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FROM LEARNER-CENTERED TO RELATIONSHIP-
CENTERED: ZEALOUS TEACHING AND THE
PEDAGOGY OF CLINIC *Rachel Camp & Deborah Epstein*

FIGHTING EXCLUSIONARY DISCIPLINE IN
DISGUISE: SYSTEMIC ADVOCACY STRATEGIES
FOR ELIMINATING POLICIES & PRACTICES
THAT CIRCUMVENT IDEA DISCIPLINARY
PROTECTIONS *Ashley Dalton, Hector Linares,
and Sara Godchaux*

THE SILVER LINING: THE USE OF GENERATIVE
AI IN CLINICAL LEGAL WRITING FOR THE
EMERGENT LEGAL PROFESSIONAL WRITER *Jay B. Knight*

TRANSFORMING TEACHING THROUGH THEATRE *Genevieve Mann*

HOPE AS A HUMAN RIGHTS PRACTICE:
CULTIVATING AND SUSTAINING TRANSFORMATIVE
HOPE TO ADVANCE SOCIAL CHANGE *Gulika Reddy*

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FROM LEARNER-CENTERED TO RELATIONSHIP-CENTERED:

ZEALOUS TEACHING AND THE PEDAGOGY OF CLINIC

Rachel Camp & Deborah Epstein 1

FIGHTING EXCLUSIONARY DISCIPLINE IN DISGUISE:

SYSTEMIC ADVOCACY STRATEGIES FOR ELIMINATING
POLICIES & PRACTICES THAT CIRCUMVENT IDEA
DISCIPLINARY PROTECTIONS

Ashley Dalton, Hector Linares, and Sara Godchaux 45

THE SILVER LINING: THE USE OF GENERATIVE

AI IN CLINICAL LEGAL WRITING FOR THE
EMERGENT LEGAL PROFESSIONAL WRITER

Jay B. Knight 99

TRANSFORMING TEACHING THROUGH THEATRE

Genevieve Mann 155

HOPE AS A HUMAN RIGHTS PRACTICE: CULTIVATING

AND SUSTAINING TRANSFORMATIVE HOPE TO
ADVANCE SOCIAL CHANGE

Gulika Reddy 199

FROM LEARNER-CENTERED TO RELATIONSHIP-CENTERED: ZEALOUS TEACHING AND THE PEDAGOGY OF CLINIC

RACHEL CAMP & DEBORAH EPSTEIN*

Clinical legal education offers learning opportunities that differ enormously from those that arise in the traditional law school curriculum, including a rejection of the cultural conception that lawyers must be personally detached and emotionally neutral in order to be zealous advocates. For these reasons, the clinic experience often catalyzes insights that challenge a broad spectrum of students' previously-held assumptions.

But our experience as clinical teachers has led us to realize that it is time to disrupt another still-pervasive conceptual myth that often goes unstated: that teachers are emotionally neutral, able to separate their personal vulnerabilities from their professional role. In reality, the teacher-student relationship is psychologically and emotionally complex. The boundaries between our personal and professional lives are permeable. Our emotional reaction to a particular student affects our teaching; the way we present as a teacher, in turn, affects that student. We are engaged in a constantly-evolving relational cycle, rather than one where each participant plays a distinct and isolated role.

Yet current learner-centered methodologies fail to push clinicians to routinely examine both sides of the educational dyad, leaving the ways our own emotional and psychological realities also affect our teaching largely unexplored. We seek to expand our pedagogy to be "relationship-centered"—to include systematic examination of the strengths, challenges, and contextual realities of both student and teacher; to consider how our individual vulnerabilities, and our complex, evolving personal and professional contexts affect student learning; and to habituate curiosity about why we may react in particular ways to a student or a type of student behavior. By seeing ourselves as non-neutral participants, and incorporating critical self-reflection into our teaching practice, we

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can retain the substantial strengths of learner-centered methods while pushing our teaching to new heights.

We examine what is missing from our pedagogy that could help catalyze clinicians to reach this highest level of teaching competence. We suggest a theoretical foundation and adaptable tools for self-reflection to create a learning environment that best supports our students' ability to achieve the maximum possible growth during clinic.

INTRODUCTION

From the outset of the clinical legal education movement, teacher-practitioners conceptualized clinic as a site for transformative learning.¹ Over the past several decades, a robust literature of books, scholarly articles, and a wealth of conference presentations have explored the rich learning opportunities that arise when students engage directly with clients in a law school clinical setting.² The clinical teaching community has responded enthusiastically to this call to excellence. Clinicians push their students to assume the role of a professional: to take primary responsibility for a client, to become active seekers of their own knowledge, to exercise critical professional judgement, and to manage the almost-constant disorientation that is integral to the on-the-ground lawyering process.³

Clinicians teach their students that there are rarely “correct” answers in lawyering work; instead, there are issues to be spotted and choices to be made. They help their students understand that the best decision in one situation is not necessarily the best in another; that the soundness of any choice is driven not only by the facts and the law, but also by individual client goals. They push their students to slow down their thinking and internalize a rigorous, systematic approach to their work that involves identifying strategic decision points, brainstorming a variety of responsive options, carefully analyzing the strengths and weaknesses of each, and—later—reflecting on the soundness of their choices to draw concrete lessons for future practice. Clinical teachers provide educational “scaffolding”⁴—carefully calibrated support

¹ See, e.g., DAVID CHAVKIN, CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS (2001); SUSAN BRYANT, ELLIOTT S. MILSTEIN, ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY (2014); DEBORAH EPSTEIN, JANE H. AIKEN & WALLACE J. MLYNIEC, TEACHING THE CLINIC SEMINAR (2014).

² *Id.*

³ See, e.g., EPSTEIN, AIKEN & MLYNIEC, *supra* note 1, 1-2.

⁴ The term “scaffolding” is borrowed from the construction industry: scaffolds are temporary structural supports that are gradually removed as the construction process progresses and the structure can stand on its own. Rachel Camp & Deborah Epstein, *Scaffolding as an Essential Tool for Clinical Pedagogy* (work in progress, on file with the authors).

that is targeted to the needs of each student and that allows them to successfully assume the role of lawyer. Over time, they gradually reduce that scaffolding to facilitate increasing independence as a student's capacity develops.⁵ And clinicians teach to transfer, pressing their students to reflect on the myriad lessons that can be drawn from their lawyering experiences and applied in other contexts.⁶

Clinical learning opportunities differ enormously from those that arise in the traditional law school curriculum, where facts are typically static, rather than chaotic; law is often discernable, rather than uncertain; and client goals are fixed and clear, rather than mutable and often in tension with each other.⁷ And clinical pedagogy is rooted in a rejection of the still-dominant cultural conception that lawyers must be personally detached and emotionally neutral in order to be zealous advocates.

For all of these reasons, the clinic experience often catalyzes “aha,” lightbulb moments of insight that challenge a broad spectrum of students' previously-held assumptions.⁸ In other words, clinical learning is not simply “additive”; as educational theorist Douglas Robertson notes, “[Y]ou cannot simply *add* the notion that the world is round to the notion that the world is flat. Some types of learning clearly have this [world-is-round] transformative effect....”⁹ Clinical legal education most certainly has enormous capacity to be “transformative.”¹⁰

⁵ The concept of educational scaffolding appears to have been coined by educational psychologist Jerome Bruner. See Arkady A. Margolis, *Zone of Proximal Development, Scaffolding and Teaching Practice*, 16 CULTURAL-HISTORICAL PSYCH. 15, 18-20 (2020) (identifying the conceptual origins of educational scaffolding in psychologist Lev Vygotsky's “Zone of Proximal Development,” a theory that explores how teachers can create optimal learning conditions); Anna Shvarts & Arthur Bakker, *The Early History of the Scaffolding Metaphor*, 26 MIND, CULTURE, & ANXIETY 4, 6-10 (2019) (exploring the origins of the scaffolding metaphor). Professor Courtney Cazden analogizes educational scaffolding to the process a parent uses to teach a child to walk: the adult begins by holding both of the child's hands tightly, gradually relaxing their grip over time, eventually releasing one hand and then the other, until finally the adult is simply walking next to the child, just in case. Parents who go through this learning process with more than one child understand that the support needed by one may not be the same, in terms of content or pace, as that required by another. COURTNEY B. CAZDEN, *CLASSROOM DISCOURSE: THE LANGUAGE OF TEACHING AND LEARNING* 102 (1988).

⁶ See, e.g., ROBERT E. HASKELL, *TRANSFER OF LEARNING: COGNITION, INSTRUCTION, AND REASONING* (2001).

⁷ See, e.g., Anthony G. Amsterdam, *Clinical Legal Education—A 21st-Century Perspective*, 34 J. LEGAL EDUC. 612, 616-17 (1984) (describing the value of clinical pedagogy in broadening law students' education).

⁸ Jane H. Aiken, *Beyond the Disorienting Moment*, 26 CLIN. L. REV. 37, 38-39 (2019) (exploring the educational importance of disorienting moments).

⁹ Douglas L. Robertson, *Transformative Learning and Transition Theory: Toward Developing the Ability to Facilitate Insight*, 8 J. EXCELLENCE IN COLLEGE TEACHING 105, 109 (1997) [hereinafter Robertson, *Transformative Learning*] (emphasis added).

¹⁰ The term “transformative learning” was originally conceptualized by Jack Mezirow, who describes it as “the process by which we transform our taken-for-granted [assumptions] to make them more inclusive, discriminating, open, emotionally capable of change, and

Transformative learning imposes substantial demands on clinic students. Many face a learning curve so steep that, at the end of the semester, they are a bit stunned by the extent of their personal and professional growth, and relieved—if not outright thrilled—that rather than conforming to a predetermined, rigid professional norm, they have developed lawyering identities rooted comfortably in their individual and authentic personas.¹¹

Transformative education places serious demands on clinicians, as well. In the supervision context, we commit ourselves to supporting our students' client representation work in ways that allow each of them to stretch, learn, and grow in their capacities as legal professionals. We also put immense time and effort into our seminar teaching.¹²

The time and labor required to provide our students with the best possible learning experience can leave us with few remaining resources to reflect critically on our *own* learning; to reflect deeply on our approach to both classroom teaching and supervision and to continue our growth toward what we have come to call “zealous teachers,” who pursue professional excellence in the same way that zealous lawyers do: “despite opposition, obstruction, or personal inconvenience.”¹³

Throughout our careers, in addition to teaching law students, both of us have devoted substantial time to teaching teachers, at both novice and highly experienced levels. Together, we have spent many years considering questions such as: What is missing from our pedagogy that could help catalyze clinicians to reach the highest possible levels of professional competence? What theoretical foundation would encourage us to create a learning environment where we can best support our students' ability to achieve the maximum possible growth during clinic? We have concluded that to answer these foundational questions we must take a revolutionary step: we must disrupt the often-unstated but still-pervasive conceptual myth that teachers are not

reflective so that they may generate beliefs and opinions that will prove more true or justified to guide action. Transformative learning involves participation in constructive discourse to use the experience of others to assess reasons justifying these assumptions, and making an action decision based on the resulting insight. Transformative [learning is about] how we learn to negotiate and act on our own purposes, values, feelings, and meanings rather than those we have uncritically assimilated from others—to gain greater control over our lives as ... clear-thinking decision makers.” JACK MEZIROW, *Learning to Think Like an Adult: Core Concepts of Transformation Theory*, in *LEARNING AS TRANSFORMATION: CRITICAL PERSPECTIVES ON A THEORY IN PROGRESS* (2000), at 7-8 (parentheticals deleted).

¹¹ This observation is based on our many collective decades of supervising clinic students.

¹² As, of course, do many non-clinical law teachers.

¹³ The D.C. Rules of Professional Conduct define the duty of “zealous” representation as requiring a lawyer “to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” D.C. R. Pro. Conduct 1.3, cmt. 1.

only intellectually, *but also emotionally* neutral, able to separate their personal vulnerabilities from their role as teachers.

This is simply not the case. In reality, the teacher-student relationship—like any other interpersonal dynamic—is psychologically and emotionally complex.¹⁴ Whether we are aware of it or not, the boundaries between our personal and professional lives are highly permeable. Our emotional reaction to a particular student affects our teaching; the way we present as a teacher, in turn, affects that student. We are engaged in a constantly-evolving relational cycle, rather than one where each participant plays a distinct and isolated role. As bell hooks explains, teachers cannot, and should not, attempt to function as “all-knowing, silent interrogators.”¹⁵

But this fundamental conceptualization of teaching as an interpersonal dynamic is largely absent from the learner-centered pedagogy that has been adopted as a best practice by the national clinical community.¹⁶ Learner-centered methods captured in conference presentations, training programs, and pedagogy-based scholarship focus nearly exclusively on a single participant in the educational dyad: the student. Learner-centered approaches emphasize shifting control to the student and making efforts to understand each student’s individual learning process, encouraging clinicians to attribute breakthroughs to student strengths and challenges to student deficits.¹⁷

Far more scarce are discussions about clinical teachers and students as inevitably, unavoidably, and necessarily interdependent. Current methodologies fail to push clinicians to routinely examine *both sides* of the educational dyad, leaving largely unexplored the ways our own emotional and psychological realities affect our teaching. This crucial oversight necessarily limits our capacity to become zealous teachers. We argue it is time to expand our pedagogy to include systematic examination of the strengths, challenges, and contextual realities of both student *and* teacher; to regularly consider how *our* individual vulnerabilities, and *our* complex, evolving personal and professional contexts affect student learning; to remain curious about *why* we may react in particular ways to an individual student or to a type of student

¹⁴ See, e.g., Harriet N. Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZ. L. REV. 315, 319-26 (2006) (exploring non-directive supervision); Douglas L. Robertson, *Professors’ Perspectives on Their Teaching: A New Construct and Developmental Model*, 23 INNOVATIVE HIGHER EDUC. 271, 279-81 (1999) [hereinafter Robertson, *Professors’ Perspectives*].

¹⁵ bell hooks, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* (1994) at 21.

¹⁶ See generally ROY STUCKY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION* 3 (2007).

¹⁷ See, e.g., MARYELLEN WEIMER, *LEARNER-CENTERED TEACHING* 10 (2013) (observing that learner-centered teachers find “strategies that give students control and responsibility commensurate with their ability to handle it.”)

behavior. By seeing ourselves as non-neutral participants, and regularly incorporating critical self-reflection into our teaching practice, we can retain the substantial strengths of learner-centered methods while pushing our teaching to new heights.

Understanding education through this complex, interdependent perspective can help us more meaningfully explore all aspects of our teaching, including the factors that contribute to our successes as well as to our limitations and setbacks. In this Article, however, we are particularly interested in exploring the latter—moments when our own emotions and experiences interfere with our teaching. In other words, we choose to focus on disorienting teaching moments; those that disrupt our connection with a student and potentially undermine the educational process.¹⁸ It is when we feel frustration, vulnerability, or lack of competence that we tend to find it most arduous to engage in critical self-reflection. These are the moments when it is both most difficult and most important to recommit to zealous teaching; to embrace the ethical standard of maintaining a commitment to zealousness even in the face of “opposition, obstruction, or personal inconvenience.”¹⁹ It is far easier, unsurprisingly, to assess our own contributions to an interpersonal dynamic when things are going well.²⁰

We explore the developmental stages of teacher competence, originally developed by Douglas Robertson in the university classroom setting. Robertson breaks down the classic pattern of teacher growth, from novice to expert, into three distinct developmental stages, each with an accompanying dominant pedagogical perspective.²¹ Each progressive pedagogical stage incorporates the strengths of those that

¹⁸ Just as with our students, teachers’ transformative learning often arises from what Jack Mezirow calls “a ‘disorienting dilemma’—some experience that problematizes current understandings and frames of reference.” Kathleen Taylor, *Teaching with Developmental Intention*, in MEZIROW, *supra* note 10, at 154 (citing to JACK MEZIROW, TRANSFORMATIVE DIMENSIONS OF ADULT LEARNING (1991)). See generally Aiken, *supra* note 8.

¹⁹ D.C. R. Pro. Conduct 1.3, cmt. 1.

²⁰ We may also have a tendency to ignore our own contributions to the teacher-student dynamic when the teaching dynamic is smooth and students are thriving, on the “if it ain’t broke, don’t fix it” theory. Nonetheless, we have chosen to focus on moments when that dynamic is suffering, in light of the special potential for an improved student learning experience.

²¹ Douglas R. Robertson, *Beyond Learner-Centeredness: Close Encounters of the Systemocentric Kind*, 18 J. STAFF, PROGRAM, & ORG. DEV. 7, 7 (2001) [hereinafter Robertson, *Beyond Learner-Centeredness*]. Professor Robertson has spent his career helping faculty become better teachers at the undergraduate, masters, and doctoral levels. *Id.* at 8-11. Robertson’s model is a series of three developmental stages: the first, teacher-centered stage, the second, “aliocentric” stage, and the final, “systemocentric” stage. Robertson, *Professors’ Perspectives*, *supra* note 14, at 271. We build on this model, adopting our own terminology and expanding the ideas to apply to the rich educational opportunities inherent in the law school clinical context—an educational model not explored in Robertson’s work.

precede it and builds in new, deeper dimensions of thought and practice.²² Although most of us move through these three developmental stages sequentially—from teacher-centered to learner-centered to what we call relationship-centered—many of us also find ourselves occasionally reverting back to prior stages even after teaching for decades.

By applying Robertson's ideas to the clinical legal education context, with a particular focus on the final and optimal stage of relationship-centered pedagogy, we can help even the newest of clinicians avoid some of the professional trials and errors that we ourselves have experienced. For our more seasoned colleagues, many of whom are likely to be familiar with the insights we describe, we hope to provide names for their practices as well as both a theoretical foundation and adaptable tools to further support their work. And for all clinicians, regardless of experience, we hope to share our understanding of the difficulties inherent in professional growth, as well as the importance of self-directed generosity as we pursue a more sophisticated skill set.

In Parts I and II, we explore the first two developmental stages of teaching—teacher-centered and learner-centered pedagogies—in the clinic seminar and supervision contexts. In Part III, we continue to analyze the learner-centered approach, exploring its power and its inherent limitations. In Part IV, we describe the third developmental stage—relationship-centered pedagogy—and the methods that are central to it, including teacher introspection and a systematic practice of disentangling our personal points of reactivity from our efforts to educate. We explore why those methods push us toward zealous clinical teaching. In Part V, we share one approach for engaging in relationship-centered pedagogy by incorporating a routine examination of our own vulnerabilities as teachers—whether psychological, emotional, social, or contextual. Finally, in Part VI, we explore the close parallels that exist in the clinic student-client relationship, and how a relationship-centered framework can help our students better understand their client interactions and be better prepared to engage in the advocacy their new professional role demands.

I. TEACHER-CENTERED PEDAGOGY: FOCUSING INTERNALLY ON OUR OWN COMPETENCE

As a baseline matter, good teachers must be competent in their subject matter. It probably goes without saying that that few teachers feel comfortable standing in front of a classroom when they are uncertain, confused, or lack deep understanding of the relevant material. The importance of content knowledge led to the early ideal of the teacher

²² Robertson, *Professors' Perspectives*, *supra* note 14, at 279-280.

as a “sage on the stage,” dispensing nuggets of wisdom into the minds of expectant students.²³ This is consistent with a “teacher-centered pedagogy” and defines the earliest stage of pedagogical development. Radical educator and philosopher Paolo Friere famously described this method as a “banking” system, where the teacher’s role is to deposit wisdom into the minds of students who receive, memorize, and repeat it.²⁴

Novice faculty tend to be centered on competence in two fundamental ways. First, they are often consumed with concern about their own *content competence*. This is especially true for those who come to teaching with limited professional experience, who may doubt the sufficiency of their own knowledge, and therefore tend to focus on strategies that reinforce it. Insecurity about the scope and limits of their content competence can lead these teachers, understandably, to concentrate on themselves, and their *own* learning, at least as much as on that of their students. This self-focus makes sense and should in no way be confused with self-absorption or narcissism. A new teacher’s drive to develop their own subject-matter competence derives from a profound desire to increase their capacity to help their students learn.²⁵

Second, teachers in this stage are often focused on developing their *teaching competence*. They seek out strategies for effective ways to impart the relevant content so that students can absorb and understand it. Even those who are long-time experts in their field, and therefore comfortable with much of the clinic syllabus content, may be insecure about how to present the material in the classroom and become an effective, dynamic teacher. Again, the result is that many clinicians in this stage—typically those at the outset of their teaching careers—need time and experience to develop their own teaching performance, to explore methods to effectively convey information, to maintain classroom control, and to facilitate discussion.

Together, these two areas of concern—“Do I know enough to be an expert?” and “Am I skilled enough to be a teacher?”—lead many new faculty to choose teaching techniques that support their control

²³ Alison King, *From Sage on the Stage to Guide on the Side*, 41 COLLEGE TEACHING 30, 31 (1993).

²⁴ PAOLO FRIERE, PEDAGOGY OF THE OPPRESSED 72 (Myra Bergman Ramos trans., 1970). In Freire’s words, “students are the depositories and the teacher is the depositor.... [T]he teacher issues communiques and makes deposits which the students patiently receive, memorize, and repeat.... [By assuming this role, the teacher] justifies his own existence.” *Id.* at 72. Freire argues for the rejection of this banking model in favor of a problem-posing approach, in which students act as “critical co-investigators in dialogue with the teacher.” *Id.* at 80.

²⁵ See e.g., Nathalie Martin, *The Virtue of Vulnerability: Mindfulness and Well-Being in Law Schools and the Legal Profession*, 48 SW. L. REV. 367, 373 (2019) (observing that law professors are concerned with ensuring students “get their money’s worth” and with a fear that our students “might lose confidence in us or believe that we lack credibility” if we do not present in the classroom as significantly smarter and more knowledgeable than they are).

and authority, in an effort to engender student trust.²⁶ These techniques can take a wide variety of forms, all of which make sense in the early stages of professional development. For example, in the classroom, including the law school clinic seminar, a novice teacher may rely heavily on lecture because the lecture method casts the teacher as the central figure; by maximizing teacher control, it reduces the risk that their limited competence—whether real or imagined—will be exposed.²⁷ Lectures can be prepared in full ahead of time, they can be restricted to subject matter areas where the teacher has the greatest command, and they can minimize time for, and risk of, potentially disruptive student interactions. On the other hand, a teacher who is developing their teaching competence may also rely on wide open, unstructured classroom conversations. This makes sense as well; by turning the conversation over to students, and relying on them to shape the discussion, the faculty member can step out of the way. By abdicating control, a teacher can reduce the risk that their inexperience will be unmasked. For a teacher uncertain about either the depth of their substantive knowledge or of their teaching ability, the lure of these self-protective classroom teaching choices can be powerful.

Of course, there are other reasons why new teachers may rely heavily on methods like lecture or unstructured discussion; for example, these may be the teaching techniques with which they are most familiar and which their own teachers most often used. In any field, learning new and increasingly effective techniques takes time and experience. But what is important for purposes of our analysis here is how natural and understandable it is for a teacher to start out with methods that center and protect themselves. Imposter syndrome may be particularly intense when a person's job involves standing in front of a room full of smart adults who expect you to know more than they do about topics under discussion, in every class, week after week. It is worth recognizing the inherent disincentive to adopt teaching methods that decrease control or open a teacher up to too many questions they are not yet prepared to answer.

Similarly, in the supervision context, where clinicians guide students in their client-representation work, concern about content and teaching

²⁶ The near-universal absence of law-teacher training also plays a role. Most new faculty, in law or any other field, must rely on their own experiences as learners to develop their initial teaching techniques. Because teacher-centered methods have long been the post-secondary cultural norm in the U.S., these are the methods with which most novice faculty have the greatest familiarity.

²⁷ Anxiety often drives a desire to exert as much control as possible over one's environment, in an effort to create a sense of order and predictability. Yuanyuan Gu, Simeng Gu, Yi Lei & Hong Li, *From Uncertainty to Anxiety: How Uncertainty Fuels Anxiety in a Process Mediated by Intolerance of Uncertainty*, J. NEURAL PLAST. 1, 2 (2020).

competence may shape pedagogical choices for novice faculty.²⁸ On the one hand, in an effort to ensure they are one step ahead of their students' questions, a new clinician may adopt more "directive" supervision strategies—telling students what to do in their client representation work, rather than finding ways to scaffold student thinking and help them to arrive at their own conclusions.²⁹ Just like classroom lectures, heavily directive supervision can magnify the clinical teacher's control and reduce the risk of the unexpected.³⁰ But this approach also limits opportunities for students to habituate strategic thinking and develop their own, independent professional judgment. On the other hand, a new clinician may adopt what appears to be a "non-directive" approach. They may over-rely on questions such as "what do *you* think?," pushing students toward independence but failing to provide the support necessary for success. Here, instead of increasing control, the novice teacher abdicates it—adopting another method for avoiding the risk of being unmasked as not worthy of their teaching role. A later-stage clinician may employ these same approaches—directive or non-directive—with real intentionality; the point here is that new teachers often make strategic choices based less on what will best promote student learning, but instead on what will best protect themselves.

We have seen these issues play out consistently in our work training new teachers. For example, for many years we have taught a year-long clinical pedagogy course to the approximately 20 incoming Georgetown teaching fellows.³¹ During Orientation, we ask the fellows to identify their biggest concerns about stepping into a teaching role. The most frequent responses reliably reveal some awareness of their limitations: the difficulty of staying one step ahead of the students in understanding the material; the fear of not being able to answer a student question; and the concern about making a substantive mistake from the front of the room. These anxieties are natural and predictable. Most students expect their teachers to know all the answers, and new teachers often have the same expectation of themselves. Passing through this developmental stage is *essential* to becoming an effective teacher.

²⁸ These observations are based on the authors' long-term experiences both with their own teaching and with training and supervising new clinical teachers.

²⁹ See *supra* note 5, for a definition of educational scaffolding.

³⁰ Of course, highly directive supervision can be the best teaching choice in some supervision situations. In the middle of trial, for example, when a student freezes, a teacher may take over for a few moments to allow the student to collect herself, regain her composure, and resume her role as lead counsel.

³¹ An early version of the course, Elements of Clinical Pedagogy, is described in an article by Wally Mlyniec, who took the lead in conceptualizing it. Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLIN. L. REV. 505, 514, 580-85 (2012).

It is important to note that although most teachers start at the teacher-centered stage and move through subsequent stages in sequential order, the process is not always a linear one. This may be particularly true for clinicians, who are constantly confronting new client, legal, and system-based realities. When we add a new topic to our syllabus, design a new seminar class, take on a new area of legal representation or focus, or otherwise expose ourselves to new challenges, even experienced clinical teachers may find we must once again—temporarily—shift back to a self-focus as we learn new content and adjust to new teaching demands.³² Clinicians may find that the arc of their pedagogic growth shifts among the stages in ways that are recursive, evolving, and spiraling in nature.

Although teacher-centered pedagogy long dominated most adult learning contexts,³³ numerous critiques of this approach exist. One widely recognized issue is that “when teaching power is used to ... control (even unintentionally), we diminish the learning space. A student who feels controlled ... will likely be less creative, take fewer risks, and perhaps choose a safer academic path.”³⁴ Perhaps in part for this reason, research has shown that lecture—a control-driven teaching method—results in “the lowest knowledge retention rate of any method of learning and encourage[s] learning at the lowest levels of cognitive function.”³⁵

Similarly, the inherently self-referential framework of the teacher-centered stage may lead new teachers to assume that what worked for them *as learners* will also work for their students.³⁶ This early developmental pedagogy can facilitate the projection of one’s own experiences onto one’s students; it supplants the more arduous but crucial work of developing a range of teaching approaches and discerning which one best fits each student’s learning needs.³⁷ A “one-size-fits-all”—or, more accurately, “my-size-fits-all”—approach may work for some students, but it will certainly fail others.³⁸

³² See discussion *infra*, Part II.

³³ The lecture method originated in medieval times. John McLeish, *The Lecture Method*, 77 *TEACHERS COLLEGE RECORD* 252 (1976).

³⁴ HARRIET L. SCHWARTZ, *What Is Connected Teaching*, in *CONNECTED TEACHING* (2019) at 19.

³⁵ Joseph T. DiPiro, *Why Do We Still Lecture?* 73 *AM. J. PHARM. EDUC.* 1, 1 (2009). Although the long-standing Socratic method, used in many large law school classes, involves a greater degree of student engagement than does lecturing, it is still deeply teacher-centered. The questions posed are those of the professor, not the student; “[s]tudents must await the instructor’s lead without knowing how to prepare for it.” Suzanne Kurtz, Michael Wylie & Neil Gold, *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 *DALHOUSIE L. J.* 797, 802 (1990).

³⁶ See text accompanying notes 25-32, *supra*, for a discussion of this self-referential framework.

³⁷ Robertson, *Professors’ Perspectives*, *supra* note 14, at 274-276.

³⁸ Students differ in myriad ways beyond their preferred learning strategies, including in terms of neurodiversity, information-processing skills, cognitive abilities, motivation, and engagement. Nonetheless, “educators are inclined to expect others, including our students,

As these examples demonstrate, methods designed to support the teacher's developmental competency can undermine our pedagogical effectiveness and limit our capacity to catalyze transformative, rather than merely "additive," student learning. Over time, as these challenges begin to surface and as a clinician gains content and teaching competence, they are also likely to gain clarity about the need for different pedagogical approaches. We may begin to notice student confusion or resistance in the classroom; student lawyering performances that reflect insufficient understanding or supervisor parroting; a general sense of student disconnection from the teacher or the material; or negative student comments on teaching evaluations about micromanagement of, or insufficient guidance for, client representation work. This evidence may accrue slowly and incrementally, but at some point, it is likely to trigger a transformational insight: to progress in our teaching skills, we need to develop methods designed to support a wide array of clinic student needs and learning goals. This realization—that *knowing and providing information* is not enough for maximal student learning—can be profoundly disorienting.

The two of us each vividly remember the early-stage anxiety that flowed from our experience of imposter syndrome, the concern we felt about unanticipated student questions, and the wave of relief that washed over us each time we were able to wrap up a seminar class or supervision session with our egos intact. But we were each also fortunate enough to have superb teaching mentors. We had opportunities to explore a variety of classroom and supervision methods with experienced clinicians and to observe them as they employed the kinds of sophisticated, interactive techniques that the legal professoriate has come to call "clinical pedagogy."³⁹ We attended national clinical conferences, where we learned how expert teachers create environments that effectively foster student learning, both in the classroom and in supervision sessions. And we learned from trial and error.⁴⁰ We came to recognize, like many of our clinical colleagues, that focusing on our

to think like us, to share our preferences. When they do not we can be quite critical of their learning process. Why is this student always relating personal anecdotes when I am trying to focus on theory? Why does that student demand examples and practical illustrations when this is not the point of the discussion? Why are there always students who go off on tangents? We all have such thoughts and questions." Patricia Cranton, *Individual Differences and Transformative Learning*, in MEZIROW, *supra* note 10, at 201.

³⁹ For Rachel, these early mentors were Leigh Goodmark and Margaret Johnson; for Deborah they were John Copacino and Wally Mlyniec.

⁴⁰ Some teachers see the limitations of this early-stage pedagogy, yet continue to use the same teaching methods, preferring to retain control or lacking the time to develop something new. William L. Goffe & David Kauper, *A Survey of Principles Instructors: Why Lecture Prevails*, 45 J. ECON. EDU. 360, 360-361 (2014) (finding, through a survey of faculty teaching college economics courses, that those surveyed who believed that lecture was the most effective teaching technique were less likely to have been exposed to research on pedagogy.)

own competence is the “teach[ing] equivalent to Maslow’s most basic, physiological needs:” while it is essential to excellent teaching, it is the floor, rather than the ceiling.⁴¹ This realization helped us transition into the next developmental stage of our work as educators: adopting a learner-centered pedagogy.

II. LEARNER-CENTERED PEDAGOGY: FOCUSING EXTERNALLY ON OUR STUDENTS

In the next developmental stage, teachers adopt a “learner-centered” pedagogy.⁴² This shift leads to a more sophisticated understanding of the faculty role: teaching no longer centers on the “*dissemination of knowledge*” but on the “*facilitation of learning*,” on helping students construct meaning for themselves.⁴³ The teacher—particularly the clinical teacher—plays a supporting role. She is less like Friere’s banker and more like a facilitator, a “partner, catalyst, resource, or poser of questions that sharpens learners’ thinking.”⁴⁴ Robertson describes the professional transition to learner-centered teaching in this way:

Rather than focusing on my own learning process as the master learner, I became fascinated with the students’ learning processes and how I [could] construct environments and activities that support these processes.... With the addition and integration of this newly conceptualized teaching responsibility—facilitating learning as opposed merely to mastering and disseminating content—my overall framework on teaching [was] transformed.⁴⁵

⁴¹ Robertson, *Professors’ Perspectives*, *supra* note 14, at 276; ABRAHAM H. MASLOW, *MOTIVATION AND PERSONALITY* 17 (R. Frager et al. eds, Harper & Row 3d. ed. 1987). Just as humans must satisfy basic physiological and safety needs before they can focus on higher-level needs, such as love, a sense of belonging, and self-actualization, it is only once a teacher has achieved basic content proficiency that they can focus on aspects of teaching external to themselves and begin to create a transformative learning space for their students. As Robertson observes, “Being able to acknowledge the loss of the old paradigm helps the learner to accept its passing . . . this acknowledgment . . . paves the way for the next phase in the learner’s development.” See Robertson, *Transformative Learning*, *supra* note 9, at 112.

⁴² Robertson calls this second developmental stage “Aliocentrism.” Robertson, *Professors’ Perspectives*, *supra* note 14, at 274.

⁴³ Robertson, *Transformative Learning*, *supra* note 9, at 107-08 (emphasis added). The teaching strategies in this stage rest on learner-focused assumptions such as: (1) students can be trusted to learn independently, when given appropriate scaffolding; (2) students’ prior knowledge can be a valuable resource for new learning; and (3) students’ emotional, as well as their cognitive, capacities, are essential to the learning process. See, e.g., Robertson, *Professors’ Perspectives*, *supra* note 14, at 281.

⁴⁴ Taylor, *supra* note 18, at 166.

⁴⁵ Robertson, *Transformative Learning*, *supra* note 9, at 109.

Clinical teachers at this stage adopt a clear-eyed centering of the learner.⁴⁶ In the classic clinic seminar, this takes the form of a shared educational space between teacher and students. Clinicians offer their substantive expertise, but their reliance on lecture is carefully circumscribed. Far more classroom learning derives from teaching methods that prioritize individual reflection, small group work, and open discussion. Regardless of the method used, these choices are no longer driven by concerns about teaching or substantive competence—here the clinician is making careful choices rooted in an awareness of what will best facilitate learning. One example of learner-centered pedagogy used in most clinic classrooms is rounds, where clinicians turn the locus of learning over to students, allowing them to arrive at insights and identify strategic lawyering options, while the teacher plays a limited (yet still important) role by prompting students to explore key questions to enhance classroom discussion.⁴⁷

Clinicians have the greatest ability to maximize the benefits of learner-centered pedagogy in the supervision context. In this small-scale, informal, and intimate setting, clinical teachers meet with students one-on-one or in small groups to help them set learning goals, work through client representation challenges, reflect on their lawyering performances, and begin to explore their individual professional identities.⁴⁸ Supervision provides a special opportunity for clinicians to gain insight into each student's cognitive and emotional responses to the learning process and to understand how those responses may be shaped by their particular lived experiences and their familial, social, and cultural contexts.⁴⁹ Add to this comparatively low teacher-student ratios,⁵⁰ shared, weighty responsibility for clinic clients, and long, collaborative work hours, and it becomes clear why clinic disrupts much of the teacher control baked into other law school courses, and why clinicians are so well-situated to adopt a learner-centered focus.

And indeed, from its inception in the mid-20th century, clinical legal education has embraced teaching methods that support learner-centered

⁴⁶ Today, “[t]he generally accepted model of adult education involves a transfer of authority from the educator to the learners; the successful educator works herself out of her job....” MEZIROW, *supra* note 10, at 14-15. See also Kathryn Fehrman & Tim Casey, *Making Lawyers out of Law Students: Shifting the Locus of Authority*, 20 PERSPECTIVES 96 (2012).

⁴⁷ See, e.g., Susan Bryant & Elliott Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLIN. L. REV. 195 (2007); Elizabeth Cooper & Anita Weinberg, *Finding Our Way: Teaching Legislative Advocacy Clinics*, 31 CLIN. L. REV. 41, 103-05 (2024).

⁴⁸ Ann Shalleck & Jane H. Aiken, *Supervision: A Conceptual Framework*, in BRYANT, MILSTEIN, & SHALLECK, *supra* note 1, at 169-70.

⁴⁹ *Id.* at 179-80.

⁵⁰ Most clinics have an 8 to 1 student-teacher ratio for both supervision and seminar. Robert R. Kuehn, David A. Santacroce, Margaret Reuter, June T. Tai, G.S. Hans, 2022-23 *Survey of Applied Legal Education*, CTR. FOR THE STUDY OF APPLIED L. EDUC. 1, 28, 32 (2023).

teaching.⁵¹ The earliest clinicians intentionally broke with traditional law school pedagogy, pushing their students to transition out of the role of passive recipients of knowledge to become active seekers of their own learning.⁵² The clinical commitment to learner-centered pedagogy is reflected in a wealth of books, articles, conference presentations, and teacher-training programs—many of which we, ourselves, have contributed to—spanning the past several decades.⁵³ Frequently used learner-centered methods successfully help students name and frame issues, engage in rigorous thinking, and navigate the numerous and varied challenges inherent in experiential learning. The goal is to put students in the driver's seat as they pursue learning, and the methods that support it permeate nearly every component of clinical programs across the country.⁵⁴ Clinicians understand that when a teacher slowly steps out of the way, removing scaffolding in a carefully calibrated series of steps, student learning—including the capacity to “own” the professional role—thrives.⁵⁵

This learner-centered focus came through when we asked experienced clinicians, attending a teacher-training institute, about their biggest concerns at this point in their teaching careers.⁵⁶ In contrast to those at the teacher-centered stage,⁵⁷ these clinicians did not share anxiety about making a mistake or being unable to answer a student question. Instead, they named issues such as whether they would succeed in catalyzing “light bulb” moments for their students, or whether they would be able to provide scaffolding sufficiently calibrated with individual student learning needs.

Another benefit of maturing into the learner-centered developmental stage is how it fosters development of the skill of cognitive empathy—the ability to understand what a student may be thinking or feeling—and, therefore, what methods may best help them learn.⁵⁸ This

⁵¹ See, e.g., J.P. Sandy Ogilvy, *Celebrating CLEPR's 40th Anniversary: The Early Development of Clinical Legal Education and Legal Ethics Instruction in U.S. Law Schools*, 16 CLIN. L. REV. 1, 9-10 (2009).

⁵² *Id.* See also Douglas L. Robertson, *Self-Directed Growth*, 50 ADULT ED. QUARTERLY 41, 42 (1999) [hereinafter, *Self-Directed Growth*] (observing that over the past several decades, this approach has acquired a “moral dominance over conversations about pedagogy...”).

⁵³ These fundamentally learner-centered teaching principles have since become a kind of clinical “orthodoxy.” The sources here are far too numerous to cite. One compilation of a number of useful articles can be found in A. HURDER, F. BLOCH, S. BROOKS & S. KAY, CLINICAL ANTHOLOGY: READINGS FOR LIVE-CLIENT CLINICS 1 (2011).

⁵⁴ Epstein, Aiken & Mlyniec, *supra* note 1, at 2.

⁵⁵ Ogilvy, *supra* note 51.

⁵⁶ We posed this question to clinicians with 5-25 years of teaching experience at each of the three Georgetown Summer Institute on Clinical Pedagogy.

⁵⁷ See text accompanying note 31, *supra*.

⁵⁸ The term “empathy” describes a range of experiences; no universal definition exists. It has been variously described as a “feeling,” *Empathy*, CAMBRIDGE ACADEMIC CONTENT DICTIONARY (2008); a “capacity,” Eric J. Vanman, *The Role of Empathy in Intergroup Relations*, 11 SCIENCE DIRECT 59, 59 (2016); a “process,” Carl Rogers, *Empathic: An Unappreciated Way of*

intersubjective understanding represents a huge gain in the teaching project; as Professor Paula Franseze observes, “Without empathy, we are teaching content instead of students.”⁵⁹

Throughout our careers as clinicians and as teachers of teachers, we have consistently witnessed the power of empathy in the teacher-student context.⁶⁰ Empathy provides teachers with a window into students’ epistemic needs that goes beyond what can be assessed through seminar questions, papers, and exams.⁶¹ Empathy opens teachers up to a more accurate and nuanced understanding of each student. It helps us avoid placing disproportionate emphasis on discrete instances when a student is “difficult” and pushes us, instead, to take a more holistic perspective about potential contributing factors.

