edu/resources/assessment-and-evaluation/design-assessment/rubrics (last accessed Aug. 3 2023).

[27] *See* Terry et al., *supra* note 24, at 136 (suggesting that, in the absence of common programmatic level assessment, experiential program leaders should gather with full time and adjunct faculty involved in experiential learning to determine the program's learning outcomes); *see id.* at 143-44 for guidance on how to approach this process and a hypothetical example of how that programmatic collaboration can yield benefits for assessment and reform of experiential programming.

[28] *Cf.* Jennifer Furze, Judith Gale, Lisa Black, Teresa Cochran, & Gail Jensen, *Clinical Reasoning: Development of a Grading Rubric for Student Assessment*, J. Physical Therapy Educ. 29, 34-45 (2015) (sharing success of a programmatic level rubric grading tool that measured clinical competency in physical therapy students because they "allow[] students to explicitly view the developmental progression").

[29] Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics-Explicit Grading Criteria*, 2004 Mich. St. L. Rev. 1, 6 (2004).

[30] Mlyniec, *supra* note 6, at 576 (Clinicians "must have concrete descriptions of what a particular grade means and articulable reasons why a student deserves that grade. New teachers need to develop an understandable grading rubric that explains what constitutes a particular grade and must have specific examples of a student's work that demonstrates why their work falls into a particular grade level."); *see also* Anne D. Gordon, *Better Than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective*

bias,[31] enhance learning[32], and are of particular importance to younger generations of learners.[33]

The explicit criteria of a rubric provide a formal context in which to name and reward good performances by students. Unfortunately, students who perform well in a busy law practice often have their performances dismissed as simply an unqualified "good job."[34] The use of a standardized rubric assessment requires that the instructor instead name the specific ways that the student was successful.[35] This increases faculty accountability for helpful and rigorous feedback.

While difficult to develop at the program level due to the number of faculty voices involved, clinical programs benefit from *criteria-referenced* standard rubrics rather than *norm referenced* assessments. Criteria-referenced rubrics increase the reliability of the assessment.[36] Norm referenced assessments are based on how students perform compared to each other or compared to an elusive and unarticulated standard of competence.[37] Norm-referenced rubrics "do not help students understand the degree to which they achieved the educational objectives of the course."[38] By contrast, criteria-referenced assessments "rely on detailed, explicit criteria that identify the abilities students

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Feedback, 27 Clin. L. Rev. 195, 240 (2021) (defending rubrics by identifying the biased assessments they can avoid and noting that "[i]f a faculty member cannot decide what they want the student to learn, how is the student to know how they're being evaluated (and, non-tangentially, how is the professor making an informed decision about what and how to teach?)").

31 *See* Gordon, *supra* note 30, at 236 (explaining that "[a]mbiguity is particularly detrimental to bias-free evaluations, because it involves intuitive judgments" and that "using a rubric ensures that every student is measured fairly").

32 *See* Sparrow, *supra* note 29, at 6 (reviewing literature from the use of rubrics in other disciplines and concluding that "students learn more effectively when their teachers provide them with the criteria by which they are evaluated.").

33 *See* Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 Clin. L. Rev. 1, 18-19 (2013) (presenting methods for engaging millennial learners in clinic, highlighting that rubrics are helpful because they "set clear expectations for students and become the benchmark for evaluation" that satisfy millennial desire for transparency, and further proposing that clinicians work with individual students to develop "learning contracts" in which each student "elect[s] or prioritize[s] the goals they will primarily focus on throughout the semester"). For a more detailed presentation of the merits of learning contracts in clinic, and how to apply them to student assessment, *see* Jane H. Aiken , David A. Koplow, Lisa G. Lerman, J.P. Ogilvy, and Philip G. Schrag, *The Learning Contract in Legal Education*, 44 Md. L. Rev. 1047 (1985).

34 *See* Cynthia Batt & Harriet N. Katz, *Confronting Students: Evaluation in the Process of Mentoring Student Professional Development*, 10 Clin. L. Rev. 581, 582 (2004) (sharing that one of the authors commonly finds that when she gives a student positive evaluations, her comments "are likely to be brief and casually offered").

35 Stuckey and Others, *supra* note 2, at 128 ("It may be more important to praise the positive aspects of students' performances than to point out the negative aspects.").

36 *Id.* at 243-45 ("The use of criteria minimizes the risk of unreliability in assigning grades.").

37 *Id.* at 243-44.

38 *Id.* at 243.

should be demonstrating […] and the bases on which the instructor will distinguish among good, competent, or incompetent performance."[39] This allows clinicians to be explicit about what they are looking for and avoid ambiguous feedback.[40] Moreover, a standardized rubric used across clinics within a program signals to clinic students that the competencies they gain in their clinic are transferable even if their case work experiences and practice areas appear distinct.[41]

Collaboration among the clinic faculty to build these explicit rubric assessments benefits students because it improves the feedback they receive. It is also helpful for individual clinicians and for the program. Developing common learning outcomes and identifying how a specific clinical course aligns with those outcomes allows clinical faculty and leaders of experiential learning programs to identify where there are gaps in students achieving learning outcomes across the clinical program and make necessary reforms or curricular additions.[42] Creation of common programmatic-level rubrics further enables rigorous assessment of program effectiveness,[43] in turn contributing to the ABA's outcome assessment accreditation mandates.[44] Faculty dialogue over learning outcomes and measurements itself yields benefits,[45] which may explain

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[39] *Id.* at 244.

[40] Anne Gordon urges clinicians to provide rubric-based specific feedback to students to avoid the "ambiguity bias trigger" and to enhance the credibility and actionability of the clinician's feedback. *See* Gordon, *supra* note 30, at 247; *see also* Mlyniec, *supra* note 6, at 576 (suggesting that clinicians should define good performances through explicit rubrics and provide specific examples that meet rubric criteria). Roy Stuckey points out that having clear criteria also "increases the reliability of the teacher's assessment by tethering the assessment to explicit criteria rather than the instructor's gestalt sense of the correct answer or performance." Roy Stuckey, *Can We Assess What We Purport to Teach in Clinical Law Courses?* 9 Int'l J. Clin. Educ. 9, 13 (2006).

[41] *See* Deborah Maranville, *Transfer of Learning, in* Revisiting the Characteristics of Effective Education 90, 91 n.9 (Deborah Maranville et al. eds., 2015) (emphasizing importance of teaching for transfer).

[42] *See* Terry et al., *supra* note 24, at 139 (explaining that by using common learning outcomes in experiential learning programs and identifying how their own courses match those learning outcomes, experiential faculty can "look for gaps and patterns in the treatment of the program outcomes" and alter the content of existing courses).

[43] *Id. at* 143 ("If [when reviewing samples of student work from embedded assignments across experiential courses] the course-level criteria do not align with the program-level criteria, then the experiential-learning faculty will need to create a rubric for assessing the students' written work products for program-level assessment and then review the assignments using that rubric.").

[44] For an example of how rubrics can be used in clinic to provide data for institutional outcome assessment requirements of ABA Standard 315, *see* Andrea A. Curcio, *A Simple Low-Cost Institutional Learning-Outcomes Assessment Process*, 67 J. Leg. Educ. 489, 492-510 (2018).

[45] *See* Barry et al., *supra* note 8, at 227 (grading across clinics "underscored the benefits of discussing with colleagues the criteria used and approaches to evaluating them."); *see also* Batt & Katz, *supra* note 34 (sharing results of collaboration and interviews with externship site supervisors on the qualities of professional development they look for in clinic students and based on this collaboration, identifying strategies for how to evaluate and mentor students to achieve these qualities).

other new proposed imperatives from the ABA to align the minimum learning outcomes of required courses.[46]

B. Collaborating Across Clinics to Overcome Siloed Programs

Genuine collaboration among the faculty to create uniform assessment tools is critical. At Touro, when I became Director of Clinical Programs, I convened our clinical faculty over the course of an initial year to meet regularly and collect and review all of the student assessment and feedback tools used in each clinic. Our clinical faculty then gathered and reviewed hundreds of other tools used in clinical law programs, externship programs, and other professions' clinical practice settings, identifying and coding the most common learning outcomes and criteria enumerated in those tools.[47] We reviewed the tools and findings as a clinical faculty and worked together to identify the ones we collectively agreed were most important to measure for our students. I then created our uniform tool. Each year, we review the tool and analyze patterns in our assessment and refine the tool. Ongoing collaboration at least annually by the clinical faculty to refine assessment tools is critical to ensure that the faculty buy into the tool's relevance rather than to ignore it or regard it as a burden. For example, most recently, we had to refine our tool to account for some of the skills we wanted to measure in our growing transactional clinic programs. Last year we also decided to eliminate criteria related to professional attire, acknowledging that standards of professionalism in attire were evolving and traditional expectations for dress and appearance in our profession are rooted in white supremacy, and can harm women, LGBTQ individuals, people with disabilities, and racial and religious minorities.[48]

The dialogue over what is included in a standard program-wide assessment is not easy. It poses particular challenges to clinicians who are often so busy with so many responsibilities to clients, students, and their institution, or when there are differences of opinion within programs about what we expect of our students. The process of collaborative assessment requires that clinicians commit to working across perceived differences and the inherent barriers resulting from commitment to academic freedom. But the enterprise has value in that it forces a

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[46] *See* Bridget Mary McCormack & William Adams, Am. Bar Ass'n, Matters for Notice and Comment: Standards 204, 301, 302, 314, 315, and 403 (Learning Outcomes) and Rules 40-46 (Processing Complaints) (Mar. 1, 2024), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2024/24-march-notice-comment-memo-outcomes-complaints.pdf.

[47] Kathy Gill & Melina Healey, Compiled and Coded Learning Outcomes (Oct. 14, 2021) (on file with author).

[48] *See* Julianne Hill, *Keeping Up Appearances: Slow-to-Evolve Dress Codes Burden Female and Minority Lawyers More*, 109 A.B.A. J. 1 (2023).

conversation. It also helps set standard expectations for in-house clinics[49] that share law practices and office space.

Finally, collaboration in the development of a standard clinic rubric assessment gives clinical faculty an opportunity to develop proficiency in using the standard tool, which, as I discuss more fully in the next section, allows them to provide a second assessment of students in other clinics and thus enhance the reliability of the feedback the student receives.

C. Assessing Students Collaboratively to Enhance Reliability

Any assessment protocol should be both valid (measure the specific learning outcomes that the tool purports to assess) and reliable (accurately and consistently measure those learning outcomes). Individualized feedback to clinic students on their case-specific clinical performances is presumptively valid to the extent that it examines the student's work on actual cases. The feedback can also be made more reliable if multiple assessors and perspectives are obtained[50] and these multiple assessors use the same metrics for evaluation.[51] Indeed, the use of a single standardized tool by multiple assessors has proven successful in health sciences professions by yielding more reliable evaluations, providing trainees more consistent feedback, and helping identify patterns in performance.[52] Multiple evaluators also reduce the impact of subjectivity and personal biases in assessment.[53]

D. Systematically Incorporating Feedback from Peers and Other Stakeholders

Collaboration in assessment should not be limited to clinic faculty. Other attorneys, judges, interdisciplinary partners, and clinic staff such as receptionists, paralegals, and other stakeholders can also enrich the feedback students receive by completing assessments with the same or

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[49] For background on the definition of "in-house," *see* Robert D. Dinerstein, *Report of the Committee on the Future of the in-House Clinic*, 42 J. Leg. Educ. 511 (1992) ("The in-house clinic further supplements the definition of clinical education by adding the requirement that the supervision and review . . . be undertaken by clinical teachers rather than by practitioners outside the law school.").

[50] *See* Grosberg, *supra* note 12, at 356-60 (suggesting that clinicians can minimize grader prejudice and maximize reliability through checking for consistency among collaborating faculty, third parties, and self-evaluations)); Gordon, *supra* note 30, at 245 (noting that multiple assessors in dialogue can increase the reliability of assessment and reduce bias through "calibration" or "rater reliability sessions," which are commonly used by large organizations).

[51] *See* Barry et al., *supra* note 8, at 227 (identifying agreement on teaching goals and evaluation criteria as a necessary condition for inter-clinic faculty cross-grading).

[52] *See* Stuckey and Others, *supra* note 2, at 248.

[53] *See id.* at 248.

similar criteria as faculty rubrics. This "team based" approach has been used successfully in medical education for decades.[54] This method asks various patients and healthcare professionals, including nurses, social workers, and attending physicians, to fill out standard assessment forms known as "360-Degree Evaluation Instruments" or "multisource feedback," which evaluate the clinical skills of medical students and residents they work with.[55] This method has been particularly helpful for measuring clinical competencies around interpersonal, communication, professionalism, or teamwork behaviors.[56] Software is then often used to track patterns of these assessments throughout a trainee's educational career (and even links assessment patterns to data on the trainee's ultimate performance on licensing exams).[57]

The rankings by peers and other team members on 360-Degree instruments tend to correlate strongly with faculty feedback when aggregated.[58] Peer assessment can "raise[] awareness of professional behavior, foster[] further reflection, help[] students identify specific mutable behaviors, and [has] been well accepted by students."[59] Client assessments of a clinic student's communication skills are likewise reliable tools for assessing student performance when combined with direct assessment of client communication by faculty.[60] Peer assessment can also play a particularly valuable role in assessment of fellow students team members' collaborative skills.[61] Moreover, the simple act of assessing peers using the same rubric as self-assessments and as the faculty member can be instructive to students in their ability to judge their own work.[62]

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[54] *See* Jocelyn Lockyer, *Multisource Feedback in the Assessment of Physician Competencies*, 23 J. CONTIN. EDUC. HEALTH PROFESSIONS 4 (2003).

[55] Kevin G. Rodgers and Craig Manifold, *360-Degree Feedback: Possibilities for Assessment of the ACGME Core Competencies for Emergency Medicine Residents*, 9 ACAD. EMERG. MED. 1300 (2002) (explaining that "360-degree evaluations" are a way to assess competency and behavior, "consist[ing] of measurement tools completed by multiple people in an individual's sphere of influence").

[56] *See generally* Lockyer, *supra* note 54.

[57] "New Innovations" is a software package that gathers 360-degree evaluations and produces reports on clinical competencies in medical students and resident physicians. *See* New Innovations, *GMA Details*, https://www.new-innov.com/pub/gme_details.html#performance-evaluation (last accessed Jan. 23, 2025).

[58] Li Meng, David G. Metro, Rita M. Patel, *Evaluating Professionalism and Interpersonal and Communication Skills: Implementing a 360-Degree Evaluation Instrument in an Anesthesiology Residency Program*, 1 J. GRAD. MED. EDUC. 216 (2009).

[59] STUCKEY AND OTHERS, *supra* note 2, at 249.

[60] *See* Karen Barton, Clark D. Cunningham, Gregory Todd Jones, Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLIN. L. REV. 1 (2006).

[61] *See* Sophie M. Sparrow, *Can They Work Well on A Team? Assessing Students' Collaborative Skills*, 38 WM. MITCHELL L. REV. 1162, 1172 (2012).

[62] *See* Elizabeth M. Bloom, *A Law School Game Changer: (Trans)formative Feedback*, 41 OHIO N.U. L. REV. 227, 245–46 (2015).

Portfolios of student work, which are "compilations of materials that document a student's academic achievement and personal development," are another useful and underutilized assessment tool, and well suited to collaborative inter-clinic program level assessment.[63] Portfolios have, in fact, been used successfully to assess minimum clinical competence to practice law in two pilot jurisdictions in the U.S.[64] Clinical programs should consider incorporating portfolios of student work product or performances that can be reviewed by an in-house faculty panel. This is a particularly good opportunity for collaborative assessment within an in-house clinic program given that there are no confidentiality issues with the reviewers regarding client work.

E. Including Rigorous and Explicit Self-Evaluation Metrics in Rubrics to Invite Student Collaboration in Assessments

Clinics are commonly referred to as "skills" (or worse, "soft skills") courses.[65] The term implies that there is some basic set of tools that can be reduced to a list of criteria against which to judge each individual student. Unfortunately, the "skills" label obscures the more abstract, yet critical, learning goals of clinic education, for students to "learn how to learn from experience."[66] In other words, clinic should help students develop capacity for self-reflection.[67] The ABA has recently formalized the importance of self-reflection and growth in legal education through mandating instruction on "professional identity formation" in new accreditation Standard 303(b)(3).[68]

The goal of self-reflection is achieved if a student is able to plan when confronted with a novel situation, execute their plan, and

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63 *See* Stuckey and Others, *supra* note 2, at 261-263.

64 *See* Deborah Jones Merritt, *Client-Centered Legal Education and Licensing*, 107 Minn. L. Rev. 2729, 2757 (2023) (describing the processes used by New Hampshire's Daniel Webster Program and Oregon's Provisional License Path, in which "examiners review portfolios of work product compiled by the candidates").

65 *See* ABA Standard 304(b), *supra* note 7 (defining clinics and other experiential courses as those which "engage students in performance of one or more of the professional skills").

66 *See* Stuckey and Others, *supra* note 2, at 172 (noting that Anthony Amsterdam cited learning how to learn from experience as "the most significant contribution of the clinical method to legal education").

67 *See* Quigley, *supra* note 15, at 60 ("Self-evaluation is an accepted tenet in clinical methodology in terms of skills training."). Self-evaluation is also effective at engaging learners in understanding their role as a social justice agent, and the impact of culture, bias, and identity on their representation and the structural barriers their clients face. *See* Bryant et al, *supra* note 18.

68 ABA Standards & Rules of Proc. for Approval of L. Schs. 2024-2025 Standard 303(b)(3) (2024) (requiring that "a law school shall provide substantial opportunities to students for . . . the development of a professional identity"). Interpretation 303-5 specifies that "developing a professional identity requires reflection and growth over time." *Id.* at Interpretation 303-5.

meaningfully reflect on the plan and performance.[69] Self-reflection is necessary to a professional's ability to be "megacognitive" about their practice, meaning "aware of what it takes to become competent in their chosen domain and to equip them with the reflective capacity and motivation to pursue genuine expertise."[70] To achieve the learning outcome of self-reflection, the student must develop a methodology in which they learn from their own experiences and "ask themselves appropriate questions that will give them an understanding of their own lawyering processes."[71] If clinic works, the student will be able to confront novel situations with recognition of the biases, cultural contexts, and assumptions that affect the relevant relationships and perceptions,[72] strategize creatively in problem solving, and build a professional identity that they can apply to their careers.[73] They will also be able to continue learning from experience, "an important life-long skill for lawyers to acquire."[74]

Performance of this learning outcome is difficult to standardize and scale.[75] Can a rubric measure how deeply and genuinely the student has examined their own biases, context, and role in legal systems while performing legal work? While challenging, metrics for self-reflection (and other "relational competencies"[76]) should be intentionally and explicitly built into clinic learning outcomes and assessments so that students are aware that their ability to be self-reflective is a key learning outcome for their experience in clinic.[77] Clinicians have developed a number of

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69 *See* STUCKEY AND OTHERS, *supra* note 2, at 127 (explaining that self-directed learning "involves a cyclical process in which [learners] appropriately classify the demands of a learning task, plan strategies for learning what needs to be learned, implement those strategies while self-monitoring the effectiveness and efficiency of the chosen strategies, and reflect on the success of the process afterwards").

70 Carnegie Report, *supra* note 11, at 173.

71 Amy L. Ziegler, *Developing A System of Evaluation in Clinical Legal Teaching*, 42 J. LEGAL EDUC. 575, 576 (1992).

72 Bryant & Peters, *supra* note 16.

73 Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 726-727 (1989).

74 Stuckey, *supra* note 40, at 19.

75 *See* Alistair E. Newbern & Emily F. Suski, *Translating the Values of Clinical Pedagogy Across Generations*, 20 CLIN. L. REV. 181, 209 (2013) ("Self-reflection by its very nature is abstract."); Stuckey, *supra* note 40, at 19 (acknowledging that it "may not be possible to develop valid and reliable summative assessments of some of our desired outcomes, and autonomy and ability to learn may be among these," but identifying ways to assess whether students understand how to "apply theories of practice to certain situations."); *but cf.* Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLIN. L. REV. 623, 679-81 (2003) (proposing that clinics use a problem-solving checklist that could be deployed when they are failing to progress in a case, to allow students to identify and resolve the impediments to progress).

76 *See* Brooks et al, *supra* note 17 (proposing that law schools include relational competency as learning outcomes in experiential learning courses).

77 *See* Carnegie Report, *supra* note 11, at 163 ("What teachers value—what they deem important and essential for students to learn—can be ascertained most directly by what they assess—what they require students to know and be able to do.").

methodologies to evaluate self-reflection.[78] Rubrics can be designed to measure the quality of self-reflection.[79] The inclusion of self-reflection in a rubric makes explicit that this is an important goal of the course and contributes to the more interactive dialogue the clinician and student should have as follow up after a scored assessment.[80] Assessment tools are often important not as much for the written information they contain, but because they are springboards for rich conversations about the student's experience in clinic and provide a foundation for further self-reflection. It is also useful to include a space for students to articulate specific moments when they have had opportunities for self-reflection during clinic.

A student's ability to self-critique is important for their professional lives after law school because graduates "will not always be able to depend on others to provide critique and feedback." Self-assessment provides a formalized opportunity for students to practice self-critique and facilitates feedback from peers and faculty for how effective the student's self-critique is as well.[81]

F. Uniform Program-Level Assessment Schemes Enhance the Institutional Standing of Clinics and Inform Attorney Licensure Reforms

Articulating program-wide learning outcomes and forms of assessment can, in turn, elevate clinical education's institutional standing and impact on legal education. By agreeing on standard learning outcomes and opportunities in clinics, clinicians might collectively influence the reform of currently misguided attorney licensure schemes that depend on testing of memorized information. Armed with real, consensus-built

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[78] For a sampling of clinicians' approaches to evaluating self-reflection in students, *see* Curcio, *supra* note 44, at 523 (providing a rubric for the learning outcome "Graduates will engage in active self-reflection and take ownership of their professional development."); Ziegler, *supra* note 71, at 585-86 (describing three evaluation techniques: (1) "a pretask report and a self-evaluation including a review of the self-evaluation"; (2) a case presentation, and; (3)"an informal contract between the student and me."). For a criteria-based rubric that articulates standards for self-reflection, *see* Terry et al., *supra* note 24, at 118-19; *see also* Gordon, *supra* note 29, at Appendix A & 249.

[79] *See* Melina Healey, Touro Law Center Clinic Assessment – Midsemester, https://docs.google.com/forms/d/e/1FAIpQLSdWIsoHuLRBFO5EmNIr7DiSNiigpI9193On1D5rfN5Qwk5D1g/viewform.

[80] *See* Ziegler, *supra* note 71, at 575-76 (identifying "ongoing dialogue" between clinician and student as a superior methodology for measuring self-reflection).

[81] *See* Stuckey and Others, *supra* note 2, at 128 ("[S]tudents should be given explicit instruction in self critique and provided with opportunities to practice self critique, which then is itself the subject of peer and instructor critique and feedback."); Newbern & Suski, *supra* note 75, at 211 (observing that students should complete self-assessments using a common rubric before they see their teachers' assessments, as this forces students "to reflect on their own learning styles and understand where they can improve in their work.").

rubrics that have been tested and refined at the programmatic level, clinicians can help move toward licensure systems that measure true competence for practice. By demonstrating the value of these valid and reliable forms of assessment, clinicians can show that a clinical pathway to licensure is a viable alternative to bar exams.

Now is a good time to do this work. The National Conference of Bar Examiners (NCBE), the nonprofit charged with developing attorney licensure standards and bar exams, announced that it will place "greater emphasis . . . on assessment of lawyering skills to better reflect real-world practice and the types of activities newly licensed lawyers perform."[82] It will accomplish this through the new "NextGen" bar exam. The NextGen format has not yet been publicly released, but the NCBE has shared that new skills competency content, such as interviewing and negotiation, will be tested with hypotheticals requiring multiple choice or written responses.[83] While this emphasis on clinical skills is a welcome change, medical education and licensure has already demonstrated that these types of professional skills are not adequately measured by tests, and "the best measures of professional behavior lie in the context of clinical activity and involve a conflict that the student or resident must resolve under supervision."[84] Standardized tests to assess clinical skills are not ideal methods to identify practice readiness. Physician licensure, until 2021, formerly required a daylong in-person clinical skills test, Step 2 CS, which involved encounters with trained simulated patients.[85] The Federation of State Medical Boards and the National Board of Medical Examiners eliminated this requirement because the tests were not viewed as a successful measure of clinical competence.[86] They declined to substitute Step 2 CS with another exam, instead emphasizing that medical schools should be responsible for assessing clinical skills readiness.[87] In law schools, clinical experiences, or a "clinical pathway" to licensure, could be a better measure of professional competence than

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[82] Nat'l Conf. Bar Exam'rs, Testing Task Force, Next Generation Bar Examination Task Force Recommendations 2 (2021), https://nextgenbarexam.ncbex.org/wp-content/uploads/TTF-Next-Gen-Bar-Exam-Recommendations.pdf#zoom=auto&pagemode=none.

[83] *See* Next Gen Bar Exam, *Frequently Asked Questions*, https://nextgenbarexam.ncbex.org/faqs/.

[84] David Stern, *Outside the Classroom: Teaching and Evaluating Future Physicians*, 20 Ga. St. U. L. Rev. 877, 903 (2004).

[85] Stacy Weiner, *What the Elimination of a Major Medical Licensing Exam - Step 2 CS - Means for Students and Schools*, AAMC News (Feb. 9 2021), https://www.aamc.org/news/what-elimination-major-medical-licensing-exam-step-2-cs-means-students-and-schools (last visited Sep 13, 2023).

[86] *See* Brendan Murphy, *USMLE Step 2 CS Canceled: What it Means for Medical Students*, Am. Med. Ass'n (Feb. 4, 2021), https://www.ama-assn.org/medical-students/usmle-step-1-2/usmle-step-2-cs-canceled-what-it-means-medical-students (last visited Sep 13, 2023).

[87] *See id.*

a standardized test because clinical education provides the opportunity for close supervision and review of a trainee's clinical skills and decision making under real life circumstances.[88]

The creation of standardized rubrics and consensus among clinicians regarding which experiences are foundational for lawyers in training enable clinicians to credibly advocate for a clinical pathway.[89] Integrating clinical education, or at least clinical voices, into licensure also elevates the perceived importance of clinical programs within institutions (and the resources for those programs).[90] Uniformity of expectations in clinic and in licensure can also help students understand what is expected of them across their training and post-graduate journeys. It also allows clinic students to be compared across programs and jurisdictions for their practice readiness.[91]

G. Mandatory Program-Wide Clinic Evaluations Improve Clinical Programs

It is difficult to directly measure a clinical program's effectiveness in educating students.[92] Client outcomes can be gathered and empirically reviewed to appraise the program's effectiveness in provision

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[88] *See* Claudia Angelos, Andrea A. Curcio, Marsha Griggs, Deborah Jones Merritt, *INSIGHT: Clinical Education—A Safe and Secure Pathway to Law Licensure*, Bloomberg Law, https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-clinical-education-a-safe-and-sure-pathway-to-law-licensure.

[89] The authors of the Carnegie Report contended that good clinic assessment is a superior form of identifying law student success. Carnegie Report, *supra* note 11, at 173 ("Assessment of the lawyering apprenticeship in law schools, when it is done well, is closer to good practice as understood by experts in the field of assessment than the summative regime in use for the cognitive apprenticeship.").

[90] Merritt, *supra* note 64, at 2739 (2023) (advocating for law schools to focus on client-centered training and noting that candidates will necessarily develop client-centered skills if state courts require them to demonstrate competence in that area for licensure).

[91] *See* Carnegie Report, *supra* note 11 (praising the medical school system's synchronization of standardized national medical student exams with subsequent licensing exams because they "allow a professor to compare local student performance with performance in other schools") (quotation marks and internal citations omitted).

[92] Since there is no direct method to measure how effective professionals are at their job once they complete a program, it is difficult to determine the quality of the program that trained them. This is true in law as well as in other professions. *See* Harvard Law School Center on the Legal Profession, *Teaching Hospitals and Teaching Teachers: Clinical Education Models in Medicine and Teacher Training, Clinical Legal Education*, The Practice (2020), https://thepractice.law.harvard.edu/article/teaching-hospitals-and-teaching-teachers/ ("One challenge in the teaching profession, not unlike the law, is a lack of consensus metrics to measure the quality of teaching in a way that can inform discussions around how to better train teachers for the future."); *See* Daniel J. Givelber, Brook K. Baker, John Debitt Robyn Milano, *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. Leg. Educ. 1, 21 (1995) ("By and large, we lack any objective measures of the efficacy of our efforts to educate lawyers.").

of legal services.[93] But measuring educational effectiveness is trickier.[94] Evaluations by students of their experiences in clinic courses can certainly yield some indirect information about course success. Unfortunately, typical law school course evaluations that are administered to students at the end of the semester do not provide robust insight into whether the clinic course was effective.[95] This is, in part, because the questions on standard school-wide course evaluations are not tailored to gauge the learning methods and outcomes for clinic.

When evaluating clinic experiences, students should be responding to targeted questions that directly reference the learning objectives of the course and placement.[96] It is not as helpful for students to assess the general quality of their experience without this basic context. Students often find clinic experiences rewarding and fail to realize that there are broader goals that they may not have been provided with an opportunity to achieve. For example, a clinic student might feel gratified that they were able to fill out a child support modification petition using a template, and thereby accomplish something for a client. While the student might be satisfied by this experience, the clinic might also have lacked true depth or opportunity to meet challenging learning outcomes. The personal relationship between the student and clinician, or the inherent thrill of finally doing legal "work" can likewise bias the evaluation toward overly positive results. Conversely, a particularly

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93 *Cf.* Colleen F. Shanahan, Jeffrey Selbin, Alyx Mark & Anna E. Carpenter, *Measuring Law School Clinics*, 92 Tul. L. Rev. 547 (2018) (reporting findings from a large dataset of unemployment insurance cases that compared clinical law students' use of legal procedures and outcomes to those of experienced attorneys in cases in the same court).

94 *See* Yael Efron, *What is Learned in Clinical Learning?* 29 Clin. L. Rev. 259, 261 (2023) (highlighting the dearth of research "showing that what clinical instructors teach is what law students actually learn" and noting that "the literature on [clinical legal education] deals extensively with the contribution and benefits of clinical pedagogy, but often does not base these important insights on systematic examination and scientific analysis."). Efron conducted a five-year qualitative study of the legal clinics in an Israeli law school based on review of personal journal entries and focus groups of participating clinic students, to measure the effectiveness of student outcomes in clinical education against theoretical objectives of clinical education. Efron's analysis found evidence that clinical teaching achieves many of its goals while acknowledging the limitations of her qualitative methodology.

95 *See* Givelber, *supra* note 92, at 21, 46 (conceding that "a student may not be the best judge of whether she has in fact learned well" and pointing out that no empirical work has been done to establish the effectiveness of clinical courses).

96 *See* Carnegie Report, *supra* note 11, at 180-182 (recommending that schools tether evaluation of students and evaluation of faculty directly to goals for student learning for a coherent educational experience); *see also* Barbara Glesner Fines & Judith W. Wegner, *Creating an Institutional Culture of Assessment*, *in* Building on Best Practices: Transforming Legal Education in a Changing World 420 (Deborah Maranville, Lisa Radtke Bliss, Carolyn Wilkes Kaas & Antoinette Sedillo Lopez eds., 2015) (noting that most teaching evaluation forms "could be used as devices for student assessment of learning, but with added items that ask students to evaluate the extent to which they think they have achieved selected learning outcomes for the course").

challenging client or a loss in a case might make a student feel negatively about their clinic experience even though it was educationally effective.

II. Touro's Standardized Student Assessments and Program

Touro's universal clinic student assessments have been in place for four years. Using a common software platform, we learned that the assessments show broad agreement between students and faculty on student performances of learning outcomes. They also suggest the need for more rigorous writing assignments in clinic.

A. Use of a Common Clinic-Wide Software Platform for Student Assessment at Touro Yielded Valuable Data

Touro's clinical program uses the Google Forms platform for its standardized program-wide student assessments. This permits aggregation of program level data. Touro can easily identify clinic or program-level patterns among student performances.[97] We can also analyze where there are consistencies and discrepancies between clinic students' views on their performance versus faculty views on their performance.

Student self-assessments are important components of a clinical program's collaborative assessment approach.[98] At Touro, each clinic student receives a mid-semester evaluation filled out by both their clinic faculty and them.[99] Students and faculty use identical rubrics, with the exception that students are asked to articulate their own learning goals for the remainder of the clinic semester. An analysis of several semesters of Touro's administrations of these evaluations has revealed close alignment between the faculty member's ratings of the student with the student's self-ratings across our learning outcomes.[100]

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[97] *See* Joohi Lee, Kathleen Tice, Denise Collins, Amber Brown, Cleta Smith, Jill Fox, *Assessing Student Teaching Experiences: Teacher Candidates' Perceptions of Preparedness*, 35 Educ. Research Q. 3 (2012) (finding that student teachers' self-assessment, conducted at intervals throughout their supervised teaching experience, was helpful to measuring the effectiveness of the teacher training programs in which they participated).

[98] *See supra* notes 65-81 and accompanying text.

[99] For Touro's most recent student assessment, *see* Melina Healey, Example Touro Law Center Clinical Program Student Assessment, https://forms.gle/2tpyrCnyrVaNgHub8 (last updated Feb. 6, 2025).

[100] An analysis of the spring 2023, fall 2023, and spring 2024 semesters' program-wide student assessments (the only semesters for which we collected sufficient data to derive statistically reliable results) revealed that in each of these semesters, faculty and students rated student performances similarly for all learning outcomes across all cumulative student grade point average quartiles. *See* Kathy Gill, Clinic Student Midsemester Assessment Analysis 12.20.24 (Dec. 20, 2024) (on file with author).

Touro's mid-semester clinic assessment also asks students and faculty to mark "N/A" where the student has not yet had an opportunity to demonstrate competence in a particular area. At the individual student level, this metric provides a foundation for further conversation if, for example, the student or clinician has failed to recognize a student's specific encounter with a client as an example of "client counseling." This might yield valuable conversation about what has accounted for the disconnect and what both parties might learn from each other's perspective. Reviewing where the student or clinician has marked "N/A" on individual assessments also gives the clinician a chance to intentionally build case work or simulations into the student's remaining experience to fill that gap.

The "N/A" or "skill not used" rating can also be helpful when reviewed program-wide for patterns. If analysis shows significant proportions of students and faculty across the program rating "N/A" or "skill not used" for particular learning outcomes, the program can also use this information to try to identify why those learning outcomes are not introduced to students and, if they are still deemed important, how to build them into the program.[101]

Students' clinic course evaluations, discussed in the following section, also assist in identifying where there are patterns of deficits in student opportunities to perform in particular learning outcomes.

B. Touro's Program-Wide Clinic Evaluation Helped Identify Areas in Need of Improvement, Such as Incorporation of More Rigorous Student Writing

In contrast to evaluation of clinical programs, site and supervisor assessments have become well established and studied in externship programs.[102] This allows externship programs to identify weaknesses in individual site placements and at the program level. In 2020, I reviewed dozens of externship site evaluation tools, and over a dozen clinic-specific evaluation tools. Having surveyed the available tools, I then developed a mandatory clinical program-wide evaluation tool that is tied

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101 *See id.* Touro's analysis found that students and faculty identified that students did not have the opportunity to demonstrate competence in areas such as "effective development of a case theory." Our faculty rated twenty-five percent of students as not having opportunity to demonstrate this skill in clinic; our students self-reported they did not use this skill in clinic at a rate of thirty-eight percent.

102 For an example of an externship site and supervisor evaluation scheme, and how it can be used for programmatic improvement, *see* Ann Marie Cavazos, *The Journey Toward Excellence in Clinical Legal Education: Developing, Utilizing and Evaluating Methodologies for Determining and Assessing the Effectiveness of Student Learning Outcomes*, 40 Sw. L. Rev. 1 (2010).

to the program's common clinic learning outcomes.[103] All Touro clinic students are required to execute this evaluation tool.[104]

Touro's mandatory program-wide clinic evaluation, like the student assessment, is on a centralized software platform. This has allowed the program to identify clinic-specific and program-wide areas for improvement. For example, the tool asks students to identify "What type of written assignments did you personally complete this semester? Please check all that apply, even if it was part of a simulation exercise."[105] The students are then provided with a list with numerous options, including, for example, journal reflections, letters, transactional legal documents, motions, affidavits, pleadings, briefs, internal memos, and case planning documents.[106]

During the first administration of this evaluation in spring 2021, the results showed that students across the program were not doing much legal writing. Many were just drafting "letters" or "emails" or "journal entries," and only 16% of clinic students identified having received written feedback on their written work.[107] We felt our program needed to teach and expect more from students' writing and provide more ongoing written feedback on this work. Accordingly, we made systematic changes to build simulations and case work opportunities to address these deficits and developed inter-clinic simulations that introduced more challenging writing assignments.[108]

Another benefit of capturing program-wide evaluation data on a single electronic platform is that it enables clinical programs to demonstrate their educational successes. Data on the type of work students

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[103] For Touro Clinical Program's Mandatory Clinic Evaluation, *see* Melina Healey, Example Spring 2024 Touro Clinic Course Evaluation, https://tourocollege.pdx1.qualtrics.com/jfe/preview/previewId/cf02e718-ec54-4bca-9e4e-2d8ecd803729/SV_cuy1fuL6aTLfEI6?Q_CHL=preview&Q_SurveyVersionID=current (last updated Feb. 6, 2025).

[104] Touro ensures both anonymity and universal clinic student completion of the clinic evaluations. We advise students during clinic enrollment that the evaluation is required for course credit. The course evaluation tool is administered by IT through Qualtrics. IT monitors whether students complete the survey and give the registrar a list of those students who completed it so that they could receive their grade in clinic. No faculty or staff outside of IT, the registrar's office, and Touro's Director of Assessment have access to the list of students who complete the survey.

[105] *See supra* note 99 for a link to the self-assessment.

[106] *Id.*

[107] Melina Healey & Kathleen Gill, Report on 2020-2021 Faculty Innovation Grant (July 21, 2021) (on file with author).

[108] Kathleen Gill, 2020-2021 Assessment Findings and Actions Planned – Mandatory Clinic Evaluation, 2022 Touro College and University System Annual Assessment Report (Oct. 12, 2022) (on file with author). For a similar approach in a social work program, where students were asked to identify which types of clinical activities they engaged in, and the program was amended based on the aggregated results, *see* Erin P. Fraher, Erica Lynn Richman, Lisa de Saxe Zerden, and Brianna Lombardi, *Social Work Student and Practitioner Roles in Integrated Care Settings*, 54 Am. J. Preventative Med. 281 (2018).

are able to do each semester can be more easily collected if all clinic students are required to fill out this type of evaluation and it all imports into one centralized location. It can be especially useful to share this type of good news when so much of what clinicians and clinic students accomplish must be kept private to preserve client confidentiality. For example, the spring 2021 administration of the Touro mandatory clinic evaluation showed that program-wide, 99% percent of students agreed or strongly agreed that their clinic professor was a good role model for client representation, 96% percent agreed or strongly agreed that their professor involved them in important decisions and they felt their work was important and valued, and 100% agreed or strongly agreed that they received an appropriate level of direct responsibility for their cases.[109]

Capturing this program-level evaluation data on a single digital platform is also helpful for backwards design in other parts of the law school curriculum by identifying where students may need to develop more advanced skills prior to starting clinic. Touro's course evaluations reinforced what we learned from our program-wide student assessment: we learned that the clinical program was not providing sufficient opportunities for challenging legal writing. These data patterns allowed the faculty to confront the fact that students were arriving in clinic unprepared for the task of advanced legal writing, and permitted clinical faculty to assist in thinking through how earlier curricular offerings could be designed to better prepare students for writing in clinic practice.[110]

One final voice that is critical when evaluating the effectiveness of clinical programs is that of the program's clients. Client satisfaction surveys may have limited reliability when used to evaluate the performances of individual students, but "in sufficient numbers may provide valuable and reliable information about the clinic or program itself."[111] Touro has a universal client survey, also using a common program-wide platform, that captures information about the quality of interactions with our clinic students, faculty, and staff and their satisfaction with our provision of services. We use information from these surveys to identify and promote good outcomes, sometimes in the media with client permission, and to troubleshoot problems in the program.[112]

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109 Healey & Gill, *supra* note 107, at 2.

110 *See* Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 Clin. L. Rev. 489, 512-515 (2013) (recommending law schools build curricula by working backwards from clinic goals and embedding clinic pedagogical methods in earlier coursework).

111 J.P. "Sandy" Ogilvy, *Guidelines for the Self Evaluation of Legal Education Clinics and Clinical Programs*, 15 T.M. Cooley J. Prac. & Clin. L. 1, 21 (2013)

112 For Touro's example client survey, *see* Client Survey: Melina Healey, Touro Law Clinic Post-Representation Survey, https://tourocollege.pdx1.qualtrics.com/jfe/preview/

Conclusion

Great benefits for clinic clients and students can be gained by collaborating across clinics and assessing students and the clinic at a programmatic level. A uniform system of assessment in clinical programs offers immense benefits for students, faculty, and the broader legal profession. By engaging in this methodology, clinical faculty can create more reliable measures of student learning, improve feedback quality, and enhance the overall effectiveness of clinical programs. Moreover, this collaboration can reduce silos between clinics, elevate the role of clinics within law schools, and contribute to broader reforms in attorney licensure.

Touro's experience demonstrates that standardized assessments of students can provide valuable insights into both student performance and program effectiveness. Program-wide clinical course evaluations further identify gaps in learning opportunities and enable clinical programs and law schools to refine curricula to better prepare students for legal practice.

Of course, much work is left to be done and my experience has shown that, as with so much of legal education, the process is as valuable as the outcome. Evaluation schemes require an iterative process. Ongoing collaboration by clinical law faculty to refine tools helps build faculty trust and buy-in to these tools and ensures ongoing dialogue over the core values of clinical education. I welcome ongoing feedback on the specific metrics that we measure in our clinical program and hope to learn more from colleagues nationwide about what and how we should measure lawyering ability.

previewId/011c0787-f2fd-4fcd-8b35-1b3831c5d287/SV_9ykdK6zGGmsTGNo?Q_CHL=preview&Q_SurveyVersionID=current (last visited Feb. 6, 2025).

INTEGRATING FICTIONAL NARRATIVES INTO CLINICAL EDUCATION CURRICULA

Peter H. Meyers & Sara D. Schotland*

Fictional narratives serve several important goals when incorporated into law school clinical program curricula. They are excellent vehicles to help law students appreciate and empathize with the lives of their often-marginalized clients, to understand the impact of laws and policies affecting their clients, and to learn effective story-telling techniques that are often the basis of effective legal advocacy. This article discusses the value of using fictional stories and provides a roadmap for clinical law professors to effectively incorporate sample fictional narratives into their class readings. This article also provides an annotated bibliography of short stories, excerpts from novels, and films that can be used, for example, in criminal justice, immigration, or domestic abuse clinics.

Introduction

This article advocates that clinical law professors should incorporate fictional narratives into their course readings.[1] In Part I of our article we offer three principal reasons for doing so: (1) helping law students comprehend and empathize with the lives of their often-marginalized clients; (2) understanding the impact of laws and policies, which can serve as a springboard for discussing legal reforms; and (3) teaching effective story-telling techniques that are often the heart of effective advocacy.

Part II provides illustrative examples of fiction that could be incorporated into a variety of clinics. We chose fiction pertinent to three types

* Peter H. Meyers is a Professor Emeritus of Clinical Law, George Washington University Law School. He served as Director of the Criminal Appeals Clinic and Vaccine Injury Litigation Clinic, and currently teaches Drugs and the Law, an advanced criminal law class. Sara Deutch Schotland teaches Law and Literature and Prison Literature at Georgetown University. She has published several articles advocating the incorporation of literature in law school and college courses: Sara D. Schotland, *Junk Tales: Incorporating Women Drug Addict Narratives in Law School Courses,* 4 Crim. L. Prac. 38 (2019); Sara D. Schotland, *Finding a Home: A Plea for Inclusion of Fiction Involving Immigrant Women in Law and Literature and Immigration Policy Courses*, 33 Geo. Immigr. L.J. 39 (2018); Sara D. Schotland, *Breaking Through the Bars: Incorporating Prisoners Writing in the Teaching of American Literature*, 13 Teaching Am. Literature 4-20 (2022). We wish to thank Mira Edmonds and Jenny Roberts for their excellent suggestions when they served as discussants for an earlier draft of this paper at a works-in-progress session of the 2024 AALS Annual Conference.

[1] While the scope of this article is limited to fiction, the same goals are achievable, and ideally supplemented, through true account narratives, film, music, or other media.

of clinics: criminal, immigration, and domestic violence. We first discuss *Junk Menagerie*, a fictional, semi-autobiographical short story about the life, arrest, conviction, and incarceration of a woman addicted to heroin. The second fiction, "Los Otros Coyotes," is set in a "near dystopia" in which undocumented migrants cross a Trump-like "MAGA" wall and are implanted with microchips so ICE can track them. The third story, "Chin," reflects the abuse of a young Chinese American boy—he is bullied by his classmates and beaten by his domineering father.

We then briefly discuss excerpts from a novel, *Jill's Trials*, involving a law student in a criminal defense clinic who undergoes professional "growth pangs" that will be relatable to many students. Jill becomes overly involved with one of her court-appointed clients, a relationship that raises strategic and ethical issues for Jill and her professor. *Jill's Trials* prompts consideration of the development of professional identity, as this dedicated but inexperienced law student breaches appropriate boundaries between lawyers and clients and learns from her errors in judgment.

Part III contains practical tips for clinical law professors on how to successfully incorporate outsider fiction into their curricula, even if they have no training in literature. An appendix provides additional examples of stories that might be included in the clinical curriculum depending on the subject matter of the clinic.

Although this article is focused on incorporating fictional narratives into clinical courses, other sources can also be employed in clinic courses to achieve similar objectives. A second appendix proposes some relevant films.

I. Reasons to Include Fictional Narratives

There are several important reasons why students would benefit if fictional narratives were more widely included in clinical curricula.

A. Empathizing with Clients

Fictional narratives can serve the valuable purpose of helping clinical students better empathize with their clients and understand the challenges that they face.[2] Realistic fiction includes both fiction by established professional authors and "outsider fiction" written by non-professional, "amateur" authors who have often been marginalized

[2] *See, e.g.,* Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 Cardozo J.L. & Gender 1, 9 (2007) (incorporating fictional narratives into domestic violence clinics allows the students to counter stereotypes about battered women, enhance compassion for clients, and assist students to better convey the narratives of clients in the courtroom); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 Mich. L. Rev. 485, 486 (1994) (stating "clinical theory has long grounded narrative in the actual practice of lawyering.").

by society.[3] In her classic article on the role of fiction in law school clinics, Caroline Grose points out that having students read outsiders' stories is a mechanism to prepare students for interviewing clients whose life experiences are so different than their own that "it won't appear on their radar screen."[4] She makes the case that:

> When we read fiction, we suspend our disbelief. We understand that the people who are acting so differently from how we in these situations would act are fictional characters, so we are able to feel compassion for them. We are able to see their world and hear their stories without rejecting it and them as implausible.[5]

A student who has read realistic fiction in advance of client interviews will not be so ignorant of the client's circumstances, so quick to disbelieve accounts that are often foreign to middle class, more privileged experiences.[6]

Law school clinics regularly serve criminal defendants, immigrants, victims of domestic abuse, tenants, juveniles, and the disabled. The student who is exposed to stories that convey the legal and institutional barriers that constrain their lives will be better able to advocate for these clients. As Mari Matsuda writes:

> The imagination of the academic philosopher cannot recreate the experience of life on the bottom…. The technique of imagining oneself black and poor in some hypothetical world is less effective than studying the actual experience of black poverty and listening to those who have done so.[7]

Moreover, we serve diverse populations; stories that center on different experiences develop our students' cross-cultural understanding and communication skills.

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[3] As defined by Carolyn Grose, the outsider is "someone who does not have access to the channels of power and communication in this society." Carolyn Grose, A *Field Trip to Benetton…and Beyond: Some Thoughts on "Outsider Narrative" in a Law School Clinic*, 4 Clin. L. Rev. 109, 110 n.4 (1997).

[4] *Id.* at 123.

[5] *Id*. at 124.

[6] Grose describes her interactions with a white male heterosexual clinic student, who had no experience with non-biological mothers in lesbian relationships impacting his representation of a lesbian client. *Id.* at 11-12 n.3. Sara Benson advocates interdisciplinary approaches to domestic violence clinics so that student lawyers will better be able to advocate for their clients if they are exposed to narratives from outgroups such as battered women, thus breaking down stereotypes and enabling students to see the world through their client's eyes. Benson, *supra* note 2, at 19-20.

[7] Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 325 (1987).

There is, as Martha Nussbaum has advocated, a powerful argument to read fiction as a spur to creating the empathetic awareness as a part of public life and political decision-making.[8] Susan Keen defines "ambassadorial empathy" as the narrative goal of fiction writers who wish to motivate readers to seek societal change.[9] Outsider narratives routinely tell stories of poverty, disadvantage, and discrimination. They are written in hopes of increasing awareness of injustice and effecting change.[10]

As Marijane Camilleri has written:

> Literature offers the reader the opportunity to experience intimately another human being whose perspective may not be familiar. This experience is not relatable or reducible to mere fact which can augment the body of social science data.[11]

Fiction is, of course, not the only tool to build empathy among clinical law students, but it is a powerful catalyst. "Anyone who cried when Beth died in *Little Women*, or cheered when Harry Potter exacted his revenge on Voldemort, has experienced the transportive power of literary fiction. When we read, we become one with the story's protagonists, experiencing their thoughts and emotions firsthand."[12]

Gerald Lopez critiques the typical hierarchical relationship that progressive lawyers have with their clients: coming from privileged socio-economic backgrounds, lawyers typically assume top-down leadership in law reform litigation and advocacy when they know little about their clients' actual lived experience.[13] To the extent that young lawyers learn more about their clients' lives and stories, collaboration is encouraged that can more effectively convey injustice to the trier of fact or decisionmaker.[14]

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[8] Martha Nussbaum, Poetic Justice: The Literary Imagination and Public Life 2-4 (1995). "I defend the literary imagination precisely because it seems to me an essential ingredient of an ethical stance that asks us to concern ourselves with the good of other people whose lives are distant from our own." *Id*. at xvi.

[9] Suzanne Keen, *A Theory of Narrative Empathy*, 14 Narrative 207, 215 (2006).

[10] *See generally* Marijane Camilleri, *Lessons in Law from Literature: A Look at the Movement and a Peer at Her Jury*, 39 Cath. U. L. Rev. 557 (1990).

[11] *Id.* at 564.

[12] Jennifer L. Connell, *Reading Cases for Empathy,* 17 U. St. Thomas L.J. 772, 772-77 (2022).

[13] Gerald P. Lopez, Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice 24-26 (1992).

[14] Richard Delgado explains why members of "the Ingroup" should read stories from members of "the Outgroup":

> Racial and class-based isolation prevents the hearing of diverse stories and counterstories. It diminishes the conversation through which we create reality, construct our communal lives. Deliberately exposing oneself to counterstories can avoid that impoverishment

For clinical faculty, the goal of developing empathy can further the objective of encouraging more students to pursue legal and social justice post-graduation—whether in government, public interest law, *pro bono* commitment in private practice, or community action. Students who hear their clients' stories as told to them in interviews may be more likely to continue justice-oriented representation in their professional careers. Realistic fiction, like client interviews, can play a role in providing students the vicarious experience of the impact of unjust laws and prompting them to work for change.

B. Prompting Discussion of Policy Issues

The meatiest fictional stories also raise challenging policy issues pertinent to course subject matter. Policy papers, newspaper articles, and other media all address policy issues pertinent to the scope of law school clinics. However, "law and literature" stories, such as those discussed below, will complement consideration of policy issues by focusing on individuals' experiences and bringing home the consequences of legal policy choices.[15] For example, "Junk Menagerie" raises the question of criminal responsibility for persons addicted to heroin, given the extreme intensity of their craving and the pain of withdrawal. "Los Otros Coyotes" movingly conveys the impact of border control policies that separate children from their parents.

C. Developing Good Narrative Skills

Good story telling techniques are essential to effective advocacy, whether in the courtroom or in public policy debate. As Thomas Mauet and Stephen Easton observe:[16]

> … and can enable the listener and the teller to build a world richer than either could make alone.

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411, 2439 (1989).

[15] *See, e.g.,* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 Hastings L.J. 717, 734 (1992) (literary accounts can inform students in criminal law clinics about important criminal justice policy issues); Richard F. Storrow, *Finding a Home for Migrant Stories: A Plea to Include Fiction Involving Migrant Women in Law and Literature and Immigration Policy Courses,* 33 Geo. Immigr. L.J. 39, 42 (2018) (immigrant stories in immigration clinic classes can "spark debate about policy choices and potential reforms."); Mira Edmonds, *Why We Should Stop Talking About Violent Offenders: Storytelling and Decarceration*, 16 Ne. U. L. Rev. 51, 111-15 (2023) (modified narratives about so-called "violent" offenders can stimulate sentencing reform and early release from prison).

[16] Thomas A. Mauet and Stephen D. Easton, Trial Techniques and Trials, Eleventh Edition 27 (11th ed. 2021). Professors Stephan Krieger and Richard Neumann, Jr. similarly urge legal advocates, whether they're engaging in interviewing, negotiations, or trials, to find "the story in the facts" of the case by engaging in "narrative thinking" that focuses "not only on the verbal and logical but also on the emotional and irrational." Stefan H. Krieger

> Good stories organize, humanize, and dramatize. They have plot, characters, and emotion. They have a narrative structure…. The story uses sensory language; vivid, visceral, and visual images; present tense; pace; and simplicity to give life to the story and dimensions to its characters. The story is told in a way that puts the members of the audience into the picture, engaging their hearts and minds, so that the audience cares about the people and what happens to them. . . . And the story is told efficiently and always moves forward, so that it never stalls or becomes boring.[17]

Carolyn Grose writes that the Legal Storytelling Movement "has assumed pride of place as a tool to help students hear and incorporate the voices of 'outsiders' as they engage in and practice various lawyering skills"[18] Grose teaches her students that "story construction" is "different from, although clearly related to 'story telling.'"[19] Binny Miller notes that lawyer and client have complementary roles in constructing the client's story, and urges a greater role for clients' voices in making the most persuasive presentation:

> Case theory—or theory of the case—can be seen as an explanatory statement linking the "case" to the client's experience of the world. It serves as a lens for shaping reality, in light of the law, to explain the facts, relationships, and circumstances of the client and other parties in the way that can best achieve the client's goals. The relevant reality combines the perspectives of the lawyer and the client with an eye toward the ultimate audience—the trier of fact.[20]

A key story-telling principle is to "show not tell."[21] The author largely avoids summary and instead "shows" the story through the characters' dialogue, interior monologue, gestures, or actions.[22] There is a direct tie-in

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and Richard K. Neumann, Jr., Essential Lawyering Skills: Interviewing, Counseling, Negotiation, and Persuasive Fact Analysis 183 (4th ed. 2011). Professors Anthony G. Amsterdam and Jerome Bruner point out: "Law lives on narratives, for reasons both banal and deep. For one, the law is awash in storytelling." Anthony G. Amsterdam and Jerome Bruner, Minding the Law 110 (2002).

17 Mauet & Easton, *supra* note 16, at 25-26.

18 Carolyn Grose, *Storytelling Across the Curriculum: From Margin to Center, from Clinic to the Classroom,* 7 J. Ass'n Legal Writing Dirs. 37, 39 (2010).

19 *Id.*

20 Miller, *supra* note 2, at 487.

21 Krieger & Neumann, *supra* note 16, at 184.

22 Renni Browne and Dave King, Self-Editing for Fiction Writers 16 (2d ed. 2004). Of course, the "show not tell" principle is not an inviolable rule. There are numerous situations where a narrative summary (telling not showing) may be appropriate, such as

between effective story telling techniques and conveying the harsh impact of government policies. In "Junk Menagerie," there is graphic depiction of a person addicted to heroin's desperate craving that impels her narcotics trading, as well as of the unendurable pain she endures from unmedicated withdrawal after she is jailed. In "Los Otros Coyotes," there is a vivid portrayal of a "great border wall" where boastful slogans are posted and the loudspeaker brays the president's accomplishment in getting Mexico to pay for his great wall. A young immigrant boy who has been separated from his parents passes into another space where the piped in sound switches to angelic music. The child is injected with a microchip by a nurse who is the bureaucratic arm of this brutal surveillant dystopia. The reader is immediately on the side of this boy and critical of policies that separate families and dehumanize migrants.

II. Examples of Fiction To Incorporate

The fiction that we discuss as examples come from a variety of genres—ranging from autobiographical to speculative, but they are based on real-world scenarios. The stories are written by a spectrum of authors—established professional to amateur to prison inmate. They switch from first person to third person and occasionally second person with considerable fluidity, and include considerable differences in tone. Reading and reflecting on these stories should prompt students to consider how they tell their clients' stories—in court, before an agency, before a legislature, in negotiations, or in other public advocacy.

A. Fiction Focused on Outsider Communities

1. Junk Menagerie: Drug Abuse

PEN America, an organization dedicated to free political expression, publishes fiction and essays from prisoners whose writings have won awards either on its website or in annual compilations.[23]

Haley Teget's short story *Junk Menagerie*, which was awarded first prize in fiction in the PEN America 2015 prison writing contest, serves the dual objectives of eliciting empathy for a drug user ensnared by the criminal justice system and providing a factual scenario that raises challenging policy questions.[24] It has a tripartite structure that conveys a three-fold message. The story begins with a first-person narrator,

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where it condenses repetitive action, describes minor plot developments or actors, or is useful to vary the rhythm or pace of the narrative

[23] *Prison Writing Awards Winners Archive*, PEN America, https://pen.org/prison-writing-award-winners-archive/ (last visited Dec. 21, 2024).

[24] Haley Teget, *Junk Menagerie,* PEN America (Nov. 23, 2015), https://pen.org/junk-menagerie/.

Charlotte, describing the all-consuming nature of the narrator's heroin addiction and the drug dealing in which she and her boyfriend engage to feed their uncontrollable craving. The second section is a bureaucratic third-person police report on her arrest that eliminates her personal identity. The last part returns to a first-person narrative that portrays her life as a prisoner serving an unexpectantly long sentence with a resulting loss of personal identity.

Haley Teget was herself arrested for drug trafficking at age twenty-two in Boise in 2012 and received a 20-year sentence.[25] Charlotte switches to the second person when she explains to us what it is like for her to get heroin—using "you" to involve us the readers, and engage us in understanding her overpowering need:

> Going to get a bunch of heroin is an exciting prospect for a heroin addict. I mean, going to get high is a good feeling, but going to get a month's worth of highs is a million times better. It's like when you're starving and someone offers you a few potato chips out of their bag. If you just eat one or two chips, it's only going to make you hungrier, and you'll focus on that certain delicious chip-y taste. Do you even want to go down that road? Most junkies will, but not me. I want the whole bag or it's not worth the effort. I want more than one bag; I want it all, so I go for the box.[26]

Charlotte and her older boyfriend Matt undertake a bus trip (they go by Greyhound because they are unlikely to be searched on the bus) to secure a supply of heroin for their own use and for distribution. This road trip bears no resemblance to fun, tourist road trips. The couple take along a supply of heroin they calculate is sufficient for the journey, but soon they desperately inject heroin at a rest stop that they thought would last them the whole trip. Charlotte illustrates that for persons addicted to heroin there is no joy in the high. She and her boyfriend are no longer able to have sex and they are afflicted with constipation. For most students, the extent of their constant craving and inability to postpone an injection is a revelation.

The brief second part of the story has an entirely different tone—it is an impersonal, detached replica of a standard police incident report, similar to that issued when Teget was herself arrested. All that matters is the place and date of the arrest, that she is suspected of multiple heroin sales, and that she was given her *Miranda* rights.

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[25] Idaho v. Teget, No. 40909, 2014 WL 1311772 (Idaho Ct. App. Apr. 1, 2014). The minimum sentence she was required to serve before eligibility for parole was eight years.

[26] Teget, *supra* note 24, at 1.

In the third part of the story, Charlotte is in prison. Although a first-time offender, she has been given a sentence of fifteen to twenty years. Her boyfriend has, to her surprise, received a more lenient sentence. From a middle-class background, Charlotte never imagined herself in prison and feels the shame she has brought upon her mother and her family. But far worse is the pain of withdrawal. As in so many prisons, she has received no medication and she describes the pain of withdrawal, including vomiting and insomnia:

> You don't sleep, only hallucinate. And the deeper your withdrawal, the worse your cravings—the number one reason you've never been able to kick in the first place…. All those euphoric highs you experienced in the early days? Welcome to the other side.
>
> Every bodily fluid runs out of you: through your pores, your nose, your eyes, your butt, until you're a Sun-Maid raisin (with stomach spasms). You don't get anything to help your symptoms, nothing for insomnia, the nurse is only there to monitor.[27]

The story ends with Charlotte not knowing who she really is: "Tell me who I am because I've lost myself and I just don't know."[28]

Students can consider several policy issues as they read *Junk Menagerie*. First, does it make sense to hold a person with a drug addiction criminally responsible? While the status of being an addict is not punishable,[29] addiction is no bar to conviction for possession or sale of drugs. Courts have reasoned that the decision to use heroin initially was voluntary, and that the choice to abstain later might be difficult, but is not impossible.[30] One commentator who opposes an insanity defense for opioid addicts contrasts a patient with Parkinson's disease who could not stop shaking though threatened with death if he continued to shake with an epileptic who accidentally kills a motorist when he has an unexpected fit while driving: the epileptic could have chosen not to drive, but the Parkinson's patient could not choose to stop shaking.[31]

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[27] *Id.* at 13.

[28] *Id.* at 17.

[29] Robinson v. California, 370 U.S. 660, 667 (1962).

[30] United States v. Lyons, 731 F.2d 243, 245 (5th Cir. 1984) (citing United States v. Moore, 486 F.2d 1139, 1183 (D.C. Cir 1973) and Bailey v. United States, 386 F.2d 1, 4 (5th Cir. 1967)); *see also* Cal. Penal Code § 29.8 (2017) ("In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of…an addiction to, or abuse of, intoxicating substances.").

[31] Stephen J. Morse, *Compelled or Cajoled? The Criminal Responsibility of Opioid Addicts*, Am. Interest (Nov. 6, 2018), https://www.the-american-interest.com/2018/11/06/the-criminal-responsibility-of-opioid-addicts/.

On the other side, the National Institute on Drug Abuse recognizes addiction as "an intense and, at times, uncontrollable drug craving, along with compulsive drug seeking and use that persist even in the face of devastating consequences."[32]

It has been argued that hardened addicts are substantially unable to conform their conduct to law, and that the law should be reformed consistent with Model Penal Code provisions that adopt such a test for not guilty by reason of insanity—requiring a showing that as a result of a mental disease or defect the defendant lacks "substantial capacity" to "conform his conduct to the requirements of law."[33] We have asked half of our class to locate textual evidence that a prosecutor could cite to demonstrate that Charlotte and Matt are in control (e.g., bribing taxi drivers, circulating between Portland and Boise to buy cheap and sell at higher prices) while the other half of the class locates textual evidence in which they take their life into their hands by very dangerous methods of injection. Charlotte tells us that she could not stop when she needs a fix even if a policeman were at her side—an illustration that has been used in insanity defense cases.

The text may also open up a debate by clinic students on drug policy. Most students will readily appreciate the concern with drug-related crime and that Charlotte and Matt are distributors who to feed their own habits are selling heroin to others. Other students, however, may perceive the failure of drug laws to date to stem heroin usage, and the injustice of incarcerating addicts without providing methadone. Only about a quarter of prisoners receive any kind of drug treatment while in prison,[34] and persons addicted to heroin or fentanyl are at great danger from fatal overdose when released without methadone.[35] *Junk Menagerie* could serve as a useful springboard to discuss the advantages and disadvantages of laws criminalizing drug abuse. When representing a client in a drug case, the lawyer often faces the challenge of presenting arguments for sentence mitigation. From the perspective of developing lawyering skills, the text offers an opportunity for students to consider

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32 National Institute on Drug Abuse (NIDA), Principles of Drug Addiction Treatment for Criminal Justice Populations: A Research-Based Guide 3 (2018), https://nida.nih.gov/sites/default/files/txcriminaljustice_0.pdf.

33 32 Model Penal Code § 4.01(1) (Am. L. Inst. 1962).

34 Among inmates who met the DSM-IV criteria for drug dependence or abuse, 28% of prisoners and 22% of jail inmates received drug treatment or participated in a program since admission to the current facility. NIDA, *supra* note 32, at 3.

35 The National Institute on Drug Abuse finds that a former inmate's risk of death within the first two weeks of release due to overdose is more than 12 times that of other individuals. *How Is Opioid Use Disorder Treated in the Criminal Justice System?* NIDA (June 2018), https://nida.nih.gov/publications/research-reports/medications-to-treat-opioid-addiction/how-opioid-use-disorder-treated-in-criminal-justice-system.

how Charlotte could be humanized to a court, if the craving she experiences is effectively portrayed.

The assignment of criminal responsibility to persons addicted to heroin because of so-called voluntary decisions to consume also raises the issue that in many instances drug addiction begins when one is a minor. It is arguably inconsistent to ignore the immaturity of adolescent decision-making when recent Supreme Court jurisprudence such as the *Roper/Miller*[36] line of cases abjures the death penalty and life imprisonment for juveniles in recognition that adolescents are impulsive and more influenced by frequently troubled home environments.

Additionally, "Junk Menagerie" raises "the boyfriend problem." As Phyllis Goldfarb has observed, female first-time offenders have suffered penalties substantially disproportionate to their individual involvement in drug activity.[37] A man who may have a much greater role in a drug conspiracy may secure a lighter sentence because he has more significant information to trade in plea bargaining versus his partner who may have had more minor involvement.[38]

2. Los Otros Coyotes: The Pain of Family Separation

Students in immigration clinics will be familiar with President Trump's family separation policy objective of "zero tolerance" that separated 5,000 children from their parents at the U.S-Mexico border during his first term in office.[39] Apart from the cruelty of separation, there was no adequate tracking device to enable eventual reunification. Even after the policy was reversed as a result of public outcry and judicial intervention in the summer of June 2018, the aftermath has continued in the form of devastating psychological damage and a protracted search to reunify all the separated families.[40]

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[36] Roper v. Simmons, 543 U.S. 551, 568 (2005) (invalidating the death penalty for individuals under age 18 when they commit crimes); Miller v. Alabama, 567 U.S. 460, 466, 480 (2012) (invalidating mandatory life imprisonment for individuals under age 18 when they commit crimes).

[37] Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. Gender Race & Just. 277, 294 (2002); *see also* Mark Maurer, *The Changing Racial Dynamics of Women's Incarceration,* The Sentencing Project (Oct. 15, 2013), https://www.sentencingproject.org/publications/the-changing-racial-dynamics-of-womens-incarceration/.

[38] *See* Marlyn Harrell, *Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color*, 11 Geo. J.L. & Mod. Crit. Race Persp. 139, 140 (2019); Holly Jeanine Boux and Courtenay W. Daum, *Stuck between a Rock and a Meth Cooking Husband: What Breaking Bad's Skyler White Teaches Us about How the War on Drugs and Public Antipathy Constrain Women of Circumstance's Choices*, 45 N.M. L. Rev. 567, 574 (2015).

[39] Piper French, *Left Apart*, N.Y. Intelligencer, Feb. 27, 2024.

[40] Ted Hesson & Nathan Layne, *Trump Refuses to Rule Out New Migrant Family Separations, but Allies Are Wary*, Reuters (Nov. 27, 2023), https://www.reuters.com/world/us/trump-refuses-rule-out-new-migrant-family-separations-allies-are-wary-2023-11-27/.

"Los Otros Coyotes" is a readily imaginable dystopian story that is set in the near future, that closely echoes Trump policies.[41] Daniel Olivas describes two youngsters separated from their parents, with 30 minutes to say good-bye, at the Mexican border. The 10-year-old protagonist Rogelio and his teenage sister Marisol pass through a border with murals depicting the life of a megalomaniac president. The loudspeaker plays "I will build a great wall—and nobody builds walls better than me." Like the other migrants, Rogelio passes to a nurse who examines his dog tag and then with soothing angelic music playing, injects him with a microchip—like those today implanted in pets.

Arriving in Los Angeles, the children are luckier than most because they move in with their loving Aunt Isabel who does all she can to be warm and welcoming. Although their home and schooling approach "near normal," Marisol and her cousin have joined the group "Los Otros Coyotes" which operates a reverse Underground Railroad. Rogelio begs to be reunited with his mother and father. Rightly or wrongly, Marisol takes her brother to Vivaparú, the leader of Los Otros Coyotes.

In contrast to the harsh sounds at the border, Vivaparú, who is non-binary, speaks to the child in a gentle voice. The name that they have taken is the Spanish equivalent of Vick's VapoRub that Rogelio's mother applied when he was ill. Vivaparú explains to the child that Homeland Security uses microchips to track young immigrants so that the government can direct them to jobs that need filing when they grow up.

To enable Rogelio to return home, the microchip will be removed from Rogelio's body and implanted in a cat. Rogelio is placed with other returning migrants in "the belly of the beast," the luggage compartment of a large black bus. The story ends in tension and heartbreak when the bus jerks to a stop. Flashlights aim at the children in the bottom of the bus and a woman screams "Oh, my God!" In the best dystopian narrative tradition, the reader longs to know what happens next, but is not told.

This is a moving narrative which illustrates some of the benefits of realistic fiction in clinical classes. The microchip tracking device is far more invasive than the requirement imposed on some migrants that they wear ankle bracelets, and has the added evil of being covertly installed—a violation of Nuremberg principles requiring informed consent.[42] Because the story is focalized on a small child, it movingly portrays his distress at being separated from his own parents—although he has the relative good fortune of being placed with a caring aunt and situated in a good school. Good lawyering skills can be developed by

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[41] Daniel Olivas, *Los Otros Coyotes*, *in* How to Date a Flying Mexican: New and Collected Stories 163-83 (2022).

[42] *See The Doctors Trial: The Medical Case of the Subsequent Nuremberg Proceedings,* Holocaust Encyclopedia, https://encyclopedia.ushmm.org/content/en/article/the-doctors-trial-the-medical-case-of-the-subsequent-nuremberg-proceedings (last visited Dec. 21, 2024).

close attention to the way in which Rogelio's pain is described and how his longing for his parents cannot be assuaged despite the kindness he receives with from his aunt's welcome.

As is typical in the dystopian genre, his teen-age sister assumes a responsibility way beyond her years. Students can discuss whether Marisol and Vivaparú made the right ethical choice in allowing Rogelio to hazard a return to his parents when he was safe, though unhappy, in his aunt's home.

Clinic students can both resonate with the agony of Rogelio's separation and evaluate the consequences of the Los Otros Coyotes group's mission. While the coyote takes an immigrant's money, often in an act of extortion, to lead his or her countrymen across the border to the U.S., there is no question that the "other coyotes" in the story are compassionate and well-intended. Yet the journey back to Mexico is just as fraught and, in fact, it appears that the bus has been apprehended and the occupants will be detained.

There is no easy, happy outcome to the policy of family separation, nor is it limited to the forced separation imposed in 2018. The broader policy conundrum is that an individual parent or teenager will cross the border for a better future leaving other family members behind. Those who enter the U.S. and those left behind are forced to decide whether the journey is worth the enormous personal toll of leaving loved ones behind.

3. Chin: Immigrant Domestic Abuse

In domestic abuse clinics, students engage in client-centered legal representation as they focus on obtaining protective orders and otherwise representing their clients. It is a practice that prioritizes empathetic understanding, sensitivity to an individual's or families' particular circumstances and cultural background, and flexible problem-solving. "Chin" is a text that can help inform clinical students how they can better relate to their clients in a cross-cultural context and develop a more nuanced approach in addressing domestic crises.

"Chin," a short story by the well-known author Gish Jen,[43] addresses domestic abuse in quite a novel way. The first-person narrator who identifies as White ("Vanilla") tells of the repeated beating experienced by a Chinese American boy next door. The story illustrates the consequences of cross-ethnicity generalizations—a common problem of engaging in misleading, prejudicial, or ignorant stereotyping.

It is easy for the narrator and his family to spy or eavesdrop on the Chin family because their adjacent apartment is a kind of goldfish bowl; their daily routines present a kind of reality TV show for the narrator's

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[43] Gish Jen, *Chin*, *in* Who's Irish 105-113 (1999).

spectator family. The narrator's family—where it seems that academics are an afterthought—watches as the son does his equations or gets beat up by his father. In effect, the Chins are surveilled as if in a panopticon.

The Chin boy, who tellingly lacks a first name that would give him an individual identity apart from that of his parents, gets beat up by his peers as well as at home. The narrator feels guilty because he "should've kept my eyes on the TV where they belonged, instead of watching stuff I couldn't turn off," but rationalizes that he was a good guy who at least did not chase young Chin onto the roof.

One evening the narrator's family watches while Chin's sister protests a beating by their father, and is in turn abused by the father. She and her mother pack a suitcase and begin to leave the house, but end up turning back. The narrator's father, a fireman, considers intervening, but in fact does not come to their rescue. The narrator's family is stunned to see the situation return to "normal" as the father makes tea for Chin and then they return to the blackboard to do equations.

This is a useful story to teach in domestic relations clinics, as well as in immigration clinics. The boy is bullied at home and bullied in the community by his peers. Chin is an outsider to the other kids—who think that he can elude their chase because he has "monkey feet." Racism, ignorance and stereotyping play a role. The narrator's father wonders if Chin is part of a "gang." And at home, Chin's father, a doctor in China and here a taxi driver, is obsessed with improving the boy's performance in math and science—unfortunately, a metal garden stake is his tool.

The story can elicit discussion on the extent to which Chin's abuse is affected by his immigrant background. Among the evils of the "model minority myth"[44] is the pressure that it exerts for success and the assumption that Asian children will excel in math and science regardless of the child's proclivities and background. In another sense, the parental abuse is relatable to the pressures, disappointments, and anxieties that lead parents to abuse children independent of any particular social status. For Jen, as in other immigrant "abuse" fiction, the father's difficulties in assimilation lead to assertion of what Jonathan Freedman has called a "violent masculinism."[45]

The young White third person narrator is technically "omniscient" but in fact deeply ignorant. However often they are observed, the members of the neighbor Chin family remain strangers and the narrator's family is astonished to see that after a violent confrontation they return to the blackboard. The story is a way to instill in students the dangers of evaluating other families based on our own self-centered myopic views.

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[44] *See* Joshua Freedman, *Transgressions of a Model Minority*, 23 SHOFAR 66, 69 (2005).
[45] *Id.* at 96.

It appears that notwithstanding the abuse there is a fragile harmony and sustained purpose to the Chin family.

B. Jill's Trials: Strategic and Ethical Dilemmas in a Clinic Setting

Peter Meyers has written a novel published by Brandylane Publications in 2025 called *Jill's Trials*. The questions that this novel raise include strategic and ethical dilemmas relevant to law school clinics.

In this novel, a student in a criminal defense clinic becomes overly involved with her court-appointed client. Talented but troubled, Jill is unwittingly duped into helping him in his criminal activities. Jill's personal involvement with her client was obviously improper, and she did not disclose it to her supervising professor. Rule 1.7(b)(4) of the District of Columbia Rules of Professional Conduct prohibits conflict of interest; such relations may impede a lawyer's ability to offer dispassionate professional advice. What should Jill do when she finds out that her client is threatening to have his accuser murdered? The District of Columbia Rules of Professional Conduct state that a lawyer "may" inform the legal authorities of a client's plan to commit such a crime, but the lawyer is not ethically required to do so.[46] The rule reads "may" not "shall," resulting in an obvious dilemma.

What action should her supervisor, an experienced criminal law professor, take when he learns of the improper relationship and the improper things that Jill has done to assist her client? If he reports her to the dean as he ought, it will extinguish a promising legal career. If he fails to report her, he violates his duty as her supervisor and, if discovered, seriously jeopardizes his own career as a law professor.

Because it is set in a clinical program, this novel addresses topics that clinicians and students may find familiar. Clinicians, for example, will recognize a controversy over whether to give tenure to an outspoken clinical law professor. Many clinical law students will identify with the tough decisions that Jill needs to make regarding her future employment. Can she overcome nervousness to become an effective advocate in the courtroom? Saddled with debt, should she "sell her soul" by joining a big law firm?

It turns out that Jill's clinical experience—notwithstanding her disastrous involvement with a client—is on balance highly positive. She makes the decision to become a public defender after she successfully represents a woman accused of prostitution; she finds a way to avoid conviction and help her client try to turn her life around. Following this experience, Jill increasingly considers her role as defense counsel: she determines that it is not only to defend the client but also to help victims

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[46] D.C. Rules of Prof'l Conduct R. 1.6.

of abuse and/or addiction find the help they need, if they are willing to seek it. The lawyer's professional obligation is limited to the scope of the engagement, and he or she is not a social worker. But should a lawyer helping clients who have been oppressed by social and institutional barriers see her role more broadly? We think this is an important topic to debate in clinical law seminars.

Jill, like many students, struggles with parents, loneliness, debts, uncertainty over career path, and anxiety about her in-court performance. Relatability should hopefully engage law student readers to also seriously engage with the ethical questions presented. Moreover, this fictional tale also demonstrates the power of narrative not only to advocate for clients, but to help shape law students' professional identity of how they see and present themselves to others.

III. Practical Tips for Incorporating Fiction in Syllabi

Below we explain why no literary training is needed to include narrative fiction in law school clinics and offer suggestions on how to locate other relevant texts or excerpts from novels.

A. No Literary Background Is Needed

It is easy to include a fictional component in the clinical syllabus without any background in literature. The clinical law professor (even one who has never taken a class in literature) is not giving a lecture which attempts to duplicate an English Department analysis of fiction applying literary theory. The goal is quite different—to come up with discussion questions to ask students' their responses to the texts. Some general prompts might include: What story-telling devices employed by the author did you find effective or ineffective? How and why were the protagonists depicted as they were? What were their challenges and back stories? As readers, what were your emotions/outrage/concerns? What policy issues were raised? Do any reforms come to mind? What are the practical difficulties in meeting challenges or implementing reforms? What successful storytelling techniques did the author employ that you can use in advocating for your clients?

We want to give students a vicarious understanding of the experiences of the characters and their legal/social predicaments. We want to stimulate a discussion of the policy issues raised and the need for reform. Additionally, we want to invite students to consider what they found effective or ineffective in the story's narrative technique—the building of character, the arc of the plot, and the description of physical setting. Outsider fiction is generally accessible and straightforward. These authors often seek to communicate their pain, protest oppression,

and spur reform; their purpose is to tell a story and send a message in the clearest possible terms. Students can discuss how the techniques employed by these authors can be successfully incorporated into good legal advocacy for clients.

While we believe that law professors in clinical courses can themselves lead these discussions of fictional narratives, another possibility is to invite to the class as a guest lecturer a professor who teaches literature at the university. This cross-fertilization of law and a literature professor could be a stimulating addition to the regular classroom discussion.

B. Sources for Texts

Most of us will only find the space in our syllabi to devote a class or two to fiction. Short stories thus are extremely practical. We don't need to locate a large number of relevant texts—three or four is about the limit, of course depending on the length of a clinical seminar class. In Appendix A, we include a list of examples of outsider stories that would be suitable in a clinic course involving a variety of areas—criminal defense, domestic abuse, and immigration as a starting point.

Our choices focus on the experience of marginalized communities. Consistent with the goals of Critical Theory, the stories focus our attention on those who are oppressed by racism, stigmatized by atypical lifestyles, or discriminated against on account of gender or ethnicity. As Richard Delgado writes:

> Ideology—the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression. The cure is storytelling (or as I shall sometimes call it, counterstorytelling).[47]

For Delgado, "the most effective counterstories must invite the reader to suspend judgment, listen for their point or message, and then decide what measure of proof they contain."[48]

Professors can decide for themselves whether they wish to focus on outsider fiction such as Pen Archive stories or on well-known published authors, whether to supplement with true narrative accounts, and whether to incorporate relevant film.

The leading literary magazines offer fertile ground, especially as their archives enable search by topic and categories. For example, a professor teaching an immigration clinic can readily locate in *The New Yorker* archives stories by immigrant authors such as Edwidge Danticat,

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[47] Richard Delgado, *supra* note 14, 2412-14.

[48] *Id*. at 2415.

Christina Henriquez, and Chimanda Adichie.[49] These stories offer a moving first-hand look at the abuse women immigrants face, obstacles to asylum, and color discrimination. Another source of stories is to inquire of professors teaching relevant courses in your college's English departments what fiction they might recommend.

Films—documentary, Hollywood, or animé—or video games, can also complement discussion of texts. In Appendix B, we provide a list of films appropriate for a variety of law school clinics.

Conclusion

Including fiction as a component of the syllabus provides clinical law students with the opportunity to better understand their clients' backgrounds and decisions—why they committed a crime and what might mitigate their sentence; why they left their country of origin and how they may gain admission or avoid deportation; how they have been abused as a result of gender status. Students who are moved by these stories are more likely to question oppressive institutional policies. And a student who closely reads a well-told story learns an important lesson: good storytelling is an invaluable skill to successful legal advocacy.

One approach is to invite to the class a professor who teaches literature at the university. But absent a guest lecturer, there should be no hesitation in discussing stories though one is a clinical professor who has never taken a class in literature.

[49] Chimanda Adiche, *The American Embassy, in* The Thing Around Your Neck 80-87 (2009); Edwidge Danticat, *Without Inspection, in* Everything Inside 115-27 (2019); Christina Henriquez, *Everything is Far From Here,* The New Yorker (July 17, 2017), https://www.newyorker.com/magazine/2017/07/24/everything-is-far-from-here.

Appendix A
Recommended Fictional Narratives with Annotations

Immigration Clinics:

Lan Samantha Chang, *The Unforgetting, in* Hunger: A Novella and Stories 134-53 (1998) (immigrant professor struggles as he fights for tenure; consequences for family).

Laila Halaby, *Fire and Sand*, *in* West of the Jordan (2003) (father's occupational disappointment, control over daughter's sexuality).

Christina Henriquez, *Everything is Far From Here*, New Yorker, July 24, 2017, at 52 (family separation).

Gish Jen, *No More Maybe*, New Yorker, Mar. 19, 2018, at 76 (inter-ethnic race animosity).

Mohja Kahf, *Spiced Chicken Queen of Mickaweaquah,* Iowa, *in* Dinarzad' Children: An Anthology of Contemporary Arab American Fiction 137 (Pauline Kaldas & Khaled Mattawa, eds., 2004) (Muslim immigrant turns tables on her abuser).

Achy Obejas, We Came All the Way from Cuba so You Could Dress Like This? (1994) (father cannot come to terms with daughter's gender nonconformity).

Domestic Abuse Clinics:

Sandra Cisneros, Woman Hollering Creek and Other Stories (1991) (crossing into Texas, new bride battles abuse).

Sandra Cisneros, The House on Mango Street (1983) (vignettes of *ventaneras*—confined women who see their world through a window).

Chinelo Okparanta, *Shelter*, *in* Happiness, Like Water: Stories 109-21 (2013) (through a young girl's eyes, efforts that her mother makes to find them a safe place).

Bharati Mukerjee, *A Father, in* Darkness (Penguin Books Canada Ltd. 1985) (a father's response to daughter's pregnancy).

Criminal Justice Clinics:

Joyce Carol Oates, *Tetanus*, *in* Give Me Your Heart: Tales of Mystery and Suspense (2012) (a young boy is taken into police custody).

Prison Writing Awards Winners Archive, PEN America, https://pen.org/prison-writing-award-winners-archive/ (last visited Nov. 27, 2024):

- Lynne Agnew, *Sabrina*, May 10, 2011 (prison neglect of person addicted to heroin).
- Jason Cockburn, *Labels Break Me*, Nov. 23, 2015 (a small boy's dreams destroyed by drugs).
- Rick Matzke, *In a Nut's Cell*, June 25, 2009 (a lonely old man gets ready for release from prison).
- Anna Vanderford, *Double Time/Borrowed Time/Time's Up*, Aug. 6, 2018 (a young girl's involvement in the prison system-from drugs to maximum security).
- John Cephas Young, *My Penal Vacation*, Aug. 6, 2018 (no plan, no help for the returning citizen after release).

James Baldwin, *Sonny's Blues*, *in* The Jazz Fiction Anthology 17-48 (Ed Sascha Feinstein & David Rife, eds., 2009) (two brothers reconnect; the elder finally listens to his brother's blues as he hears his brother's struggle with heroin addiction).

Madison Smartt Bell, *Customs of the Country*, *in* Barking Man and Other Stories 38–57 (1990) (termination of parental rights for a mother who has battled drug addiction).

Appendix B
Recommended Films with Annotations

Criminal Justice Clinics:

Shawshank Redemption (Warner Brothers 1994) (prison conditions, parole, post-release).

My Cousin Vinny (Twentieth Century FOX 1992) (comedy-drama murder trial with novice defense attorney).

If Beale Street Could Talk (Annapurna Pictures 2019) (police dishonesty, racist administration of criminal justice).

American History X (New Line Cinema 1998) (neo-Nazis in prison).

Hate U Give (Twentieth Century FOX 2018) (police brutality).

Shot Caller (Saban Films 2017) (navigating prison).

Chicago (Miramax 2002) (great musical addresses favoritism in prisons, celebrity justice, skillful tap-dance lawyering).

Black Mirror, *White Bear* (Feb. 18, 2013) (Season 2, Episode 2) (Netflix TV Series 2011-2023) (sadistic repetitive punishments imposed).

Sleepers (Warner Brothers 1996) (abuse of juveniles in detention).

Immigration Clinics:

Green Card (Touchstone Pictures 1990) (Frenchman tries to show his marriage is bona fide).

Misma Luna or Under the Same Moon (FOX Searchlight Pictures 2007) (young child crosses the border to reunite with his mother).

Sleep Dealers (Maya Entertainment 2008) (dystopian film where Mexican would-be emigrants are implanted with cables allowing them to control robots in the US to do work in the US).

American Immigrant-A Short Film (Shady Mawajdeh 2021) (manipulation of Palestinian immigrant).

A Better Life (Summit Entertainment 2011) (man seeking better life for his son struggles, criminal involvement).

Bienvenidos a Los Angeles (Flying Fish Pictures 2023) (deportation).

Superstore, Employee Appreciation Day (Season 4, Episode 22) (May 16, 2019) (NBC TV Series 2015-2021) (ICE round up of "collaterals" for deportation).

Orange is New Black, Minority Deport (July 26, 2019) (Season 7, Episode 5) (Netflix TV Series 2013-2019) (deportation).

Brooklyn Nine-Nine, Admiral Peralta (Season 2, Episode 18) (March 8, 2015) (FOX TV Series 2013-2021) (undocumented individual is witness in a high-profile case).

American Tail (Universal Pictures 2023) (animated story of family who emigrates from Russia to the United States).

Migrant (anime) (Universal Pictures 2023) (family of ducks leaves safety of New England pond).

Domestic Abuse Clinics:

Promising Young Woman (Focus Features 2020) (rape and revenge).

Sleeping with the Enemy (Twentieth Century Studios 1991) (controlling male).

Waitress (Searchlight Pictures 2007) (spousal abuse).

The Fire That Took Her (MTV Documentary Films 2022) (woman doused by her boyfriend—will her testimony be believed?).

Maid (Netflix TV Series 2021) (young mother escapes an abusive relationship and struggles to provide for herself and her daughter).

CLINICAL USE OF INCLUSIVE LANGUAGE

JENNIFER SAFSTROM*

Lawyers' primary professional tool is language. Lawyers should strive to use accurate, clear, and compelling word choices in their communications. Attorneys have the responsibility to use words that demonstrate respect for our clients and others. In addition, clinical instructors seek to further pedagogical and representation goals while also communicating principles of diversity, equity, and inclusion. This paper discusses the importance of inclusive language in legal practice and education, highlighting its role in clinical pedagogy.

The paper outlines a multi-factor framework for inclusive language decision-making: reflect, respect, accuracy, precision, relevance, and audience. This framework allows flexibility and contextual analysis, accommodating evolving language norms. The paper also examines the adoption of inclusive language in legal clinics, emphasizing its importance in student education and advocacy. By analyzing various identity categories, such as race, ethnicity, gender, and disability, among others, the paper demonstrates how clinics model inclusive language practices in their representation and communication. Overall, the project underscores the significance of inclusive language in promoting accessibility, justice, and equity within legal education and practice.

INTRODUCTION

Lawyers' primary professional tool is language.[1] Accordingly, lawyers should strive to use accurate, clear, and compelling word choices in their communications. Attorneys have the responsibility to use

* Jennifer Safstrom serves as Assistant Clinical Professor of Law and directs the First Amendment Clinic at Vanderbilt Law School. The author sincerely thanks the following individuals for their exceptional feedback, edits, and questions, which were invaluable in the development of this project: Norrinda Brown Hayat and Patience Crowder, discussants at the works-in-progress session of the 2024 AALS Annual Conference; Kate Kruse, Mia Jackson-Rosenthal, Carolyn Young Larmore, and Sue Schechter, discussants at the 2023 Clinical Law Review Workshop; attendees of the 2024 SALT Conference, 2023 Mid-West Clinical Conference, and 2023 Southern Clinical Conference. The author is grateful to Laila Hlass and Alicia Plerhoples for their support of this project's precursor. The author extends her appreciation to Brittany Dugas, Lucy Chuang, and Maddy Knight for their technical assistance and research support. All views expressed are the author's own and do not necessarily reflect those of any current or previous employer, client, or other entity.

[1] *See generally* Jennifer Safstrom & Joseph Mead, *Developing Inclusive Language Competency in Clinical Teaching*, 29 CLIN. L. REV. 349 (2023).

words that demonstrate respect for our clients and others. In addition, clinical instructors seek to further pedagogical and representation goals while also communicating principles of diversity, equity, and inclusion ("DEI") that are core to promoting accessibility and the principles of justice that ground our legal work.[2]

Inclusive language principles help to guide lawyers in choosing the most appropriate words to engender respect, amplify understanding, and enhance communication. While this requires nuanced analysis specific to the context and individuals involved, inclusive language can have a myriad of benefits. Beyond mere grammatical accuracy or linguistic specificity, word choices can help build relationships, foster understanding, and provide insight into personal narratives.[3] Inclusive language is a goal unto itself, not simply a means to achieving advocacy goals, whether in the context of litigation, legislation, or community education.

As student attorneys in a clinic, law students may encounter these issues in practice for the first time. Looking at clinics as a microcosm of the broader legal community, this paper considers the inclusivity of clinics' language choices. To contextualize this assessment, this paper employs a framework for inclusive language decision-making, discusses current best practices, summarizes current social and legal trends, and analyzes the implications of language choices through clinics' work product and public communications. This Article deeply focuses on the language choices clinics have adopted and the application of these principles. The analysis considers how these language choices are reconciled with patterns in practice and court use. This Article connects these principles to larger academic and practice issues, including law schools' experiential learning work in clinics and their mandate to provide instruction on professional identity, bias, cultural competency and humility, and racism. The Article also considers debates within the legal profession on the adoption of DEI efforts more broadly, as a backdrop for these considerations.

I. Framework for Inclusive Language Decision-Making Principles

This Article builds upon prior scholarship setting forth key considerations for inclusive language decision-making in a multi-factor framework—reflect, respect, accuracy, precision, relevance, and audience.[4] These key values help to facilitate critical self-reflection, which is

[2] Jayne Reardon, *Inclusive Language Is Allyship*, 2Civility (Apr. 22, 2021), https://www.2civility.org/inclusive-language-is-allyship/ [https://perma.cc/D6L8-DH4J].

[3] Safstrom & Mead, *supra* note 1, at 369.

[4] *Id.* at 361–69.

both inherent in the clinic pedagogical model and a critical lawyering skill.[5] "Scholars have described clinical pedagogy as a 'Prepare-Perform-Reflect' methodology": "clinical teaching connects the cognitive, practical, and ethical aspects of lawyering, [] provides students opportunities to apply their knowledge, [and allows students to] . . . reflect on the experience[s]" supported by faculty.[6] Engaging in "reflective practice applies to the legal profession," as clinic seeks to instill life-long practice skills.[7] "A conscious and deliberate analysis of a lawyering performance can provide . . . 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," allowing lawyers to concretize the abstract process of self-reflection, deliberation, and growth.[8]

These general principles provide a set of considerations to inform language choices and guide the decision-making process without dictating the use of a particular term in all situations. The language user, guided by the principles, should engage in the following behavior:

- ☐ **Reflect:** Inquire and explore language options and word choices. Ask questions. Recognize that language evolves rapidly, and so terms common years ago may no longer be appropriate.
- ☐ **Respect:** Use language that is humanizing and destigmatizing. Recognize that many terms come with baggage, and the use of certain phrases flattens a person to a particular aspect of their

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[5] Kelley Burton & Judith McNamara, *Assessing Reflection Skills in Law Using Criterion*, 19 Legal Educ. Rev. 171, 184 (2009), https://ler.scholasticahq.com/article/6221-assessing-reflection-skills-in-law-using-criterion [https://perma.cc/4JJE-N5JQ] (last visited Dec. 18, 2024) ("Reflective learners take a deep or active learning approach by asking questions of the experience to develop their own understanding . . . [to] query underpinning beliefs, values, assumptions and evidence, and to be creative in their outlook upon alternative options, conclusions, perspectives and views.").

[6] Sarah O. Schrup & Susan E. Provenzano, *The Conscious Curriculum: From Novice Towards Mastery in Written Legal Analysis and Advocacy*, 108 Nw. U.L. Rev. Colloquy 80, 88 (2013) (discussing "modeling and scaffolding are the most difficult cognitive apprenticeship tools").

[7] *See, e.g.*, Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 Clin. L. Rev. 317, 319 (2014); *id.* 320–21 (describing one model for self-reflection: "The first stage—Competence—asks the student to relate her performance to the standard of a reasonably competent lawyer. At the next stage—Difference and Choice—the student considers different means to achieve the goal of the performance. Middle stages—Internal Context and External Context—ask the student to describe factors that affected her decision-making process, beginning with a consideration of personal preferences, experiences, biases and characteristics, and moving to consideration of the preferences, experiences, biases and characteristics of others. The next stage—Societal Context—asks the student to consider relationships between law and society, social, political, historical, or economic structures that affect the lawyering process. In the final stage—Metacognition—the student should demonstrate an awareness of the effect of reflection on her thinking process.").

[8] *Id.*

identity or a condition that they are experiencing. Defer to how an individual identifies.

- ☐ **Accuracy:** Use language that is exact and correct.
- ☐ **Precision:** Utilize an appropriate level of generality or granularity.
- ☐ **Relevance:** Assess whether aspects of a person's identity are relevant to the issue.
- ☐ **Audience:** Consider the recipient of your message. Advocates can use their platforms to educate judges, partners, and/or the public about terms and the reasoning informing these language choices.

These principles aim to provide a set of considerations to evaluate in deciding on the best term in context. This framework provides flexibility, allowing for the incorporation of evolving terms and changing social use. For instance, while the term queer "was previously used as a slur, [it] has been reclaimed by many parts of the LGBTQ+ movement."[9] Rather than a framework that prescribes the use of the term queer or that, conversely, eschews its use in all cases, this methodology requires a contextualized analysis. In deciding whether the use of the term queer is apt, the author or speaker would consider not only the term's current social use (Reflect), but also the additional factors. One would assess the individual's identified language choices consistent with their identity and avoid loaded terms (Respect), consider the clarity (Accuracy) and specificity (Precision) of the terms used, in context with other potential terms (e.g., queer versus gay versus LGBTQ versus LGBTQIA+[10]). One would further consider the centrality of this language in the matter (Relevance) and how that language may be received by others in the course of achieving the representation goals (Audience).

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[9] *Sexual Orientation and Gender Identity Definitions*, Human Rts. Campaign, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/J4DQ-DBKN] (last visited Dec. 18, 2024).

[10] *See, e.g.*, *LGBTQIA Resource Center Glossary*, Univ. of Cal. Davis, https://lgbtqia.ucdavis.edu/educated/glossary#l [https://perma.cc/JJZ5-YT44] (last visited Dec. 17, 2024) ("LGBTQIA+: Abbreviation for Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, and Asexual. The additional '+' stands for all of the other identities not encompassed in the short acronym. [It is a]n umbrella term that is often used to refer to the community as a whole. Our center uses LGBTQIA to intentionally include and raise awareness of Queer, Intersex and Asexual communities as well as myriad other communities under our umbrella."); *Movement Lawyering Clinic*, Cornell L. Sch., https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/movement-lawyering-practicum/ [https://perma.cc/MFJ2-5NX5] (last visited Dec. 18, 2024) ("[L]aw students provide legal support for social justice groups including women's liberation, Black liberation, immigrants' and LGBTQ rights, and more.").

II. Evolving Social and Legal Use of Inclusive Language

Being aware of language differences and controversies is essential to well-informed and nuanced communication. This objective understanding—of what terms are in use and their origin—raises normative questions about how such terms should be used. There is debate in the legal profession, as in society, about whether and to what extent to center diversity in our interactions. These tensions manifest in several ways, in both the educational and professional contexts, through interactions with clients, colleagues, and institutional actors. The use of correct pronouns, to give one example, is not only a debate raised by litigation before the courts but is also actively being considered by the judiciary itself.[11] Diversity initiatives are simultaneously a source of legal risk and professional impetus.[12]

Inclusive language is contested in the profession and there is often no consensus. Not only is the movement to enhance DEI in the legal profession challenged, but even where there is consensus in promoting equity as a shared goal, a particular strategy may be opposed or a

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[11] *Compare* Eesha Pendharkar, *Parents Are Suing Schools Over Pronoun Policies. Here's What You Need to Know*, Educ. Week (May 12, 2023), https://www.edweek.org/leadership/parents-are-suing-schools-over-pronoun-policies-heres-what-you-need-to-know/2023/05 [https://perma.cc/LFV3-HL8C], *with* Alex Ebert, *Pronoun Selection for Lawyers, Litigants Divides Michigan Courts*, Bloomberg L. (June 6, 2023), https://news.bloomberglaw.com/business-and-practice/pronoun-selection-for-lawyers-litigants-divides-michigan-courts [https://perma.cc/7RQU-622E]; *see also* Alicia Cohn, *Judge: Referring to Transgender People by Chosen Pronouns 'Courtesy,' Not Law*, Hill (Jan. 17, 2020), https://thehill.com/regulation/court-battles/478737-judge-referring-to-transgender-people-by-chosen-pronouns-courtesy/ [https://perma.cc/VU7Y-CZUX].

[12] *See* Lara A. Flath, David E. Schwartz & Amy Van Gelder, *Employers Offering DEI Training Need to Monitor Both Pro- and Anti-DEI Court Challenges and Legislative Proposals*, Skadden (Mar. 2024), https://www.skadden.com/insights/publications/2024/03/insights-special-edition/employers-offering-dei-training-need-to-monitor [https://perma.cc/J48B-AB9V] (noting "legislators on both sides of the aisle have passed bills and introduced others to either pare back or promote DEI initiatives"); *see also The Littler Annual Employer Survey Report*, Littler (May 2024), https://www.littler.com/files/2024_littler_employer_survey_report.pdf [https://perma.cc/94KZ-AXUW] ("[I]n comparison to 2023, respondents report slightly elevated concerns around retaliation lawsuits (45%), as well as in the area of inclusion, equity and diversity (24%) after a tumultuous period of pushback against corporate diversity programs."). Given the timing of publication, this Article does not account for the implications of the Trump Administration's policies on DEI, which will undoubtedly be significant, in both the public and private sectors. See, e.g., Andrea Hsu, *Trump Calls DEI Programs 'Illegal.' He Plans to End Them in the Federal Government*, NPR (Jan. 23, 2025, 5:00 AM), https://www.npr.org/2025/01/23/nx-s1-5271588/trump-dei-diversity-equity-inclusion-federal-workers-government [https://perma.cc/HPT7-TWES]; Jessica Guynn, *'A First Taste': Trump DEI War Escalates, Reshaping Diversity in Corporate America*, USA Today (Feb. 13, 2025, 5:51 PM), https://www.usatoday.com/story/money/2025/02/13/trump-war-on-dei-escalates/78537133007/ [https://perma.cc/D2ZX-C3UX]; Brian Fong & Swaja Khanna, *Attorney General Pam Bondi's Ending Illegal DEI and DEIA Discrimination and Preferences Memo*, JD Supra (Feb. 11, 2025), https://www.jdsupra.com/legalnews/attorney-general-pam-bondi-s-ending-8012634/ [https://perma.cc/43KJ-B4LL].

given word choice could face backlash. Although an inclusive language framework does not resolve these complexities, it can provide a tool to make these considerations less ad hoc and the analysis more robust. The framework proposed in Part I, acknowledging the contentious nature of the debate, accounts for differing views and enables situational application given ever-evolving language use. Rather than a prescriptive formula, the framework operates as a multi-prong assessment to facilitate thoughtful consideration of inclusive language.

Advocates favoring diversity emphasize the importance of fostering inclusive environments that reflect the breadth of human experiences and perspectives, and why such efforts are essential to addressing historical inequities and systemic barriers, across groups and impacting every area of the law.[13] These proponents often highlight the tangible benefits of diversity, including enhanced creativity, innovation, and problem-solving, as well as the moral imperative to build fair and representative institutions.[14] Those opposed to DEI efforts are guided by principles that emphasize legal constraints, individual merit, and concerns for perceived overreach. Opponents often express concerns about the fairness of preferential policies and the potential for reverse discrimination. Critics also argue that DEI initiatives can flatten identities or unnecessarily create identity divisions that can perpetuate harm or create tokenism.[15]

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[13] *See, e.g.*, Sybil Dunlop & Jenny Gassman-Pines, *Why the Legal Profession Is the Nation's Least Diverse (and How to Fix It)*, 47 Mitchell Hamline L. Rev. 129, 130 (2021) (noting the legal "profession is the least diverse in the nation"); *How to Make Courts Accessible to Users with Disabilities and Limited English Proficiency*, Pew (Jan. 29, 2024), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2024/01/29/how-to-make-courts-accessible-to-users-with-disabilities-and-limited-english-proficiency [https://perma.cc/KQ5R-2W5F].

[14] *See, e.g.*, Kaela Sosa, *Unlocking Profitability and Growth: The Power of Diversity, Equity, and Inclusion in the Legal Industry*, TDM Libr., https://tdmlibrary.thediversitymovement.com/unlocking-profitability-and-growth-the-power-of-diversity-equity-and-inclusion-in-the-legal-industry/ [https://perma.cc/M3RS-FS37] (last visited Dec. 26, 2024) (noting benefits include "competitive advantage," "improved performance and productivity," and "innovation").

[15] *See, e.g.*, Jace Purcell, *Affirmative Action Should Prioritize Socioeconomic Status over Race*, Campanile (Nov. 1, 2019), https://thecampanile.org/20606/opinion/affirmative-action-should-prioritize-socioeconomic-status-over-race/ [https://perma.cc/S4P7-VGY4] ("People from low-income families have been deprived of advantages that their wealthier peers have access to such as attending a good high school, affording tutors and accessing standardized and AP tests—thus, logically, they should receive an advantage in admissions considerations. . . . [Higher education institutions] should set their criteria, colleges should cut out the middleman and have affirmative action admissions be mainly based on socioeconomic status rather than race.").

A. DEI Integration Debate in Legal Profession

There are efforts within the legal community that seek to acknowledge "the importance of cross-cultural competence to professionally responsible representation and the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law."[16] On the one hand, for instance, the American Bar Association's (ABA) Accreditation Standard 303 mandates law schools to provide instruction on professional identity, bias, cultural competency and humility, and racism.[17] The ABA Standards Committee has "expand[ed] their understanding of disadvantaged faculty even more, arguing that the list should also include religion, national origin, gender identity, gender expression, sexual orientation, age, disability, military status, Native American tribal citizenship and socioeconomic background."[18] The Committee's expansive definition has received pushback.[19] ABA Model Rule 8.4(g) prohibits "engag[ing] in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[20] State bar associations and courts have taken disciplinary action against attorneys using derisive language,[21] although some have noted

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16 Neil W. Hamilton & Louis D. Bilionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements*, NALP (May 2022), https://www.nalp.org/revised-aba-standards-part-1 [https://perma.cc/X9ML-5N3F] (discussing ABA standards for law schools).

17 Michelle Weyenberg, *ABA Passes Revisions to Accreditation Standards*, Nat'l Jurist (Apr. 5, 2022), https://nationaljurist.com/national-jurist/news/aba-passes-revisions-to-accreditation-standards/ [https://perma.cc/LS7Z-J9RS].

18 Danielle Braff, *ABA Considers Expanding Law School Diversity Standards*, ABA J. (Feb. 28. 2024, 9:59 AM), https://www.abajournal.com/web/article/the-aba-considers-expanding-law-school-diversity-standards [https://perma.cc/GUZ4-EGQJ].

19 Karen Sloan, *19 States Defend ABA Law School Diversity Rule Amid Republican Warning*, Reuters (June 20, 2024, 12:22 PM), https://www.reuters.com/legal/government/19-states-defend-aba-law-school-diversity-rule-amid-republican-warning-2024-06-20/ [https://perma.cc/K8AA-L6K2].

20 Model Rules of Pro. Conduct r. 8.4 (Am. Bar Ass'n 2024), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/ [https://perma.cc/G9LF-98J6] (Misconduct); *see also* Ellen Yaroshefsky, *The Long Road to New York's Anti-Discrimination and Anti-Harassment Ethics Rule*, 50 Hofstra L. Rev. 627, 656 (2022).

21 *See, e.g.*, *Lawyers Suspended for Racist, Sexist, Xenophobic, and Homophobic Email Content*, Md. State Bar Ass'n, https://125.msba.org/wp-content/uploads/2022/05/1-January-2021-Case-Notes-_-MSBA-CLE-Publications-bzijuf.pdf [https://perma.cc/ER29-NF7M] (last visited Dec. 19, 2024) ("The Maryland Court of Appeals disciplined two attorneys for including racist, misogynistic, xenophobic, and homophobic remarks in their workday emails."); Hassan Kanu, *A Lawyer's Racism Can Impede Duty to Client, Massachusetts High Court Says*, Reuters (June 20, 2023, 7:52 PM), https://www.reuters.com/legal/legalindustry/lawyers-racism-can-impede-duty-client-massachusetts-high-court-says-2023-06-20/ [https://perma.cc/J4C5-LAAQ] (finding bias

inequities in bar discipline.[22] Attorneys may face discipline for actions taken outside of professional settings.[23] A range of private and public institutions have vocalized support for diversity in the profession, access to courts, and other issues pertaining to DEI.[24] Some entities, including bar associations, have sought to provide guidance to legal professionals on diversity issues and implementation of equitable practices.[25]

Yet, there are challenges to inclusion. Some in the legal community see diversity as a threat to the profession. For instance, in an op-ed authored in the *Wall Street Journal*, Alabama Supreme Court Justice Jay Mitchell expressed worry over efforts by the National Conference of Bar Examiners ("NCBE") to update the bar exam, criticizing the changes as undermining the rigor of the test (e.g., shortened duration, testing of fewer subjects).[26] His commentary directly juxtaposes his perceived higher standards of the older exam with equity considerations, contending that "the biggest concern is the NCBE's use of the NextGen

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can undermine zealous representation in a "case [that] involved . . . a court-appointed attorney who had chastised [his client] for wearing a kufi prayer cap when they first met in 2016, . . . left a second meeting without speaking after seeing [the client's] prayer cap [, and] . . . told [the client] not to 'wear that shit in court' during their final meeting, and encouraged him to accept a longer sentence than a prior attorney had sought, the opinion said.").

[22] Joe Patrice, *Study Finds that Bar Discipline Is Totally Racist Shocking Absolutely No One*, Above the L. (Nov. 19, 2019, 12:13 PM), https://abovethelaw.com/2019/11/study-finds-that-bar-discipline-is-totally-racist-shocking-absolutely-no-one/ [https://perma.cc/G6MG-5PD5] ("A California bar study has charted attorney discipline over a 28-year span and discovered that, by and large, black and Latinx attorneys are disciplined more often and their punishments are more severe than then comparable population of white lawyers.").

[23] *Backlash Mounts Against Attorney Whose Racist Rant Went Viral*, Yahoo (May 17, 2018), https://www.yahoo.com/news/backlash-mounts-against-attorney-whose-074304592.html [https://perma.cc/AP4A-XS2W] ("A New York attorney caught hurling a racist rant . . . may now be facing disciplinary troubles, as a backlash has produced calls for his disbarment, prompted a U.S. Congressman to file a formal grievance, and caused members of the public to write scathing reviews of his legal practice on social media. According to news reports, Manhattan-based lawyer Aaron Schlossberg—whose law firm website touts his language fluency in Spanish—is . . . heard [in the video] berating the manager at Fresh Kitchen after overhearing a conversation in Spanish between other employees. The man accuses them of all being 'undocumented' and threatens to call U.S. Immigration and Customs Enforcement. 'I pay for their welfare, I pay for their ability to be here. The least they can do is speak English,' he said.").

[24] *See, e.g.*, Nat'l Ctr. for State Cts., State Court Statements on Racial Justice, https://www.ncsc.org/consulting-and-research/areas-of-expertise/racial-justice/state-activities/state-court-statements-on-racial-justice [https://perma.cc/9H9M-WUMA] (last visited Dec. 19, 2024); Edwin Bell, *Helping Courts Address Diversity, Equity, and Inclusion*, Judicature (2022), https://judicature.duke.edu/articles/helping-courts-address-diversity-equity-and-inclusion/ [https://perma.cc/YJ4U-A69B].

[25] N.Y. Bar Ass'n, Report and Recommendations of the New York State Bar Association Task Force on Advancing Diversity (Sept. 2023), https://nysba.org/app/uploads/2023/09/NYSBA-Report-on-Advancing-Diversity-9.20.23-FINAL-with-cover.pdf [https://perma.cc/J3G9-4RY5].

[26] Sarah Wood, *NextGen Bar Exam: What to Know*, U.S. News (Feb. 15, 2023), https://www.usnews.com/education/best-graduate-schools/top-law-schools/applying/articles/nextgen-bar-exam-what-to-know [https://perma.cc/E3XG-9BX4].

exam to advance its 'diversity, fairness and inclusion' agenda."[27] Justice Mitchell asserts, these changes to the exam will "put[] considerable emphasis on examinees' race, sex, gender identity, national and other identity-based characteristics" and that efforts to eliminate differences in group outcomes are resulting in a "water[ing] down [of] the test."[28] However, his op-ed fails to acknowledge ongoing controversies and concerns over disparities in bar exam results that are not in alignment with testing goals and undermine its validity as a neutral competency assessment—issues of which NCBE is acutely aware,[29] which is complemented by broader advocacy efforts[30] and movements to reconsider equities in other legal professional examinations, like the Law School Admissions Test ("LSAT").[31]

The debate within the bar and in practice expands much further. Law firms have been targeted for their programming and sued for their diversity initiatives,[32] while also simultaneously expanding practice ar-

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[27] Jay Mitchell, *The New Bar Exam Puts DEI Over Competence*, Wall St. J. (May 19, 2023, 7:04 PM), https://www.wsj.com/articles/the-new-bar-exam-puts-dei-over-competence-ncbe-family-law-schools-9c0dd4e8 [https://perma.cc/HF9R-LRXJ].

[28] *Id.*

[29] *See, e.g.*, Karen Sloan, *Racial Disparities in Bar Exam Scores Worsened in 2022*, Reuters (Apr. 12, 2023, 1:18 PM), https://www.reuters.com/legal/legalindustry/racial-disparities-bar-exam-scores-worsened-2022-2023-04-12/ [https://perma.cc/TWZ7-VR6V] ("The first-time pass rate for white test takers last year was 83%, while 57% of Black examinees passed on their first attempt—a difference of 26 percentage points—the ABA said Tuesday. In 2021, that gap was 24 percentage points."); Scott DeVito, Erin Lain & Kelsey Hample, *Onerous Disabilities and Burdens: An Empirical Study of the Bar Examination's Disparate Impact on Applicants from Communities of Color*, 43 Pace L. Rev. 205 (2023); Jane Bloom Grisé, *Question #1: Is There a Gender Gap in Performance on Multiple Choice Exams? A. Always B. Never C. Most of the Time*, 43 Women's Rts. L. Rep. 140, 144 (2021).

[30] Stephanie Francis Ward, *Disability Rights Advocates Challenge California's Bar Exam Accommodation Process*, ABA J. (June 13, 2023, 8:52 AM), https://www.abajournal.com/web/article/lawyers-involved-with-lsat-consent-decree-file-doj-complaint-regarding-california-bar-exam [https://perma.cc/4G3X-J2PB] ("Two disability rights groups have filed a U.S. Department of Justice complaint against the State Bar of California alleging that the agency 'consistently' violates the Americans With Disabilities Act regarding bar exam accommodation requests.").

[31] Karen Sloan, *LSAT's Elimination of 'Logic Games' Prompts Jeers, Cheers*, Reuters (Oct. 19, 2023), https://www.reuters.com/legal/litigation/lsats-elimination-logic-games-prompts-jeers-cheers-2023-10-19 [https://perma.cc/HDQ8-YDDD] ("The decision to axe logic games comes after the council in 2019 entered a settlement with two blind LSAT takers who claimed logic games violated the Americans with Disabilities Act because they could not draw diagrams that test takers often use to complete that portion of the test. That settlement gave the council four years to revise the logic games.").

[32] Tatyana Monnay, *Law Firms Embrace Roadmap Against Diversity Program Attacks*, Bloomberg L. (Oct. 2, 2023, 4:30 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/X8NM5AH4000000#jcite [https://perma.cc/WGR2-7LTN] ("[F]ive Republican state attorneys general sent a letter Aug. 29 to the top 100 law firms to 'ensure that you fully comply with your legal duty to treat all individuals equally—without regard to race, color, or national origin—in your employment and contracting practices.' Sen. Tom Cotton (R-Ark.) put law firms on notice for their DEI programs in a similar letter on July 17.").

eas to meet the increased demand for DEI-legal assistance.[33] Although some law firms continue to be criticized for failings in their DEI work.[34] Educational institutions have had to navigate evolving DEI restrictions.[35] And this is to say nothing of language used behind closed doors, reflecting racist, sexist, and dehumanizing views of clients, other attorneys, and judges.[36]

Another flashpoint of this debate is manifested in state courts, exemplifying the extremes of the backlash to DEI efforts. In Wisconsin, the state's "Supreme Court [ ] denied a Wisconsin State Bar request to create a new continuing education credit for attorneys focusing on diversity, equity and inclusion."[37] In seeking to modify the state bar's educational requirements, the bar association noted ongoing education re-

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[33] Tatyana Monnay, *Wall Street Firms Build Diversity Practices After Court Decision*, Bloomberg L. (Nov. 17, 2023, 4:00 AM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/bloomberg-law-news/BNA%200000018b-43b2-d03e-afeb-f7b3d2b60001 [https://perma.cc/VV9P-FV2Z] ("The Supreme Court's ban of affirmative action in college admissions has prompted a new wave of practices specializing in diversity, equity and inclusion at law firms . . . [that] decided there was enough business to justify creating the practice areas because of client queries about racial equity audits and whether diversity pushes would withstand possible legal challenges."); *see also* Tatyana Monnay, *Women, Minority Law Firm Gains Dampened by Litigation Threat*, Bloomberg L. (Jan. 10, 2024, 4:15 AM), https://news.bloomberglaw.com/business-and-practice/women-minority-law-firm-gains-dampened-by-litigation-threats [https://perma.cc/4WNP-7BV4].

[34] *See, e.g.*, Mahira Dayal, *Ex-Armstrong Teasdale DEI Chief Sues Firm for Discrimination*, Bloomberg L. (July 5, 2024, 5:33 PM), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/business-and-practice/BNA%2000000190-846b-d4f6-a199-d47b795a0001 [https://perma.cc/26EH-BZSQ] (describing former diversity leader's lawsuit against law firm for race and sex discrimination); Marianna Wharry, *Attorney Sues Former Firm for Termination While Seeking Postpartum Depression Treatment*, ALM L. (Apr. 10, 2024, 6:16 PM), https://www.law.com/2024/04/10/attorney-sues-former-firm-for-termination-while-seeking-postpartum-depression-treatment/?slreturn=20250121161658 [https://perma.cc/S4CX-GUPR] (raising claims of "unlawful pregnancy discrimination, sex discrimination, disability discrimination and retaliation").

[35] *See, e.g.*, Donald Padgett, *University of Houston Closing LGBTQA Resource Center to Comply with Anti-DEI Law*, Advoc. (Aug. 24, 2023, 4:35 PM), https://www.advocate.com/education/university-of-houston-dei-center [https://perma.cc/WK98-D3HX]; Jaclyn Diaz, *Florida Gov. Ron DeSantis Signs a Bill Banning DEI Initiatives in Public Colleges*, NPR (May 15, 2023, 5:48 PM), https://www.npr.org/2023/05/15/1176210007/florida-ron-desantis-dei-ban-diversity [https://perma.cc/4L7R-VDMS].

[36] Jon Levine, *'Woke' LA Firm Partners Routinely Used Vile Language to Refer to Women, POC, Emails Show*, N.Y. Post (June 3, 2023), https://nypost.com/2023/06/03/woke-la-firm-routinely-used-vile-language-to-refer-to-women-poc/ [https://perma.cc/2Q5M-68PU] (updated June 4, 2023,11:47 AM) ("The partners made frequent use of the word f----t and other anti-LGBTQ slurs"; "repeatedly referr[ed] to women as 'c--ts' and a judge as 'sugar t-ts'"; wrote "'Kill her by anal penetration,' . . . [in] reacting to an overtime request from another Lewis Brisbois attorney"; and utilized numerous racial slurs and offensive stereotypes, including use of "the N-word in work emails" and statements like, "Gypsy is my new word to describe about half of the minorities in California.").

[37] Rich Kremer, *Supreme Court Justice Writes DEI Education for Attorneys Would Create 'Goose-Stepping Brigade,'* Wis. Pub. Radio (July 15, 2023), https://www.wpr.org/justice/wisconsin-supreme-court-denies-request-voluntary-dei-continuing-education-attorneys [https://perma.cc/YVG2-UZQ6].

garding "'the effects of bias in negatively impacting the delivery of legal services' would improve the quality of legal services in Wisconsin."[38] In rejecting the proposal, the court's order referred to DEI as "a disguise for dangerous identity politics" and stated:

> If the Bar's end game were simply CLE credit, the petition would be easily dismissed as virtue signaling given the liberality with which the Board of Bar Examiners (BBE) already awards credit for such courses. But the Bar ultimately seeks to mandate DEIA training, impose group think on attorneys, and condition bar admission and continuing licensure on subscribing to an illiberal political ideology. Real diversity means welcoming dissenting voices, not coercing them into an echo chamber using the force of the State.[39]

B. First Amendment Considerations in DEI Initiatives

DEI initiatives can implicate First Amendment protections. The Wisconsin court also focused on First Amendment concerns in critiquing the requested DEI CLE credit. The opinion declares that "the very language of DEI[] is at odds with our 'national ethos.'"[40] It justified its decision: "The very point of mandating D[iversity,] E[quity], I[nclusion, and], A[ccess] CLE would be to create a 'goose-stepping brigade[]' of attorneys, but 'the First Amendment applies strictures designed to keep our society from becoming moulded [*sic*] into patterns of conformity[.]'"[41] Despite acknowledging that "[o]n its face, the proposed rule

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[38] *Id.*; *see* Alex Ebert, *Florida's Anti-DEI Push Axes 'Bias Elimination' Lawyer Training*, Bloomberg L. (Feb. 29, 2024, 10:33 AM) https://news.bloomberglaw.com/social-justice/floridas-anti-dei-push-axes-bias-elimination-lawyer-training [https://perma.cc/DQK3-ER6R] ("Courses on 'bias elimination' were struck from ethics classes that Florida attorneys must take to keep their law licenses under a rule formally accepted by the Florida Supreme Court Thursday. The ruling is the latest push by the high court to remove diversity, equity, and inclusion (DEI) training from the state bar."); *but see Diversity, Inclusion and Elimination of Bias FAQs*, N.Y. Cts., https://ww2.nycourts.gov/sites/default/files/document/files/2021-09/12n%20-%20FAQs%20-%20Diversity%20Inclusion%20and%20Elimination%20of%20Bias.pdf [https://perma.cc/78U3-KDU3] (New York "add[ed] Diversity, Inclusion and Elimination of Bias as a new CLE category of credit (effective January 1, 2018) and requir[es] that experienced attorneys complete at least 1 CLE credit hour in Diversity, Inclusion and Elimination of Bias as part of their biennial CLE requirement (effective July 1, 2018).").

[39] *In the Matter of Diversity, Equity, Inclusion, and Access Training for Continuing Legal Education*, Wis. Sup. Ct. (July 13, 2023), https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=679679 [https://perma.cc/M275-X9MJ].

[40] *Id.*

[41] *Id.* (annotation in original) (citation omitted) ("This sort of extreme reaction to diverse viewpoints creates legitimate fear that mandatory D[iversity,] E[quity], I[nclusion, and], A[ccess] CLE will become 'a means to harass and drive from the profession all dissenters, by requiring many participants to sit through what they will undoubtedly consider hostile propaganda. Petty harassment and timewasting can serve effectively as an ideological

might seem viewpoint neutral," the court goes on to conclude that the "underlying illiberal political ideology knows the intent is to force a particular view on an entire profession" and that "[t]he DEI[] movement's contempt for the First Amendment erodes the freedom of attorneys to advocate in their clients' best interests lest they run afoul of prevailing sensitivities."[42]

In yet another example, a North Carolina Supreme Court Justice filed a lawsuit against the state's Judicial Standards Commission, which is investigating public statements made by the justice that the commission asserts "appear to allege that your Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision making."[43] This investigation was launched after Earls "told the online legal journal Law360.com that the state supreme court should examine the reasons behind the lack of diversity in state courts and what implicit biases may be within the judiciary."[44] In the interview, "Earls herself, a Black female justice," "discussed the court's lack of judicial clerks from racial minority groups," "the role implicit bias plays in interrupting female advocates . . . and during oral arguments," and "the state courts' discontinuance of racial equity and implicit bias training."[45]

This matter invokes the First Amendment as a defense against restrictions on the justice's DEI-related speech, contrasting with the role of free speech and viewpoint diversity espoused in the Wisconsin court's analysis:

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screen.'") (quoting David Randall, *Wokeness Is Creeping into Continuing Legal Education*, James G. Martin Ctr. for Acad. Renewal (Feb. 17, 2023)).

42 Wis. Sup. Ct., *supra* note 39; *see also* Henry Redman, *Wisconsin Supreme Court Denies State Bar Request to Start DEI Training*, Wis. Exam'r (July 13, 2023, 4:03 PM), https://wisconsinexaminer.com/2023/07/13/wisconsin-supreme-court-denies-state-bar-request-to-start-dei-training/ [https://perma.cc/R8DJ-JBM8].

43 Justin Gamble, *North Carolina Supreme Court Justice Files Lawsuit over State Investigation into Her Comments About Diversity*, CNN (Sept. 4, 2023, 5:52 PM), https://www.cnn.com/2023/09/04/us/anita-earls-lawsuit-diversity-statements-reaj/index.html [https://perma.cc/7TKY-KBXJ].

44 *Id.*; *see also* Amanda Powers & Alicia Bannon, *State Supreme Court Diversity–May 2023 Update*, Brennan Ctr. (May 2023), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-may-2023-update [https://perma.cc/7VDA-AZSB] ("In 18 states, no justices identify as a person of color."; "Across high courts in all 50 states and Washington, DC, just 20 percent of state supreme court seats are held by people of color. By contrast, people of color make up over 40 percent of the U.S. population."; "Men hold 58 percent of high court seats.") (emphasis in original omitted); *see also Profile of the Legal Profession 2024: Judges,* Am. Bar Ass'n (Nov. 18, 2024), https://www.americanbar.org/news/profile-legal-profession/judges/?login [https://perma.cc/6XFD-A5E6] (providing demographics of federal judges).

45 Kelan Lyons, *NC Supreme Court Justice Anita Earls Sues State's Judicial Standards Commission*, NC Newsline (Aug. 29, 2023, 12:39 PM), https://ncnewsline.com/2023/08/29/nc-supreme-court-justice-anita-earls-sues-states-judicial-standards-commission/ [https://perma.cc/VZ47-ZRGP]; Hannah Albarazi, *North Carolina Justice Anita Earls Opens Up About Diversity*, Law360 (June 20, 2023, 10:45 AM), https://www.law360.com/articles/1687516/north-carolina-justice-anita-earls-opens-up-about-diversity [https://perma.cc/48T2-5YA3].