The intense student-teacher relationships characteristic of law school clinics make empathic understanding particularly valuable here. Student-centered teachers have methods to consider a student’s affective experience; to forge authentic connection, and to employ more effective, individualized teaching strategies. Studies show that educator empathy fosters student trust, making them more likely to feel valued and to hear and (in the clinical context) process essential feedback on

Being, 5 COUNSELING PSYCHOLOGIST 2, 4 (1975); an “internal state,” Natalie Angier, *Scientists Mull Role of Empathy in Man and Beast*, NY TIMES (May 9, 1995), <https://www.nytimes.com/1995/05/09/science/scientists-mull-role-of-empathy-in-man-and-beast.html?smid=url-share>; an “act,” *Empathy*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/empathy> (last visited June 25, 2024) ; a “multidimensional construct,” Rebecca P. Ang & Dion H. Goh, *Cyberbullying Among Adolescents: The Role of Affective and Cognitive Empathy, and Gender*, 41 CHILD PSYCHIATRY HUM. DEV. 387, 388 (2010); and a “complex, intricate task,” Helen Riess, *The Science of Empathy*, 4 J. PATIENT EXPERIENCE 74, 74 (2017). See also Jean Decety & Jason M. Cowell, *Friends or Foes: Is Empathy Necessary for Moral Behavior?*, 9 PERSPS. ON PSYCH. SCI. 525, 525 (2014) (noting that at a conference of empathy researchers, the definitional confusion was so great that “every time one attendee would ask a question about ... the role of empathy in a [particular context], the respondent would in turn reply, ‘what do you mean by empathy?’”); PAUL BLOOM, *AGAINST EMPATHY: THE CASE FOR RATIONAL COMPASSION* 16 (2016) (citing researchers who observed “[T]here are probably nearly as many definitions of empathy as people working on this topic.”); C.D. Batson, J. Fultz & Schoenrade, *Distress and Empathy: Two Qualitatively Distinct Vicarious Emotions with Different Motivational Consequences*, 55 J. PERSONALITY 19, 19 (1987) (“Psychologists are noted for using terms loosely, but in our use of empathy we have outdone ourselves.”). Despite this confusion, virtually everyone agrees that, at its core, empathy involves establishing a meaningful connection with another person. While that connection can be affective or cognitive, our focus here is on the cognitive—learning benefits that come from a teacher’s capacity to *understand* the perspective, thoughts, and feelings of their students.

⁵⁹ Paula A. Franzese, *The Power of Empathy in the Classroom*, 47 SETON HALL L. REV. 693, 695 (2017).

⁶⁰ This observation, and those that follow, are based in part on our more than four decades of collective experience in teaching a year-long course on Elements of Clinical Pedagogy to the Georgetown Law clinical teaching fellows, as well as providing intensive mentorship beyond the scope of the course itself.

⁶¹ Sal Meyers, Katherine Rowell, Mary Wells & Brian Smith, *Teacher Empathy: A Model of Empathy for Teaching for Student Success*, 67 COLL. TEACHING 160, 161 (2019).

their client representation work.⁶² As humanist psychologist Carl Rogers puts it, “[w]hen the teacher has the ability to understand the student’s reaction from the inside, has the sensitive awareness of the process of how education and learning seems to the student ... the likelihood of learning is significantly increased.”⁶³

Take, for example, a student whose words and actions lead a teacher to assume that she is not prioritizing her client representation work—something virtually all clinicians at least occasionally experience. Learner-centered pedagogy comes to the rescue here; it allows us to move past this initial judgment and, instead, expand our perspective to encompass other possible—and perhaps more generous—explanations for the student behaviors we are observing. Most experienced clinicians, fully grounded in learner-centered approaches, are adept at exercising this kind of professional curiosity or imagination—skills foundational to cognitive empathy—to move past an initial, easy, or oversimplified explanation for student behavior.

Let’s turn to a more concrete example: A clinician is supervising a student and providing feedback to improve his client-based work. On multiple occasions, the student has responded to some of the clinician’s suggestions by stating, “I just disagree with you” or “That’s not how I learned to do it at the firm last summer,” or he turns in revised drafts that fail to respond to or acknowledge many of the clinician’s

⁶² Annie McKee & Kandi Wiens, *How to Prevent Burnout with Empathy: Taking Care of Yourself and Others Is a Potent Stress-Buster*, SHRM (July 18, 2017), <https://www.shrm.org/hr-today/news/hr-magazine/0817/pages/how-to-prevent-burnout-with-empathy.aspx>. (“So not only do others benefit from our empathy, we benefit, too.”). Studies also show that educator empathy fosters trust, which in turn constitutes a foundational element of the teacher-student relationship. See, e.g., Peter Demerath, Sara Kemper, Eskender Yousuf, & Bodunrin Banwo, *A Grounded Model of How Educators Earn Students’ Trust in a High Performing U.S. Urban High School*, 54 URB. REV. 703, 704 (2022) (“The grounded model that emerged from the data analysis identifies constituent elements or building blocks of trust that both matter to students, and that educators have found to be effective in relationship building. These building blocks include educator motivation; how educators show their empathy and respect for students, their self-awareness and credibility, and how they demonstrate their professional ability and commitment to students”); Samantha L. Strachan, *The Case for the Caring Instructor*, 68 COLL. TEACHING 53, 54 (2020) (“[E]mpathy is believed to be an important signifier of care in learning environments [C]are can also play a role in how instructors . . . go about developing rapport and trust in classrooms”).

⁶³ CARL ROGERS, FREEDOM TO LEARN 126-27 (1969). For example, one faculty member (unpublished data from Schwartz & Holloway, 2017) recalled experiences early in his career when he took it personally when students declined to work hard in his classes. He remembered feeling frustrated: “I mean, why would you do this to me? I am giving you so much of myself, don’t you see what I am trying to do for you?” However, he also noted that as he gained more experience, he realized that students have various degrees of commitment to learning, he does not always know what students might be dealing with that distracts them from school, and ultimately, he needs to avoid taking on the disappointment he feels when students do not engage. His early-career perspective represents an absence of empathy; he internalized students’ experiences of not maximizing their education. HARRIET L. SCHWARTZ, *What Is Connected Teaching*, in CONNECTED TEACHING (2019) at 21.

suggestions for improvement. The initial assumption many teachers are likely to make may be a judgmental one: The student's resistance comes from arrogance. Because a clinician in the teacher-centered stage may have fewer tools to center empathic awareness, this assumption may stick. The teacher may believe in the student arrogance theory with such certainty that it shuts down her curiosity about potential alternative explanations for his behavior.

A teacher using learner-centered skills is better positioned to move beyond this initial assumption, and instead understand their students in more complex and contextualized ways. A learner-centered teacher will take a step back and wonder what may be going on for the student—what else, besides arrogance, might be the catalyst for these behaviors? In other words, this developmental stage is largely defined by the pedagogical skill of cognitive empathy, one that helps teachers expand their perspective and, therefore, their teaching effectiveness. A teacher who uses this skill may realize that the student described above does not yet understand that there is no one right way to approach strategic decisions; he may feel disoriented and shut down by the inconsistency between the clinician's feedback and advice he received in another context. Perhaps the student finds the teacher's feedback unclear and difficult to understand; stymied by his reluctance to share this fact, he sees no option other than to simply ignore it. The student may be trying to compensate for a concern that some aspect of his social location might cause the teacher to form negative assumptions about his intellectual capacity. Or maybe the student is inexperienced and unaware of how his approach comes across; he has not had a meaningful opportunity to reflect on his communication style or has not learned to present his thoughts in a more nuanced manner. A learner-centered perspective creates space for such exploration. It facilitates better teaching because it is rooted in a more expansive, and potentially more accurate, understanding of the student's actual experience.

In sum, the indisputable power of learner-centered pedagogy lies first in its recognition of each student's individuality and the impact that individuality has on learning, and second in its explicit theoretical framework that supports teachers' exercise of cognitive empathy. These lessons are imperative to excellent teaching; adoption of learner-centered teaching methods can have a profound positive impact on our ability to reach our students.⁶⁴

⁶⁴ See, e.g., Meyers, Rowell, Wells & Smith, *supra* note 61 at 162 (finding in a meta-analysis of over 100 studies spanning more than 50 years that "teacher empathy was among the strongest predictors of positive student outcomes," including academic performance, affective experience, and behavior). Research conducted in the doctor-patient context offers insight on the role of empathy in the teacher-student context. For example, research shows that patients whose doctors communicate empathy are more likely to comply with their

III. LEARNER-CENTERED LIMITATIONS: ADVANCING OUR PEDAGOGIC DEVELOPMENT

While learner-centeredness is a critical step on the path toward zealous teaching, this developmental stage has real, and relatively unexplored limitations. In our view, the most important of these is the implicit assumption that while the *student* is a full-fledged human being, with strengths, limitations, identity-based perspectives, and plenty of room to grow, the *teacher* is something quite different: an intellectually and emotionally neutral, fully-formed and enlightened participant in the learning dynamic. The near-exclusive focus on the *learner* is both the root of what is powerful about this pedagogical approach and, simultaneously, its Achilles' heel.

In reality, of course, no teacher—no human being—is a neutral participant in any interpersonal interaction. Thus, a profound naivete lies at the heart of the learner-centered approach: a teacher's focus on understanding *the learner*, no matter how useful or well-intentioned, can systematically blind her to how *her own internal landscape* is also shaping and defining the educational dynamic.

An exclusively external, student-focused lens can be incredibly seductive. It supports teachers in their efforts to identify and respond effectively to the strengths and challenges students bring with them to clinic; but it does so without demanding that teachers engage in the equally important work of critical self-analysis. Learner-centered teaching embraces student, *but not teacher*, self-reflection. This is a major failing: If we treat ourselves, as teachers, as objective, neutral actors, and ignore our personal and emotional reactions to students, we obscure our own humanity and neglect the interpersonal nature of teaching. If we try to suppress our individual histories, our social identities and stratifiers, our idiosyncratic emotions, and our personal vulnerabilities, preferences, and biases, we unwittingly idealize ourselves and fail to engage in a full accounting of our impact on our students, and our students' impact on us.⁶⁵ Learner-centered pedagogy is one-sided;

physician's advice and have better health outcomes. Sung Soo Kim, Stan Kaplowitz & Mark Johnston, *The Effects of Physician Empathy on Patient Satisfaction and Compliance*, 27 EVAL. HEALTH PROF. 237, 248 (2004); David Rakel, Bruce Barrett, Zhengjun Zhang, Theresa Hoeft, Betty Chewning, Lucille Marchand, & Jo Scheder, *Perception of Empathy in the Therapeutic Encounter: Effects on the Common Cold*, 85 PATIENT EDUC. & COUNSELING 390, 395-96 (2011); Sarah Price, Stewart W. Mercer, & Hugh MacPherson, *Practitioner Empathy, Patient Enablement and Health Outcomes: A Prospective Study of Acupuncture Patients*, 63 PATIENT EDUC. & COUNSELING 239, 243 (2006). When physicians fail to engage empathically, their patients are often dissatisfied and sometimes reject necessary treatment. Kelly B. Haskard Zolnieriek & M. Robin DiMatteo, *Physician Communication and Patient Adherence to Treatment: A Meta-analysis*, 47 MED. CARE 826, 832 (2009).

⁶⁵ This way of thinking about the teacher-student relationship echoes some ideas about student-client relationships explored in Susan Bryant's *The Five Habits of Cross-Cultural*

it holds students solely responsible for disorienting moments that we ourselves may unintentionally cause, contribute to, or interpret in ways that cramp teachers' capacity to most effectively reach our students.⁶⁶

Like all other human beings, teachers are shaped by conscious influences—such as, for example, stylistic preferences and conscious biases—as well as those that affect us on a more subconscious level—such as implicit biases, values, and insecurities.⁶⁷ While both can substantially shape how teachers interact with their students, they can also interfere with their ability to perform in positive, productive, and appropriate ways at all times, with all people.⁶⁸ Most of us understand this reality on an abstract, intellectual level. But in our day-to-day lives, teachers often succumb to the strong temptation—facilitated by the tenets of a learner-centered pedagogy—to believe that our reactions to students, or our diagnoses of the reasons for their behavior, constitute objective insights with which most other teachers would agree. We often overlook how our individual lens may distort our ability to accurately understand our students or color how we interpret our interactions with them.

The tendency to assume both that we ourselves are objective and that our good intentions could not possibly lead us astray is, of course, a prototypically human error.⁶⁹ At the same time, it obscures the true synergistic nature of the clinician-student relationship. By overlooking the reality that clinical teaching occurs within an interactive, intellectual and emotional dyad, learner-centered methods fail to push teachers toward self-reflection,⁷⁰ perpetuating the myth of teacher neutrality.⁷¹

Lawyering. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001). In collaboration with Professor Jean Koh Peters, Bryant uses the Five Habits to delineate strategies that allow clinic students to ensure both respect for “her client’s dignity, voice, and story, and the [student’s] understanding of her own biases and ethnocentric world views.” Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, in BRYANT, MILSTEIN, & SHALLECK, *supra* note 1. The basic premise here is also much-discussed in the broader anti-racism literature—that a person who has power must not only acknowledge and recognize those who have less; he must also look inward and examine how his own biases and assumptions may inform the way he attributes meaning to the behavior of others. See, e.g., LAYLA F. SAAD, *ME AND WHITE SUPREMACY* (2020); IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* (2019); AUSTIN CHANNING BROWN, *I’M STILL HERE: BLACK DIGNITY IN A WORLD MADE FOR WHITENESS* (2018); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015).

⁶⁶ Robertson, *Professors’ Perspectives*, *supra* note 14, at 281-283.

⁶⁷ We refer to the factors that contribute to the humanity and subjectivity of teachers in various ways throughout this paper, using terms such as vulnerabilities, triggers, influences, lived experiences, personal baggage, and so on. Our intent is that each such term be interpreted as capaciously and broadly as possible, to incorporate all factors that inform who we are as individuals and, therefore, the subjective lenses we bring to our teaching.

⁶⁸ Robertson, *Beyond Learner-Centeredness*, *supra* note 21, at 10-11.

⁶⁹ DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2010); Emily Pronin, Daniel Y. Lin, & Lee Ross, *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCH. BULLETIN, 371 (2002).

⁷⁰ Robertson, *Professors’ Perspectives*, *supra* note 14, at 281.

⁷¹ This egocentric orientation can result in a range of problematic cognitive errors, including confirmation bias. See Anthony G. Greenwald, *The Totalitarian Ego: Fabrication*

Until we see the pedagogical value of explicitly and systematically accounting for the factors that influence *us* in the same ways we account for those that influence our students, we are unlikely to evolve into zealous educators who take full advantage of the transformative possibilities of clinical legal education.

Once clearly stated, it may seem obvious that a professor's internal life will affect her in her teaching role. But little guidance exists in terms of either how to explore these issues or what to do when they arise. When we feel stressed, burdened, hyperreactive, or alienated, few of us have the pedagogical training needed to explore the impact of those feelings on the educational environment we strive to create.⁷² And learner-centered pedagogy provides no real guidance here. Much of the research on adult learning—including the clinical legal literature—has tended to “ignore[] the dynamic intersubjective interplay of the lived experience of teachers and learners (e.g., how feelings between teachers and learners can spiral and [what are] effective ways to manage them).”⁷³

And although learner-centered approaches support teacher-student empathy, helping our students achieve the most transformative possible learning requires broader, more complex strategies. Anyone who has taught for more than one semester knows that, despite its importance, teacher-student empathy can be challenging to maintain. From the brand-new to the highly experienced, most clinicians enter each semester with a sense of excitement about the meaningful connections they will establish with their students. But over a few short weeks, many report feeling *disconnected* from some of their students, some of the time. This is particularly common when a student's working style, communication, or emotional responses to the lawyering project are different from those of the teacher. Teachers are often disoriented by students who, for example, devote less time than needed to client representation tasks; express judgmental views about clinic clients; fail to understand or investigate the difficult realities of their clients' lives; or ignore or respond defensively to feedback on their work. Teachers may also find they feel disconnected from students for less obvious reasons—something idiosyncratic to that student's personality or demeanor.

and Revision of Personal History, 35 AM. PSYCH. 603, 606-607 (1980) (describing “cognitive conservatism” as one of three varieties of cognitive error caused by egocentrism, and “confirmation bias” as an example of cognitive conservatism).

⁷² Pedagogical training may be insufficient here; individual psychotherapy can also serve as an invaluable source of insight for teachers (as it does for anyone).

⁷³ Douglas Robertson, *Facilitating Transformative Learning: Attending to the Dynamics of the Educational Helping Relationship*, 47 ADULT EDUC. QUARTERLY 41, 47 (1996). Of course there are exceptions, including a superb series of conference workshops focused on decolonizing clinical pedagogy, presented by Professors Norinda Brown, Anjum Gupta, Renee Hatcher, Donna Lee, and Anita Sinha.

In these situations, teachers often experience what the two of us call “empathic disconnection”; where our curiosity about, or generosity toward a student decreases, or when, instead of seeking to understand, we find ourselves adopting a judgmental lens that interferes with our capacity for connection. Because it can have a harmful, even devastating impact on the teacher-student relationship, clinicians must be able to recognize empathic disconnection when it occurs and develop strategies for repairing the injured interpersonal connection.

Empathic disconnection in the clinical space lays bare a serious limitation of the learner-centered developmental stage. While teachers at this stage may use a range of strategies to explore empathic disconnection with a student, those strategies can have the unintended negative consequence of *reinforcing* it. Here’s why: although the focus on understanding a student’s context, feelings, or experiences is an important piece of promoting empathic understanding, it is only one piece. Some disconnections cannot be resolved solely by focusing on the student. Sometimes they are caused—in part or even in whole—by the teacher herself, for reasons that may have nothing to do with a particular student.

In light of this reality, we need a pedagogy that encourages us to see how the factors that shape us, as teachers, and that fill or deplete our empathy reservoirs, also shape—consciously or unconsciously—our reactions to our students. Learner-centeredness fails to demand a systematic examination of how the teacher’s own context—separate from or in addition to that of the student—might be affecting the relationship. This otherwise-powerful pedagogy does not provide the tools necessary to explore what clinicians bring to our professional lives and our interactions with our students. Learner-centered methods fail to encourage teachers to see themselves in their own, full subjectivity and humanity, as we must do if we are to rise to our full professional potential. In this way, adoption of a learner-centered pedagogy alone can enable, rather than repair, empathic disconnection.

The need for self-awareness and reflection may be particularly important for clinical teachers, due to the nature and scope of their work. Clinicians are responsible not only for promoting student learning, but also for successful client representation. Often, the clinic’s legal work has an enormous impact on a client’s safety, livelihood, or freedom. As we juggle teaching, concern for clients, and (for some) scholarship, clinicians are often stretched thin and may feel overwhelmed; this can undermine our best efforts to effectively practice empathy with our students.⁷⁴

⁷⁴ Many articles have been written addressing the value of teaching law *students* empathy as an essential lawyering skill in their representation of *clients*. See, e.g., Philip M.

And all of this is crucial because empathic disconnection undermines effective teaching. In the absence of meaningful connection, even more experienced clinicians can find it difficult to maintain their curiosity about their students' context, needs, or vulnerabilities. Instead, a teacher may find her commitment to the student begin to flag; she may adopt less effective teaching methods in her work with the student. We have witnessed many clinicians (including ourselves) experience empathic disconnection and shift—consciously or subconsciously—to a self-protective place, adopting strategies that decrease the likelihood that a student will expose our vulnerabilities. Those strategies might include providing more directive and controlling feedback rather than nurturing the student's independence, reducing time spent with the student, taking over portions of the student's client representation work, or even counting the days until the student's time in clinic will end.⁷⁵

For all of these reasons, a pedagogy that systematically incorporates a teacher's internal awareness is essential to our ability to reach full teaching maturity.⁷⁶ And a small group of teacher-philosophers outside the legal academy have developed a robust and important critical

Gentry, *Clients Don't take Sabbaticals: The Indispensable In-House Clinic and the Teaching of Empathy*, 7 CLIN. L. REV. 273, 274-85 (2000); Laurel E. Fletcher & Harvey M. Weinstein, *When Students Lose Perspective: Clinical Supervision and the Management of Empathy*, 9 CLIN. L. REV. 135, 142-47 (2002); Kristin B. Gerdy, *Clients, Empathy, and Compassion: Introducing First-Year Students to the 'Heart' of Lawyering*, 87 NEB. L. REV. 1, 17-24 (2008); Joshua Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 636-37 (2002); Ian Gallacher, *Thinking Like NonLawyers: Why Empathy is a Core Lawyering Skill and Why Legal Educators Should Change to Reflect Its Importance*, 8 LEGAL COMM'C'N & RHETORIC: JAWLD 109, 110, 138-149 (2012); Karen Irvin, Mindy Mitnick & Andrea Niemi, *"I Feel Your Pain": The Role of Empathy in Family Law*, 17 AM. J. FAM. L. 218, 21-22 (2003); Mark Baer, *Future Lawyers Should Be Screened and Trained for Empathy*, HUFFINGTON POST (Aug. 26, 2016), https://www.huffpost.com/entry/future-lawyers-should-be_b_8046278; Lynn Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987); John L. Barkai & Virginia O. Fine, *Empathy Training for Lawyers and Law Students*, 13 SW. U. L. REV. 505, 527-29 (1983); Cary Bricker, *Teaching the Power of Empathy in Domestic and Transnational Experiential Public Defender Courses*, 32 BUFF. PUB. INT. L. J. 1, 7-14 (2014); Jennifer Gerarda Brown, *Deeply Contacting the Inner World of Another: Practicing Empathy in Values-Based Negotiation Role Plays*, 39 WASH. U. J. L. & POL'Y 189, 189-91 (2012); BARBARA GLESNER FINES, *Teaching Empathy through Simulation Exercises—A Guide and Sample Problem Set*, in PROFESSIONAL RESPONSIBILITY (2008).

⁷⁵ Occasionally, of course, situations arise where some of these pedagogical choices are the best way to promote a student's educational experience: the student may be overwhelmed for a host of reasons. Our point here is that when a clinician adopts these approaches in response to their *own emotional reaction to the student*, there is a risk of harm to the student's learning.

⁷⁶ The general importance of self-awareness, outside of the particular context of pedagogy, has been explored in several law review articles published over the last 15 years. *See, e.g.,* Tammy Kuennen, *The M Word*, 43 HOFSTRA L. REV. 325 (2014) (urging the importance of student and teacher mindfulness and meditation as "formal practices in which one sets aside time to cultivate one's ability to be aware of one's thoughts, on a sustained basis").

literature addressing this pedagogical need.⁷⁷ Robertson explains that, eventually, learner-centered teachers:

realize in some fundamental way that they must again include themselves in the equation of the teacher/learning encounter, not as they originally had done as the egocentric focus—as the master learner—but rather in a new way as an important part of a teaching/learning system—as the fully human learning facilitator.⁷⁸

In response to this second transformative insight, we must build a set of relationship-centered methods onto our learner-centered approach to clinical teaching. We must incorporate the needs and context of not only the student but of the teacher in the learning dynamic. An essential benefit of such a pedagogical approach is that it enhances the teacher's capacity to develop and maintain empathic connection with their students, even in the face of personal and interpersonal obstacles that inevitably arise. We explore relationship-centered pedagogy, where clinicians are positioned to reach their full potential, in the next section.

IV. RELATIONSHIP-CENTERED PEDAGOGY: TEACHING WITH OUR FULL POTENTIAL

Relationship-centered pedagogy incorporates the strengths of the learner-centered approach and pushes past its limits.⁷⁹ Relationship-centeredness requires teachers to continue to investigate the internal, subjective experiences of their students, and to incorporate the empathic labor that permeates the learner-centered stage. But this third-stage pedagogy also pushes teachers to reject any sense of their own objectivity or emotional neutrality. Instead, it encourages them to intentionally approach the educational environment as an interdependent one; to pay close attention to the internal lives of both the student *and* the teacher. The central insight here is that learning derives from a complex

⁷⁷ See, e.g., Robertson, *supra* notes 9, 14, and 21; Parker Palmer, *The Heart of a Teacher: Identity and Integrity in Teaching*, CHANGE, Nov.-Dec. 1997, at 14 (“knowing my students and my subject depends heavily on self-knowledge. When I do not know myself, I cannot know who my students are”). On a related note, bell hooks describes the experience of many university professors as they initially sought to respect “cultural diversity” in the classroom in the late 1980s and early 1990s. These teachers “had to confront the limitations of their training and knowledge, as well as their possible loss of ‘authority.’ ... A lot of people panicked.” bell hooks, *supra* note 15, at 30.

⁷⁸ Robertson, *Professors’ Perspectives*, *supra* note 14, at 283.

⁷⁹ Relationship-centered pedagogy also incorporates the substantive and teaching competence of the first, teacher-centered stage.

system of clinician-student interactions, in which each participant plays a unique part.⁸⁰

Freed from the effort to achieve their own content- and teaching-competence, and skilled at exercising empathic awareness of their students' experience, relationship-centered teachers are well-positioned to seek a clearer understanding of what they themselves bring into the learning space. This mirrors what many of us ask of our students as they assume the lawyering role: to routinely inventory their own culture, biases, values, and personal histories and consider how these may affect their client relationships and professional effectiveness.⁸¹

Relationship-centered pedagogy provides clinicians the necessary scaffolding to move past a laser-like focus on students as the primary source of learning successes and obstacles. Instead, this approach to teaching encourages us to cast our gaze internally, to consider our own contributions with the greatest possible clarity, and to understand our own "idiosyncratic experience as [we] attempt to help individual learners."⁸² This additional pedagogic burden can be a heavy one, but it is also a high calling; it demands that we, as teachers, seek "to clarify the intellectual, emotional, and spiritual dynamics that form *or deform* our work from the inside out.... [G]ood teachers must live examined lives and try to understand what animates their actions for better and for worse."⁸³ The most effective teachers recognize that they are lifelong learners and always have room to grow as professionals. Systematic critical self-reflection is essential not only for our students, but for us as well.⁸⁴

To see the value of this developmental stage, let's go back to the "defensive-to-feedback" student we've been discussing. The teacher-centered teacher strives to ensure she has provided him with all the substantive support she can muster, with an eye toward clarity and ease of understanding. The learner-centered teacher builds on this by

⁸⁰ Robertson calls this stage "systemocentrism." Robertson, *Beyond Learner-Centeredness*, *supra* note 21, at 7. In the words of one expert teacher of teachers: "[K]nowing myself is as crucial to good teaching as knowing my students and my subject." PARKER J. PALMER, *THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER'S LIFE* 3 (10th Anniversary ed. 2007).

⁸¹ Bryant & Koh Peters, *Reflecting on the Habits*, *supra* note 65. See also Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317 (2014) (exploring an organizational model for teaching students the skill of reflection).

⁸² Robertson, *Beyond Learner-Centeredness*, *supra* note 21, at 8.

⁸³ PALMER, *supra* note 80, at 2.

⁸⁴ Although it might be counterintuitive, taking on this additional pedagogic burden is also important to sustaining a career in clinical education; unexamined, unaddressed empathic disconnection can wear teachers down over time. As Karyn Sproles puts it, "a greater awareness of the emotions we feel as teachers both in and out of the classroom can lead us to find the emotional balance that will allow for a sustainable teaching career." Karyn Z. Sproles, *The Emotional Balancing Act of Teaching: A Burnout Recovery Plan*, 153 TEACHING AND LEARNING 99 (2018), 99-100.

exploring the many possible factors that might be driving the student's observable behavior. The *relationship-centered* teacher adds to this important work by exploring the origins of her own reactivity. Perhaps the teacher's assumption that the student's resistance arises from arrogance is rooted in her own insecurity. She may have recently received a set of critical course evaluations, so that the student's comments hit her in a particularly vulnerable place. Or perhaps she has a newborn at home and is getting precious few hours of sleep at night, making it difficult for her to respond to criticism with the equanimity that she might ordinarily bring to bear. In addition to those possibilities, the teacher's and the student's social identities may make it challenging for the teacher to disentangle this interaction from past experiences of personal or societal mistreatment or oppression. Engaging in this kind of self-reflection—a crucial component of gaining a grounded understanding of the teacher-student dynamic—is central to this third developmental stage.

The evolutionary advance to a relationship-centered pedagogy provides a sophisticated, holistic framework for understanding the educational environment. And in the process, it points us to the tools we need to become our best selves for the students we are so wholeheartedly committed to teaching. Long-time educational theorist and philosopher Parker Palmer articulates the need for this last-stage pedagogy beautifully:

[The] tangles [of teaching] have three important sources. The first two are commonplace, but the third, and most fundamental, is rarely given its due. First, the *subjects* we teach are as large and complex as life, so our knowledge of them is always flawed and partial.... Second, the *students* we teach are larger than life and even more complex.... But there is another reason for these complexities: *we teach who we are*. Teaching, like any truly human activity, emerges from one's inwardness, for better or worse. As I teach, I project the condition of my soul onto my students, my subject, and our way of being together. The entanglements I experience in the classroom are often no more or less than the convolutions of my inner life. Viewed from this angle, teaching holds a mirror to the soul. If I am willing to look in that mirror, and not run from what I see, I have a chance to gain self-knowledge—and *knowing myself is as crucial to good teaching as knowing my students and my subject*.⁸⁵

⁸⁵ PALMER, *supra* note 80, at xvii. Douglas Robertson shared a similar sentiment in his observation that teaching can be “just as emotional an experience as is learning, which only makes sense because human beings are doing both.” Robertson, *Beyond Learner-Centeredness*, *supra* note 21, at 10. And John Roth, after summarizing the comments of Carnegie Professors of the Year, concluded that outstanding professors make themselves accessible to their students, which “begins with the recognition that what professors *are*

The two of us have come to understand the importance of deep self-awareness through our own clinic-based collaboration. We have spent more than a decade co-teaching; the intensity of that professional partnership has helped us see with clarity the different patterns of personal issues and professional pressures that each of us brings to our lives as teachers. We have come to learn that student behaviors that trigger empathic disconnection for one of us may not have the same effect on the other. We have seen each other incorrectly diagnose student behavior, making causal assumptions that follow relatively predictable patterns. We have served as reciprocal mirrors, helping each other see the “baggage” each of us holds—both in terms of issues we are actively working to change and those about which we lack real self-awareness.

Of course, this kind of long-term, intensive professional collaboration is a rare luxury. How can each of us, regardless of our professional context, gain clarity about our own vulnerabilities? Some clinicians are deeply introspective by nature or by training. They have substantial insight into their own interpersonal insecurities and limitations, and may be better-positioned to explore these issues within the teaching dynamic. Yet even the most insightful clinicians are likely to benefit from adopting an explicit, routine practice of naming and considering their “triggers” and vulnerabilities. Such intensive self-examination can be difficult, but it allows us to reap substantial professional benefits and expand our capacity to most effectively teach our students.

V. RELATIONSHIP-CENTERED PEDAGOGY IN PRACTICE: SELF-REFLECTION AND ZEALOUS TEACHING

Relationship-centered pedagogy requires clinicians to systematically reflect not only on their students, but also on themselves in an effort to catalyze transformative learning. In this Part, we offer one method for such self-reflection, by considering the what, the why, and the how of our own responses to student challenges.⁸⁶ First, we highlight a variety of typically unconscious influences that may play a role in teacher-student interactions. Next, we explore strategies for gaining self-awareness about the reasons underlying our reactions to particular students or student behaviors. Finally, we discuss strategies for reducing the risk that teacher-student disconnection will occur.

speaks to students more emphatically than what we say. So accessibility means opening oneself to students by sharing one's life, as well as one's knowledge, with them.” JOHN K. ROTH (ed.) *INSPIRING TEACHING: CARNEGIE PROFESSORS OF THE YEAR SPEAK 227* (John K. Roth ed., 1997) (emphasis in original).

⁸⁶ This approach stems from our collaborative efforts, and works well for us; other teachers might prefer different strategies here.

A. *The What: Naming Our Reactions to Our Students*

Teachers occasionally feel intense emotions in reaction to students that are relatively easy to identify and name. Far more often, however, our reactions are more subtle—flickers of agitation during student meetings; a fleeting sense of exasperation when a student's name pops up in our inbox; a general sense of low-level angst when interacting with a student in the classroom. It can be particularly hard to appreciate the impact that these lower-level negative responses may have on our teaching. Instead, many of us consider the issue through a learner-centered, externally-focused lens: our frustration, for example, is caused by the fact that a student is *being frustrating*. This viewpoint may well be useful; perhaps the student is not thinking things through independently or is making unfair generalizations about their clients. While our classic clinical pedagogy trains us to examine what may be going on with the student, a relationship-centered approach asks us to incorporate self-reflection and consider: Why is the student's behavior pushing my buttons? Why is it triggering an emotional reaction in me, rather than a sense of excitement about helping the student learn, or even just awareness that this is an area where the student may need to lean into growth?

Adding an internal exploration to our pedagogy can be complicated by a host of psychological phenomena. One of these is “false consensus bias”—the unconscious tendency to see one's “own behavioral choices and judgments as relatively common and appropriate....”⁸⁷ In other words, it may be difficult to identify our own triggers or idiosyncrasies if we assume that our personal responses are universal; that what *we ourselves* feel is what *all others* would also feel in similar circumstances.⁸⁸ In the clinical teaching context, false consensus bias can lead a teacher to assume that her reaction to a student is a universal, objective one—that other teachers would react similarly. The problem here is that this assumption naturally leads to a diminished sense of responsibility on the teacher's part; if all teachers would be frustrated, irritated, or alienated by a particular student's behavior, there is less incentive to explore one's own, personal contribution to the educational dynamic.

But false consensus bias is, in fact, false. In reality, each person's lived experience and social location shape their responses to particular situations in ways that vary enormously. And it is only by holding

⁸⁷ Lee Ross, David Greene & Pamela House, *The False Consensus Effect: An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279, 280 (1977); see also Gary Marks & Norman Miller, *Ten Years of Research on the False-Consensus Effect: An Empirical and Theoretical Review*, 102 PSYCH. BULL. 72, 72 (1987) (noting that over a ten-year period, “over 45 published papers have reported data on perceptions of false consensus and assumed similarity between self and others”).

⁸⁸ See, e.g., Marks & Miller, *supra* note 87, at 72.

that insight front and center that we can force ourselves to see what is, in fact, idiosyncratic about our response to a particular student or student behavior. If we assume that our reaction is both objectively accurate and complete—that the problem lies with the student and therefore the student should be the focus of our scrutiny—there is little need for self-examination. This external, learner-centered orientation fosters tunnel vision as to the range of possible factors that *could* be disrupting the teacher-student dyad. It pushes us back to a place where we (unintentionally) idealize the teacher and her role in the educational relationship. A relationship-centered lens demands, instead, that we view ourselves in our own full humanity and recognize teaching as the dynamic experience that it is.

Take for example, the defensive-to-feedback student described earlier.⁸⁹ Using learner-centered methods, a clinician might explore the student's resistant behavior, consider what might be driving it, and brainstorm how to help the student overcome that resistance and be more open to learning. As she focuses on the student, she might come to realize that he is not driven by resistance at all; perhaps he does not understand, or does not buy into, the norms and communication styles that many teachers expect in the academic context, or perhaps he is struggling with his own insecurities, his sense of belonging, or a concern about being stereotyped. Or she might come to realize that this student is, in fact, resistant to new ideas and struggles to hear other points of view. She may use such learner-centered insights to modify her teaching approach to respond and to address the learning barriers. Any one of these reactions is likely to improve the clinician's relationship with the student.

But relationship-centered pedagogy can make a crucial contribution here. In addition to exploring the student's experience (on her own or in conversation with the student), a clinician at this stage would *also* incorporate a parallel, self-reflective analysis, exploring how her own feelings and perceptive lenses might be playing a role. She might, for example, note that she has a pattern of reacting defensively when a student appears to resist her feedback. Perhaps there is some part of her reaction about which there would indeed be *consensus*—few people react with equanimity when their feedback and constructive criticism is dismissed. But perhaps there is an *individual* piece as well; a reason that this behavior is getting under her skin, making her feel particularly disconnected from the student. This third-stage approach is rooted in a fundamentally important insight: a teacher's reaction to a student may

⁸⁹ See *supra*, Part II.

reflect *the teacher's own insecurities, idiosyncrasies, or concerns* and may have *little actual resonance* with what the student is thinking or doing.⁹⁰

Once we engage in critical self-reflection, we gain far deeper clarity about the teacher-student interpersonal system. We learn to separate the student contribution, for which they are responsible and from which they can productively learn, from our own contribution, for which *we* must take responsibility and from which *we* must learn. As we grow as introspective, self-aware teachers, we become increasingly well-positioned to plumb the depths of our own triggers, reduce our empathic disconnection, and more effectively teach the students who challenge us in small or large ways.

But how do we do this? In most situations, it is unlikely that we can ask ourselves: “Why am I reacting negatively to this student?” and instantly arrive at the answer. (If we could, there might be no need for psychotherapy). To facilitate this internal exploration, we must gain clarity about the reasons for our reactions.⁹¹

B. The Why: Inventorying Our Vulnerabilities

Once we have identified our emotional reaction to a student or to a student behavior, the next step is to consider the *internal sources* of that reactivity. We need to ask ourselves: why is this student behavior triggering this particular response from me? What aspects of my own personal or professional context might be leading me, as an individual, to be emotionally triggered, when another teacher might not feel the same way? What may be driving the particular assumption I am making about the student's behavior or motivation?

To engage in this work, we suggest creating an evolving checklist of sorts, something we have come to think of as a “vulnerability inventory”—a catalogue of our triggers, biases, preferences, and other idiosyncratic penchants that may shape our interactions with students.⁹² The idea here is to systematically track both: (1) the categories of student actions that tend to push our personal, gut-level buttons, that tend to hit us in a particularly vulnerable place, or that tend to

⁹⁰ Or, of course, any one of these examples could involve challenges arising for *both* the teacher *and* the student.

⁹¹ This introspective work may be most valuable if done on a routine basis, rather than solely when tensions with students arise. As noted above, however, we are focused here on teaching moments when we feel frustration, vulnerability, or lack of competence. These are the moments when it is likely to be most difficult—yet perhaps most important—to engage in critical self-reflection.

⁹² A similar tool, referred to as a “fearless moral inventory,” is used in the Alcoholics Anonymous context. This structured self-assessment is designed to help program participants reflect on various aspects of their lives—such as personal history, emotional triggers, patterns of behavior, social influences, and coping methods—that may contribute to their struggles with addiction.

trigger in us a pattern of emotional reactivity; and (2) the reasons each category might resonate particularly acutely, for us, as individuals.⁹³ This inventory will necessarily function as a work in progress; our personal penchants are not stagnant. They morph and change over the course of our professional lives. For this reason, we think of a vulnerability inventory as something clinicians might keep somewhere on their desk or simply in their active minds; a catalogue to build upon or modify as new experiences occur or a teacher's life context evolves. The earlier that teachers can identify these issues—the earlier we can become self-reflective learners ourselves—the more likely it is that we can find ways to be less emotionally reactive to particular student behavior, reducing the risk that we will damage the educational dynamic or otherwise reduce our effectiveness as teachers.

This introspective work is highly individual in nature. Some of us may need to set real limits on self-exploration—even *if our students might benefit from it*. In some situations, deep introspection may trigger too much personal pain. In others, a student's behavior, whether extreme or microaggressive in nature, may cut too deeply at a teacher's core, and feel too personally painful.⁹⁴ When these issues arise, each of us must choose whether to prioritize caring for ourselves over our commitment to zealous teaching. The point here is not that all issues *must* be explored regardless of the potential harm to the clinician; it is simply that when we choose not to engage in such exploration, it is likely to be in direct tension with maximizing student learning. Accordingly, over the course of our professional lives, we may seek to limit the circumstances where imposing a strict boundary around self-reflection is necessary.

When we do take those opportunities for self-examination, we are likely to gain a new perspective. The more we can understand our own contributions, the better we can unpack how those contributions may have led us to distort, misconstrue, or just be plain wrong in our interpretation of a student's behavior. To help catalyze this process, below we offer several broad categories of factors that—though far from exhaustive—may help us identify our individual vulnerabilities. For each category, we explore potential issues that might arise, provide examples to illustrate how these might play out in the clinical teaching context, and share concrete prompts to jump start self-reflection.

⁹³ Although our reactions to student words and behaviors are often deeply subjective, sometimes they are likely to be shared broadly by teachers within a particular social location.

⁹⁴ The potential harms here would also affect teachers at the learner-centered stage. Regardless of a teacher's decision regarding boundary-setting in terms of self-reflection, she may need to pull back from an exploration of the student's beliefs, biases, and context in the interests of self-protection.

1. *Individual Cultural Context: Social, Professional, and Personal Factors*

Each of us exists in a particular, individual context, comprised of social, professional, personal, and other factors that profoundly shape our identity, our life experience, and how we interpret the world. As identified above, some of those contexts may remain firmly fixed; others may change over the course of our lives. Some may take on different meaning or significance depending on our life stage or degree of professional experience. Still others take on greater or lesser importance depending on the particular environment in which we find ourselves. But at any given time, we can be certain that who we are as individuals will affect how we understand and respond to our students and, as a result, will affect our teaching.

Consider, for example, a situation where a student routinely responds to a teacher's classroom presentations by posing an extensive battery of questions, ranging from big-picture theoretical concerns to detailed hypothetical possibilities. The student rarely appears to be satisfied by these conversations, and often leaves class seeming puzzled or unconvinced.

For a relatively new clinician, this student may trigger early-career imposter syndrome and doubts about his professional competence. The teacher's own apprehension may distort his interpretation, leading him to conclude that the student's persistent questions signal resistance to the teacher's point, reinforcing precisely the lack of respect he fears.

Another teacher, concerned that her gender (or some other aspect of her social location) might evoke a biased, negative response in the classroom, may assume that this student's behavior is evidence that he discounts the value of her teaching.⁹⁵ This interpretation may be bolstered through the unconscious process of confirmation bias—a cognitive habit that leads a person to over-emphasize information that appears to confirm a preexisting belief, and to minimize information that contradicts it.⁹⁶

⁹⁵ Of course, not all female teachers have concerns that students may view them negatively through the lens of gender. On the other hand, many teachers experience similar concerns that derive from other social location-based factors, such as race, age, or religion. The examples we selected for this paper are those that arise most frequently in our work with new teachers, and that resonate for the two of us, giving us a grounded perspective.

⁹⁶ See Greenwald, *supra* note 71, at 606-607; Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, AM. EDUCATOR, Wtr. 2015-2016, at 29, 31 ("Another way in which implicit bias can operate in education is through confirmation bias: the unconscious tendency to seek information that confirms our preexisting beliefs, even when evidence exists to the contrary"); Harshith B. Nair, *Repercussions of Confirmation Bias in Teaching and Learning Processes*, 12 INT'L J. EDUC. & MGMT. 319, 320 (2022) ("If a teacher has some preconceived notions regarding some students it affects the outlook of the teacher towards the student's efforts. The teacher might not appreciate the efforts of the student. The teacher might negatively reinforce the student's stunting confidence and spirit of development").

A relationship-centered pedagogy helps us remain open to the possibility that neither our own inexperience nor our social location is the primary (or even a contributing) factor driving the student's behavior. By turning our gaze inward and reflecting on how our own internal issues may be shaping our perception of a student, we are better positioned to free ourselves from our own instinctive assumptions and open ourselves up to a wider range of possibilities about what is really going on. If we can see how our own concerns, triggers, identities, and experiences shape the explanatory assumptions we tend to leap to, we can get back to a place of learner-centered exploration of the myriad possible explanations for the student's behavior. Any one of these explanations—including the initial one of student disrespect or bias—may be accurate here. What is essential is that we understand ourselves well enough to see how our own vulnerabilities might limit our inquiry, and that we find ways to open ourselves to a wider range of possibilities; a process that, in turn, will allow us to be better able to teach this student.⁹⁷

Other aspects of a teacher's immediate personal or professional life context may also shape their interactions with a student. Teachers experience the full range of life stresses that affect everyone; in any given semester, they may be in the midst of a difficult personal issue (they themselves, a child, parent, spouse, or close friend is ill; a long-term relationship is ending; the family is shifting to an empty nest or dealing with financial strain), or a professional one (they are being evaluated for tenure or promotion or are under a tight deadline for an article that has yet to take shape). These life context issues may cause strains that disrupt student relationships in ways that clinical teachers may not always notice. We may be abrupt, impatient, easily frustrated by naturally slow student learning curves, or focused more on reaching a final lawyering product than on encouraging the process of student learning. During times of personal stress, we may be excessively reactive to students who need heightened attention and support. By developing awareness of our own vulnerabilities, we increase our capacity to be present and aware with our students. This, in turn, increases our teaching effectiveness, allowing us to better reach those students who may need it most.⁹⁸

⁹⁷ And as this example reveals, it can be a particular red flag when a teacher's initial assumptions about a student align closely with that teacher's own personal vulnerabilities; such alignment can be a useful indicator that the teacher's assessments may be at least partially off-base.

⁹⁸ Of course, one of the gifts of a clinical teaching career is that we have renewed opportunity each semester to recalibrate and improve.

2. *Values*

Most clinicians are drawn to clinical teaching out of a deep commitment to the areas of law in which their students practice, and this commitment is often anchored in strongly-held values about justice, fairness, and equality. The values clinical faculty prioritize often engender similar passion in their students. When students appear to be motivated by values that differ from or conflict with our own, we may experience a sense of disconnection, making it difficult to remain committed to zealous teaching.

By way of example, the two of us whole-heartedly embrace vulnerability, diligence, professional curiosity, and client-centeredness as values essential to our own lawyering identities, and those values are embedded in every aspect of our teaching. When our observations lead us to conclude that a student is acting in ways that fail to adhere to those values, we may experience conscious or unconscious disconnection from them. This, in turn, may have a negative impact on our teaching. Similarly, many clinicians hold a range of political values that our students may not share. One of the authors had a student who asked permission to withdraw from representing a clinic client in a protection order case because the client revealed that, years before, she had an abortion; he believed abortions were per se immoral and felt uncomfortable assisting her in any way. The clinician was a life-long supporter of reproductive justice. The diametric difference in value systems made it a real struggle for the clinician to remain connected to this student and to fully prioritize his educational development.

It is only by clearly naming our own values—beyond the *lawyering* values that are foundational to our teaching, such as promoting client goals—that we can see their effect on our student relationships. There may be occasions where it is both possible and worthwhile to provisionally “parking lot” some of those values in an effort to promote the learning of a particular student. If we can identify and then disaggregate our personal values from our teaching goals, we can free ourselves up to engage in learner-centered approaches and make far more effective teaching decisions. We can be open to a universe where we embrace our obligation to teach them as we would a student who holds values more aligned with our own.

3. *Bias and Countertransference*

Teachers, like all people, hold both explicit and implicit biases toward groups and individuals. Implicit biases are associations, shaped by culturally-derived stereotypes, that may affect an individual's perceptions even though they neither are aware of them nor consciously

endorse them.⁹⁹ They can profoundly affect our interactions with others, in ways that can be wholly antithetical to the teaching role. These biases can lead to distorted thinking and inaccurate assumptions about a person's motivations, and can result in behaviors that range from slightly aloof to overtly hostile.¹⁰⁰

In a teaching context, implicit bias can have a devastating effect on student learning. A teacher's biases can lead them to decide, for example, that certain students *deserve* our time, generosity, curiosity, and compassion, while others do not. To avoid, or at least minimize, the influence of unconscious bias on our teaching, we must find ways to push these biases into awareness and adopt a systematic process of bias disruption. Though admittedly difficult, this work is crucial in the teaching context because research shows that our capacity for connection can suffer based on difference.¹⁰¹ And as discussed above, cognitive empathy—connection through understanding another—can be foundational to zealous, learner-centered clinical teaching. One way to push those biases to the forefront is to pay particular attention when we are working with students we perceive as different from us in physical, intellectual, political, racial, cultural, or other ways. We know that difference can be a distinct trigger for making unwarranted, unfair, or incomplete attributions.

Clinical teachers *also* need to be on the alert for the risk of bias that can flow from “sameness” rather than difference.¹⁰² Because initial perceptions of sameness are inherently partial or even illusory, we can experience substantial disappointment when we discover real differences with a student whom we have internally categorized as an “in-group” member.¹⁰³ For example, one of our colleagues described how, as a Black clinician, she needs to be careful about making assumptions about her Black students' empathy for a client of color, or a client from economically humble family origins.¹⁰⁴ Similarly, a teacher must be alert for assumptions that a student who shares her own political commitments or career interests will respond to clinic clients with the same empathy and generosity that she does.

⁹⁹ See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006). A person's conscious, deeply-held commitment to equality can be undermined by implicit biases.

¹⁰⁰ See, e.g., MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013); John F. Dovidio, Kerry Kawakami, & Samuel L. Gaertner, *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCH. 62 (2002).

¹⁰¹ Eric J. Vanman, *The Role of Empathy in Intergroup Relations*, 11 CURRENT OP. IN PSYCH. 59, 59 (2016).

¹⁰² Carwina Weng, Lynn Barenberg & Alexis Anderson, *Challenges of “Sameness”: Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLIN. L. REV. 339, 341-43 (2012).

¹⁰³ *Id.* at 342.

¹⁰⁴ Conversation with Professor Kristin Henning (July 2024).

Disconnection also can flow from a process that echoes what mental health professionals call “countertransference.”¹⁰⁵ Therapists use the term “transference” to explain how clients—without realizing they are doing so—project onto their therapists their own thoughts and feelings that originate in important relationships. *Countertransference* represents the parallel process, when a therapist unconsciously projects these issues onto a client.¹⁰⁶ The therapeutic relationship is thus comprised of both the “real” relationship between the two participants, and an “unreal” or transference relationship.¹⁰⁷ Because transference and countertransference are common, naturally-occurring aspects of relationships far beyond the therapeutic context, it makes intuitive sense that both would arise in the intense clinical teacher-student dynamic.¹⁰⁸ And “the less its presence is suspected, the more powerfully [countertransference] operates.”¹⁰⁹

Here’s an example: consider a clinical teacher who has a family member she adores, but who struggles with severe but untreated anxiety issues. Many times, the teacher finds that conversations with this relative get bogged down in unproductive rumination that she is unable to help with or control. As a result, the teacher occasionally feels a slight sense of dread when the relative’s name appears on her phone. When that clinical teacher has a student who exhibits similar behavior, she may

¹⁰⁵ We are acutely aware of the difficulties inherent in appropriating terminology from one field to another. We do not seek to replicate the precise meaning of “countertransference” as it is understood in the psychological literature; instead, we hope to borrow this concept to illuminate problems that can arise in the teaching relationship. We do this in the belief that a “problem or theme should define [an] inquiry, not a particular discipline.” Douglas L. Robertson, *Unconscious Displacements in College Teacher and Student Relationships: Conceptualizing, Identifying, and Managing Transference*, 23 INNOVATIVE HIGHER EDUC. 151, 153 (1999) [hereinafter Robertson, *Unconscious Displacements*].

¹⁰⁶ See Petruska Clarkson & John Nuttall, *Working with Countertransference*, 6 PSYCHODYNAMIC COUNSELING 359, 360 (2000); C. Edward Watkins, *Countertransference: Its Impact on the Counseling Situation*, 63 J. COUNSELING & DEV. 356, 356 (1985) (“Countertransference refers to some of the thoughts, feelings, and behaviors that the counselor experiences in relation to clients. The nature of these thoughts, feelings, and behaviors, however, is a matter of debate”).

¹⁰⁷ C. Gelso, *A Tripartite Model of the Therapeutic Relationship: Theory, Research, and Practice*, 24(2) PSYCHOTHERAPY RES. 117, 121-25 (2014) (Gelso posits a third component of the “working alliance”).

¹⁰⁸ See, e.g., Rachel Slater, Patricia McCarthy Veach, & Ziqui Li, *Recognizing and Managing Countertransference in the College Classroom: An Exploration of Expert Teachers’ Inner Experiences*, 38 INNOVATIVE HIGHER EDUC. 3 (2013). Transference (student to teacher) is, of course, a concept well worth exploring as part of a clinician’s focus on understanding their students’ psychological experience of the teacher-learner dynamic; here, however, we are focused on the teacher’s inner experience of *countertransference*.

¹⁰⁹ SIGMUND FREUD, *Five Lectures on Psycho-Analysis*, in 11 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 51 (J. Strachey ed. & trans. 1957); see also CARL G. JUNG, *The Psychology of Transference*, in THE PRACTICE OF PSYCHOTHERAPY: ESSAYS ON THE PSYCHOLOGY OF THE TRANSFERENCE AND OTHER SUBJECTS 163, 171 (R.F.C. Hull trans., 2nd ed., 1966).

have real trouble approaching her relationship with that student with a clean slate. Because of her history with her family member, she may move far too rapidly to a place of impatience and disconnection.

Because countertransference is—at least at the outset—an unconscious process, it may be easier to identify through behavioral signals. Expert educational theorists have categorized some of these signals at the collegiate instructional level, including where the teacher: (1) responds to a student in an unusually intense way (whether positive or negative); (2) feels particularly thin-skinned in response to a student's resistance or criticism, or feels a particularly strong need for a student's approval; (3) notices a similarity in their response to a student and a relationship pattern with a close friend or family member; (4) struggles with maintaining their usual boundaries with a particular student, or feels compelled to “rescue” a student; or (5) starts to avoid a student or engages in passive-aggressive/aggressive communication with a student.¹¹⁰

4. *Prompts to Promote Self-Awareness*

For all of these reasons, we have found it helpful to develop a list of questions to ask ourselves in an effort to gain insight into how contextual factors, values, unconscious bias, and interpersonal countertransference might contribute to our own vulnerabilities and interfere with our ability to accurately see, understand, or relate to our students. A few examples of those questions are set out below:¹¹¹

Context and values

- What aspects of my social identity or professional status are particularly salient for me? What stressors, concerns, and anxieties am I experiencing in my personal life? My professional life? How might any of these factors contribute to my sense of vulnerability? How might this, in turn, affect my interactions with students?
- How closely aligned are my assumptions about a particular student's motivation or behavior with my own stressors, concerns, and anxieties?

¹¹⁰ Collected in Robertson, *Unconscious Displacements*, *supra* note 105, at 159-61.

¹¹¹ Some prompts on this list are based on the work of a group of Eastern European mental health experts, designed to help psychotherapists identify countertransference in their interactions with client. Jan Prasko, Marie Ociskova, Jakub Vanek, Julius Burkauskas, Milos Slepecky, Ieva Bite, Ilona Krone, Tomas Sollar & Alicja Juskiene, *Managing Transference and Countertransference in Cognitive Behavioral Supervision: Theoretical Framework and Clinical Application*, 15 PSYCH. RSCH. & BEHAV. MGMT 2129, 2143, 2151-52 (2022).

- Is my behavior toward this student different from my typical behavior with other students? In what concrete ways?
- Is there something I want to tell this student that I find myself avoiding? What challenge might I be steering clear of here?

Unconscious bias and countertransference

- *Emotional reactivity*: What emotional and physiological responses do I have in response to this student? What do I find sympathetic or unsympathetic about them? Is my behavior different from my typical behavior with others? In what concrete ways? Am I taking over decisions and tasks, rather than helping the student develop increasing independence? Or am I demanding independence without sufficient scaffolding? Am I withholding assurance and validation from the student? Avoiding engagement?
- *Personal triggers*: What life experiences do my feelings, experiences, reactions, and thoughts in relation to this student remind me of? Why might I be making that connection? What do I assume the student is thinking? Feeling? What do I assume is driving the behavior I find challenging? Why might I be leaping to that particular assumption?
- *Boundary issues and intrusive thought patterns*: Do I often think of this student outside of seminar or supervision? What am I thinking about? How do I respond to the student? Do I find myself thinking about or expressing passive-aggressive comments in response to the student's words or actions? Am I tempted to denigrate the student to colleagues?

C. The How: Seeking Reconnection

The prompts listed above can help us unearth important insights about ourselves that, left unexamined, may interfere with our relationships with and understanding of our students. But once strain in the relationship seeps in, even when we clearly see that it is there, how do we get past it? How can we get back to a mindset where we can uphold our commitment to zealous teaching—supporting our students' learning despite opposition, obstruction, or personal inconvenience? The strategies each of us finds most useful to accomplish this goal will depend, of course, on highly individual- and context-specific factors. To catalyze individual thinking, we have set forth below an initial list of ideas designed to help trigger self-reflection and, by extension, empathic connection with our students:

Emotional reactivity

- Adopt a regular habit of noticing moments when your professional curiosity about a student diminishes; consider why this might be, including whether it might reflect an un-inventoried vulnerability of your own.

Personal triggers

- Find an “empathy buddy” to check in with when student empathic disconnection arises. Ask them to help you brainstorm reasons you might be feeling triggered, and concrete ideas for reconnecting with the student.
- Ask another clinical teacher whether they might react differently to this student/situation, and use that exercise to identify your own, personal contributions.

Boundary issues/harmful thought patterns

- Clearly name for yourself when your interactions with a student are starting to feel overly personal, and consider how you might be contributing to that dynamic.

General

- Ask yourself: What do I stand to lose if I work harder to practice empathy with this student? What does the student stand to lose if I fail to do so?
- Adopt the “power of three” approach: As you examine the sources of your own disconnection from a student, require yourself to come up with three distinct ideas. At most, allow yourself to select two that stem from the student’s behavior; *at least one* must be rooted in your own vulnerability.

The above prompts are offered to jump-start reflection. Of course, different clinical teachers will find different prompts more or less useful; the idea here is to develop a systematic approach to increase the self-awareness that is essential to achieving zealous teaching.

VI. PARALLELS IN THE CLINIC STUDENT-CLIENT CONTEXT:
THE NEED FOR STUDENTS TO TURN THEIR GAZE INWARD

This three-stage model for understanding teachers’ professional development can shed valuable light on the arc of clinical student

learning. Like their teachers, most clinic students progress through a series of developmental stages as they begin client representation and the construction of their own professional identities. Approaching clinic learning through this developmental perspective generates numerous benefits for students, as well as for their clinical teachers.

First, when students understand that their growth will unfold in stages, they can be more open to the disorientation that is typical in a clinic learning experience. Given the multiplicity of challenges inherent in live-client representation, even students who have a history of reliably outstanding academic performance may struggle with the learning curve during the first few weeks of clinic.¹¹² It can be enormously helpful for them to understand that they are engaged in a categorically different kind of learning than they have previously experienced. When they anticipate that their clinic-based growth will unfold in stages, they can be more generous to themselves in the early days of the semester. The developmental stage framework may help students expect and embrace constructive feedback, engage in more meaningful self-reflection, and avoid a tendency toward hyper-self-critique when they inevitably make lawyering missteps.

Second, a stage-based perspective on student learning can allow clinicians to be more generous to themselves as teachers. When we understand that our students have embarked on a developmental journey, we can recognize that no matter how superb our teaching, our students need time to grow into the role of lawyer. This realization can help us be more patient, more generous, and perhaps more helpful as clinical teachers.

Like us, our students tend to travel through three learning stages: lawyer-centered learning, client-centered learning, and relationship-centered learning. We explore each of these below.

A. Lawyer-Centered Learning

Most students find themselves in the first stage, “lawyer-centered learning” at the outset of clinic. Like new teachers, new clinic students are often concerned about how clients will see them. Will the client see them as “just” a student, or as a real lawyer? Will they be able to answer their client’s questions? Students may find that these totally normal novice concerns push them to focus heavily on themselves, and how they are being perceived, which can compete with their intended focus on their clients. These concerns tend to lead students in either (or both) of two directions. First, students may try to exert more control over client

¹¹² Some of the reasons for this disorientation are discussed *supra*, text accompanying note 10.

interactions than is realistically possible. They may focus supervision time on scenarios that are highly unlikely to arise in the context of their clinic work but that they see as important for their substantive and procedural competence. They may develop a word-by-word script for a client interview, including every question they plan to ask in the order they anticipate asking it, and they may try to hold onto that script even when the actual interview clearly demands deviation. Second, students may seek to abdicate responsibility, to a lesser or greater extent, by resisting the foundational clinical requirement that they assume the role of primary lawyer, and instead pressing their supervisor to resolve issues for them. Students often move past this first stage after they have some seminar-based and/or real-world opportunities to develop basic professional competencies, to understand the realities of practice, and to gain understanding of relevant law and procedure. For some students this is a slow grind, while for others this happens quite rapidly; either way, once they gather some foundational competence, most are ready to enter the second stage of learning development.

B. *Client-Centered Learning*

As clinic students begin to feel more comfortable in their professional role, they tend to move into the second developmental stage, “client-centered learning.” Here, we are not referring to the foundational clinical concept of client-centered lawyering, where client goals drive representation and clients actively participate in their representation.¹¹³ Instead, we are talking about an approach to professional learning where students work to understand the relational dynamic between attorney and client in a way that focuses heavily on giving primacy to the client’s goals, perspective, and needs. Here, students not only *understand* their role as a client’s agent (which may also be true in the first, lawyer-centered stage) but they *are able to act in accordance* with that understanding. They are increasingly comfortable relinquishing some degree of control, as they develop a more sophisticated understanding of how and why a client must drive the legal representation. They are more reflective about what it means to take on the role of lawyer, and what it means to be an agent for a real-life client. A shift of focus from themselves to the client leaves them better positioned to develop an empathic connection with those they represent, even in situations that might give rise to empathic disconnection. They are freed up to search for a wider range of possible explanations when a client behaves in ways that may feel confusing, personally hurtful or disrespectful, or where the client seems to lack “appropriate” concern about their own legal matter.

¹¹³ See, e.g., CHAVKIN, *supra* note 1 at 51-52 (2002).

Now, students can also identify factors that may be driving the client's actions and that are not related to themselves. This insight, based in real-world lawyering experience, demonstrates a student's learning development.

Despite the strengths of client-centered learning, there are limits to an exclusive orientation toward the client for student attorneys. Just as with learner-centered teaching, a highly client-centered focus can lead students to see themselves as emotionally and intellectually neutral and obscure their actual subjective humanity. This perspective may allow students to ignore the preferences, vulnerabilities, biases, and values that they necessarily bring to the attorney-client relationship and, instead, to lay blame for any tensions, challenges, or complexities at the client's doorstep.

C. Relationship-Centered Learning

As students continue to gain experience in the lawyering role, many of them—like many more experienced teachers—also gain insight into the limitations of this second, client-centered developmental learning stage. Just as clinicians need to embrace an interdependent, subjective perspective on the teacher-student dynamic, students need to do the same in the context of their lawyer-client relationships. Guided by faculty, they may achieve the powerful insight that a client-centered approach is not enough. The most zealous lawyering demands that students (in role as lawyers) be aware of and account for their own contributions to client interactions and how those contributions may inform their effectiveness. By engaging in serious self-reflection, students can avoid a one-sided, incomplete analysis of their client relationships that can obscure the true complexities of these human interactions.¹¹⁴

In other words, the most transformative clinical student learning occurs when students adopt a “relationship-centered” learning approach. To reach this stage, students must recognize that when they assume the role of lawyer they do not become neutral actors, but instead remain individuals with emotions, biases, values, and vulnerabilities, all of which can have a powerful effect on their lawyering and their connections with the clients they serve.

To help our students reach this stage and understand the human complexity of attorney-client relationships, we might ask them to consider some of the same questions we ask of ourselves when difficult moments or empathic disconnection arise in the teacher-student context:

¹¹⁴ Speaking for ourselves, we find it easier to help our students achieve this insight in their lawyering than we do to help ourselves achieve this insight in our teaching.

- How might concerns about my own professional competence or personal context be contributing to my view of the client or the lawyering situation?
- Do I find myself thinking about or expressing passive-aggressive comments about the client? Am I tempted to, or do I in fact denigrate the client to colleagues?
- What do I assume the client is thinking/feeling? What do I assume is driving the behavior I find challenging? Why might I leap to those particular assumptions?
- How might my personal values, biases, or prior experiences be affecting my analysis?

CONCLUSION

It is in their immersive clinic experiences that many law students first assume the role of practicing lawyer. This context gives clinical teachers, who have experience as lawyers in the field, profound pedagogic power. Clinicians have myriad opportunities to engage students in truly transformative learning, by adopting a client-centered perspective; slowing down their thinking and centering option-generation and careful strategic analysis; and internalizing a professional norm of self-awareness and self-reflection.

But to ensure that our students can experience the rich, transformative learning opportunities of clinic, each of us, as teachers, must make a serious commitment to do the same. We must not only find ways to recognize our students as individuals, with their own strengths and limitations; we must do the same with ourselves. We must see teaching for what it is: a human interaction where neither teacher nor student is intellectually or emotionally neutral or omnipotent, but where both are affected by their own, idiosyncratic experiences and histories. Zealous clinical teachers will strive to adopt a relationship-centered pedagogy, focusing on both student and teacher contributions to the learning dynamic—both in terms of successes *and* in terms of challenges. The words of bell hooks resonate here: “Professors who embrace the challenge of self-actualization will be better able to create pedagogical practices that engage students, providing them with ways of knowing that enhance their capacity to live fully and deeply.”¹¹⁵

We have offered a framework for accomplishing this goal—shifting from the traditional, primary focus on the learner to a more holistic, consistent focus on *both* participants in the educational relationship. As clinicians reach this third developmental stage of “relationship-centered” pedagogy, we can become zealous teachers who maximize our

¹¹⁵ hooks, *supra* note 15, at 22.

professional effectiveness, and who provide the educational experience each of our students deserves.

Finally, the three-stage, developmental perspective that applies to us as teachers also applies to our students, as emerging lawyers. By making these predictable stages transparent for our students, we can help them better understand and accept the challenges—large or small—they will inevitably face as they move from more traditional, predictable law school classrooms to the often-disorientating clinical context. When our students can be more generous with themselves as they prepare for practice, they can take full advantage of the transformative learning opportunities we hope to provide.

FIGHTING EXCLUSIONARY DISCIPLINE IN DISGUISE: SYSTEMIC ADVOCACY STRATEGIES FOR ELIMINATING POLICIES & PRACTICES THAT CIRCUMVENT IDEA DISCIPLINARY PROTECTIONS

ASHLEY DALTON, HECTOR LINARES, AND SARA GODCHAUX*

Students with disabilities, especially those of color, are subject to higher rates of suspension, expulsion, and alternative placement than their non-disabled peers, despite heightened disciplinary protections found in federal law. These laws are explicitly aimed at stemming discriminatory exclusion of special education students for conduct related to their disabilities, but enforcing these heightened disciplinary protections can be a daunting task. In addition to the difficulties of challenging formal removals that do not comply with these protections, another significant challenge is that school districts are regularly skirting special education disciplinary protections altogether by failing to document removals as disciplinary in nature or by disguising them as non-disciplinary educational placements, in a set of common practices the authors refer to as “exclusionary discipline in disguise.” When such practices become widespread throughout a school district, parents, advocates, and attorneys, including a growing number of law school clinicians, representing students with disabilities are often left searching for effective systemic reform strategies rather than relying on individual advocacy to react to each instance of undocumented exclusion as it occurs. Clinicians and nonprofit attorneys committed to defending the rights of students with disabilities who are low-income, system-involved, or from other marginalized communities may feel this pressure particularly acutely, given the limited capacity to provide direct representation to underserved communities with many individuals in need.

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This Article uses case studies highlighting the systemic reform strategies that the Loyola Law Clinic in partnership with the Southern Poverty Law Center, as well as other organizations inside and outside of Louisiana, have used to combat pervasive exclusionary discipline in disguise through state-level administrative complaints, due process proceedings, and civil rights impact litigation based on disability rights laws and state and federal constitutional protections. An analysis of multiple successful cases and their resulting settlement agreements provides law school clinicians and other attorneys engaged in the same work a blueprint for combating policies and practices that lead to illegal exclusionary discipline in disguise, with particular emphasis on what strategies may be most pedagogically sound for clinicians.

INTRODUCTION

Most school administrators and teachers are aware that before a student with a disability can be expelled or issued a long-term suspension, the student must be afforded an extensive process beyond what is required for students without disabilities. Specifically, the Individuals with Disabilities Education Act (IDEA) entitles students with disabilities under its purview to several heightened disciplinary protections aimed at stemming the discriminatory exclusion of special education students for conduct related to their disabilities. Such protections include, most notably, a Manifestation Determination Review (MDR) meeting intended to prevent a child with a disability from being excluded for more than ten days for behaviors related to their disability. The results of an MDR can be appealed through an administrative due process hearing, and, ultimately, to state or federal court.¹ Despite these protections, students with disabilities are subject to suspension, expulsion, and placement in alternative education settings at a significantly higher rate than their peers.² Students of color with disabilities face even higher rates of school exclusion, and for longer periods of time.³

To evade these complex procedural requirements, and sometimes even out of a purportedly benign desire to “spare” a disciplinary mark on a student’s permanent record, teachers and administrators often resort to informal and other undocumented methods of exclusionary

¹ See *infra* Section I.

² Blakely Evanthia Simoneau, *Overrepresented, Underprotected: Discipline and the Constitutional Rights of Students with Disabilities*, 54 SUFFOLK U. L. REV. 439, 445 (2021).

³ U.S. COMM’N ON C.R., *BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES* 11 (2019).

discipline, which this Article collectively describes as “exclusionary discipline in disguise” or “discipline in disguise.” These strategies often include relying on parents to remove their children from school during the day or manipulating them into giving “consent” for an alternative placement, waiving their child’s due process protections. This is frequently done as a condition to avoid harsher disciplinary consequences for their children. Other strategies involve using the Individualized Education Program (IEP) process to “place” a child on homebound or virtual instruction; in an involuntary alternative placement; or on a shortened-day schedule as the result of behavioral incidents, while characterizing the change as a non-disciplinary educational placement needed to provide a Free and Appropriate Public Education (FAPE).⁴ When such strategies are employed widely in a district, it can lead to a disproportionate number of students with emotional and behavioral disabilities languishing in alternative placements or other restrictive settings.

While individual advocacy in such cases can provide relief to a particular student, systemic advocacy seeking district-wide relief is often the most effective method of addressing widespread policies and practices leading to exclusionary discipline in disguise. To address those barriers to effective advocacy, this Article explores advocacy and litigation strategies that the Loyola Law Clinic, the Southern Poverty Law Center (SPLC), and other disability rights organizations have used to successfully combat exclusionary discipline practices of students with disabilities on a district-wide level that are undocumented or disguised as non-disciplinary placements. The types of litigation strategies analyzed in this Article include a wide variety of state complaints, due process hearings, and federal civil rights lawsuits that have challenged illegal exclusionary discipline practices on a systemic level and sought relief on behalf of all affected students with disabilities within a school district. Through these varied techniques and strategies, special education advocates along with law school clinicians have taken critical steps to prevent discriminatory exclusion of students with disabilities by reaching settlement agreements requiring independent monitoring, improved data tracking, amendment of written policies, training

⁴ The IEP is a written statement developed by a team of educators, service providers, and the student’s parents that details the student’s instructional needs and the accommodations, services, supports, and placement the school system must provide to meet those needs. *See* 20 U.S.C. § 1414(d)(1)(A). FAPE, in turn, encompasses the specialized instruction and related services designed to meet the unique needs of a child with a disability, provided in conformity with the student’s IEP. *See id.* § 1401(9), (28)-(29). For further explanation of FAPE, *see infra* note 8.

programs, and the education of stakeholders about the limits of school districts' disciplinary authority.

This Article draws upon case studies to understand the factors and circumstances that make selection of a particular strategy more advantageous than others, with a particular eye toward strategies that are resource-efficient and pedagogically sound in a clinical setting, and suggests future directions for litigation, advocacy, and reform. First, the Article reviews disciplinary protections for students with disabilities under federal law. In Section II, this Article provides an overview of the problem of exclusionary discipline in disguise, which includes both the use of informal suspensions and expulsions of students with disabilities, as well as the use of the IEP process to place special education students in alternative settings for disciplinary reasons. Section III analyzes the strategic considerations used by advocates and law school clinicians in selecting systemic advocacy strategies to challenge the range of exclusionary practices encompassed in exclusionary discipline in disguise. In Section IV, the authors use case studies from their work and the work of other advocates to explore how litigation at the federal, state, and administrative level can be used to combat these harmful and pervasive practices. Finally, the Article concludes by exploring promising directions for future legal advocacy by law school clinicians and other practitioners to prevent the punishment and isolation of students with disabilities in public schools.

I. AN OVERVIEW OF IDEA DISCIPLINARY PROTECTIONS FOR STUDENTS WITH DISABILITIES

In 1975, Congress passed a federal statute to prohibit the exclusion and segregation of students with disabilities in public schools. The foundation of the modern IDEA,⁵ the Education for All Handicapped Children Act (EAHCA),⁶ emerged from concerns that students with disabilities were receiving little to no education and were being segregated in special classes, “or otherwise neglected . . . until they eventually dropped out.”⁷ To address these issues, the statute required—and continues to require today—that students receive a FAPE in the

⁵ Matthew Schmitz, *20 Years Later: Qualified Immunity as a Model for Improving Manifestation Determination Reviews Under the Individuals with Disabilities Education Act*, 42 MINN. J.L. & INEQ. 155, 161 (2024).

⁶ Education for All Handicapped Children Act (EAHCA), Pub. L. No. 94-142, 89 Stat. 773 (1975). Before the EAHCA, the 1970 Education of the Handicapped Act (EHA) provided grants for states to provide special education services. Pub. L. No. 91-230, 84 Stat. 121, 175-88 (1970).

⁷ Claire Raj, *Disability, Discipline, and Illusory Student Rights*, 65 UCLA L. REV. 860, 867-69 (2018) (citing H.R. Rep. No. 94-332 at 2 (1975)); see EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975); S. Rep. No. 94-168, at 8 (1975), as reprinted in 1975 U.S.C.C.A.N. 1425, 1432.

least restrictive environment.⁸ The IDEA further granted procedural options to parents to contest a change in their child's educational placement.⁹

After the EAHCA was passed in 1975, it sparked debate and litigation regarding school districts' authority to discipline students with disabilities who were deemed "disruptive" to the educational process.¹⁰ Two decades later, Congress amended the statute to require the modern procedural safeguards in the IDEA for students facing exclusionary school discipline in an attempt to balance the need to avoid exclusion of students with disabilities from the educational environment with the need for educators to discipline students.¹¹ These 1997 amendments were then reinforced in the most recent reauthorization of IDEA in 2004.¹²

The current procedural protections in the IDEA prevent not only traditional suspensions or expulsions, but also "removal" of children with disabilities for disciplinary reasons more generally. As defined by federal regulations current as of the time of publication, a "removal" for the purpose of IDEA disciplinary protections is any exclusionary discipline in which a student with a disability is removed from the student's current educational placement for a violation of a code of student conduct.¹³ According to the U.S. Department of Education Office of Special Education and Rehabilitative Services, this broad definition can encompass many forms of exclusionary discipline, including when a parent is asked to pick up a child early from school, "in-school suspensions, suspensions from riding the school bus, and [even]

⁸ Compare 20 U.S.C. § 1400(d) ("ensur[ing] that all children with disabilities have available to them a free appropriate public education"), with EAHCA, Pub. L. No. 94-142, 89 Stat. 773, 780 (1975) (requiring states to provide "a free appropriate public education" to receive assistance under the EAHCA). The Supreme Court first interpreted the meaning of a "free appropriate public education" (FAPE) in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The *Rowley* decision produced a two-part test: first, whether the "State complied with the procedures set forth" in the statute, and second, whether the IEP, under a substantive review, is "reasonably calculated to enable the child to receive educational benefits." *Id.* at 206-07. Approximately thirty years later in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the Supreme Court revisited the substantive prong, holding that "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999. In other words, the FAPE provisions of the IDEA require school districts to enable a child to make progress towards the academic, functional, and other goals in their IEP.

⁹ See *Doe v. Koger*, 480 F. Supp. 225, 228 (N.D. Ind. 1979) (early interpretation of the MDR requirements in the EHA).

¹⁰ Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities under the 1997 IDEA Amendments*, 42 ARIZ. L. REV. 77, 78 (2000).

¹¹ Schmitz, *supra* note 5, at 161-62; Seligmann, *supra* note 10, at 78.

¹² Schmitz, *supra* note 5, at 165.

¹³ See 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b)(1).

referrals to law enforcement.”¹⁴ Any of these actions are considered removals if the student is not “afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child’s IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.”¹⁵

A student with a disability who is facing a disciplinary change of placement of ten days or longer is entitled to an MDR to determine if the behavior in question is a manifestation of the student’s disability.¹⁶ The requirement to hold an MDR applies to more than just students who have been identified as eligible for special education services and already have IEPs.¹⁷ The IDEA also requires MDRs to be held when the school district has “knowledge” of a student’s disability.¹⁸ In this context, a school district is deemed to have “knowledge” of a disability if: (1) “the parent . . . expressed concern in writing” that their child may need “special education and related services;” (2) the parent of the child requested an evaluation of the child; or (3) a teacher or other school official expressed a concern that a child may have a disability to the director of special education or other supervisory personnel in the school district.¹⁹ Generally, this means that, if the school district started, or should have started,²⁰ the special education evaluation process before the events giving rise to the disciplinary action, then the child has a right to an MDR before exclusion.

¹⁴ OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS: ADDRESSING THE NEEDS OF CHILDREN WITH DISABILITIES AND IDEA’S DISCIPLINE PROVISIONS 52 (2022), <https://sites.ed.gov/idea/files/qa-addressing-the-needs-of-children-with-disabilities-and-idea-discipline-provisions.pdf> [hereinafter QUESTIONS AND ANSWERS].

¹⁵ 71 Fed. Reg. 46540, 46715 (Aug. 14, 2006) (to be codified at 34 C.F.R. § 300.530(b)).

¹⁶ 20 U.S.C. § 1415(k)(1)(E); 34 C.F.R. § 300.530(e).

¹⁷ To obtain an IEP, a child must prove they have a disability within specifically delineated categories and that, because of that disability, they require special education services. 20 U.S.C. § 1401(3)(A). Eligible categories of disability include: “intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as ‘emotional disturbance’), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities.” 34 C.F.R. § 300.8(a)(1); *see also* 20 U.S.C. § 1401(3)(A)(i) (describing disability categories under the IDEA).

¹⁸ 20 U.S.C. § 1415(k)(5); *see* 34 C.F.R. § 300.530(d).

¹⁹ 20 U.S.C. § 1415(k)(5)(B). Exceptions to this rule exist where the parent refuses an evaluation or IEP services, and where the child has been evaluated but previously determined ineligible. *Id.* § 1415(k)(5)(C).

²⁰ The “child find” obligation of the IDEA requires school districts to “identif[y], locate[], and evaluate[]” all children with disabilities “who are in need of special education and related services.” *Id.* § 1412(a)(3)(A).

The right to an MDR also applies to students with disabilities outside of the special education system who instead receive accommodations under Section 504 of the Rehabilitation Act of 1973 through what are commonly referred to as “504 Plans.”²¹ For 504 students, federal regulations require an “evaluation” before a significant change in placement.²² The U.S. Department of Education interprets this regulation as mandating MDRs prior to the exclusion of students with 504 Plans, even if different regulatory requirements apply.²³ Several courts have supported this interpretation of Section 504, even without reliance upon the federal regulations.²⁴

When the IDEA’s heightened disciplinary protections apply to a student, a school district must hold an MDR for any removal longer than ten consecutive school days.²⁵ The implementing regulations of the IDEA further provide that a disciplinary change in placement occurs when a series of short-term disciplinary removals cumulatively add up to more than ten school days in a school year and the removals constitute a pattern, which also entitles children with disabilities to an MDR and related disciplinary protections in the IDEA.²⁶ Federal regulations provide several factors to consider when determining whether a series of removals constitutes a pattern: (1) the similarity of the student’s behavior in each incident; (2) the length of each removal; (3) the total amount of time the child is removed; and (4) the proximity of the removals to one another.²⁷ Thus, a single long-term removal or a series of short-term removals that form a pattern totaling more than ten

²¹ In contrast to the IDEA, *see supra* note 17, Section 504 and the ADA encompass a broader definition of “disability,” defined as an “impairment which substantially limits one or more . . . major life activities.” 29 U.S.C. § 705(20)(B); 42 U.S.C. § 12102.

²² 34 C.F.R. § 104.35(a).

²³ *See* OFF. FOR C.R., U.S. DEP’T OF EDUC., SUPPORTING STUDENTS WITH DISABILITIES AND AVOIDING THE DISCRIMINATORY USE OF STUDENT DISCIPLINE UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, 14 (2022), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/504-discipline-guidance.pdf>; QUESTIONS AND ANSWERS, *supra* note 14. Even without such guidance, students with 504 Plans often qualify for MDRs under 20 U.S.C. § 1415(k)(5)(B). If a child with a 504 Plan is suspended for longer than ten days, especially where previous behavioral concerns have been addressed, there may be an argument that the school district had “knowledge” of the disability as required under 20 U.S.C. § 1415(k)(5)(B).

²⁴ *See, e.g.,* Ron J *ex rel.* R.J. v. McKinney Indep. Sch. Dist., Case No. 4:05-CV-257, 2006 WL 2927446 (E.D. Tex. Dec. 29, 2005) (MDR procedures required); Centennial Sch. Dist. v. Phil L. *ex rel.* Matthew L., 799 F. Supp. 2d 473, 479 (E.D. Pa. 2011) (Section 504 requires process “similar” to MDRs.). Notably, neither of these opinions cites *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to support an agency interpretation of federal law, and therefore arguably such decisions are unaffected by the Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024).

²⁵ 34 C.F.R. § 300.536(a).

²⁶ *Id.* § 300.536(a)(2).

²⁷ *Id.*

school days result in a disciplinary change of placement that triggers the IDEA's heightened disciplinary protections.