> [T]he First Amendment of the United States Constitution prohibits the Commission, as an arm of the State, from stifling or even chilling free speech, especially core political speech from an elected Justice of the North Carolina Supreme Court. The First Amendment allows Justice Earls to use her right to free speech to bring to light imperfections and unfairness in the judicial system. At the same time, the First Amendment prohibits the Commission from investigating and punishing her for doing so. [46]

In seeking an injunction to prevent further speech-chilling action by the commission, Justice Earls seeks to ensure the ability to "speak out about what [she] view[s] as imperfections or defects in the judicial system and [ ] do so in a measured and nuanced manner," because prohibiting her DEI discourse is "inimical to the First Amendment."[47] In this way, the First Amendment can be used as a basis to undergird speech protections, including about DEI efforts in the judiciary and legal profession. The matter was recently resolved without deciding the issue when the North Carolina Judicial Standards Commission dismissed the complaint against Justice Earls and the judge withdrew her suit.[48]

C. Judicial Approaches to Inclusive Language

Courts have grappled with evolutions in language, contending with how to respond to emerging trends in inclusive language and offering a microcosm into the professional uses of varying terms.[49] The range of responses from the judiciary has varied. Some courts have sought to keep parity with other judicial entities in adopting changes[50] while some have

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[46] Complaint at 4, Earls v. N.C. Jud. Standard Cmm'n, No. 1:23-cv-00734 (M.D.N.C. Aug. 29, 2023), https://storage.courtlistener.com/recap/gov.uscourts.ncmd.96465/gov.uscourts.ncmd.96465.1.0.pdf [https://perma.cc/362J-P9FD].

[47] *Id.* at 20.

[48] Kelan Lyons, *Justice Anita Earls Drops Lawsuit as Judicial Standards Commission Dismisses Complaint*, NC Newsline (Jan. 17, 2024), https://ncnewsline.com/briefs/justice-anita-earls-drops-lawsuit-as-judicial-standards-commission-dismisses-complaint/ [https://perma.cc/BU34-RG3X]; Mehr Sher, *Justice Earls, NC Commission End Legal Dispute; Free Speech Issue Unresolved*, Carolina Public Press (Jan. 17, 2024), https://carolinapublicpress.org/62831/earls-nc-legal-dispute-ends-complaint-dismissed-free-speech/ [https://perma.cc/RVU3-Z22A].

[49] Part III further assesses the use of inclusive language for different communities and identities, both by courts and clinics. Word choices, use of authority, and emphasis (e.g., use of capitalization, brackets, etc.) are all significant in applying the framework set form in Part I: reflection, respect, accuracy, precision, relevance, and audience.

[50] Dyjak v. Wilkerson, No. 21-2012, 2022 WL 1285221, at *1, n.1 (7th Cir. Apr. 29, 2022) ("We see no reason to break with that emerging consensus, in light of our normal practice of using the pronouns adopted by the person before us, *e.g.*, *Balsewicz v. Pawlyk*, 963 F.3d 650 (7th Cir. 2020) (using 'she' for a transgender woman when that is the person's preference), as

contemplated the grammatical legitimacy of changed terms.[51] Courts have at times adopted terms as used by the parties,[52] but have also declined to adopt the parties' preferred terms, as did the District of Arizona in *United States v. Merlo-Espinal.* In that matter, the court rejected the use of the term "Latinx," citing a Pew Research Center study that "a majority of U.S. Hispanics . . . prefer the terms Hispanic or Latino."[53]

In considering identity language, courts have, at times, conflated or merged terms.[54] For instance, the Southern District of New York in *United States v. Scott* noted the "percent [of] Black or African American ("Black") individuals" and "Hispanic or Latino ("Latinx") individuals" in assessing the jury-eligible population in a community.[55] Courts have also used terms out of context, as did the Eastern District of Missouri in *Wilbers v. Moneta Group Investment Advisors, Inc*. In quoting Eighth Circuit case law, the court describes the U.S. Supreme Court "Justices . . . [as] mildly schizophrenic in mapping [the] contours" of a legal doctrine.[56] Offensive language is often found in statutes, case law, and other legal materials cited in scholarship and opinions.[57]

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well as the Supreme Court's decision to do so in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).").

[51] *Id.* ("[D]espite the potential for some confusion about the singular and the plural, this usage of "they/them/their" has now been accepted by numerous style guides and dictionaries as appropriate in referring to a singular person of unknown or non-binary gender.") (citing MLA Handbook § 3.5 (9th ed. 2021); APA Publication Manual § 4.18 (7th ed. 2020); *They, Them, Their*, Associated Press Stylebook (55th ed. 2020); Farhad Manjoo, *It's Time for 'They,'* N.Y. Times (July 10, 2019), https://www.nytimes.com/2019/07/10/opinion/pronoun-they-gender.html [https://perma.cc/Z5ZJ-K7EE]; Chicago Manual of Style ¶ 5.48 (17th ed. 2017)).

[52] L.O.K. by & through Kelsey v. Greater Albany Pub. Sch. Dist. 8J, No. 6:20-CV-00529-AA, 2022 WL 2341855 (D. Or. June 28, 2022) (analyzing Title IX and related claims by "Plaintiff L.O.K. [] a twelve-year-old child who is intersex and non-binary" and "uses they/them pronouns").

[53] United States v. Merlo-Espinal, No. CR 21-1720-TUC-CKJ (DTF), 2022 WL 2191192, at *3 (D. Ariz. June 17, 2022) (citing Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, Pew Rsch. Ctr. (Aug. 11, 2020), https://www.pewresearch.org/race-and-ethnicity/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it/ [https://perma.cc/5MKG-2ZW2].

[54] *See, e.g.*, Frank Newport, *Black or African American?*, Gallup (Sept. 28, 2007), https://news.gallup.com/poll/28816/black-african-american.aspx [https://perma.cc/RK94-9MTP]; John H. McWhorter, *Why I'm Black, Not African American*, L.A. Times (Sept. 8, 2004), https://manhattan.institute/article/why-im-black-not-african-american [https://perma.cc/GPY9-T2UL]; Antonio Campos, *What's the Difference Between Hispanic, Latino and Latinx?*, Univ. of Cal. (Oct. 26, 2021), https://www.universityofcalifornia.edu/news/choosing-the-right-word-hispanic-latino-and-latinx [https://perma.cc/8VFH-637X].

[55] United States v. Scott, 545 F. Supp. 3d 152, 159–60 (S.D.N.Y. 2021).

[56] Wilbers v. Moneta Grp. Inv. Advisors, Inc., No. 406CV00005 ERW, 2006 WL 1360866, at *2 (E.D. Mo. May 17, 2006) ("Although the Supreme Court has indicated the broad scope of the phrase, '[t]hat locution is not self-defining, and the Justices have been at least mildly schizophrenic in mapping its contours.'") (quoting *Minn. Chapter of Associated Builders and Contractors, Inc. v. Minn. Dept. of Pub. Safety*, 267 F.3d 807, 811–12 (8th Cir. 2001)).

[57] Caring Cmty. of Conn., Inc. v. Town of Colchester, No. HHB-CV-16-6037378-S, 2023 WL 4446569, at *5 (Conn. Super. Ct. July 6, 2023) ("(iii) housing for homeless, retarded

On other occasions, courts have decided whether to defer to terms or capitalization in source materials or to make modifications. While some courts adhere to the original source,[58] others incorporate updated language.[59] In *United States v. Talley*, the Northern District of California did both—preserving the source capitalization in quoted language but not in other sections. For instance, the court kept the original lowercasing of "black" when citing source material text that did not use caps ("The dispatcher asked if the man was 'white, black, Asian, or Hispanic.'").[60] However, the court opted to capitalize in non-quoted sections ("Talley is Black, with a medium to dark complexion.").[61]

Courts have also looked to a range of different sources to inform and justify their language choices. For instance, in adopting they/them pronouns for the litigant in *People v. Gobrick*, the opinion noted: "[T]his Court does not yet have an official policy in regard to the use of preferred pronouns."[62] After disclaiming that the "use of nonbinary pronouns . . . has no effect on the outcome of the proceedings," the court went on to use "they/them pronouns where applicable," while also preserving record references that "use[d] the pronouns he/him."[63] In support of its decision, the court cited the Merriam-Webster Dictionary, American Physiological Association, Michigan Bar Journal, and American Bar Association Journal, which all accept the use of the singular they/them.[64]

However, the concurrence of the same opinion accuses the court of fueling the flames of the "pronoun wars" which is "the greatest nightmare grammarians have ever endured."[65] The concurrence disavows the use of inclusive language, stating: "I decline to join in the insanity that has apparently now reached the courts." "Once we start down the road of accommodating pronoun (or other) preferences in our opinions," the concurrence reasons, "the potential absurdities we will face are unbounded."[66]

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or mentally or physically handicapped individuals, or for battered or abused women and children") (quoting Number 03-270 of the 2003 Public Acts, § 12-81 (7)); *see also id.* *5, n. 5.

58 Mitchell v. Morton Cnty. Sheriff Kyle Kirchmeier, No. 1:19-CV-149, 2020 WL 8073625, at *4 (D.N.D. Dec. 10, 2020), *aff'd in part, rev'd in part and remanded sub nom. Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022) ("Mitchell contends '[d]efendants have a history of discriminating against and racially profiling individuals in Indigenous communities.'").

59 State v. Griffin, 846 N.W.2d 93, 100 (Minn. Ct. App. 2014) (modifying parenthetical to note: "concluding that when 'parties agree that persons self-identifying as [B]lack are a distinctive group in the community . . . the first element of the *Williams* test' has been satisfied").

60 United States v. Talley, 636 F. Supp. 3d 1041, 1043 (N.D. Cal. 2022).

61 *Id.* at 1045.

62 People v. Gobrick, No. 352180, 2021 WL 6062732, at *1 (Mich. Ct. App. Dec. 21, 2021), *appeal denied*, 981 N.W.2d 59 (Mich. 2022).

63 *Gobrick*, 2021 WL 6062732, at *1.

64 *Id*.

65 *Id.* at *9 (Boonstra, J., concurring).

66 *Id.*

Accordingly, Judge Boonstra writes: " I decline to start down that road, and while respecting the right of dictionary- or style-guide-writers or other judges to disagree, do not believe that we should be spending our time crafting our opinions to conform to the 'wokeness' of the day."[67]

"Michigan has become the first state to require judges to refer to attorneys [and parties] by their preferred pronouns," which went into effect January 1, 2024, after the Michigan Supreme Court approved a new rule by a five-to-two majority.[68] The rule allows "[p]arties and attorneys" to "include Ms., Mr., or Mx. as a preferred form of address and one of the following personal pronouns in the name section of the caption: he/him/his, she/her/hers, or they/them/theirs" and "allows attorneys to include their preferred forms of address or pronouns in the captions of court documents."[69] The rule "requires judges to use those terms 'or other respectful means' when referring to those attorneys either in court or in documents," with the use of "alternative neutral language such as 'Attorney Smith' or 'Plaintiff Smith.'"[70] The order notes the importance of the rule in fostering public access and trust:

> Judges are ultimately public servants. We serve the entire public and are required to treat those who come before us with civility and respect. The gender identity of a member of the public is a part of their individual identity, regardless of whether others agree or approve. . . . The amendment of MCR 1.109(D) will help to promote and preserve the judiciary's credibility and currency with the public that we serve while also providing guidance to judges and court staff.[71]

In short, courts' adoption of inclusive language is highly varied, but many are confronting these issues in their practice and the substance of their decisions. More generally, equity and inclusion principles are being actively debated within court systems, by practicing attorneys, in legal academia, and by our society writ large.

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67 *Id*.

68 Karen Sloan, *'History is Made' as Michigan Judges Are Ordered to Use Lawyers' Preferred Pronouns*, Reuters (Sept. 28, 2023, 12:04 PM), https://www.reuters.com/legal/government/history-is-made-michigan-judges-are-ordered-use-lawyers-preferred-pronouns-2023-09-28/ [https://perma.cc/W22E-KXTZ].

69 *Id.*

70 *Id.*

71 Amendment of Rule 1.109 of the Michigan Court Rules, Mich. Sup. Ct. (Sept. 27, 2023), https://www.courts.michigan.gov/siteassets/rules-instructions-administrative-orders/proposed-and-recently-adopted-orders-on-admin-matters/adopted-orders/2022-03_2023-09-27_formor_amdmcr1.109.pdf [https://perma.cc/K4R8-EA8G] (Welch, J.).

D. Evolving Approaches and Strategies to Inclusive Language

Equity and discrimination are changing concepts within the law itself,[72] and contested in the law school setting.[73] Even when there is consensus on principles, there may not always be agreement on methodology or application. For example, this debate exists with respect to the use of person-first or identity-first language.[74] Advocates favoring person-first language emphasize the importance of recognizing individuals as people before their disabilities or conditions. Referring to "a person with a disability," rather than a "disabled person," centers their humanity and individuality so a person's identity is not overshadowed by a single characteristic. This approach seeks to engender respect and avoid dehumanization. Those opposed, who prefer identity-first language, are guided by principles of empowerment and pride in identity. They argue that phrases like "autistic person" or "disabled person" affirm that these aspects are integral to who they are, not something separate or negative. For many, identity-first language reflects a reclamation

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[72] *See, e.g.*, Michelle Travis, *The Supreme Court Case that Will Fuel the Corporate DEI Debate in 2025*, Forbes (Dec. 22, 2024), https://www.forbes.com/sites/michelletravis/2024/12/22/the-supreme-court-case-that-will-fuel-the-corporate-dei-debate-in-2025/ [https://perma.cc/632X-A8HX] ("The U.S. Supreme Court is set to rule on an employment discrimination case in 2025 that could add fuel to the debate over corporate DEI programs—without ever mentioning diversity, equity, and inclusion. *Ames v. Ohio Department of Youth Services* involves a 'reverse discrimination' claim. These claims are brought by members of a majority group alleging discrimination in favor of members of a minority group.").

[73] *See, e.g.*, Anemona Hartocollis, *Northwestern Law School Accused of Bias Against White Men in Hiring*, N.Y. Times (July 2, 2024), https://www.nytimes.com/2024/07/02/us/affirmative-action-lawsuit.html [https://perma.cc/NBX3-A3EX] ("A conservative group filed a lawsuit against Northwestern University's law school on Tuesday, claiming that its attempts to hire more women and people of color as faculty members violate federal law prohibiting discrimination against race and sex."); Stephen Lemons, *Is There DEI in ASU? Judge Lets Professor Sue over Diversity Training*, Phoenix New Times (Dec. 20, 2024), https://www.phoenixnewtimes.com/news/asu-loses-bid-dismiss-anti-dei-lawsuit-brought-by-professor-20815934 [https://perma.cc/LTG5-3C7M] ("Maricopa County Superior Court . . . denied a motion to dismiss Goldwater's May 17 amended complaint that challenges the "Inclusive Communities" training the university requires of all employees.").

[74] *See, e.g.*, Shannon Wooldridge, *Writing Respectfully: Person-First and Identity-First Language*, Nat'l Inst. of Health (Apr. 12, 2023), https://www.nih.gov/about-nih/what-we-do/science-health-public-trust/perspectives/writing-respectfully-person-first-identity-first-language [https://perma.cc/7LQK-ENRZ]; *Person-First and Identity-First Language*, Employer Assistance and Resource Network on Disability Inclusion, https://askearn.org/page/people-first-language [https://perma.cc/6SKX-3ST9] (last visited Dec. 26, 2024); Tara Haelle, *Identity-first vs. Person-first Language Is an Important Distinction*, Ass'n of Health Care Journalists (July 31, 2019), https://healthjournalism.org/blog/2019/07/identity-first-vs-person-first-language-is-an-important-distinction/ [https://perma.cc/74TA-HW49].

of terms, some of which may have been used historically to marginalize. Critics of person-first language often see it as dismissive of the lived realities and cultural significance tied to these identities, which promote solidarity. Opponents may also resist the clunkiness of people-first language.[75] As evidenced by these disagreements, there is no universal agreement on when to use which form.

To provide another illustration: content or trigger warnings have pros and cons to their utilization.[76] These disclaimers "are distinct in that they originated as a measure of protection specifically for survivors of trauma" as a way to "warn readers before discussing their experiences," although they have been expanded.[77] "Trigger warnings are now used in educational settings, social media, entertainment, and other venues," and it may be helpful to consider the use of trigger warnings in legal documents, such as in the context of domestic and sexual violence.[78] For example, two recent lawsuits filed against Sean Combs contained a trigger warning as seen here:[79]

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[75] *See Person-first Language Causes More Discrimination*, Valley Vanguard (Feb. 10, 2020), https://thevalleyvanguard.com/2020/02/10/person-first-language-causes-more-discrimination/ [https://perma.cc/YN5U-S7PZ] ("First off, it feels like a euphemism. It implies that outright saying their disability or health condition is something to be ashamed of and thus leads to more stigma. This is also why I dislike the term 'differently abled.' It's also just clunky language and unnecessarily wordy. There are only a few circumstances where person-first language has flowed as naturally as identity first.").

[76] Diana Simon, *Legal Education and Trigger Warnings: More Harm Than Good?*, 18 Charleston L. Rev. 481 (2024), http://dx.doi.org/10.2139/ssrn.4535054 [https://perma.cc/G6LW-FCX2].

[77] Payton J.Jones, Benjamin W. Bellet & Richard J. McNally, *Helping or Harming? The Effect of Trigger Warnings on Individuals with Trauma Histories*, 8 Clinical Psych. Sci. 905 (2020) ("Giving a trigger warning means providing prior notification about forthcoming content that may be emotionally disturbing (Boysen, 2017). In this sense, trigger warnings are similar to PG-13 or 'viewer discretion advised' warnings that are common across many different forms of media."); *but see* Shawnelle Martineaux, *Don't Enshrine Trigger Warnings in Tort Law*, J. Free Black Thought, https://freeblackthought.substack.com/p/dont-enshrine-trigger-warnings-in [https://perma.cc/KP67-B6MK] (last visited Dec. 20, 2024) ("Today, however, with the preponderance of evidence of their ineffectiveness, their potential harmfulness, and an ever-extending list of purported triggers aimed at protecting against nebulous trauma events, I am compelled to forward three arguments against trigger-warning liability.").

[78] Jones, et al., *supra* note 77.

[79] *See* Doe v. Combs, Case 1:23-cv-10628 (Dec. 6, 2023), https://s3.documentcloud.org/documents/24193182/new-jane-doe-lawsuit-against-diddy-aka-sean-combs.pdf [https://perma.cc/8U3B-9AE2].

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE,

Plaintiff,

v.

SEAN COMBS, HARVE PIERRE; THE THIRD ASSAILANT; DADDY'S HOUSE RECORDINGS, INC. and BAD BOY ENTERTAINMENT HOLDINGS, INC.,

Defendants.

Civil Case No.

COMPLAINT

JURY TRIAL DEMAND

TRIGGER WARNING:
THIS DOCUMENT CONTAINS HIGHLY GRAPHIC INFORMATION OF A SEXUAL NATURE, INCLUDING SEXUAL ASSAULT

Plaintiff Jane Doe ("Ms. Doe") hereby alleges as follows:

PRELIMINARY STATEMENT

1. On November 16, 2023, Casandra Ventura a/k/a "Cassie" filed a 35-page lawsuit in which she exposed Sean Combs for subjecting her to nearly a decade of physical, sexual and emotional abuse punctuated by rape, sex trafficking and being forced to engage in drug fueled nonconsensual sexual encounters with other men.

2. Ordinarily, when a lawsuit such as Ms. Ventura's is filed that involves events that took place long ago, witnesses are few and far between and evidence hard to muster. Not so for the claims brought against Mr. Combs. Within minutes of the filing, salient facts of Ms. Ventura's claims were confirmed by various witnesses, including a rival musician whose car Mr. Combs blew up as well as various individuals who observed Mr. Combs beat Ms. Ventura.

However, the use of trigger warnings is debated, even in the context of the classroom. Some favor trigger warnings as modernizing the law school curricula, countering what some see as "an outdated system of learning that does not account for the changing demographics of our law students" and permitting students to "grappl[e] with and critique[e] the traditional law school pedagogy."[80] Others reject the notion

[80] Simon, *supra* note 76, at 5.

of dispassionate learners and underscore the importance of making classrooms more "sensitive, inclusive, and antiracist," including to ensure those from vulnerable populations feel included in the learning environment.[81] By contrast, some advocates and educators oppose the use of trigger warnings. Some harbor concerns for academic freedom. A report by the American Association of University Professors argued that "trigger warnings are 'infantilizing and anti-intellectual'; single out certain topics for attention; may result in professors eliminating material in their classes altogether; and may have a special impact on non-tenured and contingent faculty, who will feel even more pressure to use them or be fired."[82] Some may be concerned with its impact on classroom discussion dynamics, or see it as anti-Socratic.[83] Some find it unsupported by research or counterproductive.[84] Ultimately, there is no consensus on the use of content or trigger warnings.

III. Inclusive Language Practices in Clinics

This part catalogs the various terms used by clinics, which provide a snapshot into broader trends in the legal profession, and evince or eschew values outlined in the framework presented in Part I. Given the issues within the legal profession related to inclusive language, as discussed in Part II, thoughtfulness around language choices is a critical part of professionalism. Clinics serve an important role in preparing students for practice and are directly engaged in practice themselves. In addition to fulfilling educational mandates to educate on "bias, cross-cultural competency, and racism,"[85] teaching inclusive language

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[81] *Id.* at 6, 8.

[82] *Id.* at 9.

[83] *Id.* at 11 ("The Socratic method also requires students to think on the spot, answer questions precisely, and take intellectual risks. . . . An overriding learning goal is teaching students 'to engage in sophisticated legal research and analysis, including analogical reasoning, critical thinking, problem solving, and policy analysis.' Stripping or limiting classroom content because it might be offensive could undermine these goals. Giving trigger warnings or omitting offensive words or epithets because they will trigger student sensitivities is not going to prepare students for the realities of practicing law.") (internal citation omitted).

[84] *Id.* at 13 ("[T]rigger warnings have the potential to make students feel more anxious, not less."); *id.* ("[T]rigger warnings may give someone the impression that survivors are 'emotionally incapacitated' when, in fact, most trauma survivors are 'resilient and show few symptoms of PTSD after an initial period of adjustment.'").

[85] ABA Standard 303 requires law schools to "provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation." ABA Standards for Approval of Law Schools, Am. Bar. Ass'n, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf (last visited Dec. 26, 2024). Standard 303 also mandates that an accredited law school must offer a curriculum that requires each student to satisfactorily complete one or more experiential courses (which can include clinical courses) totaling at least six credit hours, although there are proposals to increase this requirement. ABA

decision-making skills serves other practice and pedagogical interests.[86] For example, inclusive language practices are essential to comply with professional ethics rules.[87] As "law school clinics . . . share ethics issues with law firms, government entities, public defenders, and legal aid offices," and students are operating under the same requirements as attorneys, clinics are "highly conscientious that ethics and professionalism are a major component of their programs."[88] In addition to building cultural competence and fostering positive relationship building, inclusive language reinforces effective communication and has an impact on the clinic's representation. For instance, inclusive language is a necessary tool for client-centered lawyering, which "refers to a 'richly elaborated philosophy of lawyering that strives at once to be client-directed, holistic, respectful of client narrative, client-empowering, and partisan.'"[89] Given the importance of clinical advocacy, this section considers how clinics exemplify the various language choices utilized in courts and society more broadly with respect to the adoption of inclusive terms.

Experiential Credits Working Group of the Standards Committee (Nov. 1, 2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/nov23/23-nov-experiential-learning-working-group-memo-to-council.pdf [https://perma.cc/3PVA-ZLF5].

[86] William E. Adams, Jr. & Leo P. Martinez, *Focus on Diversity: The ABA Strengthens Diversity, Equity, and Inclusion Educational Requirements for Law Schools*, Bar Exam'r (2022), https://thebarexaminer.ncbex.org/article/summer-2022/focus-on-diversity-2/ [https://perma.cc/MD5H-ZLRU] (last visited Dec. 20, 2024).

[87] *See supra* Part I; *see, e.g.*, Priscilla DeGregory, *'Racist Lawyer' Aaron Schlossberg Publicly Scolded by Appeals Court*, N.Y. Post (Dec. 22, 2022, 3:17 PM), https://nypost.com/2020/12/22/racist-lawyer-aaron-schlossberg-scolded-by-appeals-court/ [https://perma.cc/Q7JN-ERCH] (documenting attorney's statements, including: "If they have the balls to come here and live off of my money—I pay for their welfare, I pay for their ability to be here—the least they can do is speak English"); Matter of Teague, 15 N.Y.S.3d 312, 313 (2015) ("Respondent was charged with having made patently offensive racial, ethnic, homophobic, sexist, and other derogatory remarks to attorneys, in violation of rule 8.4(h) of the Rules of Professional Conduct"); Debra Cassens Weiss, *After Learning Lawyer's Remark Was a 'Serious Covert Insult,' Judge Refers Incident to State Bar*, ABA J. (July 21, 2022, 9:53 AM), https://www.abajournal.com/news/article/fter-learning-lawyers-remark-was-serious-covert-insult-judge-refers-incident-to-state-bar [https://perma.cc/Q95X-AMQD] (last visited Dec. 20, 2024) (reporting attorney used "'See You Next Tuesday' [a]s a euphemism for the C-word" towards two female lawyers).

[88] Nina W. Tarr, *Ethics, Internal Law School Clinics, and Training the Next Generation of Poverty Lawyers*, 35 Wm. Mitchell L. Rev. 1011, 1012 (2009) (discussing confidentiality, conflicts of interest, and other ethical issues); M. Chris Fabricant, *Rethinking Criminal Defense Clinics in "Zero-Tolerance Policy" Regimes*, 36 N.Y.U. Rev. L. & Soc. Change 351, 379–80 (2012) (considering the ethical issues arising between cause-lawyering and client-centered representation).

[89] Julie D. Lawton, *Who Is My Client? Client-Centered Lawyering with Multiple Clients*, 22 Clin. L. Rev. 145, 148 (2015) ("[R]especting the importance of the client's role in client decision-making; and respecting the importance of the attorney's appreciation for their clients' 'perspectives, emotions and values' are enabled by inclusive language in the process of developing narratives and setting goals.).

A. General Considerations

This section seeks to provide the foundation for inquiring about language choices in the clinical and advocacy context as set forth in Part I. Reflection requires consideration of the evolution of language and the current debates on word choice. In seeking to distill the existing language controversies for different communities or identity groups, this part will introduce the use of terms in law and society. Then, for each category, the paper will elevate clinical examples demonstrating the range of language choices utilized and reflect on the potential applicability of the remaining principles—respect, accuracy, precision, and relevance—in the analysis.[90]

Under the framework, respect entails understanding individual preferences and avoiding assumptions. It is best to seek guidance from individuals with whom one is directly engaged to understand how they describe their identity and which terms they feel comfortable using. Moreover, avoid making assumptions and educate oneself on current trends in language use. For instance, many organizations that work directly with particular communities can provide insight into general terms in current use.[91] Being mindful of variations in the preferences between members or a group and that some terms may only be appropriate for use by those who are in-group, as opposed to those not of that identity, is also important.[92]

Individuals should also convey respect in word choice and be careful using: zoomorphic, debasing idioms (e.g., "keeping someone on a tight leash"); coded, stigmatized phrases (e.g., "blue collar worker"); dehumanizing, reductionist language (e.g., "slave" instead of "enslaved person").[93] Terms that might be devaluing or stigmatizing should be

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[90] This analysis relies on the publicly available information about various clinical programs available through their websites. The audience for these sites is largely mixed—targeting prospective clients, current students, alumni, and the community writ large—and, thus, language may vary in other contexts.

[91] Safstrom & Mead, *supra* note 1, at 369 ("Resources from the National Center on Disability and Journalism, GLAAD, and the Marshall Project, for instance, provide particular insight into the identifiers that are commonly used or preferred by members of their represented communities."); *see also* Appendix.

[92] *In-group/Out-group*, Univ. of Tex. Sch. of L., https://ethicsunwrapped.utexas.edu/glossary/in-group-out-group [https://perma.cc/8KFR-SQFT] (last visited Dec. 18, 2024).

[93] Brian Resnick, *The Dark Psychology of Dehumanization, Explained*, Vox (Mar. 7, 2017, 8:10 AM), https://www.vox.com/science-and-health/2017/3/7/14456154/dehumanization-psychology-explained [https://perma.cc/ELJ6-6PTT] ("Look back at some of the most tragic episodes in human history and you will find words and images that stripped people of their basic human traits. In the Nazi era, the film *The Eternal Jew* depicted Jews as rats. During the Rwandan genocide, Hutu officials called Tutsis 'cockroaches' that needed to be cleared out."); Scott Cummings, *Racial Prejudice and Political Orientations Among Blue-Collar Workers*, 57 Soc. Sci. Q. 907 (1977), https://www.jstor.org/stable/42859715 ("Given the blue collar's reaction against the war on poverty, affirmative action and racial quotas . . .

avoided.[94] For instance, terms like "marginalized," "underserved," "underrepresented," or "minoritized" can have an othering effect, as these terms gloss over "the historical disinvestment experienced by some communities" and that more "[e]quity-focused alternatives include 'historically and intentionally excluded' and 'disinvested,'" which reflect the historic and social experiences of a population or group.[95] One should also be cautious with the use of colloquialisms or terms that have a loaded history. Although terms can become attenuated from their original meaning, it is helpful to be aware that many phrases have biased origins. For instance, while the term "off the reservation" may be an appropriate way to describe factual circumstances,[96] its more common use as a figure of speech to describe someone acting erratically belies its historical roots. The use of the same term as a colloquialism to mean "to deviate from what is expected or customary; to behave unexpectedly or independently" carries negative connotations.[97] The term's derivation

produce[d] a fusion between racial prejudice and reactionary politics."); *Language of Slavery, Underground Railroad*, Nat'l Park Serv. (Jan. 28, 2022), https://www.nps.gov/subjects/undergroundrailroad/language-of-slavery.htm [https://perma.cc/3GAN-PXC8] (Using the term enslaved person "more accurately describes someone who was forced to perform labor or services against their will under threat of physical mistreatment, separation from family or loved ones, or death. . . . Enslaved person emphasizes the humanity of an individual within a slaveholding society over their condition of involuntary servitude. . . . [T]his term, in which enslaved describes but person is central, clarifies that humanity was at the center of identity while also recognizing that this person was forcibly placed into the condition of slavery by another person or group.").

[94] *See, e.g.*, *Socioeconomic Status and Classism in Language*, Pratt Inst. (Oct. 27, 2023, 4:31 PM), https://libguides.pratt.edu/c.php?g=1278195&p=9379489 [https://perma.cc/5Z6G-PDRU] ("Terms to Avoid: The poor, low-class people, poor people; Suggested Alternatives: People whose incomes are below the federal poverty threshold, People who self-reported incomes were in the lowest income bracket; Comments: Many people find the terms 'low-class' and 'poor' pejorative. Use person-first language instead. Define income brackets and levels, if possible."); *APA Style Guide*, Am. Psych. Ass'n, https://apastyle.apa.org/style-grammar-guidelines/bias-free-language/socioeconomic-status [https://perma.cc/B5UW-VDT7] (last visited Dec. 18, 2024); *Inclusive Language for Reporting Demographic and Clinical Characteristics*, JAMA, https://jamanetwork.com/pages/inclusive-language [https://perma.cc/9ZDW-2E6V] (last visited Dec. 18, 2024).

[95] Andis Robeznieks, *Try These 7 Equity-Focused Language Options to Engage Patients*, Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/health-equity/try-these-7-equity-focused-language-options-engage-patients [https://perma.cc/8S5L-9NX3] (last visited Dec. 18, 2024).

[96] U.S. Comm'n on Civ. Rts., American Indian Civil Rights Handbook 58 (Mar. 1972), https://www2.law.umaryland.edu/marshall/usccr/documents/cr11033.pdf [https://perma.cc/LGP3-4NU8] ("Others [tribes] permit absentee voting only by members temporarily absent from the reservation and still others allow absentee voting by members living permanently off the reservation.").

[97] Kee Malesky, *Should Saying Someone Is 'Off The Reservation' Be Off-Limits?*, NPR (June 29, 2014, 3:41 PM), https://www.npr.org/sections/codeswitch/2014/06/29/326690947/should-saying-someone-is-off-the-reservation-be-off-limits [https://perma.cc/9CYB-N2RM]; *see also* Ben Zimmer, *'Off the Reservation' Is a Phrase With a Dark Past*, Wall St. J. (May 6, 2016, 12:40 PM), https://www.wsj.com/articles/off-the-reservation-is-a-phrase-with-a-dark-past-1462552837 [https://perma.cc/W2VR-NBFR].

relates to "Native American peoples [who] were restricted to reservations created by the U.S. government, and their freedom was severely limited," but has also been used in its more figurative sense for "a century-long history in American political life" in contexts that are far attenuated from the term's origin.[98] As such, many people using the phrase may have no idea of the term's history, and may think the expression's use is universally innocuous.

Similar logic applies to the use of other casual turns of phrase or specific terms provided in the Appendix. Some of the most commonly used words or idioms that carry historical connotations include: hooligan, hysteria, gypped, moron, lame, and you guys.[99] Even terms with mixed or contested historical origin, like "hip hip hooray"[100] or "rule of thumb,"[101] may carry deep social connotations. Idioms with problematic

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[98] Malesky, *supra* note 97.

[99] *See generally* Christina Sterbenz & Dominic-Madori Davis, *12 Racist and Offensive Phrases That People Still Use All the Time*, Bus. Insider (June 16, 2020, 12:16 PM), https://www.businessinsider.com/offensive-phrases-that-people-still-use-2013-11 [https://perma.cc/QK5U-WRVM]; *Common Idioms and Expressions that are Unknowingly Offensive*, Chase Brexton Health, https://chasebrexton.org/blog/common-idioms-and-expressions-are-unknowingly-offensive [https://perma.cc/5PLL-3K4P] (last visited Dec. 18, 2024); Kiran Herbert, *Offensive Words and Phrases to Eliminate from Your Business Communications*, Outside (Feb. 22, 2022), https://www.outsideonline.com/business-journal/issues/offensive-words-and-phrases-to-eliminate-from-your-business-communications/ [https://perma.cc/A4MM-UHKF]; Morgan Greenwald, *20 Things You're Saying That You Didn't Know Were Offensive*, BestLife (Nov. 1, 2020), https://bestlifeonline.com/offensive-sayings/ [https://perma.cc/8PE4-JB9H]; Janaki Challa, *Why Being 'Gypped' Hurts the Roma More Than It Hurts You*, NPR (Dec. 30, 2013, 3:49 PM), https://www.npr.org/sections/codeswitch/2013/12/30/242429836/why-being-gypped-hurts-the-roma-more-than-it-hurts-you [https://perma.cc/MB53-W3HQ]; *Block*, Etymology Dictionary, https://www.etymonline.com/word/block [https://perma.cc/89Q8-835H] (last visited Dec. 18, 2024).

[100] Sterbenz & Davis, *supra* note 99 ("Though steeped in controversy, some think the first part of this phrase relates to anti-Semitic demonstrations that started in Germany in the 19th century. Germans cheered 'hep hep,' a German herding call, as they forced Jews from their homes across Europe, according to Cracked.").

[101] U.S. Comm'n on Civ. Rts., Compare Under the Rule of Thumb: Battered Women and the Administration of Justice 2 (Jan. 1982), https://www.nlm.nih.gov/exhibition/confrontingviolence/assets/transcripts/OB12012_200_dpi.pdf [https://perma.cc/S6TU-HT3P] ("American law is built upon the British common law that condoned wife beating and even prescribed the weapon to be used. This 'rule of thumb' stipulated that a man could only beat his wife with a 'rod not thicker than his thumb.'") (internal citation omitted) *with* Devon Link, *Fact Check: Origin Stories for Popular Phrases are Nothing More than Urban Legends*, USA Today (Oct. 16, 2020), https://www.usatoday.com/story/news/factcheck/2020/10/16/fact-check-origin-stories-popular-phrases-urban-legends/5939942002/ [https://perma.cc/KP6J-34KJ] ("In April 1998, the Baltimore Sun investigated the etymology of 'rule of thumb' and found no clear evidence that the domestic abuse story was true. The Sun suggested the phrase could have come from brewers' practice of using their thumb to test the temperature of beer."); *see also id*. ("Both the Sun and the Phrase Finder acknowledged a story in which a judge supposedly told a man he could beat his wife with a stick so long as it was thinner than his thumb. Allegedly, Judge Sir Francis Buller's 1782 decision inspired cartoonist James Gillray to publish a satirical illustration the following year, which dubbed him 'Judge Thumb.'"); *see also* Craig Shrives, *Rule of Thumb (Origin)*, Grammar Monster, https://www.grammar-monster.com/sayings_proverbs/

origins, despite being removed in time and context, might nonetheless be divisive in their modern use, although some may argue the modern-day meanings are too far removed from their origins and reflect the way our language evolves.[102]

At times, the relevance of a particular aspect of someone's identity might be emphasized or minimized, and how various aspects of someone's identity intersect may be nuanced. For instance, someone's gender identity may or may not be related to their immigration claim.[103] Although disaggregated for the purposes of this analysis in Part III, individuals can belong to multiple identity groups. Intersectionality, a concept coined by Kimberlé Crenshaw, highlights how various social identities—such as race, gender, sexuality, class, and ability—interconnect to create unique experiences of privilege or oppression.[104] Recognizing these intersections allows us to address the complexities of individual identity, and account for their lived experiences and worldview. Inclusive language promotes a deeper understanding of diversity and intersectionality, fostering communication that uplifts rather than marginalizes.[105]

These generalized considerations are designed to foster reflection and respect: both to develop an understanding of terms' origin and impact, and to ensure language avoids needlessly stigmatizing any aspect of an individual's identity. However, there may be times when an individual's preference, social understanding, legal meaning, and other considerations can influence the accuracy, precision, or relevance of these

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rule_of_thumb.htm [https://perma.cc/UK67-6Z5Y] (last visited Dec. 18, 2024) ("Gillray's cartoon shows a man beating his fleeing wife, while Judge Buller (called 'Judge Thumb'), carrying two bundles of sticks, watches the pair. The cartoon's caption reads 'thumbsticks—for family correction: warranted lawful!'"); *see also* BBC History Magazine, *Why Do We Say 'Rule of Thumb'?*, History Extra (Apr. 15, 2021), https://www.historyextra.com/period/modern/rule-thumb-idiom-origins-meaning-phrase-why-do-we-say/ [https://perma.cc/CEQ4-Q3K3].

102 Human Rts. Campaign, *supra* note 9.

103 *Compare Sex and Gender Law Clinic Secures Asylum Grant for Gay, HIV-Positive Ivoirian*, Columbia L. Sch. (Dec. 18, 2008), https://www.law.columbia.edu/news/archive/sex-and-gender-law-clinic-secures-asylum-grant-gay-hiv-positive-ivoirian [https://perma.cc/DA4N-ECCH] ("Columbia Law School's Sexuality and Gender Law Clinic yesterday secured asylum for a gay, HIV-positive man who feared persecution if forced to return to the Republic of Côte d'Ivoire (Ivory Coast) in West Africa. The U.S. Department of Homeland Security issued the grant of asylum."), *with Community HeLP Clinic Secures Visas for Victims of Serious Crime*, Univ. of Ga. Sch. of L., https://digitalcommons.law.uga.edu/press_releases/1279/ [https://perma.cc/96N8-ABWK] (last visited Dec. 27, 2024).

104 Maya Richard-Craven, *DEI Should Address Intersectionality. Here's Why*, Forbes (Apr. 14, 2024), https://www.forbes.com/sites/mayarichard-craven/2024/04/14/dei-should-address-intersectionality-heres-why/ [https://perma.cc/3HRZ-RXTM].

105 *Language, Inclusion and Intersectionality*, Simpl4All, https://simpl4all.eu/news/language-inclusion-and-intersectionality/ [https://perma.cc/2XT7-3Z8J] (last visited Dec. 27, 2024) ("Words are a tool through which we attribute meaning and meaning to reality. Consequently, no language is ever neutral because the words we choose become the lens through which we interpret the world. Those who express themselves have a great responsibility in using inclusive and non-exclusive language.").

terms. There is variability within communities and across individuals, as well as across contexts, that may necessitate the use of particular terms. The legal profession and clinics, as society as a whole, face an ongoing struggle in discerning what terminology best reflects the nuance and the fullness of an individual's identity.

B. Race & Ethnicity

Courts and clinics alike, which reflect society's broad range of language, have used a range of terms to reflect racial and ethnic identities. Generally, in discussing racial or ethnic identity, authors and speakers should be aware of terms that have potentially coded meanings.[106] To center respectful, humanizing language, oversimplification or reductionism in describing an individual's identity should be avoided. It is further suggested to define individuals' identity based on who they *are* rather than who they *are not*, which is why terms like "minority" or "non-white," which define people as othered with respect to the majority group, should be avoided.[107]

The nuances of identity are individual, and one should default to the labels someone uses to identify themselves. Adherence to individual preferences is respectful. It is important to be aware of the nuance of terminology, and that there are differences, even between terms that are, colloquially, used synonymously or differently. For instance, the terms African American and Black may be interchangeable for many, but not for all, individuals. African American can imply a recent connection to an African nation (e.g., recent immigrant) and the latter may more aptly be used to describe people whose connection to Africa is more distant (e.g., Caribbean immigrants who identify as Black but not African).[108] Further, the term Black is capitalized and should be used as an adjective rather than a noun.[109]

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106 *See, e.g.*, Jemima McEvoy, *Here's How 'Urban,' a Term Plagued by Racial Stereotypes, Came to Be Used to Describe Black Musicians*, Forbes (June 10, 2020, 3:08 PM), https://www.forbes.com/sites/jemimamcevoy/2020/06/10/heres-how-urban-a-term-plagued-by-racial-stereotypes-came-to-be-used-to-describe-black-musicians/?sh=7c2cb16346e7 [https://perma.cc/VNY4-B6HU]; *The Racially Charged Meaning Behind the Word 'Thug,' All Things Considered*, NPR (Apr. 30, 2015, 5:25 PM), https://www.npr.org/2015/04/30/403362626/the-racially-charged-meaning-behind-the-word-thug [https://perma.cc/Z6UM-DFFF].

107 Lorraine Bannai & Anne Enquist, *(Un)examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 Seattle U. L. Rev. 1, 18 (2003) (discussing the use of "positive" terms, such as "people of color," rather than describing an individual or community as what they are not, *e.g.*, non-white).

108 *Id.*; *see also* Nat'l Archives, *Black Person*, Nat'l Archives Catalog (Dec. 19, 2023), https://www.archives.gov/research/catalog/lcdrg [https://perma.cc/U8KA-6WWV.].

109 *Explaining AP Style on Black and White*, Assoc. Press (July 20, 2020), https://apnews.com/article/archive-race-and-ethnicity-9105661462 [https://perma.cc/S6EA-5LE2] ("AP's style is now to capitalize Black in a racial, ethnic or cultural sense, conveying an essential and shared sense of history, identity and community among people who identify as Black, including those in the African diaspora and within Africa.").

Other groups' identity language requires similar sensitivity to nuance, history, and current social use. For instance, many Native American groups prefer to be identified by tribal membership (e.g., Seminole, Cherokee, Alaskan Native, etc.).[110] Some use the term Native American, indigenous, or Indian, but some strongly disfavor the use of particular terms.[111] To proffer another example: "Asian refers to people who are citizens of countries in the Far East, Southeast Asia or the Indian subcontinent, or to describe people of Asian descent," the term "Pacific Islanders includes Native Hawaiian, Samoan, Guamanian, Fijian and other peoples of the Pacific Island nations," and "Asian/Pacific Islander or Asian American and Pacific Islander (AAPI) refers to this population in its entirety."[112] Hispanic, used to indicate Spanish origin, is not equivalent to Latino, which "refers to (almost) anyone born in or with ancestors from Latin America and living in the U.S., including Brazilians."[113] There are also emerging terms in these communities, such as Latinx[114] and BIPOC,[115] which have been met both with welcome and dissatisfaction by various community members. Latinx, for instance, is favored as

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110 *Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs*, 84 Fed. Reg. 1200 (Feb. 1, 2019), https://www.govinfo.gov/content/pkg/FR-2019-02-01/pdf/2019-00897.pdf [https://perma.cc/JUH2-6P4P] ("This notice publishes the current list of 573 Tribal entities recognized by and eligible for funding and services from the Bureau of Indian Affairs (BIA) by virtue of their status as Indian Tribes."); *see also Territory Acknowledgement*, Native Land Digit., https://native-land.ca/resources/territory-acknowledgement [https://perma.cc/DGN4-RCVW] (last visited Dec. 26, 2024).

111 Dacoda McDowell-Wahpekeche, *Which Is Correct? Native American, American Indian or Indigenous?*, Oklahoman (Apr. 22, 2021, 6:01 AM), https://www.oklahoman.com/story/special/2021/04/22/what-do-native-people-prefer-called/4831284001/ [https://perma.cc/4E7G-FJD4] (updated Apr. 23, 2021, 10:24 AM) ("'American Indian' . . . or 'Indian'" is a "misnomer" because it may confuse individuals who come from India, as "there are Indian Americans who come from south Asia.").

112 *Guide to Inclusive Language: Asian, Asian American, Pacific Islander*, Adelphi Univ., https://www.adelphi.edu/brand/messaging/guide-to-inclusive-language/ [https://perma.cc/FP34-WBLP] (last visited Dec. 20, 2024) (original emphasis omitted).

113 *What's the Difference Between Hispanic and Latino?*, Encyc. Britannica, https://www.britannica.com/story/whats-the-difference-between-hispanic-and-latino [https://perma.cc/6ZNL-6YRG] (last visited Dec. 20, 2024).

114 *See, e.g.*, Mark Hugo Lopez, Jens Manuel Krogstad & Jeffrey S. Passel, *Who Is Hispanic?*, Pew Rsch. Ctr. (Sept. 15, 2022), https://www.pewresearch.org/short-reads/2024/09/12/who-is-hispanic/ [https://perma.cc/KBT2-AEAB] ("Only 23% of U.S. adults who self-identified as Hispanic or Latino have heard of the term [Latinx], and just 3% said they use it to describe themselves," according to a 2019 survey. Awareness and use of the term vary across subgroups, with Hispanics ages 18 to 29 among the most likely to have heard of the term—42% say they have heard of it, compared with 7% of those 65 and older. Some of the most common use of Latinx is among Hispanic women ages 18 to 29—14% say they use it, compared with 1% of Hispanic men in the same age group.).

115 *Compare* Crystal Raypole, *BIPOC: What It Means and Why It Matters*, Healthline (Nov. 9, 2021), https://www.healthline.com/health/bipoc-meaning [https://perma.cc/US54-6938], *with* Andrea Plaid & Christopher MacDonald-Dennis, *'BIPOC' Isn't Doing What You Think It's Doing*, Newsweek (Apr. 9, 2021, 1:54 PM), https://www.newsweek.com/bipoc-isnt-doing-what-you-think-its-doing-opinion-1582494 [https://perma.cc/7RX7-UMLR].

a gender-neutral alternative to Latina or Latino. However, some prefer "elle" or "Latine," as more consistent with the Spanish language, which can be applied to all terms. "[T]he gender-neutral option with 'e' would be 'le chique alte' and 'les chiques altes'" instead of the gendered alternatives, "las chicas altas" or "los chicos altos."[116]

Clinics must navigate these language choices at every stage of representation. Many clinics ask prospective clients identity questions upfront, in order to ascertain and utilize language in accordance with an individual's preferences; some ask open-ended questions, whereas others provide multiple-choice options. To offer one example: Western New England School of Law's Small Business Legal Clinic provides the following race categories on its optional "Demographic Information" question on its legal intake form:

- Aboriginal or Torres Strait Islander Australian
- American Indian/Alaskan Native
- Asian
- Black or African American
- Canadian Aboriginal
- Caucasian/White
- Native Hawaiian or Other Pacific Islander
- Latin X
- Other (Please specify)[117]

This is just one example of the range of options that can be used to solicit information about an individual's identity. Leaving a write-in option where an individual can specify a term besides those provided is another way to allow individuals to identify without pre-determined labels, which can allow for greater specificity and accuracy in the language used by the person.

Identity language use extends far more broadly than initial intakes. Clinics use a range of specific terms to encompass individuals across identity groups, particularly those experiencing relevant harm or facing systemic barriers, but have also adopted more general terms like BIPOC. The University of Minnesota, for instance, launched the Racial Justice Law Clinic to "teach second and third year students how to engage in direct representation, strategic litigation, and other forms of advocacy as part of a greater movement to advance the rights of Black,

116 Fiona Siobhan Bean, *Les Chiques: The Addition of a Third Gender-Neutral Option in the Spanish Language*, Univ. of Mont. Sch. of L., https://scholarworks.umt.edu/umcur/2021/humanities_oral/15/ [https://perma.cc/6N8G-8WW2] (last visited Dec. 20, 2024).

117 *Small Business Legal Clinic Application*, W. New Eng. L., https://www1.wne.edu/law/centers/center-for-innovation-and-entrepreneurship-application.cfm [https://perma.cc/EJ69-UKW4] (last visited Dec. 20, 2024).

Indigenous, Latine/x, Asian-American Pacific Islander, and/or other People of Color."[118] The clinic goes on to say: "As an institution, we routinely see unmet need . . . that affect the rights and well-being of traditionally under-resourced people . . . we're [often] talking about BIPOC individuals and communities. Our disparities are among the worst in the nation in almost every measure of social welfare and social control."[119] Other institutions also use the term BIPOC, such as Fordham in its Experiential Learning Anti-Racism Steering Committee statement: "As a result, we have not identified and addressed policies and practices that perpetuate structural racism; have not placed Black, Indigenous, and People of Color (BIPOC) perspectives, voices, and leadership in the forefront; and have not consistently named and countered racism in its implicit and explicit manifestations,"[120] despite its role in the legal professional.[121] Other law schools and clinical programs have adopted similar anti-bias statements.[122] Some law school clinics also use other inclusive terms, such as people or "students of color," but which may lack specificity.[123]

Language for other communities similarly varies. For instance, University of Tennessee's Legal Clinic "is designed to learn more about

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118 Liliana Zaragosa, *Racial Justice Law Clinic*, Univ. of Minn. L. Sch., https://law.umn.edu/course/7120/fall-2022/racial-justice-law-clinic/zaragoza-liliana [https://perma.cc/S9KQ-FF6S] (last visited Dec. 20, 2024).

119 Suzy Frisch, *Minnesota Law to Launch Racial Justice Law Clinic*, Univ. of Minn. L. Sch., https://minnesotalawmag.law.umn.edu/stories/racial-justice-clinic [https://perma.cc/4P2U-ZE2Z] (last visited Dec. 20, 2024).

120 *Clinics*, Fordham Sch. of L., https://www.fordham.edu/school-of-law/experiential-education/clinics/ [https://perma.cc/Z4EC-3UCQ] (last visited Dec. 20, 2024).

121 *See, e.g.*, Jeffrey Rachlinski, Andrew J. Wistrich & Bernice B. Donald, *Getting Explicit About Implicit Bias*, Judicature (2020), https://judicature.duke.edu/articles/getting-explicit-about-implicit-bias/ [https://perma.cc/XN5Q-B2PM] (discussing unconscious bias in judging); Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012).

122 *See, e.g.*, *Legal Clinic Antiracism Statement*, Univ of Ark., https://ualr.edu/law/clinical-programs/legal-clinic-antiracism-statement [https://perma.cc/N8KL-AWGF] (last visited Dec. 20, 2024).

123 *See, e.g.*, *Racial Equity in Education Law and Policy Clinic*, Georgetown Univ. L. Ctr., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/racial-equity-in-education-law-and-policy-clinic [https://perma.cc/2V2D-UYU3] (last visited Dec. 20, 2024) ("[The] REEL Policy Clinic engages in policy advocacy on behalf of clients to advance racial equity in education. This work includes addressing issues that disproportionately impact the educational experiences and outcomes of students of color, including discriminatory school discipline practices, police presence in schools, school segregation, resource inequities, narrow and punitive assessments, and educational approaches that focus on remediation of students of color."); *Center for Racial and Disability Justice*, Northwestern Pritzker Sch. of L., https://www.law.northwestern.edu/research-faculty/racial-disability-justice/ [https://perma.cc/7JR3-DYDL] (last visited Dec. 20, 2024) ("Northwestern Pritzker Law Center for Racial and Disability Justice (CRDJ) is a first-of-its-kind center dedicated to promoting justice for people of color, people with disabilities, and individuals at the intersection of race and disability.").

the challenges and opportunities in Knoxville's African American and immigrant communities,"[124] whereas the University of California Irvine describes that "workers are susceptible to unlawful treatment, particularly low-wage immigrant, women, and Black workers."[125] To consider another institution: Colorado Law offers a Civil Rights & Racial Justice Certificate that describes both "American Indian Law" and externships related to "American Indian/indigenous peoples law and policy."[126] Lewis & Clark Law School's Small Business Legal Clinic, in discussing its Rural Program "for more equitable access to legal services across the state" noted: "A number of groups provided input, from local chambers of commerce and the Oregon Native American Chamber to Latinx and rural community organizations."[127] Also using the term Latinx, the University of Baltimore's Immigrant Rights Clinic "focuses on providing medical services and health outreach to the Latinx community in the Baltimore area."[128] McGeorge Law School's Immigration Clinic, relatedly, notes that "as anti-immigrant sentiment has increased, Asian communities have experienced the effects firsthand" and have resulted in increased deportations.[129]

Utilizing the right terminology to accurately and precisely describe identity, while respecting individual preferences and potential audience norms, requires careful consideration of all aspects of a term's use, history, and contextualized application. The part highlights the need for precise and accurate language when describing racial and ethnic identities, demonstrating how accuracy involves understanding the distinctions and contexts behind each term. It also calls for attention to the granularity of terms to ensure that they appropriately reflect individual and group identities, particularly with respect to self-identification. Commitment to thoughtful, context-sensitive language

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124 *Legal Clinic Launches Effort to Study Systemic Racism*, Univ. of Tenn. Coll. of L. (Jan. 22, 2021), https://law.utk.edu/2021/01/22/legal-clinic-launches-effort-to-study-systemic-racism/ [https://perma.cc/3QFZ-JGY7].

125 *Workers, Law, and Organizing Clinic*, Univ. of Cal. Irvine Sch. of L., https://www.law.uci.edu/academics/real-life-learning/clinics/wlo.html [https://perma.cc/3546-83WW] (last visited Dec. 20, 2024) ("Labor exploitation is facilitated and structured by racism, misogyny, ableism, and other forms of subordination. The immigration and criminal legal systems deepen the vulnerability of low-wage workers.").

126 *Civil Rights & Racial Justice*, Univ. of Colo. L. Sch., https://www.colorado.edu/law/areas-study/civil-rights-racial-justice [https://perma.cc/54L6-GAJQ] (last visited Dec. 20, 2024).

127 Daniel F. Le Ray, *The Road to a Successful Business*, Lewis & Clark L. Sch. (2022), https://www.lclark.edu/live/news/48637-the-road-to-a-successful-business [https://perma.cc/637E-HG9X].

128 Stephen Gaines, *Student-Attorney in UB School of Law Immigrant Rights Clinic Describes Working with Latinx Clients*, Univ. of Balt. Sch. of L. (May 20, 2019), https://ublawaccolades.wordpress.com/2019/05/20/student-attorney-in-ub-school-of-law-immigrant-rights-clinic-describes-working-with-latinx-clients/ [https://perma.cc/4UJB-69P6].

129 Kishwer Vikaas, *Immigration Resources for the AAPI Community*, McGeorge Sch. of L. (Nov. 3, 2021), https://www.mcgeorgelegalclinics.com/2021/11/immigration-resources-for-the-aapi-community/ [https://perma.cc/7GLP-2A5C].

that respects individual identities while addressing social and historical use is foundational.

C. Sex, Gender, Gender Identity & Sexual Orientation

Clinics also seek to foster respect regardless of gender identity and sexual orientation, especially as understandings of sex, gender, and sexuality have evolved. Gender identity and sexual orientation protections have been widely litigated.[130] Precise and accurate descriptions of gender require a granular understanding of scientific and social labeling. Sex assigned at birth "(male, female, intersex)" is "often based on the child's external anatomy."[131] Gender identity is "[o]ne's innermost concept of self as male, female, a blend of both or neither."[132] A cisgender individual is "[a] person whose gender identity is consistent in a traditional sense with their sex assigned at birth."[133] Transgender is an adjective to "[d]escribe[] a person whose gender identity and sex assigned at birth do not correspond based on traditional expectations" and includes "people who are gender fluid or non-binary."[134] Gender identity is distinct from gender expression, which is the "[e]xternal appearance of one's gender identity, usually expressed through behavior, clothing, body characteristics or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine."[135] Sexual orientation describes a person's "emotional, romantic or sexual attraction to other people."[136] While some terms have been generally abandoned, such as "homosexual" or "transsexual," some terms may have different connotations over time or carry different meaning when used in-community

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130 *See, e.g.*, Nicole Chavez, *Why Montana's Two-Spirit People Are Challenging a State Law that Defines Sex as Binary*, CNN (Dec. 4, 2023, 11:39 AM), https://www.cnn.com/2023/12/04/us/montana-two-spirit-lawsuit-sex-binary-reaj/index.html [https://perma.cc/PLZ6-TEY2]; Jodi Fortino, *A Kansas City Student Teacher's Lawsuit Says Their Gender-Neutral Pronouns Deemed 'Too Personal,'* KCUR (Mar. 24, 2023, 3:00 AM), https://www.kcur.org/news/2023-03-24/a-kansas-city-student-teachers-lawsuit-says-their-gender-neutral-pronouns-deemed-too-personal [https://perma.cc/F3MY-YU66]; Solcyré Burga, *The Implications of Supreme Court's 303 Creative Decision Are Already Being Felt*, Time (July 16, 2023, 12:32 PM), https://time.com/6295024/303-creative-supreme-court-future-implications/ [https://perma.cc/F3NU-944P].

131 *Assigned Sex at Birth*, Bos. Med. Ctr., https://www.bmc.org/glossary-culture-transformation/assigned-sex-birth [https://perma.cc/CE5M-K9Y6] (last visited Dec. 20, 2024).

132 *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions [https://perma.cc/9PHD-VNVT] (last visited Dec. 20, 2024).

133 *LGBTQ+ Inclusion: Glossary*, Univ. of Wis. Med., https://www.uwmedicine.org/practitioner-resources/lgbtq/lgbtq-inclusion-glossary [https://perma.cc/6HSB-84QB] (last visited Dec. 26, 2024).

134 *Id.*

135 Human Rts. Campaign, *supra* note 9.

136 *Id.*

versus by those who do not share that identity, like the term "queer."[137] Language has evolved to encompass a range of identities, such as the use of "they/them" as a gender-neutral pronoun or "Mx." as a gender-neutral honorific.[138]

Clinics have adopted a range of terms to enhance respect for all communities, while also using precise and accurate language with respect to these identity categories. Some may inquire about gender in their intake forms, regardless of whether it is directly related to the clinics' services.[139] Clinics may also address particular client constituencies. For instance, clinics have often discussed women directly in the context of specific work, where women might be overrepresented in needing aid or suffering unique harm. For example, Domestic Violence Clinics may discuss the gender-based impact of their services, as did Tulane, Cincinnati, and Buffalo.[140] Some clinics may directly target women's services.[141] Clinics do not discuss exclusively serving women, however, in

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137 Juliette Rocheleau, *A Former Slur Is Reclaimed, and Listeners Have Mixed Feelings*, NPR (Aug. 21, 2019, 10:33 AM), https://www.npr.org/sections/publiceditor/2019/08/21/752330316/a-former-slur-is-reclaimed-and-listeners-have-mixed-feelings [https://perma.cc/26Q7-TH87] (noting the mixed feelings regarding the use of "queer," with one listener describing the usage as "painful" and another sharing "he's a 'big fan' of the word").

138 *They*, Merriam-Webster, https://www.merriam-webster.com/dictionary/they [https://perma.cc/F9NG-T7HS] (last visited Dec. 26, 2024); *Mx.—A Gender-Neutral Honorific*, Merriam-Webster, https://www.merriam-webster.com/wordplay/mx-gender-neutral-title [https://perma.cc/HP9F-A38F] (last visited Dec. 20, 2024) (adding the word to the dictionary in September 2017).

139 *Compare Intellectual Property Clinic*, Univ. of Ill. Chi. Sch. of L., https://law.uic.edu/experiential-education/clinics/trademark/contact/ [https://perma.cc/W98T-5GRF] (last visited Dec. 27, 2024) (providing Mx. honorific in intake form), *with* Startup Clinic, Univ. of Miami Sch. of L., https://miami.app.box.com/s/qaqedgfy00x999k7nxoiuskj2c36wj2t [https://perma.cc/DHR7-JXJL] (last visited Dec. 27, 2024) (omitting gender inquiry in intake form).

140 *Domestic Violence Clinic*, Tulane L. Sch., https://law.tulane.edu/domestic-violence-clinic [https://perma.cc/Z9TM-J7ZE] (last visited Dec. 20, 2024) ("'Domestic violence requires a response well beyond either interventions for individual victims or the arrest of individual perpetrators. It requires full community engagement and a recognition of the complex and diverse experiences of women who experience abuse.' Senior Professor of the Practice, Becki T. Kondkar."); *Domestic Violence & Civil Protection Order Clinic*, Univ of Cincinnati Coll. of L., https://law.uc.edu/real-world-learning/clinics/DomesticViolenceandCivilProtectionOrderClinic.html [https://perma.cc/BX3C-GM79] (last visited Dec. 20, 2024) (discussing collaboration with "University of Cincinnati's Women's Center and Women Helping Women" and efforts to ensure "Cincinnati's YWCA battered women and children's shelter" retained funding); Family Violence & Women's Rights Clinic, Univ. of Buffalo Sch. of L., https://www.law.buffalo.edu/beyond/clinics/domestic-violence.current-projects.html [https://perma.cc/JZ4N-477Q] (last visited Dec. 20, 2024) ("Clinic students have participated in the annual Teen Dating Violence Summit organized by the Erie County Commission on The Status of Women. Clinic students have developed a domestic violence court watch toolkit, and are working with Zonta and The Erie County Commission on the Status of Women on implementation.").