Once a school district identifies the need for an MDR before disciplinary exclusion, the school district must conduct the MDR within ten days of the decision to change the student's placement.²⁸ The purpose of an MDR is to determine whether the student's behavior was directly and substantially related to the student's disability or whether it was a result of the school's failure to implement the student's IEP.²⁹ Prior to making a determination, the MDR participants must consider "all relevant information in the student's file, including the [student]'s IEP, . . . teacher observations, and any relevant information provided by the parent[.]"³⁰ If the MDR's conclusion is that the behavior was related to the disability or caused by the "failure to implement the IEP," and is therefore a "manifestation," then in most cases the student must be immediately returned to the student's original placement.³¹

There are several notable exceptions to the general rule that a student must be immediately returned to their previous placement upon a finding that the conduct was a manifestation. First, regardless of whether the behavior is a manifestation, school districts can place a child in an interim alternative educational setting like an alternative school or program for up to forty-five school days when the conduct involves possession of a weapon; knowing possession or use of illegal drugs or sale or soliciting the sale of controlled dangerous substances; or the infliction of serious bodily injury as defined under federal law.³² Students placed in an interim alternative educational setting under these exceptions must continue to receive FAPE.³³ Also, a student does not have to be returned to their previous placement, even if the behavior was determined to be a manifestation, if the parents and the school district agree to a change of placement.³⁴ Finally, a school district may request a due process hearing to seek an order for a change in placement from a hearing officer if it believes that maintaining the current placement of a child whose behavior is a manifestation of their disability is substantially likely to result in injury to the child or to others.³⁵ If the hearing officer agrees that there is a substantial likelihood of injury to the child or others, the hearing officer may order the child

²⁸ 20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).

²⁹ *Id.*

³⁰ *Id.*

³¹ 20 U.S.C. § 1415(k)(1)(F); 34 C.F.R. § 300.530(e)-(f).

³² 20 U.S.C. § 1415(k)(1)(G); 34 C.F.R. § 300.530(g).

³³ 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d)(i).

³⁴ 20 U.S.C. § 1415(k)(1)(F)(iii); 34 C.F.R. § 300.530(f)(2).

³⁵ 20 U.S.C. § 1415(k)(3)(A); 34 C.F.R. § 300.532(a). It is important to note that this provision does not give the school district unilateral authority to use alleged safety concerns to keep the child out of school while the hearing is pending if the behavior was determined to

placed in an interim alternative educational setting for up to forty-five school days.³⁶

Notwithstanding any of these exceptions, if the behavior is determined to be a manifestation, then the school district must conduct a Functional Behavioral Assessment (FBA) or review the student's FBA if one already exists.³⁷ An FBA is a scientific, data-driven process used by schools "to understand the function and purpose of a child's specific, interfering behavior and factors that contribute to the behavior's occurrence and non-occurrence for the purpose of developing effective positive behavioral interventions, supports, and other strategies to mitigate or eliminate the interfering behavior."³⁸ At the same time, the school district must conduct or review a Behavior Intervention Plan (BIP) if the behavior is determined to be a manifestation.³⁹ A BIP is a part of a student's IEP and is "designed to address behaviors that interfere with the child's learning or that of others and behaviors that are inconsistent with school expectations."⁴⁰ The BIP focuses on strategies for eliminating target behaviors and teaching the student appropriate replacement behaviors. A student's BIP "generally describes the behavior that inhibits the child from accessing learning and the positive behavioral interventions and other strategies that are to be implemented to reinforce positive behaviors and prevent behavior that interferes with the child's learning and that of others."⁴¹ As the name implies, the primary purpose of a BIP is to identify interventions, not punishments, to help the student. Finally, if the behavior was a manifestation by virtue of being a direct result of the school's failure to implement the IEP, then the school must take steps to ensure that the identified deficiencies are remedied immediately.⁴²

Parents who disagree with an MDR determination have appeal rights.⁴³ After an initial MDR determination by the school, parents can appeal by filing an expedited special education due process hearing request. The special education due process hearing requires formal adjudication before an independent hearing officer, typically appointed by the state educational authority.⁴⁴ If the parents are dissatisfied with

be a manifestation and the special circumstances involving weapons, drugs, or serious bodily injury are not present.

³⁶ 20 U.S.C. § 1415(k)(3); 34 C.F.R. § 300.532(b)(2)(ii).

³⁷ 20 U.S.C. § 1415(k)(1)(F)(i); 34 C.F.R. § 300.530(f)(1)(i).

³⁸ QUESTIONS AND ANSWERS, *supra* note 14, at 52.

³⁹ 20 U.S.C. § 1415(k)(1)(F)(ii); 34 C.F.R. § 300.530(f)(1)(ii).

⁴⁰ QUESTIONS AND ANSWERS, *supra* note 14, at 51.

⁴¹ *Id.*

⁴² 34 C.F.R. § 300.530(e)(3).

⁴³ 20 U.S.C. § 1415(k)(3).

⁴⁴ *Id.* § 1415(f); 34 C.F.R. § 300.511(b). For cases involving MDRs, the case should be granted expedited status, which means that the hearing must occur within twenty school days

the hearing officer's decision, they may then appeal to state or federal court.⁴⁵

MDR procedures are meant to prevent school districts from imposing a disciplinary change of placement for behavior that is a manifestation of the student's disability. In fact, failure to adhere to the necessary procedures is the most common basis for overturning the disciplinary exclusion of a student with disability.⁴⁶ However, a lawyer is often necessary to vindicate the rights of students facing disciplinary changes in placement, as identifying and remedying procedural failures in the MDR process is challenging. This poses access to justice issues for parents unable to afford or retain counsel. Further, empirical data shows that parents attempting to appeal the substance of an MDR determination—for example, a parent who files a due process hearing to contest the school's determination that a child's outburst at school was unrelated to a mental health disorder—face a number of significant barriers. Scholars have routinely critiqued MDR determinations as inherently subjective, as they lack measurable or objective metrics to determine the relationship between behavior and disability.⁴⁷ In most cases, parents who appeal the decision of an MDR team have only data and information collected by the school district to show the relationship between the child's disability and the behavior.⁴⁸ The school district may fail to collect information to show this connection or may manipulate the data collected; as a result, independent expert testimony in MDRs is critical for parents—but also can be expensive.⁴⁹ Even with experts, parents face impediments to overturning the substance of an MDR determination, where the standard for review on substance is highly deferential.⁵⁰

In sum, the IDEA contains substantial procedural mechanisms to address and prevent the exclusion of students with disabilities from school. However, beyond individual legal representation for parents who can afford to retain counsel,⁵¹ the limited efficacy of these procedures in the IDEA informs the need for advocates to go beyond individual

of the filing of the due process complaint, and the decision must be issued within ten school days after the hearing. 20 U.S.C. § 1415(j)(4)(B).

⁴⁵ *Id.* § 1415(g)-(i).

⁴⁶ Raj, *supra* note 7, at 860, 884-85.

⁴⁷ Justin P. Allen & Matthew T. Roberts, *Practices and Perceptions in Manifestation Determination Reviews*, 53 SCH. PSYCH. REV. 31, 36-38 (2021); Raj, *supra* note 7, at 890; *see also* Schmitz, *supra* note 5, at 164 (citing the same).

⁴⁸ Raj, *supra* note 7, at 890; *see also* Schmitz, *supra* note 5, at 164 (citing the same).

⁴⁹ Raj, *supra* note 7, at 890-98.

⁵⁰ Maria M. Lewis, *Navigating the Gray Area: A School District's Documentation of the Relationship Between Disability and Misconduct*, 120 TCHRS. COLL. REC. 1, 6, 24 (2018); *see also* Schmitz, *supra* note 5, at 164 (citing the same).

⁵¹ For further examples of how to combat exclusion through the MDR procedures, *see, e.g.*, Michele Scavongelli & Marlies Spanjaard, *Succeeding in Manifestation Determination*

due process hearings to contest, more broadly, the exclusion of students with disabilities. In the next sections, we will explore the possibility of seeking such systemic relief through litigation.

II. THE SCOPE AND HARM OF EXCLUSIONARY DISCIPLINE IN DISGUISE

Disproportionate exclusionary discipline is one of many barriers that students with disabilities—and especially students of color with disabilities—face in accessing a public education. In its most recent data release, the Civil Rights Data Collection (CRDC) reported that students with disabilities were significantly more likely to be suspended, expelled, or referred to law enforcement than their non-disabled peers. While only approximately 17% of public school students have identified disabilities, students with disabilities represented almost a third—29%—of K-12 students who received out-of-school suspensions in the 2020-2021 school year.⁵² Students with disabilities also accounted for 21% of expulsions.⁵³

Students of color likewise account for disproportionate numbers of suspended and expelled students,⁵⁴ with Black students in particular routinely disciplined for normal childhood behavior and pushed out of school.⁵⁵ Approximately one in five Black children with a disability, for example, was suspended from school in the 2013-2014 school year, according to the U.S. Department of Education.⁵⁶ And once excluded, children of color with disabilities missed more instructional time. According to the U.S. Commission on Civil Rights, Black students with disabilities who are suspended or expelled lose approximately seventy-seven more days of instruction compared to White students with disabilities.⁵⁷

Research further shows that students with disabilities face other disturbing forms of exclusionary and unsafe situations at school, including bullying, harassment, seclusion, and restraint. Of the 42,500

Reviews: A Step-by-Step Approach for Obtaining the Best Result for Your Client, 10 U. MASS. L. REV. 278 (2015).

⁵² *Civil Rights Data Collection (CRDC) for the 2020-2021 School Year*, U.S. DEP'T OF EDUC., OFFICE FOR C.R., <https://www.ed.gov/laws-and-policy/civil-rights-laws/crdc/crdc-2021-school-year> (last visited Aug. 6, 2025) [hereinafter CRDC 2020-2021 School Year].

⁵³ *Id.*

⁵⁴ See generally U.S. COMM'N ON C.R., *supra* note 3, at 10 (“Students of color as a whole, as well as by individual racial group, do not commit more disciplinable offenses than their White peers – but black students, Latino students, and Native American students in the aggregate receive substantially more school discipline than their White peers and receive harsher and longer punishments than their White peers receive for like offenses.”).

⁵⁵ *Id.* at 35-36.

⁵⁶ *Id.* at 7-8.

⁵⁷ *Id.* at 11.

allegations of harassment or bullying reported by students in the 2020-2021 school year, the CRDC reported that 9% were based on disability.⁵⁸ Meanwhile, students with disabilities account for 81% of students physically restrained beyond a temporary touching or holding of a child's wrist, arm, shoulder, or back for the purpose of escorting a child to a safer location; 32% of students handcuffed, or otherwise mechanically restrained; and 75% of kids who are secluded in an unmonitored—and potentially even locked—room.⁵⁹

Over time, these disparities have persisted, even as overall rates of suspensions and expulsions have decreased. In the 2017-2018 school year, suspension rates fell to 5%—a significant decrease from prior years, even if still higher than rates of suspension in the 1970s and early 1980s.⁶⁰ Nevertheless, advocates, including the authors of this Article, remain concerned about exclusionary and discriminatory discipline, especially with the potential increased behavioral needs of students returning to in-person instruction in the 2020-2021 school year after the COVID-19 pandemic. Preliminary data following students' return to school has shown exclusionary discipline approaching or exceeding pre-pandemic levels in some places.⁶¹ Furthermore, while school districts should be applauded for responding to criticism of “zero tolerance” policies by developing programs in restorative justice, Positive Behavior Interventions and Supports (PBIS), conflict resolution, and other non-punitive disciplinary approaches, some school districts emphasize these policies to the exclusion of accurately reporting the number of students they actually remove from the educational environment.⁶² In other words, incoming suspension and expulsion data fails to account for the prevalence of informal removals and punitive alternative placements often made through the IEP process that are often framed as alternatives to traditional exclusionary discipline.

This trend is highly concerning, as the undocumented nature of the exclusionary discipline leaves advocates and policymakers without a reliable data set upon which to base advocacy. Nonetheless, advocates and clinicians repeatedly facing exclusionary discipline in disguise have started to sound the alarm and collect data and information about this phenomenon.⁶³ This section details an emerging picture of these

⁵⁸ CRDC 2020-2021 School Year, *supra* note 52.

⁵⁹ *Id.*

⁶⁰ Peggy Nicholson, *Too Young to Suspend: Ending Early Grade School Exclusion by Applying Lessons from the Fight to Increase the Minimum Age of Juvenile Court Jurisdiction*, 11 BELMONT L. REV. 334, 349-50 (2024).

⁶¹ *Id.* at 350.

⁶² See *infra* Section II(A) (discussing prevalence of informal and other undocumented disciplinary removals).

⁶³ See NAT'L DISABILITY RTS. NETWORK, OUT FROM THE SHADOWS: INFORMAL REMOVAL OF CHILDREN WITH DISABILITIES FROM PUBLIC SCHOOLS 12 (2022), <https://www.ndrn.org/>

removals gleaned from advocates, including categories of removals and their harms.

A. *Types of Exclusionary Discipline in Disguise*

Discipline in disguise comes in many shapes and sizes. As described below, strategies can include informal removals, as well as the stealth use of the IEP process to place special education students in alternative settings that are actually disciplinary in nature. This section will review each of these forms of undocumented disciplinary action.

Informal removals are perhaps the most well-known variety of discipline in disguise. As defined by the U.S. Department of Education, an informal removal is an “action taken by school personnel in response to a child’s behavior that excludes the child for part or all of the school day, or even an indefinite period of time” without invoking federal and state law disciplinary procedures.⁶⁴ Informal removals can include extended “cool downs” or “time-outs,” certain types of in-school suspensions, and short formal removals that turn into longer removals marked as absences because the return of the student is conditioned on the holding of a parent conference or obtaining a mental health evaluation. A common form of informal removal is when a school calls a parent to pick up their child during the school day to avoid having to suspend the child or so that the child can “cool down.” In other instances, a school district may issue a one-day suspension but not allow the student to return until the parent attends a conference with the principal or school disciplinarian. If the parent has transportation issues or an inflexible work schedule that prevents them from attending the conference immediately, what is documented as only a one-day suspension may result in a removal that lasts for several days. Another type of informal removal is the use of “time out” rooms for extended periods of the day, or in-school suspensions in which students are isolated from their peers and denied the opportunity to access services and instruction. If a school district relies heavily on the use of informal removals, then many students could experience a pattern of removals that exceed ten cumulative days of removal in a school year without ever receiving the benefit of having an MDR.

In addition to these informal removals, another form of undocumented disciplinary exclusion involves disguising removals to alternative schools or programs as IEP placements when, in reality, the placement is a disciplinary consequence for alleged behavior that

wp-content/uploads/2022/01/Out-from-The-Shadows-1.pdf [hereinafter NAT’L DISABILITY RTS. NETWORK].

⁶⁴ QUESTIONS AND ANSWERS, *supra* note 14, at 52.

violates a code of student conduct. These alternative settings might take the form of a remote learning program, a homebound placement, a shortened-day schedule, a traditional alternative school, a public day program, or some other type of special school or program for students with behavioral needs.⁶⁵ In most states, school districts can use the power of the district representative on the IEP team to change a special education student's placement to a more restrictive setting even if the parent does not agree with the rest of the IEP team.⁶⁶ In such jurisdictions, school district members of the IEP can remove a student for behavior without a formal suspension or expulsion by describing the alternative setting as an appropriate IEP placement constituting the student's least restrictive environment. While such placements may discuss the student's need for behavioral support, they typically avoid any reference to the change as a disciplinary consequence in the IEP. Although a parent can file a request for due process to invoke the student's "stay-put" rights to prevent the involuntary placement, many parents are unaware of this right; do not have the wherewithal to file and litigate a due process proceeding on their own; or are unable to procure assistance from advocates or legal representatives to do so.⁶⁷

In other states, parents must consent for an IEP change in placement to take effect if it is purportedly non-disciplinary in nature.⁶⁸ In these jurisdictions, school districts must request and win a due process hearing to implement a non-disciplinary change of placement if the parent does not agree to it. While a school district initiating due process proceedings for these purposes is rare in most places, there are many subtle (and not-so-subtle) ways that school districts can coerce or manipulate parents into indicating agreement to a change in placement and waiving due process protections, despite a lack of meaningful

⁶⁵ Although not reviewed as case studies in this essay, advocates have also brought class action litigation targeting public day programs for special education students in recent years. *See, e.g., S.S. ex rel. S.Y. v. City of Springfield*, 332 F. Supp. 3d 367 (D. Mass. 2018); *E.F. v. City of New York*, No. 2021-cv-00419, 2022 WL 4644633 (E.D.N.Y. Sept. 30, 2022). These cases raise disability claims exclusively, without the due process claims discussed herein.

⁶⁶ *See* Letter from Off. of Special Educ. Programs & Rehab. Servs. to Dorothy M. Richards 1 (Jan. 7, 2010), in 55 IDELR 107 (2010) ("If the [IEP] team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint.").

⁶⁷ *See* 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518.

⁶⁸ For example, California requires informed consent from the parent for IEPs and prohibits school districts from unilaterally implementing components of an IEP for which a parent has not provided informed consent. *See* CAL. EDUC. CODE § 56346. Other states, such as Massachusetts, require a parent signature on the IEP prior to implementation, with an option on the signature block giving parents the opportunity to accept or reject, in whole or in part, proposed changes. *See* 603 MASS. CODE REGS. § 28.00 (2025).

consent. Some districts may describe the proposed alternative setting as a therapeutic placement to the parent even though the student would have less access to specialized instruction and services than in their current placement.⁶⁹ Additionally, a school district might directly or indirectly threaten harsher consequences by describing voluntary placement in an alternative setting as the only way to avoid a longer involuntary alternative placement or other disciplinary action.⁷⁰ Similarly, some districts describe agreeing to a change in placement as the only way to avoid marring the student's record with a formal expulsion that could jeopardize a student's future employment or higher education prospects.⁷¹ In some instances, school districts might even imply or state explicitly that agreement to a change in placement is the only way to prevent referral to law enforcement.⁷² Used separately or in combination with one another, these kinds of tactics can vitiate consent when parents are made to feel that they have no choice but to indicate their agreement to the change in placement.⁷³

Unfortunately, where informal and IEP-based disciplinary removal practices are undocumented as disciplinary action, research on the number of children excluded from school through these covert mechanisms is sparse. Partners at national Protection and Advocacy (P&A) agencies, which provide legal representation and investigate abuse and neglect of persons with disabilities, report that hundreds if not thousands of students with disabilities are illegally informally removed from school each year.⁷⁴ The P&A agencies further describe that, among the discipline cases they receive, these informal forms of school removal are among the most common school discipline issues they encounter—perhaps even more common than routine suspensions and expulsions.⁷⁵ These informal removals evade data reporting requirements to state education departments and the CRDC, and, as a result, more accurate estimates of the broad impact of informal and other undocumented removals present significant challenges.

⁶⁹ See, e.g., Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024). For further information about this litigation see *infra* Section IV(B).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ NAT'L DISABILITY RTS. NETWORK, *supra* note 63, at 12 ("Among other concerns, parents and LEAs are frequently not in a place of equal bargaining power, with both parties equally aware of the child's rights and the legal options available.").

⁷⁴ *Id.* at 7.

⁷⁵ *Id.* at 17.

B. Harms from Exclusionary Discipline in Disguise

The harm that results from these exclusionary removals is well-documented, even if the suspension or expulsion is not. Students suspended or expelled are more at risk of school avoidance, academic failure, grade repetition, behavior problems, substance use, dropout, and court involvement.⁷⁶ Further, the research suggests that even one suspension can trigger these negative outcomes. For example, the Council of State Governments Justice Center has found a single suspension makes a student three times more likely to enter the juvenile justice system the following school year.⁷⁷ The harms, moreover, are not confined to the students excluded. Indeed, there is little justification for exclusionary discipline practices where research shows suspensions produce little to no benefits for educational achievement at the school level.⁷⁸ A significant body of research also shows that exclusionary disciplinary practices are potentially counterproductive, with a harmful impact on school culture. In fact, some studies suggest that, paradoxically, schools that discipline students more frequently are also more dangerous.⁷⁹

For students with undocumented suspensions or expulsions, the “informality” of the exclusion can cause further harm. As previously noted, informal removals are by definition not recorded or reported as such to the school district, state, and federal government. Without this data, policymakers lack key information to develop evidence-based approaches to improve student behavior and climate. At the individual level, the informal exclusion can still come at severe cost not only to the children who are missing out on key instructional time, but also to their parents and caregivers, even if framed by the school as a less punitive alternative to a suspension or expulsion. Take, for example, the informal removals effectuated by schools calling a parent to pick up their child due to disruptive behaviors. These calls typically occur in the middle of the day—at times, according to advocates, under threat of a child being arrested, or of a report of child abuse and neglect being made to

⁷⁶ U.S. COMM’N ON C.R., *supra* note 3; see also Russell J. Skiba et al., *Parsing Disciplinary Disproportionality: Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion*, 51 AM. EDUC. RSCH. J. 640 (2014) (summarizing social science research on the impact of suspensions and expulsions).

⁷⁷ U.S. COMM’N ON C.R., *supra* note 3, at 77 (citing TONY FABELO ET AL., *BREAKING SCHOOLS’ RULES: A STATEWIDE STUDY OF HOW SCHOOL DISCIPLINE RELATES TO STUDENTS’ SUCCESS AND JUVENILE JUSTICE INVOLVEMENT*, JUSTICE CENTER THE COUNCIL OF STATE GOVERNMENTS & PUBLIC POLICY RESEARCH INSTITUTE xii (2011), https://csgjusticecenter.org/wp-content/uploads/2020/01/Breaking_Schools_Rules_Report_Final.pdf).

⁷⁸ DANIEL J. LOSEN, NAT’L EDUC. POL’Y CENTER, *DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE* 10 (2011).

⁷⁹ *Id.* at 10-11.

the state child welfare agency, if the parent refuses to pick up the child immediately; meanwhile parents who respond to such threats by leaving work midday may risk losing their jobs and plunging their families into financial destitution, which of course can further harm their children.⁸⁰ More generally, advocates report that children sent home from school in this way can get caught in a cycle of “rejection and removal” that can “silently kill” educational opportunity.⁸¹ And these feelings can be compounded when schools send the message that they are singling out students because of race, ethnicity, national origin, and/or disability, according to the U.S. Commission on Civil Rights.⁸²

Even if the informal removal results in placement at an alternative school or homebound instruction, rather than total exclusion from the school environment, severe educational deprivation can persist. Research suggests that even well-intentioned efforts to provide educational services in a school building—such as an alternative, therapeutic, or public day school, as opposed to virtual, online, or home instruction—can severely damage children’s educational opportunities. At alternative schools serving children who are expelled or suspended from school, or are at risk of educational failure, educational options are often severely limited, and most schools fail to graduate one-third or more of their students.⁸³ Nearly two-thirds of alternative schools offer one or no science classes, and nearly one-third of alternative schools offer only one or no math classes.⁸⁴ At disciplinary alternative schools, the academic options can be even more limited.⁸⁵ In some states, these alternative schools may be framed as “therapeutic” programs;⁸⁶ in this way, disciplinary alternative schools can parallel the harms of some traditional public day school programs, discussed further below. These harms are not abated just because the school may frame the setting as a therapeutic placement, rather than as a consequence of a suspension or expulsion.

While day school programs may in some circumstances be necessary to provide FAPE to students with disabilities,⁸⁷ a number of purportedly

⁸⁰ See *infra* note 116 (describing litigation in Boston challenging such practices).

⁸¹ NAT’L DISABILITY RTS. NETWORK, *supra* note 63, at 7.

⁸² U.S. COMM’N ON C.R., *supra* note 3.

⁸³ GOV’T ACCOUNTABILITY OFF., GAO-20-310, K-12 EDUCATION: INFORMATION ON HOW STATES ASSESS ALTERNATIVE SCHOOL PERFORMANCE 12-17, <https://www.gao.gov/assets/gao-20-310.pdf>.

⁸⁴ *Id.* at 12.

⁸⁵ *Id.*

⁸⁶ See Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024). For further information about this litigation, see *infra* Section IV(B).

⁸⁷ See, e.g., Groton-Dunstable Regional Sch. Dist., 107 LRP 31892 (May 31, 2007) (ordering school district to reimburse parent for private day school tuition after school district failed to provide FAPE); Saddleback Unified School District, 23 IDELR 477 (Nov. 20, 1995) (holding that private day school placement for students with learning disabilities

“therapeutic” programs exacerbate children’s mental health condition rather than improve it. In these schools, typically public day schools for students with identified disabilities, schools routinely inform students with behavioral disabilities and their caregivers that services, if they desire them, are only available at a single school: the purportedly “therapeutic” school. At some of these programs, advocates have reported the provision of few academics and the use of dangerous physical restraints, inappropriate forced isolation, threatened and repeated arrests, and suspensions for minor offenses.⁸⁸

Students on homebound, shortened-day, or remote instruction due to their behavior can, in some circumstances, face similar deprivations. Certainly, homebound or remote placements may be required as accommodations to “aid” or “prevent medical harm to” immunocompromised students, or to address other health and disability-related issues.⁸⁹ Homebound, shortened-day, and remote placements for behavior reasons, however, can produce severe inequities. P&A agencies report the education provided to students with disabilities on homebound instruction for behavioral reasons typically is, at best, anemic, and, at worst, non-existent. For example, advocates report that children with disabilities receive remote or homebound instruction with less than ten hours of tutoring *per week*, and often even these minimal services are not provided or made available.⁹⁰ The educational deprivation that results can be even more extreme than for a general education student, where students with disabilities placed on homebound instruction tend to have highly specialized academic needs and, therefore, without intensive supports and services, may have even less capacity than other students to learn independently. Further, as is abundantly clear after the COVID-19 pandemic, homebound or remote instruction places burdens on parents and caregivers by requiring them to fill in as educators and paraeducators. Even if the child can access education remotely or from home, and has the necessary support to do so, children in remote or homebound programs may be deprived of other important school

was required to provide FAPE where district had previously denied FAPE in a public school setting).

⁸⁸ Class Action Complaint, *Doe v. Pasadena*, No. 2:16-CV-00984 (Feb. 11, 2016) (alleging that, at a public day school in California, “[r]ather than fostering learning, the emphasis at [the public day school] is on behavior control using drastic methods including dangerous physical restraints, inappropriate forced isolation, threatened and repeated arrests, and suspensions for minor offenses”); Class Action Complaint, *Parent/Professional Advocacy League v. Springfield*, No. 3:14-cv-30116 (June 27, 2014) (same in Springfield, Massachusetts); Class Action Complaint, *E.F. v. N.Y. City Dep’t of Educ.*, No. 1:21-cv-00419 (Jan. 26, 2021) (same in New York City); *see also* Second Amended Complaint, *P.A. ex rel. A.A. v. Voitier*, No. 2:23-cv-02228 (E.D. La. May 20, 2024) (disciplinary alternative school claiming to be therapeutic in Louisiana).

⁸⁹ 34 C.F.R. § 300.114(a); 34 C.F.R. § 300.115.

⁹⁰ NAT’L DISABILITY RTS. NETWORK, *supra* note 63, at 15.

experiences and services, including access to free and reduced-priced lunch, school-based health clinics, libraries, playgrounds, extracurricular sports and arts activities, and, more generally, a sense of belonging.⁹¹

The continued persistence of practices excluding students with disabilities from school is disheartening, as they represent precisely the variety of educational exclusion the IDEA was designed to address.⁹² Further, it can be challenging for legislative reforms to target discipline in disguise, where the behavior is often designed precisely to evade existing statutory protections against unlawful student exclusion. In this area of school discipline reform, then, litigation, including under the IDEA, is of particular importance. The disciplinary protections of the IDEA, and their potential pitfalls as purely individual advocacy tools, will be explored further in the next section.

III. BARRIERS TO CHALLENGING DISCIPLINE IN DISGUISE SYSTEMICALLY

It is not uncommon for school district officials to view the procedures described above as overly burdensome and unduly restrictive of the district's ability to maintain order in its schools. Faced with the possibility of having to keep a perceived "problem student" in a regular school setting, some school districts will go to great lengths to avoid having to implement the IDEA's disciplinary safeguards.

Individual advocacy for students and families subjected to these kinds of practices is resource- and fact-intensive. For example, the greatest challenge to advocacy around informal removals is often proving a sufficient number of undocumented removals. If a parent has not kept a detailed log of undocumented removals, the parent can establish a pattern of undocumented removals through phone records, text messages, and emails. Similarly, establishing that IEP placements are disguised exclusionary discipline—or that there was no valid consent to a change in placement—is a highly fact-specific inquiry generally established through testimony and documentary evidence submitted as part of a state administrative complaint or at a due process hearing. Such fact-intensive advocacy is not only resource-intensive, as previously noted, but also may not dissuade school districts from engaging in the same illegal practices against other students—or perhaps even the client in future incidents. In other words, school districts may find it acceptable to lose or settle individual cases where the vast majority of parents and students affected by these disciplinary practices will not have the means to challenge the district's actions.

⁹¹ *Id.*

⁹² See generally *A History of the Individuals with Disabilities Education Act*, U.S. DEPT OF EDUC., <https://sites.ed.gov/idea/IDEA-History#1975> (last visited Aug. 6, 2025).

Thus, advocates have turned to systemic litigation, despite increasingly frustrating results. Some of the common barriers to such litigation, including limitations on class action relief and extensive exhaustion requirements, will be explored further below, such that these barriers may be avoided in future litigation strategies.

A. *The Short-Lived Promise of Federal IDEA Class Actions*

The promise of systemic reform litigation has been a central component of the IDEA since its inception.⁹³ Indeed, the drafters of the IDEA⁹⁴ relied heavily on two class action cases, *Pennsylvania Association for Retarded Children (P.A.R.C.) v. Commonwealth of Pennsylvania*⁹⁵ and *Mills v. Board of Education of the District of Columbia*,⁹⁶ in drafting the law.⁹⁷ In the legislative history, Congress anticipated similar litigation to enforce the rights of children with disabilities after the law's enactment.⁹⁸ This expectation was fulfilled by numerous class actions seeking to challenge schoolwide policies discriminating against students with disabilities in the 1980s and onwards, including, for example, lawsuits challenging the number of instructional days per year students with disabilities could receive;⁹⁹ denial of education to students with disabilities in juvenile detention centers;¹⁰⁰ and automatic, non-individualized placement of students with disabilities in particular placements.¹⁰¹

Then, in 2011, the Supreme Court decided *Wal-Mart v. Dukes*,¹⁰² which upended systemic reform class action litigation of all kinds, including special education class-action litigation.¹⁰³ In *Wal-Mart*, a class of a million and a half female employees challenged sex discrimination in salary and promotion decisions under Federal Rule of Civil Procedure 23(a). The requirements to certify a class under Rule 23(a) are fairly

⁹³ Joshua M. Anderson, *Idea Class Action Lawsuits and Other Means of Challenging Systemic Violations of Federal Special Education Law*, 15 TENN. J.L. & POL'Y 224, 229 (2021) (discussing class action background of IDEA); Mark C. Weber, *Idea Class Actions After Wal-Mart v. Dukes*, 45 U. Tol. L. REV. 471, 476 (2014) (discussing class action litigation relevant to the IDEA).

⁹⁴ Originally, the IDEA was called the Education for All Handicapped Children Act of 1975. See EAHCA, Pub. L. No. 94-142, 89 Stat. 773 (1975).

⁹⁵ 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

⁹⁶ 348 F. Supp. 866 (D.D.C. 1972).

⁹⁷ Anderson, *supra* note 93, at 229 (citing Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, (1975)).

⁹⁸ *Id.* (reviewing IDEA legislative history on class actions).

⁹⁹ Weber, *supra* note 93, at 475-77 (citing *Battle v. Pennsylvania*, 629 F.2d 269, 280 (3d Cir. 1980)).

¹⁰⁰ *Id.* (citing *Andre H. ex rel. Lula H. v. Ambach*, 104 F.R.D. 606, 613 (S.D.N.Y. 1985)).

¹⁰¹ *Id.* (citing *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1064 (6th Cir. 1983)).

¹⁰² 131 S. Ct. 2541, 2551 (2011).

¹⁰³ Weber, *supra* note 93, at 481-85.

straightforward: (1) that the class is so numerous that individual joinder is not practicable; (2) that there are questions of law or fact common to the class; (3) that the claims or defenses of the representative parties are typical of those of the class; and (4) that the representative parties will fairly and adequately protect the class's interest. The Supreme Court held, in *Wal-Mart*, that the second requirement, commonality, requires that the harm must "be of such a nature that it is capable of classwide [sic] resolution—which means that determination of its truth or falsity will resolve an issue that is central to . . . the claims in one stroke."¹⁰⁴

Shortly after *Wal-Mart*, courts began applying the new Rule 23(a) commonality standards to systemic reform litigation on behalf of students with disabilities.¹⁰⁵ Since then, IDEA class action litigation has faced significant barriers.¹⁰⁶ The IDEA is a statute that exists to combat a single, discriminatory approach to all students with disabilities, without regard for the needs of the individual child. Accordingly, substantive relief under the statute is usually individually tailored—take, for example, the most basic requirement of an "individualized" education program or IEP. Several scholars have noted that, while the IDEA requires individual remedies, common policies that disregard the unique, individual characteristics and needs of students with disabilities may nonetheless be ripe for post-*Wal Mart* class certification: especially where the remedy requested is not to afford individual consideration but to implement a single policy.¹⁰⁷ In other words, class action litigation that challenges failure to adhere to IDEA procedures, rather than failure to substantively provide education, remains more viable. However, separating procedure from substance can be challenging in this context.

Take, for example, the issue of MDRs. The requirement that an MDR take place is a procedural requirement under the IDEA; however, certain questions must be appropriately asked and answered: Is the behavior related to the child's disability? Did the school district implement the IEP? These requirements are substantive, and the result can be overturned in an individual special education due process hearing. This not only presents a commonality issue but also raises a separate issue: whether the lawsuit has been properly exhausted through the

¹⁰⁴ *Wal-Mart*, 131 S. Ct. at 2545.

¹⁰⁵ Weber, *supra* note 93, at 481-91.

¹⁰⁶ *Id.* (identifying post-*Wal-Mart* decisions where classes were decertified or not certified); see also, e.g., *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012) (vacating a class certification order in an IDEA class action after *Wal-Mart*).

¹⁰⁷ Claire S. Raj, *Rights to Nowhere: The Idea's Inadequacy in High-Poverty Schools*, 53 COLUM. HUM. RTS. L. REV. 409, 458 (2022) (describing several IDEA "class action lawsuits . . . able to leverage procedural claims to bring about significant substantive changes to school systems" since *Wal-Mart*).

special education due process procedures required by the IDEA.¹⁰⁸ The increasingly substantial procedural barriers posed by exhaustion, even for litigants who can satisfy the post-*Wal Mart* class action certification standard, are explored in the next section.

But first, a final note on the promise of class actions in this context in light of recent case law developments. Federal disability statutes such as the IDEA, Section 504, and the Americans with Disabilities Act (ADA) are not the only protections against discipline in disguise. Students also have procedural due process rights under the Fourteenth Amendment to the U.S. Constitution¹⁰⁹ and parallel state constitutional provisions.¹¹⁰ Many state constitutions recognize a right to procedural due process before suspension or expulsion, based upon the U.S. Supreme Court decision in *Goss v. Lopez*. In *Goss*, the Supreme Court held that students have a property interest in education protected by the Due Process Clause, which cannot be removed without adherence to minimum procedures.¹¹¹ Some federal courts and circuits have interpreted this decision as applying only to “traditional” removals from the brick-and-mortar school building, permitting removals without due process of students to alternative schools, for example.¹¹² However, not

¹⁰⁸ T.R. v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020) (“Repeatedly, courts facing putative class actions claiming a systemic deficiency under IDEA have found that the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand.” (quoting T.R. *ex rel.* Galaraza v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020))).

¹⁰⁹ *Goss v. Lopez*, 419 U.S. 565 (1975).

¹¹⁰ The scope and content of these constitutional due process protections varies by state and circuit. *See generally* E. J. Schopler, *Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R. 2d 903 (discussing cases which “discuss . . . whether a student is entitled to a hearing, or a formal hearing, before his suspension”).

¹¹¹ 419 U.S. at 579.

¹¹² *See, e.g.*, *Swindle v. Livingston Par. Sch. Bd.*, 655 F.3d 386, 394 (5th Cir. 2011); *Nevares ex rel. Nevares v. San Marcos Consol. Indep. Sch. Dist.*, 111 F.3d 25, 26 (5th Cir. 1997); *see also* *S.J.W. ex rel. Wilson v. Lee’s Summit R-7 Sch. Dist.*, 696 F.3d 771, 779 (8th Cir. 2012) (finding no irreparable harm on a preliminary injunction motion where plaintiff attended an alternative school and “earned academic credit and stayed on track for graduation”). Note, even in the Fifth and Eighth Circuits, procedural due process claims may proceed based upon nontraditional, informal removals in some circumstances involving severe deprivations at an alternative or homebound setting, according to several district courts. *Cole ex rel. Cole v. Newton Special Mun. Separate Sch. Dist.*, 676 F. Supp. 749, 752 (S.D. Miss. 1987), *aff’d*, 853 F.2d 924 (5th Cir. 1988) (“A student could be excluded from the educational process as much by being placed in isolation as by being barred from the school grounds.”); *Riggan v. Midland Indep. Sch. Dist.*, 86 F. Supp. 2d 647, 655 (W.D. Tex. 2000) (finding plaintiff raised a genuine fact issue as to whether alternative placement amounted to an effective deprivation of access to education “because [the student] was prohibited from participating in or benefitting from comments of his teacher and peers”); *see also* *Gentry v. Mountain Home Sch. Dist.*, No. 3:17-CV-3008, 2018 WL 2145011, at *10 (W.D. Ark. May 9, 2018) (“The Court believes [plaintiff] has raised a genuine, material question of fact as to whether completing the last few months of his senior year at the [alternative educational setting] . . . would have been significantly different from or inferior to the education he would have received at Mountain Home

all federal courts and circuits adhere to this interpretation of *Goss*,¹¹³ and advocates have put forth arguments to distinguish those precedents.¹¹⁴ Moreover, state constitutions contain their own procedural due process provisions that may protect against such removals,¹¹⁵ and states may also have statutes with even more robust protections against removals of any

High School. There is evidence in the record that the [alternative placement] did not offer many, if any, of the courses [plaintiff] was taking during his last semester at Mountain Home High School, and that it did not offer certain classes [plaintiff] needed to take, not simply to graduate, but to graduate and attend the colleges to which he had been provisionally accepted.”); *Engle v. Indep. Sch. Dist. No. 91*, 846 F. Supp. 760, 765 (D. Minn. 1994) (rejecting defendants’ argument that “because homebound instruction was offered and schoolwork was sent home to [plaintiff], any deprivation of [plaintiff’s] right to public education was *de minimis*”).

¹¹³ *Betts ex rel. Betts v. Bd. of Educ. of City of Chi.*, 466 F.2d 629, 633 (7th Cir. 1972) (requiring procedural due process protections where an alternative school placement was “tantamount to expulsion”); *Everett v. Marcuse*, 426 F. Supp. 397, 400 (E.D. Pa. 1977) (“In the present cases, the School District has argued that a lateral transfer, even if for disciplinary reasons, unlike a suspension, deprives a pupil of no property right. The evidence presented at the hearings, as well as common knowledge of urban school systems, refutes such argument.”). Other circuits have left open the possibility for due process claims less explicitly. *See Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (holding that an in-school suspension, even where students are provided with educational instruction, can violate due process when it “so isolates a student from educational opportunities that it infringes her property interest in an education”); *Buchanan v. City of Bolivar*, 99 F.3d 1352, 1359 (6th Cir. 1996) (noting possible availability of a procedural due process claim with “some showing that the education received at the alternative school is significantly different from or inferior to that received at [the] regular public school”); *Zamora ex rel. Zamora v. Pomeroy*, 639 F.2d 662, 670 (10th Cir. 1981) (suggesting a viable due process claim where education at an alternative program is so “inferior [as] to amount to an expulsion from the educational system”); *see also C.B. ex rel. Breeding v. Driscoll*, 82 F.3d 383, 389 (11th Cir. 1996) (citing *Zamora*, 539 F.2d at 670, with approval). Beyond these circuit court opinions, several district courts have applied the same approach. *See, e.g., Gentry*, 2018 WL 2145011, at *10 (“The Court believes [plaintiff] has raised a genuine, material question of fact as to whether completing the last few months of his senior year at the [alternative educational setting] . . . would have been significantly different from or inferior to the education he would have received at Mountain Home High School. There is evidence in the record that the [alternative placement] did not offer many, if any, of the courses [plaintiff] was taking during his last semester at Mountain Home High School, and that it did not offer certain classes [plaintiff] needed to take, not simply to graduate, but to graduate and attend the colleges to which he had been provisionally accepted.”); *E.S. ex rel. D.K. v. Brookings Sch. Dist.*, No. 4:16-CV-04154, 2018 WL 2338796, at *4-5 (D.S.D. May 23, 2018) (finding that the plaintiff was deprived of a property interest where “she was not assigned work in her regular classes and did not receive any instruction from a certified teacher”); *Edwards v. MiraCosta Coll.*, No. 3:16-CV-1024, 2017 WL 2670845, at *5 (S.D. Cal. June 20, 2017) (finding plaintiff adequately pled a deprivation of a liberty interest where he “alleged that the suspension ha[d] negatively affected his grade point average, resulted in him being placed on academic probation, and caused him to be ineligible for academic scholarships”).