141 *See, e.g.*, *Women's Employment Rights Clinic*, Golden Gate Univ. Sch. of L., https://law.ggu.edu/academics/clinics/womens-employment/ [https://perma.cc/3U5L-PT2V] (last visited Dec. 20, 2024) ("The Clinic's mission is centered on ensuring that every worker has the right to economic fairness, equal opportunity, and dignity in the workplace. Our mission

recognition that gender violence can occur to anyone, including men and nonbinary individuals.[142] Terms like "intimate partner violence" or "domestic violence" are neutral: they do not imply gender identity, a gendered relationship association, or a gendered assumption of who is perpetuating the violence.[143]

Clinics can also use gender-inclusive terminology even when the issue might appear gendered. The use of gender-neutral language, like pregnant people or lactating parent (rather than gendered terms like "pregnant mothers," "pregnant women," or "breastfeeding mother"), accurately acknowledges a broader range of gender identities for individuals who are also biologically able to sustain a pregnancy.[144] For instance, New York University's Reproductive Justice Clinic engages in "legal and policy research and analysis to support community and movement efforts to establish new or better resources for menstruating, pregnant, birthing and parenting people."[145] However, some are concerned that de-gendering pregnancy can have adverse consequences and gloss over gender-based disparities in health and society more

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is to collaborate with grassroots, community-based organizations, and worker centers to enhance their capacity for systemic change."); *International Women's Human Rights Clinic*, Georgetown Univ. L. Ctr., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/international-womens-human-rights-clinic [https://perma.cc/5KXT-PLQQ] (last visited Dec. 20, 2024) ("The IWHR Clinic advances women's human rights globally through partnerships with local women's human rights non-governmental organizations ('NGOs'), as well as through research and scholarship."); *Judge Elmo B. Hunter Legal Center for Victims of Crimes Against Women*, S. Methodist Univ. Sch. of L., https://www.smu.edu/law/clinics/hunter-legal-center [https://perma.cc/C6LN-S697] (last visited Dec. 20, 2024) ("Students enrolled in the . . . Clinic provide representation to survivors of gender-based harms, including domestic violence, sexual assault and human trafficking, in a broad range of legal areas. The Hunter Center has partnered . . . to serve women who are most critically in need of legal assistance.").

142 *See, e.g.*, *Domestic Violence Clinic*, Georgetown Univ. L. Ctr., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/domestic-violence-clinic/ [https://perma.cc/B9CK-EGL5] (last visited Dec. 20, 2024) ("Students in the Domestic Violence Clinic (DVC) represent victims of intimate abuse in civil protection order (CPO) cases in the D.C. Superior Court.").

143 *Family Violence Clinic Expands Its Impact with State and County Support*, Univ. of Buffalo Sch. of L., https://www.law.buffalo.edu/links/2021-June/family-violence-clinic.html [https://perma.cc/7R54-XFEH] (last visited Dec. 26, 2024) (discussing casework to address "intimate partner violence" and expressing "hope this program will prevent re-traumatizing a person who has experienced our court system because of domestic violence"); *see also* Mack Kenner, Cindy Yao, Lindsay Sergi & Julia Sturges, *Transgender and Nonbinary Persons' Rights and Issues*, 25 Geo. J. Gender & L. 1087, 1103 (2024) ("Transgender people face high rates of victimization due to domestic and intimate partner violence.").

144 Harmeet Kaur, *The Language We Use to Talk About Pregnancy and Abortion Is Changing. But Not Everyone Welcomes the Shift*, CNN (Sept. 4, 2022, 6:01 AM), https://www.cnn.com/2022/09/04/us/abortion-pregnant-people-women-language-wellness-cec/index.html [https://perma.cc/V796-HUH2].

145 *Reproductive Justice Clinic*, N.Y.U. Sch. of L., https://www.law.nyu.edu/academics/clinics/reprojustice [https://perma.cc/6499-3BEK] (last visited Jan. 23, 2025).

broadly.[146] Gendered terminology is reflected in clinical use, too, such as in one program's utilization of "pregnant women."[147]

Clinics have also used a range of terms in considering gender identity.[148] Some clinics may use gendered dichotomies that do not reflect a recognition of nonbinary gender identities. For instance, one Veterans Legal Services Clinic offers "students will represent men and women who have served in our country's military and help them access benefits to which they are entitled under federal law."[149] This description leaves out servicemembers who are nonbinary, compounding a history of marginalization and exclusion in military services.[150] Gender-restricted language is often used in potentially exclusionary ways.[151] However, gen-

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146 Brooke Migdon, *Experts Warn Gender-Neutral Language Like 'Pregnant People' May Put Mothers at Risk*, Hill (Feb. 1, 2022), https://thehill.com/changing-america/respect/diversity-inclusion/592335-experts-warn-gender-neutral-language-like ("Desexing the language of female reproduction has been done with a view to being sensitive to individual needs . . . Yet, this kindness has delivered unintended consequences that have serious implications for women and children . . . includ[ing] 'dehumanizing' mothers . . . because alternative, gender-inclusive terms typically involve body parts or physiological processes."); *see also* Kathy Katella, *Maternal Mortality Is on the Rise: 8 Things to Know*, Yale Med. (May 22, 2023), https://www.yalemedicine.org/news/maternal-mortality-on-the-rise [https://perma.cc/P8BS-E96E] ("Maternal mortality has been rising in the United States. A report from the Centers for Disease Control and Prevention (CDC) counted 1,205 U.S. women who died of maternal causes in 2021, compared with 861 in 2020 and 754 in 2019.").

147 *Reproductive Justice Clinic*, Univ. of Cal. Irvine Sch. of L., https://www.law.uci.edu/academics/real-life-learning/clinics/reproductive-justice.html [https://perma.cc/GJ34-EFFB] (last visited Dec. 20, 2024) ("Our vision is to promote the reproductive health and rights of women and girls locally, nationally, and internationally through education, research, and legal advocacy. . . . Pregnant women in the United States have experienced punishment.").

148 *See, e.g.*, *Whose Name Is It, Anyway? Un-gatekeeping the Legal Name Change Process*, Univ. of Buffalo Sch. of L., https://www.law.buffalo.edu/links/2023-April/clinic.html [https://perma.cc/UNY6-6NFJ] (last visited Dec. 20, 2024) (including pronouns for each individual, e.g., "Associate Professor Heather Abraham (she/her)"; "Sean Brosius (he/him)"; "Daniel Kahl '24 (they/he)"; "Zadaa Ziran Guo '24 (they/them)").

149 *Veterans Legal Services Clinic*, Univ. of Ark., https://ualr.edu/law/clinical-programs/veterans-legal-services-clinic/veterans-legal-services-clinic-students/ [https://perma.cc/278D-XSV5] (last visited Dec. 20, 2024).

150 *Blueprint for Equality: A Transgender Federal Agenda, National Center for Transgender Equality*, Nat'l Ctr. for Transgender Equity, https://transequality.org/sites/default/files/docs/resources/NCTE%20Federal%20Blueprint%20Chapter%2014%20Military%20Service_0.pdf [https://perma.cc/M4WL-VQ2E] (last visited Dec. 20, 2024) ("Until recently transgender people have served with distinction, but in silence, in every branch of our armed forces. But while the repeal of 'Don't Ask, Don't Tell' in 2010 has allowed lesbian, gay, and bisexual troops to serve openly, an estimated over 12,000 transgender service members were still forced to lie about who they are in order to serve their country. On June 30, 2016, the Defense Department announced that transgender service members may live openly without fear of discharge, and the military will adopt policies to allow qualified transgender individuals to enlist, provide medically necessary care, and support gender transition while serving.").

151 *See, e.g.*, *FAQs for Prospective Transnational Worker Rights Clinic Students*, Univ. of Tex. Sch. of L., https://law.utexas.edu/clinics/transnational-worker-rights/course-info/faqs-for-prospective-students/ [https://perma.cc/M6QD-S8W2] (last visited Dec. 20, 2024) ("You will be providing legal representation to immigrant and low-wage working men and women

dered terms may accurately reflect existing social divisions or realities. For example, "[t]he Prisoner Assistance Program, part of Maine Law's Cumberland Legal Aid Clinic, helps inmates at the Maine Correctional Center in Windham in the Men's, Women's, and Pre-Release Units."[152] Gendered terms may be appropriate for subsets or cohorts where each person's identity is known.[153] They might also be appropriate to denote unique harm to a specific population, enhancing precision.[154]

Several clinics directly represent individuals on the basis of gender identity or sexual orientation. However, even groups that work with this community use a variety of terms. "Harvard LGBTQ+ Advocacy Clinic . . . work[s] on cutting-edge issues involving LGBTQ+ rights, with a particular emphasis on issues affecting underrepresented communities within the LGBTQ+ community."[155] So, too, does Gonzaga,[156]

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in active litigation helping them recover unpaid wages, combat employment discrimination, and enforce basic employment rights."); *Civil Rights Appellate Clinic Testimonials*, Penn State L. Sch., https://pennstatelaw.psu.edu/practice-skills/clinics/civil-rights-appellate-clinic/civil-rights-appellate-clinic-testimonials [https://perma.cc/7729-RBXB] (last visited Dec. 20, 2024) ("'The Nittany Lion class-members worked very well and quickly with my firm . . . to protect our men and women in uniform after they get called to the colors to serve our Nation. I am grateful to Prof. Foreman and to his class for their sharp thinking, their tenacity, their ease of expression, and for their great advocacy for our most-deserving client and for all those generations of soldiers, sailors, marines and airmen who are in a position to benefit from any precedent created by winning cert in this matter.' Adam Augustine Carter, The Employment Law Group, PC"); *Veterans Clinic*, Baylor L. Sch., https://law.baylor.edu/why-baylor-law/academics/experiential-learning/legal-clinics/veterans-clinic [https://perma.cc/27JN-4E3Z] (last visited Dec. 26, 2024) ("Growing up in a family with a history of military service, Baylor Law Professor Bridget Fuselier founded the clinic after having witnessed firsthand the many men and women who served their country, only to be forgotten after their years of service.").

152 *Prisoner Assistance Clinic*, Univ. of Me. Sch. of L., https://mainelaw.maine.edu/academics/clinics-and-centers/prisoner-assistance/ [https://perma.cc/CY87-6QHU] (last visited Dec. 20, 2024).

153 *Compare Innocence Clinic*, Univ. of Mich. Sch. of L., https://michigan.law.umich.edu/academics/experiential-learning/clinics/michigan-innocence-clinic-0 [https://perma.cc/VZ8L-N23Q] (last visited Dec. 20, 2024) ("The first exclusively non-DNA Innocence Clinic in the country, the Michigan Innocence Clinic has successfully won the release of 41 men and women who had been wrongfully convicted of crimes and served anywhere from a few months to 46 years in prison.") *with Racial Justice Clinic*, Univ. of S.F. Sch. of L., https://www.usfca.edu/law/engaged-learning/law-clinics [https://perma.cc/3AEU-NLJC] (last visited Dec. 20, 2024) ("The RJC is committed to representing innocent men and women deserving of justice.").

154 *Criminal Defense and Racial Justice Clinic*, Univ. of D.C. Sch. of L., https://law.udc.edu/criminallawclinic/ [https://perma.cc/7FLG-LPPU] (last visited Dec. 20, 2024) ("Black Americans are incarcerated in state prisons at nearly five times the rate of white Americans. Although Black people make up less than half of the District of Columbia population, over 90 percent of people incarcerated in our local jails are Black . . . Clinic students also represent incarcerated individuals, overwhelming Black men and women, seeking release through parole.").

155 *LGBTQ+ Advocacy Clinic*, Harvard L. Sch., https://hls.harvard.edu/clinics/in-house-clinics/lgbtq-advocacy-clinic/ [https://perma.cc/F4T6-K6MZ] (last visited Dec. 20, 2024).

156 *Lincoln LGBTQ+ Rights Clinic*, Gonzaga Univ. Sch. of L., https://www.gonzaga.edu/school-of-law/clinic-centers/law-clinic/lgbtq-rights-clinic [https://perma.cc/TER8-W98A] (last

although institutions may use a variety of terms.[157] Brooklyn Law's program, by contrast, is labeled the "LGBT Advocacy Clinic":

> [The Clinic] represent[s] LGBT people in a variety of civil legal matters . . . including obtaining legal name changes and changing gender markers on identity documents for transgender clients, filing adoption petitions for LGBT parents seeking a legal relationship with their children, assisting LGBT people in obtaining divorces and other family law relief, helping transgender women incarcerated in men's prisons obtain medical care and protection from sexual assault, and filing complaints on behalf of LGBT people facing discrimination at school, at work, or in public accommodations.[158]

Clinics can foster respect by adopting current, inclusive, humanizing language that acknowledges the evolving understandings of gender identity and sexual orientation. Deference to individual preferences is key, but ensuring accuracy involves understanding distinctions between terms, such as "gender identity" versus "gender expression." Word choice may, at times, center gender-neutral terms or, in some cases, use gendered language when addressing unique harms or specific populations.

D. Citizenship & Immigration Status

Clinics must also navigate complexities in word choices related to immigration status. There is a range of terms pertaining to citizenship and immigration status, many of which have both legal and social implications, connoting both legal privileges and public perceptions about a politically wrought issue. The terms "illegal," "illegal immigrant," and "alien" should

visited Dec. 20, 2024) ("The Lincoln LGBTQ+ Rights Clinic works to protect and advance the equal rights and dignity of individuals who identify as LGBTQ+.").

157 *See, e.g.*, *LGBTQI+ Rights Clinic*, Bluhm Legal Clinic, Northwestern Pritzker Sch. of L., https://www.law.northwestern.edu/legalclinic/lgbtqi/ [https://perma.cc/YZF7-37AR] (last visited Dec. 26, 2024) ("The Northwestern Pritzker School of Law Bluhm Legal Clinic's LGBTQI+ Rights Clinic works to promote and advance litigation in support of the rights of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) people."); *LGBTQI Equality Clinic*, Univ. of Md. Carey Sch. of L., https://www.law.umaryland.edu/academics/clinics/lgbtqi-equality-clinic/ [https://perma.cc/V96B-PBUD] (last visited Dec. 26, 2024).

158 *Clinic–LGBT Advocacy*, Brooklyn L. Sch., https://www.brooklaw.edu/Courses/Clinic-LGBT-Advocacy [https://perma.cc/64TV-T5NF] (last visited Dec. 20, 2024); *see also Advocacy for LGBT Practicum*, Cornell L. Sch., https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/advocacy-for-lgbt-practicum/ [https://perma.cc/TDH8-ZUCN] (last visited Dec. 20, 2024) ("The LGBT practicum is dedicated to achieving equal rights and dignity for lesbian, gay, bisexual, and transgender (LGBT) people."); *Veterans Legal Services Clinic*, Yale L. Sch., https://law.yale.edu/clinics/vlsc [https://perma.cc/76SW-4C3P] (last visited Dec. 20, 2024) ("The clinic makes a special effort to assist groups that are marginalized within the military, such as Black and Latinx veterans, women and immigrants, LBGTQ+ veterans, veterans with disabilities, and survivors of military trauma.").

generally be avoided, as they have a dehumanizing valiance.[159] Advocates have suggested the use of more respectful and less stigmatizing terms, including: "undocumented," "unauthorized," "non-citizens," "without status," or "unlawfully present."[160] However, there is no consensus on the use of these terms. For instance, some have an antipathy for the term "undocumented" because it may inaccurately convey a false understanding, as "[m]any illegal immigrants aren't 'undocumented' at all; they may have a birth certificate and passport from their home country, plus a U.S. driver's license, Social Security card or school ID. What they lack is the fundamental right to be in the United States."[161] While disfavored terms still often appear in statutes, case law, and other legal sources[162] and are, at times, still used by courts,[163] more modern terminology is also utilized.[164]

Clinics have typically used modern terms in describing immigration-related issues or identity status pertaining to citizenship. For instance, Stanford's Immigrants' Rights Clinic discusses representing an "asylum seeker"[165] and "longtime [ ] area resident,"[166] using these terms to describe the nature of the client's petition and current community ties. Relatedly, the "first and only dedicated in-house Immigration Clinic in the state of Georgia" uses the term "non-citizen"[167] as does Duke.[168] To

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159 Monika Batra Kashyap, *"Illegal" vs. "Undocumented": A NWIRP Board Member's Perspective*, NW. Immigrant Rts. Project, https://www.nwirp.org/illegal-vs-undocumented-a-nwirp-board-members-perspective/ [https://perma.cc/9677-TZ5Z] (last visited Dec. 20, 2024); Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC News (Jan. 22, 2021, 2:34 PM), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350 [https://perma.cc/PV8J-ZDHD].

160 Kashyap, *supra* note 159.

161 *Id.*

162 *See, e.g.*, Jane W. v. Thomas, 560 F. Supp. 3d 855, 883 (E.D. Pa. 2021) (discussing the Alien Tort Statute, 28 U.S.C. § 1350).

163 *See, e.g.*, State v. Dep't of Com., No. CV 21-1523, 2022 WL 17251152, at *3 (E.D. La. Nov. 28, 2022) (referencing "illegal immigrants" in discussion of state standing).

164 *See, e.g.*, United States v. Dasilva, No. 3:21-CR-267, 2022 WL 17242870, at *6 (M.D. Pa. Nov. 23, 2022) (using the term "undocumented individuals" in considering whether Second Amendment protections are available to noncitizens).

165 *IRC Students Successfully Represent Asylum Seeker*, Stanford L. Sch., https://law.stanford.edu/immigrants-rights-clinic/#slsnav-overview [https://perma.cc/XN8Y-AWM4] (last visited Dec. 20, 2024) ("[Students] represented D, a young woman from Ethiopia seeking asylum after experiencing persecution due to her ethnic identity.").

166 *IRC Students Represent Longtime Bay Area Resident in Deportation Case*, Stanford L. Sch., https://swap.stanford.edu/was/20190310002619/https://law.stanford.edu/immigrants-rights-clinic/#slsnav-latest-updates [https://perma.cc/U2SV-JKXV] (last visited Dec. 26, 2024).

167 *Immigration Clinic*, Ga. State Coll. of L., https://law.gsu.edu/student-experience/experiential-learning/clinics/immigration-clinic/ [https://perma.cc/QXS3-BU7W] (last visited Dec. 20, 2024) ("Through the Georgia State Law Immigration Clinic students develop and practice fundamental lawyering skills, including interviewing, counseling, fact investigation, legal research and writing, and courtroom fundamentals as they work on the cases of low-income non-citizens.").

168 *Immigration Clinic*, Duke L. Sch., https://law.duke.edu/immigrantrights/ [https://perma.cc/J9CE-5VZW] (last visited Dec. 20, 2024) ("The Immigrant Rights Clinic represents

give another example, the Immigration Litigation & Appellate Clinic at the University of Idaho allows "students [to] help immigrants who may be seeking asylum, permanent resident status, citizenship, status under the Violence Against Women Act (VAWA) and relief from removal" and refers to their "clients."[169] Other clinics have also generally used the terms "immigrants," "refugees," or "noncitizens."[170] This language acknowledges an individual's personhood, apart from their legal status. The University of Maryland avoids labels and describes their clients' experiences: "You will represent individuals fleeing persecution, those facing deportation because of criminal conviction, and those who have been the target of abusive enforcement practices."[171]

Clinics addressing immigration issues can apply respect by avoiding dehumanizing terms, which may carry emotional and political weight, while also ensuring legal accuracy. Recognizing that labels, like "undocumented," may not fully capture certain individuals' circumstances, precision is also

individuals facing deportation and partners with local, state, and national organizations to promote access to resources, education, and justice for non-citizens. The clinic engages students in efforts to advance the rights of non-citizens through litigation, education and outreach, and policy advocacy.").

169 *Immigration Clinic*, Univ. of Idaho Coll. of L., https://www.uidaho.edu/law/academics/experiential-learning/clinics/immigration [https://perma.cc/8VZX-KT63] (last visited Dec. 20, 2024).

170 *See, e.g.*, *Immigration Practice Clinic*, Vanderbilt L. Sch., https://law.vanderbilt.edu/clinics-experiential-learning/immigration-practice-clinic/ [https://perma.cc/9PGZ-XQVZ] (last visited Dec. 20, 2024) (discussing "represent[ation of] low-income immigrants from all over the world"); *Refugee & Human Rights Clinic*, Univ. of Me. Sch. of L., https://mainelaw.maine.edu/academics/clinics-and-centers/refugee-and-human-rights/ [https://perma.cc/98ER-ZEE9] (last visited Dec. 20, 2024) ("The RHRC and its attorneys target a critical gap in access to justice—providing direct legal representation and broader advocacy to immigrants and refugees seeking political asylum and similar protections under federal law."); *Immigrant Rights Clinic*, Univ. of Balt. Sch. of L., https://law.ubalt.edu/clinics/immigrantrights.cfm [https://perma.cc/ZC8X-W7Z4] (last visited Dec. 20, 2024) ("[S]tudents may collaborate on one issue related to systemic law reform to improve the procedures and laws that shape our immigrant clients' lives."); *Federal Appellate Immigration Clinic*, Univ. of Md. Carey Sch. of L., https://www.law.umaryland.edu/academics/clinics/federal-appellate-immigration-clinic/ [https://perma.cc/8EU6-XXK5] (last visited Dec. 20, 2024) ("In these appellate forums, [students] will advocate for [their] clients while working to develop favorable precedents on systemic issues affecting noncitizens who face deportation or immigration imprisonment."); *Immigration Clinic*, Roger Williams Sch. of L., https://law.rwu.edu/academics/juris-doctor/clinics-and-externships/immigration-clinic [https://perma.cc/BS5L-ARXR] (last visited Dec. 20, 2024) ("Students enrolled in the Immigration Clinic represent indigent immigrants who are seeking lawful permanent residence in the United States or are seeking to defend against removal proceedings."); *Transnational Legal Clinic*, Univ. of PA. Carey L. Sch., https://www.law.upenn.edu/clinic/transnational/ [https://perma.cc/2DNH-E2N5] (last visited Dec. 20, 2024) ("[S]tudents have represented individuals seeking asylum and other forms of immigration relief from across the globe and have worked alongside and on behalf of international human rights and community-based organizations before regional and international human rights mechanisms on a range of rights-based issues, particularly as they relate to migrants and internally-displaced persons.").

171 *Immigration Clinic*, Univ. of Md. Carey Sch. of L., https://www.law.umaryland.edu/academics/clinics/immigration-clinic/ [https://perma.cc/GC6S-Z5BD] (last visited Dec. 20, 2024).

critical to align with legal definitions for relief. In applying these principles, clinics must thoughtfully navigate the complexities of immigration-related language while fostering dignity and clarity for their clients.

E. Disability & Medical Conditions

Clinics' descriptions of individuals' health conditions can be extremely fraught, especially given the range of medical conditions and their potential impacts. While people-first framing is often preferred to center the individual over their identity (e.g., "people with disabilities"), some individuals or communities prefer identity-first framing[172] (e.g., "autistic adult" or "Deaf person").[173] Some terms have evolved to remove their stigmatization, such as the term "substance use disorder," which has been used to replace "substance abuse," "substance misuse disorder," "addict," "junkie," and "abuser," among others.[174] There are many terms in our vernacular that are ableist, including many metaphors and idioms (e.g., "turn a deaf ear," "dragging one's feet," and "turn a blind eye")[175] and ordinary turns of phrase (e.g., "insane," "psycho," "lame," "moronic," and "crazy").[176] For example, courts have colloquially used the term "schizophrenic" to mean contradictory or illogical outcomes,[177] despite being a negative derivation of the medical condition "schizophrenia,"

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172 *People First Language*, Off. of Disability Rts., D.C., https://odr.dc.gov/page/people-first-language [https://perma.cc/L77N-EEJU] (last visited Dec. 20, 2024).

173 *See* Amanda Taboas, Karla Doepke & Corinne Zimmerman, *Short Report: Preferences for Identity-First Versus Person-First Language in a US Sample of Autism Stakeholders*, 27 Autism 565 (2022), https://pubmed.ncbi.nlm.nih.gov/36237135/ [https://perma.cc/FZ9W-CTHU] (last visited Dec. 20, 2024) (surveying affected individuals who described a preference for "identity-first language"); *see also Interpreter Etiquette & the Do's and Don'ts of Working with an Interpreter*, Off. of Ct. Interpreting Servs. D.C. (Apr. 18, 2022), https://www.dccourts.gov/sites/default/files/divisionspdfs/Dos-and-Donts-When-Working-With-an-Interpreter.pdf [https://perma.cc/CD7A-W32F] (last visited Dec. 20, 2024) (utilizing "Deaf persons").

174 *Words Matter—Terms to Use and Avoid When Talking About Addiction*, Nat'l Inst. on Drug Abuse, Nat'l Inst. Health (Nov. 29, 2021), https://nida.nih.gov/nidamed-medical-health-professionals/health-professions-education/words-matter-terms-to-use-avoid-when-talking-about-addiction [https://perma.cc/4SZT-NCKM].

175 Cameron Hunt McNabb, *Ableist Language—Disability Metaphors—Disability Studies*, Writing Commons (2023), https://writingcommons.org/section/style/elements-of-style/inclusive-language/disability-studies-abelist-language-inappropriate-disability-metaphors/ [https://perma.cc/DJ2J-KVJB].

176 Monica Torres, *Instead of These Ableist Words, Use Inclusive Language at Work*, Huffington Post (July 8, 2022), https://www.huffpost.com/entry/disability-language-work_l_5f85d522c5b681f7da1c3839 [https//perma.cc/6K4M-VHF8].

177 *See, e.g.*, Wilbers v. Moneta Grp. Inv. Advisors, Inc., No. 406CV00005 ERW, 2006 WL 1360866, at *2 (E.D. Mo. May 17, 2006) ("Although the Supreme Court has indicated the broad scope of the phrase, '[t]hat locution is not self-defining, and the Justices have been at least mildly schizophrenic in mapping its contours.'") (quoting Minn. Chapter of Associated Builders and Contractors, Inc. v. Minn. Dep't of Pub. Safety, 267 F.3d 807, 811–12 (8th Cir. 2001)).

the effects of which can include "disruptions in thought processes, perceptions, emotional responsiveness, and social interactions."[178]

Clinics must navigate these medical and colloquial variations in their language choices. There are several clinics that practice disability law and use the name in their clinic title and/or description of their work,[179] and some have renamed to evince evolutions in terminology.[180] Clinics have also used the following terms: "people with disabilities,"[181] "disabled individuals,"[182] "adults with intellectual and developmental

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178 *Schizophrenia*, Nat'l Inst. of Health, https://www.nimh.nih.gov/health/statistics/schizophrenia [https://perma.cc/4B65-P89Y] (last visited Dec. 20, 2024).

179 *See, e.g.*, *Community Law Clinic*, Penn State L. Sch., https://dickinsonlaw.psu.edu/community-law-clinic [https://perma.cc/85AT-84AM] (last visited Dec. 20, 2024) ("For those underserved populations living near or below the poverty line, the Community Law Clinic represents the way forward in matters of family law, disability law, and other areas where they need legal assistance."); *Disability Rights Clinic*, Syracuse Univ. Coll. of L., https://law.syracuse.edu/academics/experiential-courses-clinics-externships/clinics/disability-rights-clinic/ [https://perma.cc/6J63-3CK2] (last visited Dec. 20, 2024) (The Disability Rights Clinic (DRC) is dedicated to providing representation to individuals with disabilities as well as groups representing the disabled community."); *Olmstead Disability Rights Clinic*, Ga. State Coll. of L., https://law.gsu.edu/student-experience/experiential-learning/clinics/olmstead-disability-rights-clinic [https://perma.cc/JMY3-4LUN] (last visited Dec. 20, 2024) ("Students have the opportunity to advocate on behalf of children and adults with disabilities in special education cases, administrative proceedings, and potential federal litigation.").

180 *Disability Inclusion and Advocacy Law (DIAL) Clinic*, Nova Se. Univ. Shepard Coll. of. L., https://www.law.nova.edu/clinics/in-house/dial-clinic.html [https://perma.cc/3J64-HYF7] (last visited Dec. 20, 2024) ("The Disability Inclusion and Advocacy Law (DIAL) Clinic (formerly known as the Adults with Intellectual & Developmental Disabilities (AIDD) law clinic) introduces law students to legal practice advocating for the civil rights of persons with disabilities.").

181 *See, e.g.*, *Disability Rights and Justice Clinic*, N.Y.U. Sch. of L., https://www.law.nyu.edu/academics/clinics/DisabilityRights [https://perma.cc/VMW3-2N59] (last visited Dec. 20, 2024) ("The Disability Rights and Justice Clinic advocates to enhance and promote the civil rights, autonomy, and self-determination of low-income individuals with disabilities."); Jeanne Leblanc, *UConn Law and Disability Rights Connecticut Establish Legal Clinic*, Univ. of Conn. Sch. of L. (Sept. 12, 2022), https://today.uconn.edu/2022/09/uconn-law-and-disability-rights-connecticut-establish-legal-clinic/# [https://perma.cc/XPC6-4KBL] ("The UConn School of Law has joined forces with Disability Rights Connecticut to offer a clinic providing legal advocacy for people with disabilities."); *see also Disability Law Clinic*, Wayne State L. Sch., https://law.wayne.edu/academics/clinics/disability [https://perma.cc/P6BX-DVFM] (last visited Dec. 20, 2024) (describing "residents with disabilities"); *Workers' Rights Disability Law Clinic*, Univ. of Cal. Berkeley Sch. of L., https://www.law.berkeley.edu/experiential/pro-bono-program/slps/inactive-student-initiated-legal-services-projects-slps/workers-rights-disability-law-clinic-wrdlc/ [https://perma.cc/7GB5-P2JR] (last visited Dec. 20, 2024) (discussing work on behalf of "workers with disabilities"); *Disability Rights Clinic*, Univ. of Tex. Sch. of L., https://law.utexas.edu/clinics/disability-rights/ [https://perma.cc/62UH-53ZN] (last visited Dec. 20, 2024) (representing "clients with disabilities").

182 *Elder & Disability Law Clinic*, William & Mary Sch. of L., https://law.wm.edu/academics/programs/jd/electives/clinics/clinics_list/elder/ [https://perma.cc/VR3W-JCMF] (last visited Dec. 20, 2024) ("The Elder & Disability Law Clinic provides free legal assistance for qualifying seniors and disabled individuals.").

disabilities,"[183] "disability rights,"[184] and "disability justice."[185] Clinics may use more general health-related language,[186] or allude to the scope of client eligibility or service offerings.[187]

Clinics have, at times, described their work on behalf of individuals, "adults and children [to] obtain much needed disability benefits from the Social Security Administration (SSI and SSDI)."[188] This framing focuses on the services and benefits to which an individual is entitled, rather than on the person's actual qualifying health condition. Stanford's Community Law Clinic goes on to describe their "clients [as] adults and children in our local community who are unable to work on a full time basis due to mental and/or physical disabilities."[189] "By preparing the cases and putting on a strong case at hearing, CLC students are able to secure life-changing benefits for a majority of [the] clients" by helping them navigate the complex SSDI process and humanizing the individuals in the administrative process.[190]

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183 *Disability and Civil Rights Clinic*, Brooklyn L. Sch., https://www.brooklaw.edu/Academics/Clinics-and-Externships/In-House-Clinics/Disability-and-Civil-Rights-Clinic [https://perma.cc/H98J-4AQM] (last visited Dec. 20, 2024) ("The Disability and Civil Rights Clinic focuses on protecting and advancing the civil rights of adults with intellectual and developmental disabilities . . . [and] functions as a pro bono law firm representing low-income New Yorkers, and their families in a variety of civil legal matters, including housing, public benefits, access to health care, special education, parental rights, alternatives to guardianship, prisoners' rights and discrimination in access to programs and services.").

184 *Veterans Law and Disability Benefits Clinic*, Harvard L. Sch., https://hls.harvard.edu/clinics/in-house-clinics/veterans-law-and-disability-benefits-clinic/ [https://perma.cc/3V7J-BKQX] (last visited Dec. 20, 2024) ("Enrolled students have frequent opportunities to interact with medical providers and medical experts and to work on cases at the intersection of disability rights, disability access, mental health and the law.").

185 *Civil Rights and Disability Justice Clinic*, N.Y. L. Sch., https://www.nyls.edu/civil-rights-and-disability-justice-clinic/ [https://perma.cc/WF78-4LJD] (last visited Dec. 20, 2024) ("[S]tudents will work under close faculty supervision and in partnership with community members, grassroots groups, and legal organizations to litigate cases and develop advocacy related to a range of civil rights and disability justice issues including racial, economic, and criminal justice, and education, housing, and voting rights.").

186 *Health and Disability Law Clinic*, Univ. of Va. Sch. of L., https://www.law.virginia.edu/clinics/health-and-disability-law-clinic [https://perma.cc/UAV2-6537] (last visited Dec. 26, 2024) ("Clients' health needs include public benefits claims (including Medicaid, Social Security, Medicare and other benefits); insurance coverage; obtaining access to mental health or rehabilitative services; and seeking justice for the mistreatment of seniors and those with disabilities in various contexts.").

187 *Disability Rights Law Clinic*, Am. Univ. Wash. Coll. of L., https://www.american.edu/wcl/academics/experientialedu/clinical/theclinics/disability/ [https://perma.cc/X52Q-9Q6V] (last visited Dec. 26, 2024) ("The DRLC is a one-semester clinic in which law students represent clients and their families in a variety of matters related to disability law and people with disabilities (both mental and physical).").

188 *Community Law Clinic, Social Security Disability*, Stanford L. Sch., https://law.standford.edu/community-law-clinic/social-security-disability [https://perma.cc/XY94-3QFB] (last visited Dec. 20, 2024).

189 *Id.*

190 *Id.*

When describing individuals' health conditions, clinics should adopt language that respects the individual rather than their condition, such as using people-first terms like "people with disabilities," or defer to identity-first preferences when they align with specific community norms. Precision is essential in avoiding stigmatizing terms or casual misuses of terminology, such as using "schizophrenic," in a way that perpetuates harmful stereotypes. Lastly, relevance can guide how health conditions are framed, focusing on the legal requirements, such as for services provided or benefits sought. These considerations ensure that clinics treat their clients' identities with dignity while maintaining clarity in communication.

F. Criminal Legal System

Clinics, like courts, often use deeply entrenched terms to refer to criminal defendants.[191] However, some courts have used terms like "criminal legal system," in lieu of "criminal justice," as more accurate in acknowledging the wrongful treatment of individuals in the carceral system because of inequity based on race, poverty, mental illness, housing instability, and substance use.[192] Moreover, utilizing "incarcerated person" or other person-first framings, instead of "inmate" or "felon,"[193] is recommended to promote respect.[194] A person-first approach would utilize the terms "incarcerated people"; "imprisoned people"; "people in prison/jail"; "people jailed in X facility"; "John Doe, who was in-

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191 *See, e.g.*, Johnson v. Gov. of State of Fla., 405 F.3d 1214, 1216 (11th Cir. 2005) (discussing "challenge to Florida's felon disenfranchisement law"); Martinez v. State, 772 P.2d 1305, 1306 (stating that "meritorious deductions may not shorten the basic thirty-year term of capital felons").

192 *See, e.g.*, United States v. French, 977 F.3d 114, 118 (1st Cir. 2020) ("Juror 86 had not disclosed this information about her son's involvement in the criminal legal system on a questionnaire that the Clerk's Office distributed to her when she was called for jury duty in October 2013, prior to jury selection."); State v. Tesfasilasye, 518 P.3d 193, 200 (Wash. 2022) ("One of the State's proffered reasons for the strike—that the juror might be biased because her son had, in her view, been treated unfairly by the criminal legal system—is presumptively invalid."); Baker v. 3M Co., No. 5:19-CV-00704-AKK, 2020 WL 6750805, at *2 (N.D. Ala. Oct. 15, 2020) (noting complainant "had multiple encounters with the criminal legal system").

193 Green v. Mass. Dep't of Corr., No. 2184CV02283C, 2021 WL 6335670, at *1 (Mass. Super. Nov. 30, 2021) (alleging plaintiffs "and other incarcerated persons have been deprived of their due process rights and right to counsel"); Remick v. City of Phila., No. CV 20-1959, 2021 WL 4269171, at *1 (E.D. Pa. Sept. 14, 2021) (discussing "programming, visits, and movement of incarcerated persons").

194 *See, e.g.*, Goodvine v. Duckert, No. 22-CV-204-PP, 2022 WL 14813062, at *1 (E.D. Wis. Oct. 26, 2022) (noting "plaintiff was incarcerated when he filed his complaint"); Valentine v. Collier, No. 4:20-CV-1115, 2020 WL 3666614, at *1 (S.D. Tex. July 6, 2020) ("Pending before the Court are three Motions to Intervene filed by individuals incarcerated at Texas Department of Criminal Justice (TDCJ) prisons other than the Pack Unit, which is the prison at issue in the present case.").

carcerated at F[ederal] C[orrectional] I[nstitute]"; or "Jane Doe, who is serving 12 years in [ ] State Prison" exemplify this trend.[195] Person-first language can also apply to post-incarceration labels: "offender," "parolee," or "probationer," among others.[196]

A full range of terms is used by clinics in their advocacy practices. Yale, for instance, uses the term "criminal legal system" in describing its Criminal Justice Advocacy Clinic,[197] as does Vanderbilt's Youth Opportunity Clinic in discussing "criminal legal involvement,"[198] while some clinics use criminal justice.[199] Other clinics, at UCLA and Stanford, use non-stigmatizing terms like "community members," "members of our community accused of crimes," or "clients."[200] Several clinics also used the term "defendants,"[201] "adults charges with criminal offenses,"[202]

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195 Akiba Solomon, *What Words We Use—and Avoid—When Covering People and Incarceration*, Marshall Project (Apr. 12, 2021, 6:00 AM), https://www.themarshallproject.org/2021/04/12/what-words-we-use-and-avoid-when-covering-people-and-incarceration [https://perma.cc/D4ZE-ASYA].

196 *Id.*

197 *Criminal Justice Advocacy Clinic*, Yale L. Sch., https://law.yale.edu/studying-law-yale/clinical-and-experiential-learning/our-clinics/criminal-justice-advocacy-clinic [https://perma.cc/Y6X8-WZSQ] (last visited Dec. 20, 2024) ("Students in the Criminal Justice Advocacy Clinic (CJAC) represent individuals and organizations affected by the criminal legal system.").

198 *Youth Opportunity Clinic*, Vanderbilt L. Sch., https://law.vanderbilt.edu/clinics-experiential-learning/youth-opportunity-clinic/ [https://perma.cc/2WJZ-VBKP] (last visited Dec. 20, 2024) ("Students in the Youth Opportunity Clinic represent young people from age 16 to 25 who are at risk for criminal legal involvement. Students' civil legal advocacy helps clients access opportunities and achieve stability in the areas of education, housing, and employment.").

199 *Criminal Justice Clinic*, Wash U. Sch. of L., https://law.washu.edu/academics/clinical-education-program/criminal-justice-clinic [https://perma.cc/C4EX-RJ7H] (last visited Dec. 26, 2024) ("The clinic exposes students to real-life lawyering skills within the framework of the criminal justice system for adults charged with misdemeanor or felony offenses.").

200 *Criminal Defense Clinic*, UCLA Sch. of L., https://law.ucla.edu/academics/experiential-program/law-clinic-courses/criminal-defense-clinic [https://perma.cc/U7LL-UP8D] (last visited Dec. 20, 2024) (explaining students "help[] community members to obtain post-conviction relief, such as pardons and clemency"); *Fact Sheet About Gubernatorial Pardons in California*, ILRC (June 4, 2019), https://www.ilrc.org/resources/fact-sheet-about-gubernatorial-pardons-california [https://perma.cc/F4YR-D3MD] (last visited Dec. 20, 2024) (discussing Governor's pardon power for "persons convicted of California state crimes"); *Criminal Defense Clinic*, Stanford L. Sch., https://law.stanford.edu/criminal-defense-clinic/#slsnav-people [https://perma.cc/5M74-VCFW] (last visited Dec. 20, 2024) ("Each student represents members of our community accused of crimes"; "Clinic students are their clients' primary legal representatives in and out of court.").

201 *See, e.g.*, *Clinics*, Samford Univ. Cumberland Sch. of L., https://www.samford.edu/law/clinics [https://perma.cc/2X7C-49L8] (last visited Dec. 20, 2024) ("The Capital Defense Clinic allows students to work with the Jefferson County Public Defender's Office to assist in representing defendants who face capital charges.").

202 *Criminal Practice Clinic*, Vanderbilt L. Sch., https://law.vanderbilt.edu/clinics-experiential-learning/criminal-practice-clinic/ [https://perma.cc/2QAW-MX9L] (last visited Dec. 20, 2024) ("Students enrolled in Criminal Practice Clinic represent adults charged with criminal offenses and children charged with criminal offenses and delinquency.").

or otherwise refer to "indigent clients."[203] For those with convictions, people-first language can still center personhood: "people incarcerated for felonies."[204] The use of inclusive language is reflected in various clinics' advocacy.[205] Sometimes the term "felon" is used, such as in reference to the name of the offense (e.g., "felon in possession of a firearm"), or in describing scope of work or eligibility for services.[206]

However, not all clinics use these terms consistently. For instance, one clinic at Samford University describes how "students work on potential innocence claims of several Alabama prisoners" in its Innocence Clinic.[207] The Drake Wrongful Convictions Clinic describes its program as "provid[ing] students with the opportunity to investigate and contribute to work on post-conviction litigation for Iowa inmates."[208] Emory uses the term "offenders" in explaining: "[A] team of two students will work on either a civil appeal regarding legal issues arising from foster

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203 *Criminal Defense Clinic*, Drake Univ. L. Sch., https://www.drake.edu/law/clinics-centers/clinic/criminal-defense [https://perma.cc/KNP4-TDX9] (last visited Dec. 20, 2024) ("The clinic contracts with the Iowa State Public Defender's Office to represent indigent clients who have requested a public defender."); *see also Criminal Defense Clinic*, Univ. of Colo L. Sch., https://www.colorado.edu/law/academics/clinics/criminal-defense-clinic [https://perma.cc/T6W4-Q9XY] (last visited Dec. 20, 2024) ("The Criminal Defense Clinic offers law students the opportunity to represent indigent clients charged with misdemeanor and municipal offenses in Boulder and Jefferson Counties. The clinic provides high-quality legal services to clients and serves the community at large by providing legal assistance to those too poor to otherwise afford a lawyer.").

204 *Wrongful Convictions Clinic*, Duke L. Sch., https://www.colorado.edu/law/academics/clinics/criminal-defense-clinic [https://perma.cc/G4LM-Z5FV] (last visited Dec. 20, 2024) ("The Wrongful Convictions Clinic investigates plausible claims of innocence made by people incarcerated for felonies in North Carolina.").

205 *See, e.g.*, ILRC, *supra* note 200 (discussing Governor's pardon power for "persons convicted of California state crimes"); Stanford L. Sch., *supra* note 200 ("Each student represents members of our community accused of crimes"; "Clinic students are their clients' primary legal representatives in and out of court.").

206 *See* Mike Fox, *Supreme Court Takes Clinic Case on Challenges to Convictions*, Univ. of Va. Sch. of L. (May 17, 2022), https://www.law.virginia.edu/news/202205/supreme-court-takes-clinic-case-challenges-convictions [https://perma.cc/EMC3-LUTE] ("Jones filed a motion to vacate his sentence in a 2000 conviction for being a felon in possession of a firearm."); *see also Juvenile Justice Clinic*, Cornell L. Sch., https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/juvenile-justice-clinic/ [https://perma.cc/DSR4-8ZNJ] (last visited Dec. 20, 2024) ("The clinic works closely with Justice 360-SC, a nonprofit that represents death-sentenced inmates and juveniles in South Carolina."); *Capital Punishment Clinic*, Cornell L. Sch., https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/capital-punishment-clinic/ [https://perma.cc/2KCX-B9HH] (last visited Dec. 20, 2024) ("Our clients are prison inmates, usually from the American South, who are challenging their convictions and sentences in the state and federal courts."); *Michigan Innocence Clinic*, Univ. of Mich. Sch. of L., https://michigan.law.umich.edu/academics/experiential-learning/clinics/michigan-innocence-clinic-0 [https://perma.cc/7BTH-2YBA] (last visited Dec. 20, 2024) ("Information for Convicted People").

207 Samford Univ. Cumberland Sch. of L., *supra* note 201.

208 *Wrongful Convictions Clinic*, Drake Univ. L. Sch., https://www.drake.edu/law/clinics-centers/clinic/wrongfulconvictionsclinic/ [https://perma.cc/238B-JK5Q] (last visited Dec. 26, 2024).

care proceedings or criminal appeals on behalf of youthful offenders in the juvenile and criminal justice systems."[209] These clinics utilize potentially less preferred terms while working to further equity within these communities.

When addressing individuals within the criminal legal system, person-first language can cultivate respect for the whole person. Although the use of stigmatizing terms like "inmate" or "felon" is common, including in the context of legal statutes or case law, clinics should ensure their language reflects the precise context without reinforcing bias. While opting for inclusive alternatives may be easier in some contexts, such as in client communication rather than pleadings, using adverse identities only when legally necessary can advance equity and clarity.

G. Survivors & Victims

Clinics, like courts and advocates, have used both the terms "victim" and "survivor" to describe those affected by crime.[210] The word "victim" can both carry sympathy and compassion for someone who has been injured, the label can also be understood to "imply weakness, assume guilt, or assign blame."[211] "Survivor" can be considered an empowering label that centers an individual's recovery process. While both words may be accurate, their varying use can connote precision and respect. Affected individuals may prefer one label over the other, embrace the use of both terms, or prefer another descriptor, like

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[209] *Barton Appeal for Youth Clinic*, Emory Sch. of L., https://law.emory.edu/academics/clinics/faculty-led-clinics/barton-appeal-for-youth-clinic.html [https://perma.cc/M8LK-DZMC] (last visited Dec. 26, 2024).

[210] *See, e.g.*, *Victims & Survivors*, Or. Dep't of Just., https://www.doj.state.or.us/crime-victims/ [https://perma.cc/K4BP-8BTR] (last visited Dec. 26, 2024) ("The mission of the CVC program is to ease the financial impact of these crimes on victims, survivors, and their families.").

[211] *Victim or Survivor: Terminology from Investigation Through Prosecution*, Sexual Assault Kit Initiative & RTI Int'l. 1, https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf [https://perma.cc/YQZ6-TC4T] (last visited Dec. 26, 2024).

"victim-survivor."[212] As such, both the term victim and survivor are routinely used.[213]

Clinics utilize a range of labels regarding survivors and victims in their practice. Several clinics use victim-survivor, victim/survivor, or a combination of the terms.[214] However, some use just the term "victim"[215]

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[212] *Id.*; *see also Survivor, Victim, Victim-Survivor*, Upsetting Rape Culture, https://upsettingrapeculture.com/survivor-victim/ [https://perma.cc/26WZ-JH44] (last visited Dec. 26, 2024) ("*Victim-survivor* has been used to express the intersectional experiences of the most marginalized groups affected by sexual assault, violence, and abuse such as Black cis-women, Black trans-women, and gender non-conforming folks of color who have herstorically never been seen as victims in the eyes of culture, community, or the law. *Victim-survivor* acknowledges the reality of vulnerability *and* triumph as well as the need to acknowledge various connected oppressions that can further complicate the already traumatic experience of sexual assault, intimate partner violence, and abuse.").

[213] *Compare* State in Int. of L.R., 314 So. 3d 1139, 1141 (La. App. 4 Cir. 2021) ("The issue before this Court, is the extent of a victim's right to be heard in a juvenile court proceeding: specifically, whether the victim of a delinquent act has standing to petition or motion a juvenile court to act."), *with* Fox v. State, 640 S.W.3d 744, 753 (Mo. 2022) (discussing state's assertion that "preventing sexual assault survivors from incurring secondary trauma due to interactions with the criminal justice system [wa]s a[] compelling interest").

[214] *See, e.g.*, *Child and Family Law Clinic*, Univ. of Ariz. Coll. of L., https://law.arizona.edu/academics/clinics/child-and-family-law-clinic [https://perma.cc/AX8K-DY35] (last visited Dec. 26, 2024) ("Clinic students provide representation to adults and teenagers in contested order of protection hearings to ensure that the order is upheld without modifications that pose a risk to the safety of the victim-survivor."); *Restraining Order & Survivor Advocacy Clinic*, Univ. of Wis.-Madison L. Sch., https://law.wisc.edu/eji/rosa/ [https://perma.cc/446M-PQCL] (last visited Dec. 26, 2024) ("Law students assist victims/survivors of intimate-partner violence and/or crime by assisting with Restraining Order petitions, providing direct representation at injunction hearings (restraining order hearings), and providing relevant resources under the supervision of experienced clinical faculty. In addition, the Clinic seeks to assist victims/survivors with additional legal needs consistent with victims' rights under Wisconsin's Marsy's Law."); *Harvard Law School's Marianna Yang Examines Rise in Factors, Hurdles in Courts for Victims*, Harvard L. Sch. (June 30, 2022), https://legalservicescenter.org/harvard-gazette-shadow-pandemic-of-domestic-violence/ [https://perma.cc/W7TF-EDKR] (using "victim/survivor").

[215] *Family Law Clinic*, Univ. of Ark. Sch. of L., https://ualr.edu/law/clinical-programs/litigation-clinic/ [https://perma.cc/YR2H-TV8X] (last visited Dec. 26, 2024) ("In the Family Law Clinic, qualified UA Little Rock law students . . . may represent clients who are victims of domestic violence, parents seeking to establish or modify visitation or custody arrangements, spouses seeking divorce, or family members establishing guardianship over disabled relatives."); *Domestic Violence Clinic*, Mercer L. Sch., https://mercerlaw.university-tour.com/practice-makes-purpose/clinics#:~:text=Domestic%20Violence%20Clinic [https://perma.cc/KHA4-P4G3] (last visited Dec. 26, 2024) ("[S]tudents represent victims in Temporary Protective Orders."); *Immigration Litigation and Appellate Clinic*, Univ. of Idaho, https://www.uidaho.edu/law/academics/experiential-learning/clinics/immigration [https://perma.cc/ZRJ7-67LD] (last visited Dec. 26, 2024) ("Representing clients in removal proceedings before Immigration Judges, the Board of Immigration Appeals, and federal appellate courts; Representing clients in their applications for permanent residence, citizens."); *Crime Victim Litigation Clinic*, Lewis & Clark Sch. of L., https://law.lclark.edu/programs/criminal_law/cvlc/ [https://perma.cc/93QJ-VNGS] (last visited Dec. 26, 2024) ("Victims' rights were passed into law several decades ago but are only now being recognized in the media and in law.").

or "survivor."[216] The integration of both labels, alternatingly throughout, is also a common strategy.[217]

For instance, in a resource developed in part by the Vanderbilt First Amendment and Harvard Law School's Cyberlaw Clinic, the toolkit notes:

> Note: This toolkit uses both the terms victim and survivor to refer to people who have experienced sex-based harassment. This is because some people use one or both terms to describe themselves, and others feel that neither term accurately captures the complexity of their identity or experience.[218]

Accordingly, a range of terms might be most appropriate to use, either alternatingly or in combination, depending on an individual's preference, audience, and other considerations. Clinics can enhance respect

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216 *Domestic Violence Law Clinic*, Univ. of Ala. Sch. of L., https://law.ua.edu/academics/law-clinics/domestic-violence-clinic/ [https://perma.cc/9LGQ-YFZP] (last visited Dec. 26, 2024) ("The Domestic Violence Law Clinic in Tuscaloosa County, Alabama, offers free and comprehensive legal help to survivors of domestic violence. . . . We assist domestic violence, stalking, and sexual assault survivors living in Tuscaloosa, Alabama."); *Domestic Violence Clinic*, Univ. of Or. Sch. of L., https://law.uoregon.edu/become-practice-ready/clinics/domestic-violence [https://perma.cc/9YA3-KDAR] (last visited Dec. 26, 2024) (describing "represent[ation of] low-income survivors of domestic violence, sexual assault, and stalking in civil legal matters," and using the term "victim" only when the term appeared in a statute or agency name, such as when disclaiming the clinic "is a recipient of Victim of Crime Act Funds from the Oregon Department of Justice, Crime Victim and Survivor Services Division (DOJ/CVSSD)"); *Domestic Violence Clinic*, Georgetown Univ. L. Ctr., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/domestic-violence-clinic/course-overview/ [https://perma.cc/TYW2-J87L] (last visited Dec. 26, 2024) ("For example, a CPO judge may direct an abusive partner to cease assaulting and threatening a survivor; to stay away from the survivor's home, person and workplace; not to contact the survivor in any manner; and to vacate the parties' shared home.").

217 *Family Justice Clinic*, Univ. of Idaho Coll. of L., https://www.uidaho.edu/law/academics/experiential-learning/clinics/faces [https://perma.cc/RUQ8-Q65U] (last visited Dec. 26, 2024) ("Students . . . assist in the full representation of survivors of domestic and sexual violence. . . . By working with the Faces of Hope Foundation, students have the opportunity to also interface with other professionals advocating for those impacted by interpersonal violence, including . . . [police, investigators,] medical professionals with St. Luke's and St. Alphonsus, victim advocates, counselors and many others."); *Restoration and Justice Clinic*, Pepperdine Caruso Sch. of L., https://law.pepperdine.edu/experiential-learning/clinical-education/clinics/restoration-and-justice-clinic/ [https://perma.cc/GFB2-H9BE] (last visited Dec. 26, 2024) (noting "represent[ation of] victims of domestic violence, human trafficking, sexual assault and other gender-based crimes" and also describing "advocacy to ensure that the survivor's legal needs are met"); *Human Trafficking Clinic + Lab*, Univ. of Mich. Sch. of L., https://michigan.law.umich.edu/academics/experiential-learning/clinics/human-trafficking-clinic-0 [https://perma.cc/X4UD-NGLM] (last visited Dec. 26, 2024) ("Our vision for the HTC+Lab partnership is that the work with individual survivors in the clinic will help ensure the lab is victim-centered and informed by lived-experience.").

218 *Survivors Speaking Out: A Toolkit About Defamation Lawsuits and Other Retaliation by and for People Speaking Out About Sex-Based Harassment*, Nat'l Women's L. Ctr & Know Your IX, at 1, https://nwlc.org/wp-content/uploads/2023/08/Toolkit-Printer-Friendly-PDF.pdf [https://perma.cc/8UWA-ZVWF].

by recognizing and honoring individuals' preferences and ensuring it is reflective of each person's unique experience. Accuracy is essential when choosing terms, as terms carry different connotations; the blanket application of a single term does not tailor the terminology with precision to the specific audience, purpose, and context.

H. Homelessness

People may experience a range of housing access challenges and the experiences of unhoused individuals can vary greatly.[219] The people-first approach would discourage the use of phrases like "homeless person" in favor of alternatives such as "person experiencing homelessness."[220] This phrasing uses "person-centered terminology to phrase homelessness as an experience or an adjective, as opposed to an aspect inseparable from one's identity."[221] Although this phrasing has been utilized by some courts;[222] and some have utilized similar language such as "unhoused person,"[223] the use of "homeless person(s)" is still commonplace.[224]

Many housing clinics do not work with the unhoused population, but are instead working with renting "tenants" or "homeowners" to prevent eviction or property loss.[225] Some clinics work on housing is-

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219 *Four Categories of the Homeless Definition*, HUD Exchange, https://www.hudexchange.info/homelessness-assistance/coc-esg-virtual-binders/coc-esg-homeless-eligibility/four-categories/ [https://perma.cc/X368-XNQU] (last visited Dec. 26, 2024) (describing various experiences of housing insecurity, including "literally homeless" and "sheltered homeless").

220 *People Experience Homelessness, They Aren't Defined by It*, U.S. Interagency Council on Homelessness (June 28, 2017), https://www.usich.gov/news-events/news/people-experience-homelessness-they-arent-defined-it [https://perma.cc/Q9G2-JSHA].

221 Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 Harv. C.R.-C.L. L. Rev. 367, 412 (2021).

222 Denver Homeless Out Loud v. Denver, Colo., 32 F.4th 1259, 1264 (10th Cir. 2022) ("Encampments of people experiencing homelessness have proliferated throughout Denver."); Honkala v. U.S. Dep't of Hous. & Urb. Dev., No. CV 21-0684, 2022 WL 282912, at *1 (E.D. Pa. Jan. 31, 2022) ("In 2018, the total number of people experiencing homelessness in Philadelphia was 5,788."); Where Do We Go Berkeley v. Cal. Dep't of Transp., No. 21-CV-04435-EMC, 2022 WL 1032494, at *3 (N.D. Cal. Apr. 6, 2022) (discussing "housing opportunities come up for persons experiencing homelessness").

223 Rios v. Cnty. of Sacramento, 562 F. Supp. 3d 999, 1019 (E.D. Cal. 2021) ("Courts within this Circuit have often considered what process is due when a local government removes an unhoused community and its belongings from a particular property.").

224 *See, e.g.*, Miranda v. United States, No. 2:17-CR-00159-DBB, 2023 WL 4303742, at *2 (D. Utah June 30, 2023).

225 *Housing Law Clinic*, Vanderbilt L. Sch., https://law.vanderbilt.edu/clinics-experiential-learning/housing-law-clinic/ [https://perma.cc/AFX9-H66G] (last visited Dec. 26, 2024) ("Students in the Housing Law Clinic represent low-income tenants and homeowners across Tennessee in a wide variety of matters that directly impact their housing."); *see, e.g.*, *Civil Justice Clinic*, Duke L. Sch., https://law.duke.edu/civiljustice/ [https://perma.cc/GKP9-4MXY] (last visited Dec. 26, 2024) ("[S]tudents directly represent clients in matters that include actions

sues in services of a particular population, like veterans.[226] However, clients receiving services from any clinic might be experiencing homelessness or dealing with housing insecurity.[227] Of the clinics working with this community, several use the term "experiencing homelessness."[228] Some have also used the term "unhoused,"[229] and others "homeless."[230] The Homeless Advocacy Clinic at the University of the

arising from unsafe housing, landlord-tenant disputes, evictions, foreclosures, rent-to-purchase agreements, breach of contract, [and] consumer protection issues," among others.); *Housing Clinic*, Univ. of Idaho Coll. of L., https://uidaho.edu/-/media/uidaho-responsive/files/law/academics/practical-skills-flyer-202122.pdf?la=en&rev=39f00a106c1a44de8e791724b70cf137 [https://perma.cc/TFQ5-HBNK] (last visited Dec. 26, 2024) ("Housing Clinic focuses primarily on residential tenant eviction defense, habitability, and security deposits.").

226 *See, e.g.*, *Veterans Justice Clinic: Poverty, Homelessness & Criminalization*, UCLA Sch. of L., https://law.ucla.edu/academics/curriculum/veterans-justice-clinic-poverty-homelessness-criminalization [https://perma.cc/238B-N9XW] (last visited Dec. 26, 2024) (assisting veterans with "continuing harms of COVID-19 on our clients (e.g. housing and economic insecurity, disability justice, and health access)").

227 Olivia Klein, *Clients, CORIs, and Community in Harvard Defenders*, Harvard L. Sch. (May 11, 2023), https://hls.harvard.edu/clinic-stories/clients-coris-and-community-in-harvard-defenders/ [https://perma.cc/3VBR-Y6AU] ("'In CORI representation, you get to build a holistic relationship with your clients and learn about their hopes. It's empowering to say, what are your goals, and how can we partner with you to get there? . . . I had a client who had been experiencing homelessness for several decades, and we were able to seal her CORI, and I'm deeply grateful that now she's in permanent housing. It was really transformational to see how well she's doing.'").

228 *Penn Law's Walk-In Legal Assistance Project (WILA)*, Univ. of Pa. Carey L. Sch., https://www.law.upenn.edu/live/profiles/795-penn-laws-walk-in-legal-assistance-project-wila [https://perma.cc/92XK-J8U6] (last visited Dec. 26, 2024) ("At a weekly clinic, WILA provides accessible civil legal services to people who are experiencing homelessness and housing insecurity."); *Report Documents the Criminalization of Homelessness*, Yale L. Sch. (Nov. 17, 2016), https://law.yale.edu/yls-today/news/report-documents-criminalization-homelessness [https://perma.cc/BZ3S-P36L] ("The report documents the harms people experiencing homelessness suffer at the hands of the criminal justice system every day."); *Housing Rights Initiative*, Univ. of Mia. Sch. of L., https://www.law.miami.edu/academics/programs/human-rights/initiatives/housing-rights/ [https://perma.cc/K4GD-75SF] (last visited Dec. 26, 2024) ("In the United States and locally in Miami, the use of petty offenses to criminalize poverty is a critical issue where people experiencing homelessness regularly face the threat of criminal sanctions for fulfilling basic needs.").

229 *See, e.g.*, Nora Moriarty-McLaughlin, *Pepperdine's Legal Aid Clinic Offers Lifeline to L.A.'s Unhoused Population*, Pepperdine Caruso Sch. of L. (Jan. 25, 2023), https://pepperdine-graphic.com/pepperdines-legal-aid-clinic-offers-lifeline-to-l-a-s-unhoused-population/ [https://perma.cc/A4MK-JGVY] ("Law students at the Legal Aid Clinic at Pepperdine's Caruso School of Law help unhoused and impoverished people in Downtown L.A.'s Skid Row by providing them access to legal support."); *Law Students Help Clients to Enforce Civil Rights*, Univ. of Ark. Sch. of L. (Apr. 27, 2022), https://news.uark.edu/articles/59931/law-students-help-clients-to-enforce-civil-rights [https://perma.cc/E69E-C8PB] ("[S]tudents . . . helped a local unhoused man charged with felony arson finally get released from jail.").

230 *Clinics*, Pepperdine Caruso Sch. of L, https://law.pepperdine.edu/experiential-learning/clinical-education/clinics/ [https://perma.cc/M7Z5-YBUN] (last visited Dec. 26, 2024) ("In the Legal Aid Clinic at the Union Rescue Mission students represent clients who are homeless on Skid Row in downtown Los Angeles.").

Pacific uses a combination of terms in describing the crisis in accessing services:

> In 2019, the Sacramento County Board of Supervisors formally declared an emergency homeless shelter crisis. The 2019 Homeless Point in Time for Sacramento County found that 5,570 persons experience homelessness on a given night, and that number has increased with COVID-19. In 2020, more than 95 homeless men and women died in Sacramento County, and the number of homeless deaths is surging. The data from a variety of governmental and nonprofit organizations is overwhelming that the vulnerable reentry and homeless population suffer disproportionately from serious mental illness and substance use disorders.[231]

These terms can also be adapted for use across communities or when working with individuals who have intersectional identities. For instance, terms that relate to both survivor status and housing status can be used in combination, such as Harvard's use of the term "survivor-tenant."[232]

When addressing housing access challenges, clinics can demonstrate respect by using person-centered terminology, recognizing that homelessness is a circumstance, not an intrinsic aspect of identity. Accurately reflecting both legal and social realities requires precise tailoring when describing specific populations or issues. By thoughtfully applying these principles, clinics can address housing challenges in a way that respects the dignity and complexity of the individuals and communities they serve.

Conclusion

Inclusive language practices can help ensure all individuals are "treated fairly, with courtesy and respect, without regard to their race, gender, or any other protected personal characteristic."[233] Clinical advocacy reflects the range of terminology used in our society and

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[231] *Homeless Advocacy Clinic Goals & Structure*, Univ. of the Pac. McGeorge Sch. of L., https://law.pacific.edu/law/legal-clinics/homeless-advocacy-clinic [https://perma.cc/A7BT-8XVN] (last visited Aug. 1, 2023); *see also Gift to Homeless Advocacy Clinic Will Support Students and Community*, Univ. of the Pac. McGeorge Sch. of L., https://www.pacific.edu/pacific-newsroom/gift-homeless-advocacy-clinic-will-support-students-and-community [https://perma.cc/XY3H-TEDR] (last visited Aug. 1, 2023).

[232] *A Victory for Survivor-Tenants in Housing Court, Housing Law Clinic*, Harvard L. Sch. (Sept. 26, 2017), https://hls.harvard.edu/clinic-stories/clinical-voices/a-victory-for-survivor-tenants-in-housing-court/ [https://perma.cc/PH8C-BAA3].

[233] People v. Gobrick, No. 352180, 2021 WL 6062732, at *1 (Mich. Ct. App. Dec. 21, 2021).

profession, including by clinics and courts, as reflected in the examples discussed. Clinics can model the balancing required to make inclusive language decisions—weighing reflection, respect, accuracy, precision, and relevance communicated by word choices to different audiences—in all aspects of their practice by assessing word choices, being mindful of the origin and history of words, honoring individual preference, considering intersectionality, and contextualizing their language choices.

Appendix

Term	Origin or Usage
auction block	This phrase describes where enslaved people stood to be sold.[234]
basket case	This term "is used to refer to an ineffective or powerless person," but its first cited use "in the Oxford English Dictionary is in 1919, soon after the end of World War I . . . came from rumors about soldiers who had lost all of their limbs and had to be transported in a basket."[235]
bugger	"This word's roots are traced to Bulgarians and anal sex. 'Bulgarus' was a name given to a sect of heretics believed to have come from Bulgaria in the 11th century. Over time and through various languages, this was later shortened to 'Bugger.'"[236]
cretin	"Though most people use the word 'cretin' to refer to someone that is 'insensitive' or 'stupid,' Merriam-Webster writes that the word used to refer to those who live[] in the French-Swiss Alps, and were affected with hypothyroidism."[237]
eenie, meenie, miney, moe	"This modern, inoffensive version [of the children's rhyme] comes from a similar, older one, where n---er replaces tiger."[238]

234 *Block*, Etymology Dictionary, https://www.etymonline.com/word/block [https://perma.cc/2TF6-D6H2] (last visited Jan. 29, 2025); *see also Sale*, National Humanities Center Toolbox Library: Primary Resources in U.S. History & Literature, Nat'l Humanities Ctr., https://nationalhumanitiescenter.org/pds/maai/enslavement/text2/text2read.htm [https://perma.cc/39GQ-BKL5] (last visited Jan. 27, 2025).

235 Anne Curzan & Rebecca Kruth, *The Dark Origin of "Basket Case,"* Mich. Public (Jan. 6, 2019, 2:40 PM) https://www.michiganpublic.org/arts-culture/2019-01-06/the-dark-origin-of-basket-case [https://perma.cc/676F-XCEZ] (last visited Jan. 31, 2025); *see also Basket Case*, Dictionary.com, https://www.dictionary.com/browse/basket-case [https://perma.cc/KKM6-QB5M] (last visited Jan. 27, 2025).

236 Gavin Fernando, *From 'Long Time No See' to 'Bugger!', These Overused Expressions Have Racist Origins*, Chronicle (Sept. 10, 2018, 6:46 PM), https://www.thechronicle.com.au/news/from-long-time-no-see-to-bugger-these-overused-expressions-have-racist-origins/news-story/8ec88c31249f092e250a0353894411cf [https://perma.cc/EUT3-3262] (last visited Jan. 31, 2025); *see* Sterbenz & Davis, *supra* note 99 ("Many considered the Bogomils heretical and thus, said they approached sex in an 'inverse way.'").

237 Sterbenz & Davis, *supra* note 99; *see also Cretin*, Merriam-Webster, https://www.merriam-webster.com/dictionary/cretin [https://perma.cc/HUL9-SAWC] (last visited Jan. 31, 2025).

238 Sterbenz & Davis, *supra* note 99; *see* Alex Abad-Santos, *The Racist Children's Songs You Might Not Have Known Were Racist*, Vox (May 21, 2014, 8:00 AM), https://www.vox.com/2014/5/21/5732258/the-racist-childrens-songs-you-might-not-have-known-were-racist [https://perma.cc/8XLL-MKL2] (last visited Jan. 31, 2025); *see also* Samara Pearley, *Eenie Meenie Miney Moe and the Ice Cream Truck Song's Origin*, African Am. Folklorist, https://theafricanamericanfolklorist.com/articles/eenie-meenie-miney-moe-and-the-ice-cream-truck-songs-origin [https://perma.cc/HUH7-8V89] (last visited Jan. 31, 2025).

grandfather clause/grandfathered in	"The Grandfather Clause was a statute enacted in many states in the Deep South allowing prospective white voters to evade sitting literacy tests and other tactics designed to stop southern [B]lack[] [people] from voting and having other rights similar to white people."[239] It is still used to mean some individuals are exempted from certain rights or privileges.
guru	Describing the term "guru," like "ninja," as "culturally appropriated and [ ] gendered as masculine, which can discourage female applicants," for instance, "when it appears in job descriptions."[240]
gyp	The use of the term "gypped" to mean "defrauded, swindled, [or] cheated," originated as a slur against the Romani people, who are colloquially referred to as gypsies.[241]
hooligan	"This phrase started appearing in London newspapers around 1898. The Oxford Online Dictionary speculates it evolved from the fictional surname 'Houlihan,' included in a popular pub song about a rowdy Irish family. Other sources . . . claim that Patrick Houlihan actually existed and that he was a bouncer and a thief in Ireland."[242]
hysteria	"[D]octors used 'hysteria' as a medical explanation for nearly every sick woman they encountered. The idea for such a diagnosis comes from Hippocrates' belief that a woman's hysteria is caused by a 'wandering uterus.'"[243]

[239] Fernando, *supra* note 236; *see Inclusive Language*, Univ. of Cal. Riverside, https://diversity.ucr.edu/sites/default/files/2018-11/Inclusive_Language_for_web_4_2.pdf [https://perma.cc/E8W8-8GV9] (last visited Jan. 31, 2025).

[240] Herbert, *supra* note 99; *see also* Michael T. Nietzel, *Stanford University Backs Away Its Harmful Language List*, Forbes (Jan. 08, 2023, 9:22 AM), https://www.forbes.com/sites/michaeltnietzel/2023/01/08/stanford-university-backs-away-from-its-harmful-language-list/ [https://perma.cc/6HPV-8G6Y] (last visited Jan. 31, 2025) ("[I]n the Buddhist and Hindu traditions, the word is a sign of respect. Using it casually negates its original value.").

[241] Challa, *supra* note 99; *see also Gyp*, Merriam-Webster, https://www.merriam-webster.com/dictionary/gyp [https://perma.cc/84NQ-XKCG] (last visited Jan. 31, 2025).

[242] Sterbenz & Davis, *supra* note 99; *see also The Original Hooligans*, Bloomberg (Aug. 17, 2012, 3:20 PM), https://www.bloomberg.com/news/articles/2012-08-17/the-original-hooligans [https://perma.cc/8SRT-N5UQ] (last visited Jan. 31, 2025) ("Hooligans were a stereotypical representation of urban immigrants, characterizing the cultural mixing and prejudices of London in the late 1800s.").

[243] Greenwald, *supra* note 99; Cecilia Tasca, Mariangela Rapetti, Mauro Giovanni Carta & Bianca Fadda, *Women and Hysteria in the History of Mental Health*, 8 Clinical Prac. & Epidemiology Mental Health 110, 111 (2012), https://pmc.ncbi.nlm.nih.gov/articles/PMC3480686/pdf/CPEMH-8-110.pdf [https://perma.cc/QNM4-SM9H] (last visited Jan. 31, 2025).

itis	"More commonly known now as a 'food coma,' this phrase directly alludes to the stereotype of laziness associated with African Americans . . . [and] stems from a longer (and incredibly offensive) version—n----ritis."[244]
long time no see/no can do	Grammatically incorrect phrases like "long time no see" or "no can do" "mimic[] non-native English speakers when they are speaking English."[245]
master	Colloquial use of the term master (e.g., master copy, master list, master bedroom), "either as a verb or an adjective . . . [references that] historically, masters enslaved people, didn't consider them human and didn't allow them to express free will, so this term should generally be avoided."[246]
meeting a deadline	"In the 1860s, a 'dead line' was a line within or around a prison. Prisoners would be shot for crossing the 'dead line.' . . . Some of the earliest mentions of deadline come up in 1863, preserved in diaries kept by captive soldiers during the Civil War," including at the Andersonville, Georgia Confederate prison.[247] This term evolved to its modern use: to finish something by a specific time.
moron	"The term 'moron' wasn't originally an insult, but a psychological diagnosis denoting a mild disability," as is the case with the words imbecile and idiot.[248]

244 Sterbenz & Davis, *supra* note 99; *Racist and Offensive Terms We Use in Everyday Language*, Ebony (Nov. 14, 2013), https://www.ebony.com/racist-and-offensive-terms-we-use-in-everyday-language-981 [https://perma.cc/R2S6-TY4U] (last visited Jan. 31, 2025).

245 Lakshmi Ganghi, *Who First Said 'Long Time, No See' and In Which Language?*, NPR (Mar. 9, 2014, 7:05 PM), https://www.npr.org/sections/codeswitch/2014/03/09/288300303/who-first-said-long-time-no-see-and-in-which-language [https://perma.cc/B8T3-SHZE] (last visited Jan. 31, 2025); *see* Katherine Timpf, *'Long Time, No See' Is Now Considered 'Derogatory' Toward Asians*, Nat'l Rev. (Nov. 6, 2018, 5:50 PM), https://www.nationalreview.com/2018/11/university-claims-long-time-no-see-expression-derogatory-to-asians/ [https://perma.cc/32Q5-MSX6] (last visited Jan. 31, 2025); *see also* Univ. of Cal. Riverside, *supra* note 239 ("[S]imilar to 'no can do' 'long time no see' originally mimicked and denigrated Chinese or Native American speech patterns.").

246 Nietzel, *supra* note 240; *see* Kate Conger, *'Master,' 'Slave' and the Fight Over Offensive Terms in Co*mputing, N.Y. Times (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/technology/racist-computer-engineering-terms-ietf.html [https://perma.cc/FH72-TZAW].

247 *Your 'Deadline' Won't Kill You*, Merriam-Webster, https://www.merriam-webster.com/wordplay/your-deadline-wont-kill-you [https://perma.cc/56ZR-643X] (last visited Jan. 27, 2025).

248 Greenwald, *supra* note 99; *The Clinical History of 'Moron,' 'Idiot,' and 'Imbecile,'* Merriam-Webster, https://www.merriam-webster.com/wordplay/moron-idiot-imbecile-offensive-history [https://perma.cc/4L85-8J2L] (last visited Jan. 31, 2025).

mumbo jumbo	"The phrase 'mumbo jumbo' likely comes from the West African god *Maamajomboo*. Why is it offensive?" In addition to being appropriative, the term carries weighted implications because "Mandinka males would dress up like the god to solve domestic disputes and abuse their wives."[249]
paddy wagon	"'Paddy' originated in the late 1700s as a shortened form of 'Patrick,' and then later a pejorative term for any Irishman. 'Wagon' naturally refers to a vehicle. 'Paddy wagon' either stemmed from the large number of Irish police officers or the perception that rowdy, drunken Irishmen constantly ended up in the back of police cars, according to Splinter News."[250]
peanut gallery	"[T]he popular phrase 'peanut gallery' typically used to reference hecklers, originated as a term to refer to those—usually Black people—who sat in the 'cheapest' section of the Vaudeville theaters."[251]
pow-wow/powwow	"A pow-wow is a social gathering for ceremonial purposes, and many tribes still hold them [] regularly. Using this out of context to refer to a meeting or a quick chat or conversation trivializes the long tradition that is still maintained today by many tribes."[252]
slave driver	The term's use, such as to refer to a tough supervisor, "makes light of the horrific experience of slavery."[253]
sold down the river	"Today, if someone 'sells you down the river,' [they] betray[] or cheat[] you. But the phrase has a much darker and more literal meaning . . . [D]uring slavery in the US, masters in the North often sold [ ] misbehaving [en]slave[d] [people], sending them down the Mississippi River to plantations in Mississippi, where conditions were much harsher."[254]

249 Greenwald, *supra* note 99; *see also* Lakshmi Gandhi, *Unmasking the Meaning and Marital Disputes Behind Mumbo Jumbo*, NPR (May 31, 2014, 7:03 AM), https://www.npr.org/sections/codeswitch/2014/05/31/317442320/unmasking-the-meaning-and-marital-disputes-behind-mumbo-jumbo [https://perma.cc/5257-BP66] (last visited Jan. 31, 2025).

250 Sterbenz & Davis, *supra* note 99; *see Avoid the Paddy Wagon this St. Patrick's Day*, Nat'l Law Enf't Officers Mem'l Museum, https://nleomf.org/avoid-paddywagon-this-st-patricks-day/ [https://perma.cc/2G72-76LJ] (last visited Jan. 31, 2025); *see also Paddy Wagon*, Merriam-Webster, https://www.merriam-webster.com/dictionary/paddy%20wagon [https://perma.cc/9FFA-SNV5] (last visited Jan. 31, 2025).

251 Sterbenz & Davis, *supra* note 99; *see* Ebony, s*upra* note 242.

252 *The Social Justice Phrase Guide*, Advancement Project, https://advancementproject.org/wp-content/uploads/2015/10/94da835bcf2d3e7631_bfm6yh5kg-1.pdf [https://perma.cc/2N9G-HS3P] (last visited Jan. 31, 2025); *see Powwow*, Merriam-Webster, https://www.merriam-webster.com/dictionary/powwow [https://perma.cc/DS4G-X26W] (last visited Jan 31, 2025).

253 Herbert, *supra* note 99; *see Slave Driver*, Merriam-Webster, https://www.merriam-webster.com/dictionary/slave%20driver [https://perma.cc/G3GG-P6LG] (last visited Jan. 31, 2025).

254 Sterbenz & Davis, *supra* note 99; Leah P. Holmes, *Sold Down the River*, Miss. Encyc. (July 11, 2017), https://mississippiencyclopedia.org/entries/sold-down-the-river/ [https://perma.cc/6LBN-V443] (last visited Jan. 31, 2025).

spaz	The term "spaz" or "spastic" to mean "over-energetic" or "excitable" belies the term's "historic association with cerebral palsy which was previously known as spastic paralysis."[255]
spinster	"Once upon a time, the word 'spinster' didn't refer to an unmarried woman, but a person who spun yard or thread for a living. Eventually the term took on its current meaning, as most of the women who were spinsters were also lower-class and unwed, relying on their job to provide for themselves."[256]
spirit animal	Using "spirit animal" to mean an animal you "connect with" strongly coopts the term's origin and "trivializes Native relationships to the animal world . . . [which are deeply rooted in the] values and spiritual beliefs of Native communities."[257]
tipping point	"When tipping point first began to be employed in general use, it was almost entirely in reference to the propensity of white families to move out of an area when a certain percentage of the neighborhood was composed of [B]lack families. It served as a precursor of sorts to the phenomenon of white flight."[258]
totem pole	A totem pole is a "sculpture primarily traditional to tribes . . . when used as an idiom to describe a person of low rank, inaccurately trivializes the tradition and meaning of the totem poles, which do not have a hierarchy of carvings based on physical position" and reinforced a negative association.[259]
tribe	"Often used as a cutesy way to describe like-minded people, 'tribe' has colonial origins as a bureaucratic term forced on Native Americans and incorrectly applied to many Africans."[260]

255 Greenwald, *supra* note 99; Ben Zimmer, *The Surprising History of the Slur Beyoncé and Lizzo Both Cut from Their New Albums*, Slate (Aug. 3, 2022, 6:04 PM), https://slate.com/culture/2022/08/beyonce-renaissance-lizzo-spaz-ableist-slur-lyrics-history.html [https://perma.cc/X4NL-HPP9] (last visited Jan. 31, 2025).

256 Greenwald, *supra* note 99; *Where Does the Term 'Spinster' Come from?*, Merriam-Webster, https://www.merriam-webster.com/wordplay/spinster-meaning-origin [https://perma.cc/9SJQ-83MK] (last visited Jan. 31, 2025).

257 *Native American Relationships to Animals: Not Your "Spirit Animal,"* Nat'l Museum of the Am. Indian, https://americanindian.si.edu/nk360/informational/native-american-spirit-animal [https://perma.cc/7ZV3-LT4Y] (last visited Jan. 31, 2025); *see* Herbert, su*pra* note 99.

258 *The Racist Origins of 'Tipping Point,'* Merriam-Webster, https://www.merriam-webster.com/wordplay/origin-of-the-phrase-tipping-point [https://perma.cc/9D2E-LD9B] (last visited Jan. 31, 2025); *see* Greenwald, *supra* note 99.

259 Advancement Project, *supra* note 252; Herbert, *supra* note 99.

260 Herbert, *supra* note 99; *see* J. Maija Doggett, *The Trouble With "Tribe,"* Alaska Bus. Mag., https://digital.akbizmag.com/issue/april-2024/the-trouble-with-tribe/ [https://perma.cc/XD8T-RPTS] (last visited Jan. 29, 2025).

uppity	"[T]he term 'uppity,' nowadays used generally to refer to a stuck-up or arrogant person, was commonly used to describe Black people that 'didn't know their socioeconomic place.'"[261]
use as a crutch/lame/handicap	"Beyond 'crippling,' ableism is on display when people use the words 'lame,' 'crutch,' and 'handicap.'"[262]
you guys	"Positing men as the status quo excludes women and non-binary folks," although some consider the term as egalitarian in origin, referring to Guy Fawkes.[263]

261 Sterbenz & Davis, *supra* note 99; Elspeth Reeve, *Yep*, '*Uppity*' *Is Racist*, Atlantic (Nov. 22, 2011), https://www.theatlantic.com/politics/archive/2011/11/yep-uppity-racist/335160/ [https://perma.cc/586R-XFY3] (last visited Jan. 31, 2025).

262 Emerson Malone, *Ableism Is Embedded in Our Language. We Can Dismantle It.*, BuzzFeed (Nov. 17, 2021, 1:47 PM), https://www.buzzfeednews.com/article/emersonmalone/ableism-language-disability [https://perma.cc/PSV4-ZMLV]; Rakshitha Arni Ravishankar, *Why You Need to Stop Using These Words and Phrases*, Harv. Bus. Rev., https://hbr.org/2020/12/why-you-need-to-stop-using-these-words-and-phrases [https://perma.cc/WGC9-2EUZ] (last visited Jan. 31, 2025).

263 Herbert, *supra* note 99; *see also* Allan Metcalf, *The Surprising Origins of the Phrase 'You Guys,'* Time (Sept. 30, 2019, 11:00 AM), https://time.com/5688255/you-guys/ [https://perma.cc/3CTS-M4TS] (last visited Jan. 31, 2025) (describing use of the phrase in reference to Guy Fawkes and the shifting social meaning of the expression).

VALUES-AMBIGUOUS CLINICS

Willow Tracy*

Abstract

As law school clinical programs have grown in recent decades, many of the newer offerings focus on business law, entrepreneurship, intellectual property, and technology. It is commonly presumed that social justice values, such as the amelioration of poverty or the protection of fundamental rights, are not foundational goals of these non-traditional clinics. This Article calls these clinics "values-ambiguous" to highlight the frequent uncertainty and skepticism about their relationship to traditional clinical social justice values. Importantly, "values-ambiguous" does not describe a quality of the clinic itself, it describes a quality of perception of the clinic. In other words, "values-ambiguous clinics" are clinics that are typically not perceived as having a social justice mission, whether or not they in fact do. As values-ambiguous clinics have grown in number and in importance, the broader clinical community has struggled to come to terms with their presence. While it is generally accepted that these clinics provide important student opportunities and contribute to the overall rise of the status of clinics within the legal academy, they have also been seen as replicating hierarchy, undermining the established goals of clinical pedagogy, and neglecting the foundational social justice imperative of clinics. This Article sidesteps the usual arguments about how non-traditional clinics can and should be reconciled with traditional clinical social justice imperatives. It instead focuses the conversation on the ways in which the rise of values-ambiguous clinics presents opportunities for all clinicians to critically (re)consider their own preconceptions about the nature, role, and relationship of values, skill, and theory in clinical legal education. Using quantitative and qualitative analysis and storytelling, this Article surfaces and describes tensions and themes in current scholarship, and

* Willow Tracy is an Associate Clinical Professor and founding director of the Business Law Clinic at the University of Georgia School of Law. She is grateful to Jason Cade, Praveen Kosuri, Scott Lowry, Laura Norris, Stephen Reed, Alex Scherr, Ann Shalleck, Brett Stohs, Elizabeth Taxel, Paul Tremblay, Paige Wilson, the participants in UGA Law's Writing Workshop, and the participants in the Clinical Law Review Writers' Workshop for providing feedback on this Article. For exemplary help in both conceptualizing and researching this article, she thanks UGA law student Sarah Quarles. For dedication to data collection, and generosity in data sharing, she thanks Bob Kuehn and the Center for the Study of Applied Legal Education.

suggests avenues for further conversation about the future of clinical legal education.

The last several decades have seen a trend of law schools offering increasing numbers of "values-ambiguous" clinics, by which I mean clinics that are commonly perceived as not having the pursuit of public interest, the protection of fundamental rights, the amelioration of poverty, or other social justice values as foundational goals.[1] These values-ambiguous clinics are often transactional legal clinics, such as business law or entrepreneurship clinics, but can also be non-transactional clinics, such as intellectual property and technology (IP/T) clinics that engage in litigation and advocacy.[2] Importantly, by describing certain clinics as values-ambiguous, I am not describing an underlying quality of the clinic itself. I am instead describing a quality of perception of the clinic.[3] Thus by values-ambiguous clinics I simply mean those clinics, often but not always transactional and IP/T clinics, that are typically not perceived as pursuing the traditional clinical "social justice imperative,"[4] whether or not they in fact do.

In this Article I argue that the emergence of values-ambiguous clinics has been a disruptive force in clinical education and has resulted in divisions within the clinical community.[5] I further claim that the presence (and increasingly the prominence) of values-ambiguous clinics provides an opportunity for us to consider important but challenging questions about the nature and role of values in clinical legal education. Understanding and discussing these divisions, and addressing the challenging questions they present, is critical if we want to move toward a

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[1] On the definition of values-ambiguous clinics *see infra* Part I(B).

[2] Cynthia L. Dahl & Victoria F. Phillips, *Innovation and Tradition: A Survey of Intellectual Property and Technology Legal Clinics*, 25 Clinical L. Rev. 95 (2018) (describing intellectual property and technology clinics as "varied and multidimensional legal practice from purely transactional to advocacy undertaken through education, policy and litigation."); *see also infra* Part I(B).

[3] The focus on perception invites the question: the perception of whom? At the most general level I mean the perception of actors within the broader law school community, including law students, clinicians, doctrinal faculty, and administrators. As the Article progresses I occasionally focus on a more specific subset of this community. For a more extended discussion of perception *see infra* Part I(B).

[4] *See* Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. Rev. 1461 (1998) for use of the term "social justice imperative". *See infra* Part III(B)(1) for the definition of social justice in the clinical setting.

[5] I intentionally use the term disruptive to invoke both the traditional association of disruptive with "troublesome" as well as the business context association of disruptive with "leading to innovation." *See e.g.*, Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 Clinical L. Rev. 1, 3 (2015) ("In business and technology literature, 'disruptive' describes innovations that improve products or services in unanticipated ways, typically by designing for new kinds of consumers—often overlooked by an industry."); Clayton M. Christensen, The Innovator's Dilemma: When New Technologies Cause Great Firms to Fail (1997).

more integrated clinical community that is capable of pursuing its many shared goals.[6]

It seems clear that values-ambiguous clinics are here to stay and also clear that this development has been greeted with something short of universal enthusiasm in the broader clinical community. On the one hand, these clinics may be seen as an important part of the overall rise of the status of, or at least attention to, clinics generally within legal education,[7] but on the other hand they are perceived as replicating hierarchy, undermining established goals of clinical pedagogy, and neglecting the foundational values mission of clinics in favor of a narrow conception of skills development.[8]

It is perhaps not surprising that scholarship discussing the relationship of transactional or IP/T clinics to social justice commitments often focuses on correcting misperception. The existing literature is dominated by explanations of the ways in which these non-traditional clinics can, or in fact already do, operate in a manner that is consistent with traditional clinical social justice value-comitments.[9] Rather than initiating another round of conversation about whether transactional, IP/T, and

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[6] These shared goals might relate to student education or employability, institutional reputation, the strength and stature of clinical programs, or outcomes related to broader social goals. For a discussion of goals in the context of clinic design, *see* Donald Nicolson, JoNel Newman & Richard Grimes, How to Set up and Run a Law Clinic: Principles and Practice 19–44 (2023).

[7] *See* Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 Dick. L. Rev. 551 (2018); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 Fordham L. Rev. 1929 (2002); Patience A. Crowder, *Designing a Transactional Law Clinic for Life-Long Learning*, 19 Lewis & Clark L. Rev. 413, 415 (2015) ("The combined effect of increased student demand for different types of transactional experiential opportunities and the publication of two very influential reports, the 1992 ABA MacCrate Report and the 2007 Carnegie Foundation Report, challenged law schools to begin providing more exposure to transactional practice and interdisciplinary work.").

[8] *See, e.g.*, Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 Clinical L. Rev. 287 (2019).

[9] *See, e.g.*, Lauren Carasik, *Justice in the Balance: An Evaluation of One Clinic's Ability to Harmonize Teaching Practical Skills, Ethics and Professionalism with a Social Justice Mission*, 16 S. Cal. Rev. L. & Soc. Just. 23 (2006); Dubin *supra* note 4; Laurie Hauber, *Promoting Economic Justice Through Transactional Community-Centered Lawyering*, 27 St. Louis U. Pub. L. Rev. 3 (2007); Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 Clinical L. Rev. 195 (1997); Lynnise E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 Vill. L. Rev. 175 (2017). There is also a large body of scholarship, some of which is discussed below, that makes broader and more general claims regarding the primacy of the social justice mission for all clinics, including advocacy and litigation clinics. But I mean here to just be describing a more narrow body of literature that is concerned with the subset of clinics that I describe as values-ambiguous, but that in the existing literature is usually referred to as transactional. Additionally, there is a much smaller body of literature, also discussed below, that claims that transactional clinics need not primarily, or even secondarily, concern themselves with social justice or public interest values, but should instead focus on practical skills training. *See* Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 Clinical L. Rev. 205 (2010); Stephen F. Reed, *Clinical Legal*

other values-ambiguous clinics should, can, or already do operate in service of social justice goals, this Article attempts to examine the context of these conversations more broadly and to give sustained attention to the implicit and explicit assumptions they contain.

The goal of this Article is to introduce new frameworks for discussion, to examine the divisions between different types of clinicians, and to move toward an inclusive and hopeful conversation about the future of clinical legal education—a future that seems certain to contain values-ambiguous clinics. In pursuit of this goal I use quantitative and qualitative analysis as well as storytelling—providing fictional "vignettes" told in segments throughout the Article—to anchor the discussion.

This Article proceeds in three parts. Part I introduces the vignettes and then defines the focus of the inquiry, explores the terminology used, and discusses empirical trends related to the growth of values-ambiguous clinics. Part II provides the next segment of the vignettes and then explores the claim that the growth of values-ambiguous clinics has resulted in a problematic divide. Part III turns to a discussion of some of the many challenging subjects that the rise of values-ambiguous clinics force us to confront, including the different ways we might conceptualize the relationship between values, theory, and skills training in clinical legal education. I conclude with a possible ending to the vignette segments presented in Parts I and II.

I. Introduction

To introduce the subject of this Article, I begin with two vignettes that offer a more individual-level perspective on the intersection between different types of clinics. The vignettes are presented from the perspectives of two clinicians who are colleagues at the same law school; one a director of a values-presumed poverty law clinic (the "Traditional Clinician") and the other the director of a values-ambiguous transactional clinic (the "Transactional Clinician"). These vignettes are purely fictional, and while they are informed by conversations I have had with many clinicians over the years, they do not reflect my own or anyone else's specific story. I include these vignettes not because I am primarily concerned with the personal challenge any individual clinician might experience in relating to another clinician or with their interpersonal difficulties in feeling understood, seen, or respected by one another. Rather, I include them because I believe that some of the tensions that are experienced on the individual level may provide insight into the broader set of macro-level challenges that are the subject of this paper. Additionally, I include these vignettes because I think the subject

Education at a Generational Crossroads: A Self-Focused Self-Study of Self, 17 Clinical L. Rev. 243 (2010). *See also infra* Part II.

under discussion can have a tendency toward the theoretical and that it is helpful to give examples to anchor the conversation.[10] Finally, I include these stories because, despite the prevalence of the issues they discuss, there is relatively little explicit discussion in existing scholarship of these disparate experiences and what they may tell us about the present and future of clinical education.

A. The Introduction Story

1. The Traditional Clinician

When the Traditional Clinician was in law school, she took all the clinical offerings available to her and they absolutely changed her life. It was the only place in law school where she felt she belonged, and where she received mentorship, a vision of what it meant to be a lawyer, and an understanding of how this profession could truly matter. After this incredible and transformative clinical experience, she went on to have a satisfying career working in, and then later running, a legal aid office. She eventually became a clinical professor herself, taking over as director of an established poverty law clinic. She aspires to have the same impact on the next generation of law students that her mentors had on her and considers it a great privilege to work in the same community as some of the clinicians she worked with as a law student.

She has a deeply held commitment to social justice, and her work is centrally concerned with helping those who have been oppressed. She of course knows that not all her students will go on to have a career in the public interest; in fact, very few of them will, and she doesn't blame them. After all, she understands all too well what a difficult path that can be. But the fundamental skills training—for example client counseling, legal writing, reflective thinking, and professional identity formation—that they encounter in her clinic transfer to all practice settings. And more importantly, wherever they go after they graduate, even if it is to do corporate work at a large law firm, her students will be informed by the perspectives on law that they were exposed to in the clinic. In her clinic they will have to grapple with the very human side of poverty law, and most of them will be transformed by this in one way or another. In some ways she knows her clinic is even more important to the students who won't go on to do public interest because this clinic might be the

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[10] *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 Mich. L. Rev. 2411 (1988); Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 Geo. J. Legal Ethics 1, 20 (2000) ("Stories can build bridges across gaps of race, class, gender, sexual orientation, and other differences. Circulating the stories and perspectives of the 'other' can open the eyes of the majority to those perspectives. . . . Personal experience almost always makes a concept more powerful than abstractions.").

only place in law school or in their legal careers that they encounter these essential perspectives.

Her work is rewarding and meaningful, but exhausting. There are occasionally wins for clients, but those are few and far between. She is painfully aware of the horrific unmet need for legal services and the high stakes of her clinic's cases. She knows the clinic's work is often the only thing preventing horrific and unjust human suffering. She is drained from her constant exposure to broader social problems, from the racism of the criminal justice system to the tragedies of economic inequality. She is desperate to have more support for her work, but she knows that clinics are expensive, and funding is hard to come by, so she just gives it everything she's got and soldiers on, making plenty of personal sacrifice along the way.

So she was surprised then when the Dean of the law school, after saying it would be too expensive to get her the help she needs in her clinic, announced that the school was planning to start a brand new "business law" clinic.

2. The Transactional Clinician

After a successful and mostly satisfying career doing corporate work at a large law firm, the Transactional Clinician had been ready for a change. She wanted to give back to her community by providing high quality legal services to the types of small business clients who could never have afforded her firm's services. She also was excited about helping to mold the next generation of law students into ethical and skilled transactional lawyers. What better way to do this than by teaching a transactional clinic!

There were no transactional clinics when she was in law school; in fact there was almost no coursework at all that discussed transactional lawyering, and the creation of a business law clinic feels like a real sign of progress in legal education. Moving to clinical teaching meant a dramatic pay cut and enduring some academic bureaucracies, but she felt called to do this meaningful work. She loves the idea of sparing the next generation of transactional lawyers from having to learn practical skills on their own like she did or from rolling the dice with a law firm supervisor who may or may not have the time to provide thoughtful mentorship. She's also aware that transactional law has a diversity problem. She hopes that by making this clinic available and demystifying transactional law practice she can help empower groups who have historically been underrepresented in transactional law, including women, first-generation law students, and racial minorities. Doing good work for small businesses who truly need her assistance to thrive is the icing on top!

When she initially set up her new clinic, the first of its kind at her law school, there had been a steep learning curve, but she innovated as fast as she could, adapting everything from client intake procedures, to interviewing guidelines, to reflective learning exercises, to her practice area. Her attention was immediately focused, however, on an unfortunate realization: there hadn't been as much progress as she'd thought in law schools, and transactional law was still wildly under-represented in the legal academy relative to its prominence in practice. Getting students from zero to anywhere even in the vicinity of "practice ready" suddenly felt like a very tall order.

Her work is rewarding and meaningful, but exhausting. It takes her clinic much longer to get work product to clients than she thought it would because the students have to learn a whole set of technical writing skills and get up to speed on so many new substantive subjects before they can contribute. She painstakingly chooses clients who can benefit from their services, who can accommodate the long turnaround times, and who have legal issues that are neither too basic nor too complex to be great learning opportunities for students. She's giving this everything she's got, and she isn't sure whether to laugh or cry when she thinks back on how she thought clinical teaching would be like a vacation relative to firm practice. But she's more convinced than ever that this work is essential to legal education, so she soldiers on, making plenty of personal sacrifice along the way.

So she was surprised when she learned that some of her clinical colleagues think that starting a business law clinic hadn't been the best decision for the law school and that they aren't sure if her clinic is aligned with the values mission of their clinical program.

B. Terms And Trends

This Article argues that the emergence and growth of values-ambiguous clinics (again, meaning clinics that are commonly percieved as not having foundational social justice goals) has been disruptive to the clinical community and that, in trying to come to terms with the professional integration of these clinics, we encounter some very challenging questions. I will thus begin by locating this inquiry in a particular part of the experiential/clinical universe, providing additional discussion about what I mean by values-ambiguous clinics and why I believe this new terminology is necessary, and summarizing some trends surrounding the growth of these clinics.

1. Locating the Inquiry: In-house Clinics

In this article I am primarily discussing "in-house" law school clinics, rather than externships, simulation courses, or other experiential

opportunities.[11] This focus is not because I think these issues do not come up in other settings; on the contrary, the ongoing debates about corporate counsel externships and private law firm externship placements are rich sources for this inquiry, and I will at least tangentially reference some of this discussion.[12] However, I will be primarily discussing in-house clinics—for a few reasons. Most of the existing literature on related subjects is also carried out in terms of in-house clinics, and this is the literature I wish to engage with. I also believe it matters that more law school resources are typically required for in-house clinics than other experiential opportunities and that in-house clinics are seen as setting standards for the broader category of experiential legal education.[13] Finally, in-house clinics are what I have the most first-hand experience with and what I personally find most compelling. I founded an in-house business law clinic in 2011 that I would describe as a values-ambiguous clinic, and I continue to serve as the director of that clinic. My experience teaching an in-house clinic and interacting with the broader clinical community in this capacity in part motivates the inquiry.

2. Defining Values-Ambiguous Clinics

I propose the new terminology of "values-ambiguous" clinics because I do not believe there is an existing term that describes the group of clinics that I am interested in, and I also believe we have been stymied in our conversations by this lack of terminology. I am aware that in suggesting new terminology I am inviting challenges, not least of which is the difficulty of engaging with existing literature in a consistent way. I am also aware that the specific term I have chosen is imperfect.[14]

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[11] I also am limiting the focus of my inquiry to clinics based in the United States. For a discussion of the global clinical movement see, for example, The Global Clinical Movement: Educating Lawyers for Social Justice (Frank S. Bloch ed., 2011); Richard Wilson, The Global Evolution of Clinical Legal Education: More than a Method (2018); Nicolson et al., *supra* note 6.

[12] For a summary of discourse regarding the relationship between private practice externships and social justice goals, *see* Kristen Uhl Hulse, *The Foundations for (Private) Practice: Building Professional Identity Through Law Firm Externships*, 89 UMKC L. Rev. 583 (2021). *See also* Dubin, *supra* note 4, at 1469–70 (noting "the emerging emphasis on clinical education's skills training and professional competency functions has led to law schools' increased reliance on less resource intensive models of instruction that downplay social justice and public service concerns. These models include non-client simulation courses . . . .").

[13] Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J.L. & Soc. Just. 331, 338–39 (2012) ("Clinics are the top of the pyramid in terms of experiential learning.").

[14] Other terms I considered included values-contested and values-not-presumed. These options struck me as, respectively, less accurate and more awkward.

When I began thinking about this subject my focus was initially more simply on transactional clinics, and this would have been consistent with common usage and with most of the scholarship on related subjects. Although there is no universal method of referring to clinics,[15] authors have found it to be a useful shorthand to (implicitly or explicitly) split clinics into two rough groups. One group is "transactional clinics" where the lawyering activity involves "the development of organizations, businesses, and structures for clients to own and use."[16] The second group is "traditional" or "litigation legal services" clinics that engage in advocacy, litigation, or dispute resolution.[17]

Here, where our concern is perception of values commitments, using transactional—a word that generally describes a type of law practice—to communicate about the presence of clinics that are perceived to not have social justice values commitments, is clearly problematic.[18] Drawing a line around transactional clinics is both over- and under-inclusive for the current inquiry and, more importantly, somewhat misses the point. Transactional clinics certainly are frequently values-ambiguous, in the sense that it frequently isn't apparent whether a transactional clinic has a foundational values commitment. But transactional clinics are also often *not* values-ambiguous and, conversely, non-transactional clinics may also be values-ambiguous.

To give an example of the over-inclusivity of a focus on transactional clinics, consider two transactional clinics, a Community Economic Development (CED) Clinic and a Business Law Clinic. The two clinics might do a similar or even identical set of transactional legal tasks—for

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[15] Melissa L. Kidder, *The Future of Rural Lawyering: How Law Schools Should Embrace a General Practice Legal Clinic Model to Address the Current and Future Legal Needs of Rural and Smaller Communities*, 70 Drake L. Rev. 83, 111 (2022) ("there is not one common set of vocabulary for how law schools identify or label their clinical programs.").

[16] Paul R. Tremblay, *The Emergence and Influence of Transactional Practice Within Clinical Scholarship*, 26 Clinical L. Rev. 375, 375 (2019).

[17] Paul R. Tremblay, *Transactional Legal Services, Triage, and Access to Justice*, 48 Wash. U. J.L. & Pol'y 11, 12 (2015) (contrasting transactional legal services (TLS) with litigation legal services (LLS)); Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 Wash. U. J.L. & Pol'y 249, 263 (2004) (comparing "the transactional context" with how "[t]raditional clinics have historically raised questions."); Kotkin, *supra* note 8, at 302 (describing the "classic legal services style practice"); Jones, *supra* note 9, at 195 (describing "transactional clinics in contrast to more traditional clinics"). Because this language is common, it is also what I use in the vignettes. I label the clinicians as being traditional and transactional, rather than values-presumed and values-ambiguous, because I am trying to reflect the reality of typical usage, rather than trying to be precise in my categorization.

[18] Others have discussed definitional challenges with the use of "transactional". *See, e.g.*, Tremblay, *supra* note 16, at 375 n.1 ("In the law firm and law school worlds the distinction between litigation and transactional work is quite common, but articulating the precise difference is not self-evident."); Praveen Kosuri, *"Impact" in 3D—Maximizing Impact Through Transactional Clinics*, 18 Clinical L. Rev. 1, 5–6 (2011) ("'Transactional law' and 'transactional clinic' are incredibly broad terms.").

instance, forming businesses or drafting contracts—and they might perform these tasks for a similar or identical type of clients—for instance micro-entrepreneurs within a certain city.[19] But despite these similarities the CED Clinic would be more likely to be presumed to be carrying out this work for a social justice purpose, while the Business Law Clinic's underlying values-commitments might be seen as ambiguous. It may be the case that in fact the Business Law Clinic had the same social justice orientation as the CED Clinic, or a different but equally foundational values commitment, or no social justice orientation at all.[20] But whatever the case may be, we would likely not presume, absent additional information, that the Business Law Clinic had a foundational social justice commitment. I would therefore describe the Business Law Clinic, but not the CED Clinic, as values-ambiguous. Tellingly, although CED clinics usually are transactional, CED clinics are often excluded from values-based critiques of transactional clinics.[21]

The category of transactional clinics can also be under-inclusive for purposes of the current inquiry. For instance, advocacy- and litigation-based intellectual property and technology clinics or securities arbitration clinics also tend to share this quality of being perceived as having an ambiguous commitment to social justice, even though they are often grounded in a non-transactional advocacy or dispute resolution practice.[22]

Commentators writing about clinics with unclear values commitments, many of which are transactional, address the over-/under-inclusivity of terminology in a few ways. For instance, some specify that by transactional they mean just those transactional clinics that are not community lawyering or CED clinics.[23] Similarly, others specify that

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[19] Priya Baskaran & Michael Haber, *Transactional Clinics As Change Agents in the Trump Era: Lessons from Two Contexts*, 26 J. Affordable Housing & Community Dev. L. 335, 336 (2017) (describing how a CED Clinic and an Innovation and Entrepreneurship clinic do similar substantive legal work).

[20] For a discussion of CED practice as distinct from other types of transactional practice with respect to values orientation, *see* Kosuri, *supra* note 18, at 8 ("CED lawyers are advocates. They are political lawyers who help community clients organize and build institutions that hopefully help to improve neighborhoods. Though CED lawyers often represent clients in transactions, they are not transactional lawyers—CED lawyers' focus is on communities and community desires.").

[21] *See infra* note 23. *See also* Kosuri, *supra* note 18, at 12 (noting CED "has long been heralded as a way for transactional lawyers to engage in transformative work by helping to create institutions that would then engage in or promote the many needed components necessary to drive economic development."); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 Stan. L. Rev. 399, 437, 447–57 (2001) (noting the widespread appeal of CED but criticizing some forms of CED that are more market-based).

[22] Dahl & Phillips, *supra* note 2.

[23] There are several different ways authors have tried to separate out CED clinics. For instance, Praveen Kosuri groups transactional clinics into the groups CED and "general

when they say transactional they primarily mean startup and entrepreneurship clinics[24] or clinics that are "market-based."[25] Some suggest or state that clinics, even if they have what we would typically call a transactional practice area, are actually not transactional clinics if they are focused on "community outcomes" rather than "deals."[26] Many others do not bother to make additional distinctions at all or, understandably, use terms inconsistently—sometimes using transactional clinics to describe a practice type that is in contrast with litigation or advocacy and other times using the term to describe a specific subset of that practice area that does not appear to be mission- or values-driven.[27] Others deal with a narrower subject area subset, such as intellectual property clinics, regardless of whether the clinics are transactional or not.[28] Still others

services clinics" where small business and nonprofit organizations clinics comprise the general services transactional category. Kosuri, *supra* note 18 at 9. Tremblay groups transactional clinics into those that are and are not "grounded in community lawyering." Tremblay, *supra* note 16, at 380. Minna Kotkin describes her concern as being limited to "new business-oriented clinical subjects, excluding those grounded in community lawyering." Kotkin, *supra* note 8, at 303. Ettienne Toussiant describes business law clinics as "distinct from so-called Community Development Law Clinics that teach similar transactional lawyering skills but focus on the needs of community-based and marginalized clients." Etienne C. Toussaint, *The Purpose of Legal Education*, 111 Calif. L. Rev. 1, 11 n.43 (2023). *See also* Alina S. Ball & Manoj Viswanathan, *From Business Tax Theory to Practice*, 24 Clinical L. Rev. 27, 32 n.19 (2017) ("While transactional lawyering has been used in other lawyering scholarship to describe a broad range of skills that include almost any non-litigation-based practice, this Article narrows the use of the term to the representation of business entities where the legal team interprets, analyzes, and advises on private ordering, statutes, regulations, and case law to assist their clients in realizing their transactional goals and business objectives.").

[24] Kotkin, *supra* note 8, at 304 (focusing on "transactional law, particularly that involving entrepreneurs").

[25] Cummings, *supra* note 21, at 409 (describing transactional CED as being either market-based or aligned with progressive political action); *see also* Paul R. Tremblay, *Rebellious Strains in Transactional Lawyering for Underserved Entrepreneurs and Community Groups*, 23 Clinical L. Rev. 311, 323 (2016); Tremblay, *supra* note 17, at 13 (distinguishing between "collectivist" and "entrepreneurial" transactional legal services).

[26] Kosuri, *supra* note 18, at 8 ("CED lawyers are advocates. They are political lawyers who help community clients organize and build institutions that hopefully help to improve neighborhoods. Though CED lawyers often represent clients in transactions, they are not transactional lawyers—CED lawyers' focus is on communities and community desires.").

[27] This challenge is also reflected in the survey used by the Center for the Study of Applied Legal Education (CSALE), that provides a comprehensive, and commonly relied upon, set of data regarding trends in clinical legal education. *See, e.g.*, Robert R. Kuehn et al., *2022–23 Survey of Applied Legal Education*, Ctr. for Study Applied Legal Educ. (2023), [hereinafter CSALE 2022–23]. For instance, the CSALE 2022–23 sub-survey asks clinical program representatives to describe their offerings by "type of clinic" and the mutually exclusive response options include transactional, entrepreneurship, or CED. Later, the sub-survey asks them to describe their practice type in terms of the percentage of the work they do that is transactional, litigation, or advocacy. Both of these inconsistent meanings of "transactional" reflect common usage.

[28] *See, e.g.*, Dahl & Phillips, *supra* note 2.

paint with a broader brush, describing the clinics of interest as "business oriented" or "specialty" clinics.[29]

None of the above descriptors quite capture the concept that I believe to be at the heart of the current discussion. Perhaps the descriptor in the existing literature that comes closest to the group of clinics I mean to be discussing is Minna Kotkin's refreshingly direct description of "business-oriented clinics with questionable social utility."[30] I depart from this description, not only in terms of the embedded critique but also in the focus on perception of values alone, rather than a combination of business orientation and uncertain values. While it is again true that business-orientation, like a transactional practice style, is a very common feature of these clinics, I believe business orientation is perceived as problematic only insofar as it is paired with values-ambiguity.

Having defended the need for a new category and provided a rationale for the specific choice of term, I now address some of the possible concerns with "values-ambiguous" as a descriptor. The first of these is that the words value and values have dual meanings. They can refer to a commitment to an ideal or principle, as in social justice values, and this is the meaning I am trying to evoke. They can also refer to an assessment of worth or importance, as in an assessment that a clinic contributes nothing of value. While I do not mean to be evoking the latter usage, there is potential for confusion, particularly when I am separately discussing the ways in which we might evaluate the relative "worth" of clinics.[31] A second issue with the word values is that it may be overbroad. When I say values, I do not mean all possible ideals one might be committed to, for instance the ideal of loyalty. I mean the subset of values that might be termed "social justice values" as they are imagined within the clinical community.[32]

Concerns may also be raised by the word ambiguous. As noted above, when I discuss the ambiguity of a clinic's values commitments, I mean to be specifically highlighting the tendency toward uncertainty in the *perception* of a values commitment, rather than making any sort of assessment of the actual underlying reality of a values commitment.

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[29] Kotkin, *supra* note 8, at 302. For a broad approach, *see also* NICOLSON ET AL., *supra* note 6, at 7. Nicolson, Newman, and Grimes describe clinics in the two groups of "clinics that focus on the education of students" as "educationally oriented" in contrast to "social justice oriented clinics which have social justice as their main, but not necessarily exclusive focus." While this is a helpful approach, it does not fit the present argument where I am concerned primarily with perception, rather than clinic design.

[30] Kotkin, *supra* note 8, at 304.

[31] Adding a layer of confusion, some argue that a clinic that has no values (in the sense of social justice commitments) also has no value (in the sense of worth). *See infra* Part III(B)(2).

[32] For the challenges of defining "social justice" *see infra* Part III(B)(1). This use of "values" as shorthand for "social justice values" as a clinical goal is common in existing commentary. *See infra* Part III(B)(2).

In other words, the ambiguity I assign to a clinic is describing the likelihood of an observer of the clinic having the experience of being uncertain as to whether the clinic is oriented to social justice values, rather than describing an inherent quality of the clinic itself. Put more simply, I mean to be highlighting the fact that some clinics are likely to be presumed to be operating for social justice purposes, while others are not.[33]

For example, I teach a business law clinic, and even though I personally believe my clinic operates in service of social justice values, I would label it as a values-ambiguous clinic because I do not believe that any given member of the law school community would immediately and confidently assume that this was the case. I do not view this as a negative assessment of myself or my clinic. If there is any embedded criticism in the label at all it is a criticism of our collective reluctance to more fully and openly discuss the issues that are the subject of this Article.

It is also worth noting that I am generally treating values-ambiguity as a binary quality of a clinic, in the sense that I am suggesting any given clinic either is or is not values-ambiguous. We could, and perhaps should, instead think of a clinic's values-ambiguity as being a matter of degree, type, or audience. For instance, we might say that a CED clinic, particularly one that focuses on individual entrepreneurs, might be more values-ambiguous than a general civil legal services clinic, in the sense that we might be less sure of its values commitments. Or, a First Amendment Clinic that does work for a wealthy conservative politician might leave some in doubt of its values-commitments, even though the clinic is obviously fundamentally concerned with protecting rights.[34] Or, a tax clinic might be considered values-ambiguous by a member of the general public—but when the legal academy is the audience it is generally understood that most tax clinics serve low income tax payers in a way that is presumed to be in furtherance of social justice.

Beyond noting which audience I mean to be discussing (generally, that of the legal academy, including law students, clinicians, other faculty, and administrators) and later discussing the challenges of defining social justice values, I have chosen to not elaborate further on these finer distinctions of degree, type, or audience. I do not pursue this inquiry in this Article both for the sake of simplicity and because I believe the fundamental premises of the Article work equally well if we decide it is worthwhile to subsequently refine the lines of which clinics fall within and without the values-ambiguous designation.

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[33] For discussion of the sense in which this perception could be seen as accurate, *see infra* Part III(A).

[34] Jack Stripling, *Why Is an Arizona State University Law Clinic Defending Kari Lake?*, Wash. Post (Sept. 30, 2023), https://www.washingtonpost.com/education/2023/09/30/arizona-state-kari-lake-lawsuit-defamation/.

Another difficulty of using the term values-ambiguous is that it doesn't lend itself easily to a counterpart or a term to describe those clinics that are not values-ambiguous. For that I will use the term values-presumed, although it is not an exact opposite to values-ambiguous. By values-presumed, again, I do not mean that the clinic necessarily does have a values commitment. Nor do I mean that we presume we know which specific version of social justice values the clinic might be advancing. I simply mean that, absent information to the contrary, we generally will presume that these clinics operate in service of social justice values.

Having thus explained the use of the term values-ambiguous I will conclude with the note that in this Article I will often by necessity use the groups of transactional and IP/T clinics to pursue a point. This practice will particularly be used when I am summarizing or engaging with existing literature or data sources, as I do in portions of the next sections.

3. The Growth of Values-Ambiguous Clinics

This Article asserts that there has been a trend toward values-ambiguous clinics, in the sense that they have grown in number more rapidly than other types of clinics. Insofar as the values-ambiguous category overlaps with transactional, entrepreneurial or IP/T clinics, a growth trend has been well documented in the existing literature.[35] While authors are not always in exact agreement about numbers, there is widespread agreement that transactional and IP/T clinics have "grown exponentially."[36] Relatedly, there is an abundance of scholarship declaring a more general trend away from certain types of clinics that are presumed to be very strongly identified with a social justice mission. Authors have noted, for instance, the proliferation of clinical "programs that replicate the more elite elements of private and public practice"

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[35] *See, e.g.*, Kotkin, *supra* note 8, at 302–03; Susan R. Jones & Jacqueline Lainez, *Enriching the Law School Curriculum: The Rise of Transactional Legal Clinics in U.S. Schools*, 43 WASH. U. J.L. & POL'Y 85, 92–96 (2013); Kosuri, *supra* note 18, at 10; Tremblay, *supra* note 16, at 379; Dahl & Phillips, *supra* note 2, at 99; Ball, *supra* note 5, at 10; Kidder, *supra* note 15, at 84–85.

[36] Jones & Lainez, *supra* note 35, at 92–93. For instance, it has been noted that, between 2007-2008 and 2016-2017, the percentage of schools reporting offering a "entrepreneur/start-up/small business" clinic rose from 0% to 29%, and that the percentage reporting offering an intellectual property clinic rose from 11% to 23%. Kotkin, *supra* note 8, at 302–03. Kosuri notes that as of 2011 "there are approximately 80 live-client transactional clinics spread over 200 law schools in the U.S." Kosuri, *supra* note 18, at 10. Tremblay similarly notes that "[b]y 2014, virtually every law school in the country offered at least one, and often more than one, clinic focusing on for-profit business enterprises, nonprofits, CED, or similar transactional practice." Tremblay, *supra* note 16, at 379. Relatedly, Dahl and Phillips's study of intellectual property and technology clinics described them as "one of the fastest growing substantive areas of focus for new law school clinics." Dahl & Phillips, *supra* note 2, at 99 (citing Robert R. Kuehn & David A. Santacroce, *2013–14 Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC. (2014)).

rather than "classic legal services style practice"[37] and the rise of "special and distinct areas of practice clinics" rather than "classic legal aid or general practice style legal services in-house clinics."[38]

While none of these categories of inquiry capture the exact question addressed by this Article, they do provide an important starting point, both because they discuss categories commonly associated with values-ambiguity and because they demonstrate a widespread perception and discussion of trends that may contribute to the division that will be discussed in Part II of this Article. In looking to data to shed additional light on the subject of values-ambiguous clinics, I thus begin by describing the methodology and data sources used in this inquiry and then turn to discussion of trends in the growth values-ambiguous clinics.

a. Methodology and Data Sources

The following analysis is based on a dataset that originated with a selection of raw survey data from the Center for the Study of Applied Legal Education CSALE.[39] I then supplemented these data with information gathered through additional research and altered it to resolve reporting discrepancies.[40] To understand the need for this new dataset and why it may provide slightly different results from those previously reported, it is necessary to first describe the CSALE data and some of the challenges of using them to describe trends in types of clinics offered.

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37 Kotkin, *supra* note 8, at 302.

38 Kidder, *supra* note 15, at 84–85. Additionally, there is scholarship documenting a growth of the presence of these types of clinics not just in numbers but also in prominence within academic literature discussing clinics. Transactional clinician Paul Tremblay, after conducting a review of the published issues of the Clinical Law Review, observes that, although writing about transactional topics is minimal, articles covering these subjects have "increased demonstrably between 1994 and 2019." Tremblay, *supra* note 16, at 375–76.

39 The 12 individual CSALE raw datasets used as inputs are: *2007–08 Master Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2008); *2010–11 Master Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2011); *2013–14 Master Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2014); *2016–17 Master Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2017); *2019–20 Master Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2020); *2022–23 Master Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2023); *2007 Sub-Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2007); *2010 Sub-Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2010); *2013 Sub-Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2013); *2016 Sub-Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2016); *2019 Sub-Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2019); *2022 Sub-Survey Responses*, Ctr. for the Study of Applied Legal Educ. (2023). All datasets on file with author, and available by request from CSALE.

40 Records of all specific inputs and alteration to data, on file with author. For use of this technique *see* Kosuri, *supra* note 18, at 10, observing that there is not a definitive way of "counting" transactional clinics and noting his reliance on calling schools as well as using CSALE data. Praveen Kosuri and Bernice Grant are currently in the process of creating an updated database of transactional clinics using a similar technique.

CSALE has collected data in six biannual survey periods, beginning in 2007-2008, and ending in 2022-23.[41] Following each of these periods CSALE publishes a summary of some survey data and also makes selections of raw data for each survey period available by request.[42] The raw data are available in two primary forms, reflecting the two types of surveys CSALE issues: "program level" data, where one person describes the entire set of experiential and clinical offerings at a school, and "individual level" data, where a representative of an individual externship or clinic reports on behalf of just that course.[43] The program level data are more complete in the sense that a much higher percentage of schools respond to the survey, while the individual level data are more detailed, in the sense that each respondent provides more types of information about that clinic. Both types of data, however, reflect inevitable reporting discrepancies that make them difficult to use as a source of quantitative data that demonstrate the magnitude of a shift in trends of how many of a certain "type" of clinic is being offered over years. These issues include the following: many representatives do not report data in all periods; program level representatives often describe clinic types differently from individual representatives; program level representatives inconsistently report total numbers of clinics year over year; program level and individual level respondents inconsistently describe clinic type; and survey categories change over time.[44]

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41 For ease of discussion, I will henceforth refer to the survey period by the initial year only. For instance, I will describe the 2007–08 survey period as "the 2007 survey period."

42 Some authors who report trends use the published summaries, and others appear to use raw data. The potential issues described below are reflected in both sources.

43 Additional data beyond what I describe is collected. Note also that what I call "program level data" CSALE calls "Master Survey Responses," and what I call "individual data" CSALE calls "Sub-Survey Responses."

44 The reporting of my own school, the University of Georgia School of Law, provides an example of these difficulties. A program level representative reported the total number of clinics offered, and the type of clinic offered in every survey period, and most individual directors reported in every survey period as well. However, in one year a program level representative input the total number of experiential offerings where the survey requested the total number of in-house clinics, and in another year a program representative described all of the kinds of work each clinic did, rather than assigning each clinic to a "type." These two entries made it look like in one year UGA Law had an increase of nine new clinics, and that in another year we had a CED, a transactional, and an entrepreneurship clinic. Neither of these were true. My own individual director level responses were similarly problematic. In one year I failed to report at all, in two years I described my clinic as a transactional clinic, and then I switched to describing it as an entrepreneurship clinic for two surveys after that. Uncorrected, it would appear that UGA Law created a new entrepreneurship clinic. I know that I simply was inconsistent in my reporting and conflicted about how to describe my clinic, and I apparently made different choices each year. I say this not to disparage myself or my school – both produced an above average set of survey responses. I say it to illustrate why I felt it necessary to create a new dataset and to identify and resolve discrepancies where possible.

In order to identify errors, I first narrowed the list of data I was looking at to include only law schools that were ABA accredited in 2023, and I only looked at raw data describing in-house clinics, and reports from program representatives or clinic directors. I then normalized the data categories across all survey periods and made 190 individual datasets that included all available information for each school across all 12 CSALE datasets.[45] Once these data were grouped by school, I identified apparent pattern discrepancies in program level data, for instance large jumps in numbers of clinics reported or a clinic type that appeared to be oscillating between two different categorizations. For each identified discrepancy, I attempted to resolve the concern by first cross-checking individual level CSALE data; then looking for additional information on the school's website, from news sources or from other means of reporting about the status or creation of a clinic; and then by contacting a representative of the school for additional information.[46] Where I was unable to resolve the discrepancy with additional information, I relied on a set of protocols for correcting the outlying data, or I eliminated the data from the final sample.[47] I then reordered data into a new dataset. Unless otherwise noted, this is the dataset I use below.[48]

I am certain that there remain many inaccuracies in this dataset, and I hope to further refine and supplement it for future work, but I believe it is sufficient to support the claims I make in this Article.[49]

b. Defining Categories

As noted above, there is considerable variability in the way commentators have referenced clinic type when discussing clinics that are perceived as not having a social justice commitment. IP/T clinics, entrepreneurship clinics, and transactional clinics are the most commonly discussed.

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45 For example, if any clinic type was offered as an option in any year I included it as a data category for every year. I then recategorized to reflect these new options. For instance, if a clinic self-described as "other: entrepreneurship" in a year where selecting entrepreneurship wasn't an option, I added it to the "entrepreneurship" column.

46 Documentation of sources for altered data on file with author. All described data supplementation and alteration was only completed for the total number of clinics reported, and for the types of clinics discussed below. I thus did not, for instance, attempt to identify discrepancies in the reported distribution of Immigration Clinics or Veterans Legal Clinics.

47 Documentation of each identified discrepancy and of each resolved discrepancy on file with author.

48 Dataset on file with author.

49 Discrepancies that I know to remain stem from sources that include schools describing what counts as an "in-house clinic" differently (e.g. what one school describes as an in-house clinic another school might describe as an externship) and schools grouping clinics differently (e.g. a startup clinic and a technology clinic being collectively described as one Innovation Clinic).

In looking at growth trends in values-ambiguous clinics, I include all clinics that identify as IP/T clinics and entrepreneurship clinics in the category of values-ambiguous clinics. When it comes to the more general category of "transactional clinics" however, it becomes necessary to confront the delineation between what I argue values-presumed transactional clinics and what I argue are values-ambiguous transactional clinics. There is of course no way to draw this line precisely, dealing as we are with complex questions of perception, so I simply will draw it transparently.