¹¹⁴ *See, e.g., Memorandum in Opposition to 12(c) Motion for Judgment on the Pleadings at 13-16, P.A. ex rel. v. Voitier*, No. 23-cv-2228 (E.D. La. Mar. 26, 2024), Dkt. No. 25.

¹¹⁵ Danielle Weatherby, *Student Discipline and the Active Avoidance Doctrine*, 54 U.C. DAVIS L. REV. 491, 518 (2020) (“[S]tate constitutions’ guarantees of free, public education are recognized property interests protected under the procedural prong of the Due Process Clause.”) (citation omitted); *see also* Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1148

kind.¹¹⁶ These federal and/or state procedural due process claims can be pursued independently or in conjunction with disability discrimination claims.

Before or around the time *Wal-Mart v. Dukes* was decided, cases challenging informal removals on procedural due process grounds typically sought class certification.¹¹⁷ The class certification issues plaguing systemic reform IDEA litigation, however, also impact class claims for pure procedural due process violations, especially for discipline in disguise. This is because school districts do not typically pursue only one method to evade procedural requirements for exclusion of students with disabilities, but rather employ multiple methods to evade MDR and other hearing requirements¹¹⁸—for example, by coercing a “voluntary placement” of a child at an alternative school after a disciplinary incident, and then using disciplinary incidents at the alternative school to justify the child’s indefinite placement in an alternative setting.¹¹⁹ Where students may be sent home from school or placed at an inferior or segregated school in multiple different ways within a single school district, commonality issues can prevent successful class certification. And if the proposed class includes a disability subclass with disability discrimination claims, IDEA exhaustion issues may persist. We thus address next the exhaustion barriers to systemic reform litigation in this context.

B. Adding Exhaustion to Injury: Non-Class Procedural Barriers to IDEA Systemic Reform Litigation

Similarly, in the early years of IDEA systemic reform litigation,¹²⁰ the exhaustion requirement was not unduly restrictive, with courts

(2000) (“All fifty state constitutions contain provisions guaranteeing a right to free public education.”); *id.* at 1148 n.9 (collecting state constitution provisions).

¹¹⁶ See generally U.S. DEP’T OF EDUC., COMPENDIUM OF SCHOOL DISCIPLINE LAWS AND REGULATIONS FOR THE 50 STATES, DISTRICT OF COLUMBIA AND THE U.S. TERRITORIES (2024), <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/School%20Discipline%20Laws%20and%20Regulations%20Compendium.pdf>. For an effective example of due process claims challenging informal removals under state statutes that offer strong protections, see Greater Bos. Legal Servs., Greater Boston Legal Services Clients and Boston Public Schools Reach Settlement to End Unlawful Suspensions of Kindergartners, First, and Second Graders (Nov. 16, 2018), <https://dev-gbls.pantheonsite.io/sites/default/files/2018-11/gbls-press-release-bps-school-discipline-settlement-11-16-2018.pdf> (last visited Aug. 15, 2025).

¹¹⁷ See, e.g., Verified Second Amended Complaint – Class Action, *Harris v. Atlanta Indep. Sch. Sys.*, No. 08-cv-1435 (Mar. 31, 2009), ECF No. 147; see also *infra* Section IV(A)(1) (b) (discussing *P.B. v. White*, No. 2010-cv-04049 (E.D. La. Mar. 20, 2012)).

¹¹⁸ See Section II(A) (discussing informal and other undocumented removal methods used within and between different school districts).

¹¹⁹ See, e.g., Second Amended Complaint, *P.A. ex rel. A.A. v. Voitier*, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

¹²⁰ Weber, *supra* note 93, at 485 (describing the pre-*Wal Mart* “period in which class action challenges to special education systems in school districts around the United States were relatively frequent” (citation omitted)).

recognizing extensive exceptions to the statute's exhaustion requirement. Although the text of the IDEA does not include exhaustion exceptions,¹²¹ the legislative history of the statute allows for such lenience.¹²² Initially, these exhaustion exceptions were widely recognized by courts, and included: (1) futility; (2) systemic violations; (3) inadequacy; and (4) severe or irreparable harm.¹²³ These exceptions are judicially created and may be categorized differently in some cases.¹²⁴ Nevertheless, in 1988, the Supreme Court in *Honig v. Doe* recognized the futility and inadequacy exceptions, when it noted that "parents may bypass the administrative process where exhaustion would be futile or inadequate."¹²⁵

Until 2017, these exceptions meant exhaustion did not pose a major barrier to systemic relief for students with disabilities,¹²⁶ even

¹²¹ For an explanation of exhaustion exceptions included in the IDEA legislative history, see Bari Britvan, Comment, *Idea's Futility Exception: On the Verge of Futility?*, 172 U. PA. L. REV. 1361, 1371 (2024).

¹²² See *id.* at 1400; see also *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 114 (2d Cir. 2004) ("[T]he futility exception has been applied in cases of alleged systemic violations, and . . . such cases are often class actions."); *J.G. ex rel. Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444, 447 (2d Cir. 1987) ("[C]laims of generalized violations . . . lend themselves well to class action treatment."); *T.R. ex rel. Galarza v. Sch. Dist. of Phila.*, 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020) ("Repeatedly, courts facing putative class actions claiming a systemic deficiency under IDEA have found that the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand." (quoting *T.R. ex rel. Galarza v. Sch. Dist. of Phila.*, 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020))).

¹²³ See generally Richard P. Shafer, *Exhaustion of State Remedies Under § 615 of the Education for All Handicapped Children Act (20 U.S.C.A. § 1415)*, 62 A.L.R. Fed. 376 (1983) (describing cases that "discuss[] whether a party must exhaust the available state administrative remedies before commencing an action" under section 615 of the EACA).

¹²⁴ See, e.g., Richard Marsico, *A New Hope: Perez v. Sturgis Public Schools Opens the Courthouse Doors to Children with Disabilities*, 11 BELMONT L. REV. 210, 216 (2024) (describing five common exceptions to IDEA exhaustion, including that (1) "the plaintiff is challenging a statute, practice, or procedure that the plaintiff alleges is contrary to law"; (2) "the relief plaintiff seeks is not available through the IDEA's administrative process"; (3) "the administrative process is inadequate to provide a forum to adjudicate the plaintiff's claims"; (4) "resort to the administrative process would cause the child severe or irreparable harm"; and (5) "the school district did not give notice of the availability of the IDEA's administrative process.").

¹²⁵ 484 U.S. 305, 327 (1988).

¹²⁶ Most courts considering the issue have consistently held that exhaustion is not jurisdictional under the IDEA. Ellen Saideman & Michele Scavongelli, *IDEA/ADA/Section 504 & Recent Supreme Court Decisions—Perez, Cummings & Loper Bright at the Conference of Council of Parent Attorneys and Advocates* (Mar. 8, 2025). Four circuits have explicitly reached this conclusion. See *K.I. v. Durham Pub. Sch. Bd. of Educ.*, 54 F.4th 779, 792 (4th Cir. 2022); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 867 (9th Cir. 2011) (noting that the "IDEA's exhaustion requirement is a claims processing provision that IDEA defendants may offer as an affirmative defense"), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014); *Mosely v. Bd. of Educ. of the City of Chi.*, 434 F.3d 527, 533 (7th Cir. 2006) ("A failure to exhaust is normally considered to be an affirmative defense . . . and we so see no reason to treat it differently here [under the IDEA]."); *N.B. ex rel. D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) ("The exhaustion requirement . . . is not jurisdictional . . .").

if class certification did.¹²⁷ However, following the Supreme Court's decision in *Fry v. Napoleon*,¹²⁸ the exhaustion requirement began to pose more formidable barriers in systemic reform cases.¹²⁹ The *Fry* decision requires exhaustion of administrative remedies whenever the "gravamen" of the complaint constitutes a denial of FAPE under the IDEA.¹³⁰ To assist courts and advocates in making an assessment of the complaint's "gravamen," the Supreme Court proposes the following questions: "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?"¹³¹ In other words, if the claim arguably relates to the provision of education, then exhaustion is required—and courts, after *Fry*, have interpreted this ruling strictly to require exhaustion even where relief at the administrative level was, in fact or effectively, unavailable.¹³²

In 2023, the Supreme Court dispelled the most restrictive of those interpretations in *Perez v. Sturgis Public Schools*.¹³³ This lawsuit was brought by Miguel Luna Perez, who is deaf, and attended public school in the Sturgis School District from age nine to twenty.¹³⁴ When

¹²⁷ See, e.g., *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982) (upholding class certification despite argument that plaintiffs failed to exhaust administrative remedies in case challenging New York State and city education authorities' failure to provide FAPE); *Ass'n for Retarded Citizens in Colo. v. Frazier*, 517 F. Supp. 105 (D. Colo. 1981) (pursuing a class action on behalf of all children with disabilities aged five to twenty-one living at state home and training school).

¹²⁸ 580 U.S. 154 (2017).

¹²⁹ The *Fry* decision has, however, opened the door to federal lawsuits, without exhaustion barriers, for issues such as harassment, abuse, unreasonable force, and other kinds of discrimination that do not concern schooling. See, e.g., *McIntyre v. Eugene Sch. Dist.*, 976 F.3d 902 (9th Cir. 2020) (disability-based harassment and discrimination); *K.G. v. Sergeant Bluff- Luton Cnty. Sch. Dist.*, 244 F. Supp. 3d 904, 923 (N.D. Iowa 2017) (use of force against student); *K.L. v. Scranton Sch. Dist.*, No. 3:19-cv-0670, 2020 WL 42723 (M.D. Pa. Jan. 3, 2020) (discrimination unrelated to schooling); *K.D. ex rel. K.J. v. St. Joseph Sch. Dist.*, 18-6113-CV, 2019 WL 267743 (W.D. Mo. Jan. 18, 2019) (abuse).

¹³⁰ 580 U.S. at 154.

¹³¹ *T.B. ex rel. Bell v. Nw. Indep. Sch. Dist.*, 980 F.3d 1047, 1052 (5th Cir. 2020) (citing *Fry*, 137 S. Ct. at 756).

¹³² See Raj, *supra* note 107, at 418 (noting, before *Perez* and after *Fry*, that courts frequently dismissed cases seeking systemic or programmatic remedies, on the basis that "because students could have sought individual remedies, the exhaustion process is not futile" (emphasis omitted)).

¹³³ 143 S. Ct. 859 (2023).

¹³⁴ *Id.* at 862.

the district announced that it would not permit Mr. Perez to graduate, he and his family filed an administrative complaint with the Michigan Department of Education alleging violations of the IDEA, Title II of the ADA, and Section 504.¹³⁵ The state Administrative Law Judge dismissed the ADA and Section 504 claims for lack of jurisdiction.¹³⁶ The parties then reached a settlement agreement as to the IDEA claims.¹³⁷ Thereafter, Perez pursued his dismissed ADA and Section 504 claims for money damages in federal court.¹³⁸ In its opinion, the Supreme Court unanimously held that the IDEA exhaustion requirement does not preclude an ADA lawsuit in such circumstances, *i.e.*, where the relief sought (money) is unavailable under the IDEA.

Following *Perez*, whether a disability discrimination claim must be exhausted through the administrative procedures available under the IDEA is subject to a two-part inquiry: (1) Is the gravamen of the complaint a denial of a FAPE under the IDEA?; and (2) Is the “relief sought” through the claim available under the IDEA? If the answer to the first question is no, then, under *Fry*, the ADA claims may proceed without administrative exhaustion. If the answer to the second question is no, exhaustion is not required. However, what relief is “unavailable” under the IDEA beyond money damages remains to be defined. *Perez* only involved money damages. While claims for money damages such as those in *Perez* now clearly may bypass special education due process hearings, requests for systemic injunctive or declaratory relief are less clear, even though statewide or district-wide injunctive relief is not a remedy “available” under the text of the IDEA.¹³⁹ The consensus of lawyers and scholars is that *Perez* should open the courthouse doors again to IDEA class action litigation; nonetheless, such promise has so far failed to realize.¹⁴⁰

The reasons *Perez* has not opened the door to special education class action litigation are manifold. First, the Supreme Court noted in *Perez* that claims seeking money damages in combination with other relief available under the IDEA “may find [the] request for equitable relief barred or deferred if [the plaintiff] has yet to exhaust [due process proceedings].”¹⁴¹ This language creates some ambiguity about whether exhaustion is required for systemic, as opposed to individual, equitable

¹³⁵ *Perez ex rel. Perez v. Sturgis Pub. Schs.*, No. 1:18-CV-1134, 2019 WL 8105854, at *2 (W.D. Mich. June 20, 2019), *report and recommendation adopted*, No. 1:18-CV-1134, 2019 WL 6907138 (W.D. Mich. Dec. 19, 2019).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Britvan, *supra* note 121, at 1386-1400.

¹⁴⁰ See Marsico, *supra* note 124, at 235-37.

¹⁴¹ *Perez*, 143 S. Ct. at 865.

and declaratory relief. Further, money damages in the special education context can involve highly individualized inquiries, which creates a commonality problem.¹⁴² Besides those evidentiary problems,¹⁴³ the Supreme Court recently decided in *Cummings v. Premier Rehab Keller, P.L.L.C.* that emotional distress damages are no longer available under Section 504 of the Rehabilitation Act.¹⁴⁴

Because Section 504 and the ADA are often interpreted similarly by courts,¹⁴⁵ emotional damages under the ADA—a typical form of damages for educational violations—are now uncertain.¹⁴⁶ Accordingly, unless state or federal law provide otherwise, the sole reliable damages options that remain are generally limited to lost economic opportunity; lost vocational damages/earning capacity; medical expenses; and nominal damages.¹⁴⁷

Further, although a special education due process hearing officer does not have jurisdiction to issue systemic injunctive and declaratory relief for an entire school district or state,¹⁴⁸ school districts may have an argument that the administrative forum is still required, even if it is time-consuming, inefficient, and ineffective to resolve the issue at hand.¹⁴⁹ For example, systemic failures to provide MDR meetings prior

¹⁴² T.R. *ex rel.* Galarza v. Sch. Dist. of Phila., 4 F.4th 179, 190 (3d Cir. 2021) (noting that “the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand” (quoting T.R. *ex rel.* Galarza v. Sch. Dist. of Phila., 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020))).

¹⁴³ In some good news, the question of whether plaintiffs must prove intentional discrimination in these kinds of cases was recently settled in favor of parents and students when the Supreme Court unanimously held that the ADA and Rehabilitation Act do not require children with disabilities “to satisfy a more stringent standard of proof than other plaintiffs to establish discrimination under the acts.” A.J.T. *ex rel.* A.T. v. Osseo Area Schs., Indep. Sch. Dist. No. 279, 145 S.Ct. 1647, 1658-59 (2025).

¹⁴⁴ 142 S. Ct. 1562, 1576 (2022).

¹⁴⁵ Because they share a similar framework, Title II of the ADA and Section 504 generally “are interpreted *in pari materia*.” Frame v. City of Arlington, 657 F.3d 215, 223 (5th Cir. 2011); see also Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 287-88 (5th Cir. 2005) (collecting cases).

¹⁴⁶ Britvan, *supra* note 121, at 1379 (“[F]ollowing *Cummings v. Premier Rehab Keller PLLC*, in which the Supreme Court held that emotional distress damages are no longer available under Section 504 of the Rehabilitation Act, the availability of such damages under the ADA is uncertain.”); see also Saideman & Scavongelli, *supra* note 126 (citing Doherty v. Bice, 101 F.4th 169, 174 (2d Cir. 2024), *cert. denied*, 220 L. Ed. 2d 144, 174 (Oct. 15, 2024)) (noting that the Second and Eleventh Circuits have already explicitly held, since *Cummings*, that emotional distress damages are unavailable under Title II of the ADA); A.W. v. Cowenta Cnty. Sch. Dist., 110 F. 4th 1309 (11th Cir. 2024), *petition for cert. filed*, No. 24-523 (Nov. 5, 2024)). Compensatory and punitive damages are not available under the IDEA, see Perez, 143 S. Ct. at 863-64, and punitive damages are not recoverable in suits under Section 504 at Title II of the ADA. See Barnes v. Gorman, 536 U.S. 181, 189 (2002).

¹⁴⁷ Saideman & Scavongelli, *supra* note 126.

¹⁴⁸ Erin B. Stein, Comment, *The Individuals with Disabilities Education Act (Idea): Judicial Remedies for Systemic Noncompliance*, 2009 Wis. L. Rev. 801, 814 (2009).

¹⁴⁹ See, e.g., Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1308-09 (noting “the mere fact the complaint is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion” and holding that “even though injunctive relief is unavailable, the

to disciplinary alternative school placement could be resolved, at the due process hearing level, with an individual award to a child providing return to their original school placement and compensatory services; this ruling, however, does nothing to prevent the child from being immediately transferred back to the disciplinary alternative school again after the due process hearing officer's decision.

In theory, the futility exception to IDEA exhaustion would account in such circumstances for the unsuitability—even if not unavailability—of relief at the due process hearing level.¹⁵⁰ However, the Court declined, in *Perez*, to address “whether IDEA’s exhaustion requirement is susceptible to a judge-made futility exception.”¹⁵¹ Although the Supreme Court has recently affirmed the existence of a futility exception in other statutory contexts, this statement in *Perez* renders the future of IDEA reform litigation uncertain in cases not involving monetary relief.¹⁵² Unless a class action complaint involves a request for money damages,¹⁵³ exhaustion of administrative remedies may still be required, including resource-intensive investigations and months of attorney and client time, burden, and cost.¹⁵⁴

Some courts have even held that exhaustion of individual named plaintiffs is insufficient to remove exhaustion barriers to special education class action litigation—instead, exhaustion of the *entire class* is required. In *S.S. ex rel. S.Y. v. City of Springfield*, for example, lawyers filed a special education due process hearing request and fully exhausted administrative remedies of the lead plaintiff prior to filing

administrative process has the potential for producing the very result plaintiffs seek, namely, statutory compliance”).

¹⁵⁰ Britvan, *supra* note 121, at 1386-1400; *see also id.* at 1373 (discussing the futility exception, which has been utilized as an umbrella exception “for a variety of situations in which administrative relief is more or less unlikely”) (internal citations omitted).

¹⁵¹ *Perez*, 143 S. Ct. at 859; Kayla Bridgham & Janet R. Decker, *An Analysis of Idea Administrative Exhaustion One Year Post-Perez*, 425 ED. LAW REP. (West) 1, 17-18 (Aug. 29, 2024) (“[T]he *Perez* Court also declined to rule on whether the exhaustion requirement under 20 U.S.C. § 1415 includes a futility exception, allowing plaintiffs to forgo exhaustion when it would be futile.”).

¹⁵² Compare *A.G. ex rel. Gibson v. Bd. of Educ. of the Winton Woods City Sch. Dist.*, 632 F. Supp. 3d 771, 779 (S.D. Ohio 2022) (“Sixth Circuit law does not apply a futility exception to the IDEA exhaustion requirement.”), with *R.Z. ex rel. B.Z. v. Cincinnati Pub. Schs.*, 1:21-cv-140, 2021 WL 3510312, at *4 (S.D. Ohio Aug. 10, 2021) (analyzing whether plaintiff could show that exhaustion was futile because the Sixth Circuit *Perez* majority, despite holding that there is no futility exception, also noted that even if the exception existed, it would not apply).

¹⁵³ *See, e.g., Powell ex rel. J.T.A. v. Sch. Bd. of Volusia Cnty.*, 86 F.4th 881, 883 (11th Cir. 2023) (seeking damages for learning loss from COVID-19 related school closures).

¹⁵⁴ *See Raj, supra* note 107, at 415 (“The high cost of attorneys and experts, unequal bargaining power between parents and schools, and a hesitancy to disrupt a child’s school-based relationships all undermine low-income families’ ability to leverage the IDEA.”).

a federal class action complaint.¹⁵⁵ The class action complaint was traditional systemic reform litigation, targeted to combat the “informal removal” of students with disabilities to a public day school program that was segregated and educationally inferior, in violation of the ADA.¹⁵⁶ Students at the public day school had mental health disabilities, and, while the school claimed to be therapeutic, plaintiffs documented use of dangerous physical restraints, forced isolation in padded rooms, suspensions for minor offenses, and repeated arrests and law enforcement involvement.¹⁵⁷ The remedy sought was purely injunctive relief.¹⁵⁸ After filing the lawsuit in 2014, more plaintiffs—who had not exhausted administrative remedies—were added to the suit.¹⁵⁹ With these new plaintiffs, counsel moved for class certification well after the lawsuit began, and after significant motion practice and discovery had been conducted.¹⁶⁰

Following this significant investment of resources, the district court denied Plaintiffs’ motion for class certification, despite the exhaustion of the original plaintiff to the litigation. The Court held that because “the members of the proposed class may achieve a remedy through an IDEA administrative hearing related to the claims raised[,] . . . the IDEA exhaustion requirement applies to individual members of the proposed class.”¹⁶¹ The fact that one named plaintiff had exhausted was inadequate to resolve this issue, and, in fact, created typicality and adequacy barriers to class certification, in the Court’s view.¹⁶² Further, the Court found the futility exception to be inapplicable.¹⁶³

In light of this ruling, some have concluded that, going forward, courts may require classes to be limited only to parties who have previously exhausted.¹⁶⁴ Where resources to bring individual due process complaints are extremely limited, particularly for low-income families, the limitation of class certification to exhausted parties would be almost

¹⁵⁵ 318 F.R.D. 210, 222 (D. Mass. 2016), *aff’d*, Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13 (1st Cir. 2019).

¹⁵⁶ Complaint, S.S. *ex rel.* S.Y. v. City of Springfield, 24-cv-30116 (June 27, 2014).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ S.S. v. City of Springfield, 318 F.R.D. 210, 216-19 (D. Mass. 2016).

¹⁶⁰ See Memorandum in Support of Motion to Certify Class, S.S. *ex rel.* S.Y. v. City of Springfield, 24-cv-30116 (July 15, 2014), Dkt. No. 157; see also Order, S.S. *ex rel.* S.Y. v. City of Springfield, 24-cv-30116 (May 16, 2016), Dkt. No. 140 (expert report on class certification related scheduling order).

¹⁶¹ S.S. *ex rel.* S.Y. v. City of Springfield, 318 F.R.D. 210, 224 (D. Mass. 2016).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Trevor Matthews, Note, *The Most Integrated Setting: Olmstead, Fry, and Segregated Public Schools for Students with Disabilities*, 102 MINN. L. REV. 1413, 1439 (2018) (reviewing prospects for future systemic reform IDEA litigation).

preclusive to special education systemic reform litigation.¹⁶⁵ To combat this risk, several scholars have made persuasive arguments that such rulings should be revisited for systemic reform litigation after *Perez*,¹⁶⁶ or otherwise overruled on the basis of other administrative law precedent concerning exhaustion and exhaustion exceptions.¹⁶⁷ Such litigation, however, may be risky, time-consuming, and resource-intensive.

The resource constraint issues are, unfortunately, heightened for some advocates, rather than mitigated, following *Perez*. Interlocutory appeals of class certification decisions in systemic reform cases challenging systemic policies, rather than money damages, may raise novel, non-frivolous questions that require time-intensive analysis on appeal.¹⁶⁸ Where most lawyers bringing systemic reform cases on behalf of students with disabilities in school are non-profit or legal aid lawyers with limited resources, the risk of bringing such lengthy and perilous litigation may outweigh the benefits. The same is true for clinicians.

Further, even if class certification succeeds and class-wide relief is granted, the limited legal resources of the legal aid organization will go towards monitoring enforcement of a class-wide consent decree for years.¹⁶⁹ The resources required to monitor such consent decrees weaken these organizations' abilities to bring new suits—which is a particular issue when advocates seek to combat compliance evasion methods that may, and do, change over time. This type of long-term monitoring work is particularly unsuitable for law clinics, where it can span years of clinic students and may detract from the focus on individual special education representation by student practitioners.

IV. EMERGING SYSTEMIC ADVOCACY STRATEGIES TO COMBAT DISCIPLINE IN DISGUISE

Faced with these procedural and practical barriers, the prospects for traditional, class action reform litigation targeting informal removals—whether brought under the IDEA, Section 504, or the ADA—appear limited. As a result, many advocates and parents of children with disabilities find themselves at a loss to address the issue of discipline in disguise. Therefore, there is a growing and urgent need for alternative

¹⁶⁵ See Raj, *supra* note 107, at 415.

¹⁶⁶ Marsico, *supra* note 124, at 237.

¹⁶⁷ Matthews, *supra* note 164, at 1439 (reviewing arguments to revisit S.S. based on IDEA legislative history, employment law, and Social Security exhaustion rules); see also Abbe Petuchowski, Note, *Beyond the Point of Exhaustion: Reforming the Exhaustion Requirement to Protect Access to Idea Rights in Juvenile Facilities*, 56 COLUM. J.L. & SOC. PROBS. 41, 87 (2022) (discussing habeas-based potential basis to affirm the exhaustion exceptions).

¹⁶⁸ Fed. R. Civ. P. 23(f) (standard for interlocutory class action certification appeals).

¹⁶⁹ See, e.g., *infra* Section IV(A)(1)(b) (discussing New Orleans special education class action litigation).

litigation strategies to address these forms of exclusionary discipline systemically.

Thankfully, in some parts of the country, advocates have already begun to devise alternatives, which may be highly successful models for clinical education and representation. The case studies below provide other methods to combat exclusionary discipline in disguise that creatively address the procedural barriers previously analyzed, including exhaustion and class certification, and render systemic litigation more accessible to law students. These case studies include illustrations of the use of formal dispute resolution mechanisms under the IDEA to obtain relief on behalf of multiple students, as well as multi-plaintiff, non-class systemic litigation. While the post-*Perez* possibilities for class action IDEA systemic reform litigation are promising, these advocacy strategies ultimately may be less risky and more resource-efficient, for advocates both inside and outside the law school setting. While it is the authors' hope that the previous section provides a blueprint for clinicians and litigators who, by necessity or design, litigate the limits of *Perez* in systemic relief cases, the alternative, often more accessible, advocacy strategies described in the case studies below must also be considered, especially for law clinics, legal aid organizations, non-profits, and the law firms that support them with *pro bono* legal counsel. Even without testing the limits of the exhaustion doctrine of the IDEA, the case studies have obtained effective relief for students in school districts where informal removals and other forms of exclusionary discipline in disguise are a persistent and pervasive issue.

A. *Using IDEA Formal Dispute Resolution Mechanisms to Obtain Systemic Relief*

For a child with a disability not receiving appropriate education in school, the administrative procedures of the IDEA usually represent the first line of defense. There are two administrative procedures that states accepting funds under the IDEA are required to maintain: impartial due process hearings¹⁷⁰ and state administrative complaints.¹⁷¹ Typically, these processes are pursued by individual parents or their advocates, seeking relief on behalf of individual children. However, nothing in the IDEA or its implementing regulations limits these dispute resolution processes to a single plaintiff at a time. As explored in the case studies below, advocates have pursued options to bring multi-student administrative

¹⁷⁰ See generally 20 U.S.C. 1415(f) (impartial due process hearings).

¹⁷¹ See generally Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 3 (2018) (providing an overview of state law incorporation of the IDEA's requirements).

state complaints and due process complaints with remarkably positive results.

1. *Multi-Plaintiff Due Process Hearing Requests*

The impartial due process hearing is an adjudicative process to determine whether a child received FAPE, including the opportunity for parents and the school district to put on evidence, present witnesses and expert witnesses, obtain a record of the proceedings, and retain counsel.¹⁷² It includes an extensive prehearing phase, including a complaint, a response, a resolution session, prehearing disclosure, and the opportunity for mediation. The process is overseen by impartial hearing officers who are not employees of the State Education Agency or school district employees.¹⁷³ In some states, hearing officers are appointed from lists maintained by the state education agency and are not necessarily attorneys.¹⁷⁴ In others, the hearing officer is an Administrative Law Judge from the state office or agency in charge of administrative proceedings.¹⁷⁵ Following the hearing, the hearing officer issues a decision about whether FAPE was provided.¹⁷⁶ Thereafter, a party may appeal, first to a review officer in the select states that choose to have a second administrative tier, and then to state or federal court.¹⁷⁷ These administrative procedures must be exhausted before filing any suit in state or federal court under the IDEA,¹⁷⁸ if, as discussed in the previous section, so required under *Perez and Fry*.¹⁷⁹

Testing the limits of such administrative procedures to adjudicate systemic policy issues, the case studies below brought multi-student due process complaints. While neither case was resolved in Plaintiffs' favor by a due process hearing officer, both presented the opportunity to obtain a written decision denying any available policy relief; opened the possibility for mediation and settlement discussions prior to filing federal litigation; and laid the groundwork for future federal litigation by attempting to exhaust the claims at issue. While each case study was filed before or around the time of *Wal-Mart*, which may have increased

¹⁷² 20 U.S.C. § 1415(f), (h); *see also* Zirkel, *supra* note 171, at 3 (describing features of special education due process hearings).

¹⁷³ 20 U.S.C. § 1415(f)(3)(A). The hearing officer, with some limited exceptions, is not directly involved in these enumerated prehearing steps. Zirkel, *supra* note 171, at 8 (citing 20 U.S.C. § 1415(c)(2)(D)).

¹⁷⁴ JOY MARKOWITZ, EILEEN AHEARN, & JUDY SCHRAG, NAT'L ASS'N STATE DIRS. SPECIAL EDUC., INC., *DISPUTE RESOLUTION: A REVIEW OF SYSTEMS IN SELECTED STATES* 14 (2003).

¹⁷⁵ *See* LA. ADMIN. CODE tit. 28, pt. XLIII, § 151(C).

¹⁷⁶ 20 U.S.C. § 1415(f)(3)(d).

¹⁷⁷ 20 U.S.C. § 1415(g), (i)(2)(A); *see also* Zirkel, *supra* note 171, at 3.

¹⁷⁸ 20 U.S.C. § 1415(l).

¹⁷⁹ For further discussion of the IDEA exhaustion requirements, *see supra* Section III(B).

the odds of settlement, this unconventional practice remains worth considering today as a method to either exhaust, or, at a minimum, gain evidence relevant to combatting an exhaustion defense.

a. Jefferson Parish Public Schools

In 2005, the SPLC and the Southern Disability Law Center filed a single due process hearing request on behalf of three students with mental health disabilities and a class of all similarly situated students enrolled in the Jefferson Parish Public School System.¹⁸⁰ The complainants filed this novel due process proceeding not against the school district in which the students were enrolled but against the State Education Agency (SEA) for Louisiana. Since class certification is not available at the administrative level, the complainants filed as a multi-plaintiff due process proceeding. Such a multi-plaintiff approach to administrative remedies, however framed, can go far in obtaining systemic relief, even without systemic federal litigation as part of a class action, as explained below.

The *James T. v. LDOE* “class” due process complaint in Jefferson Parish alleged that the Louisiana Department of Education (LDOE) had failed to fulfill its supervisory and enforcement responsibilities under the IDEA by failing to appropriately monitor and impose corrective action on the local school district for its years of systemic violations of the rights of students with mental health disorders, described under the IDEA as an exceptionality of “Emotional Disturbance.”¹⁸¹ Specifically, the complaint alleged that students with mental health disorders were being suspended and expelled to alternative schools at significantly higher rates than their non-disabled peers; were not being provided with MDRs prior to disciplinary changes in placement; and were not receiving FBAs, BIPs, and related services like social work or counseling to address their behavioral needs.¹⁸² Addressing the issue of IEP placements as discipline in disguise, the complaint also alleged that the district was violating the right to education in the least restrictive environment by using completely segregated self-contained classes to warehouse

¹⁸⁰ For a copy of the due process complaint, ensuing settlement agreement, and Corrective Action Plan for *James T. et al v. LDOE* (*James T.* case), see *Jefferson Parish Special Education*, SPLC, <https://www.splcenter.org/seeking-justice/case-docket/jefferson-parish-special-education> (last visited Aug. 6, 2025).

¹⁸¹ See Request for an Administrative Due Process Hearing Involving James T., Glenn D., Keneisha S. and a Class of All Similarly Situated and Treated Students with Emotional Disturbance in the Jefferson Parish Public School System at 2-7, *James T. v. LDOE*, 45-H-41 (Feb. 1, 2005), https://www.splcenter.org/wp-content/uploads/2009/07/Jefferson_Parish_Complaint.pdf. For regulatory and statutory definitions of “Emotional Disturbance” under the IDEA, see 34 C.F.R. § 300.8(a)(1); see also 20 U.S.C. § 1401(3)(A)(i) (describing disability categories under the IDEA).

¹⁸² *Id.*

students identified with the exceptionality of Emotional Disturbance. The segregated classrooms, operating as special schools within a regular school, were effectively impossible for students with behavioral needs to “earn their way” out of, as the program required, due to a lack of supports and discriminatory exit criteria.¹⁸³ The central theory of the complaint in *James T.* was that the LDOE had violated its duty of general supervision as the SEA to ensure that all education programs for children with disabilities in the state administered by local education agencies meet the educational standards of the SEA, including those related to disciplinary procedures, as required by 42 U.S.C. § 1412 (a) (11) and 34 C.F.R. §§ 300.149 and 300.600.¹⁸⁴ The LDOE had long been aware of the district’s non-compliance around issues like education in the least restrictive environment and disproportionate school discipline rates through its compliance monitoring, but had never imposed corrective action on the school district.¹⁸⁵

Counsel for the complainants were prepared to litigate the due process proceeding and, if necessary, appeal to federal district court after exhausting administrative remedies. LDOE, however, was willing to negotiate, and the *James T.* case ultimately resulted in a settlement agreement requiring appointment of a special master by LDOE over the local school district to oversee the implementation of the corrective action plan required by the settlement.¹⁸⁶ The settlement agreement required elimination of the district’s policy or practice of using informal removals known as “Until Parent Conference” (UPC) or “Cool Off” suspensions with students classified as Emotionally Disturbed.¹⁸⁷ The special master was tasked with developing and implementing a central administrative tracking system for accurately recording the number of disciplinary referrals and removals to prevent informal or undocumented removals from being used.¹⁸⁸ It also required closure of the segregated self-contained classrooms, which students classified as having the exceptionality of Emotional Disturbance could rarely “earn their way” out of due to the structure of the points-based behavioral program used in the classrooms.¹⁸⁹ Corrective action also included development of a written policy requiring an MDR to be held prior to the commencement of any suspension resulting in a student with an exceptionality of Emotional Disturbance being removed for more than ten cumulative school days in a school year. The

¹⁸³ *Id.* at 4.

¹⁸⁴ *Id.* at 7-8.

¹⁸⁵ *Id.* at 6-7.

¹⁸⁶ See Mediated Settlement Agreement ¶¶ 11-13, *James T. v. LDOE*, 45-H-41 (Aug. 2005), https://www.splcenter.org/wp-content/uploads/2009/07/Jefferson_Parish_Agreement.pdf.

¹⁸⁷ *Id.* ¶ 15.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* ¶ 16.

special master was also responsible for developing a training protocol and program for conducting FBAs and drafting and implementing effective BIPs. Data supports that the changes implemented as the result of the settlement agreement benefitted all students, not just special education students with an exceptionality of Emotional Disturbance, as the out-of-school suspension rate for the district fell by nearly half from 29.26% during the 2002-2004 school year to 16.6% in 2007.¹⁹⁰

b. New Orleans Public Schools

In the wake of Hurricane Katrina, New Orleans became the first all-charter school district in the nation. The transition to an all-charter system created difficulties for all but led to particularly challenging problems for special education students and their families. Each charter organization functioned as its own Local Education Agency (LEA) for special education purposes, with no centralized system for enrollment or provision of related services, and no real oversight of special education from the Orleans Parish School Board. Unsurprisingly to many advocates, this decentralized system led to special education students being denied admission to charter schools and being subjected to both formal and informal disciplinary exclusion without any due process protections or procedural safeguards.

To address exhaustion issues, in July of 2010, SPLC and the Loyola Law Clinic filed a class action due process complaint on behalf of thirteen Orleans Parish students with disabilities against LDOE and the Board of Elementary and Secondary Education (BESE).¹⁹¹ The complaint alleged, among other things, that students with disabilities were being denied admission to the public charter schools in the district on the basis of their disabilities and that students with disabilities were being excluded for manifestations of their disabilities because of a failure to follow the procedural safeguards required by law.¹⁹² The complaint relied not just on violations of the IDEA and its regulations, but also alleged as separate counts violations of the anti-discrimination provisions of Section 504 and the ADA.¹⁹³

This multi-plaintiff complaint was filed before a federal class action lawsuit against LDOE and BESE in October 2010, and the Orleans

¹⁹⁰ See LDOE, *Suspensions and Expulsions*, [https://louisianabelieves.com/docs/default-source/data-management/2007-2012-discipline-counts-and-rates-site-\(district-state---public\).xlsx?sfvrsn=e4b2831f_6](https://louisianabelieves.com/docs/default-source/data-management/2007-2012-discipline-counts-and-rates-site-(district-state---public).xlsx?sfvrsn=e4b2831f_6) (last visited Aug. 6, 2025).

¹⁹¹ For the Due Process Complaint, the Federal Court Class Action Complaint, Class Action Settlement, and other documents associated with *P.B. v. Brumley*, see *P.B., et al. v. Brumley*, SPLC, <https://www.splcenter.org/seeking-justice/case-docket/pb-et-al-v-brumley> (last visited Aug. 6, 2025).

¹⁹² Due Process Complaint, *E.A. v. La. Dep't of Educ.* (July 28, 2010) <https://www.splcenter.org/wp-content/uploads/2010/07/NOLAschools072810.pdf>.

¹⁹³ *Id.* at 56-58.

Parish School Board (OPSB) later intervened as a defendant.¹⁹⁴ Although the administrative hearings never concluded, the issues that arose from filing of the multi-plaintiff due process complaint allowed advocates to gather extensive evidence about the unavailability of the administrative proceedings to address their systemic concerns.

The later federal class action suit resulted in a consent judgment focused on independent monitoring in the areas of discipline, enrollment, identifying students with disabilities, and the provision of special education services.¹⁹⁵ The independent monitor was tasked with issuing compliance reports in each of those areas every 180 days.¹⁹⁶ The consent judgment and independent monitoring also spurred the development of a centralized process for handling enrollment, expulsion, and long-term suspension housed within the offices of NOLA Public Schools rather than the individual charter organizations; now, the NOLA Public Schools Student Hearing Office conducts all student disciplinary conferences and expulsion hearings for students with and without disabilities.¹⁹⁷ If a student with disabilities is recommended for expulsion, the Student Hearing Office reviews the record to ensure an MDR has been held in compliance with state and federal special education laws and regulations.¹⁹⁸ If a timely MDR has not been held, then the Student Hearing Office will not proceed with the expulsion hearing and will send the student back to their placement at the referring school.¹⁹⁹

Although suspensions remain a problem, the implementation of this centralized disciplinary process led to a significant reduction in the number of expulsions, from a high of 440 expulsions in a school year to a low of sixty-seven expulsions several years after the entry of the consent judgment and creation of the Student Hearing Office.²⁰⁰ The litigation also led to the creation of NOLA Public Schools guidance regarding informal suspensions, which requires charter schools within the district to accurately document all school removals for disciplinary purposes,

¹⁹⁴ See Complaint, P.B. v. Pastorek, No. 2:10-cv-04049 (Oct. 26, 2010), https://www.splcenter.org/wp-content/uploads/2010/11/pb_v_pastorek.pdf; see also Order, P.B. v. White, No. 2:10-cv-04049 (E.D. La. Mar. 20, 2012), Rec. Doc. 140.

¹⁹⁵ See Consent Judgment, P.B. *ex rel.* Berry v. White, No. 2:10-cv-04049 (Mar. 25, 2015), https://www.splcenter.org/wp-content/uploads/2015/03/pb_order.pdf.

¹⁹⁶ Jaclyn Zubrzycki, *New Orleans Schools Unite on Expulsions*, EDUC.WEEK (Feb. 19, 2013), <https://www.edweek.org/leadership/new-orleans-schools-unite-on-expulsions/2013/02>.

¹⁹⁷ See NOLA PUB. SCHS., STUDENT HEARING OFF.: MANUAL FOR DISCIPLINARY PROCEDURES 22 (2024), <https://nolapublicschools.com/documents/2024-2025-student-hearing-office-manual/download?p=1>.

¹⁹⁸ *Id.* at 28.

¹⁹⁹ *Id.* at 26-27.