In this Article, in addition to entrepreneurship and IP/T clinics, I include the following transactional clinics in the "values-ambiguous" category: business law clinics and a collection of specialty clinics such as entertainment law clinics. I do not include clinics that are described as transactional CED clinics. Where a clinic might be simultaneously described as both a business law and a community economic development clinic, for instance a "Small Business and Nonprofit Clinic" or a "Business & Community Clinic," I included it in the values-ambiguous category, but where it is described only as nonprofit or community development clinic, I did not.[50]

To summarize, in the category of values-ambiguous clinics I include: IP/T, entrepreneurship, a relatively small number of securities law clinics, and those transactional clinics that are not exclusively described as nonprofit or community economic development clinics.[51]

c. Summary based on Data

At the most general level, the data confirm that values-ambiguous clinics are on the rise, both in absolute numbers, and as a percentage of all clinics. Values-ambiguous clinics have quadrupled in absolute number from 2007-2022, while the percentage of all clinics that are values-ambiguous has roughly doubled in the same time period. [52]

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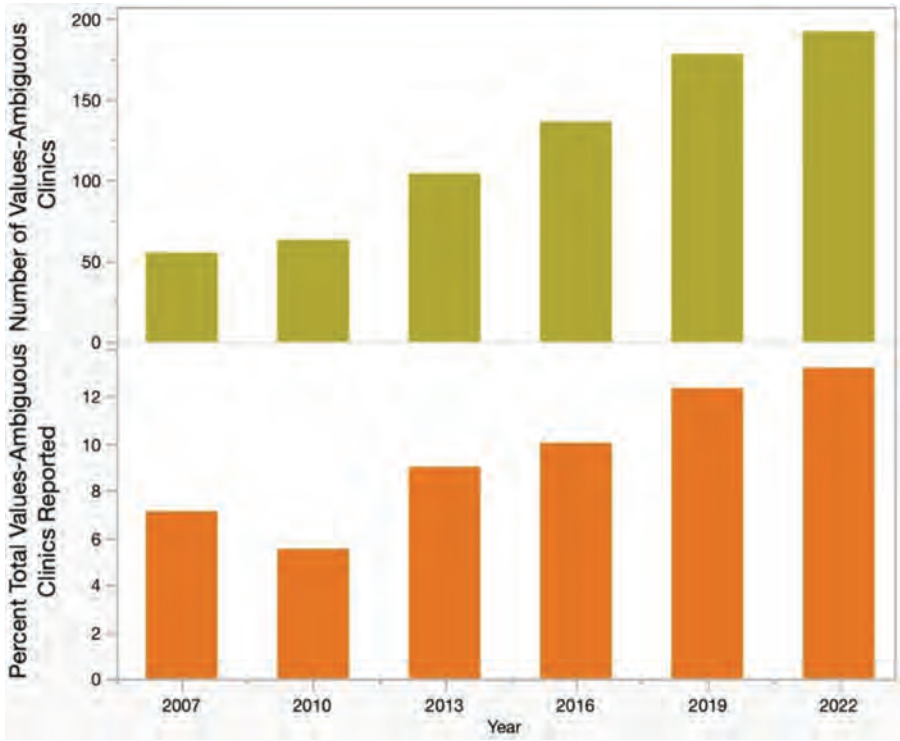
[50] Absent additional information, I included all clinics in the transactional category where a program representative classified a clinic that was transactional (in the sense of a transactional practice type) as "transactional" given the binary choice of "transactional" or "community economic development."

[51] For this Article I did not separately validate these chosen categories as being values-ambiguous, in the sense that I did not, for instance, ask a selection of people to report whether or not they presumed that these clinics had foundational values commitments or what degree of confidence they had in this presumption, etc.

[52] In 2007 there were 55 values-ambiguous clinics, while in 2022 there were 192. The percentage of all reporting clinics that were values-ambiguous clinics was 7.1% in 2007 and 13.2% in 2022. This general trend is not dramatically different if we exclude CED clinics from the category of values-ambiguous, as I have, or if we include them. However CED clinics have not experienced growth of the same magnitude. In 2007 there were 36 CED clinics, while in 2022 there were 54. The percentage of all reporting clinics that were CED clinics was 4.7% in 2007, while in 2022 the percentage was only 3.7%.



This growth trend is largely caused by the addition of entrepreneurship and IP/T clinics, rather than by the addition of general transactional clinics.[53] IP/T clinics made a relatively steady climb in number and percentage over this period, while entrepreneurship clinics had a significant "jump" between the 2017 and 2019 survey periods, followed by much more modest growth after 2019.[54]

Beyond simply establishing an accurate baseline for purposes of the broader discussion, which is my primary intention, these data suggest many interesting questions, most of which are beyond the scope of the current inquiry.[55] Before leaving the data behind however, I want to

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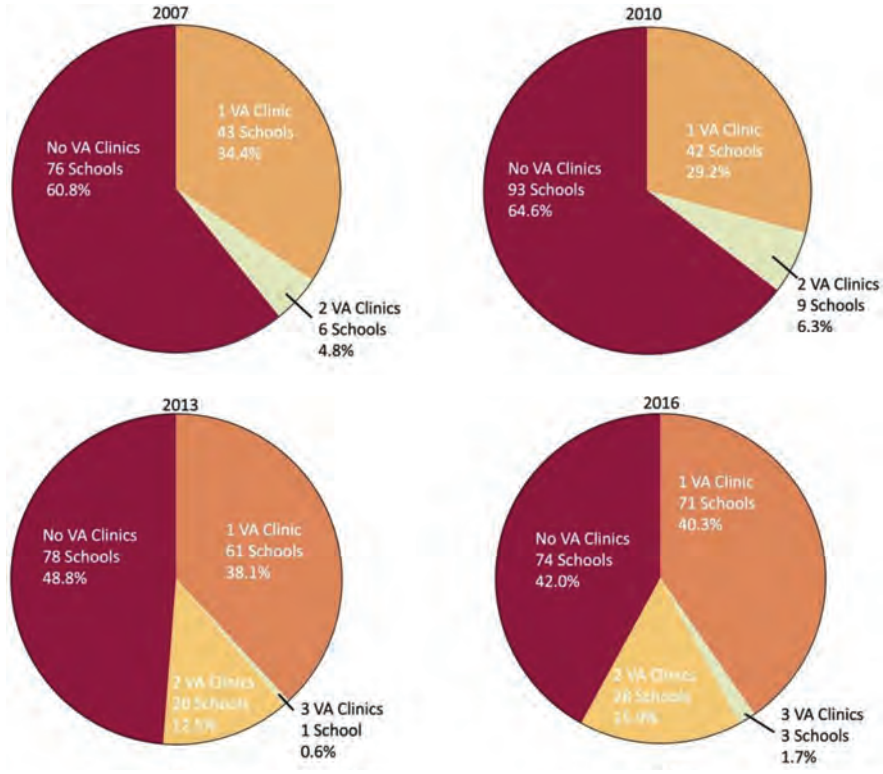
[53] Values-ambiguous transactional clinics, unlike entrepreneurship and IP/T clinics, have experienced only very slight growth as a percentage of reporting clinics over the survey periods. Entrepreneurship clinics grew from less than 1% in 2007 to 4.8% in 2022; IP/T grew from 1.9% in 2007 to 4.9% in 2022. Transactional clinics grew from 2.9% in 2007 to 3% in 2022. For a much more detailed and nuanced picture of the growth of IP/T clinics based on survey data, *see* Dahl & Phillips, *supra* note 2.

[54] Some but not all of the "jump"can be explained by the fact that in 2019 the CSALE survey added entrepreneurship as a named category that respondents could select for the question of clinic type. Previously, a respondent would have to write this category in (which some did) or choose another classification such as transactional (which others did).

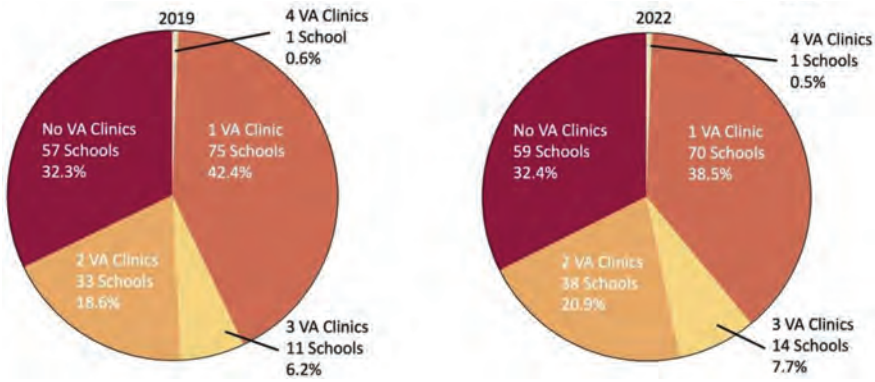
[55] For instance, we might also wish to know to what extent are certain clinic types supplanting other clinic types, to what extent are they simply supplementing them, and what is driving schools to add values-ambiguous clinics.

briefly explore two additional qualities of this growth trend that may be relevant to this discussion. The first of these, demonstrated above, is that, growth notwithstanding, it obviously remains the case that values-ambiguous clinics are very much in the minority of all clinics in terms of "market share," representing at their highest point only 13.2% of all reported clinical offerings.

Secondly, as I show below, the growth of values-ambiguous clinics has generally been dispersed, in the sense that it has been driven by many schools adding one or two values-ambiguous clinics, rather than a smaller number of schools adding many values-ambiguous clinics. The following graphs show the patterns of growth of values-ambiguous clinics described above. Each graph depicts a survey year, and each segment identifies the raw number of schools, and the percent of total of schools, that have the specified number of values-ambiguous clinics. [56]



[56] For depicting the dispersion of growth among schools I used a slightly different sample of the dataset than I used above. I again included only law schools that were ABA accredited in 2023, but here I further limited the data to depict only those schools that had one or more clinic of any type in the survey period.



As these graphs show, the number of values-ambiguous clinics has grown, and the number of schools that offer one or more values-ambiguous clinics has grown as well. However, the percentage of schools offering only one values-ambiguous clinic remains high, representing by far the largest category (other than schools with no values-ambiguous clinics at all) in each of the survey periods. A full exploration of the implications of this type of growth is beyond the scope of this paper, as is a more nuanced look at what populates each of the categories depicted. However, this basic depiction of both the overall growth of values-ambiguous clinics and the dispersed nature of the growth of values-ambiguous clinics may help illuminate the following discussion.

As shown above, values-ambiguous clinics are very much in the minority in the broader clinical community, are relatively isolated within most individual school, and are often newer and less established than their values-presumed counterparts. These qualities may be useful in understanding the nature of the divide and the proposed discussions in Parts II and III of this Article.

II. The Divide

Part I of this Article discussed terminolgy and growth trends related to values-ambiguous clinics. In Part II, I turn to a discussion of what I believe is a problematic, and under-discussed, divide between clinicians that centers around perceptions of values commitments. I begin with another segment of the vignette, and then present some themes related to the division.

A. The Divide Story

1. The Traditional Clinician

After the initial shock upon learning about the new business law clinic wore off, the Traditional Clinician was determined to keep an

open mind. She does not think transactional legal help is what is most needed to address the immediate needs in their community, nor does she think transactional skills training is what law students most critically need. But she has some friends who teach community economic development clinics at other schools, so she knows transactional clinics can be allies in a social justice mission, and she is cautiously optimistic that this will be the case at her school as well.

However, once the new business law clinic has been operating at her school for a while, she starts to think she was justified in her doubts. This business law clinic provides free legal services to relatively privileged entrepreneurs and business owners, including university students and even faculty members, who want help with tasks like forming corporations, registering trademarks, and drafting and reviewing investment contracts.

She is of course aware that this kind of transactional work is something that many students—including her own clinic students—will go on to do in their future legal careers, but do they really need a clinic dedicated to this? She finds it disconcerting to see so much clinic work dedicated to the pursuit of private gain and with no apparent consideration of if these services are going to those most in need. The director of the transactional clinic doesn't seem to even make the smallest concession to social justice, rejecting even the idea of having strict income limits as part of the client intake process, because, she says, she wants students to have the chance to work on a "wide range of deals." Does she really think that clinical education can be reduced to providing corporate law skills-training to law students who just want a leg up in their lucrative "BigLaw" jobs after graduation?

The Traditional Clinician can't help but notice that the director of the transactional clinic doesn't attend much of the school's clinic-wide programming or help with the many public interest committees and events the clinical faculty coordinates. If the transactional clinician is trying to figure out how to become integrated in their community, it sure doesn't show. When all the clinicians at their law school go together to the annual clinical conference, the director of the transactional clinic again seems completely unengaged. For the Traditional Clinician and her other colleagues, the clinical conference is a family reunion, an affirmation, a source of inspiration, and a place they go to find the information, community, and support they need to push forward through the many challenges the year will bring.

It all seems lost on the director of the transactional clinic, who (she couldn't help but notice) was chatting with other corporate lawyers in the lobby during the keynote address. The Traditional Clinician doesn't want to judge, but she privately thinks the director of the transactional clinic is probably the person who *most* needed to hear that impassioned talk! The speech had been honoring a preeminent clinician who was

retiring and reminding the audience of their responsibility to carry her social justice work forward.

To add insult to injury, on the last day of the conference the Traditional Clinician received an email from the law school administration, sent to all of the clinical faculty at their school, announcing that they have decided to start a new intellectual property clinic. The email describes the intellectual property clinic as "building on the successes of the Business Law Clinic" and as a way to help students develop their "professional identity" and "get practice ready."

The Traditional Clinician tries to see the positive in this—more clinics are a good thing, aren't they? But she's troubled by both the reality of this new clinic and the messaging around it, which seems to affirm a vision of clinics as being simply the "trade school" portion of law school. More importantly, law students have the rest of their lives to practice law for the "haves," and with more and more clinics that don't challenge them to think deeply about social justice they might never understand how the law can be a tool for meaningful social change.

It starts to feel like the same hierarchy that exists in the practice of law: the business lawyers are winning the day; and the poverty lawyers are doing all the hard work and losing status and losing ground.

How could this be happening here in the clinical program, the very place where reflecting on inequality and on the function of law is supposed to be happening?

2. The Transactional Clinician

After the initial shock upon learning about her colleagues' doubts about her clinic wears off, the Traditional Clinician is determined to not get defensive. She hates the thought of her colleagues having a low opinion of her, and she can see how they might not understand the way her work can have broad and important social impacts. But the more she thinks about it, the more conflicted she becomes. The Transactional Clinician actually isn't sure if the version of social justice her colleagues seem to understand really is what she is—or should be—doing. She's torn between wanting to defend herself by explaining all the good that has come of her clinic's work and wanting to question what is starting to seem like a set of unspoken rules of clinical education.

Is the pursuit of a specific vision of social justice, not hands on practical learning, what is essential to a law clinic? Is there room for versions of social justice that aren't explicitly aligned with the political left? Why is it that only the clinical faculty, and not the doctrinal faculty, are supposed to be doing this social justice work? How is she supposed to know or explain which of her client projects really should be seen as "social justice" work? And what exactly do people mean by social justice anyway?

One thing she is clear on though is that all these questions can't be resolved by something as simple as using strict income limits for client selection. She knows a few other traditional clinics don't use them either so that can't be the problem. And she does help indigent entrepreneurs, she just doesn't exclusively do this work because its often not the best practical training for her students. So many transactions they need to know about only really happen when there is some money at stake, and they need to understand the mechanics of a wide range of deals. She's also not positive the work she does for the most under-resourced clients is her most important work in terms of impact on society or on students: isn't it the for-profit clients who have enough capital to get things off the ground (if not a budget for all the legal services needed) and who are actually building viable businesses and potentially contributing to the economic health of the area? And isn't it the work that actually results in real-world outcomes for a viable business where students get to experience the power of law and their responsibility to that ideal? Of course she wants to do social good and also to be seen as doing social good, but it doesn't seem so simple.

She knows she isn't winning any popularity contests with the other clinicians at her law school and she wants to get more engaged, but they sure don't make it easy. She doesn't attend a clinic-wide session on trauma-informed litigation techniques because she is busy and it is not something she understands as directly relevant to her work. And she doesn't volunteer for any public interest award committee work or to assist with public interest events because they seem to have less to do with experiential legal education generally and more to do with a specific vision of a litigation-based, poverty-centered social justice lawyering movement. She honestly isn't sure why these committees and events are the clinical program's responsibility anyway.

When she joins her clinical colleagues at their favorite clinical conference, she is disappointed to find that everything from the conference theme, to the keynote speech topic, to the kind of professional awards given, to the scholarship discussed seem to be more of the same. Everyone seems to be imagining a shared profession that she does not see herself in. She can see her colleagues feel like they are at a family reunion, but she feels more like she's at a middle school dance. She starts to notice that some people who have been teaching clinics like hers for a while also seem to be hanging back from the full group conversations. They invite her to join them for a chat during the keynote address, which she wasn't going to attend anyway, and when she shares her quandary with them they nod knowingly and tell her not to let it bother her. They say she should just join them at the Transactional Clinical Conference, where she'll be understood. She does not want to give up on participating in what she understands to be her broader profession, but she also isn't sure how to proceed.

On the last day of the conference, however, she receives an email containing some great news: the law school administration – citing the successes of her clinic – announced that they are planning to add an IP clinic to the program offerings! In addition to being excited about the new clinic, she's excited to see that the administration isn't just describing the need for this clinic in terms of social justice, they are describing it in terms of student's educational needs to develop their "professional identity" and to "get practice ready." She couldn't agree more. She knows one more clinic won't do much to address the backlog of demand from students or clients but this is a step in the right direction. Maybe it will also help her colleagues appreciate the contributions of her kind of clinical work. But she still wonders why that's something she has to defend. Shouldn't that be obvious here in the clinical program, the very place where learning practical lawyering skills is supposed to be happening?

B. The Divide

While I suspect that some aspects of the above vignette segments will be recognizable to readers of this article, and many are indeed based on trends documented in existing literature,[57] division or tension between values-ambiguous (by any name) clinicians and other clinicians is rarely explicitly discussed in academic literature in any sustained fashion.[58] There are a few exceptions to this phenomenon, but perhaps even more telling are the ways in which the literature does not directly or thoroughly explore this subject. In particular, very little scholarship that is written by non-transactional or IP/T clinicians describes a division

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[57] *E.g.*, Darian M. Ibrahim, *How Do Start-Ups Obtain Their Legal Services?*, 2012 Wis. L. Rev. 333, 335 (2012) (describing the difficulty in obtaining legal services for newly forming businesses); Rachel S. Arnow-Richman, *Employment As Transaction*, 39 Seton Hall L. Rev. 447, 447–50 (2009) (describing the dearth of transactional offerings); Robert R. Statchen, *Clinicians, Practitioners, and Scribes: Drafting Client Work Product in a Small Business Clinic*, 56 N.Y.L. Sch. L. Rev. 233 (2012) (describing the legal drafting work done in business law clinics); Paul R Tremblay, *Social Justice Implications for "Retail" CED*, 27 J. Affordable Hous. & Cmty. Dev. L. 503 (2019) (describing different ways different individuals might understand social justice in different settings); Danielle R. Cover, *Good Grief*, 22 Clinical L. Rev. 55 (2015) (describing burnout associated with social justice lawyering); Nantiya Ryan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 Hastings Women's L.J. 3 (2020) (describing status hierarchies in legal education); Eric J. Gouvin, *Teaching Business Lawyering Skills in Law Schools: A Candid Assessment of Challenges and Some Suggestions for Moving Ahead*, 78 UMKC L. Rev. 429, 430–31 (2009) (describing the tendency to focus on litigation skills although a majority of students do not go on to become litigators).

[58] I want to emphasize again that these stories are fictional, do not reflect my own career trajectory or my own experience at UGA Law, and that I have generally emphasized tensions to highlight a dichotomy.

or expresses concern about growth trends regarding values-ambiguous clinics.[59]

On the other hand, a large body of writing from transactional and IP/T clinicians either explicitly references a divide or writes in response to an assumed or perceived divide. In other words, most of the discussion of the existence of an issue comes from transactional or IP/T clinicians themselves. These expressions range from mild observations that someone else has a concern, to more explicit warnings in the face of a perceived issue. Transactional clinician Paul Tremblay for instance gently notes "the uneasy relationship between teaching small business law in a clinical setting and the social justice mission of clinical teaching generally" and "the not-infrequent curiosity about whether [small business and startup] practice has any, or any significant, social justice value."[60] Transactional clinician Patience A. Crowder similarly describes the "perennial question chasing transactional legal clinics: whether transactional law clinics are truly grounded in public service, social justice goals, and service delivery."[61]

Cynthia Dahl and Victoria Phillips, directors of intellectual property clinics, more directly note that, because of increasing numbers of transactional and IP/T clinics "some commentators are expressing concern about the future of clinical education . . . and its underlying social justice values."[62] They are specifically writing to reassure those who have these concerns, but despite the fact that these concerns are understood by them to be (and I believe are) quite pervasive, they weren't at that time able to cite any commentators that explicitly expressed concern about the effect of growing numbers of certain types of clinics on the future of clinical legal education.[63] Even when transactional clinicians occasionally have written in defense of not having a traditional social justice mission in certain types of clinics, they are writing with an understanding that this stance is controversial, but can't cite much by way of direct criticism. Perhaps unsurprisingly then, this scholarship has also not subsequently garnered much explicit push-back in scholarship.[64]

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59 *But see* Kotkin, *supra* note 8.

60 Tremblay, *supra* note 16, at 388–89.

61 Crowder, *supra* note 7, at 417.

62 Dahl & Phillips, *supra* note 2, at 98.

63 *Id.* at 98 n.11, citing Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 Clinical L. Rev. 355, 356 (2008) (Ashar argues generally that the dominant case-centered, skill-centered clinic model is ineffective in serving the interests of poor people and proposes an alternative model centered on collective mobilization.) *See also* John O. Calmore, *"Chasing the Wind": Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization*, 37 Loy. L.A. L. Rev. 1167 (2004) (discussing the need for professional re-socialization).

64 Although these articles are regularly cited, these points do not seem to have been directly or robustly engaged with.

It is possible that this relative lack of scholarship can all simply be explained by the plentiful nature of a different type of scholarship. There is of course a tremendous body of scholarship discussing the primary importance of social justice to clinical education generally, some of which describes or decries an apparent general trend toward placing pedagogical goals and skills development above progressive values-based missions in all types of clinics.[65] Even when these articles do not directly mention transactional, IP/T, or other frequently values-ambiguous clinic practice-types (and they usually do not), the inference that a values-ambiguous clinic would be frowned upon according to the criteria is abundantly clear.

Turning to the exceptions, the authors who do explicitly decry the trends of what I am calling values-ambiguous clinics, their concerns are often expressed strongly. For instance, Etienne C. Toussaint, notes "the dangers of neoliberalism are visible in the growing popularity of transactional law clinics that prepare law students for venture capital and start-up law practice . . . such clinics can undermine the *public* purpose of law school if they fail to engage the experiences of historically marginalized populations differentiated across racial and class divides."[66] In the only article I am aware of where concern regarding the rise of values-ambiguous clinics is expressed in any direct or sustained way, Minna Kotkin makes a powerful argument that the growth trend in transactional clinics is problematic because it replicates hierarchies found within the practice of law and further erodes "the poverty law foundation of clinical education, and its emphasis on values—local community empowerment, social justice and law reform."[67]

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65 For the claim that clinics generally are moving toward educational goals, *see, e.g.* Nicolson et al., *supra* note 6, at 20 (noting "it is now probably true to say that more law clinics are oriented toward educating students than serving the community."). For a discussion of criticisms of this trend, *see infra* Part III. There is a related conversation, that I do not directly engage with here, regarding whether certain kinds of "direct service" or "retail" service providers are less allied with social justice than those who engage in "representative" or other types of lawyers. *See, e.g.*, Rebecca Sharpless, *More Than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy*, 19 Clinical L. Rev. 347, 347 (2012) (noting the problematic pattern in scholarship where "direct service attorneys—those who engage in the representation of low-income individuals—serve as a foil for better social justice lawyers.").

66 Toussaint, *supra* note 23, at 11–12. Toussiant also makes a distinction between CED and clinics that I would describe as values-ambiguous. He describes business law clinics as being distinct from "so-called Community Development Law Clinics that teach similar transactional lawyering skills but focus on the needs of community-based and marginalized clients." *Id.* at 11 n.43.

67 Kotkin, *supra* note 8, at 288. More frequently, rather than directly advancing a direct claim that values-ambiguous clinics are problematic, clinicians tend to write as though the practice areas that primarily comprise this designation simply don't exist within the clinical universe. Paul Tremblay, after analyzing twenty plus years of scholarship in the Clinical Law Review, notes that this tendency to ignore or exclude can be seen in everything from the relatively small numbers of articles written about transactional subjects to the way the broad term lawyering is used in the literature. He notes of clinical scholarship, "it appears that

That criticisms exist does not necessarily mean that a division does, but despite the relative dearth of writing directly addressing this issue, I believe the existence of a division is an open secret—one that scholars who direct values-ambiguous clinics are most likely to indicate in scholarship. Transactional Clinician Praveen Kosuri explicitly describes a division between clinicians, wondering if the friction between clinics that are and are not seen as mission driven has reached the point that "the clinical community has outgrown a single house"[68] and stating that if clinical programs do not proactively reconcile this, they "risk a schism" brought about by outside pressure from law school administrators.[69] Kosuri further notes his belief that the clinicians who founded the modern legal movement are threatening to destroy clinics by trying to exclude clinics that don't share their version of social justice. Similarly, transactional clinician Steve Reed opines of a divide and its significance:

> The differences in opinion manifest in small ways: a conversation after a clinical faculty meeting where someone quickly changes the subject to avoid unpleasantness, a public email exchange that flames briefly and then is forgotten, a conference planning committee meeting that strikes an "everyone is equal" compromise. But we must make no mistake: when the current generation overseeing legal clinics retires, the most powerful advocates of the public interest agenda will be gone.[70]

Spoken or not, explicit or implied, confronted or ignored, some sort of division between values-ambiguous and values-presumed clinics appears to be alive and well. While the division appears to be pervasive and persistent, I believe it is not inevitable, and need not be permanent. The tendency in existing scholarship, discussed in the next section of this Article, has been to imagine solutions in terms of suggesting that transactional or IP/T clinics can or should operate or communicate differently to resolve this ambiguity. While I think this is an extremely important body of work, and while I am hopeful about a more unified and integrated future in clinical education, I argue that persisting in this manner is unlikely to lead to the desired outcome. Rather, I think we need to collectively grapple with some of the broader definitional and purpose-related questions that values-ambiguous clinics implicate.

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when writers, even in recent years, write about *lawyering* in some generalizable fashion, the examples that appear in those works tend to understand the lawyering process as advocacy, negotiation, and resolution of disputes. . . . Generic law practice seems to be understood primarily as litigating." Tremblay, *supra* note 16, at 379.

68 Kosuri, *supra* note 13, at 335 n.34.

69 *Id.* at 344.

70 Reed, *supra* note 9, at 253–54.

III. Themes and Questions

In this section, I begin by discussing, and identifying themes in, some of the existing scholarship on the relationship of social justice to transactional, IP/T, and other potentially values-ambiguous clinics. I then turn to a discussion of how values-ambiguous clinics surface several broader questions regarding how we might define social justice or other values and the many ways we might conceptualize the meaning of and relationship between skills, values, and theory when discussing the purposes of clinical education.

A. Values-ambiguous Clinics and Social Justice

To the extent that values-ambiguous clinics are comprised of clinics that are transactional, a relevant argument could be and has been made that transactional law is fundamentally, necessarily, and foundationally at odds with social justice. The essence of this argument is: to the extent one believes that capitalism is fundamentally flawed as an economic system, for instance because it is racist or otherwise "incompatible with oppressed people's welfare," then transactional lawyering "must go down with it" because "some affirmation of capitalism is an unavoidable aspect of transactional lawyering."[71] By extension, many other values-ambiguous clinics that could be said to have the tendency to affirm capitalism—for instance by assisting a wealth-seeking business with securing its legal right to exclusively profit from its intellectual property—could also fall into this category. While most would stop short of making the claim that transactional law or IP/T practices are, as an absolute matter, incompatible with social justice, the tendency to assume that transactional lawyering or IP/T law generally and social justice do not go hand in hand is prevalent. It is not surprising then that assumptions that the clinics that practice and teach these types of law are also frequently assumed to be fundamentally less compatible, if not completely incompatible, with social justice goals.

Against this backdrop, a substantial amount of careful scholarly attention has been paid to advancing some version of the claim that although certain clinics engage in a type of law that is not obviously associated with social justice or the public interest, those clinics are in fact best understood as social justice or public interest clinics. This group of scholarship is concerned with what I will call "unmasking." The essence of the argument it contains is that although a clinic might have a

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[71] Gregory E. Louis, *Bridging the Two Cultures: Toward Transactional Poverty Lawyering*, 28 Clinical L. Rev. 411, 425–26 (2022) (providing a summary of literature describing transactional law as inherently tainted by its link to capitalism and disagreeing with this premise).

practice area that is not commonly associated with the public good, at least in this case, it would be a misunderstanding to not identify them with "the good fight," as they are in fact so aligned. In other words, the issue with values-ambiguous clinics is not one of fundamental values alignment, the issue is one of optics, which can be resolved by an unmasking that reveals the true nature of the clinic as having been social justice oriented all along. Some unmasking literature makes a broader claim that most transactional or IP/T clinics are social justice aligned, some makes a narrow claim that just an individual clinic is social justice aligned, and some makes a middle ground claim that a subset of clinics with a certain mission or that employ certain methodology are social justice aligned.[72]

Susan Jones' pioneering article, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice* deserves pride of place in the unmasking literature category.[73] Jones explores the relationship between small business representation and social justice goals by describing how transactional clinics "provide much needed legal representation to low-income and underrepresented communities."[74] This article has been joined by legions of other compelling assertions, made by a group of authors who emphasize transactional clinical work's ability to help further social enterprise,[75] its compatibility with critical theory,[76] its tools for addressing income inequality, including through alternative business structures,[77] its capacity to promote social and economic justice,[78] its ability to further Black and Brown economic recovery,[79] and its centrality to addressing rural legal shortages.[80] There are numerous articles situating (some) transactional clinics in social justice traditions of "community lawyering" where transactional practice is understood as capable of producing social good by "participating in establishment of structures through which collectives might operate productively and lawfully,"[81] or in the "rebellious lawyering" traditions, where lawyers are called to "recognize

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72 *E.g.*, Jones & Lainez, *supra* note 35, at 89 (broadly claiming that "true to their social justice underpinnings, transactional clinics often serve a social justice mission.").

73 Jones, *supra* note 9.

74 *Id.* at 195–96.

75 Alicia E. Plerhoples, *Representing Social Enterprise*, 20 Clinical L. Rev. 215 (2013).

76 Ball, *supra* note 5.

77 Carmen Huertas-Noble, *Worker-Owned and Unionized Worker-Owned Cooperatives: Two Tools to Address Income Inequality*, 22 Clinical L. Rev. 325 (2016).

78 Jones, *supra* note 9; Pantin, *supra* note 9; *see also* Ball & Viswanathan, *supra* note 23, at 59–60.

79 Louis, *supra* note 71.

80 Alexandra P. Everhart Sickler, *A Rural State Perspective on Transactional Skills in Legal Curricula and Access to Economic Opportunity*, 27 J. Affordable Hous. & Cmty. Dev. L. 499 (2019).

81 Tremblay, *supra* note 16, at 380.

the importance of creating dynamic approaches to injustice… that are uniquely tailored to address social harm."[82] In their comprehensive study of IP/T clinics,[83] Dahl and Phillips undertake a direct "unmasking" effort by producing survey data to document the sense in which IP/T clinicians understand themselves to be operating social justice clinics. The goal of this effort is to allow "all clinicians to better understand the underlying goals, contributions, pedagogy and loyalty to the clinical tradition and public interest mission of Intellectual Property and Technology clinics." [84] Unmasking appears both in the context of clinical "goals"—that is, what the clinic is trying to do/accomplish/achieve—and clinical "methods"—how the clinic or clinical teacher reaches those goals."[85]

As a counterpoint to this unmasking narrative, there is also a small body of scholarship that we might call "confirming" literature. This literature, unlike the unmasking literature, states or suggests that the perception that transactional or IP/T clinics are less grounded in social justice values is accurate. The confirming literature also generally defends values-ambiguous clinics on these terms. Praveen Kosuri, for instance, generally claims that "[t]ransactional clinics' primary focus is on grounding students in fundamental transactional skills. …[and] [t]he clinicians who

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[82] Patience A. Crowder, *What's Art Got to Do with It?: A Rebellious Lawyer Mindset in Transactional Practice*, 23 Clinical L. Rev. 53, 53 (2016); Gerald Lopez, Rebellious Lawyering: One Chicano's Vision Of Progressive Law Practice (1992); Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 43 Hastings L.J. 947 (1992); Anthony V. Alfieri, *Rebellious Pedagogy and Practice*, 23 Clinical L. Rev. 5 (2016); Brian Glick, *Two, Three Many Rosas! Rebellious Lawyers and Progressive Activist Organizations*, 23 Clinical L. Rev. 611 (2017). *See generally* Alicia Alvarez et al., *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients as Trusted Neighborhood Problem Solvers*, 23 Clinical L. Rev. 577 (2017); R. Anthony Reese, *Copyright and Trademark Law and Public Interest Lawyering*, 2 UC Irvine L. Rev. 911, 918 (2012).

[83] Dahl & Phillips, *supra* note 2.

[84] *Id.* at 98.

[85] Susan Jones, for instance, generally describes the method of working with microbusinesses. Susan R. Jones, *Transactional Law, Equitable Development, and Clinical Legal Education*, 14 J. Affordable Hous. & Cmty. Dev. L. 213 (2005). Dahl and Phillips similarly present a long list of methods used by IP/T clinics they say are aligned with the traditional clinical social justice imperative including: taking on underrepresented clients; using an income cap in selection of clients; operating "with a public interest mission in mind"; conducting policy projects; seeking to stimulate regional economic growth through successful companies; working to achieve public health goals through successful medical companies; and creating jobs. Dahl & Phillips, *supra* note 2, at 120–21. Dahl and Phillips recognize that public interest may need to be defined "in slightly different ways" in Intellectual Property and Technology Clinics, including by "filling the void for legal assistance for these early stage or community entities where the traditional legal marketplace is not accessible." Id. at 104. However, they go on to note the clients—while they may not be able to afford all the legal services needed for their projects—neither are most of them correctly labeled as "disadvantaged" or "poor," nor do many of the clinics operate with an income cap. *Id.* at 131, 135–36. *See also* Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 Clinical L. Rev. 489, 492 (2013) (discussing the distinction between methods and goals).

run them are usually far removed from the social justice imperative."[86] To some extent Kosuri agrees with the unmasking literature, and he provides careful explanation of the ways in which transactional clinics can and do have social justice impacts, but he also defends the claim that "[r]egardless of the clinical context, non-social-justice-oriented clinics should be a valid offering for students."[87] Similarly, transactional clinician Steve Reed notes that his clinic focuses almost exclusively on skills development rather than social justice and expresses the opinion that "it is better to give the law students good training they can put to use in BigLaw than to try to get them interested in helping indigent clients."[88]

The answer to whether a values-ambiguous clinic (or any clinic) is in fact operating in service of social justice is of course a complicated matter, but it does seem that almost all of the academic writing done by or reflecting the perspective of transactional or IP/T clinicians that addresses questions of values expresses the belief that in one form or another, the values-ambiguous clinic is doing public good, not just private good. Even the two authors most explicitly claiming transactional clinics should not have to be oriented toward social justice, Kosuri and Reed, describe generally understanding themselves to be public interest lawyers who choose to teach in an ideologically neutral way.[89] This notwithstanding, I think it is a near certainty that some directors of values-ambiguous clinics in fact do not understand themselves as public interest or social justice lawyers. It would also not be surprising that one who had this understanding would choose not to express it in scholarship, as most people generally do not want to be perceived as anti-social justice or anti-public interest.[90]

B. The Challenges

Thus far this Article has argued that there is a divide between different clinicians largely centering around perceptions about values commitments. It has also argued that while there is a large body of scholarship defending the proposition that transactional and IP/T clinics are values-aligned with traditional clinics, the perception remains that these clinics are either entirely unconcerned with social justice or

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86 Kosuri, *supra* note 18, at 9.

87 Kosuri, *supra* note 13, at 341.

88 Reed, *supra* note 9, at 252.

89 Kosuri, *supra* note 13, at 342 ("Despite how it may appear, I believe in social justice. I even believe that law school clinics should be free to champion social justice causes. In fact, I am firmly engaged in achieving social impact through the work of my clinic—a transactional clinic at the University of Pennsylvania.").

90 *Id.* at 332 ("[N]o one wants to be perceived as against 'doing good' or helping the underprivileged.").

more concerned with skills than social justice. In some, but by no means all or most cases, this perception may also be accurate.

The tendency has been to treat this as the end of a conversation, but in the next sections of this Article, I would like to suggest some ways we might move forward. First, I discuss the challenges associated with the absence of a shared definition of social justice or other values, and then I turn to a broader discussion of clinical purposes and the ways that the relationship between skills and values have been and might be imagined. I conclude Part III with a discussion of the tension between skills and theory. In each of these sections I note how these challenging topics may be particularly highlighted or amplified by values-ambiguous clinics.

1. No Definition

One difficulty in discussing the divide between clinics that do and do not have an obvious values-commitment is that we lack an explicit, in depth, shared definition of what we might mean by social justice or other values. Although there are an abundance of articles that deal with the subject of the role of values in clinical education and that seek to explain exactly how clinics carry out these goals, the literature generally either offers brief definitions that invite further questions or assumes definitions of terms like social justice and public interest, rather than undertaking the process of explicitly defining the ways in which these values are presented.[91] The clinical community is not alone in this tendency. As noted by the philosopher Michael Novak, "whole books and treatises have been written about social justice without ever offering a definition of it. It is allowed to float in the air as if everyone will recognize an instance of it when it appears. This vagueness seems indispensable. The minute one begins to define social justice, one runs into embarrassing intellectual difficulties."[92]

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[91] *Id.* at 331 n.1 ("Social justice is rarely defined in clinical education conversations, and there is often an assumption that everyone is talking about the same thing."); Rebecca Sharpless, *supra* note 65, at 350 ("There is no settled meaning to the notion of social justice or progressive lawyering."); Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 Fordham L. Rev. 719 (2001). For use of brief definitions *see, e.g.*, Pantin, *supra* note 9, at 186 ("For purposes of my work and this Article, social justice is '[j]ustice in terms of the distribution of wealth, opportunities, and privileges within a society.' . . . Further, it is a moral principle of fairness and belief in the equal allocation of benefits among participants in an economy." (alteration in original) (citing *Social Justice*, Oxford Living Dictionaries, https://en.oxforddictionaries.com/definition/social_justice [https://perma.cc/G558-U6TJ] (last visited Jan. 21, 2017))); Nicolson et al., *supra* note 6, at 27 (adopting the definition "the fairness of health, housing, welfare, education and legal resources in society" (citing *Teaching Social Justice to Law Students through Community Service*, *in* Transforming South African Universities – Capacity Building for Historically Black Universities (Philip F. Iya, Nasila S. Rembe, & J. Baloro eds., 1999))).

[92] Michael Novak, *Defining Social Justice*, 108 First Things 11 (2000).

Those who discuss social justice or clinical values commonly point to certain descriptive attributes of a representation, for instance that the clients lack financial resources or are underrepresented, that there is a question of fundamental rights, or that there are important rights or liberty outcomes for an individual client or for society more broadly.[93] Sometimes this literature describes values in terms of tangible outcomes for a client, and sometimes it describes values in terms of access to processes, regardless of outcome.[94] Sometimes values are described in terms of outcomes for students, for instance that they are exposed to a concept or an experience of injustice; or to a particular way of thinking about the law as a tool of injustice, and sometimes values are described in terms of a general ethos, or an orientation.[95] Some articles use values words like public interest, poverty law, and social justice interchangeably while others make distinctions, for instance that by social justice they mean more than mere public interest.[96]

Because there is so much variety in the way clinical values are described, it is very difficult for a clinic that isn't already presumed to be value-aligned to demonstrate (or argue against) this commitment. The definitional ambiguity may also be associated with the accusation that social justice and other values language is being used as a mere code for expressions of left-leaning, liberal ideology, including those associated

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[93] *See, e.g.*, Tremblay, *supra* note 16, at 390 ("representing low-income clients facing serious loss of rights, liberty, and essential benefits"); Kosuri, *supra* note 13, at 331 ("'social justice' mission—that is, representation of the indigent and under-represented about poverty law issues").

[94] For discussion of the many different ways public interest and social justice have been imagined in clinical education, *see generally* Susan D. Carle, *supra* note 91, at 729 (describing how "people use the term 'public interest' law as a gloss for a wide range of sometimes contradictory lawyering categories."); David R. Esquivel, *The Identity Crisis in Public Interest Law*, 46 Duke L.J. 327 (1996). For an access to justice perspective *see, e.g.*, Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 Fordham L. Rev. 997 (2004). *See also* Tremblay, *supra* note 17, at 12.

[95] Dubin, *supra* note 4, at 1477 ("'[A] larger [clinical] goal of social justice instruction should be the learner's attainment of a level of understanding of the relationship between law and issues of social justice at both broad based and personal levels.' Clinical education serves this function by facilitating transformative experiential opportunities for exploring the meaning of justice and developing a personal sense of justice, through exposure to the impact of the legal system on subordinated persons and groups and through the deconstruction of power and privilege in the law." (second alteration in original) (quoting Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 Clinical L. Rev. 37, 43 (1995))).

[96] Carasik, *supra* note 9, at 43–44 ("The terms public interest lawyering and social justice lawyering are often used interchangeably. While there is indeed overlap between them, both terms evade easy definition and consensus. . . . I prefer to characterize them as occupying different places on the continuum of lawyering for the public good."); Stuart A. Scheingold, *Essay for the In-Print Symposium on the Myth of Moral Justice*, 4 Cardozo Pub. L. Pol'y & Ethics J. 47, 48 n.3 (2006) (Ultimately, "[w]hether the pursuit of any particular cause advances the public interest is very much in the eye of the beholder.").

with the progressive politics of the 1960s.[97] Echoes of this association can be seen in articles arguing that teaching values is problematic because it is important to be ideologically neutral or to not alienate students who have different beliefs.[98] Depending on what we mean by values (or ideology, for that matter), this framing of values teaching vs. ideological neutrality could be understood as describing a mutually exclusive pair—for instance if we mean social justice as ideologically aligned with politically left-leaning political teaching—or it could be seen as a false dichotomy—if we mean social justice as an already arguably ideologically neutral pursuit of a goal or value such as the amelioration of poverty.

I don't believe we are going to arrive at one shared definition of what we mean when we invoke words and phrases like values, social justice, and public interest, and I don't even particularly view that as a desirable outcome. Rather, I believe our collective cause would be furthered if we decreased our tendency to speak as though these terms did have generalizable, readily understood and widely agreed upon definitions when they in fact do not. Instead, we might more explicitly identify the specific concept we mean to invoke in any given conversation, and select a term that is more easily and tangibly described than these blanket terms.[99] We might further acknowledge that at times some of our many different understandings of a values commitment might not be universally applicable and might even be in conflict with each other.[100] For example, if I have my students draft a contract for an indigent client they may be promoting access to justice for an individual, but they may not be promoting economic development for a community. Conversations that encompass many different understandings of values, again, do not strike me as inherently problematic or limiting, but the habit of speaking as though there is one agreed upon understanding of values does.

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97 Susan D. Carle, *supra* note 91, at 729 (describing those who associate public interest law as "lawyering specifically with a left wing or politically progressive agenda"); Stephen Wizner, *Beyond Skills Training*, 7 Clinical L. Rev. 327, 338 (2001) (noting that the "clinical faculty has been accused by some of our non-clinical faculty colleagues of being 'mired in the sixties.'"). *But see* Baskaran and Haber, *supra* note 19, at 341 (opining that a "social justice perspective helps students lay aside personal politics.").

98 Kosuri, *supra* note 13, at 338 ("Every law student should feel welcome in a clinic regardless of ideology, background, or interest. . . . [T]acit signals may nevertheless make many students feel uncomfortable with clinics that espouse a different ideology, or worse, fear being judged by professors. Additionally, some students may still be forming their ideology; others may not have one at all. Students may be dissuaded from working in a clinic for fear that clinical faculty will dogmatically preach rather than allow students to formulate their own beliefs and values.").

99 *See, e.g.*, Tremblay, *supra* note 17, at 12 (noting transactional legal services in clinics are more suited to long-term capacity-building understandings of social justice goals than to "triage-based" understandings).

100 For examples of this, *see* Susan D. Carle, *supra* note 91; Rebecca Sharpless, *supra* note 65.

2. *The Purpose of Clinics: Values and skills*

Relatedly, there is also considerable ambiguity surrounding interpretations of the purposes of clinics. A great deal of writing has been devoted to exploring the purposes of clinical education, including in literature that discusses the historical evolution of understandings of the purposes of clinics, different ways of conceiving of clinical purposes, claims of the primacy of social justice or other values as the true purpose clinical education, and discussions of the interplay between the pursuit of social justice and skill development in the clinical setting. There is of course, again, no single agreed upon articulation of the purposes of clinical education and an abundance of options regarding how one might conceive of these purposes. Existing commentary offers us: nine goals of clinical education;[101] ten primary clinical themes with underlying value choices;[102] three waves associated with different values commitments;[103] a "loose consensus" of three broad goals of clinical education;[104] and a theory-practice spiral.[105] We also have a long list of goals such as "theory-driven preparation and advocacy," "reflective practice,"[106] and providing "substantial lawyering experience,"[107] as well as claims that "clinical education is not an amalgamation of goals, but a distinct pedagogical method."[108] The state of scholarship is perhaps best summarized by Carolyn Grose's succinct conclusion, after extensive research, that a review of existing literature did not result in a "'clear description' of the goals and methods of clinical pedagogy." [109] To dramatically oversimplify a great deal of very interesting scholarship however, the two most dominant categories of purposes discussed for clinics are those associated with skill development (generally, but not always, meaning students learning practical lawyering skills and competencies) and those

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101 Carasik, *supra* note 9, at 43–44.

102 David Barnhizer, *The University Ideal and Clinical Legal Education*, 35 N.Y.L. Sch. L. Rev. 87, 89–91, 124 (1990).

103 Margaret Martin Barry, et al., *Clinical Education for This Millennium: The Third Wave*, 7 Clinical L. Rev. 1, 12, 16–18 (2000).

104 Grose, *supra* note 85, at 493–94 ("[C]linical education has three broad goals: providing learning for transfer; exposing students to issues of social justice; and offering opportunities to practice lawyering skills.").

105 Phyllis Goldfarb, *A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education*, 75 Minn. L. Rev. 1599; Grose, *supra* note 85.

106 Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. Legal Educ. 375, 378–80 (2001).

107 A.B.A Section of Legal Education and Admissions to the Bar, ABA Standards and Rules of Proc. for Approval of L. Schs. 2023-2024 (2024), Standard 304.

108 Stephen F. Befort, *Musings on A Clinic Report: A Selective Agenda for Clinical Legal Education in the 1990s*, 75 Minn. L. Rev. 619, 624–25 (1991).

109 Grose, *supra* note 85, at 492.

associated with the pursuit of values-based goals (described in various ways, as discussed above).[110]

One interesting, embedded theme in discussions of skills and values in the existing literature is the variety in how authors imagine the *relationship* between skills and values, however defined. A substantial number of authors present skills and social justice as fundamentally compatible and mutually reinforcing, while many others imagine them as fundamentally in tension, while still others view them as being in a subordinate, instrumental relationship.[111] For the first group, those that see skills and values as mutually reinforcing, the question of tradeoffs between purposes doesn't matter as much, because you can do both. They argue for instance, that "skills training … is an essential and pervasive element nested within an approach to clinical teaching that privileges an overall understanding of the relationship between law and social change."[112] These authors describe an understanding where "the very circumstances that further valuable clinical professional competency instruction can contribute to the service mission."[113] For example, Martin Guggenheim points out that a focus on social justice is important "not only because of its effect upon clients but also because of its effect upon students" as part of skill development. [114]

Other commentators imagine the skills/values relationship very differently, describing the challenges of "the *competing* goals of providing skills training and furthering a social justice agenda" in a clinic.[115] Some have gone so far as calling it a "strain of schizophrenia" in clinical education from conflicting educational and service objectives.[116] Importantly, a conflicting relationship between values and skills is imagined in many arguments that are concerned with priority imbalance in clinical education—noting for example: "by necessity, as transferable skills training and assumption of lawyer role in individual cases has become the core

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110 Nicolson et al., *supra* note 6, at 19 ("the most common objectives [of clinics] are to enhance student education and to serve social justice.").

111 Although I am describing these in terms of different authors, as will be clear below, it is the case that many individual authors describe the purposes of clinics in more than one of these ways, for instance sometimes describing goals as competing and sometimes describing them as instrumental.

112 Ashar, *supra* note 63, at 385.

113 Dubin, *supra* note 4, at 1481.

114 Martin Guggenheim, *Fee-Generating Clinics: Can We Bear the Costs?*, 1 Clinical L. Rev. 677, 683 (1995). A similar but weaker claim is made that the two goals are compatible in the sense that if a clinic focuses on social justice, education will inevitably happen along the way. *See, e.g.*, Nicolson et al., *supra* note 6, at 20 (noting "if students provide services to the community, they will inevitably learn about the substantive law and its application, along with the skills and values applicable to law.").

115 Carasik, *supra* note 9, at 26 (emphasis added). *See also* Nicolson et al. *supra* note 6, at 19 (observing that "there is a potential and often-experienced tension between these two goals.").

116 George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. Legal Educ. 162, 186, n.108 (1974).

aim of clinical legal education, community-based advocacy has become a byproduct of clinical curricula."[117] In this understanding, "the emphasis on skills training in clinical programs has resulted in … too little [time devoted] to the ways in which lawyers can, and should, use law to pursue social justice and stimulate social reform."[118]

Still a third way of conceptualizing these goals imagines an instrumental relationship between skills and values. Skills training, in this description, should not be understood as an "end unto itself," but rather, should be understood only as a means toward the end of a values goal.[119] In this understanding, commentators ask: "what skills do students need to learn, incidental to and in order to pursue the overriding … purpose of the clinic," where the overriding purpose is "teaching law students about the ability and responsibility of lawyers to work for justice and to challenge injustice."[120] When imagined as having worth only as means to a values end, skills training that is not used in service of a values goal is useless at best and harmful at worst. As expressed by Jane Aiken:

> If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.[121]

Whether we believe skills and values goals are in mutually reinforcing, competing, or instrumental relationships matters a great deal when we are talking about values-ambiguous clinics. If we believe that they are mutually reinforcing, then we might regard a director as making an easily avoidable mistake by choosing to structure a clinic in a way

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117 Ashar, *supra* note 63, at 368 n.43.

118 Wizner, *supra* note 97, at 333. A distinction might be made, although I have not seen this articulated in this way, that there is a difference between skills generally, for instance so-called "soft-skills" or "DRAIN" skills (drafting, research, advocacy, interviewing and negotiation skills) on the one hand and more specific technical skills like how to draft a specific contract on the other. Some of this may be captured under the distinction between "skills" and "substantive law," but I suspect there is more room for fruitful discussion here. For some of the specific ways specific skills are understood by transactional clinicians, *see* Robert R. Statchen, *supra* note 57.

119 Wizner, *supra* note 97, at 338 (characterizing and agreeing with the position of William Pincus: "experiential learning and skills-training [are] seen as the means for achieving the justice goal . . . not as ends in themselves."); *see generally* William Pincus, *Concepts of Justice and of Legal Education Today*, *in* Council On Legal Education For Professional Responsibility, Clinical Education For Law Students: Essays By William Pincus, 125, 131 (1980) (speech delivered at Order of the Coif Dinner, Villanova Law School, January 15, 1971).

120 Wizner, *supra* note 97, at 338.

121 Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 Clinical L. Rev. 1, 6 n.10 (1997).

that might give short shrift to values. If there is no cost, why wouldn't we simply do both at once? If I believe that when my students draft a contract for an indigent client they will simultaneously learn about contract drafting and learn about or promote social justice, then why would I ever have them learn contract drafting skills in a context where these social justice implications are not present? Or to look at this differently, if entrepreneurship clinics provide the same skills training as community economic development clinics, but don't bring the values benefits, why do we have them at all? Or if, as the "unmasking" literature claims, some values-ambiguous clinics actually do provide values benefits, why don't we just rename them community economic development clinics to avoid the optics problem?

On the other hand, if we understand skills and values as in conflict we might see values-ambiguous clinics very differently. In this understanding, values-ambiguous clinics, or any other clinics that expend a lot of effort on skills training, might be problematic because gains for skills-training goals are losses for values goals. For instance, I might think that when I have my students write and revise a contract for an indigent client they better learn the practice skill of contract drafting, but the more time they spend on the time-consuming process of learning how to draft, the fewer clients we are able to serve, and the less social justice impact our clinic has. Conversely, others with this understanding of values and skills training as being in conflict might believe that clinics with a strong focus on values are problematic because gains for social justice goals come at the expense of student opportunities for skill development. If this was my understanding, I might imagine that if I have my students only draft contracts for indigent clients where their work will have a social justice impact, then they will have a suboptimal skill training experience. The logic here would be that this will preclude them from working on transactions that are very good for skill development but that only happen when the parties to the transaction have more resources.[122]

And finally, if we understand skills goals as not being valid as independent goals at all, but only as having merit if they are pursued in service of values goals, we might have a still different reaction to values-ambiguous clinics. Here we are not really assessing the relationship between two different possible goals, we are instead saying that social justice is the only proper goal and that skills training is an instrument we might use to obtain that goal. With this understanding, a

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[122] *See, e.g.*, Reed, *supra* note 9, at 250–51 ("I suppose one could, theoretically, only represent people who do not have any capital, but in that case the practical training aspect of our transactional clinic would suffer. If work closer in style and substance to BigLaw work will yield the kind of training that will best prepare students for their future, then a better capitalized business with more complex legal needs better suits our substantive goals.").

values-ambiguous clinic would be greeted with considerable suspicion if not outright hostility. For instance, if this was my understanding, I might imagine that if I have my students draft contracts for clients where their work will not have a social justice impact, or where I do not show them its social justice impact, then the time I have spent on contract drafting skills training is at best purposeless and a waste of a rare opportunity to open their eyes to the relationship of law and justice. At worst, in this view my work is perpetuating a harm—teaching students to become more skilled in using the law as an instrument for private gain rather than public good.

As with the discussion of the definition of values and social justice, the point is again not that we must agree on the question of whether values and skills goals are compatible with, in conflict with, or subordinate to one another. The point is also not that we must each individually adopt only one understanding of the relationship of these goals that applies in every situation. Rather, the point is that we are stymied when we proceed as though we have one shared, static, self-evident understanding of the relationship between skills and values when we in fact do not.

The presence of values-ambiguous clinics highlights these discrepancies of understanding and offers us an opportunity to explore further. If we don't know whether a clinic is oriented toward any values goals at all, we are confronted with broader questions of understanding how it fits with any purpose and whether that purpose might be independently valid. We thus might imagine the values-ambiguous clinic as being in need of "unmasking," in need of additional values orientation, or as being an active threat to justice. Some of the division between clinicians may stem from differing implicit assumptions about the relationship between values and skills. To the extent this is the case, the division may be ameliorated if we can distinguish between where we actually disagree about certain clinics or their goals and where we are simply imagining relationships between purposes differently.

3. Theory

In the prior section, I was discussing the purposes of clinical education in terms of the relationship between skills and values. In this section I want to also introduce a second pairing relevant to the discussion: skills vs. theory. Understandings of skills-based legal education vs. theory-based legal education, like understandings of skills-based clinical purposes vs. values-based clinical purposes, play an important role in conversations about the purposes of clinics. From the earliest history of clinics these pairs—skills and theory, and skills and values—have been dominant themes in clinical commentary.

For example, when told in brief, the story of the history of law clinics is often depicted as a fairly simple "values to skills" evolution where the modern clinical movement began with a values commitment borne out of the civil rights era that has subsequently been eroded by the introduction of a stronger emphasis on skills training.[123] Skill-centric values-ambiguous clinics, in this simplistic story, are very much a product and a symptom of this latter era.[124]

However, more in-depth discussion of the history of clinics includes a "theory to skills" evolution as well. This history is more likely to take as its beginning point the 1920s, when legal realists and others rejected the notion that law could be taught through theory (via the case method) alone but rather emphasized the importance of skills development through apprenticeship-style training in "clinical law schools."[125] In some sense, these advocates were not suggesting a new way of teaching, they were advocating clinics as a return to an even older way of teaching law: the theory-based system they argued against was predated by a long period where legal education was understood not in terms of theory or classroom learning but was almost entirely practice-based.[126] In these longer time-horizon versions of clinical history, skills-centric values-ambiguous clinics are perhaps not best understood as a new deviation from mid-20th century values-based origins but rather may be seen as a throwback to an earlier era of skill, rather than theory, emphasis in legal education.[127]

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123 *See, e.g.*, Dubin, *supra* note 4, at 1466 ("Beginning in the 1980s, clinical education experienced a shift in emphasis from its origins in client and community service, structural reform, and social justice ideals, 'to a largely skills focused curriculum.'" (quoting Minna J. Kotkin, *The Violence Against Women Act Project: Teaching A New Generation of Public Interest Lawyers*, 4 J.L. & Pol'y 435, 448 (1996))); Kotkin, *supra* note 8, at 289 ("The beginnings of clinical education in the 1960s grew out of law students' growing political involvement."); Wizner, *supra* note 97, at 332 ("The founders of the clinical movement, responding to the social ferment and legal rights explosion of the 1960's, 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 engaging students in the pursuit of social justice" while today clinical legal education tends to "emphasize skills training and professional development over social objectives.").

124 Kosuri, *supra* note 9, at 220 (noting that "[t]ransactional clinics are . . . less tethered to the past because [they] did not emerge from the fervor of the civil rights era.").

125 Joy, *supra* note 7, at 562 (citing Jerome Frank, *Why Not a Clinical Lawyer-School?*, Univ. Pa. L. Rev. 907 (1933); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947)).

126 Rachel Gurvich et al., *Reimagining Langdell's Legacy: Puncturing the Equilibrium in Law School Pedagogy*, 101 N.C. L. Rev. Forum 118, 125 (2022); Albert James Harno, Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession (1953).

127 This is not to suggest they weren't also concerned with values; early proponents of what we now call clinics generally tended to group the goods of increased skills-based training and values (for instance the amelioration of poverty, etc.) together and then to set the pair as being in contrast to a classroom or theoretical treatment of the law. Barry et al.,

Continuing through the current day, scholars regularly express their understandings of and concerns with clinics along these multiple axes. For instance, some are concerned that priorities have become misaligned and skill is being focused on to the exclusion of values, while others are concerned that priorities have become misaligned and theory is being focused on to the exclusion of skills. That these conversations have gone on for more than a century may indicate the depth of the issues they implicate. And unsurprisingly, as with discussions of values, they are made challenging by the many ways we might characterize theory.

While here I am referring to theory as it is used to reference the conceptual, doctrinal, podium-style, classroom-only teaching of law, rather than a practical, experiential, skills-based treatment, this is certainly not the only way it could be used. By "theory" we might also mean, for instance "the theory that law should be used as a tool for social justice," or we might mean clinical pedagogical theory involving "learning for transfer." Rather than teasing out these many different ambiguities or permutations, I instead want to focus on how these conversations about theory and skills additionally highlight our understanding of the place of skills in legal education and how values-ambiguous clinics might bring that story closer to the surface in potentially uncomfortable ways.

Although skills training has been frequently championed in arguments against purely theoretical educational methods, it is also, as a practical matter, devalued in the legal academy.[128] Rejections of the premises that legal education is "nothing more than the mastering of a craft"[129] and law school is merely "trade school" or is a way to learn to be "simply a skilled legal mechanic"[130] have roots at least as old as formalized law school itself.[131] These rejections contains echoes of antiquated elitist views of labor generally and are reflected in myriad places within the legal academy, from the hierarchy of law school instruction where theory-oriented professors have more status than practice-oriented professors[132] to the patterns of more "elite" law

supra note 103, at 12 ("The earliest forms of clinical legal education embraced the dual goals of hands-on training in lawyering skills and provision of access to justice for traditionally unrepresented clients.").

128 Gurvich et al., *supra* note 126, at 125.

129 Albert Harno, *supra* note 126, at 39.

130 Warren E. Burger, The State of the Federal Judiciary (1971), *in* 57 A.B.A. J. 855, 857 (1971) (A lawyer "must be more than simply a skilled legal mechanic.").

131 Gurvich et al., *supra* note 126, at 142–43 ("This bifurcation, and the implicit devaluation of learning outside the traditional Socratic classroom, reinforces the long critiqued and profoundly durable skills-doctrine divide that dates back to Langdell's rejection of faculty whose experience involved *practicing* law rather than *studying* it.").

132 Kristen K. Tiscione, *How the Disappearance of Classical Rhetoric and the Decision to Teach Law As A "Science" Severed Theory from Practice in Legal Education*, 51 Wake Forest L. Rev. 385, 394 (2016).

schools traditionally privileging theoretical treatment of law over practical aspects of law.[133]

On the clinical side, alignment with skills, as opposed to values or theory, unsurprisingly is thus often understood to be a double edged sword. On the one hand, it is argued that as more emphasis has been placed on skills training in legal education more generally, clinics have risen in number and arguably in status.[134] However, as clinics are more firmly typecast as a place to learn skills, their fates are more strongly tied to the lower status this association has historically connoted.[135] This association can be seen as creating countervailing incentives for clinics to market themselves as being places to learn skills but, very importantly, concerned with more than "mere" skills. This challenge is nicely expressed by transactional clinician Alina Ball who observes, "[h]aving resisted the perception of clinical legal education as the 'trade school' component of the legal academy, clinicians are understandably uncomfortable with exclusive emphasis on the skills training portion of clinical pedagogy."[136] Minna Kotkin expresses a similar set of concerns in somewhat different terms. She describes two hierarchies at stake—clinical vs. doctrinal (what I might call skills vs. theory) and a hierarchy in clinic practice type (what I might call skills vs. values)—and explains her concern with further replication of these hierarchies. In essence, by this she means: if the values-ambiguous clinicians who primarily teach skills in the context of higher status practice areas win the day, their victory would both further entrench all clinicians in the lower status role of mere skills teachers and also would place the values-oriented clinicians at the bottom of clinical heap because their skills training is associated with lower status types of law practice. While both Ball and Kotkin locate skills-association as being a root of these issues, Ball primarily focuses on theory (specifically, she discusses the theory contributions of a transactional law clinic) as a solution, while Kotkin focuses on values (specifically, the need for transactional clinics to have value commitments) as a solution.

This thoughtful set of concerns brings me to my final point of discussion. It is not surprising that values-ambiguous clinics—an expression of legal education that may appear to be skill-centric rather than values- or theory-centric—would raise issues of hierarchy. As with most other subjects discussed in this Article, my primary hope is that we might examine this debate more thoroughly and have a productive conversation. Here, where hierarchy is implicated at the intersection of

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133 John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 Wm. Mitchell L. Rev. 303, 323 (2007).

134 Kotkin, *supra* note 8.

135 *Id.*

136 Ball, *supra* note 5.

skills, values, and theory, I think we can do that by taking seriously the questions of how different types of clinics might differently assess, understand, and pursue various goals, and by considering if we can create a stronger and more integrated alliance between values-ambiguous and values-presumed clinicians.