²⁰⁰ Wilborn P. Nobles III, *New Orleans Schools Seek Better Discipline Process as Expulsions Drop But Suspensions Rise*, NOLA.COM (June 27, 2019), https://www.nola.com/news/education/new-orleans-schools-seek-better-discipline-process-as-expulsions-drop-but-suspensions-rise/article_b777475f-4267-5bff-8a97-8b6847af2692.html.

including students sent home for a portion of a school day, in order to properly facilitate the administration of procedural safeguards like MDRs.²⁰¹ The consent judgment remains in force nearly ten years since.²⁰²

2. *Multi-Plaintiff Administrative Complaints*

Another avenue of relief is federal and state administrative complaints. While these administrative complaints cannot independently satisfy IDEA exhaustion requirements,²⁰³ they are resource-efficient options to seek systemic relief before costly and time-intensive litigation. At the federal level, complaints of disability discrimination can be filed with the U.S. Department of Education Office for Civil Rights (OCR)²⁰⁴ and the U.S. Department of Justice (DOJ) Educational Opportunities section. OCR enforces civil rights laws prohibiting discrimination based on race, color, national origin, sex, disability, and age in schools that receive federal funding.²⁰⁵ DOJ investigates similar discrimination complaints in schools.²⁰⁶ While neither agency enforces the IDEA, both agencies have authority to investigate disability discrimination under the ADA and Section 504.

At the state level, the IDEA requires a parallel but distinct administrative complaint process. Amendments to the IDEA in 1992 require all state educational agencies to provide complaint procedures concerning IDEA violations to parents, community members, and others.²⁰⁷ The precise content of these procedures is delegated to each state educational agency.²⁰⁸ Generally, however, the process for

²⁰¹ See NOLA PUB. SCHS., PB v. WHITE – UNDOCUMENTED SUSPENSION GUIDANCE (n.d.), https://noscihigh.org/files/galleries/Undocumented_Suspension_Guidance.pdf (last visited Aug. 4, 2025). The policy delineates that “[r]emovals that result in a student’s absence for less than half of an academic day should be recorded as a half-day of removal; removals for more than half of a school day should be recorded as whole-day removals.”

²⁰² On February 12, 2025, the Defendants filed a motion to terminate the Consent Judgment. See Motion to Dismiss, P.B. v. White, No. 2010-cv-04049 (E.D. La. Feb. 12, 2025), Dkt. No. 466.

²⁰³ See generally *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1074 (9th Cir. 2002) (“Only § 1415 procedures are required to be exhausted prior to suit.”).

²⁰⁴ This Article does not address the potential diminishment or closure of OCR under the Trump Administration. For more information on this topic, see Collin Binkley & Bianca Vázquez Toness, *In Trump’s Quest to Close the Education Department, Congress and His Own Agency May Get in the Way*, ASSOCIATED PRESS (Feb. 4, 2025), <https://apnews.com/article/trump-education-department-executive-order-8519eaa465385cc13f4ddcae90228dd3>.

²⁰⁵ *Your Rights*, DEP’T OF EDUC. (Jan. 15, 2025), <https://www.ed.gov/about/ed-offices/ocr/know-your-rights>.

²⁰⁶ *Educational Opportunities Section*, DOJ: C.R. Div., <https://www.justice.gov/crt/educational-opportunities-section> (last visited Aug. 4, 2025).

²⁰⁷ Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures Under the Individuals with Disabilities Education Act*, 368 WEST’S EDUC. LAW REP. 24, 25 (2019).

²⁰⁸ *Id.*

state investigations parallels the administrative procedures followed by federal agencies. States must provide an optional on-site school investigation; an opportunity for the complainant to provide additional information, including orally; an opportunity for the school district to resolve the complaint; a mutual opportunity for mediation; review of all relevant submitted information; and a written decision with an independent determination as to whether a school district violated a requirement of the IDEA.²⁰⁹ These determinations address FAPE violations, and state educational agencies are permitted to award compensatory services and other prospective corrective action necessary to ensure compliance.²¹⁰

While advocates often look to DOJ and OCR to combat a wide range of disability discrimination issues,²¹¹ these state procedures should not be overlooked, especially with shifting priorities in discrimination enforcement between presidential administrations.²¹² Even in Louisiana, multi-student administrative state complaints have been used to combat informal removals.²¹³

For example, in 2006 and 2007, the SPLC and the Southern Disability Law Center sought to combat informal exclusions in three other large school districts in Louisiana besides Jefferson and Orleans Parish, with similar problematic disciplinary practices and elevated rates of exclusionary discipline against students with disabilities. As a result of the willingness shown by LDOE to impose systemic corrective action, the advocates opted to switch strategies and file systemic state administrative complaints, with multiple complainants, directly against the school districts for East Baton Rouge Parish, Caddo Parish, and Calcasieu Parish. The earliest multi-student administrative complaint was filed against the East Baton Rouge Parish Public School System and named two middle

²⁰⁹ *Id.* (citing 30 C.F.R. § 300.151, 153).

²¹⁰ 30 C.F.R. § 300.151(b) (stating that the SEA remedies “must address (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) Appropriate future provision of services for all children with disabilities”); *see also id.* § 300.152(b)(2) (describing “procedures for effective implementation . . . , if needed, including (i) Technical assistance activities; (ii) Negotiations; and (iii) Corrective actions to achieve compliance”).

²¹¹ Anderson, *supra* note 93, at 248 (“OCR complaints remain an avenue for relief that has traditionally been a favored method by aggrieved parents or advocacy organizations.”).

²¹² *See, e.g., Brooke Shultz, Trump Shakeup Stops Most Work at Education Department’s Civil Rights Office*, EDUC.WEEK (Feb. 14, 2025), <https://www.edweek.org/policy-politics/trump-shakeup-stops-most-work-at-education-departments-civil-rights-office/2025/02>.

²¹³ For examples of successful “class” administrative complaints in other contexts, *see, for example*, ALLISON ZIMMER, LA. CTR. FOR CHILD.’S RTS., LEARNING INTERRUPTED 31-32 (n.d.), <https://lakidsrights.org/wp-content/uploads/2022/09/LEARNING-INTERRUPTED-email.pdf> (last visited Aug. 6, 2025) (detailing two successful multi-student administrative complaints seeking to obtain compensatory education services and policy change for children in juvenile detention in Louisiana).

schoolers with Emotional Disturbance as complainants.²¹⁴ It alleged class-wide violations and sought systemic relief for the district's failure to follow IDEA disciplinary provisions related to holding MDRs, conducting FBAs, and developing and reviewing BIPs.²¹⁵ The complaint also detailed the frequent use of informal "cool-down" suspensions to evade required IDEA disciplinary procedures.²¹⁶ The parties agreed to mediation and entered into a mediation agreement that required the district to hire a behavioral consultant from a list provided by the complainants.²¹⁷ The main role of the behavioral consultant was to develop and implement a Positive Behavioral Support (PBS) training program and protocol for the district that included specific "strategies, objectives, and timelines" for reducing the long-term suspensions and expulsions of students with Emotional Disturbance and increasing their access to regular education classes.²¹⁸ The agreement also called for the development of a tracking system for accurately recording the number of disciplinary referrals and removals for the class of students.²¹⁹ The agreement further required a revision of the district's Discipline Handbook to include provisions expressly prohibiting informal removals including "cooling off" periods and requests for parent pickup of students.²²⁰

In December of 2006, advocates filed a similar "class" administrative complaint against the Caddo Parish Public School System on behalf of six middle and high school special education students with exceptionalities of Emotional Disturbance.²²¹ The complaint alleged system-wide failure to provide sufficient related services to address behavioral needs; educate students with Emotional Disturbance in the least restrictive environment; and follow IDEA disciplinary procedures related to MDRs, FBAs, and BIPs.²²² When negotiations with the school district stalled, parents' counsel began negotiating with LDOE to avoid filing a class due process complaint against the SEA similar to the one used in Jefferson Parish. As a result, the LDOE conducted a site visit and issued a monitoring report

²¹⁴ James Comstock-Galagan, *et al.*, Administrative Complaint at 1 (May 10, 2006), https://www.splcenter.org/wp-content/uploads/2009/07/East_Baton_Rouge_Complaint.pdf. To access the East Baton Rouge Parish Class Administrative Complaint and ensuing Mediation Agreement, see *East Baton Rouge Special Education*, SPLC, <https://www.splcenter.org/seeking-justice/case-docket/east-baton-rouge-special-education> (last visited Aug. 6, 2025).

²¹⁵ See Comstock-Galagan, *supra* note 214.

²¹⁶ *Id.* at 6-7.

²¹⁷ See Mediation Agreement ¶¶ 1-2 (Sept. 18, 2006), https://www.splcenter.org/wp-content/uploads/2009/07/East_Baton_Rouge_Agreement.pdf.

²¹⁸ *Id.*

²¹⁹ *Id.* ¶ 7.

²²⁰ *Id.*

²²¹ H. Clay Walker, *et al.*, Class Administrative Complaint at 2 (Dec. 13, 2006), https://www.splcenter.org/wp-content/uploads/2009/07/Caddo_Parish_Complaint.pdf. To access both the Caddo Parish Class Administrative Complaint and Negotiated Settlement Agreement, see *Caddo Parish Special Education*, SPLC, <https://www.splcenter.org/seeking-justice/case-docket/caddo-parish-special-education> (last visited Aug. 6, 2025).

²²² *Id.* at 3-8.

for the district in February 2008, which substantiated many of the violations alleged in the class administrative complaint.²²³ The named complainants and LDOE then entered into a negotiated settlement agreement requiring the hiring of an independent consultant or independent management team to oversee the implementation of an Intensive Corrective Action Plan (ICAP) for the Caddo Parish school district.²²⁴ The ICAP required similar measures to the agreements in Jefferson and East Baton Rouge Parish related to training programs, protocols, and policies for positive behavioral supports, FBAs, BIPs, and MDRs.²²⁵

The advocates then filed a third and final “class” administrative complaint against the Calcasieu Parish Public School System in September 2007.²²⁶ The parties entered into a negotiated settlement agreement just over a month later. Like the other settlements, the agreement called for the hiring of a consultant to oversee the development and implementation of training programs, protocols, policies, and tracking systems designed to ensure compliance with the disciplinary procedures required by the IDEA.²²⁷ The Calcasieu settlement also devoted a section of the agreement to ensuring the provision of a commensurate school day for students with Emotional Disturbance. The purpose of this section was to eliminate the school district’s practice of shortening the school day of students with Emotional Disturbance by delaying their start time or requiring them to leave early, and thereby providing them with less education than their non-disabled peers.²²⁸

Thus, while each complaint and resulting settlement agreement varied in their details to account for the particular context of each school district, the same general strategy resulted in systemic reform that addressed pervasive practices of evading the IDEA’s disciplinary safeguards. It should be noted, however, that each of these complaints took place during a time in which the state department of education was a relatively willing and reform-minded participant; such strategies could be less effective under a different administration with different priorities.²²⁹

²²³ See Negotiated Settlement Agreement at 1 (Mar. 2008), https://www.splcenter.org/wp-content/uploads/2009/07/Caddo_Parish_Settlement.pdf.

²²⁴ *Id.*

²²⁵ *Id.* at 2-3.

²²⁶ James Comstock-Galagan, *et al.*, SPLC, Class Administrative Complaint at 1 (Sept. 21, 2007), https://www.splcenter.org/wp-content/uploads/2009/07/Calcasieu_Parish_Complaint.pdf. To access the Calcasieu Parish Class Administrative Complaint, Negotiated Settlement Agreement, and Corrective Action Plan, see *Calcasieu Parish Public School System*, SPLC, <https://www.splcenter.org/seeking-justice/case-docket/calcasieu-parish-public-school-system> (last visited Aug. 6, 2025).

²²⁷ See Negotiated Settlement Agreement ¶¶ 1-3 (Oct. 11, 2007), https://www.splcenter.org/wp-content/uploads/2009/07/Calcasieu_Parish_Agreement.pdf.

²²⁸ See *id.* ¶ 15.

²²⁹ At the time of the complaints discussed from 2006 to 2007, the Louisiana Department of Education was controlled by appointees of Governor Kathleen Blanco, including

B. Targeted Multi-Plaintiff Systemic Litigation Grounded in Federal and State Civil Rights Law

After the initial decision of whether to exhaust, or attempt to exhaust, state-level administrative processes, or otherwise pursue settlement prior to state or federal litigation, advocates then face the issue of whether to seek class certification in their state and federal court filings. This is a step advocates sometimes overlook or miss, as class action litigation is the most typical variety of systemic reform litigation. Class certification, however, is by no means a requirement for systemic reform impact litigation, as the case study below demonstrates.²³⁰

In further pursuit of combatting informal and other undocumented removals in Louisiana, the SPLC and the Loyola Law Clinic recently brought a lawsuit in federal court on behalf of five students in St. Bernard Parish.²³¹ The lawsuit alleged multiple violations of federal law on behalf of the plaintiff-students, without class-wide claims for relief.²³² Located in the Greater New Orleans area near the lower Ninth Ward, St. Bernard Parish has experienced demographic shifts in recent years, especially since Hurricane Katrina, leading to more students of color in the public school system.²³³ The district has only two high schools: the traditional high school and C.F. Rowley Alternative (Rowley), an alternative school for suspended and expelled students.²³⁴ While the school district is predominantly White, the student population at Rowley is majority-Black and includes a disproportionate number of students with disabilities.²³⁵

This case began in the law school clinic, with law student practitioners at the Loyola Law Clinic representing several students with disabilities in St. Bernard Parish in school discipline hearings and special education due process proceedings after they had been referred to the district's

Cecil Picard and Paul Pastorek. See *Paul Pastorek Named Interim State Superintendent of Education*, WAFB (Mar. 4, 2007, at 22:26 CST), <https://www.wafb.com/story/6162443/paul-pastorek-named-interim-state-superintendent-of-education/>.

²³⁰ See generally Maureen Carroll, *Aggregation for Me, But Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2017 (2015) ("When a plaintiff seeks an injunction or declaration based on a defendant's generally applicable policy or practice, the case has an inherently aggregate dimension, regardless of whether the plaintiff brings it as a class action or as an individual suit.").

²³¹ Second Amended Complaint, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

²³² *Id.*

²³³ Chad Calder & Jeff Adelson, *Built for White Residents Fleeing the City, Inner Suburbs Like St. Bernard are Increasingly Diverse*, NOLA.COM (Dec. 31, 2021), https://www.nola.com/news/built-for-white-residents-fleeing-the-city-inner-suburbs-like-st-bernard-are-increasingly-diverse/article_de34b954-57c1-11ec-8b84-d7f44244c257.html.

²³⁴ Second Amended Complaint ¶ 37, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

²³⁵ *Id.* ¶ 45; see also *Enrollment Data*, LA. DEP'T OF EDUC., <https://www.louisianabelieves.com/resources/library/student-attributes> (last visited Aug. 6, 2025).

alternative school. The students, clinicians, and authors of this Article eventually noticed a pattern of violations. Students with disabilities and students of color were routinely sent to the district alternative school for long periods of time, without due process or special education protections, purportedly for different reasons, but with the same result: indefinite school exclusion typically lasting for well over the equivalent of a full semester, which, if for disciplinary reasons constitutes an expulsion as defined under state law.²³⁶ The clinic students provided the initial legal representation in special education proceedings and any disciplinary hearings or meetings, under clinician supervision. In addition to providing a unique pedagogical experience for the students with opportunities to prepare witnesses, compile exhibits, and practice other trial advocacy skills in two full due process hearings, this process successfully exhausted the claims of future plaintiffs in the federal litigation.

The subsequent federal complaint did not include class allegations, but rather specific factual allegations for multiple plaintiffs.²³⁷ A record review conducted by the clinical students, and subsequent cite checking and drafting, significantly sped up the complaint drafting process. Based on these individual allegations and publicly available information and data, the complaint alleged that the school district had a policy and practice of involuntarily and discriminatorily placing students at Rowley for months or even years without following state and federal law.²³⁸ According to the complaint, the school district forced parents to sign a waiver of their child's right to a due process hearing to avoid arrest or an expulsion on their permanent record, or otherwise suspended the students and then prohibited their return.²³⁹ Once placed at Rowley, students were denied education and special education services and supports; were subjected to excessive contact with law enforcement; were segregated from non-disabled peers; and were effectively barred from exit based on an unfair point system.²⁴⁰ As in Jefferson Parish, the complaint alleges that it was effectively impossible for students with behavioral needs to "earn their way out" of the alternative school due to a lack of supports and discriminatory exit criteria, including the point system.²⁴¹ The suit included claims on behalf of the individual students under the U.S. Constitution, the Louisiana Constitution, the ADA, Section 504 of the Rehabilitation Act, the Louisiana Human Rights Act, and other Louisiana state laws.²⁴² The relief sought included not only

²³⁶ Second Amended Complaint at 2, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. May 20, 2024).

²³⁷ *Id.*

²³⁸ *Id.* ¶ 60.

²³⁹ *Id.* ¶¶ 59-61.

²⁴⁰ *Id.*

²⁴¹ *Id.* ¶¶ 59-71.

²⁴² *Id.* ¶¶ 156-204.

injunctive relief to prevent future placements at the alternative school, but also district-wide disciplinary policy change and damages.²⁴³

Once the federal litigation was underway, the SPLC took a more central role in navigating complex issues of federal civil procedure, with students participating in discrete processes including discovery review, responses, and legal research. Students also had the opportunity to attend hearings in federal court and to participate in settlement conferences with the Magistrate Judge. Following the settlement negotiations, the parties reached a settlement agreement that demonstrates that class claims are not necessary to gain meaningful systemic relief against discipline in disguise.²⁴⁴ The agreement alters the school district's official policies, student handbooks, and other public-facing documents to require, prior to an alternative school placement, the school district to provide due process and an MDR meeting. The district-wide policy changes include a requirement that students receive due process before disciplinary transfer to an alternative school; that students receive a definite exit date if referred to the alternative school; and that students again receive due process if, for any reason, they are held at the alternative school past their exit date. The agreement further requires public data reporting on alternative school placements longer than a school semester, as well as training for school staff. While the agreement does not impose independent monitoring, the data transparency, public notification, and alteration of school board policies provide a key mechanism for parents to hold the school district accountable.

C. *Limitations and Direction*

The above case studies show that traditional IDEA class action litigation is far from the only method to combat discipline in disguise. A variety of other advocacy and litigation strategies, which may be more accessible to law clinicians than typical special education class action litigation, exist to avoid this costly and—given recent developments in case law—often risky strategy. Given the unfavorable case law on exhaustion and class certification for IDEA class actions in the past decade, many of these more traditional class action lawsuits can be litigated for years before ultimately being dismissed on threshold, procedural issues.²⁴⁵ In some cases, these risks may be worth taking; however, most law school clinicians, civil rights lawyers, special education practitioners, and nonprofit organizations lack the resources

²⁴³ *Id.* ¶¶ 48-50.

²⁴⁴ Settlement Agreement, P.A. *ex rel.* A.A. v. Voitier, No. 2:23-cv-02228 (E.D. La. Feb. 26, 2025), Dkt. No. 102-3 [hereinafter St. Bernard Parish Settlement Agreement].

²⁴⁵ *See, e.g.*, Section III(B) (discussing *S.S. ex rel. S.Y. v. City of Springfield*).

to undertake substantial, multi-year risks. This section will explore the benefits and drawbacks of alternative litigation strategies.

FIGURE I: BENEFITS AND DRAWBACKS OF CASE STUDIES’ APPROACH TO DISCIPLINE IN DISGUISE

	Benefits	Drawbacks
Multi-plaintiff due process hearings	<ul style="list-style-type: none">+ Shorter and less expensive+ Provides basis for exhaustion defense for later state/federal court litigation+ May result in settlement or mediation before costly state/federal court litigation+ Student exposure to trial advocacy skills	<ul style="list-style-type: none">- Length of administrative proceedings may depend on defendants’ litigation strategy (<i>i.e.</i>, whether or not defendants file a motion to dismiss)- Could result in resource-intensive parallel administrative proceedings- Federal or state claimants may be required to preserve claims before administrative hearings conclude- If proceeding does not progress beyond due process, limitation to remedies available under the IDEA
Multi-student state administrative complaints	<ul style="list-style-type: none">+ Minimal resource investment apart from complaint drafting+ Well established process for systemic relief, including through settlement or mediation+ Not preclusive+ Possible intensive and independent drafting experience for students and negotiation experience in mediation or settlement	<ul style="list-style-type: none">- No appeal available- Not sufficient to satisfy exhaustion requirements- Generally, one-year statute of limitations, without any tolling effect on other claims- Availability of non-settlement relief subject to the state department of education’s discretion- Not typically fee-generating
Multi-plaintiff systemic litigation	<ul style="list-style-type: none">+ Urgent claims on behalf of individual plaintiffs may be pursued in due process proceedings+ Parallel due process claims can challenge policy and practice+ Monetary, injunctive, and declaratory relief can be sought for individual students+ Lengthy consent decree or independent monitoring process will not impede litigation if school district strategy shifts to alternative methods of exclusion+ Student exposure to systemic federal and state litigation	<ul style="list-style-type: none">- Exhaustion of individual plaintiffs still may be required unless monetary relief sought- Injunctive relief usually limited to individual plaintiffs, except as to modification of formal policies- Independent monitoring unlikely, and, therefore, subsequent litigation to enforce policy change may be required

First, advocates and clinicians bringing due process complaints on behalf of students, or advocates and clinicians who seek to bring federal civil rights litigation, should not overlook state-level administrative processes, including due process hearings and state administrative complaints, as a preliminary defense against informal and undocumented disciplinary practices. Multi-plaintiff due process hearings, such as the New Orleans and Jefferson Parish Public Schools case studies explored above, can open mediation discussions about systemic relief, especially where such preliminary administrative proceedings demonstrate that any exhaustion defenses in state or federal court will face substantial barriers. At the very minimum, multi-plaintiff due process requests can help to establish that the lawsuit is appropriately litigated in federal court, notwithstanding exhaustion defenses, if, at the administrative level, the hearing officer rules that systemic ADA and 504 claims must be dismissed due to a lack of jurisdiction. Such a ruling could be used to conclusively show not only administrative exhaustion²⁴⁶ but also, in the alternative, the unavailability of relief in the administrative forum in later state or federal court litigation, *i.e.*, futility.²⁴⁷

Of course, this strategy relies on some factors not necessarily within litigants' control: namely, defendants typically would have to file a motion to dismiss to obtain such a ruling. It also carries some risks—for example, if the motion is granted and jurisdiction is denied, the parents and students may face a difficult decision between accepting an IDEA settlement with a universal waiver, including of 504/ADA claims.²⁴⁸ If such a motion is not filed early in the litigation, or if the motion is denied,²⁴⁹ advocates may face the daunting prospect of litigating several parallel due process hearings simultaneously. For an independent practitioner, a small nonprofit organization, or a law clinic

²⁴⁶ See, e.g., *S.P. ex rel. M.P. v. Knox Cnty. Bd. of Educ.*, 329 F. Supp. 3d 584, 593 (E.D. Tenn. 2018) (denying motion to dismiss for failure to exhaust where the ADA claim for lack of jurisdiction “was heard on the substance and granted” at the administrative hearing level); Saideman & Scavongelli, *supra* note 126.

²⁴⁷ See, e.g., *Cayla R. v. Morgan Hill Unified Sch. Dist.*, 5:10-cv-04312, 2012 WL 1038664, at *4 (N.D. Cal. Mar. 27, 2012) (Section 504 claim exhaustion was futile where the hearing officer “routinely dismisses claims brought under [Section] 504 for lack of jurisdiction”); see Scavongelli & Saideman, *supra* note 126.

²⁴⁸ One approach to this issue would be to obtain a carve-out in the settlement agreement waiver for 504/ADA claims. If the school district refuses to accept this carve-out, advocates also may want to consider whether their client, at some point in the negotiations, wants to make a written counter-offer conditioning settlement upon no waiver for ADA/504 claims and obtain a rejection in writing. See Saideman & Scavongelli, *supra* note 126.

²⁴⁹ An adjudication on the merits, if the systemic claim proceeds, can be appealed to complete the exhaustion process. 20 U.S.C. § 1415(*l*). Advocates seeking this conclusive adjudication at the administrative level should note that at least one district court has held that § 1415(*l*) may require a state administrative hearing officer to exercise jurisdiction over some non-IDEA claims. See *In re P.G. v. Genesis Learning Ctrs.*, No. 3:19-cv-00288, 2019 WL 3323163 (M.D. Tenn. July 18, 2019).

professor supervising multiple students, this burden may be substantial. To combat this risk, advocates can frame the relief requested in systemic terms only, *i.e.*, policy change and/or damages, rather than individual remedies such as compensatory education or a new school placement for an individual child. Of course, such requested remedies must align with the clients' goals. And in some cases, it can be challenging to find multiple clients at once with the same systemic objective, particularly within the typical one to two-year statute of limitations for IDEA claims.²⁵⁰ Nonetheless, where practitioners receive multiple similar cases from a single school district within a short period of time, such multi-plaintiff due process hearing requests should be considered as less resource-intensive options to obtain maximum impact before state or federal court litigation.

Even less resource-intensive, state administrative complaints remain a second option, particularly in states where the state department of education is politically interested in and motivated to hold school districts accountable. Although such procedures do not satisfy the requirements of exhaustion under the IDEA,²⁵¹ they avoid the risk of litigating multiple adversarial due process hearings simultaneously; indeed, advocates have minimal involvement after the complaint is filed.²⁵² In a clinical setting, this offers a discrete and time-limited opportunity for students to practice making systemic claims before full-blown federal or state court litigation. And state complaint procedures are more well-established than due process hearings as an avenue for systemic relief. However, state administrative complaints generally have a one-year statute of limitations,²⁵³ and so multiple plaintiffs with parallel interests must be located and aggregated quickly; often, this is a barrier, especially where the advocate wants to pursue a due process hearing or direct state/federal court litigation simultaneously. Advocates and clinicians may not want to expend resources to pursue this additional remedy before other litigation, especially where it is not

²⁵⁰ 20 U.S.C. § 1415(f) ("A parent or agency shall request an impartial due process hearing within 2 [sic] years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows."). For a state-by-state analysis of shorter and longer IDEA statutes of limitation specified by state law, see Perry A. Zirkel, *The Statute of Limitations for an Impartial Hearing Under the IDEA: A Guiding Checklist*, 363 WEST'S EDUC. LAW REP. 483 (May 2, 2019).

²⁵¹ See *Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1074 (9th Cir. 2002).

²⁵² See Section III(A)(2) (discussing state administrative complaint procedures).

²⁵³ 34 C.F.R. § 300.153(c). At least one state, however, has expanded the statute of limitations to two years. LA. ADMIN. CODE tit. 28, pt. XLIII, § 152 (2024).

fee-generating;²⁵⁴ however, from the standpoint of pursuing systemic relief, the juice can be well worth the squeeze. Even in states with less progressive state departments of education, multi-student state administrative complaints signal potential future state or federal court litigation—and, critically, offer school districts an off-ramp through mediation and settlement.

Systemic settlement, of course, is not the only possible outcome of such complaints, although for many advocates and school districts, it is a desirable and efficient one. The agency may also issue a ruling in the complainants' favor, which can buttress later litigation even if it does not satisfy exhaustion requirements. In *Fry v. Napoleon Community Schools*, for example, the parents filed a complaint with OCR before filing the federal lawsuit that eventually reached the Supreme Court.²⁵⁵ OCR decided in the parents' favor that the school district had discriminated against the student and required the school to provide a new IEP that included a provision allowing her service dog in school.²⁵⁶ Nonetheless, out of fear of ill will from school officials, the parents enrolled their child in another school and sued the school district in federal court seeking declaratory and monetary relief.²⁵⁷ Importantly, such subsequent litigation is not precluded by the federal or state administrative complaint process.²⁵⁸ Furthermore, while advocates run the risk of a negative administrative outcome from the administrative agency without any opportunity to appeal,²⁵⁹ those administrative decisions do not have preclusive effect on independent lawsuits.²⁶⁰ Advocates still must take care, however, to file any lawsuit within the

²⁵⁴ See Vultaggio *ex rel.* Vultaggio v. Bd. of Educ., 343 F.3d 598, 599 (2d Cir. 2003) (affirming that state complaint procedures “[are] not an ‘action or proceeding’ within the meaning of IDEA’s attorneys’ fees provision”).

²⁵⁵ 580 U.S. 154, 163 (2017).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Importantly, the federal and state administrative processes are not mutually exclusive. See Peter J. Maher, Note, *Caution on Exhaustion: The Courts’ Misinterpretation of the Idea’s Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the Idea*, 44 CONN. L. REV. 259, 271 (2011) (noting the OCR “regulations do not require parties to exhaust [the state] grievance procedure before filing a complaint with OCR for a violation of Section 504, although [they] encourage[] parties to use the grievance procedure and resolve disputes at the local level” (citing Analysis of Final Regulations, 34 C.F.R. § 104 App. A ¶ 12 (2011))).

²⁵⁹ 34 C.F.R. § 300.153(c).

²⁶⁰ *Caldwell v. Knox Cnty. Bd. of Educ.*, No. 3:13-CV-552, 2014 WL 3735840, at *6 (E.D. Tenn. July 29, 2014) (“[A]s a number of courts have found, [where] plaintiffs . . . have an adequate remedy in a court, [it] precludes judicial review of the OCR proceedings: they can sue the alleged wrongdoer directly.” (citing, *inter alia*, *Wash. Legal Found. v. Alexander*, 984 F.2d 483, 486 (D.C. Cir. 1993) (“[A]n adequate remedy is available to appellants, and we therefore conclude that appellants have no cause of action under the APA for the discrimination alleged.”))); *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999) (“[W]e think that [the] direct remedy against funding recipients is not

relevant limitations period, as the state administrative complaint does not toll an otherwise applicable statute of limitations.²⁶¹

The final alternative explored in this Article is multi-plaintiff systemic litigation. Without class claims, this form of litigation avoids a post-*Wal Mart* class certification dispute, while maximizing plaintiffs' ability to pursue IDEA, 504, and ADA claims for relief, including money damages. From the perspective of effective clinical pedagogy, the time-limited nature of this approach is attractive as well; where IDEA class action litigation may sometimes go on for a decade or more at a time, multi-plaintiff litigation is more likely to last for approximately one to three years, allowing clinic students to be involved in a significant portion of the duration of the case. Exhaustion issues may remain for claims seeking injunctive or declaratory relief, and multiple clients may have to be exhausted—along with their ADA/504 claims²⁶²—in administrative due process hearings to support multi-plaintiff litigation.²⁶³ However, those administrative due process hearings can occur on individual timelines, which is particularly useful if a plaintiff is facing exigent circumstances.²⁶⁴ Following the conclusion of administrative proceedings, a motion to add new plaintiffs can be filed after exhaustion is complete,²⁶⁵ and these administrative hearings provide a fertile environment for dedicated clinical students to practice putting on witnesses and evidence, as well as conducting direct and cross-examinations. If initial administrative proceedings fail to produce the systemic relief requested, advocates may be able to support arguments that new plaintiffs raising similar claims should join the litigation without due process proceedings, on the basis that relief is effectively unavailable in the administrative forum.²⁶⁶

only 'adequate,' but, as the Supreme Court recognized, is preferable to a direct suit against the agency itself.”).

²⁶¹ With multi-plaintiff due process hearings, plaintiffs should be careful not to allow the statute of limitations to impede future litigation in state or federal court. In contrast to traditional IDEA claims that can be appealed, *see* 20 U.S.C. § 1415(i), administrative proceedings seeking systemic relief may not follow the same procedure, especially if the administrative process results in a ruling that advocates do not want to appeal, *i.e.*, that the administrative process is unavailable.

²⁶² Some courts have held that the non-IDEA claim, like the IDEA claim, must be exhausted in the administrative forum. *See, e.g.*, *C.W. v. Denver Cnty. Sch. Dist. No. 1*, 17-cv-02462, 2019 WL 4674331, at *23 (D. Colo. Sept. 25, 2019), *appeal dismissed*, 994 F.3d 1215 (10th Cir. 2021); *Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1192 (11th Cir. 2018); *see also Saideman & Scavongelli, supra* note 126.

²⁶³ *See* Section III(B) (discussing *Perez* and limitations on money damages since *Cummings*).

²⁶⁴ *See* 20 U.S.C. § 1415(j)(4)(B) (providing expedited treatment for due process hearings during a period of school exclusion).

²⁶⁵ *See* Fed. R. Civ. P. 15(a)(2) (directing federal courts to “freely give leave [to amend] when justice so requires”).

²⁶⁶ *See* Section III(B) (discussing futility exception, including the “unsuitability” as well as “unavailability” of the administrative forum).

In multi-plaintiff systemic limitation, due process claims under the federal constitution, state constitution, and state laws also expand opportunities for relief. In the context of combatting discipline in disguise, due process claims in particular have distinct benefits, because they are not subject to the same potential limitations on money damages as 504 and ADA claims, and they do not require exhaustion of special education due process proceedings. Due process claims further allow advocates to seek relief on behalf of not only students with disabilities, but also other students, especially students of color, disproportionately subjected to informal removals along with students with disabilities.²⁶⁷ Such claims, however, may be more straightforward to pursue with certain kinds of informal removals more obviously akin to suspension and expulsion—such as calling parents to pick up children from school²⁶⁸—than other forms of undocumented discipline purporting to provide therapeutic interventions and education, such as alternative school, public day school, or homebound placement.²⁶⁹

Of course, pursuit of multi-plaintiff litigation, as opposed to traditional class litigation, has trade-offs, regardless of the claims pursued. Most importantly, individual plaintiffs who seek injunctive or declaratory relief against a generally applicable policy or practice are typically entitled to receive only individual injunctive relief, even if that individual relief is predicated on substantive proof of a policy, practice, or systemic violation.²⁷⁰ It can be challenging to obtain evidence of widespread practices without class certification, especially in cases involving sensitive information about minors that may be subject to additional protections beyond traditional discovery rules.²⁷¹ That said, if multiple plaintiffs are bringing the litigation, full school records will be available for each individual student, and evidence of systemic practices in the school district also can be drawn across the multiple student-litigants' records in combination with aggregate data about discipline in the school district,²⁷²

²⁶⁷ See Section II (discussing disproportionate informal removals of Black students).

²⁶⁸ See *supra* note 116 (discussing class action litigation in Massachusetts challenging this practice).

²⁶⁹ But see *supra* notes 112-113 (discussing successful lawsuits bringing due process claims on behalf of students sent to alternative schools and, in one instance, placed on homebound instruction).

²⁷⁰ Carroll, *supra* note 230, at 2063 (discussing difference between private agreements in “quasi-individual” actions and consent decrees in class action cases).

²⁷¹ Compare P.A. *ex rel.* A.A. v. Voitier, No. CV 23-2228, 2024 WL 3967474, at *8-9 (E.D. La. Aug. 28, 2024) (permitting discovery on some but not all information requested about students in comparable circumstances in multi-plaintiff systemic litigation), with *id.* at *7 (requiring production of information about relevant nonparty students in school district, but allowing redaction of identifying information).

²⁷² This data can typically be obtained through publicly available sources such as the CRDC. See U.S. DEP’T OF EDUC., CRDC, <https://civilrightsdata.ed.gov/> (last visited Aug. 6, 2025). Alternatively, data can be collected through public records requests, or, in the absence

especially through expert testimony. And even if a motion to compel is required to ensure access to non-plaintiff records, such discovery litigation can be more efficient than resolution of a class certification dispute.

The problem, therefore, is not necessarily in proving systemic practices, but in obtaining systemic relief. Where consent decrees and independent monitoring are not available, advocates may have to bring subsequent litigation to ensure that systemic practices identified as unlawful are, in fact, reformed—which, without a consent decree or independent monitoring, can be challenging to do. However, lawyer and court oversight is not the only check on public education. Alternatives such as those featured in the St. Bernard Parish settlement agreement can include changes to district policies, plus data transparency to ensure that discipline in disguise is brought to light.²⁷³ To the extent plaintiffs can obtain monetary relief, the damage to school districts' pocketbooks further may have a deterrent effect. Individual damages can also make a substantial difference in the lives of individual student-litigants and their parents, who have not only suffered due to the school districts' unlawful actions but also have devoted substantial time and resources to litigation. Finally, where multiple plaintiffs pursue common claims, there is a greater chance that press coverage may highlight the issue beyond individual circumstances. It is often this public pressure, as much as or more than legal action, that deters future rights violations, and multi-plaintiff litigation can help garner such attention, similar to class action suits.²⁷⁴

There is, of course, a risk that school districts will attempt to mitigate the collective action effects of multi-plaintiff claim aggregation by “picking off” individual plaintiffs, *i.e.*, offering to settle with individuals for money damages without systemic relief or delaying litigation such that individual claims for injunctive relief become moot. But, especially before the class is certified, this is a risk even of class action litigation.²⁷⁵

of an appropriate response from the public agency to these requests, through discovery. *See, e.g.*, Minutes Entry, P.A. *ex rel.* A.A. v. Voitier, No. CV 23-2228 (E.D. La. Apr. 25, 2024), Dkt. No. 36 (requiring native format production of public record request responses on discipline and alternative school placement).

²⁷³ *See* St. Bernard Parish Settlement Agreement, *supra* note 244.

²⁷⁴ Carroll, *supra* note 230, at 2050 (discussing media coverage advantages of class litigation versus an individual case).

²⁷⁵ *See* Fed. R. Civ. P. 23(e) (requiring fairness hearing for “certified” class); *cf.* Carroll, *supra* note 230, at 2045 n.161 (discussing protection against mootness for certified classes). Of note, defendants cannot attempt to “pick off” plaintiffs by taking action to moot claims before class is certified; after the motion for class certification is filed, the Supreme Court has held that litigation may proceed on behalf of the class even after a named plaintiff's case becomes moot. *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 405 (1980). However, mootness protections against “pick off” of named plaintiffs are not guaranteed in all circumstances, particularly if an appeal follows the class certification decision. *See generally* Michele C. Nielsen, Comment, *Mute and Moot: How Class Action Mootness Procedure Silences Inmates*, 63 UCLA L. REV. 760, 782 (2016) (discussing limitations of Supreme Court doctrine preventing “pick off” of named class action plaintiffs in public interest cases).

In other words, there are risks common to obtaining systemic relief in both multi-plaintiff and class action litigation, which are not necessarily relieved by the time-consuming, expensive, and potentially risky pursuit of class status.

Finally, even if class status is pursued, the long-term costs of managing and defending a consent decree must also be considered, especially in a clinical setting where students will be in law school, typically, only for a fraction of the life of the court proceedings. Many systemic reform class actions go on for years in the remedial phase.²⁷⁶ In that lengthy process, it can be challenging to ensure students gain appropriate skills. And, from an advocacy prospective, the clinicians and students will typically be bound by a consent decree or judicial order issued years ago, without the benefit of discovery to investigate how the school district may, in the case of informal removals, have shifted to alternative methods of discipline in disguise, such as placing more special education students in homebound or virtual classrooms rather than in alternative schools. In other words, where undocumented removals are ever-shifting responses to avoid legal requirements protecting the rights of students with disabilities, the longevity of a traditional consent decree may be a drawback not only from a pedagogical perspective for law school clinicians but also from a broader sustainability and efficacy perspective, as multi-plaintiff litigation allows lawyers to respond rapidly to changing conditions. Although some may classify this dynamic as a “whack-a-mole” approach, it is important to remember that defendants are just as disincentivized to avoid serial litigation as plaintiffs, if not more so. Indeed, in other contexts such as mass torts, defendants have moved for class certification in individual cases to avoid the resource drain of serial litigation.²⁷⁷ The risk of such expensive, serial litigation therefore can have a deterrent effect on school districts, without the necessity of a years-long consent decree often bound to outdated conditions.

CONCLUSION

In conclusion, combatting discipline in disguise, due to its elusive and shifting nature, is undeniably daunting. Despite the heightened protections of federal law aimed at stemming discriminatory exclusion of students with disabilities, students with disabilities, especially those of color, continue to face high rates of school exclusion. When school districts obscure these exclusions by failing to document removals as disciplinary in nature or by disguising them as non-disciplinary educational placements, the challenge of both individual and systemic advocacy is multiplied. Case law

²⁷⁶ See, e.g., *M.D. ex rel. Stukenberg v. Abbott*, Docket No. 11-cv-00084 (S.D. Tex. July 4, 2025) (ongoing monitoring since 2017).

²⁷⁷ Carroll, *supra* note 230, at 2049-50.

developments that impede advocates' ability to pursue traditional special education class action litigation further complicate advocacy by lawyers dedicated to defending the rights of students with disabilities who are low-income, system-involved, or from other marginalized communities.

Despite the challenges of the current political and jurisprudential environment, the case studies in this Article demonstrate that multiple strategies remain to seek systemic change in districts that hide or disguise exclusionary discipline. The advocates and law school clinicians in the case studies explored in this Article chose the particular strategy used in each case study based on the facts and circumstances that existed at the time, including under different state and federal administrations with varying levels of commitment to combating educational inequity for students of color and students with disabilities. All of the strategies discussed have the potential to improve resource efficiency, achieve efficient relief, and provide valuable educational experiences for clinical students. They also avoid some of the drawbacks typically associated with special education class action litigation. While the success of any systemic reform approach is dependent on the context of the situation to which it is being applied, the same strategies or a combination of them could also be used against school districts in other jurisdictions that are engaging in similar practices of evading IDEA procedural safeguards by hiding or disguising exclusionary discipline.

THE SILVER LINING: THE USE OF GENERATIVE AI IN CLINICAL LEGAL WRITING FOR THE EMERGENT LEGAL PROFESSIONAL WRITER

JAY B. KNIGHT*

Although Generative Artificial Intelligence (GAI), in the form of ChatGPT-5,¹ is currently being hailed as breakthrough technology akin to the calculator² of the 1960's, the Apple II³ or Atari's Pong⁴ of the 1970's, VisiCalc⁵ of the late 1970's and 1980's, GAI will not replace the tried-and-true method of editing written work that caters to specific clients in legal

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¹ OpenAI Brand Guidelines Page, <https://openai.com/brand/> (last visited January 26, 2025). According to OpenAI, use of its brand name should cite its models, such as, GPT-3.5, GPT-4o, or GPT-5. OpenAI is not the only creator of large language models. Anthropic, Alphabet Inc., Microsoft, Meta, DeepSeek, LexisNexis, Westlaw, and xAI are some of the companies that create large language models for public use or consumers. All generative artificial intelligence uses large language models for consumer use. Generative Artificial Intelligence will hereinafter be referred as "GAI." This article will focus on GAI in general and at times refer to specific models of GAI.

² *Review of Anita MK-8*, ANITA CALCULATORS (December 1961), http://www.anita-calculators.info/html/review_of_anita_mk_8.html [<https://perma.cc/2EW3-CC7L>] (last visited August 29, 2025) [hereinafter *Anita*], which references, *Simple and Silent*, Office Magazine at 1244-1245.

³ Timothy B. Lee, *How Apple Became the World's Most Valuable Company*, VOX (updated September 9, 2015 at 22:17 EDT), <https://www.vox.com/2014/11/17/18076360/apple> [<https://perma.cc/CZW8-AGTB>].

⁴ *Atari introduces Pong*, CENTRE FOR COMPUTING HISTORY, <https://www.computinghistory.org.uk/det/6124/Atari%20Introduces%20Pong> [<https://perma.cc/69WX-Q69T>].

⁵ James Wilson, *What Was Before Excel? Uncovering The Origins of Spreadsheet Software*, TOOLING ANT, <https://toolingant.com/what-was-before-excel/> [<https://perma.cc/TY22-LW23>]. Wilson describes the world of data before it could be organized and presented in digital form. Released in 1979, VisiCalc was the first spreadsheet software to be used in electronic form. Lotus 1-2-3 was released in 1983. Both software programs stored, analyzed, and manipulated data on a mainframe computer. It was not portable. The program had limited rows and columns and calculation functions. Its limitation led to the acceptance of Microsoft's Excel, which was released in 1985. Excel allowed spreadsheet software to be used on personal computers, unlimited rows and columns, and more calculation functions.

representation or written work assignment in legal education because in its current state GAI cannot discern persuasive qualitative analyses based on specific clients' needs or in law school andragogy.⁶ GAI, however, can supplement in a substantive way the choices legal practitioners and law students can make regarding almost any area of the law. It can give choices of legal strategy or options, write templates from pleadings to briefs to memos, summarize documents, and correct grammar in written work. Its abilities lead this author to conclude that GAI, despite its flaws⁷, can assist law professors with students whose experience with writing has not been paramount or not part of their educational tradition, the emergent writer. This article will focus on how GAI can assist clinical law professors, as knowledge mentors, to aid emergent writers to write better. Knowledge mentors can help emergent writers review GAI outputs with a critical eye, connecting output to client representation, through methods such as scaffolding. Knowledge mentors can guide emergent writers through the prompting process to access information, apply that information to the client, and develop written documents more effectively and efficiently through metacognition techniques. Knowledge mentors can support emergent writers to harness the language and tone flexibility needed for different documents to different audiences under the professor's careful attention and observation of the emergent writers' written progress. Through the lens of the latest legal writing pedagogy, knowledge mentors will learn how to utilize metacognition, scaffolding,

⁶ Michael D. Murray, Prompt Engineering and Priming in Law (paper at 1, July 29, 2024), <https://papers.ssrn.com/abstract=4909532> [<http://dx.doi.org/10.2139/ssrn.4909532>]; Michael D. Murray, Artificial Intelligence and the Practice of Law Part 1: Lawyers Must be Professional and Responsible Supervisors of AI (June 14, 2023), <https://papers.ssrn.com/abstract=4478588> [<http://dx.doi.org/10.2139/ssrn.4478588>]. Both articles discuss the lawyer's responsibilities to the client when using AI, in general, and GAI in legal documents. They also showcase GAI's limits in its use in the legal profession. The articles, however, show the possibility of using GAI and the purported efficiencies if used responsibly and ethically. Using GAI for legal research is still a work in progress. *See infra* note 31. Legal research using GAI, however, is gaining more attention and the subject of several recent legal research products by companies such as Westlaw and LexisNexis. Throughout this paper, this author will refer to legal andragogy instead of legal pedagogy. It makes more sense to treat law students as emerging adults who can think for themselves and make decisions about what they learn instead of rendering to them the mystical legal knowledge advance by a professor who directs their learning. *See* Charletta A. Fortson, *Now is Not the Time for Another Law School Lecture: An Andragogical Approach to Virtual Learning for Legal Education*, 65 ST. LOUIS U. L.J. 505, 507-08 (2021) (advocating that an andragogical approach to teaching law students is focused on the learner or student-centered learning as opposed to the pedagogical approach where the focus is on distribution of content to students by the teacher or a teacher-centered learning).

⁷ Jake Karr & Jason Schultz, *The Legal Imitation Game: Generative AI's Incompatibility with Clinical Legal Education*, 92 FORDHAM L. REV. 1867, 1870-72 (2024) (discussing that GAI in the legal setting simply mimics human legal knowledge while delivering outputs that read authoritatively. The flaw of mimicry leads the uneducated user to make inaccurate or unethical decisions.)

and editing to improve the writing of emergent writers. This approach in clinical legal education must involve an embrace of GAI to benefit future attorneys. Finally, the article will argue that, despite its ethical and pragmatic flaws, GAI's use in the clinical legal space will serve students who are emergent writers better than the current model for legal writing related to clinical legal education.

INTRODUCTION

In 1961, the ANITA MK 8 calculator became the first commercially successful calculator for use at the consumer level.⁸ The availability and power of the ANITA MK 8 raised concerns that people would no longer need to remember simple arithmetical operations because a desk device machine could do it for them.⁹ As calculators became cheaper, faster, and smaller, those concerns spilled into the primary and secondary education levels and the commercial testing environments.¹⁰ How will math teachers teach math to students?¹¹ Will students be robbed of learning how to estimate values?¹² Should the national math testing environment allow calculators to be used?¹³ In the post-secondary and graduate educational level, professors chagrined that new engineering students would no longer use the slide rule and, as a result, would lose some of the critical thinking skills and their elegant analytical short cuts that came along with using the slide rule, estimation, and working out long and complex arithmetical calculations.¹⁴ Yet, the calculator has proven to be an essential tool in all areas of life, including law students doing simple arithmetical calculations for their clients or assignments.¹⁵ These students, for the most part, left long and complex calculations to other more advanced apps, such as Excel, which is based on the principles

⁸ Anita, *supra* note 2.

⁹ *Id.*

¹⁰ Audrey Watters, *A Brief History of Calculators in the Classroom*, HACK EDUCATION (Mar. 12, 2015), <https://hackeducation.com/2015/03/12/calculators> [<https://perma.cc/2NV3-QYSL>] (under the section, *Calculators (Not) Allowed*).

¹¹ *Id.*

¹² See *id.* at Section, *What Do Calculators Do (To Math Class)?* See Sarah Banks, *A Historical Analysis of Attitudes Toward the Use of Calculators in Junior High and High School Math Classrooms in the United States Since 1975* (2011) (Master of Education Research Thesis), at 3-4, 14-15, 18, 20, https://digitalcommons.cedarville.edu/cgi/viewcontent.cgi?article=1030&context=education_theses [<https://perma.cc/FN5Q-D4AB>].

¹³ Banks, *supra* note 12.

¹⁴ David Wees, *Calculator vs Slide Rule vs Hand calculations*, THE REFLECTIVE EDUCATOR (Dec. 29, 2011), <https://davidwees.com/content/calculator-vs-slide-rule-vs-hand-calculations/> [<https://perma.cc/2FSH-4NA6>].

¹⁵ Janice Ruiz, *How Do Lawyers Use Math? Math In Law*, AMERICAN JUDICIAL SYSTEM (Aug. 15, 2024), <https://www.ajs.org/how-do-lawyers-use-math/> [<https://perma.cc/V88N-ZW3U>].

embodied in the simple calculator.¹⁶ While some scholars distinguish GAI¹⁷ and its potential harm from the simple tool of calculation software, others believe that GAI will provide more beneficial use than that of the simple calculator.¹⁸ Unlike the calculator, law students, who have not learned how to use GAI in an ethical way, will learn to use it unethically and improperly. Especially, given the fact that law firms, federal and state agencies, and courts are using GAI in their professional work with clients and in litigation. The law school clinic will need to assert the same knowledge to law students. A case can be made that writers who show a history of writing well in academic settings do not need GAI to further reinforce their writing. This article claims that the emergent writer, a writer whose history shows an unbalanced approach to writing, a lack of foundational writing skills, or a deficit in their ability to express thoughts in clear and unambiguous ways, may be buoyed by the use of GAI. To illustrate a helpful analogy, ChatGPT to an emergent writer¹⁹ perhaps has profound beneficial use as Sesame Street had on children from marginalized communities based on race, sex, gender, and economic status.²⁰

In 2015, Professors Kearney and Levine reported on their investigation of the impact of children viewing Sesame Street in 1969 on their academic and labor market performance based on the availability of viewing that program.²¹ Their inventive investigation resulted in something astounding that “Sesame Street improved school performance, particularly for boys. The point estimates for long-term educational and labor market outcomes are generally imprecise.”²²

¹⁶ Wilson, *supra* note 5.

¹⁷ For purposes of this article, generative artificial intelligence or GAI is a specific form of artificial intelligence that uses large language models to mimic language, text, images, video, or audio in a new way based on a user prompting the program to create language, text, images, video, or audio. See John Bliss, *Teaching Law in the Age of Generative AI*, 64 JURIMETRICS J. 111 (2024), at 115 (available at <https://ssrn.com/abstract=4682456>).

¹⁸ See *id.* at 111.

¹⁹ As defined in this article, an emergent writer is a student whose life experience has neither encouraged writing as a skill nor enhanced their ability to think through writing. The emergent writer is someone who does want to write and think more clearly, concisely, and persuasively, but their experience in academia or professionally have not been focused on those writing skills. This term is novel to this article.

²⁰ Melissa S. Kearney & Phillip B. Levine, *Early Childhood Education by Television: Lessons from Sesame Street*, 11 AM. ECON. J.: APPLIED ECON. 318 (2019), <https://www.aeaweb.org/articles?id=10.1257/app.20170300> [<https://perma.cc/7GDP-VUVH>].

²¹ *Id.* at 319.

²² *Id.* at 320. Kearney and Levine “investigated whether preschool-age children exposed to Sesame Street ... improved educational and labor market outcomes.” They investigated children six and under in 1969 and who lived in locations where broadcast reception allowed for Sesame Street to be viewed relative to those same cohorts whose broadcast reception was limited. The results “generated a positive impact on educational outcomes through the early school years.” While investigating census data between the 1980s to 2000s and various high school surveys, the investigators found that those children who were exposed

Watching Sesame Street had an impact on pre-school age children and their performance in school, but the biggest beneficiaries were boys.²³ Of course, the technology that revolutionized Sesame Street's ability to help pre-school age children was not the television alone, but the way its program was delivered: UHF vs. VHF.²⁴ In 1969, where UHF transmission was available (e.g., in largely populated cities of the United States), Sesame Street was available to be viewed for households with a TV that could receive UHF signals.²⁵ Yet, where UHF was only available, Sesame Street was not available for all to view.²⁶ Using that information to cull economic, census data, high school data, and trial studies at the time, they found that the information pointed to improvement in the academic performance of those pre-school age children, but the long-term impact of the children's viewing could not be ascertained.²⁷ The substance of what Sesame Street was offering to children translated to an outcome that benefited some children, but not all children.²⁸ They would enter pre-kindergarten having known letters, numbers, words, patterns, etc. In a sense, they had knowledge that helped them recognize abstract concepts in those first formative years from other children who may or may not have received similar knowledge without Sesame Street. It gave some boys an advantage that a teacher might not have known came from a television program.

to "better reception capabilities were 14 percent more likely to be attending the grade that is appropriate for their age in middle and high school years." The investigators also found that the "data indicate positive effects for both boys and girls, with larger estimates for boys." Lastly, they found that the "data also indicate[d] positive effects for all three race/ethnic groups considered [non-white Hispanics, Blacks, and Hispanics], with larger point estimates for [B]lacks and Hispanics than for white non-Hispanics."

²³ *Id.* at 336.

²⁴ *Id.* at 321-322. UHF is ultra-high frequency, and VHF is very high frequency. Sesame Street broadcasted on UHF signal, which was not available on all TV sets in 1969. VHF was a superior signal and could be seen by farther distance and not affected by high obstacles, such as, buildings and mountains. If someone bought a TV in 1969, they could receive VHF signals but may not be able to receive UHF signals. More expensive TVs in 1969 could receive both signals.

²⁵ *Id.* at 322 (detailing that 54 percent of households with TV sets received UHF signals in 1969); *see id.* at 325 (proposing that an estimated 65 percent of TV sets could receive UHF signals in 1969).

²⁶ *Id.* The authors of the study showed that given UHF's inferior transmission signal, there were counties that could not receive Sesame Street. Through simulated tests, the authors demonstrated that the children in those counties where UHF signals were received, tests scores for grade-for-age children (preschool to early elementary) revealed a positive impact on those children's educational performance. The simulated tests presented further evidence of "[w]ell-conducted randomized control trials at the time *Sesame Street* was initially introduced ... that watching the show generated an immediate and sizeable increase in test scores" at 343. Access to the technology influenced children.

²⁷ *Id.* at 341-2.

²⁸ *Id.* at 335-6. According to the authors, the biggest beneficiary of receiving Sesame Street through the UHF signals were boys and Black early elementary students. Other students benefitted as well, but not as profound.

This author believes that GAI offers the emergent writer in law school a similar advantage that was not available to them prior to December 2022. The impact on adult education and legal writing in the clinical legal education space could be transformative if understood and applied with a professor's particular observation, care, and analysis. Clinical legal education is closer to that of the legal practitioner community than that of the traditional law school community. In order to support law students in the clinics, clinical professors need to learn the technology and facilitate the integration of the technology into clinical education andragogy. Law schools around the country are assessing the strengths and weaknesses of the use of GAI in the classroom as well as in the legal practice. Law firms are incorporating GAI and AI practice into document review, evidence analysis, pattern recognition of similar cases and judges' opinions, and contract and pleading creation. Based on the changing legal landscape, several legal scholars have begun to propose new approaches to legal writing andragogy.²⁹ Few legal scholars have addressed this change in clinical legal education. Teaching law students how to use GAI as a tool to improve their writing and as an agent in their thinking, clinical law professors will prepare law students for the ethical practice of law. This article will discuss where clinical legal writing was before the introduction of ChatGPT 3.0 and where it could go with GAI.³⁰ How GAI could be used to teach law students how to write better, discern facts from hallucinations³¹ derived from

²⁹ See *infra* note 140.

³⁰ John D. Feerick, *Writing Like a Lawyer*, 21 *FORDHAM URB. L.J.* 381, 381 (1994) (claiming that the causes of bad legal writing "include insufficient education in good writing, carelessness, faulty thinking and reasoning, a failure to appreciate the potential impact of legal language, an unwillingness to risk new language, and an inability or failure to make the time commitment required for good legal writing."); Terrill Pollman, *Building a Tower of Babel or Building a Disciple? Talking about Legal Writing*, 85 *MARQ. L. REV.* 887, 893-914 (2002) (giving a great history of teaching legal writing in law schools, including apprenticeship, formalism, and legal or new rhetoric); Tonya Kowalski, *Toward a Pedagogy For Teaching Legal Writing in Law School Clinics*, 17 *CLIN. L. REV.* 285, 291-3 (2010) (positing that clinicians and legal writing professors collaborate to help law students write better through dealing with transfer theory-connecting prior learning in new context- and schema theory-an inability to cue previous knowledge for use in a new situation. Professor Kowalski emphasizes that clinic legal professor should help their student shift the context of their knowledge foundation to application based on prior knowledge learned in legal writing and analysis courses); and Cheri Wyron Levin, *The Doctor is In: Prescription for Teaching Writing in a Live-Client In-House Clinic*, 15 *CLIN. L. REV.* 157, 165-6 (2008) (promoting incorporating advance legal writing programs into existing clinical law curriculum).

³¹ There will be a number of terms or jargon throughout this article that is common language for creators and users of AI in general. Generative AI is unique as a subset of AI that users have employed in the millions. The first, and probably most important, is hallucinations; see ETHAN MOLLOCK, *CO-INTELLIGENCE/LIVING AND WORKING WITH AI* 53 (2024); Negar Maleki, Balaji Padmanabhan & Kaushik Dutta, *AI Hallucinations: a Misnomer Worth Clarifying*, (January 9, 2024) (unpublished manuscript), arXiv:2401.06796v1 [https://perma.cc/SF3Z-KQL9]. According to Maleki, Padmanabhan, and Dutta, the term "hallucination" is

Large Language Models³² being used by GAI chatbots, edit pleadings, briefs, communications, and memos using GAI, and practice counseling and interview skills with textual and auditory simulations.³³ This article will explore how professors in clinical legal education, in GAI's current state, can use GAI to further the aim of assisting students with their representation of clients in an ethical and pragmatic way and enhance the writing skills of the emergent professional writer.

Part I of this article will describe GAI in general and various chatbots in particular: how a program like ChatGPT-5³⁴ or Protégé™ operates, what it can do well, and what it cannot do. Part II will briefly describe and analyze the scholarship in legal writing and its development at law schools. This part examines the purpose of legal education with a specific focus on legal writing in the clinical legal space. This part explores further who the emergent writer is and the impact legal writing has on emergent writers, while recommending that clinical legal

neither precise nor universally accepted and depends on which field of AI is being studied. While they argue that the term should be replaced with a term that is universally accepted and precise, others have begun to use the term as a euphemism for generated information that is inaccurate, fabricated, incorrect or all three, but is passed along as true or factual. See MOLLICK, *supra*, at 91. The first mention of hallucinations, as a euphemism for generative AI problems with facts, in print was in the New York Times. See also, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (first published May 1, 2023, updated May 9, 2023), <https://www.nytimes.com/2023/05/01/business/ai-chatbots-hallucination.html> [<https://perma.cc/KXZ3-MRZ4>]. The term was popularized to include all non-factual or non-attributable information. The term hallucination in this article will be used to emphasize generated information that is inaccurate, incorrect, fabricated, unsupported, irrelevant, uncited, false, or all of the above. See also Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning & Daniel E. Ho, *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, 22 J. OF EMPIRICAL LEGAL STUDIES 216, 216 (2025) (stating that "...[the LLMs'] adoption remains hindered by a critical flaw: their tendency to generate incorrect or misleading information, a phenomenon generally known as 'hallucination [cite omitted].'"")

³² Adam Pasick, *Artificial Intelligence Glossary: Neural Networks and Other Terms Explained*, N.Y. TIMES (March 27, 2023), <https://www.nytimes.com/article/ai-artificial-intelligence-glossary.html> [<https://perma.cc/2BER-7DQ7>]; see *What is a large language model (LLM)?*, CLOUDFLARE, <https://www.cloudflare.com/learning/ai/what-is-large-language-model/>, (last visited June 3, 2025). Large Language Models, or LLMs, are software programs that digest huge amounts of data to recognize and generate data. Data could be text, images, audio, graphic or summary tables, etc. The program is a set of algorithms that recognizes patterns in the data and gives back a different set of data predicting in a probabilistic manner the output the user seeks. Unlike extractive AI or simple computer programs that generate a predicative single answer or task, LLMs continue to learn (digest more data) through a process of tuning (receiving new data or prompted to seek new data). Sometimes called deep learning, LLMs continue to receive new data by the user of an LLM. ChatGPT, and its competitors, is a specific type of LLM.

³³ See *infra* note 140.

³⁴ As of the date of this article's publication, the consumer market for GAI is broken into three model types: the chatbot; the simulated companion; and the agent. This paper will focus primarily on the chatbot. There will be brief discussions on the other models, but the legal practice has been using the chatbot model for most of its work. The legal practice is beginning to use GAI in an industrialized way as the agent model.

education can boost writing and analysis in the law for the emergent writer. Part III will analyze some of the ethical problems wrought by GAI and propose solutions to those problems. This part will make the case that GAI should be used in the clinical legal space to facilitate legal writing andragogy for the emergent writer. Part IV will explore new ideas generated for the proper use of GAI and propose ways that assist clinical law professors with their andragogical approach to the law and law students while improving their critical thinking and writing skills. This part will list helpful suggestions for professors to employ in their clinical courses with a specific emphasis on the emergent writer. This part concludes that legal writing must adapt to the latest technology to transform legal writing with current students and for the future of the legal profession. This part also considers the benefits of GAI use to writing in the clinical legal space, as well as andragogical benefits to students learning to master the craft of legal writing.

I. THE GAI LANDSCAPE

GAI, and all its iterations, has burst into the public imagination and utility. Every day, people around the world have found uses for programs, such as ChatGPT, that have improved their lives for the better.³⁵ Some people claim that its predicative capacity to write language and code, among other things, has streamlined routine writing and coding tasks that took a significant amount of time to complete.³⁶ Others have cautioned that its predicative and generative qualities bring with them apocalyptic scenarios that could hurt (and in some cases have hurt) creative outputs and systematic renderings of false information and

³⁵ Mollick, *supra* note 31, at 111; see Kevin Roose, *Don't Ban ChatGPT in Schools. Teach With It*, N.Y. TIMES (January 12, 2023), <https://www.nytimes.com/2023/01/12/technology/chatgpt-schools-teachers.html> [<https://perma.cc/L5H7-877Y>] (outlining the ways ChatGPT can be an effective teaching tool in high schools); Elizabeth A. Harris, *Peering Into The Future of Novels, With Trained Machines Ready*, N.Y. TIMES (April 20, 2023), <https://www.nytimes.com/2023/04/20/books/ai-novels-stephen-marche.html> [<https://perma.cc/VF87-9GDH>] (discussing the advantages of having a chatbot help write novellas); JEREMY KORST, STEFANO PUNONI & MARY PURK, GROWING UP: NAVIGATING GEN AI'S EARLY YEAR, AI AT WHARTON AND GBK COLLECTIVE, THE WHARTON SCHOOL OF THE UNIVERSITY OF PENNSYLVANIA (October 2024) at 54 - 56, https://ai.wharton.upenn.edu/wp-content/uploads/2024/11/AI-Report_Full-Report.pdf [<https://perma.cc/S95L-3U66>] (detailing the various uses of GAI by businesses including document writing/editing, analysis, data analysis, coding, and summarization in fields such as marketing, customer interaction, human resources, and corporate decision-making); and Marc Zao-Sanders, *How People are Really Using Generative AI in 2025*, HARV. BUS. REV. (April 9, 2025), <https://hbr.org/2025/04/how-people-are-really-using-gen-ai-in-2025> [<https://perma.cc/MK3M-VBPJ>] (highlighting that its survey found people are using GAI for therapy/companionship, organizing tasks, goal-setting, scheduling, and other brainstorming ideas to “make best use of their time[.]” and enhanced learning).

³⁶ Zao-Sanders, *supra* note 35.

derivative unauthorized original work.³⁷ This dichotomy in the use of GAI brings confusion and could promote indolence among users.³⁸

In New York, for example, an attorney substituted his due diligence, competency, and other ethical requirements for using a GAI shortcut to generate a legal memo that was filed with the New York Supreme Court on behalf of his client.³⁹ The attorney, Steven A. Schwartz, prompted ChatGPT 3 to generate a legal memo to file with the court and never checked the citation, cases, or legal analysis and argument created by GAI. Unknown to the attorney, the GAI program hallucinated, or made up, the analysis, cases, and citations.⁴⁰ Once submitted to the court and served upon opposing counsel, both found discrepancies in the analysis and then discovered that the cases and citations were fabricated.⁴¹ In the sanctions hearing, the court found that Schwartz's claim of ignorance of using the GAI did not absolve the attorneys from violations of Rule 11(b)(2), among other rule violations, and further that the attorneys warranted sanctions under Rule 11.⁴² This case is a classic example of plagiarism, cheating, incompetence, ignorance, misuse, fraudulent behavior, and indolence.

³⁷ *Pause Giant AI Experiments: An Open Letter*, FUTURE OF LIFE INST. (March 22, 2023), <https://futureoflife.org/open-letter/pause-giant-ai-experiments/> [<https://perma.cc/3JT9-M7Q6>] where the authors recommend that "Society has hit pause on other technologies with potentially catastrophic effects on society."

³⁸ Jay B. Knight, OpenAI ChatGPT 3.5 (free-version), "How can you help me make this sentence better and more professional sounding: This dichotomy of GAI's use brings with it confusion to and may promote indolence on the user." (June 10, 2024) (on file with the author of this article). This author wanted to see whether the free version of ChatGPT 3.5 could produce a better sentence than the author's own. The output produced the sentence as used in this article. The use of ChatGPT 4.0 and other LLMs in this article have been limited to examples and research ideas. Other than the example in this sentence, the author did not enhance his writing for this article. Given the amount of improvements in LLMs in 2024 and 2025, this author cannot say that the restriction will be used in the future. Other ideas regarding the problem of GAI use with attorneys will be the focus of future articles.

³⁹ *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (D.N.Y. 2023). The use of GAI in litigation is increasing. According to Professor Damien Charlotin, expert in the legal implications of AI use in the law and legal profession, among other expertise, attorneys and pro se litigants have been using GAI in their pleadings in court and agency settings and hallucinated citations have been submitted to judges, chairs, and other decision-makers. Professor Charlotin has set up a database to track the inappropriate use of GAI in the legal setting. Damien Charlotin, AI HALLUCINATION CASES, <https://www.damiencharlotin.com/hallucinations/> [<https://perma.cc/M55K-WJKL>] (last visited August 30, 2025).

⁴⁰ See *Mata*, 678 F. Supp. at 452. Schwartz testified at a "sanctions hearing that when he reviewed the reply memo, he was operating under the false perception that [ChatGPT 3] could not possibly be fabricating cases on its own." The case highlights that Schwartz and counsel of record, Peter LoDuca, did not perform minimum due diligence of checking citations, or reading cases cited, or shepardizing any cases mentioned in their table of authorities. They also misrepresented their affidavits and were candid with the court upon questions. These are significant ethical lapses and ones this author will explore in a future article.

⁴¹ *Id.* at 450.

⁴² *Id.* at 466.

The outcry from the legal community was quick, but it calmed down when some members of the legal community focused only on GAI's generative written powers.⁴³ Meanwhile, Judge Brantley Starr in the U.S. District Court for the Northern District of Texas issued an order requiring attorneys and pro se litigants to certify that “no portion of any filing will be drafted by [GAI] ... or that any language drafted by [GAI] will be checked for accuracy, using print reporters or traditional legal databases, by a human being.”⁴⁴ By the end of 2023, other federal courts in different states followed suit.⁴⁵ In that year, GAI, through the

⁴³ Ralph Artigliere & Ralph C. Losey, *The Future Is Now: Why Trial Lawyers and Judges Should Embrace Generative AI Now and How to Do it Safely and Productively*, 48 AM. J. TRIAL ADVOC. 323 (Spring 2025) where the authors argue that practitioners (as well as judges) should use GAI as an agent to collaborate with on a variety of tasks and intellectual work products. In 2023, both Westlaw and LexisNexis announced that they would be using GAI in their respective legal databases. Giving attorneys the ability to draft legal documents based on a prompt, the legal databases would combine the power of their legal libraries with the power of GAI to pull those resources into its generative features. They claimed that hallucinations would be minimized. See Joe Patrice, *New LexisNexis Generative AI Writes Mean Cease & Desist Letters, Becoming The AI We Never Knew We Needed*, ABOVE THE LAW (May 4, 2023), <https://abovethelaw.com/2023/05/new-lexisnexis-generative-ai-writes-mean-cess-desist-letters-becoming-the-ai-we-never-knew-we-needed/> [<https://perma.cc/8KL2-VH7B>]; Press Release, Thomson Reuters, *Thomson Reuters Launches Generative AI-Powered Solutions to Transform How Legal Professionals Work* (November 15, 2023), <https://www.thomsonreuters.com/en/press-releases/2023/november/thomson-reuters-launches-generative-ai-powered-solutions-to-transform-how-legal-professionals-work> [<https://perma.cc/S55B-98MF>]; see also Magesh et al, *supra* note 31.

⁴⁴ Jacqueline Thomsen, *US judge orders lawyers to sign AI pledge, warning chatbots “make stuff up”*, REUTERS (June 2, 2023), <https://www.reuters.com/legal/transactional/us-judge-orders-lawyers-sign-ai-pledge-warning-they-make-stuff-up-2023-05-31/> [<https://perma.cc/M6DL-ZZXL>]; see also STATE BAR OF TEXAS, ENVIRONMENTAL & NATURAL RESOURCES LAW, A SAMPLING OF AI COURT ORDERS, <https://www.texenrls.org/wp-content/uploads/2024/07/A-sampling-of-AI-Court-Orders.pdf> [<https://perma.cc/H2VP-CG2K>] (last visited on June 11, 2025) along the Section’s website on the specific wording of Judge Brantley’s order are other similar judicial orders from two other judges (Judge Michael Baylson, U.S. District Court for the Eastern District of Pennsylvania and Magistrate Judge Peter Kang, U.S. District Court for the Northern District of California).

⁴⁵ Jamie Eggertsen, *What You Need to Know: AI Disclosure Rules in Legal Filings*, EVE LEGAL BLOG (March 19, 2025), <https://www.eve.legal/blogs/what-you-need-to-know-ai-disclosure-rules-in-legal-filings> [<https://perma.cc/G3H4-MMDJ>] where the blog lists jurisdictions that have enacted state specific requirement for disclosures of AI use in federal and state courts, such as Texas, Pennsylvania, New Jersey, North Carolina, Illinois, and California. Michigan is being proposed as of the writing of this article; see also Order on Artificial Intelligence, Judge Stephen Alexander Vaden, Ct. Int’l Trade (June 8, 2023), www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [<https://perma.cc/6JRN-LQQW>] is a standing order for disclosure on the use of GAI (last visited on June 11, 2025); see also *David Belenzon v. Paws Up Ranch*, CV 23-69-M-DWM (D. Mont. June 22, 2023) (order granting attorney *pro hac vice* with specific instructions prohibiting the use of AI), <https://storage.courtlistener.com/recap/gov.uscourts.mtd.73612/gov.uscourts.mtd.73612.8.0.pdf> [<https://perma.cc/H4WM-XXHU>]; see also Tracking Federal Judge Orders on Artificial Intelligence, LAW360, <https://www.law360.com/pulse/ai-tracker> [<https://perma.cc/BNB6-NGMK>] for a list of other federal district courts for orders involving attorneys and pro se litigants using GAI in those district courts.

use of Application Programming Interface, or API,⁴⁶ LexisNexis and Westlaw, two of the leading legal research tools in the U.S., finished implementing GAI into their search engines for customers to use.⁴⁷ While some judges are concerned with the use of GAI in official legal memos and pleadings, other judges have embraced it for their use in official duties.⁴⁸ Other than legal research companies, legal assistants, or legal intelligence companies, such as vLex, have jumped in on the use of AI and GAI for their customers, such as law firms, state bar associations, and in-house corporate counsel.⁴⁹ Given the frenzy to go to AI and GAI for use in the legal community, how does GAI work?

A. GAI's Basic Building Blocks

But how does GAI manufacture, fabricate, and compose lengthy written pieces? It has to do with the connection of neural networks⁵⁰ built

⁴⁶ Another jargon is API, a mechanism that enables different software components to communicate with each other using a definite set of protocols. iPhones use APIs to display weather, stocks, news, etc. In the case of Protégé™ and CoCounsel, the API uses the LLM to work with the vast data libraries stored in LexisNexis and Westlaw storage databases. See AWS, *What is an API?*, <https://aws.amazon.com/what-is/api/#:~:text=API%20stands%20for%20Application%20Programming,other%20using%20requests%20and%20responses> [https://perma.cc/MFZ8-55XW].

⁴⁷ Artigliere et al., *supra* note 43; see also Bob Ambrogi, *It's the Battle of the AI Legal Assistants, As LexisNexis Unveils Its New Protégé and Thomson Reuters Rolls Out CoCounsel 2.0*, LAW.SITES (August 11, 2024), <https://www.lawnext.com/2024/08/its-the-battle-of-the-ai-legal-assistants-as-lexisnexis-unveils-its-new-protége-and-thomson-reuters-rolls-out-cocounsel-2-0.html> [https://perma.cc/X5B6-NLQD].

⁴⁸ Cedra Mayfield, *Judges Have Concerns About Artificial Intelligence: Here's What They Said*, LAW.COM (March 11, 2024), <https://www.law.com/dailyreportonline/2024/03/11/judges-have-concerns-about-artificial-intelligence-heres-what-they-said/?slreturn=20241009141516> [https://perma.cc/T4WG-M6GG] (giving a range of concerns by federal and state judges about the use of GAI in filings opting to certify or prohibits its use. Cf *supra* note 43 (where lawyers are moving ahead with the use of GAI despite the bench's concerns)).

⁴⁹ Ambrogi *supra* note 47. vLex combined with another database company, Fastcase, in 2023. vLex claims to have a billion legal documents from more than 100 countries to build its subscriber-based GAI business for law firms, jurisdictional bar associations, and other third-party platforms that will conduct legal research, litigation analytics, and bankruptcy workflow tools for its two million users. See Press Release, Oakley Capital, Vlex Combines With Fastcase to Form the World's Largest Law Firm Subscriber Base (April 4, 2023), <https://www.oakleycapital.com/news-and-insights/vlex-combines-with-fastcase-to-form-the-world-s-largest-law-firm-subscriber-base> [https://perma.cc/56Z6-S36Z].

⁵⁰ *What is a Neural Network?*, GEEK FOR GEEKS <https://www.geeksforgeeks.org/machine-learning/neural-networks-a-beginners-guide/> [https://perma.cc/L38C-M4SC], a neural network is another term of art. It means a method that teaches computers to process data in a way that is inspired by the human brain. Where the LLMs are the algorithms or programs, the neural network is the method by which the algorithms communicate with each other to solve mathematical problems. The analogy is to the human brain where neurons in the brain communicate with each other to send messages to the rest of the body to do something. Neural networks operate with (neuron equivalents) of data that comes together through the LLM. Neural networks make it possible for LLM to learn and are used for deep learning. See *supra* note 32.

into an algorithmic program designed to detect patterns and copy things with similar inputs.⁵¹ In other words, in a very simplified way, the GAI program copies an image, translates the image to zeros and ones, and then it is coded into meta concepts for storing purposes called tokens.⁵² When a person prompts the program to retrieve something similar, the words in the prompt trigger the tokens to come together and reassemble themselves in a different way as requested by the prompt.⁵³ While this description looks like a one-to-one relationship about how the program accesses images and concepts, the description lacks the explanation of the speed and network capacity that the program accesses, to the tune of hundreds of billions of images in seconds.⁵⁴ This makes the GAI program powerful in its ability to give the user images, texts, audio, or video representations in a matter of minutes, if not seconds.

The prompts are the directional guider that the program needs to assemble the outputs that the user seeks.⁵⁵ Prompts are tokens that assist any program to cull, reassemble, or organize the images or data that the program has learned from being trained on large datasets. Prompts are a convenient way to communicate with an LLM. The difference in the use of LLMs with GAI is that LLMs have been trained primarily on texts.⁵⁶ Learning will be discussed shortly, but learning is what allows the prompts to be utilized in an effective way by using parameters.⁵⁷ Parameters channel the learning of LLMs and give tokens certain weight based on the amount of data and prompt inputs.⁵⁸ As the prompts on the chatbot interface turn into tokens, those tokens find similar-looking tokens and begin to structure the output in a way

⁵¹ Harry Surden, *ChatGPT, AI Large Language Models, and Law*, 92 FORDHAM L. REV. 1939, 1961 (2024)(summarizing how neural networks operate in the GPT model with deep learning saying, “In essence, neural networks are just extremely flexible pattern detectors: they can approximate just about any underlying pattern, if given enough data to examine.”)

⁵² *Id.* at 1951 n. 66. (“Tokens are small units of texts that a model uses internally to process longer words more easily.”) According to Professor Surden, the LLM uses the neural network process to predict tokens. In his article, he focused on text, but tokens can be broken into any unit of data or information, such as an image, audio, or text; *see also* Michael D. Murray, *Generative Artificial Intelligence — Where did it come from? How does it work?*, (July 29, 2024)(unpublished manuscript paper), at 10 <https://ssrn.com/abstract=4909859> [<http://dx.doi.org/10.2139/ssrn.4909859>].

⁵³ Surden, *supra* note 51, at 1951-2. Another jargon word is prompt, “which is the term for a user-provided text input, such as an instruction”

⁵⁴ Tianyu Ding, Tianyi Chen, Haidong Zhu, Jiachen Jiang, Yiqi Zhong, Jinxin Zhou, Guangzhi Wang, Zhihui Zhu, Ilya Zharkov & Luming Liang, *The Efficiency Spectrum of Large Language Models: An Algorithmic Survey 4* (April 18, 2024) (unpublished manuscript), <https://arxiv.org/abs/2312.00678> [<https://perma.cc/R5FC-A6PB>].

⁵⁵ Xavier Amatriain, *Prompt Design and Engineering: Introduction and Advanced Methods 1* (February 12, 2024) (unpublished manuscript), <https://arxiv.org/html/2401.14423v3> [<https://perma.cc/LRK2-DPYR>]; *see* Surden, *supra* note 51 at 1952-3.

⁵⁶ Murray, *supra* note 52, at 9-10; *see also* Surden, *supra* note 51, at 1955.

⁵⁷ Surden, *supra* note 51, at 1957.

⁵⁸ *Id.*

that the algorithm has learned to structure those tokens or create new patterned tokens.⁵⁹ The parameters of the tokens keep pushing the tokens into a pattern that makes sense from a syntax viewpoint, but could be qualitatively inaccurate.⁶⁰ The problem is exacerbated if the prompt is vague, imprecise, or narrowly defined.⁶¹ Those prompts can push the parameters to outputs that are vague, imprecise, or narrowly defined. Prompts also use natural language processing or NLP's.⁶² The NLP's is an algorithm that converts texts and audio into tokens which can be converted back to language in the form of text or audio.⁶³ A classic interface used for NLP is a chatbot.

The chatbot is a form of interface that allows the user of the chatbot to have a conversation with the LLM.⁶⁴ Many students in law school will have used programs, such as Word or Excel, and interfaced with them to produce papers and charts. Those programs allow users to input information and structure their input in any way they wish.⁶⁵ In the case of Excel, the user can organize information in such a way that allows the program to use formulae to get a specific output.⁶⁶ The communication between the user and the program is one-directional, or like hitting a nail with a hammer. If the input cannot fit the formula, then the output will look weird or be wrong. On the other hand, a chatbot will accept any input given and retrieve information that seems similar to the input or assemble an output resembling the input given.⁶⁷ It is not one-directional; it is multi-directional. There are many possible outputs for the input given. Because it is a chatbot, the program is designed to have

⁵⁹ *Id.* at 1958.

⁶⁰ *Id.*

⁶¹ Magesh, *supra* note 31, at tbl. V n. 88.

⁶² *Natural Language Processing (NLP) – Overview*, GEEKSFORGEEKS (August 06, 2025), <https://www.geeksforgeeks.org/natural-language-processing-overview/> [https://perma.cc/BEP9-SEE9], NLP is defined as a field that combines computer science, AI, and language studies. It is a mathematical construction of language in such a way that it deconstructs words into tokens only to reconstruct them. NLP helps computers understand human language without the need of computer language, such as Fortran, Cobalt, or Python. Surden, *supra* note 51, at 1945.

⁶³ See *Natural Language Processing NLP – Overview* under Applications of Natural Language Processing (NLP), GEEKSFORGEEKS.