The abundant calls for clinicians to embrace a values mission more completely and defenses of clinics in traditional values terms are an important part of the story, but I believe there is also room for other techniques of fighting hierarchy. First, clinicians might embrace and elevate, rather than de-emphasize or minimize, our roles as skills teachers. Second, clinicians might endeavor to bring values-ambiguous clinicians who teach in higher status practice areas more fully into the fold as partners and allies, regardless of whether they are in obvious alignment with a particular version of values.

As for the first of these suggestions, while acknowledging the long standing hierarchies within legal education, we as clinicians might make a concerted effort to reimagine and re-present the narrative around skills training, for instance by rejecting minimizing qualifiers such as "mere skills," "simply 'skills training,'" and "reduction to … technical skills."[137] We might also question the habits of describing skills training as something clinics should transcend,[138] or of categorizing clinical efforts as useless if all they do is teach students skills. [139]Our students want to become lawyers, and increasingly their non-clinical professors have very little first-hand experience in that profession.[140] Our collective fates may be tied to being characterized as the "'trade school' component of the legal academy," but it does not seem impossible to reclaim that characterization from elitist narratives about different forms of labor and to celebrate it as sufficient in its own right.

As to the second point, we might agree with, as I do, the underlying premises of Minna Kotkin's argument that the rise of clinics that focus on teaching skills in contexts associated with conventionally higher-status practice areas has the potential to replicate problematic hierarchies. But I also see both hope and opportunity here, because I believe that values-ambiguous clinicians can be allies in fighting hierarchy, rather than serving a fixed role within it. While values-ambiguous

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137 Wizner, *supra* note 97, at 339.

138 Grose, *supra* note 85, at 493 (framing the inquiry in terms of what we do that "transcends skills training for lawyers").

139 Aiken, *supra* note 121, at 6 n.10.

140 Justin McCrary et al., *The Ph.D. Rises in American Law Schools, 1960-2011: What Does It Mean For Legal Education?*, J. Legal Educ. 543 (2016); Brent E. Newton, *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. Rev. 105.

clinicians may come from practice backgrounds that enjoy a relatively higher status, they have chosen a profession, clinical teaching, where that status relationship is often inverted.[141] Values-ambiguous clinics are on the rise, but they are also relatively new and, in most schools, as well as in the greater clinical community, they comprise a minority position.[142] Their colleagues and supervisors and leaders are less likely to understand the work they do, and the ways they interact with the law are less likely to be represented in the clinical community and in the broader legal academy. I believe they often are in positions where they are inclined to join a common cause and are stopped only by the hurdle of mutual understanding.

I do not mean to underestimate the powerful hierarchies at stake within the practice of law generally, within the legal academy, or within the clinical community. Instead, I mean to suggest that it might behoove us all to reconsider the ways we have previously imagined the battlelines.

IV. Conclusion

A. Concluding Thoughts

This Article has argued that the rise of values-ambiguous clinics has been a disruptive force in clinical legal education and that there is currently a largely unacknowledged divide between different types of clinicians. It seems clear that values-ambiguous clinics are here to stay, and their persistent presence forces us to confront a series of challenging but difficult questions about clinical education, and about legal education more broadly. While these questions may not have clear answers, identifying and exploring them in an intentional and reflective manner is critical. They are important both for our scholarly conversations, for our practical understandings, and for our ability to work together toward the shared goals of the clinical community, our students, and our institutions. Productive conversation will necessarily entail some exploration of what we mean by certain terms, and grappling with the intersection of several thorny juxtapositions that are implicated by clinical legal education. This Article has suggested several possible avenues for conversation.

B. The Traditional and Transactional Clinician Go Home

Following the clinical conference the Transactional and the Traditional Clinician, finding themselves seated next to each other

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[141] Susan D. Carle, *supra* note 91, at 729 ("There is an alternative prestige hierarchy in the profession, especially at many law schools, that confers special honor to some alternative careers focused on helping people in need who cannot pay for legal representation."); Ryan, *supra* note 57.

[142] *See supra* Part I(B)(3).

on the plane headed home, struck up a conversation. The Traditional Clinician politely asked the Transactional Clinician what she thought of the keynote speaker. The Transactional Clinician replied that she had heard there was a high turnout and that the conference facilities had been set up very well to accommodate this. The Transactional Clinician in turn politely asked the Traditional Clinician if she was excited about the news they had received about the intellectual property clinic that would be starting at their law school. The Traditional Clinician replied that she had heard these types of clinics were very in vogue, and she was continuously impressed by the Dean's ability to fundraise.

Both Clinicians were tempted to let this stale conversation come to an end, and the story could very well have concluded here. But instead, they each decided to risk a bit of candor and curiosity. The Transactional Clinician said she actually had intentionally skipped the talk, along with a number of other sessions, because she was having a very hard time connecting with the subject matter and was feeling frustrated by assumptions that certain versions of social justice were applicable in certain ways in all of legal education. It seemed dated, and it seemed to minimize student interests and needs, and she did not understand it. Why did this conference—and for that matter their own clinical faculty—seem so full of assumptions that only certain clinics did social justice work? And what was so wrong with teaching skills anyway?

The Traditional Clinician knew she had some good answers to some of these questions but also that some would require a bit more reflection. But first she needed to get her own concerns on the table as well. She said she actually was not at all excited about the new intellectual property clinic. She in fact was frustrated to see another example of clinical resources being squandered on privileged, college-educated clients when there was so much need in oppressed communities. How did anyone think the next generation of lawyers would learn to use law as a meaningful tool for social change if all clinics taught was lawyering for the "haves" in their pursuit of private gain? And why was it so hard to understand what social justice was and that skills and social justice could be pursued at the same time? The Transactional Clinician knew she had answers to some of these questions but not to others. At this point they both could see that there was a lot more to the story than the way they had been imagining it.

Once it was clear they were going to engage with this subject, they just needed to settle on how. The Transactional Clinician suggested they start by creating a list of agreed upon defined terms and subjects where they were and were not in alignment that they could refer to during future conversations. The Traditional Clinician instead suggested treating the conversation like structured "case rounds," attempting to first identify the problem before proceeding to problem solve. To the likely

annoyance of the other passengers in their row, this methodological debate went on for a while before they settled on a middle ground approach, doing a bit of both. They asked broad open-ended questions of each other and followed up for additional details. How do you understand the role of values and skills in your clinic? Why do you focus on that? How do you focus on that? What clinics do you wish we had here? Why? Where are we in alignment? How do we see things differently? What concerns you? Is there any kind of client you wouldn't take on, even if it was great skills training? Do you ever wonder if your work is actually having the impact you most value? Do you ever have to make hard tradeoffs between values goals and skills training? Where else might our students learn about law as a tool for change? How do you see the future of legal education? What hierarchies most trouble you? And so on.

Although the plane eventually landed and this conversation came to a close, the broader conversation, once started, did not end. Eventually, the Traditional and the Transactional Clinician were able to understand and articulate each other's positions and to refine their own. They each took something from their new understandings that informed and improved their own clinical teaching, that deepened their ability to participate in the broader clinical community, and that strengthened them in their pursuit of various outcomes. They were also able to exchange pedagogical techniques, collaborate on clinic projects, present together at conferences, and advocate for student and clinical outcomes together. They did not ever come to share the same views, but with some dedication and some continued curiosity, they did come to share a commitment to working together toward a better future of clinical legal education.

ARE APPELLATE CLINICS EFFECTIVE?

Xiao Wang*

Law school clinics are integral to legal education, offering students practical experience while serving clients in need and affecting the law more broadly. But despite the enormous investments in experiential learning that law schools make each year, there remains a lack of comprehensive research assessing the efficacy of clinics in serving clients.

This Article aims to address this void by assessing the performance of fifteen appellate clinics across nearly three hundred federal court of appeals cases. The findings suggest promising evidence of clinical effectiveness. For example, in immigration cases, appellate clinics achieved a reversal rate of 55%, rising to 70% when all favorable case outcomes were considered (e.g., dismissals, reversals in part). For prisoner-plaintiff cases, the reversal rate was 41%, increasing to 71% with favorable outcomes included. These rates outpace national averages, even when compared to clients who are represented by non-clinic counsel. Such results provide empirical evidence confirming that law school clinics make a positive impact on case outcomes. The Article concludes by suggesting reforms—for law schools, courts, and other institutions—to facilitate the role of clinics as a resource for the public interest community.

Introduction

Measuring clinic effectiveness touches on one of the core promises of clinical education. As Steven Leleiko, a clinician at New York University, noted more than forty years ago, "clinical education introduces an empirical base to one's understanding of legal principles,"[1] because "[t]he core of the clinical experience is client representation in a real case within the legal system."[2] This scenario "presents clinical teachers and students with both the opportunity and responsibility to plan and conduct studies on specific components of the legal system with the objectives of contributing to our understanding of how the law

* Assistant Professor & Director of Supreme Court Litigation Clinic, University of Virginia School of Law. My thanks to Scott Ballenger, Daniel Harawa, Brian Wolfman, and Lauren Kaufmann for their helpful comments, edits, and suggestions. This piece benefited greatly from the research assistance of many students, including Meg Pritchard, Ben Buell, Rachel Williams, Donna Qi, Ben Gusdal, Jordan Allen, Alyssa Gao, and Katherine Hitchcock.

[1] Steven H. Leleiko, *Clinical Education, Empirical Study, and Legal Scholarship*, 30 J. Legal Educ. 149, 153 (1979).

[2] *Id.*

actually operates."[3] And it is through this opportunity and responsibility that clinical programs can help to provide better service to clients, further the education of law students, and improve the legal system.

Yet despite Leleiko's vision, there is today "scant data about how well law school clinic students perform on behalf of their clients."[4] Existing research tends to fall into three camps. The first uses observational tools to summarize a specific clinic representation or provides anecdotal conclusions from a small subset of clinic's cases.[5] The second attempts to measure a particular clinic's win rate.[6] And the third assesses outcomes among a group of clinics, but usually in only a specific subject area, such as employment or immigration.[7] These studies each help to conceptualize what clinics do and how they perform. But the insight they provide is invariably limited. Analysis of a single clinic's efficacy gives little insight into clinical impacts more broadly. And research into a specific subject area is, by definition, cabined to a particular type of case and thus cannot offer a more comprehensive look at how clinical representation might affect results in other types of cases.

Such difficulties in evaluation are not unique to clinics. Researchers have long struggled to measure the efficacy and impact of legal representation, and many scholars continue to question how much access to and availability of counsel improves case outcomes.[8] Some studies have

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[3] *Id.*; *see also* Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303, 1321 (1947) ("An interest in the practical should not preclude, on the contrary it should invite, a lively interest in theory.").

[4] Colleen F. Shanahan, Jeffrey Selbin, Alyx Mark, & Anna E. Carpenter, *Measuring Law School Clinics*, 92 TUL. L. REV. 547, 549 (2018).

[5] *See, e.g.*, Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 874–81 (1996) (describing two case studies to illustrate clinical lawyering skills); Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 GONZ. L. REV. 1, 7–8 (1998) (using cases from the Idaho Appellate Clinic as a case study for gaining analytical, practical, and ethical skills and meeting client objectives).

[6] *See, e.g.*, Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340 (2007) ("Asylum seekers represented by Georgetown University's clinical program from January 2000 through August 2004 were granted asylum at a rate of 89% in immigration court."); Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 156 (2013) ("All of these statistics regarding the effects of specialists hold true with respect to the subset of specialists working with Supreme Court clinics. The clinics [with a focus on Stanford's clinic] have prevailed in 21 of the 30 cases . . . .").

[7] *See, e.g.*, Shanahan et al., *supra* note 4, at 559, 566 ("Our study draws on a large data set of unemployment insurance (UI) cases in the District of Columbia (D.C.) Office of Administrative Hearings (OAH)," with "[t]he clinical law students com[ing] from Georgetown, George Washington, American, and Catholic Universities."); Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 53 (2015) (analyzing case outcomes in immigration proceedings and showing that clinical representation resulted in relief at a rate comparable to that of law firms and nonprofits).

[8] *Compare* D. James Greiner & Cassandara Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*,

even suggested that having an attorney (including a student-attorney through a clinical program) may deliver worse client outcomes.[9] These circumstances underscore the need for rigorous and empirical analysis into clinical performance. After all, "[d]o no harm" is a fundamental tenet "instilled in every healthcare professional at the beginning of their clinical careers."[10] If legal clinics cannot hold true to this same principle, one might wonder whether the considerable investments into clinical education are justified.[11]

This Article contributes an important dataset towards such analytical efforts. It collects data from nearly three hundred federal circuit court cases, drawn from the work of fifteen law school appellate clinics, and tracks each case's outcome (e.g., reversal, affirmance, or dismissal). The Article focuses on appellate work because any decision in these cases not only affects a clinic's own clients, but also has a magnifying effect on the law by creating precedent across a circuit (and may ultimately prompt Supreme Court review).[12] Whether such clinics

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121 Yale L.J. 2118, 2175, 2198 (2012), *and* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. Pa. L. Rev. 967, 991–92 (2012), *with* Mitchell Levy, Comment, *Empirical Patterns of Pro Se Litigation in Federal District Courts*, 85 U. Chi. L. Rev. 1819, 1830 (2018) ("However, the few reliable studies conducted thus far tend to suggest that providing access to counsel significantly improved outcomes for civil litigants."); *see also id.* (citing sources).

[9] *See, e.g.*, Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461, 492 (2007) ("[P]ro se defendants consistently score better than represented defendants in all categories in which there are sufficient data from which to draw conclusions."); Greiner & Pattanayak, *supra* note 8, at 2124–25 (finding that clients' assistance by Harvard Legal Aid Bureau ("HLAB") had "no statistically significant effect on the probability that a claimant would prevail, but that the offer did delay the adjudicatory process," and that delay "probably meant that many of these claimants who were offered HLAB assistance suffered the harm of having to wait longer for their benefits to begin") (footnote omitted); *cf.* Shanahan et al., *supra* note 4, at 582 (showing that clinic students provide favorable outcomes slightly less frequently than experienced attorneys, but that difference is not statistically significant.).

[10] Kyriaki-Barbara Papalois, *'First, Do No Harm' . . .* A Call to Re-evaluate the Wellbeing of Healthcare Staff, 10 Int'l J. Med. Students 439, 439 (2022).

[11] *See, e.g.*, ABA Section of Legal Education and Admissions to the Bar, Standards and Rules of Procedure for Approval of Law Schools 2024-25 (2024) at Standard 303(a)(3) [hereinafter ABA Standards], *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2024-2025/2024-2025-standards-and-rules-for-approval-of-law-schools.pdf (requiring all law students to complete at least six credit hours of experiential learning); Robert R. Kuehn, Margaret Reuter & David A. Santacroce, Ctr. for the Study of Applied Legal Educ., 2019–20 Survey of Applied Legal Education 6, https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/628457f6d9c25cc6c1457af4_Report%20on%202019-20%20CSALE%20Survey.Rev.5.2022.pdf (noting that virtually every law school offers clinics to satisfy the ABA's experiential learning requirement, with an average of seven clinics offered per law school).

[12] About a decade ago, Nancy Morawetz and Jeffrey Fisher explored this question—whether clinics might create "bad" law for others—in a pair of law review pieces about Supreme Court clinics. *See, e.g.*, Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. Rev. 131, 192 (2011) ("A case granted that leads to an argument but a bad outcome or bad dicta

are linked to favorable case outcomes is, thus, a particularly important question, with potential ramifications for millions of individuals.

By collecting and assessing this data, this Article aims to advance a conversation among three audiences: law schools that must decide how to deploy resources in clinical programs, groups that may be skeptical of or concerned about clinical programming, and courts and other institutions that are invested in improving access to justice.

The findings offer a favorable, albeit preliminary, case for clinical effectiveness. In immigration matters, appellate clinics obtained a reversal rate of 55%.[13] If all favorable case outcomes (e.g., dismissals, reversals in part) are included, that percentage rises to 70%.[14] These rates stand in contrast to the 6% for all federal immigration appeals.[15] In prisoner civil rights cases, appellate clinics obtained a reversal rate of 37%.[16] When all favorable outcomes are considered, the percentage increases to 71%.[17] Again, those rates significantly outpace the overall reversal rate, which hovers near 5%.[18] Appellate clinics likewise outperformed the overall reversal rates in criminal, habeas, and general civil matters.[19]

These results are, admittedly, not a product of randomized trials.[20] But my goal is not necessarily to add a perfectly designed experimental study to the existing empirical literature.[21] As I explain, trying to create a randomized trial would be both infeasible and counterproductive to learning. My aim is instead to provide a panoramic perspective of the results clinics are achieving and use these results as a platform for further discussion.[22]

This Article proceeds in four Parts. Part I reviews the existing literature. Part II summarizes the results of the study into appellate clinic performance, showing that such clinics outperformed the general population in each subject matter category: immigration, prisoner civil rights,

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might be good for the lawyers—who still have had the opportunity to handle a case before the Supreme Court—but it is surely not good for the client or others similarly situated."); Fisher, *supra* note 6, at 188 ("It turns out that unless one takes an extremely broad view of public interest communities' 'right' to control litigants' access to the Court, clinics actually seem to pose a minimal concern."); *id.* at 187–98 (addressing additional concerns behind clinical representation before the Supreme Court, including whether clinics can and should work on cases that may make "bad law," and whether clinics can screen for such cases). As outlined in Part I, if Supreme Court clinics merit such scrutiny, so too should appellate clinics—indeed, the case may be even more compelling. *See infra* Part I.A.

13 *See infra* Part III.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 Greiner & Pattanayak, *supra* note 8, at 2121.

21 Random assignment is neither feasible nor prudent for clinical work, perhaps especially appellate clinic work. *See infra* Part III.A.

22 *See infra* Parts II & IV.

habeas, criminal appeals, and general civil litigation. Part III addresses possible methodological concerns. Part IV concludes with potential institutional reforms and avenues for further research.

I. The Case for Clinical Empirical Scholarship

A. Shortcomings in the Existing Literature

Although clinical education is entering its fifth decade, the field has rarely been the subject of empirical study.[23] As Robert Kuehn and David Santocroce observe, even basic questions—such as how many schools require or guarantee a clinical experience, how many students enroll in a clinic, and what types of clinics are offered—remain largely unanswered.[24] Unsurprisingly, given these deficits, research into the efficacy of clinical programs is in even shorter supply. Indeed, "[d]espite clinical education's focus on assessment and evaluation," "we have limited data on whether and how law school clinic students are learning to be lawyers."[25] And "[a]though many . . . *believe* law school clinics' low- and moderate-income clients are better off with the assistance of law students than without, we have limited empirical evidence to support our views."[26]

One study, conducted by James Greiner and Cassandra Pattanayak, found that an offer of clinical representation (rather than actual representation) by Harvard's Legal Aid Bureau did not measurably improve case outcomes for those seeking unemployment benefits.[27] In fact, offers of representation actually "delay[ed] the adjudicatory process,"[28] which might have ended up producing a *worse* outcome, since at least some clients had been unfairly denied benefits and a delay only meant a longer wait before reversal.

Another analysis, by Colleen Shanahan and several co-authors, reviewed the performance of four Washington, D.C.-based clinics, focused also (like the Greiner and Pattanayak study) on obtaining worker benefits for indigent clients.[29] Shanahan found "that clinical law students [were] using procedural tactics"—such as introducing evidence,

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[23] Robert R. Kuehn & David A. Santacroce, *An Empirical Analysis of Clinical Legal Education at Middle Age*, 72 J. Legal Educ. 622, 622 (2022).

[24] *Id.* at 8–10, 30–31.

[25] Shanahan et al., *supra* note 4, at 553; *see also* Yael Efron, *What Is Learned in Clinical Learning?*, 29 Clin. L. Rev. 259, 259 (2023) ("Do we really know what students in legal clinics learn? Those involved in clinical education define the intentions and rationales that guide their clinical pedagogy, but there is a dearth of research showing that what clinical instructors teach is indeed learned by law students.").

[26] Shanahan et al., *supra* note 4, at 556 (emphasis added).

[27] Greiner & Pattanayak, *supra* note 8, at 2149–63.

[28] *Id.* at 2124.

[29] Shanahan et al., *supra* note 4, at 561.

exchanging certain disclosures, and appearing and presenting arguments at hearings—"more often than [other experienced] attorneys."[30] Yet such uses of procedure did not meaningfully impact case outcomes. Experienced attorneys actually prevailed at higher rates than clinic-assisted clients.[31] Somewhat concerningly, Shanahan acknowledged that clinics' increased use of procedural maneuvers might, in some instances, result in "delays [to] the receipt of [unemployment] benefits"—thereby corroborating the concern spotlighted by Greiner and Pattanayak.[32]

A third study assessed immigration case outcomes among different categories of attorneys. This study found that, compared to small firms, medium firms, large firms, nonprofit organizations, "hybrid" representation involving multiple institutions, and pro se respondents, "[l]aw school clinical programs had the highest overall success rate of any attorney type for relief applications on behalf of non-detained clients."[33] A fourth and final study looked at asylum adjudications within Georgetown's immigration law clinic.[34]

Still, this handful of studies can hardly be considered enough for a field that has witnessed unprecedented investment and growth in recent years. Indeed, in 2014, the American Bar Association "mandated a six-credit experiential course graduation requirement for law schools."[35] In the decade since, many law schools have invested heavily in clinical education, with some "creat[ing] a dean for experiential education," others "appoint[ing] two or more individuals with experiential oversight responsibilities," and still others "requiring enrollment in law clinic and externship courses."[36] Given such significant investments, the answer to whether clinics deliver effective client representation should be something more definitive than "we think so, but we don't know for sure."

Along these same lines, many proponents of clinical education point to "student learning [and advancing] social justice" as the central "goals of clinical education"[37] Clinics that advance both goals obviously serve the law student and law school, as well as the public interest

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30 *Id.* at 574.

31 *Id.* at 577–78. That said, this finding was not statistically significant. Workers won 82% of the time when represented by an experienced attorney and 78% of the time when represented by a clinic student; that difference, given the population of the dataset, yielded a p-value of 0.293.

32 *Id.* at 575 n.85.

33 Eagly & Shafer, *supra* note 7, at 54.

34 Ramji-Nogales et al., *supra* note 6, at 340.

35 Allison Korn & Laila L. Hlass, *Assessing the Experiential (R)evolution*, 65 VILL. L. REV. 713, 713 (2020); *see also* ABA STANDARDS, *supra* note 11, at Standard 303(a)(3). The ABA Standards defined experiential courses as "simulation courses, law clinics, and field placements." ABA STANDARDS, *supra* note 11, at Standard 304(a).

36 Korn & Hlass, *supra* note 35, at 719, 720, 730.

37 Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLIN. L. REV. 39, 44 (2013).

community. But if clinics are developing student skills at the expense of their clients' interests, that should prompt a critical re-evaluation (if not a wider restructuring and examination) into the allocation of law school resources. Shanahan's finding that the use of procedural tactics can simultaneously advance clinical student learning while delaying clients' receipt of benefits sharply illustrates this point.[38]

Lastly, resources for indigent representation are invariably limited. "[B]oth nationally and in every state in which the issue has been analyzed, demand . . . for legal services outstrips supply."[39] Further, "legal services budgets have been hit hard in recent years by reductions in charitable giving, state funding, and proceeds from interest on lawyers' trust fund accounts."[40] Given this decline in funding, and the need for coordination and collaboration among the public interest bar, some scholars have pointed to clinics as an emerging hub for public interest advocacy.[41] Yet if clinics are to play such a role, then there should be a strong sense of how well they are doing in representing their clients.

B. Why Study Appellate Clinics?

To address these concerns, I examined the case outcomes in nearly three hundred federal circuit court cases litigated by appellate clinics. These clinics provide an ideal frame to examine clinical efficacy for three reasons: (1) availability and accessibility, (2) diversity, and (3) precedential impact and influence.

1. Data Availability and Accessibility

Several years ago, I created the National Appellate Clinic Network ("Network"). The Network is a collaborative project, comprising today more than a dozen law school clinics. Its centerpiece is a searchable database of several hundred legal briefs, collected from the work of Network members. There are briefs from nearly every federal court of appeals, as well as a handful of state appellate courts and federal agencies.[42] PACER and Bloomberg searches were conducted to ensure that the database included the full roster of a clinic's briefs. At the time of this writing, no other publicly available database encompasses such an

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[38] See *supra* note 32 and accompanying text.

[39] Greiner & Pattanayak, *supra* note 8, at 2122.

[40] *Id.* at 2026.

[41] Daniel Epps & William Ortman, *The Defender General*, 168 U. Pa. L. Rev. 1469, 1522–23 (2020); *see also* Andrew M. Perlman, *The Public's Unmet Need for Legal Services & What Law Schools Can Do About It*, 148 Daedalus 75, 76 (2019).

[42] *Briefs and Filings Database*, Nat'l App. Clinic Network, https://www.law.virginia.edu/briefs-and-filings-database (last visited Jan. 10, 2024).

array and quantity of searchable clinical legal work, making the database an ideal candidate for further study.[43]

2. *Participant and Subject Matter Diversity*

The Network also offered heterogeneity in geography, law school, and subject matter. Participating clinics represent law schools spanning the country, from the West Coast (Berkeley and UCLA), Mountain West (Colorado), Midwest (Chicago, Northwestern, Iowa, Indiana, Washington University in St. Louis, Case Western, and St. Thomas in Minneapolis), and East Coast (Georgetown, Duke, Virginia, Cornell, and New York University).[44] This geographic distribution means that, altogether, Network participants brought cases in nearly every federal court of appeals, with several clinics routinely litigating outside their home jurisdiction.[45] That feature distinguishes the Network from prior research, which focused on a single law school or a group of law schools in the same geographic area.[46] Participating law schools cover a range of school rankings, ensuring that no group or type of law school is overrepresented.[47]

Furthermore, recall that prior studies into clinical performance focused on two specific topic areas: immigration and employment.[48] Such

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[43] The Network was recognized as a Top Ten Law School Innovation by Bloomberg Law. *See* Francis Boustany, *Bloomberg Law Announces Top 10 Law School Innovators*, Bloomberg L. (Jan. 17, 2023, 9:32 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-bloomberg-law-announces-top-10-law-school-innovators.

[44] *People*, Nat'l App. Clinic Network, https://www.law.virginia.edu/people-national-appellate-clinic-network (last visited Jan. 10, 2024). Participating clinics included the Ninth Circuit Practicum (Berkeley), the Prisoners' Rights Clinic (UCLA), the Appellate Advocacy Practicum (Colorado), the Jenner & Block Supreme Court and Appellate Clinic (University of Chicago), the Federal Appellate Clinic (Northwestern), the Federal Criminal Defense Clinic (Iowa), the Habeas Litigation Practicum (Indiana), the Appellate Clinic (Washington University), the Appellate Litigation Clinic (Case Western), the Appellate Clinic (St. Thomas), the Appellate Courts Immersion Clinic and Appellate Litigation Clinic (Georgetown), the Appellate Litigation Clinic (Virginia), the Appellate Litigation Clinic (Duke), the Asylum and Convention Against Torture Appellate Clinic (Cornell), and the Appellate Litigation Clinic (NYU). There are other clinics that have joined the Network, but only a subset contributed briefs to the database and those that did not were excluded from the analysis.

[45] Among the clinics studied, none had matters before the Federal Circuit, which reflects the special content focus of that circuit's docket.

[46] *See supra* notes 6–7.

[47] Admittedly, higher ranked law schools tended to participate in the Network. But that may be a product of this group of law schools being more likely to offer appellate litigation experiences. *See, e.g.*, Adrienne Jennings Locke, *Encouraging Reflection On and Involving Students in the Decision to Begin Representation*, 16 Clin. L. Rev. 357, 363 (2017) (acknowledging that some "[l]aw school administrators may view clinics as recruiting tools and develop prestigious clinics designed, in part, to enhance law school rankings," and including Supreme Court clinics as an example).

[48] *See supra* notes 6–7.

a specific focus, combined with a spotlight on only a small subset of clinics (usually one, no more than four), cannot provide a complete picture of clinical performance.[49]

By contrast, appellate clinic litigation frequently draws on variegated concepts and subject matters, from civil procedure to constitutional law to criminal law to statutory interpretation. Diversity in such matters means that an analysis of case outcomes can offer a glimpse into not only whether appellate clinics are effective, but also where they might be most or least effective and whether the efficacy or lack thereof depends on variables connected to the specific subject matter. For example, the Shanahan and the Greiner and Pattanayak studies examined employment benefits where the delay from litigation ended up decreasing the amount recovered by the client. But in many types of appellate advocacy, there may be a benefit to clients in fully litigating a case and using the full toolbox to do so.

To show this subject matter diversity, I organized the Network's database into several categories.[50] To start, criminal and civil work were separated from one another. In virtually every criminal matter, the clinic was appointed to represent a criminal defendant under the Criminal Justice Act ("CJA"). That Act provides for the appointment of counsel to indigent individuals in federal criminal proceedings.[51] Most of the Act's funding goes toward federal defender programs, since more than 95% of indigent individuals are represented by a public defender.[52] Yet some jurisdictions do not have a defender's office.[53] Even in districts

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[49] *Id.*

[50] Several clinics also undertook work before state courts and federal administrative agencies. However, these matters were a small handful within the corpus of appellate clinic work. Much state court work, moreover, was in the form of an amicus brief on behalf of a third-party organization rather than direct representation of a client, making it difficult to measure whether the clinic's advocacy was effective. Finally, as covered in greater detail below, *see infra* Part III.A, there is no available benchmark for state courts to compare against.

[51] 18 U.S.C. § 3006A(c).

[52] Federal defender organizations include both federal public defenders and community defenders. Federal public defenders are federal entities, and their staff are federal government employees. Community defenders are nonprofit organizations which receive grants or contracts from the federal judiciary. *See Defender Services*, U.S. Cts., https://www.uscourts.gov/services-forms/defender-services (last visited July 16, 2023). From 2015 to 2018, 96% of indigent defendants were represented in district court by a defender organization. *See* Kelly Roberts Freeman, Bryce Peterson & Richard Hartley, Urb. Inst., Counsel Type in Federal Criminal Court Cases, 2015–18 12 (May 2022), https://www.ojp.gov/pdffiles1/bjs/grants/304552.pdf. Although no such data is available at the appellate level, there is nothing to suggest a significant difference between representation by a federal defender and representation by community defenders.

[53] These districts are the Southern District of Georgia, Eastern District of Kentucky, and District of the Northern Mariana Islands. Charles Bethea, *Is This The Worst Place To Be Poor*

that do have a federal public defender, a conflict of interest (e.g., a case involving multiple defendants with potentially opposing legal strategies) may preclude a defender organization from representing all defendants.[54] And a breakdown in the relationship between a defendant and their public defender may require a change of counsel.[55] In these sorts of cases, the court appoints counsel from a panel of attorneys, with the criteria for panel membership set by the governing court.[56] Many clinical faculty are members of the CJA panel for at least one, if not multiple, circuits, and CJA cases typically represent a significant source of appellate clinic litigation.

After separating these criminal cases, the most challenging division was distinguishing between habeas and prisoner civil rights matters.[57] The traditional understanding is that habeas cases are legal "challenge[s] [that] attack[] the . . . validity of [a] continued conviction or the fact or length of the sentence," but nonetheless lie outside of (or, more specifically, collateral to) any issues raised in a direct criminal appeal.[58] They are typically brought under 28 U.S.C. §§ 2255, 2254, or 2241: § 2255 corresponds to actions to vacate federal sentences, § 2254 corresponds to actions to vacate state sentences, and § 2241 provides a "catchall" for when §§ 2255 and 2254 are "inadequate" or inappropriate.[59] On the other hand, prisoner civil rights cases arise when a favorable outcome on appeal will not change the conviction or sentence but could relate to a condition of confinement (e.g., deliberate indifference of prison medical care).[60] Yet notwithstanding

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and Changed with a Federal Crime?, New Yorker (Nov. 5, 2021), https://www.newyorker.com/news/us-journal/is-this-the-worst-place-to-be-poor-and-charged-with-a-federal-crime.

54 *See, e.g.*, United States v. Cain, No. 06-0551, 2007 WL 1745617, at *9 (D. Md. June 12, 2007) ("Ordinarily, in multiple defendant cases, the Federal Public Defender shall be appointed to represent the allegedly most culpable defendant requiring the appointment of counsel.").

55 *See, e.g.*, United States v. Lee, No. 18-2391, Dkt. No. 5 at 1 (6th Cir. Dec. 11, 2018) (motion by public defender to withdraw because "there has been a breakdown in the attorney-client relationship that would render further representation unreasonably difficult").

56 United States v. Parker, 469 F.3d 57, 62 (2d Cir. 2006) (describing procedures and processes for CJA appointments).

57 "Prisoner" is used as a shorthand to refer broadly to any suit that was filed when a plaintiff was incarcerated, whether that be in a jail, prison, or other setting, and vice-versa for use of "non-prisoner."

58 Leamer v. Fauver, 288 F.3d 532, 542 (3d Cir. 2002); *see also* Preiser v. Rodriguez, 411 U.S. 475, 500 (1973) ("When a state prisoner is challenging the very fact or duration of his physical confinement… his sole federal remedy is a writ of habeas corpus."); Heck v. Humphrey, 512 U.S. 477, 486 (1994) ("We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement.").

59 Lester v. Flournoy, 909 F.3d 708, 710 (4th Cir. 2018).

60 *Leamer*, 288 F.3d at 542; *see also Heck*, 512 U.S. at 487 ("[I]f the district court determines that the plaintiff's [§ 1983] action, even if successful, will *not* demonstrate the

these distinctions in theory between habeas and § 1983, courts in practice "have reached inconsistent results in [their] efforts to delineate [] precisely the claims which may [or may] not be brought in habeas."[61] To minimize the difficult line-drawing exercises between habeas and § 1983, for this dataset I coded a matter as a "habeas" case whenever the plaintiff filed suit under §§ 2255, 2254, or 2241. All other matters filed by an incarcerated individual were classified "Prisoner Civil Rights."

After sorting criminal, habeas, and prisoner civil rights matters, the remaining matters fell naturally into several categories: labor and employment, immigration, non-prisoner civil rights, and complex civil and other litigation (e.g., class actions or international law).[62] The findings are summarized in the Table below.

Table 1: Appellate Clinic Matters by Type of Case

Category	No. of Cases	% of Total
Prisoner Civil Rights	74	26.5%
Habeas	63	22.6%
Criminal	54	19.4%
Labor and Employment	24	8.6%
Complex Civil & Other	24	8.6%
Immigration	21	7.5%
Non-Prisoner Civil Rights	19	6.8%
Total	**279**	**100%**

As Table 1 reflects, appellate clinics practice in a wide variety of subject areas.

One potential concern, given this heterogeneity, is whether appellate clinics were doing quintessential "clinic" work—i.e., "providing legal representation to low-income clients"[63]—or whether their focus on

invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed.").

[61] Nettles v. Grounds, 830 F.3d 922, 933 (9th Cir. 2016). Such inconsistency is a result of a long line of Supreme Court decisions, which reflect a shifting understanding between what is covered under habeas, what is covered under § 1983, and what may be covered by both. *See*, *e.g.*, *Heck*, 512 U.S. at 480–81 ("This case lies at the intersection of the two most fertile sources of federal-court prisoner litigation—the Civil Rights Act of 1871 and the federal habeas corpus statute. Both of these provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials." (citation omitted)); Muhammad v. Close, 540 U.S. 749, 752 n.2 (2004); Nance v. Ward, 597 U.S. 159, 167 (2022) ("This Court has often considered, when evaluating state prisoners' constitutional claims, the dividing line between § 1983 and the federal habeas statute.").

[62] When a case involved discrimination in the workplace, the matter was included under Labor and Employment.

[63] Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 Fordham L. Rev. 1929, 1935 (2002); *see also* Stephen Wizner & Jane Aiken, *Teaching and*

bringing cases before a specific court required a trade-off in the type of client the clinic represented. To investigate that question, I looked at whether a clinic client was represented in district court and, if so, by what type of counsel. For ease of organization, I separated clients who retained paid representation from clients who proceeded pro se, were represented by a public defender service, or were represented by a legal aid service.

Table 2: Appellate Clinic Caseload by Type of Case and Status in Lower Court / Agency

Category	No. of Cases	No. Pro Se, Defender, or Legal Aid Below	% Pro Se, Defender, or Legal Aid Below
Prisoner Civil Rights	74	71	96.0%
Habeas	63	62	98.4%
Criminal	54	54	100%
Labor and Employment	24	10	41.7%
Complex Civil & Other	24	20	83.3%
Immigration	21	20	95.2%
Non-Prisoner Civil Rights	19	13	68.4%
Total	**279**	**250**	**89.6%**

As Table 2 reflects, appellate clinics often represent clients who, absent clinic involvement, would have been unable to afford representation on their own on appeal. In fact, the clinics within the dataset represented individuals who tended to be worse off than the typical client within their specific subject category.

Among all federal appeals, for instance, more than 80% of prisoner petitions (habeas and prisoner civil rights) are pro se;[64] between 65 and 70% of immigration cases in removal proceedings are pro se.[65] For clinics within the dataset, though, 96% of their prisoner civil

Doing: The Role of Law School Clinics in Enhancing Access to Justice, 73 Fordham L. Rev. 997, 997 (2004) ("[I]t seems obvious that the obligation [to address access to justice issues] is best accomplished by law school clinics assisting low-income individuals and communities that are underserved or have particular difficulty obtaining lawyers because of the nature of their legal problems."); Shanahan et al., *supra* note 4, at 556 (describing clinics as sites of service and citing sources); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. Rev. 1461, 1475 (1998) (explaining that clinical learning "furthers social justice imperatives . . . through the provision of services" to indigent or otherwise vulnerable communities).

[64] *See U.S. Courts of Appeals – Judicial Business 2021*, U.S. Cts., https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2021 (reporting that more than 84% of prisoner petitions (including habeas and prisoner civil rights) were pro se).

[65] Eagly & Shafer, *supra* note 7, at 16; Ryan D. Brunsink & Christina L. Powers, *The Limits of Pro Se Assistance in Immigration Proceedings: Discussion of* NWIRP v. Sessions, 122 Dick. L. Rev. 847, 849 (2018) (noting that respondents in removal proceedings are

rights clients and 95% of immigration clients were unrepresented below.[66] The upshot is that, because most appellate clinic clients were unrepresented or underrepresented below, the clinics themselves were not poaching or competing for cases with other attorneys, organizations, or clinics. Rather, they were *additive* to work undertaken by such entities, which is a core mission of clinical education.

3. Potential Precedential Impact

A final reason behind the focus on appellate clinics is their potential precedential impact. As scholars have noted, jurisdiction at the federal court of appeals is generally mandatory: "[A] civil litigant or criminal defendant that loses in district court can seek review before their regional circuit court of appeal as a matter of right, and the circuit court must thereafter issue a decision."[67] And given the relative rarity of Supreme Court review, federal "[c]ircuit court decisions often represent the final word on issues of federal law."[68] Such decisions become "the last resort for most litigants," and, in the case of a published opinion, also become binding precedent for millions of similarly situated individuals within a circuit's jurisdiction.[69]

That said, many federal appellate decisions are not published. Overall, "eighty-seven percent of federal appeals [are] resolved in unpublished opinions."[70] And "self-represented appellants [are] twelve times less likely to receive a published opinion than appellants represented by counsel": "[J]ust 2.1% of [non-incarcerated] self-represented [individuals] and 5.3% of incarcerated persons received

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represented between 14 and 37% of the time); Nina Bernstein, *In City of Lawyers, Many Immigrants Fighting Deportation Go It Alone*, N.Y. Times (Mar. 12, 2009), https://www.nytimes.com/2009/03/13/nyregion/13immigration.html (discussing lack of quality representation for immigration cases within New York and finding that "nationwide, only about 35 percent have any kind of lawyer").

66 Likewise, overall, non-prisoner civil rights plaintiffs were pro se around 34% of the time in district court, and labor and employment plaintiffs were pro se between 20 and 24% of the time. Victor D. Quintanilla, Rachel A. Allen, & Edward R. Hirt, *The Signaling Effect of* Pro Se *Status*, 42 L. & Soc. Inquiry 1091, 1094 (2017). Those overall rates are both higher than the rates for the clinic clients in the dataset.

67 Xiao Wang, *In Defense of (Circuit) Court-Packing*, 119 Mich. L. Rev. Online 32, 33 (2020); *see also* Ramji-Nogales et al., *supra* note 6, at 361 ("As a practical matter, the last chance for an unsuccessful asylum applicant is to appeal an adverse Board decision to a U.S. Court of Appeals.").

68 Wang, *supra* note 67, at 33; Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 Emp. Rts. & Emp. Pol'y J. 63, 63 (1997) ("[I]f one wants to study where the law is really made," then the starting point should be "the federal courts of appeals.").

69 Wang, *supra* note 67, at 33.

70 Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek, & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 Cornell L. Rev. 1, 2 (2022).

published opinions in their cases."[71] These decisions obviously impact the individual client, but have far less of an impact on the law more broadly.

Nevertheless, one reason I wanted to study appellate clinics more systematically was because I had, through the Network, gotten a sense that appellate clinics were handling a significant number of important, precedent-setting cases. In the past few years alone, for instance, appellate clinics have been lead counsel in matters redefining the requirements for federal employment discrimination claims in the Fifth, Sixth, and D.C. Circuits, overturning decades-old precedents in the process.[72] They have expanded the First Amendment rights of high school students in the Fourth Circuit.[73] And they have prevailed in Eighth Amendment challenges to prison conditions in the Ninth Circuit.[74]

Such anecdotal observations prompted me to take a closer look into the data, to see whether appellate clinics were in fact handling a disproportionate number of cases that resulted in published opinions. To flesh out this analysis, I drew on a recent study by Abbe Gluck and various co-authors, which examined the rate of publication at the federal courts of appeals for civil rights, benefits, commercial, immigration, prison conditions, habeas, and labor and employment cases.[75] These groups map on relatively well to the category breakdown in Tables 1 and 2, and Table 3 compares these rates against one another. For Table 3, pending matters were excluded from the corpus, since it is unclear whether these cases will result in precedential or non-precedential opinions.

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[71] *Id.* Unpublished decisions, of course, still hold significant persuasive value. FED. R. APP. P. 32.1 ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like.").

[72] *See* Threat v. City of Cleveland, 6 F.4th 672, 679 (6th Cir. 2021); Chambers v. District of Columbia, 35 F.4th 870, 882 (D.C. Cir. 2022) (en banc); Hamilton v. Dallas County, 79 F.4th 494, 497–98 (5th Cir. 2023) (en banc). These cases were brought by the Georgetown Appellate Courts Immersion Clinic.

[73] Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 536–37 (4th Cir. 2022) (University of Virginia Appellate Litigation Clinic).

[74] Von Tobel v. Johns, No. 20-16853, 2022 WL 1568359, at *2 (9th Cir. May 18, 2022) (University of St. Thomas Law School Appellate Clinic).

[75] Brown et al., *supra* note 70, at 56.

Table 3: Publication Rates, Clinic Cases vs. Overall

Category	Published Decisions (Network)	Total Decided Cases (Network)	Publication Rate (Network)	Publication Rate (Aggregate, from Gluck)
Prisoner Civil Rights	37	59	62.7%	3.5%[76]
Habeas	35	56	62.5%	3.4% to 4.7%[77]
Criminal	38	52	73.1%	N/A
Labor and Employment	16	24	66.7%	38.0%[78]
Immigration	5	20	25.0%	6.3%[79]
Complex Civil & Other	15	20	75.0%	49.0%[80]
Civil Rights (Non-Prisoner)	9	15	60.0%	19.4% to 22.1%[81]
Total	**155**	**246**	**63.0%**	**12.2%[82]**

Table 3 confirms the significant precedential impact of appellate clinics. More than 60% of appellate clinic matters resulted in a published decision, over five times the rate in the overall population. In some categories, the differences were especially pronounced, with gaps of over 50% in habeas and prisoner-plaintiff matters.[83]

These figures present a potential double-edged sword. They are, on the one hand, a positive sign that appellate clinics are working on significant cases and establishing new legal precedent. Yet because these

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[76] *Id.* at 57.

[77] *Id.* at 62. This is the rate for petitions brought pursuant to 28 U.S.C. §§ 2241, 2254, and 2255. It excludes capital cases; there was, from my review, only a single capital case in the National Appellate Clinic Network, making this an apt comparison.

[78] *Id.* at 64.

[79] *Id.* at 60.

[80] *Id.* at 59.

[81] *Id.* at 58 (publication range for civil rights cases, excluding voting cases (no clinic participant had litigated a voting rights case), civil rights employment cases, and prisoner-plaintiff cases).

[82] *Id.* at 4. Note that this figure is based on 2015 to 2020 data, while Gluck and her co-authors focused on case dispositions from 2008 to 2018. However, as Merritt McAlister has chronicled, the rate of non-publication has remained fairly constant (if anything, it has slightly increased) over the past several decades. *See* Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 Nw. U. L. Rev. 1137, 1152 (2021) ("Today, unpublished decisions are as prevalent as they ever have been—even though the courts see nearly 20,000 fewer cases than they did at the caseload zenith in 2005, when the unpublication rate was lower than it is today.") (footnote omitted).

[83] Gluck and her co-authors did not separately examine direct criminal appeals, but it is reasonable to infer a publication rate in the ballpark of habeas and prisoner-plaintiff matters. Brown et al., *supra* note 70, at 66, 111.

decisions are published, they not only decide the legal issue presented by a specific client, but also set the law more broadly within a circuit—potentially creating "good" or "bad" law for millions of other groups and individuals. Further, the number of appellate clinics has swelled: thirty-two law school clinics reported focusing on appellate work in 2007;[84] fifty-six did so in 2017.[85] Such increases, combined with their precedential reach and comprehensive geographic scope, underline the case for examining their efficacy.

II. Measuring Appellate Clinic Effectiveness

With Part I having addressed why this Article focuses on appellate clinics—the data is readily available, these clinics handle a diversity of subjects, and appellate clinic cases have precedential implications—Part II examines the natural follow-up question: How often do appellate clinics win? The short answer is "quite a lot," and almost always more than a client's next-best alternative (proceeding pro se or even going with a non-clinic attorney). But getting to that answer requires first addressing some challenging questions about study design and methodology.

A. Study Design and Methodology

Any study into clinical efficacy must, as a starting point, have a baseline—otherwise, there would be little indication whether clinics were doing better, worse, or the same as a non-clinic plaintiff or defendant. The problem, though, is that no such perfect, publicly available baseline exists. The most comprehensive source of data is maintained by the Administrative Office of the U.S. Courts ("AO"). The AO tracks decisions in the federal courts of appeals by circuit and nature of the proceeding, among other metrics.[86] It organizes cases into eight buckets: Criminal, U.S. Prisoner Petitions, Other U.S. Civil, Private Prisoner Petitions, Other Private Civil, Bankruptcy, Administrative Agency Appeals, and Original Proceedings & Miscellaneous Applications.[87]

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[84] David A. Santacroce & Robert R. Kuehn, Ctr. for the Study of Applied Legal Educ., Report on the 2007–2008 Survey 8, https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/5da859d2990d0a932118b8b6_CSALE.07-08.Survey.Report.pdf.

[85] Robert R. Kuehn & David A. Santacroce with Margaret Reuter & Sue Schechter, Ctr. for the Study of Applied Legal Educ., Report on the 2016–17 Survey 9, https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/628457da3c8fe346a0508cee_Report%20on%202016-17%20CSALE%20Survey.REV.5.2022.pdf.

[86] B-5, U.S. Cts., https://www.uscourts.gov/data-table-numbers/b-5 (last visited Aug. 7, 2023).

[87] *Table B-5: U.S. Courts of Appeals—Decisions in Cases Terminated on the Merits, by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2023*, U.S. Cts., https://www.uscourts.gov/statistics/table/b-5/federal-judicial-caseload-statistics/2023/03/31 (last visited May 27, 2024).

And the AO identifies, for each of these buckets, the number and percentage of cases where the court of appeals affirmed or reversed the district court. These buckets correspond reasonably well with the case categories identified in Part I, making an apples-to-apples comparison possible between clinic performance and the AO's baseline. Still, there are three significant limitations to the AO's dataset.

1. Affirmances in Part / Reversals in Part

First, parties often seek review of many claims, and a court might affirm the district court on some but reverse and remand on others. But the AO does not distinguish between a case that is affirmed in full and one that is affirmed in part and reversed in part. Case decisions are always classified as "affirmed" even if the appellate court reversed on multiple counts and only affirmed on one.[88]

That metric, if used for this study, would significantly understate favorable outcomes in clinic cases. Consider *Real v. Perry*.[89] Plaintiff Mamberto Real had been staying at a shelter for almost a year after losing his job.[90] The shelter discharged him in February 2017, and he started "living in his vehicle," which he "parked in the shelter's parking lot."[91] A week later, two police officers approached Real's vehicle. One officer shined a flashlight into Real's car and declared that "you have five (5) seconds to leave or I am going to shoot you N*****."[92] The officer counted to five, removed his gun, and pointed it at Real's face. At this point, the other officer "intervened by placing his body between the gun and Real."[93] Real filed suit, alleging claims of excessive force by the first officer and a *Monell* violation by the city.[94] The district court granted motions to dismiss both claims.[95]

Georgetown's Appellate Courts Immersion Clinic represented Real on appeal. The Eleventh Circuit ultimately affirmed in part and reversed in part. It held that "there was without question an initial 'show of authority' when [the officer] pointed his gun at Real."[96] Real had therefore pleaded a plausible Fourth Amendment claim against

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88 *Table B-5*, *supra* note 87, at n.1 ("Affirmed includes appeals affirmed in part and reversed in part.").

89 810 F. App'x 776 (11th Cir. 2020).

90 *Id.* at 778.

91 *Id.*

92 *Id.*

93 *Id.* (alteration omitted).

94 *Id.* at 780. Under *Monell*, a city may only be held liable for the actions of law enforcement officers when an official city policy or custom caused a violation of constitutional rights. *Id.* (citing Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 694 (1978)).

95 *Id* .at 778.

96 *Id.* at 779.

the officer, contrary to the district court's earlier finding. As to Real's *Monell* claim, though, the Eleventh Circuit determined that "Real did not allege any facts to support this claim in the district court."[97] Indeed, Real did "not even discuss this claim in his brief on appeal."[98]

Virtually every lawyer would agree that the clinic's decision to abandon the *Monell* claim was a strategic one, and one that obviously paid off for the client. After all, recent Supreme Court precedent has made it "exceedingly challenging for plaintiffs to prevail in claims against officers and local governments" through *Monell*.[99] "[P]leading failures" by self-represented plaintiffs like Real are especially "common."[100] Continuing to litigate a claim without sufficient (or in Real's case, *any*) substantive allegations, particularly against this tide of unfavorable precedent, would only deflect the court from focusing on well-pleaded and plausible claims that could, if successful, make a plaintiff whole. Doing so might also undercut a lawyer's credibility. Consequently, although *Real* might be only a partial victory in name, the ultimate result reflects the best-case scenario for the client on appeal. Similar circumstances apply to several other clinic cases.[101]

But under the AO's dataset, *Real* would not have been considered a reversal, instead being coded as an affirmance because the district court's decisions on *some* of Real's claims were affirmed on appeal. Yet that is, by any reasonable perspective, inaccurate. Although the clinic obtained the best-case scenario for Real on appeal (reversal on the only plausible claim brought, with the possibility of full damages on remand), the AO would categorize such a result the same as if a clinic had not been involved at all and Real had litigated his case and lost on every one of his claims—both would be deemed "affirmances." No one would consider these situations equivalent.

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97 *Id.* at 780.

98 *Id.*

99 Joanna C. Schwartz, *Backdoor Municipal Liability*, 132 Yale L.J.F. 136, 137–38 (2022); Alexander Reinert, Joanna C. Schwartz, & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 Nw. U. L. Rev. 737, 754–55 (2021) ("[T]he Supreme Court's limitation on municipality liability operates as a significant barrier to relief for those injured by unconstitutional conduct.").

100 Nancy Leong, Katelyn Elrod & Matthew Nilsen, *Pleading Failures in* Monell *Litigation*, 73 Emory L.J. 801, 801 (2024). "[A]n analysis of the complaint in every case that resulted in a federal appellate decision in 2019 reveals that 56.5% of complaints filed by represented parties failed even to state the elements of any theory of municipal liability." *Id.*

101 *See, e.g.*, United States v. Musgraves, 831 F.3d 454, 469 (7th Cir. 2016) (reversing three convictions, vacating sentence in its entirety, and remanding for re-sentencing on two remaining convictions, which carried significantly less prison time) (Northwestern Appellate Advocacy Center); Starbuck v. Williamsburg James City Cnty. Sch. Bd., 28 F.4th 529, 538 (4th Cir. 2022) (reversing district court dismissal as to claims against individual officials but affirming dismissal as to the School Board) (University of Virginia Appellate Litigation Clinic).

Consequently, for my analysis I have separated out partial affirmances and partial reversals. Doing so helps align my dataset with the aggregate data organized by the AO, for a still-imperfect apples-to-apples comparison. But by separating these partial reversals, the study can also show and measure the other favorable outcomes that clinics obtained, which would be obscured were it only examining reversals in full.

2. Voluntary Dismissals and Settlements

Next, the AO does not consider a voluntary dismissal a favorable termination on the merits and hence does not include such dismissals as part of its data. Such results are instead categorized as a termination on procedural grounds and are part of a separate AO data sheet.[102] Yet, in actual practice, voluntary dismissals can sometimes be considered favorable outcomes for clinics and clients alike. For example, voluntary dismissals in criminal and immigration matters typically reflect a favorable outcome because the government agrees to drop the case.[103]

In a Ninth Circuit immigration appeal involving the University of Virginia Appellate Litigation Clinic, for instance, the government moved to remand to the Board of Immigration Appeals ("BIA") before oral argument. That move represented a "complete victory" for the client because, had the case proceeded to argument and decision by the Ninth Circuit, the very best result would have been the same for the client: granting the client's petition for review, vacating the agency decision below, and remanding to the BIA.[104] On the other hand, some dismissals are, consistent with the AO's assessment, purely procedural—i.e., dismissals that are due to a lack of appellate jurisdiction.[105]

Given these considerations, I have separated voluntary dismissals and settlements from the dataset. Individual clinic faculty were then consulted to determine whether these dispositions should be categorized as favorable or neutral/procedural outcomes for their clients.

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[102] *See, e.g.*, *Table B-5A: U.S. Courts of Appeals—Cases Terminated on Procedural Grounds, by Circuit and Nature of Proceeding, During the 12-Month Period Ending September 30, 2021*, U.S. Cts., https://www.uscourts.gov/file/39456/download (last visited Aug. 7, 2023).

[103] *See, e.g.*, United States v. Roberts, No. 19-1979 (8th Cir. July 23, 2019), ECF No. 16 (Iowa Criminal Defense Clinic) (voluntary dismissal of appeal). Prior studies have generally treated a voluntary or stipulated dismissal as a sign of "litigation success," since the client likely received some sort of relief against their claims. *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 Wm. & Mary L. Rev. 641, 677 (2023) [hereinafter *Civil Rights Without Representation*] (internal quotation marks omitted).

[104] Melissa Castro Wyatt, *Appellate Clinic Students Succeed at 9th Circuit: Win Protects Ukrainian National Facing Deportation in Oregon*, UVA Law (Jan. 4, 2024), https://www.law.virginia.edu/news/202401/appellate-clinic-students-succeed-9th-circuit.

[105] United States v. Jones, No. 14-1665 (7th Cir. Jan. 29, 2015), ECF No. 28 (Northwestern Appellate Advocacy Center) (dismissing appeal for lack of appellate jurisdiction).

3. Appellants and Appellees

Third, the AO does not identify which party prevailed below. That means it cannot segregate when an affirmance would be considered a win for the clinic, such as when a clinic represents a party opposing appeal, from when an affirmance would be deemed a loss, as when a clinic represents a party seeking appeal.

That concern is at least partially offset because Network clinics generally represented appellants before a federal court of appeals. They did so in every criminal and immigration case from the Network's database. That makes sense. In criminal matters, the government rarely loses in district court; when it does, it may be unable to appeal an adverse result because of double jeopardy concerns.[106] Similarly, immigration proceedings typically begin in immigration court, with the respondent (the immigrant) on one side and government attorneys from Immigration and Customs Enforcement ("ICE") on the other. Either party may appeal the immigration judge's decision to the BIA, an appellate body within the Department of Justice ("DOJ").[107] But only the individual immigrant may appeal an adverse BIA decision to a federal circuit court; the government does not appeal because ICE and BIA are both executive branch entities.

There were, however, some cases in which clinics represented appellees—i.e., the client had won below and sought counsel on appeal to defend the lower court's decision. In *Thompson v. Winn*, for example, the district court granted Anthony Thompson's habeas petition, holding that Thompson's "Sixth Amendment rights were violated by the trial court's use of mandatory sentencing guidelines."[108] Thompson had been pro se in district court.[109] On appeal, the government did not contest the grant of habeas.[110] Instead, it challenged the remedy, arguing that re-sentencing was inappropriate and the district court should have ordered a more limited proceeding, a *Crosby* remand.[111] Given the nature of such questions, which involved Michigan Supreme Court

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106 *See, e.g.,* United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that a verdict of acquittal could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution.").

107 *See* 8 C.F.R. § 1003.1(b).

108 Thompson v. Winn, No. 2:18-cv-13959, 2020 WL 1847967, at *1 (E.D. Mich. Apr. 13, 2020).

109 *Id.*

110 Brief for Respondent-Appellant at 3, Thompson v. Winn, No. 20-1448 (6th Cir. Nov. 19, 2020), ECF No. 18 ("The issue in this case is not whether the district court properly granted federal habeas relief on a Sixth Amendment sentencing claim."). A *Crosby* remand is a "remand to the trial court to determine whether the court would have imposed a materially different sentence had it not been constrained by [a state's] previously mandatory sentencing guidelines." *Id.* (citing United States v. Crosby, 397 F.3d 103 (2d Cir. 2005)).

111 *Id.*

precedent, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and U.S. Supreme Court case law, the Sixth Circuit appointed Washington University of St. Louis's Appellate Clinic to represent Thompson on appeal.[112] The clinic prevailed as appellee, obtaining a full (rather than *Crosby*) remand.[113]

Thompson is an unambiguous clinic win. But the AO's data would not necessarily be able to distinguish it as such. That is because most habeas petitioners *lose* in district court, meaning that usually (but not always) a reversal, rather than an affirmance, is a sign of success on appeal—not, as in *Thompson*, the other way around. To account for this gap, this study generally compares clinic reversal rates against the AO's reversal rate in each category, but separately identifies matters where the clinic, representing the appellee, obtained a favorable outcome through an affirmance on appeal.

B. Study Results and Findings

Each of the foregoing issues—partial affirmances, dismissals and settlements, clinics as appellees—makes comparison of clinical performance against the AO baseline challenging. Further, although the AO collects information on all federal appellate dispositions, its data naturally fluctuates from year to year. Consequently, in what follows, I used a simple weighted average of the AO's data from 2020 to 2023 (the Network was established in 2021) as a sort of "baseline" of the outcomes in all appeals.[114] As a cross-check, I drew on available relevant secondary source information. I then compared clinic performance in specific areas (e.g., immigration, criminal, habeas, etc.) against this baseline.

1. Immigration

Prior scholarship has suggested that clinical assistance significantly benefits individuals in immigration removal. In *Refugee Roulette*, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag found that unrepresented asylum seekers were granted asylum 16.3% of the time in immigration court, for cases brought between 2000 and 2004.[115] For represented respondents, this number increased to 45.6%.[116] And for those represented by Georgetown's clinic, the figure was higher still, at

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[112] Order at 3, Thompson v. Winn, No. 20-1448 (6th Cir. July 20, 2020), ECF No. 10; *see also* 6TH CIR. I.O.P. 22(c) ("When a pro se applicant is the appellee in a 28 U.S.C. §§ 2241, 2254, or 2255 case, the clerk will appoint counsel if the applicant is indigent.").

[113] Morrell v. Wardens, 12 F.4th 626, 628 (6th Cir. 2021).

[114] This calculation relied on a simple average of the twelve-month B-5 Tables ending in March 31, 2023; March 31, 2022; and March 31, 2021.

[115] Ramji-Nogales et al., *supra* note 6, at 341.

[116] *Id.*

89%.[117] Another study of immigration courts, by Ingrid Eagly and Steven Shafer, substantially corroborated these findings.[118] Self-represented individuals obtained relief in 13 to 23% of cases.[119] Represented individuals obtained relief between 48 and 63% of the time.[120] The rate for clinics was between 56 and 77%.[121] My analysis finds that this same trend holds true at the appellate level, showing significant effectiveness of clinic counsel in obtaining immigration relief.

For federal court of appeals matters, the AO's dataset does not separately consider immigration appeals among its "nature of proceeding" categories. But it does include information on "Administrative Agency Appeals" and immigration appeals represent almost all such filings: in 2021, appeals of BIA decisions "constituted 87 percent of administrative agency appeals."[122] Over the past three years, the reversal rate in administrative agency appeals was about 7.2%.[123]

Independent studies substantially corroborate this low reversal rate. In 2005, the DOJ reported a reversal rate of between 8.5% (if partial reversals are excluded) and 14% (if partial reversals are included).[124] Such rates had, according to the Justice Department, largely stayed consistent since 1983.[125] Independent secondary research has suggested a rate of about 15%.[126] Against this approximate baseline, I reviewed the disposition of clinic immigration cases, exclusive of pending cases.

Table 4: Favorable Outcomes in Immigration Appeals, Clinics vs. Overall

	Appellate Clinic Network	**All Appeals**
Full Reversal	55.0%	~ 6.2% to 8.0%
Affirmed in Part, Reversed in Part	10.0%	~ 5.5% to 7.0%
Dismissed	5.0%	
Total	**70.0%**	**~ 11.7% to 15.0%**

117 *Id.*

118 Eagly & Shafer, *supra* note 7.

119 *Id.* at 51.

120 *Id.*

121 *Id.* at 53.

122 *U.S. Courts of Appeals – Judicial Business 2021*, U.S. Cts., https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2021 (last visited July 23, 2023).

123 *See supra* note 114.

124 Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 Geo. Imm. L.J. 1, 14 (2006).

125 *Id.*

126 Ramji-Nogales et al., *supra* note 6, at 362. This represents the rate of reversal on appeal, not (as referenced above) asylum outcomes in immigration court.

On the whole, all immigrant petitioners obtained a favorable outcome on appeal about 14% to 15% of the time. Clinics delivered favorable outcomes in more than two thirds of cases: eleven cases were reversed in full, one case was dismissed, and two were reversed in part.

2. Prisoner Civil Rights

As with immigration cases, the AO's dataset provides a helpful yet incomplete baseline for prisoner civil rights matters. Such matters fall into two categories, U.S. Prisoner Petitions and Private Prisoner Petitions. Over the past three years, the reversal rate for these two categories has been between 4.5% and 5.5%.[127] The AO, however, bundles prisoner civil rights matters and habeas petitions together, reflecting the hazy line between these two types of cases discussed above.[128]

Such grouping could produce a distorted reversal rate for prisoner civil rights cases. About two thirds of prisoner plaintiff appeals were habeas petitions, while one third related to civil rights.[129] If the reversal rate for habeas cases was very low (which would seem to be the case, at least anecdotally[130]), then the AO's dataset might camouflage a far higher reversal rate in prisoner civil rights matters.

To better get at the "true" reversal rate, I reviewed several independent studies that looked strictly at prisoner civil rights matters. The first studied appellate decisions from 1995 and found a reversal rate of between 2.3% and 2.5%, with another 1.3% to 2.5% reversed in part and affirmed in part.[131] This study did not uncover a significant gap in reversal rates between habeas and prisoner civil rights cases.[132] A second study, undertaken by Kevin Clermont and Theodore Eisenberg, studied reversal rates between 1988 and 1997.[133] Their review yielded a reversal rate of around 8%; Clermont and Eisenberg's calculation also

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127 *See generally supra* note 114.

128 *See* John Scalia, U.S. Dep't of Just., Bureau of Just. Stat., Prisoner Petitions in the Federal Courts, 1980–96 at 13 (Oct. 1997), https://bjs.ojp.gov/content/pub/pdf/ppfc96.pdf; *see also supra* notes 57–61 and accompanying text.

129 *Id.*

130 *See, e.g.*, Harrington v. Richter, 562 U.S. 86, 102–03 (2011) (explaining that the AEDPA standard is intentionally "difficult to meet," requiring a petitioner to "show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement").

131 Scalia, *supra* note 128, at 13.

132 *Id.*

133 Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. Ill. L. Rev. 947, 954–55; *accord* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1597 n.121 (2003) ("Inmate plaintiffs occasionally appeal, though they do not often win their appeals."); *see also id.* (confirming Clermont and Eisenberg's findings).

included full reversals and reversals in part.[134] Clermont and Eisenberg similarly found that habeas cases were reversed at a slightly higher rate than prisoner civil rights decisions.[135]

Importantly, Clermont and Eisenberg found a statistically significant difference in reversals between defendant-oriented appeals and plaintiff-oriented appeals. When prisoner-plaintiffs lost below, and sought a different result on appeal, they succeeded between 5.7% (if the appeal was taken after trial) and 8.2% (if the appeal was taken pretrial) of the time.[136] When defendants (i.e., prison officials) lost below, and sought a different result on appeal, they succeeded between 37.7% (appeal after trial) and 57.5% (appeal before trial) of the time.[137] Put differently, if a prisoner won below, it was much more likely that prison officials would win on appeal by obtaining a reversal than vice versa.

Although these studies are somewhat dated, their overall conclusion substantially corroborates that of the AO. These secondary sources suggest a reversal rate in the rough range of 5% and 8%, inclusive of reversals in part and affirmances in part; the AO's, which includes only reversals, was about 4.5% to 5.5%. As before, this baseline range was compared against the disposition of all prisoner civil rights clinic matters.

Table 5: Favorable Outcomes in Prisoner Civil Rights Appeals, Clinics vs. Overall

	Appellate Clinic Network	**All Appeals**
Full Reversal	40.7%	~ 2.5% to 5.8%
Affirmed in Part, Reversed in Part	20.3%	~ 2.0% to 3.0%
Affirmed (as Appellee)	5.1%	
Dismissed	5.1%	
Total	**71.2%**	**~ 5.0% to 8.0%**

Again, the data shows significant gaps between clinical representation and the overall population. Of the Network's fifty-nine prisoner civil rights cases that have been decided, clinics achieved a favorable outcome in forty-two matters. When the clinic represented an appellant, it obtained a full reversal or remand in twenty-two matters, a partial reversal in twelve matters, and a favorable voluntary dismissal in three matters. In three other cases, the clinic represented an appellee.[138]

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134 Clermont & Eisenberg, *supra* note 133, at 951, 954, 967.

135 *Id.* at 954, 967.

136 *Id.*

137 *Id.*

138 *See* Thomas v. Baca, 827 F. App'x 777, 777 (9th Cir. 2020) (appeal of district court's denial of summary judgment to defendants) (Georgetown Appellate Courts Immersion Clinic);

It prevailed in each case—a notable result since, according to Clermont and Eisenberg, prisoner-plaintiff victories in district court are usually reversed rather than affirmed on appeal.

3. Habeas

The process for examining the Network's habeas matters charted a similar course. Clermont and Eisenberg estimated a reversal rate of 9.7 to 10.8% in habeas cases, with a similar discrepancy between reversals of defendant-oriented and plaintiff-oriented appeals.[139] That is, just as in prisoner civil rights cases, habeas grants were affirmed at a significantly lower rate than habeas denials. The Bureau of Justice Statistics reported a lower reversal rate for cases: 3.3% to 3.7% full reversals, and 1.2% to 1.5% reversals in part.[140] A separate DOJ study substantially corroborated these ranges.[141]

There is, however, good reason to believe the "true" habeas reversal rate today is far lower than this range. Congress enacted AEDPA in 1996, which imposed stringent additional requirements for individuals seeking habeas relief from state court decisions. Clermont and Eisenberg studied cases pre-AEDPA; the BJS and DOJ studies were also generally pre-AEDPA.[142] The DOJ commissioned a follow-up study in 2007 into habeas litigation in federal district courts in the decade after AEDPA's passage. Based on a random selection of 2,500 non-capital matters, the study authors found that "only 7 petitioners received relief, a rate of 1 in every 341 cases filed." That would be less than 0.3%.[143] The rate for evidentiary hearings (a form of partial relief) was only marginally higher, at 0.41%.[144]

Unfortunately, there has not been a similar study undertaken in the decade and a half since. But there is little reason to imagine a substantial uptick in habeas grants since 2007. If anything, more recent

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Knighten v. Ramsey, No. 22-5078, 2023 WL 2998424, at *1 (10th Cir. Apr. 19, 2023) (appeal of district court's denial of motion to dismiss) (Colorado Appellate Advocacy Practicum).

139 Clermont & Eisenberg, *supra* note 133, at 951, 954, 967.

140 Scalia, *supra* note 128, at 13.

141 Carol G. Kaplan, U.S. Dep't of Just., Bureau of Just. Stat., Habeas Corpus – Federal Review of State Prisoner Petitions 5 (Mar. 1984), https://bjs.ojp.gov/library/publications/habeas-corpus-federal-review-state-prisoner-petitions#:~:text=It%20found%20that%203.2%20percent,requirement%20for%20further%20judicial%20review (3.2% of habeas petitions granted in whole or in part).

142 *See, e.g.*, Brown v. Davenport, 596 U.S. 118, 134 (2022) ("Today, then, a federal court must *deny* relief to a state habeas petitioner who fails to satisfy either this Court's equitable precedents or AEDPA. But to *grant* relief, a court must find that the petitioner has cleared both tests.").

143 Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, U.S. Dep't of Just., Off. of Just. Programs, Executive Summary: Habeas Litigation in U.S. District Courts 9 (Aug. 2007), https://www.ojp.gov/pdffiles1/nij/grants/219558.pdf.

144 *Id.* at 5.

Supreme Court decisions have made it even more challenging for habeas petitioners by imposing significant barriers to petitioners seeking evidentiary hearings,[145] ruling that petitioners must overcome harmless error even if AEDPA is satisfied,[146] and holding that a state court decision is an adjudication on the merits even when the decision offers no substantive reasons.[147] Given such circumstances, this analysis anchored the total reversal rate in habeas petitions to hew much closer to the low single digits, rather than the high single digits reported by Clermont and Eisenberg.

Table 6: Favorable Outcomes in Habeas Appeals, Clinics vs. Overall

	Appellate Clinic Network	**All Appeals**
Reversed	25.0%	~ 4.5% to 5.5%
Affirmed in Part, Reversed in Part	5.4%	
Affirmed (as Appellee)	8.9%	
Dismissed	3.6%	
Total	**42.9%**	**~ 4.5% to 5.5%**

Clinics obtained reversals of unfavorable district court decisions 25% of the time in habeas matters. When dismissals, partial reversals, and affirmances where the clinic represented the appellee are factored in, clinics obtained a favorable outcome in 42.9% of habeas matters. These rates are significantly higher than the baseline, whether taken from Clermont and Eisenberg's work or from the more recent 2007 DOJ study. Even so, clinics did obtain a lower rate of favorable outcomes in habeas matters than in immigration and prisoner civil rights cases (where the rate is around 70%). After these percentages were presented to clinical faculty and practitioners, each respondent pointed to the increasingly challenging legal landscape for habeas claims.[148] Many noted that a habeas petitioner had not succeeded in the Supreme Court in many years. Given these headwinds, even if the caselaw arguably favors a petitioner, circuit judges may be especially

[145] Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (holding that, for 28 U.S.C. § 2254(d)(1) petitions, review "is limited to the record that was before the state court that adjudicated the claim on the merits").

[146] *Brown*, 596 U.S. at 134–35. There are persuasive arguments that this approach—"negative habeas equity"—is atextualist and inconsistent with habeas history. *See* Lee Kovarsky, *The New Negative Habeas Equity*, 137 Harv. L. Rev. 2222 (2024).

[147] Harrington v. Richter, 562 U.S. 86, 99 (2011) ("[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning.").

[148] Interviews with clinical faculty (on file with author).

hesitant to grant habeas, out of a concern for possible reversal by the Supreme Court.[149]

4. Criminal

There were fifty-two criminal decisions in the Network's database. The clinic represented the appellant in virtually all matters.[150] This circumstance made it easier to distinguish and identify clinic successes. If a sentence or conviction was affirmed, the clinic "lost." If a conviction or sentence was reversed or vacated, the clinic "won." And if a case was dismissed, that typically favored the defendant, too. Furthermore, on criminal matters, the AO's dataset offers a reasonable baseline: the dataset isolates criminal appeals and finds, over the past three years, that those appeals resulted in reversals in 7.7% of cases.[151] This overall reversal rate appears to have stayed roughly the same over time: "A comprehensive study of the federal circuit courts for the years 1925–1996 found that . . . 'outright reversal' occurs in just 6 percent of appeals."[152] And, consistent with criminal matters handled by appellate clinics, most criminal appeals more generally are brought by defendants, rather than the government.[153] Table 7 plots this baseline rate against favorable outcomes in appellate clinic cases.

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149 Cassano v. Shoop, 10 F.4th 695, 696–97 (6th Cir. 2021) (Griffin, J., dissenting from denial of rehearing en banc) (cataloging twenty-two instances where Supreme Court had reversed Sixth Circuit in habeas matter).

150 The one exception was *United States v. Loniello*, 610 F.3d 488 (7th Cir. 2010), a case handled by the Northwestern Federal Appellate Clinic. But that case was a continuation of a prior matter, *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008), which was handled by the same clinic. In *Thornton*, the earlier case, the Seventh Circuit reversed the defendant's conviction because of insufficient evidence. It observed, however, that although the evidence was insufficient to support a conviction under one paragraph of the charging statute, the defendant's "acts appeared to violate" another, separate paragraph of the statute. *Loniello*, 610 F.3d at 490. The prosecutor subsequently charged the defendant under this separate paragraph. The district court concluded that such charging constituted double jeopardy. *Id.* at 491. But the Seventh Circuit reversed, to the detriment of the clinic's client. *Id.* at 492.

151 *See supra* note 114.

152 Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. App. Prac. & Process 199, 219 & n.101 (2001).

153 *See* Margaret D. McGaughey, *When the United States Loses: The Government Appeal Process*, 18 J. App. Prac. & Process 297, 297 (2017). Both informal political factors, such as prosecutorial discretion and limited resources, and formal legal guardrails, such as double jeopardy, play a role in the government declining to appeal many criminal matters.

Table 7: Favorable Outcomes in Criminal Appeals, Clinics vs. Overall

	Appellate Clinic Network	**All Appeals**
Reversed	9.6%	6.0% to 7.7%
Affirmed in Part, Reversed in Part	9.6%	
Dismissed	1.9%	
Total	**21.1%**	**6.0% to 7.7%**

Appellate clinics achieved a favorable result in criminal appeals about 20% of the time. Based on reversals alone, that rate is well above that of overall criminal appeals. But it is not as far above this baseline rate as the other categories above (immigration, prisoner civil rights, etc.). Two reasons explain this smaller gap in apparent clinical effectiveness.

First, as discussed above, partial reversals should be considered wins—particularly so in criminal cases. *United States v. Jaffal*, brought by Virginia's Appellate Litigation Clinic, is illustrative.[154] The clinic asserted that, at trial, the district court had made improper evidentiary rulings and failed to provide a lesser-included-offense instruction.[155] Either route would have granted Jaffal relief in the form of a new trial. Presenting both routes, however, allowed counsel to spotlight several favorable factual circumstances before the panel, thus providing the court a more complete story of the client's situation. The Sixth Circuit ultimately held in Jaffal's favor on the jury instruction argument but affirmed the district court's evidentiary rulings.[156]

Though technically an affirmance in part and reversal in part (and thus an "affirmance" in the AO's dataset), most lawyers would consider the result in *Jaffal* a win. For one, the client obtained the same result (a retrial) as he would have had he prevailed on all of his arguments. His evidentiary challenges were a more uphill argument compared to his jury instruction argument. And had he prevailed on his evidentiary challenges, he would have had a more favorable environment on retrial. But had he not brought them at all, there is a chance he would not have been afforded *any* relief. Securing meaningful relief that improves the client's situation should be treated as a win, reflective of synergistic and strategic lawyering.

Second, the Sixth Amendment guarantees criminal defendants a right to counsel through their first appeal; that constitutional mandate

154 United States v. Jaffal, 79 F.4th 582 (6th Cir. 2023).
155 *Id.* at 589.
156 *Id.*

is, as discussed above, funded through the CJA.[157] One would reasonably expect, given those circumstances, for clinics to have a more muted effect in criminal cases. After all, unlike civil appeals, where many individuals proceed pro se,[158] virtually every criminal defendant has a lawyer on appeal. It's simply a question of what type of lawyer that defendant will have: public defender, private retained counsel, CJA-appointed attorney, or legal clinic. All that said, the data still indicates that clinics provide some benefit above that of a run-of-the-mill attorney. Clinics obtained full reversals about 10% of the time, against an overall baseline rate of 6% to 8%.

Moreover, among non-clinic attorneys—public defenders, private counsel, and CJA-appointed attorneys—clinics are likely best compared to the last group, CJA lawyers. That is because both groups draw from the same population of cases: clients who are not being represented by a public defender and clients who cannot afford to retain private counsel. There is compelling evidence to suggest that reversal rates for CJA-appointed attorneys are likely much lower than the overall baseline rate of 6% to 8%.

Research comparing public defenders to CJA-appointed attorneys has found that appointed attorneys generate worse outcomes for their clients in terms of (1) the probability of being convicted, (2) the likelihood of incarceration, and (3) sentence length.[159] A 2011 study on defendants charged with felony offenses found that defendants represented by public defenders had a 73% chance of conviction. Defendants represented by CJA-assigned counsel faced a 78% chance of conviction.[160] Those in the latter group also received on average a twelve-month-longer sentence. Another study of cases produced similar results. Defendants based in San Francisco who were represented by a federal public defender faced a 10.5%-shorter prison term and were 22% less likely to face a prison sentence compared to those represented by an appointed attorney.[161]

Commentators suggest that CJA-appointed attorneys fare significantly worse because they often have limited experience and skills and cannot compete with the institutional knowledge, resources, and

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157 Gideon v. Wainwright, 372 U.S. 335, 345 (1963); Douglas v. California, 372 U.S. 353, 357 (1963) ("[W]here the merits of the one and only appeal an indigent has as of right are denied without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."); 18 U.S.C § 3006A.

158 Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26–27 (1981).

159 Thomas H. Cohen, *Who is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 Crim. Just. Pol'y Rev. 29 (2014); Yotam Shem-Tov, *Make-or-Buy? The Provision of Indigent Defense Services in the U.S.*, 104 Rev. Econ. & Stat. 819 (2017).

160 Cohen, *supra* note 159, at 38–39.

161 Shem-Tov, *supra* note 159, at 824.

connections that public defenders or paid private counsel may possess.[162] Some of these concerns are offset in the clinical setting. Although student-attorneys have limited litigation experience, many appellate clinicians come from backgrounds in public interest or criminal defense work.[163] That background provides the training, knowledge, skills, and institutional connections that a non-clinic CJA attorney may lack.

5. Remaining Civil

Finally, I examined all remaining civil matters, which included labor and employment, complex civil and class actions, and non-prisoner civil rights cases. These categories were combined for two reasons. First, there were few individual cases within each category. A single favorable result might therefore severely distort the data. And similarly, the AO's dataset does not distinguish between these three categories; instead, it broadly lumps these matters into two groups: (1) civil cases where the United States is a party and (2) all other private civil cases. Reversal rates were substantially similar between these two groups: 12.4% of private civil cases were reversed on appeal; 15.9% of civil cases involving the United States as a party were reversed.[164]

These rates mirror the secondary literature. As Barry Edwards has chronicled, "[t]he best available data on federal and state court appeals indicate that the overwhelming majority of lower court decisions are affirmed on appeal."[165] Edwards observed that appeals courts affirm about 90% to 92% of the time.[166] Considering that the affirmance rate is somewhat higher in criminal cases, at around 95%, a slightly lower affirmance rate (of between 12% and 16%) in civil matters would make sense.

That said, one should not draw firm conclusions from this catch-all category. The subject matter in the AO's dataset varies widely, from intellectual property to class action to employment discrimination to contract disputes. Certainly, appellate clinics handled some of these types of cases. But it did not do so for all types. That makes the AO's data over-inclusive and a highly imperfect apples-to-apples comparator.

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162 *See* Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (Nat'l Bureau of Econ. Rsch., Working Paper No. 13187, 2007), https://www.nber.org/system/files/working_papers/w13187/w13187.pdf.

163 Within the National Appellate Clinic Network, eight faculty members previously worked full time at the ACLU, Legal Aid, or other non-profit organization. At least three were public defenders.

164 *See supra* note 114.

165 Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 Emory L.J. Online 1035, 1040 (2019).

166 *Id.* at 1035 & nn.1–3.

Table 8: Favorable Outcomes in Remaining Civil Appeals, Clinics vs. Overall

	Appellate Clinic Network	**All Appeals**
Reversed	35.6%	12.4% to 15.9%
Affirmed in Part, Reversed in Part	20.3%	
Affirmed (as Appellee)	5.1%	
Dismissed	5.1%	
Total	**66.1%**	**12.4% to 15.9%**

Again, clinics are associated with a much higher rate of favorable outcomes than the overall population. In thirty-nine matters (out of sixty-one), the clinic's client achieved a favorable outcome. That is several times higher than the baseline rate. Table 9 summarizes the data from the preceding Tables.

Table 9: Summary Chart of Outcomes, Clinics v. Overall

Category	**Baseline Reversal Rate in All Appeals**	**Clinic Reversal Rate**	**All Favorable Clinic Outcomes**
Immigration	~14.0% to 15.0%	55.0%	70.0%
Prisoner Civil Rights	~5.0% to 8.0%	37.3%	71.2%
Habeas	~4.5% to 5.5%	25.0%	42.9%
Criminal	~6.0% to 7.7%	9.6%	21.1%
General Civil	~12.4% to 15.9%	35.6%	66.1%

C. Why Are Appellate Clinics Successful?

We know that appellate clinics make law—their cases are published far more often than not. And we also have data showing they are often making "good" law, benefitting their clients and similarly situated individuals, and usually far more so than if the client were proceeding without a lawyer or with a non-clinic, CJA-appointed attorney.[167] What might explain this apparent success? And why might we see it particularly from appellate clinics, as opposed to the employment law clinics that Shanahan and Greiner and Pattanayak studied, which suggested clinic representation might increase "engagement with the process," but may not "ultimately lead to improvement in outcomes"?[168] Based

[167] As used in this Article, "good" law represents binding precedent (or, in the case of unpublished opinions, persuasive authority) that rules in favor of a clinic client, while also providing reasoning that may assist other, similarly situated individuals.

[168] *Id.* at 1370; Greiner & Pattanayak, *supra* note 8, at 2149–63.

on the data, I hazard three explanations: (1) the importance of legal research resources, (2) the investment of time in an appellate matter, and (3) the nature of appellate proceedings.

1. Greater Emphasis on Legal Research

The "conventional wisdom" is that in an appeal, briefing is paramount.[169] But how to organize and shape a brief, how to craft an argument, and when to emphasize certain issues are all exercises of judgment.[170] Examining every Network brief to determine whether a clinic or its opposing counsel made the "best" argument for a "winning" case would be both incredibly time-intensive and impossibly subjective. Another metric is more ascertainable and carries some predictive power.

In a prior study of more than four hundred federal cases, Elizabeth Tippett concluded that the "strongest results"—i.e., the strongest relationship between a particular variable and a positive result— "involved the [nature of] citations" within a brief, "suggesting that legal research plays a central role in brief writing."[171] Tippett conducted several complex analyses of citation patterns and sentence structure, but the "simplest approach to citation analysis was merely to count them: How many citations appeared per brief?"[172] Citation count was "consistently among the top predictive features of summary judgment outcome."[173]

This analysis was replicated across most cases within the Network, except for immigration cases, as documents in these cases are often not publicly accessible via PACER or Bloomberg.[174] With those cases excluded, I used the Table of Authorities to count the number of authorities in the principal clinic brief and the number of authorities in the principal opposition brief. The findings are produced below.

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169 Michael Duvall, *When Is Oral Argument Important? A Judicial Clerk's View of the Debate*, 9 J. App. Prac. & Process 121, 122 (2007); *see also id.* ("Oral argument significantly impacts the outcomes of only very close cases.").

170 *Cf.* Elizabeth C. Tippett et al., *Does Lawyering Matter? Predicting Judicial Decisions from Legal Briefs, and What That Means for Access to Justice*, 100 Tex. L. Rev. 1157, 1159 (2022) (observing that lawyers and law students take many courses on legal writing and research, and "these activities train lawyers in a set of norms and practices that are assumed to be the most effective for client advocacy. Yet, the effect of such training can be difficult to quantify, and the efficacy of conventional wisdom difficult to test").

171 *Id.* at 1160.

172 *Id.* at 1174.

173 *Id.*

174 *See, e.g.*, *Sealed & Confidential Materials: Appellate Procedure Guide*, U.S. Ct. of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/appellateprocedureguide/General_Provisions/SealedConfidMem.html (last visited Aug. 9, 2023).

Table 10: Average No. of Citations, Clinics v. Opposing Counsel

Category	Avg. Clinic Citations	Avg. Opposing Brief Citations	Difference
Complex Civil	68.1	72.3	-4.2
Habeas	55.0	54.5	+0.5
Prisoner Civil Rights	53.7	52.3	+1.4
Criminal	58.6	48.8	+9.8
Non-Prisoner Civil Rights	66.0	50.1	+15.9
Labor & Employment	70.3	52.1	+18.1

As reflected, clinics cited more (and often significantly more) authorities than opposing counsel across all categories except for complex civil cases—which, as noted, is an inherently challenging category from which to draw firm conclusions, given the wide variation in cases under this heading.[175]

2. Increased Investment of Time and Resources

Such a result—that clinics win more because they cite more legal authority—prompts a natural follow-up question: Why are clinic briefs better researched? One likely answer is that law students and legal clinics simply have more time and resources.

Consider a typical CJA case. In 2023, counsel appointed under the Act may earn up to $9,100 per appeal.[176] The prescribed hourly rate under the Act is $164,[177] meaning that an attorney will be compensated for up to 55.5 hours of work. That includes all research, client communication, meetings, writing, and argument. Any extra hour of legal work past 55.5 hours is not compensated. By comparison, most clinics average between three and six credit hours per semester, with some appellate clinics covering both academic semesters. ABA Standard 310 provides that a credit hour "is an amount of work that reasonably approximates

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[175] In discussions about this gap with clinical faculty, many pointed to the idiosyncratic nature of the complex civil cases, and the relatively small number that clinics handle. Interview with clinical faculty member (notes on file with author).

[176] Criminal Justice Act (CJA) Guidelines, Chapter 2, § 230: Compensation and Expenses of Appointed Counsel, U.S. Crs., https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_23 (last revised Dec. 29, 2022). In the most recent decade, the cap was between $7,800 and $9,100 per appeal. *See CJA Panel Attorney Hourly Rates and Maximum Case Compensation Rates*, U.S. Crs. (Dec. 30, 2022), https://www.are.uscourts.gov/sites/are/files/CJA%20Rate%20Schedule.pdf.

[177] *Id.*

not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for fifteen weeks."[178]

Such requirements mean that a single appellate clinic team often dedicates hundreds of hours to a particular case. A two-person case team in a fifteen-week semester for a three-credit clinic would dedicate 270 hours of time to a case.[179] A larger case team, for a four- or six-credit clinic over two semesters, could well exceed 1,000 hours of student work, exclusive of faculty or staff attorney time. Such numbers are many times higher than what would be compensable under the CJA. In addition, the resources at a law school allow clinics to frequently cast a wider net than their private practitioner counterparts. Clinic students might, for instance, consult other faculty and lean on library resources. They have unlimited (or virtually unlimited) access to research databases and legal reporters. Private practitioners, on the other hand, have fewer such opportunities.

Appointed attorneys, of course, likely do not "need" as much time to prepare a case as a law student, nor do they need extensive legal resources to prepare a good case—particularly if they have prior relevant experience. That is likely one of the key conclusions from Shanahan's study and other prior research. Moreover, many appointed attorneys provide far more than 55.5 hours of work on a CJA case.[180] Certainly, not every CJA-appointed attorney spends only about sixty hours on an appeal, and not all clinics spend over a thousand on an appeal. Nor do non-clinic CJA attorneys always consult fewer resources than a law school clinic. My claim is far more modest: given the way the CJA is structured, there is no financial incentive for a private practitioner to spend the same amount of time or resources on an appeal as a law school clinic. And it is reasonable to imagine that such incentives—a ceiling on compensation for attorney time, a floor that is much higher than that ceiling for student clinical time—could produce more research and better results in appellate cases.

3. Deliberative Nature of Appellate Proceedings

If these circumstances—more legal resources and more dedicated time—help explain appellate clinic efficacy, why wouldn't they deliver similar results in other clinical settings? Recall there was only mixed

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178 ABA Standards, *supra* note 11, at Standard 310(b)(1).

179 Students dedicate three hours per week per credit hour; three credit hours by two students is eighteen total hours per week.

180 Courts recognize this point, acknowledging that the Act's ceilings are far below market rates. In re Carlyle, 644 F.3d 694, 699 (8th Cir. 2011) ("CJA service is first a professional responsibility, and no lawyer is entitled to full compensation for services for the public good.")

support for clinical assistance in Washington, D.C. unemployment proceedings, and even less support in offers of clinical assistance by Harvard's Legal Aid Bureau.

Based on interviews with clinical faculty, part of the answer lies in the different nature of appellate proceedings.[181] A theme echoed in these interviews was that students were particularly well-equipped to undertake appellate work. Starting in their first year, law students are exposed to many of the basic tenets of appellate advocacy. Their writing courses often culminate in a model appellate-style brief. Their casebooks teem with federal appellate decisions.[182] Moot court gives students an early taste of appellate process and procedure. The law school experience, in short, gives upper-level law students *some* understanding of a federal appeal. On the other hand, most students are unlikely to be familiar with procedures in the D.C. Office of Administrative Hearings; many have probably never even heard of the office.[183]

How might these different circumstances produce different results? In the specialized administrative hearing context, "clinical law students, working as junior collaborators, . . . *act*[] like practicing lawyers."[184] Consistent with such actions, Shanahan observes, "the data suggests that clinical law students are using procedural tactics incrementally more often than attorneys."[185] But acting like a lawyer by "us[ing] procedures like practicing attorneys," is—obviously—far different from being a lawyer.[186]

I emphasize that no student, regardless of prior experience, comes into an appellate clinic as a polished appellate attorney. They simply come in with a better grounding than they would compared to, say, a clinic that focuses on processes and procedures of which students are unfamiliar. Moreover, even if some students may be unfamiliar with certain appellate procedures, the nature of appellate proceedings frequently gives them the necessary time to acclimate, because almost every federal appeal will take months,[187] with courts often liberally granting briefing and filing extensions.[188] By comparison, cases in administrative court typically "have very short timelines: often two to three weeks from when the case is scheduled (which is when a representative typically

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181 Interviews on file with author.

182 *See, e.g.*, Arthur D. Austin, *Is the Casebook Method Obsolete?*, 6 Wm. & Mary L. Rev. 157, 157 (1965).

183 Shanahan et al., *supra* note 4, at 559.

184 *Id.* at 573.

185 *Id.* at 574.

186 *Id.*

187 *See, e.g.*, Fed. R. App. P. 4(a) (requiring a notice of appeal within 30 days of judgment in some cases, and 60 days when the United States, its agency, or officer is a party).

188 *See, e.g.*, 11th Cir. R. 31-2(a) (providing that a party's first extension of up to 30 days may be made by telephone and may be granted by the Clerk, rather than a judge).

takes a client) to the hearing."[189] A truncated timeline means that clinic students in those cases must quickly learn what processes could be relevant. But that might mean a tradeoff in grasping the substantive law to present "well-organized and . . . good arguments."[190]

III. Addressing Methodology Concerns

When sharing earlier drafts of my research, I encountered a recurring critique: my findings drew on observational, rather than experimental, data. To many researchers, random assignment provides the sole useful barometer of efficacy: "[T]he only way to produce credible quantitative results on the effect of legal representation is with randomized trials."[191] "[A]lmost all [other] literature," as Greiner and Pattanayak put it, "is unworthy of credence."[192]

In my view, such a perspective unnecessarily elevates the perfect at the expense of the useful. That is particularly true because random assignment is not feasible at the appellate level and certainly not at the appellate clinic level.

For one thing, many clients are represented in district court and continue to retain that same counsel on appeal. It would be neither ethical nor prudent to force these individuals to terminate an existing attorney-client relationship in favor of casting their lot in some randomized controlled experiment.

Even if one were only to study pro se parties, that would itself come with many challenges. After all, the AO's data does not note how much more frequently represented appellants prevail than pro se parties, or how often appointed counsel prevail rather than retained counsel. Nor is it possible to collect such data through commercial databases.[193] It would, in other words, be very difficult to find a perfect baseline or, to borrow the parlance of experimental scholars, an appropriate control group.

These practical issues dovetail with effects that would be counter-productive to student learning were any such endeavor tried in a clinical setting. A clinic could, for instance, offer legal assistance at random to pro se parties—e.g., extending clinical services for every thousandth appeal filed. Yet doing so would undercut many pedagogical goals. Faculty routinely evaluate cases before offering clinical

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189 *Id.* at 568.

190 *Id.*

191 Greiner & Pattanayak, *supra* note 8, at 2182.

192 *Id.*

193 Merritt E. McAlister, *Missing Decisions*, 169 U. Pa. L. Rev. 1101, 1103 (2021) (noting the absence of a significant share of appellate decisions, particularly for pro se parties, in commercial databases).

assistance, to examine whether the case's legal complexity and factual record lend themselves to student instruction. They gauge whether a case is a suitable candidate for oral argument, which might serve as a capstone to the clinical experience. Some faculty also consider where a client is located to see whether the clinic will allow students to develop client communication and interaction skills. They also may consider whether a case poses an especially thorny legal or factual issue where a law school's resources might be particularly valuable. Some clinics even involve students in case selection to teach why certain matters are particularly good candidates for appellate review, while others might have waiver or vehicle problems. There are thus many reasons why deliberative case selection can promote valuable educational goals. Few faculty would sacrifice such goals for a random experiment.

All that said, I acknowledge my findings in this study may be susceptible to court-driven and clinic-driven selection effects. That is, it's possible that courts might only appoint clinics in meritorious cases (a court-driven selection effect), and clinics might agree to represent clients only in "winnable" matters, thereby inflating their rates (a clinic-driven selection effect). This Part tackles those concerns.

A. Court-Driven Selection Effects

Court appointments are a source of many appellate clinic cases. For criminal cases, the CJA provides the necessary funding to guarantee counsel to defendants through their direct appeal,[194] and occasionally on postconviction review as well.[195] Because of this guarantee, there are few court-driven selection effects in criminal matters—the courts of appeals do not get to choose which defendants get counsel and which do not since the law mandates that all have counsel.

Civil appointment, on the other hand, is significantly more ad hoc. There is very little research examining when courts appoint counsel in civil cases, what factors they consider when they do, and whether appointment affects outcomes. But the available data suggests a

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194 *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 393–94 (1985).

195 *See, e.g.*, 18 U.S.C. § 3006A(a)(2). How systematically courts appoint in habeas matters varies widely; observers have criticized this "decentralized system" for "creat[ing] a disorganized framework that leads to inconsistent appointment for similarly situated petitioners, not only in whether or not a petitioner will receive counsel, but in the experience and quality of counsel as well." Diana Cummiskey, Comment, *The Appointment of Counsel in Collateral Review*, 24 Penn. J. Const. L. 939, 941 (2022). Nevertheless, the available data suggests appointment overall is infrequent, in less than 10% of non-capital cases. *Id.* at 940 n.1; *see also* Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 Fed. Sent'g Rep. 308, 315–16 (2012).

dizzying kaleidoscope of approaches. In the Ninth Circuit, for instance, the court seeks appointment in about 160 cases per year.[196] To facilitate those appointments, the court has a special program for law school clinics, generally focused on prisoner civil rights or immigration matters which the circuit has decided would benefit from appointed counsel.[197] These cases are set on an expedited briefing and argument schedule which ensures that briefing is complete, typically within a single semester, and oral argument is held during the academic calendar year. A pro bono coordinator works with parties and the court to navigate calendars to accommodate a law school's schedule. As of 2023, 18 law schools participate in the program.[198] Few other courts, however, appoint as frequently or as systematically. The Fifth Circuit's pro bono program appoints in ten to fifteen cases each year.[199] The Eighth Circuit does so even more rarely.[200] And the Tenth Circuit appoints so rarely that it cautions prospective attorneys that they "may have to wait a significant amount of time to receive an appointment."[201]

Such variation could distort outcomes if some courts are appointing more selectively than others. Under that theory, the circuits that appoint only in meritorious or likely meritorious cases would see a higher win rate compared to the AO baseline, regardless of whether the appointment went to a clinic or not. Conversely, courts (like the Ninth Circuit) that appoint more frequently might see a lower win rate.[202]

Yet the data does not necessarily support this theory. Table 11 compares appellate clinic win rates for civil appointment by circuit. For simplicity's sake, the Table includes all favorable outcomes, including dismissals and partial reversals. To prevent a single decision from overstating its impact, the Table is limited to those circuits with three or more decisions.[203]

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196 *See Pro Bono Program*, U.S. Cts. for the Ninth Circuit, https://www.ca9.uscourts.gov/probono/ (last visited July 26, 2023).

197 E-mail from Ninth Circuit Pro Bono Coordinator to author, May 10, 2021 (on file with author).

198 E-mail from Ninth Circuit Pro Bono Coordinator to author, May 31, 2023 (on file with author).

199 *See* E-mail from Fifth Circuit Mediation and Judicial Support Officer to author, Dec. 7, 2022 (on file with author).

200 Phone interview with Eighth Circuit Clerk of Court, Dec. 6, 2021.

201 Am. Bar Ass'n, App. Prac., Guide to Volunteer Pro Bono Appeals in the Federal Courts 11 (2016).

202 Greiner & Pattanayak, *supra* note 8, at 2190 ("[S]tudies . . . strongly suggest that the court is culling the docket for serious cases likely to receive severe dispositions and then requiring counsel in those cases but not others." (alterations and internal quotation marks omitted)).

203 Applying this filter excluded the First, Second, and Fifth Circuits.

Table 11: Clinic Win Rate by Circuit

Circuit	No. of Civil Case Appointments	Favorable Clinic Outcomes	Win Rate
Fourth	40	21	52.5%
Ninth	26	20	76.9%
Seventh	20	13	65.0%
D.C.	17	10	58.8%
Third	16	11	68.8%
Sixth	11	4	36.4%
Eleventh	7	4	57.1%
Tenth	6	5	83.3%
Eighth	4	2	50.0%

There is not an inverse relationship between win rate and frequency of appointment. In fact, one of the circuits that appoints most often, the Ninth, had the second-highest win rate. Several cases help illustrate why courts do not (or, possibly, cannot) appoint only in meritorious matters.

Begin with a recent Supreme Court case, *Taylor v. Riojas*, which involved a challenge to qualified immunity. The Court there held that, given the "egregious facts of the case"—an inmate held for days without access to food and water, in a cell covered in his own feces—"any reasonable officer should have realized that [such] conditions of confinement offended the Constitution."[204] *Taylor* has since been described by scholars as a "critically important decision[] defining the contours of qualified immunity's protections and shaping public debate about the doctrine."[205] Yet in actually litigating his case, Taylor "spent years searching, in vain, for lawyers willing to represent" him.[206] He "repeatedly asked the judges hearing" his case to "appoint counsel; those requests were repeatedly denied."[207] He represented himself in district court and through appeal.[208] In other words, even though Taylor was ultimately successful before the Supreme Court—obtaining a result that, according to the Court, "any reasonable officer should have realized"—neither the Fifth Circuit nor the district court saw his claims as even worthy of appointment of counsel.

Nor is *Taylor* an exception to the rule. Consider two similar cases from different courts of appeals. In 2023, a Northwestern Federal Appellate Clinic case involved the forcible medication of a California

204 Taylor v. Riojas, 592 U.S. 7, 9 (2020) (per curiam).
205 Schwartz, *Civil Rights Without Representation*, *supra* note 102, at 648.
206 *Id.* at 649.
207 *Id.*
208 *Id.*

prisoner, Everett Spillard.[209] There was no dispute that Spillard had been administered medication without his consent.[210] Yet in granting summary judgment to the prison defendants, the district court did not address whether that non-consensual administration violated Spillard's constitutional rights. Instead, it resolved the case on qualified immunity grounds.[211]

But there was a major problem with that ruling: "Because [defendants were] privately employed medical providers, the defense of qualified immunity [was] categorically unavailable."[212] Neither party pointed to this mistake in the district court's order: Spillard because he was pro se, and defendants because they had no incentive to object.[213] It was not until the Ninth Circuit appointed a clinic to represent Spillard that defendants' private party status became an issue.[214] In response, defendants conceded—for the first time, on appeal—that they were not "entitled to summary judgment on qualified immunity grounds."[215] They argued instead that the court should dismiss on alternative grounds.[216] The Ninth Circuit rejected this argument: the "alternative bases argued by [defendants]" did not "support affirmance."[217] The panel reversed and remanded the matter to the district court; the parties reached a favorable financial settlement on remand.

Contrast *Spillard* with *Pinkston v. Kuiper*. Just like in *Spillard*, the prisoner there was given medication without his consent, when officials forcibly administered him antipsychotic drugs.[218] Pinkston moved several times in district court for the appointment of counsel. Each time, his motions were denied.[219] So he represented himself at a four-day evidentiary hearing. At the end of this hearing, the district court found that defendants had violated Pinkston's due process rights.[220] Jail officials, represented by a national corporate law firm, appealed to the Fifth Circuit. Pinkston again moved for appointment of counsel. The

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209 Spillard v. Ivers, No. 21-16772, 2023 WL 4992827, at *1 (9th Cir. Aug. 4, 2023).

210 *Id.*

211 *Id.*

212 *Id.* (citing Jensen v. Lane Cnty., 222 F.3d 570, 577–79 (9th Cir. 2000)).

213 Appellant's Informal Brief, Spillard v. Ivers, No. 21-16772 (9th Cir. Dec. 23, 2021), Dkt. No. 9.

214 *See* Plaintiff-Appellant's Opening Brief (Replacement), Spillard v. Ivers, No. 21-16772 (9th Cir. Nov. 14, 2022), Dkt. No. 36.

215 *See* Defendant-Appellees' Answering Brief (Replacement) at 15, Spillard v. Ivers, No. 21-16772 (9th Cir. Mar. 6, 2023), Dkt. No. 49.

216 *Id.* at 33.

217 *Id.*

218 Pinkston v. Miss. Dep't of Corr., No. 4:17-cv-39-DMB-DAS, 2021 WL 1206412, at *1–2 (N.D. Miss. Mar. 30, 2021).

219 *See, e.g.*, Pinkston v. Miss. Dep't of Corr., No. 4:17-cv-39-DMB-DAS (N.D. Miss.), Dkt. Nos. 43 & 138.

220 *Pinkston*, 2021 WL 1206412, at *1.

Fifth Circuit did not act on this motion; instead, several weeks later, Rights Behind Bars, a nonprofit organization, reached out and offered its assistance pro bono. Attorneys from WilmerHale later entered an appearance.

It is unclear, absent Rights Behind Bars and WilmerHale's involvement, whether the Fifth Circuit would have appointed Pinkston counsel. There are strong indications it would not have. At oral argument, for instance, Judge Edith Jones castigated WilmerHale for representing Pinkston.[221] She described Pinkston as "quite a manipulator" and asked to review the "law firm's [pro bono] policy."[222] Judge Jones questioned why "the law firm [thought] it was worthwhile to use a case on behalf of a liar and faker" to "make a very, very significant rule of constitutional law."[223] The Fifth Circuit's opinion ultimately reversed the district court's ruling.[224]

What matters is not just the different substantive results reached in this pair of cases. These courts of appeals also took radically different approaches to the appointment of counsel, despite similar fact patterns. If anything, Pinkston may have had a far stronger case for counsel than Spillard. Pinkston prevailed at trial but, by his own admission, had neither the resources nor legal expertise to properly brief an appeal.[225] Spillard, on the other hand, had his case dismissed at summary judgment, well before trial. Yet the Ninth Circuit granted Spillard's motion for appointment. The Fifth Circuit likely would have denied Pinkston's.

The upshot from this discussion is that, even if courts wanted to appoint only in meritorious matters, in many cases they would not be able to tell, before briefing, whether a case has merit. That uncertainty undermines any strong court-driven selection effect for civil appointments.

B. Clinic-Driven Selection Effects

A second selection effect could be the population of appellate clinics examined. According to the most recently available data, fifty-six law schools reported having an appellate clinic.[226] There are fifteen clinics in the National Appellate Clinic Network. These participants were

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221 Oral Argument at 33:31, Pinkston v. Kuiper, 67 F.4th 239 (5th Cir. 2023) (No. 21-60320).

222 *Id.*

223 *Id.*

224 *Pinkston*, 67 F.4th at 239.

225 Some courts will, indeed, appoint as a matter of internal procedure if a pro se plaintiff prevails below. *Cf.* 6TH CIR. I.O.P. 22(c) ("When a pro se applicant is the appellee in a 28 U.S.C. §§ 2241, 2254, or 2255 case, the clerk will appoint counsel if the applicant is indigent.").

226 ROBERT R. KUEHN, DAVID A. SANTACROCE, MARGARET REUTER, JUNE T. TAI & G.S. HANS, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., 2022–23 SURVEY OF APPLIED LEGAL EDUCATION 9, https://uploads-ssl.webflow.com/5d8cde48c96867b8ea8c6720/64fb7bd82fdee48e57e8ef04_Report%20on%202022-23%20CSALE%20Survey.rev.9.8.23.pdf.

not selected at random; they affirmatively chose to participate. That non-randomness begs several related questions: Do clinics within the Network look meaningfully different from clinics outside the Network? And do participating clinics take only sure winners, with non-participating clinics electing for different cases and realizing different outcomes?

1. Participating vs. Non-Participating Clinics

To start, there is no reason to think participating clinics looks significantly different from their non-participating clinic counterparts. All appellate clinics are subject to the same basic operating constraints. Most, for instance, rely on court appointments as a source of cases. Furthermore, many jurisdictions bar or severely restrict all clinics from receiving compensation for their work, thus precluding appellate clinics from seeking fee-generating clients.[227] Finally, many clinicians (whether in the Network or not) come from public interest backgrounds, thereby influencing the type of case work that they are able and willing to undertake.[228] Given these circumstances, most appellate clinics gravitate toward criminal defense and civil plaintiff work—the same work that, of course, comprises the majority of cases within the Network's dataset.

Moreover, though sampling was not random, it did follow methods—respondent-driven and targeted sampling—which have been shown to remove bias. Respondent-driven sampling, known also as snowball sampling, starts with a single sample, or "seed."[229] That seed recruits others, who in turn recruit additional waves, picking up momentum like a snowball.[230] As a sample "expand[s] wave by wave, it approach[es] an equilibrium" that "could potentially become reliable if the number of waves is sufficiently large."[231] To further overcome non-randomness, some researchers employ additional "targeted" sampling.[232] Such sampling aims to recruit participants based on what we know of the overall population. To do so, researchers identify "a target population," representative of the population of the whole.[233] They then

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227 *See, e.g.*, ILL. SUP. CT. R. 711(d) ("A student or graduate rendering services authorized by this rule shall not request or accept any compensation from the person for whom the student or graduate renders the services."); 6th CIR. R. 46(d)(2)(A) ("An eligible law student may appear in this court . . . [o]n behalf of an indigent, with the written consent of the indigent and the attorney of record.").

228 *See, e.g.*, *supra* note 163.

229 Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1078 (2014).

230 *Id.*

231 *Id.*

232 *See* Alexander & Prasad, *supra* note 229, at 1078–79; Douglas D. Heckathorn, *Respondent-Driven Sampling: A New Approach to the Study of Hidden Populations*, *in* SOCIAL PROBLEMS 175 (1997).

233 *Id.*

"recruit" to "ensur[e] that subjects from different areas and sub-groups will appear in the final sample," so that the sample reflects the overall population.[234]

As relevant here, the Network began with a core group of clinicians. These colleagues subsequently referred others, who did the same, creating several waves of referrals, just as respondent-driven sampling would instruct. And consistent with targeted sampling, the Network's participants reflect a diverse set of geographies and law school rankings, such that no region or type of law school is overrepresented. Participants pursued appeals in virtually every federal circuit court, across a diverse array of subject matters. The sample, in short, aims to reflect the heterogeneity of appellate clinics more generally.

2. Meritoriousness and Case Selection

Similarly, the evidence does not suggest that participating clinics used case meritoriousness as a *sine qua non* for case selection. Indeed, when asked whether they screened for merit, clinic faculty universally said no.[235] Many stated that they did not systematically track how often they prevailed. Some had at best a general sense on these points, but most expressed some surprise when presented with the dataset here (specifically, at how appellate clinics appeared to be as successful as they were). Participation in the Network was motivated by a desire to share briefing materials and research, rather than elevating or inflating the win percentage of clinics. Clinic faculty also offered several additional responses.

First, several faculty emphasized the inherent unpredictability of appellate case outcomes.[236] Echoing the disparate results in *Taylor*, *Spillard*, and *Pinkston*, respondents observed that it was very difficult, if not impossible, to screen for meritorious cases.

Second, even if a clinical faculty member could discern a case's meritoriousness, taking only meritorious cases generally would not promote foundational pedagogical goals.[237] Many Network faculty emphasized that no clinic should be measured based on outcomes alone. Echoing the literature on clinical pedagogy, most underscored that "[c]linics serving low-income clients offer especially valuable opportunities for students to learn how the law functions, or fails to function, for

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234 *Id.*

235 That finding coheres with prior clinical research. *See, e.g.*, Ramji-Nogales et al., *supra* note 6, at 340 n.75 ("[C]ases are not selected solely based on the likelihood of success—that is, the clinic does not select only those cases most likely to win."); Shanahan et al., *supra* note 4, at 581 ("A fourth explanation is based in our interviews with clinic directors, who suggested that clinics do not screen for cases based on merit and often prefer to take 'harder' cases.").

236 Interviews with clinical faculty members (notes on file with author).

237 Interview with clinical faculty member (notes on file with author).

the have-nots."[238] They allow students a chance to get "out of the classroom into the real world of law, from which they would return to the classroom with a deeper understanding of how legal doctrine and legal theory actually work."[239] Moreover, as participating faculty observed, client service is never limited only to wins and losses; the lawyer is counselor and listener, both an individual advocate and a representative of the broader judicial system. Consistent and dedicated legal representation can still lead clients to develop a sense of procedural justice and legitimacy of the legal system, notwithstanding an ultimately adverse result.[240] Inculcating these skills in law students can be foundational for future practice regardless of the outcome in a specific case.

Third, and along this same line, several faculty emphasized that taking "harder" cases in fact was necessary so that students could remain engaged on a case through briefing and argument.[241] Cases "involv[ing] challenging facts, challenging clients, or expansion of the law" were "seen as valuable educational opportunities."[242]

Recall here the difference between a non-clinical, CJA attorney and a clinic that must comply with ABA requirements. The former category has a financial incentive to cap time spent on any given CJA matter. These attorneys could plausibly gravitate to more straightforward (and meritorious) cases. On the other hand, clinical students can spend hundreds of hours on a particular case. A simple case that offers little opportunity for research and analysis does not maximize potential clinic resources and potentially shutters a valuable learning opportunity.[243]

Finally, clinic faculty offered several other factors—whether a case would be set for oral argument and whether students could travel to meet the client and attend hearings—that played a role when making intake decisions. For all these reasons, it is unlikely that clinical case selection is tethered to meritoriousness.

That said, one avenue for future research is to examine differences among different types of appellate clinics and how these differences impact effectiveness. For instance, the median enrollment of all clinics

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238 Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 199 (2000); *see also* Elliott S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. Legal Educ. 375, 375 (2001) ("Modern clinical education . . . responded to students' desire to learn how to use law as an instrument of social change and to be involved in the legal representation of poor people.").

239 Wizner, *supra* note 63, at 1934.

240 *Cf.* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 Crime & Just. 283, 286 (2003) ("Procedural justice judgments consistently emerge as the central judgment shaping people's reactions to their experiences with legal authorities.").

241 Interview with clinical faculty member (notes on file with author).

242 Shanahan et al., *supra* note 4, at 581.

243 Ramji-Nogales et al., *supra* note 6, at 340 n.75 ("[T]he clinic often chooses particularly complex and difficult cases so that students will have challenging educational experiences.").

is eight students per faculty or staff member.[244] And clinical offerings awarded a median of four credits per semester.[245] Some programs, such as Northwestern's Appellate Advocacy Center, enroll between sixteen and twenty students under one faculty member's supervision, and take a generalist approach to case selection. Others, like Georgetown's Appellate Courts Immersion Clinic, enroll eight to ten students across three faculty members (a professor and two fellows), with students enrolled full-time (i.e., fourteen credits) during their semester.[246] More analysis is necessary to test whether these differences lead to different results—i.e., whether greater resources lead to a higher volume of work, greater complexity in the type of work undertaken, meaningfully different success rates, or some combination of the above. Future research, with that additional data, could contrast and compare the efficacy of these different clinical models.

VI. Using Appellate Clinics to Improve Access to Justice

This Article speaks to three audiences: law schools interested in developing clinical programming, groups interested in evaluating clinical effectiveness, and legal institutions invested in improving access to justice. On the first two groups, Parts II and III suggest that appellate clinics perform quintessentially clinical work, offering legal assistance to individuals who would otherwise be self-represented or underrepresented. They are also additive in nature, as they do not crowd out direct services clinics or legal aid organizations but instead complement them by representing clients who would otherwise not have legal assistance. And clinic representation often produces favorable outcomes for their clients. This Part addresses the final audience by discussing potential institutional reforms through three actors: federal appellate courts, administrative agencies, and state courts.

A. Increase Appointments in the Federal Courts of Appeals

As discussed above, civil appointment practices differ widely. But one takeaway from this study is that virtually every federal appellate court could appoint more frequently—demand for such appointments often outstrips supply. Indeed, as the Tenth Circuit acknowledges, pro bono panel attorneys often wait months or even years before they

244 Kuehn et al., *supra* note 226, at 26–27.

245 *Id.* at 25.

246 *Appellate Courts Immersion Clinic*, Georgetown L., https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/appellate-courts-immersion-clinic/ (last visited Sept. 25, 2023).

receive a potential appointment.[247] If that is so, what downside would there be to appointing more frequently, to clear out this waiting list?

Or take, as another data point, prisoner civil rights cases. These appeals comprise a significant source of appointments in many circuits.[248] But the number of prisoner petitions filed does not appear to correlate with appointment volume. In the Ninth Circuit, for instance, 1,807 prisoner petitions were filed between March 2021 and 2022.[249] In the Fifth Circuit, 1,525 such petitions were filed in this period.[250] But the Fifth Circuit only appoints counsel in ten to fifteen cases per year, while the Ninth Circuit does so at ten times that rate. These disparities could reflect, as Judge Richard Posner has put it, a "downright indifference of most judges to the needs of pro se" litigants, particularly in one circuit or jurisdiction.[251]

Such practices carry consequences that reach beyond an individual client. They signal an abandonment of a core judicial mission to ensure and improve access to justice. The Fifth Circuit, recall, did not appoint counsel in *Pinkston*, when the Ninth Circuit did so in *Spillard*. And the Fifth Circuit did not appoint counsel in *Taylor*. More frequent appointment might, in the case of *Taylor*, have shielded the Fifth Circuit from reversal by the Supreme Court. And more frequent appointment could "narrow the claims [at issue] and limit evidence to relevant issues," thereby "benefitting [the] client, opposing parties, and the court," as well as the law more generally within a circuit.[252]

B. Expand Clinic Participation in Federal Administrative Agency Appeals

Most federal administrative agencies provide internal review processes, with plaintiffs required to exhaust those processes before taking their cases to federal court.[253] Appellate clinics, however, rarely appear

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247 Guide to Volunteer Pro Bono Appeals, *supra* note 201, at 11.

248 *See* E-mail from Ninth Circuit Pro Bono Coordinator; *supra* note 197; Guide to Volunteer Pro Bono Appeals; Lessons Learned From the Fifth Circuit Pro Bono Program, Bar Ass'n of the Fifth Circuit (Oct. 2019), https://www.baffc.org/wp-content/uploads/2019/10/BAFFC-Pro-Bono-Panel-Presentation-4845-8321-0408-1.pdf (profiling cases, all of which involved habeas or prisoner civil rights).

249 *Table B-1: U.S. Courts of Appeals—Cases Filed, Terminated, and Pending, by Nature of Proceeding, During the 12-Month Period Ending March 31, 2022*, U.S. Cts., https://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2022/03/31 (last visited July 26, 2023).

250 *Id.*

251 Richard A. Posner, Reforming the Federal Judiciary: My Former Court Needs to Overhaul Its Staff Attorney Program and Begin Televising Its Oral Arguments 10 (2017).

252 Schwartz, *Civil Rights Without Representation*, *supra* note 102, at 704.

253 *See, e.g.*, 8 U.S.C. § 1252 (stating that immigration cases must go through Immigration Judge and Board of Immigration Appeals); Porter v. Nussle, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life.").

before these administrative agencies; the database included a single such disposition, from a Board of Immigration Appeals matter. The lack of participation in federal administrative appeals may be a critical missed opportunity, for two interrelated reasons.

First, there is strong evidence that counsel in agency proceedings can make a credible difference. Since 2001, for instance, the Executive Office for Immigration Review and the Catholic Legal Immigration Network have partnered to organize the BIA Pro Bono Project.[254] The program has helped identify and coordinate legal representation for over 1,000 individuals. Respondents selected for the Pro Bono Project obtained relief at significantly higher rates than individuals proceeding pro se.[255]

Second, because of demanding standards of review, the converse is also true: absent counsel, plaintiffs have a harder time winning before the agency and subsequently before a federal court of appeals. In immigration cases, for example, federal courts review whether "substantial evidence [supports] the BIA's factual findings."[256] That means "[t]he agency's 'findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'"[257] On some factual and legal determinations, indeed, federal courts lack any jurisdiction over the agency's determination.[258] That concept is borne out in this dataset: some clinics failed to obtain favorable client outcomes in certain administrative law cases because plausible claims were not presented and exhausted before the agency.[259]

Several barriers, though, encumber clinic participation in agency proceedings. Consider the BIA Pro Bono Project referenced above. The BIA seldom hears argument and rarely publishes any of its resulting decisions (many of its decisions are short, per curiam opinions). Moreover, the BIA is often unwilling to grant requests for modified briefing schedules. Instead, briefs are due within thirty days after a notice of appeal is filed, with the possibility of a single, three-week extension. None of these circumstances is conducive to a semester- or

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254 *See* A Ten Year Review of the BIA Pro Bono Project: 2002–2011, at 2, U.S. Dep't of Just., https://www.justice.gov/sites/default/files/pages/attachments/2015/11/17/bia_pbp_eval_2012-1-13-14.pdf.

255 *Id.* at 12–13.

256 Medina-Rodriguez v. Barr, 979 F.3d 738, 744 (9th Cir. 2020) (quoting Conde Quevedo v. Barr, 947 F.3d 1238, 1241 (9th Cir. 2020)).

257 Nasrallah v. Barr, 140 S. Ct. 1683, 1692 (2020).

258 *See* Anaya-Ortiz v. Holder, 594 F.3d 673, 676 (9th Cir. 2010) (holding that the court lacks jurisdiction over agency determination regarding whether a plaintiff has committed a particularly serious crime).

259 Thomas-Joseph v. Comm'r of Soc. Sec., No. 21-11020, 2022 WL 1769134, at *3 (11th Cir. June 1, 2022) ("Ms. Thomas-Joseph did not raise her right-to-counsel argument before the appeals council or the district court. She thus has forfeited it.").

year-long clinical learning experience. Were that not enough, outreach for the BIA Pro Bono Project is sporadic. At present, the Project's website is no longer publicly accessible, and no case updates have been provided in nearly three years.

Given the results from Parts II and III, administrative agencies should consider introducing clinic assistance programs or revamping existing programs. Doing so can assist in the disposition of cases, thus potentially preventing unnecessary litigation and ensuring timely and accurate resolution of matters.

C. Facilitate Clinic Participation in State Appellate Courts

Finally, institutional reform need not be limited to federal actors. State courts present a promising, yet largely unrealized, path for appellate clinic work.

Case Western's Appellate Litigation Clinic, for instance, represented Terry Barnes before the Supreme Court of Ohio. The case asked whether Barnes could "withdraw his guilty plea when, before sentencing, he discover[ed] evidence that (1) his attorney withheld from him and (2) would have negated his decision to plead guilty had he known about it."[260] Barnes had pleaded guilty to involuntary manslaughter, but later learned that there was security footage corroborating a self-defense claim for him. Though Barnes had lost at the trial and intermediate appellate level, the state supreme court ruled in his favor.[261] That result is a victory for the clinic and the client. But it also underscores the importance of undertaking state work. Had Barnes not received clinical assistance until his case reached federal court through a habeas petition, he might never have obtained any relief. And given the difficult headwinds facing federal habeas petitioners, state criminal appellate work may represent a singular opportunity for clients like Barnes to obtain a favorable outcome in their cases.

Still, as with administrative agencies, clinic participation in state courts has been sporadic. The Network database had fewer than ten state court matters, compared to the nearly three hundred federal court cases. That deficit might be remedied, at least in part, by simply encouraging clinics to consider taking more of a mix of state and federal cases. Federal circuit appointments have long been regarded as the foundational source of appellate clinic work. But that should not dissuade clinics from embracing similar work in state courts. A willingness by clinics to pursue state court work must, however, be met by a concomitant

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260 State v. Barnes, 222 N.E.3d 537, 538 (Ohio 2022).

261 *Id.* at 544.

effort by state courts to offer clinical opportunities. As a promising sign, about twenty states have begun offering structured pro bono appellate opportunities.[262]

Yet these programs are often structured in a manner that thwarts clinical participation. Virginia's program, for example, is extremely limited: "Only three or four pairs of attorneys per year are invited by the court to represent indigent clients on appeal" to the Supreme Court of Virginia.[263] All state appeals first "go to the Court of Appeals of Virginia for an appeal [as] of right," which suggests that a viable appointment effort before the Court of Appeals could foster clinical participation. Yet as of this writing, the Court of Appeals "has yet to create a pro bono program."[264] Likewise, the Supreme Court of Illinois provides a volunteer pro bono program for criminal appeals.[265] But the program explicitly excludes law students from participation (even if the student is being supervised by a clinical faculty member).[266] That exclusion is ripe for reexamination. At the least, as this Article has shown, appellate clinic assistance appears on par with that of another appointed attorney—and there are compelling signs that clinic assistance is in fact better for a prospective client. No evidence supports Illinois's rules restricting clinical participation in the pro bono program.

Conclusion

Do clinics effectively serve their clients and advance the law? This Article endeavors to answer this question by gathering relevant data from various appellate clinics. It finds that these clinics obtain favorable outcomes for their clients, likely at rates comparable to or better than those of other counsel. Their success paves the way for expansion of appellate pro bono and clinical offerings, both among law schools that offer clinics and among institutional actors seeking to close the access to justice gap.

More broadly, this Article represents a necessary step in research and study into clinical efficacy. But it is only a first step. After

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262 Am. Bar Ass'n, Council of App. Laws., Manual on Pro Bono Appeals Programs for State Court Appeals, at i (Oct. 2022), https://www.americanbar.org/content/dam/aba/publications/judicial_division/cal-probonomanual-third-edition.pdf.

263 *Id.* at 54.

264 *Id.*

265 *See Supreme Court Volunteer Pro Bono Program for Criminal Appeals*, Ill. Cts., https://www.illinoiscourts.gov/eservices/pro-bono-program/ (last visited Sept. 23, 2023).

266 *See Eligibility Criteria for Volunteer Pro Bono Program Attorneys*, Ill. Cts., https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/458a9f42-dc65-4181-b545-d795df4a1361/Criteria.pdf (last visited Sept. 23, 2023) ("This program is not currently open to law students with a Rule 711 license or who are participating in a law school clinic.").

all, every year, law schools make significant investments in clinical programming; clinics litigate cases that establish precedent within a circuit or across several circuits; and courts determine whether to seek or appoint counsel, including clinic counsel. Under these conditions, it is critical we understand whether clinics are effective in serving their clients, how they are effective, and how their efficacy might shape the relationship between clients, clinics, and legal institutions in the future.