⁶⁴ *What is a Chatbot? Definition, Types, and Examples*, COURSEARA (July 01, 2025), <https://www.coursera.org/articles/what-is-a-chatbot> [https://perma.cc/K6P6-UEK7].

⁶⁵ *What Happens Inside Your Computer When a Key is Pressed?*, FUTURE LEARN <https://www.futurelearn.com/info/courses/computer-systems/0/steps/53503> (last visited August 30, 2025).

⁶⁶ Microsoft Support, *The Order in Which Excel Performs Operations in Formulas*, <https://support.microsoft.com/en-us/office/the-order-in-which-excel-performs-operations-in-formulas-28eaf0d7-7058-4eff-a8ea-0a835fafadb8> (last visited August 30, 2025).

⁶⁷ Surden, *supra* note 51, at 1952.

a conversation with the user to narrow the output to the given input or tune the output.⁶⁸

Fine-tuning the output is part of the learning process for LLMs.⁶⁹ Given the large datasets from which LLMs must learn, most programmers will fine-tune outputs based on industry needs and expectations.⁷⁰ Like most of machine learning, this too is an iterative process, where programmers are constantly weighing the quality of the output.⁷¹ The problem here, as in all of the LLM training and learning, is who the programmers are and what they are weighing based on what criteria. What custom knowledge base are the programmers and users evaluating? Fine-tuning is what subject matter legal experts with LexisNexis+ AI, or Protégé™, are doing when they train the LLMs being used in its products.⁷² The programmers are fine-tuning Protégé™ with its library of legal publications as the custom knowledge base. They prompt the chatbot, read an output, either affirm or negate the output, and run the prompt again for a different, and, they hope, more accurate output.⁷³ This fine-tuning takes time, energy, money, and expertise.

⁶⁸ Chatbots use NLPs to understand the user's input. Some chatbots do not need sentences written out grammatically correct in order to understand. While there are different types of chatbot for purposes of this article, and those closer to GAI, the predictive chatbot is used most often. They are a learning chatbot in order to predict better the output the user wants. Users can write to chatbots and speak to it. Users can download documents to a chatbot and chatbots are used to create specific or task-focus chatbots, sometimes known as declarative chatbots. ChatGPT 4o, for example, uses a predictive chatbot as a way to allow users to input information; *See COURSERA, supra* note 64, under the section heading, Chatbots vs. AI chatbots vs. virtual agents vs. virtual assistants, when a chatbot is used as an agent, the chatbot directs the other parts of a program to execute specific tasks on the internet or another program. This article will not go into the agentic uses of AI, but that process is here and will be part of a bigger conversation about GAI and Artificial General Intelligence (AGI) in legal practice in the near future.

⁶⁹ Huzefa Chawre, *Fine-Tuning LLMs: Overview, Methods, and Best Practices*, Turing website (unpublished manuscript) (November 21, 2023), <https://www.turing.com/resources/finetuning-large-language-models> [<https://perma.cc/5J52-Q483>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Press Release, LexisNexis, LexisNexis Launches Lexis+ AI to the UK Legal Market (June 12, 2024), <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-launches-lexis-ai-to-the-uk-legal-market> [<https://perma.cc/9ZW6-6RPZ>].

⁷³ *Id.* One of the problems with LLMs, in general, is the difference between probabilistic and deterministic approaches in software development; *see Surden, supra* note 51, at 1949 (discussing the probabilistic nature of LLMs. Society has come to know that a software programs like Word or Excel are deterministic, even if it does not know what that means. For example, when a "T" is typed using Word or other word processing program, it will always come out a "T." A user does not expect "Q" or some other letter to pop up when typing a "T." Probabilistic, however, is different. A user can prompt a chatbot with a specific task output, such as "What is the capital of France?" As Surden explains the chatbot can come with several answers before hitting on Paris. The chatbots needs prompting and fine-tuning to reveal an answer that is accurate. The other feature of the LLM model and prompting is that the same prompt may yield different answers. That is the probabilistic nature of GAI in general. Surden, *supra* note 51, at 1953.

B. The Debate Over GAI Use in the Legal Context

GAI is a constant iterative algorithm that needs interaction to improve, unlike extractive AI. This type of AI simply retrieves or extracts data that exists in any dataset. Google search perfected the extractive AI.⁷⁴ Its early AI algorithm allowed users to search the internet for any words that the users put in its search box.⁷⁵ This simple program became a process informally known as “Googling.”⁷⁶ In some cases, the search program undertook a different appeal than perhaps the creators intended. The program permitted users to search for everything and anything on the internet. A saving grace of the program is that it provides a link to a source of the data for the user to evaluate and differentiate from either the original source or some other source. It did not make up data.⁷⁷ This is highly consequential. Knowledge retrieval, as opposed to knowledge simulation and duplication, is static and can be verified or discriminated against by the user. Synthetic data, data created by using GAI, cannot be verified by, assessed for discrimination against, or confirmed by most users. Extractive AI simply retrieves what has already been there and fashions it to appear as different, as in Alphabet’s Gemini,⁷⁸ or retrieves what may be a standard set of knowledge. GAI, however, gives what has been put in by reliable and unreliable sources. It may extract, like Gemini, but it may create new data based on the old data.

This generative programming brings with it some useful tools but requires knowledge to handle it correctly. GAI is beneficial as in brainstorming with a chatbot, creating outlines or notes, reviewing grammar, lexicon, and syntax, drafting preliminary documents (i.e., pleadings), creating points or counterpoints, revising points and counterpoints, simulating textual and audio interviews and depositions, summarizing long documents or articles, or imagining possibilities. Given

⁷⁴ Rachel Hespell, *Our 10 Biggest AI moments so Far*, GOOGLE BLOG (September 26, 2023), <https://blog.google/technology/ai/google-ai-ml-timeline/> [https://perma.cc/EWT2-ZJV8] (summing up extractive AI in the words of Larry Page, a Google co-founder, as “The perfect search engine should understand exactly what you mean and give you back exactly what you need.”)

⁷⁵ *Id.*

⁷⁶ *2002 Words of the Year*, AMERICAN DIALECT SOCIETY (January 13, 2003), https://americandialect.org/2002_words_of_the_year/ [https://perma.cc/946K-GSML].

⁷⁷ Ruibo Liu, Jerry Wei, Fangyu Liu, Chenglei Si, Yanzhe Zhang, Jinmeng Rao, Steven Zheng, Daiyi Peng, Diyi Yang, Denny Zhou & Andrew M. Dai, *Best Practices and Lessons Learned on Synthetic Data 1* (August 10, 2024) (conference paper at COLM 2024), <https://arxiv.org/pdf/2404.07503> [https://perma.cc/WFB8-PFW9] (defining synthetic as “artificially generated data that mimics the characteristics and patterns as real-world data, but is created through algorithms, generative models, or even simulations, rather than being directly created by humans.” Citations omitted.) Making up data is otherwise known as synthetic data.

⁷⁸ Joan Santoso, *Gemini Reshaping the NLP Task for Extracting Knowledge in Text*, MEDIUM (February 18, 2024), <https://medium.com/@joansantoso/gemini-reshaping-the-nlp-task-for-extracting-knowledge-in-text-c0d5fdd4edd8> [https://perma.cc/QE4M-XJ8D].

GAI's probabilistic nature, it is well-hemmed to create something from a few text, image, or audio prompts. It is not, however, useful to make definitive predications, accurate calculations, or sequential analysis, such as analyzing the law based on a simple prompt.⁷⁹ The latter requires an analysis that is itself iterative and sometimes sequential. GAI is getting closer to doing that with math and physics problems.⁸⁰ It may take a few more years for the GAI chatbot interface to give legal information in a way that is akin to an attorney's analysis. That is a grave concern for the profession and the practice. Yet, GAI is not a shortcut, and better minds will have to tackle this problem once it becomes commonly used.

C. *GAI is Not currently an Epistemological Box*

Imagine asking ChatGPT: if a pedestrian slips on some water that fell from an air conditioning duct in the store and falls while entering a minimart store, what laws could you use to sue the minimart store owner?⁸¹ ChatGPT could respond in the following manner: It may give

⁷⁹ Murray, *supra* note 6, at 9 (discussing the many different ways prompting can be used to allow the GAI to "reason" by using several prompts in a Chain-of-Thought or Tree-of-Thought prompting).

⁸⁰ *Id.* at 11.

⁸¹ Jay B. Knight, OpenAI ChatGPT-4o, "if a pedestrian slips on some water that fell from an air conditioning duct in the store and falls while entering a minimart store, what laws could you use to sue the minimart store owner?" (October 23, 2024) (on file with the author of this article). Output: "If a pedestrian slips on water that fell from an air conditioning duct and falls while entering a minimart, several legal concepts could be used to sue the store owner. The primary legal theories are:

"1. Premises Liability:

- This is the key area of law governing such accidents. It holds property owners and operators responsible for maintaining a reasonably safe environment for customers or visitors. To successfully sue the minimart store owner under premises liability, the injured person (plaintiff) must prove:
- The store owner had a duty of care to maintain the property safely (as a business owner, they generally owe a duty to anyone entering the store).
- The owner breached that duty by failing to address the water from the AC duct (e.g., knowing about the leak and failing to fix it or warn customers).
- The breach caused the accident, leading to injury.

"2. Negligence:

- Negligence claims require showing that the store owner was careless in maintaining the premises. A plaintiff would need to prove:
- Duty of care: The store owner had a responsibility to keep the premises safe.
- Breach of duty: The owner breached this by not maintaining the AC system or cleaning the water spill.
- Causation: The water from the AC directly caused the pedestrian's fall.

an iteration of basic legal concepts, such as premises liability, negligence, constructive notice, and negligence *per se*.⁸² These are all concepts that may be involved in a law school exam on the classic slip and fall scenario. What if I changed the prompt to: if a pedestrian slips on some water that fell from an air conditioning duct in the store and falls while entering a minimart store in Baltimore, Maryland, draft a complaint that the pedestrian could use to sue the minimart store owner in a Baltimore court?⁸³ ChatGPT gives you a basic pleading form with a relatively coherent caption and cites statutes that are on point for personal and subject matter jurisdiction.⁸⁴ A year ago, it could not have done that. While the basic pleading template is impressive, the pleading itself is not very good, but allows the user to input information specifically about the plaintiff, defendant, and the scene of the alleged injury. For an expert, there is a lot of work to be done if the client is dependent on their attorney to represent them competently and diligently. For a novice, at best, the output looks somewhat complete. Without a guiding hand, the novice attorney may fill in the blanks, file the template, and call it a day.⁸⁵ This is the danger of using GAI as an epistemological

- Damages: The pedestrian suffered injuries or financial loss due to the fall.

“3. Constructive Notice:

- The plaintiff could argue that the minimart should have known about the water issue and had enough time to correct it. Even if the store owner claims ignorance, proving that the dangerous condition existed long enough for the owner or employees to have reasonably discovered and fixed it can help establish liability.

“4. Violation of Health or Safety Codes:

- If the water leak from the AC system violated local health or building codes, it could be used as evidence of negligence *per se*. This means that the violation itself serves as proof of negligence.

“Would you like help with drafting an outline or legal argument based on this situation?”

⁸² ChatGPT on another day may give you something different. The probability of giving the user the same answer consistently is not a feature of the algorithm. It's part of the probabilistic nature of GAI. Giving accurate and correct answers, GAI may give the user that outcome but more likely it will give an answer that is probably related to the prompts the user gives. The user should suspect that GAI will give neither an accurate nor correct answer. The flaw is on the user's belief that GAI can be used only to give accurate or correct answers. MOLLICK, *supra* note 31, at 128 (explaining that based on an experiment with BCG when the human only relied on ChatGPT-4's responses the human got the right answer 60 to 70 % of the time, instead of the 84 % of the time without the help of ChatGPT).

⁸³ Jay B. Knight, OpenAI ChatGPT-4o, “if a pedestrian slips on some water that fell from an air conditioning duct in the store and falls while entering a minimart store in Baltimore, Maryland, draft a complaint that the pedestrian could use to sue the minimart store owner in a Baltimore court?” (October 23, 2024) (on file with the author of this article).

⁸⁴ *Id.*

⁸⁵ *cf.* Jay B. Knight, Anthropic Claude 3.5 Sonnet, “if a pedestrian slips on some water that fell from an air conditioning duct in the store and falls while entering a minimart store in Baltimore, Maryland, draft a complaint that the pedestrian could use to sue the minimart

box.⁸⁶ The output starts the attorney's work, such as an assistant helps start the drafting process by getting the attorney what she needs to draft the pleadings.

This leads to questions about how law schools and legal clinics in law schools should handle this technology.⁸⁷ It seems to be technology built to handle the mundane problem of starting a document, audio, visual, or idea. It allows for creativity from past documents, ideas, or concepts. It does not allow for definitive answers on a specific point.⁸⁸ Entering a general prompt gives a general output, if the user is lucky

store owner in a Baltimore court?" (October 23, 2024) (on file with the author of this article) (similar output as compared with ChatGPT-4o, but the caption was more complete and included a certificate of service. The ChatGPT-4o version had more counts and substance to the prayer for relief, but Claude 3.5 had an actual monetary value to its prayer for relief).

⁸⁶ David S. Kemp, *Artificial Intelligence for Lawyers and Law Students: Crutch, Craft, or Catalyst?*, 49 SETON HALL LEGIS. J. 633 (2025); see MOLLICK, *supra* note 31, at 52-54 and 128 (citing a few studies on performance with GAI. While performance improved, one problem kept coming up in these experiments, "... most participants didn't even bother editing the AI's output once it was created for them. It is a problem I see repeatedly when people first use AI ... also a danger that we trust AIs for work too much." Mollick advocates for "being a human in the loop" of GAI).

⁸⁷ Jonathan H. Choi & Daniel Schwarcz, *AI Assistance in Legal Analysis: An Empirical Study*, 73 J. OF LEGAL EDUC. 384, 397 (Spring 2025) (finding "that access to AI substantially improved average student performance on multiple-choice questions but did not substantially improve average performance on essay questions."); Caitlain Devereaux Lewis, *All In: Strategic Approaches to Incorporating AI into Legal Higher Education*, KUWAIT INT'L LAW SCHOOL J. Part V. b. (April 21, 2024) <https://ssrn.com/abstract=4818383> (on file with author) (advocating for the use of GAI in legal education, particularly for legal research, advocacy and legal writing, negotiations, and organization and management of legal work.); Michael D. Murray, *Artificial Intelligence for Learning the Law: Generative AI for Academic Support in Law Schools and Universities — Report of Experiments* (September 04, 2024) (unpublished manuscript), <https://ssrn.com/abstract=4946680> [<http://dx.doi.org/10.2139/ssrn.4946680>] (advancing the idea through his own study of law students using different LLMs that using GAI as a tutor with novice law students enhanced their knowledge of the subject matter (copyright and trademark) as shown in pre-test and post-test exam scores.); Jonathan H. Choi, Amy Monahan & Daniel Schwarcz, *Lawyering in the Age of Artificial Intelligence*, 109 MINN. L. REV. 147, 170 (November 2024) (finding that "access to [GAI] caused little average improvement on the quality of output in lawyering task [from law students] but a substantial increase in speed completion. ... [law students] who had the worst performance without assistance from [ChatGPT-4] received the largest quality benefits, with little quality benefit to participants who are capable of producing high-quality work on their own. In contrast, the improvement in speed was largely consistent among [law students]."

⁸⁸ Andrew Blair-Stanek, Nils Holzenberger & Benjamin Van Durme, *Can GPT-3 Perform Statutory Reasoning?*, Proceedings of the 19th International Conference on Artificial Intelligence and Law (May 10, 2023), <https://arxiv.org/abs/2302.06100> [<https://perma.cc/X6BV-FP3D>] (assessing based on an older LLM that ChatGPT 3 is mediocre at best when it comes to interpreting statutes and using legal logic to analyze those statutes). Compare, however, the use of LexisNexis' Protégé™ in the same way. The program can give you descriptions of the law based on treatises, cases, statutes, and secondary legal sources. It has the capacity to give an opinion on the likelihood of an argument or give you possible arguments that would likely prevail in a jurisdiction. The program, however, cannot verify its claims. The verification part is the duty of the attorney. While it can persuade the user to believe one argument is better than another one, the user must verify the claim.

and the GAI does not hallucinate. Entering a specific prompt may help with accelerating more creative and precise language, but that risks other problems the legal practitioner needs to avoid.⁸⁹ So should clinic programs in law schools. As articulated earlier and noted in this article, there has been much scholarship on the effectiveness of GAI and much musing about its influence in the legal community.⁹⁰ The practice of clinical programs, however, is closer to that of the legal practitioner community than that of the traditional law school community. It is not out of the question for clinical programs to begin to utilize GAI in their teaching rubric.⁹¹ Clinical professors should learn to use this technology as a tool and as an assistant or agent. As will be discussed later, this is critical if clinical students are to learn about the use of GAI in their later practice and not fall into the crutch of indolence, incompetence, plagiarism, and misuse.

GAI should be used as a building block, much like a block of clay is used for sculpting. As described above, GAI can give a legal user a starting point that, with careful crafting, will generate a quality product. To generate a quality product, the user must do their research diligently and competently. In the case of research, GAI is a bit off.⁹² Microsoft's Copilot or perplexity.ai services general research because they offer links to sources on the web/internet so that the user can verify whether the output is reliable or hallucinating. Research, however, is a part of

⁸⁹ Joseph Regalia, *From Briefs to Bytes: How Generative AI is Transforming Legal Writing and Practice*, 59 TULSA L. REV. 193, 219 (2024) (cautioning lawyers and those who teach soon-to-be lawyers that client confidentiality and data privacy are ethical obligations in the legal profession. Use of GAI without informing the client and preserving confidentiality and privacy would violate standard ethical obligations). Regalia's point is that LLMs are constantly learning through the process of fine-tuning. As a result, an LLM without guardrails could share sensitive, private client confidential information unbeknownst to the user.

⁹⁰ Bliss, *supra* note 17, at 152; see Choi, et al., *supra* note 87, *Lawyering in the Age of Artificial Intelligence* at 3 n. 2.

⁹¹ Marie Summerlin Hamm, Benjamin V. Madison, III & Ryan P. Murnane, *The Rubric Meets the Road in Law Schools: Program Assessment of Student Learning Outcomes as a Fundamental Way for Law Schools to Improve and Fulfill Their Respective Missions*, 95 U. DET. MERCY L. REV. 343, 357 (2018) (stating that "Rubrics are the most commonly used direct assessment tool. A rubric essentially articulates a framework for successful student learning by merging the criteria for the goal with a rating scale. The two basic types of rubric are holistic and analytic.") GAI can help professors modify or improve current rubrics in their courses and clinical work. The legal writing scholars have pointed a way towards the use of GAI in professors' work; Lewis, *supra* note 87, at 14 tbl. 4; See *infra* note 140.

⁹² Magesh et al., *supra* note 31, at 232 (Although the authors point out the limitations in their results, it is clear that "the differences [in the GAIs' responsiveness to user input and accuracy of their outputs] may even change over time within the same tool. The closed nature of these tools, however, make it difficult for lawyers to assess when it is safe to trust them." The authors cite that LexisNexis' Lexis+ AI, Westlaw's AI-Assisted Research and Ask Practical Law AI, and ChatGPT-4 all hallucinated and provide inaccurate responses to user input, with the legal LLMs hallucinating 17% to 33% of the time. More research is needed for legal research products that have come out since 2024).

a lawyer's duty. The other, and probably most importantly, is the legal analysis that a decision maker can rely on, and the client can depend on. The legal practitioner must also be diligent and competent in assessing and advising the client on any particular facts regarding the current laws or rules. This requires critical and concentrated analysis of the law to the facts for which a client must understand are for or against them. The client can then make a reasoned and informed decision whether to pursue a claim or not, or, if pursued, a judge can rule reliably on those advocated facts and law. LexisNexis AI+ is helping to craft this new world where an attorney can get reliable cases on or near the point to the facts that a user inputs to its chatbot.⁹³ A study has shown, however, that the search, narrative, and knowledge functions are not perfect or foolproof.⁹⁴ It requires a user who has knowledge of the law and cases to verify and confirm that the data that is being given to the user is reliable. Again, the user, the attorney, must commit to the duty of competence and diligence. What is in the scholarly literature that can aid clinical law professors in legal writing and clinical legal education to advance attorney knowledge of this technology to assist the formation of the proto-professional and emergent writer?

II. THE LEGAL WRITING LANDSCAPE

A. *Legal Writing Scholarship*

A brief history of the theory and pedagogy regarding legal writing reveals that those scholars have had to connect three problems: defining legal writing; utilizing and enhancing the andragogy of legal writing to law students' performance; and linking that performance to the legal profession.⁹⁵ This has created a field of legal education that has been wrought with hits and misses since the inception of formal legal education in law schools.⁹⁶ This section will briefly outline the key theories about the most effective way to teach legal writing and its

⁹³ Magesh et al., *supra* note 31, at 222; *see also* LexisNexis Launches Protégé AI Assistant for General Use, LEGAL.IO (January 27, 2025), <https://www.legal.io/articles/5570030/LexisNexis-Launches-Protege-AI-Assistant-for-General-Use> [<https://perma.cc/C4S5-TTB6>] (touting the capabilities of the program quoting Min Chen, Chief AI Officer, LexisNexis Legal & Professional, "LexisNexis evolution from extractive to generative to agentic AI makes our legal AI solutions easier than ever to use, helping customers accomplish a remarkable amount of work without needing to be an expert in prompting").

⁹⁴ Magesh et al., *supra* note 31, at 232.

⁹⁵ *See supra* note 30.

⁹⁶ Pollman, *supra* note 30, at 894 (summarizing that law schools and practitioners viewed legal writing courses as a step beyond what law schools should do and unnecessary, what employers could do through apprenticeships, or what may be unachievable); *see also* Levin, *supra* note 30, at 158-9 (quoting Pollman's work on the view of law schools prior to 1980 that "writing ability as inherent and unteachable").

correlation to law school and professional performance. Along the way, this section will begin to explore how GAI may mix Formalism and the new Rhetoric in an interesting way, which will be discussed more in-depth in the next part.

As legal writing developed from a purely apprentice approach, where a mentoring attorney would teach a newly minted lawyer a hands-on basis to practicing law, to an approach designed with a pedagogical bias, law students have struggled to understand if the emphasis of their legal writing is on the product of the writing piece, the analysis or thought behind issue spotting, the resolution of a legal problem, or a combination. For those studying legal writing, law students should be able to produce all three and more. Several legal writing approaches were developed towards the latter half of the last century to teach law students the importance of thinking, communicating, and analyzing, and to challenge those students to demonstrate that importance in their writing. The following explores those approaches briefly.

1. Formalism

Some scholars have pointed out that in legal writing, the deliverable end-product with its formal features that lawyers produce is key to a competent attorney.⁹⁷ This approach is known as formalism.⁹⁸ Writing is considered the product of completed thoughts that have been well developed by analysis of the problem, research of the cases, and acknowledgment of the opposing parties' arguments. Formalism ascribes to an approach that others in the field will understand.⁹⁹ A common language with specific cultural norms assumes that in a moment of conflict, the purveyors of that language will engage ethically, reasonably, and fairly. This approach predicts description, argument, analysis, and a pleading with a prayer for relief.¹⁰⁰ Professors of law schools have taught this approach as either IRAC (Issue(s), Rule(s), Analysis, and Conclusion) or CREAC (Conclusion, the prayer for relief, Rule(s), Explanation, Analysis, and Conclusion,¹⁰¹ a repeat of a prayer for relief).

⁹⁷ Pollman, *supra* note 30, at 896.

⁹⁸ *Id.*

⁹⁹ *Id.* at 897; see Patrice, *supra* note 43 (discussing how GAI wrote a cease and desist letter).

¹⁰⁰ Pollman, *supra* note 30, at 898 (suggesting that the formalist approach to writing to the form facilitates learning to write as a lawyer within "the conventions of organizing a formal legal analysis." Pollman points out that this approach might enable student learning "to produce formulaic responses and ultimately uninspired writing.")

¹⁰¹ See generally Tracy Turner, *Finding Consensus in Legal Writing Discourse Regarding Organizational Structure: A Review and Analysis of the Use of IRAC and its Progenies*, 9 LEGAL COMM. & RHETORIC: JALWD 351 (Fall 2012) (arguing for a consensus of different structures of legal writing to minimize confusion); Gerald Lebovits, *Cracking the Code to Writing Legal Arguments: From IRAC to CRARC to Combinations in Between*, 82 N.Y. St.

Both methods are similar in their common language. The thinking is that the writer in this culture can take any template or boilerplate document and insert these methods for a result that will advance their client's needs. Any side to a conflict will understand the methodology of the IRAC/CREAC, context, analysis, and prescription and argue for or against them. Most importantly, a decision-maker who is also from this culture will understand them and decide the merits of a case based on the formulaic method.

Most law schools have built their teaching pedagogy on this formalist assumption by teaching IRAC/CREAC, grading based on those methods, and helping students learn and do the methods. Formalists emphasize the use of templates with a reliance on the familiarity of conventional legal forms.¹⁰² The Formalists' approach is not wrong, but incomplete. The approach may allow writers to believe that using IRAC/CREAC is a good approximation of knowledge. If students mimic the formalistic approach by producing a coherent document using the forms and methods, the assumption is that they understand the law and their client's facts. The student thinks like a lawyer.¹⁰³ Formalism's approach emphasizes competent creation of the product through the use of IRAC/CREAC and a prescribed process of building on templates. The emergent writer could expand their legal thinking through this approach. Whether the emergent writer will consider a client's specific facts in their analysis of the client's problem, while not appealing only to the content end-product, such as pleadings, remains to be seen. What is less assured is whether the emergent writer will be ethically competent and holistically knowledgeable about their client.

2. *New Rhetoric*

After the introduction of clinical legal education and more experiential approaches to teaching the law, it was not enough to show the end-product of a legal document or to expect students to mimic a formulaic approach to understanding the law or clients. A new approach

B. J. 64 (July/August 2010), https://www.researchgate.net/publication/45402536_Cracking_the_Code_to_Writing_Legal_Arguments_From_IRAC_to_CRARC_to_Combinations_in_Between [<https://perma.cc/K5AP-7HP3>].

¹⁰² Pollman, *supra* note 30, at 898.

¹⁰³ Feerick, *supra* note 30, at 381 (advancing that law schools must teach legal writing to law students because in 1994 there was so much bad legal writing. He advocates for writing tutors to first years, legal writing professors to attend writing workshops and seminars, and, substantively, first year courses and clinical programs integrate with writing courses. *See id.* at 385-386. Since his article, those suggestions have been incorporated in many law school curricula and graduation requirements. *See generally* Pollman *supra* note 30, at 904 (comparing the New Rhetoric legal writing movement to Formalism).

to writing was needed to address the problem of how to think about a problem.¹⁰⁴ This approach naturally constitutes a new norm: thinking is about meaning or making sense of what is “meaning.”¹⁰⁵ Legal writing scholars devised a new way to approach law and how students can interpret law with meaning that takes into consideration context, history, identity, equity, etc., all those things that make us human.¹⁰⁶ The law is a compendium of words designed to control behavior, define rights and obligations, and shape actions and expectations going forward. In this new approach, words or language shape and form experience.¹⁰⁷ This approach was called the New Rhetoric.¹⁰⁸

The New Rhetoric launched a diverse field of thoughts on questions of what the law is, how the law should be used or applied, how lawyers establish meaning, and are thinking and writing the same thing. This approach uses context that is certainly outside of the form-generating approach to the law. Legal studies fields, such as Critical Legal Studies, Critical Feminist Theories, Critical Race Theories, Economic Legal Theories, and Originalist Textual Theories, broaden the knowledge and language of law.¹⁰⁹ This meant that instead of describing the issue, citing the appropriate law, explaining the analysis and the relevant fact’s application to the law, and concluding with a demand, a legal writer could expand on the relevant facts according to evidence and give a

¹⁰⁴ Pollman, *supra* note 30, at 899 (explaining that the New Rhetoric consists entirely of a writer as creator of content and context. The movement persuaded law schools to help law students think about a problem through knowledge, discovery, construction of meaning and knowledge. *See id.* at 902-3. The New Rhetoric compels students to understand a client’s problem, not just through legal knowledge, but to think of ways that helps the client’s needs through that problem.

¹⁰⁵ *Id.* at 903.

¹⁰⁶ *Id.* at 903 – 4.

¹⁰⁷ *Id.* at 900.

¹⁰⁸ *Id.* at 899-900; *see generally* Michael R. Smith, *Rhetoric Theory and Legal Writing: An Annotated Bibliography*, 3 J. ASS’N LEGAL WRITING DIRECTORS 129 (Fall 2006) (A good resource to explore all types of rhetorical communication devices in the law).

¹⁰⁹ Pollman, *supra* note 30, at 901; Linda L. Berger, *Studying and Teaching “Law as Rhetoric”: A Place to Stand*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 3, 10-1 (2010) (arguing that law school writing courses should emphasize rhetoric as an essential for legal composition); *see also* Larry Alexander and Saikrishna Prakash, “Is That English You’re Speaking?” *Why Intention Free Interpretation Is An Impossibility*, 41 SAN DIEGO L. REV. 967, 983-8 (August-September 2004) (countering against originalist textual theories, which seeks to nullify intent in the analysis of legal text, the authors posit that any objectified intent in understanding legal text cannot be read as an intention free text that is text with no writer’s intention, just the text itself. The authors claim that interpretation of a text requires understanding the intention of the writer of the text as well as understanding and accepting norms and context for meaning); *see also* Michael D. Murray, *After the Great Recession: Law and Economics’ Topics of Invention and Arrangement & Tropes of Style*, 58 LOY. L. REV. 897, 902 (Winter 2012) (describing the different rhetorical canons of law and economics); *see also* Debra Moss Curtis & Judith R. Karp, “In a Case, In a Book, They Will Not take a Second Look!” *Critical Reading in the Legal Writing Classroom*, 41 WILLAMETTE L. REV. 293, 311 (Spring 2005).

complete or thorough picture of the issues involved in the claim or alleged violation of the law. The New Rhetoric, in some ways, promotes a balance of understanding a set of circumstances with a focus on the law's application to those circumstances. For example, using the scenario of the classic slip and fall, a Formalist writer could use the boilerplate produced by ChatGPT,¹¹⁰ fill in the required information for the plaintiff and defendant, add the IRAC method of analysis, check the legal citations, demand the relief, check with the client, and file the complaint. Assuming the minimum legal and ethical duties have been met, the legal writer is done and onto the next pleading. The New Rhetoric requires the legal writer to ask a few more questions to the client, such as, are there results the clients wants other than money, is it important for the client's voice to be heard in an ADR setting or with the judge, or does the client want something that the law cannot give? Instead of writing a pleading that outlines the basic contours of the law's relief, this approach allows for creativity and a norm that looks to the law as more than a problem-solver. The legal writer can incorporate the voice of the client more meaningfully. This approach also requires law schools to teach the law in a different way than just the IRAC/CREAC method.

The impact of the New Rhetoric on legal writing and education has been profound. The focus is on process rather than product. Client-centered lawyering (CCL), a process, is a natural outgrowth of the thinking behind the New Rhetoric.¹¹¹ CCL's focus on an attorney's ability to listen to their client, actively ask questions about what they heard and what the client believes the law can do, and weigh all options based on the answers is a process that requires thought. CCL allows the attorney to ask about the client's living conditions, their hopes, the impact of conflict or harm suffered at the hands of another, and other non-law-related circumstances. Law schools, which use experiential education through externships and clinics, have developed an andragogy that slows down the representation process to consider more than just doing the law, but considering the law in a holistic way that meets the client's interests and needs. The hope with the New Rhetoric approach is beyond making a competent attorney, but an attorney who approaches the law through a holistic view of the law's control over people. Writing becomes a tool by which to execute the desires, dreams, needs, and interests of the client by using the law. Writing can include describing the client or the client's community in a way that evokes a larger picture

¹¹⁰ Knight, *supra* note 83.

¹¹¹ Amelia J. Uelmen, "Millennial Momentum" For Revising the Rhetoric of Lawyers' Relationship and Roles, 9 U. ST. THOMAS L.J. 446, 458-60 (Fall 2011); see John B. Mitchell, *Narrative and Client-Centered Representation: What a True Believer To Do When His Two Favorite Theories Collide?*, 6 CLIN. L. REV. 85 (Fall 1999).

than a legal dispute. Writing in this approach can encapsulate a broader description and advocacy for solutions not found in the law. This kind of creativity emphasizes thinking over performance results.¹¹² Writing is simply a tool by which to exhibit thinking. But what happens to knowledge as it was emphasized through the Formalists?

3. *Transformative Writing for the Emergent Writer*

Perhaps, law schools have gone the route of transforming the legal profession by creating a hybrid: writing formulaically as a basis to expand on the notion of CCL. While, rightly or wrongly, bar passing rates for law schools are a measure of the law schools' abilities to demonstrate that their students have mastered basic legal concepts to go into the world and give legal advice, it is a very small measure of serving a client.¹¹³ All the thinking behind the New Rhetoric is seldom exhibited in the bar test. Depending on the student population with respect to GPAs and LSATs, law schools are left scrambling to design programs that can meet or surpass the jurisdiction's passing rate. Professional identity and legal ethics are deemphasized in pursuit of matching the meter. The hybrid approach, however, can be a solution to the bar passing problem. This is the approach used at the University of Baltimore School of Law.

This law school combines the notions that writing is fundamental to thinking and that acquiring legal knowledge is an ongoing mission.¹¹⁴ Its clinic, for example, emphasizes metacognition as a teaching tool to capture the best part of the Formalists and the New Rhetoric.¹¹⁵ Metacognitive thinking empowers the person thinking by increasing their mental capabilities to discover and connect flaws in their thinking

¹¹² Pollman, *supra* note 30, at 904.

¹¹³ Michael James Bommarito & Daniel Martin Katz, GPT Takes the Bar Exam (December 29, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4314839> [<http://dx.doi.org/10.2139/ssrn.4314839>]; cf Matthew Stubenberg, Chloe Berridge, Thomas Smith & Joshua Casey, How AI Stacks Up Against the Multistate Bar Exam (May 12, 2025) (unpublished manuscript), <https://ssrn.com/abstract=5291811> [<http://dx.doi.org/10.2139/ssrn.5291811>]; Eric Martínez, *Re-Evaluating GPT-4's Bar Exam Performance* (Artificial Intelligence and Law, LawAI Working Paper No. 1-2023, May 8, 2023), <https://ssrn.com/abstract=4441311> [<http://dx.doi.org/10.2139/ssrn.4441311>]; see also Daniel Martin Katz, Michael James Bommarito, Shang Gao & Pablo Arredondo, *GPT-4 Passes the Bar Exam* (March 15, 2023), 382 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY A (2024), <https://ssrn.com/abstract=4389233> [<http://dx.doi.org/10.2139/ssrn.4389233>]. There is an irony here that an algorithmic program with a scintilla of legal knowledge trained on what is available on the internet can "master" legal concepts in a complex test.

¹¹⁴ Levin, *supra* note 30, at 164.

¹¹⁵ Jaime Alison Lee, *From Socrates to Selfies: Legal Education and the Metacognition Revolution*, 12 DREXEL L. REV. 227, 229-30 (2020) (defining metacognition as "human performance improves when people strategically plan and reflect on past experiences in order to improve future performance.")

process.¹¹⁶ Using a reflective and scaffolding approach to teaching, the professor can help the student think about what they were thinking when they worked on an assignment, where in the process they diverted from the purpose of the assignment, where they made strides in the process, and did their thinking achieve or not the purpose of the assignment.¹¹⁷ Writing assignments, pleadings, briefs, and other legal documents used for persuasion involve this type of thinking strategy. A boilerplate gives the student the contours of what the results look like. An ability to listen and ask questions gives the student the ability to understand the whole as well as the parts of the representation. The metacognitive thinking process helps the students put it all together. Writing in a journal or reflection piece helps the students think through a problem where the answers are not neatly found in a legal case or cannot simply be worked out through a logical process of understanding the law. Writing with the help of a professor can alleviate the student's anxiety about making mistakes and enhance their ability to seek solutions that include the law.

Clinical legal education begins with metacognitive thinking in mind. The purpose of clinical legal education is primarily to teach students to develop legal practice skills in a real-world environment where the students represent people, communities, projects, or craft policy initiatives or legal authority.¹¹⁸ While the beneficial byproduct of providing access to justice to individuals or communities is lauded and should be a goal, it is not the only goal of clinical legal education.¹¹⁹ A paramount goal is to assist the student to think as an attorney in the hopes that they will write as an attorney.¹²⁰ This particular goal is practiced through a combination of processes: the Formalist's approach of emphasizing end-product; the New Rhetoric's approach to thinking of a legal problem as more than a legal dispute to be resolved by law; and the metacognitive thinking approach of reflection, meaningful feedback, and scaffolding.¹²¹ Clinical legal education slows the process of thinking through a non-directive approach of questions to the students that goes beyond getting an answer in the narrow scope of the law. Students are allowed to explore legal questions, the implications of only following the law, the consequences of not addressing fundamental conditions or problems, and other areas that their doctrinal courses would not be able

¹¹⁶ *Id.* at 237.

¹¹⁷ ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION, Clinical Legal Education Association, 127 (1st ed. 2007).

¹¹⁸ *Id.* at 166; see TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 6 (Susan Bryant, Elliott Milstein & Ann C. Shalleck eds., 2014) [hereinafter CLINICAL PEDAGOGY].

¹¹⁹ CLINICAL PEDAGOGY, *supra* note 118, at 14.

¹²⁰ *Id.*

¹²¹ Kowlski, *supra* note 30, at 341.

to address.¹²² Clinical legal education harmonizes different andragogical approaches to stimulate a student's thinking about what approach to use in their representation of a client. Writing is a natural derivative of that thinking and the clearest avenue to assist the student with their thinking. Professors in the clinical legal space have many tools at their disposal to enhance the students' education. Perhaps GAI can be one of those tools. GAI has the potential to involve differing approaches to teaching in different ways.

B. Legal Education and the Emergent Writer

1. The Problem: Students Who Have Not Learned or Been Taught To Write Well

This section assesses the concerns of the emergent writer. The emergent writer is one who has not become a complete writer. A complete writer seldom exhibits grammatical problems in writing or delivers syntax and lexicon confidently without qualifying the language or premises in their writing. Students who have made it through four years of undergraduate education or more and arrive at law school prepared to handle the writing tasks are usually complete writers. The emergent writer may mix tenses in their writing, use run-on sentences, combine different ideas into a singular sentence without describing the ideas, seldom edit or revise current work, or transpose the organization of a formulaic style without understanding the consequences for doing so. There are no studies on how many emergent writers exist in law schools or whether emergent writers exist. For purposes of this article, the emergent writer struggles with writing tasks. If an andragogical approach could be divined to help the emergent writer, the hope is that GAI can be sourced with that approach in mind. GAI could help solve the problems itemized above and help further the approaches discussed above to the benefit of the emergent writer.

¹²² This article will not cover the differences between the andragogical theories of doctrinal and clinical teaching. Each has a space in the law school community to co-exist. Doctrinal courses, however, only emphasize the recognition of law and the case method analysis of an area of law through the sometime use of the Socratic method. *See* STUCKEY, *supra* note 117, at 82. Some critics argue that the problem with doctrinal courses is their confinement to the coverage of a particular area of law and limited space to explore the context underpinning the area of law being covered. *Id.* at 34. It can introduce several lenses or theories of analysis to that particular area, but not its impact or influence on a pluralistic society. Doctrinal misses the forest for the trees. On the other hand, andragogical clinical approaches use the trees to see the forest and ask the emergent writer to put it all together. It is to this latter part that the article focuses the reader to understand GAI as a useful tool in the endeavor of helping the emergent writer emerge as a professional writer.

Some first-generation college or law students may be emergent writers.¹²³ Some first-generation college or law students are complete writers. Their success in prevailing over obvious obstacles, both educational and experiential, has enhanced their ability to write better than the emergent writer.¹²⁴ They are often lauded for excelling in this area and are often sought after to teach emergent writers or explain how the emergent writer can overcome obstacles.¹²⁵ The emergent writer has not had life experience before law school that emphasized writing. The emergent writer may have had different obstacles to overcome: translation of an exacting form of writing that are hailed by professionals, but not emphasized in the emergent writers' experiences; imposter syndrome; the lack of ready mentors to assist writing; humility and the lack of expression over achievement; execution of a technical form of writing that is different from college writing; the lack of camaraderie with fellow students and faculty for fear of being pigeonholed as a weak writer and thinker; and the lack of reinforcement or redirection of improved writing from a knowledge mentor who could reinforce or redirect the emergent writer.¹²⁶ If the emergent writer is also a first-generation law student, then the obstacles deepen and the support becomes harder and more necessary.

The first-generation emergent writer in law school may not have had the advantage of a family's history in post-high school education.¹²⁷ Perhaps this writer has never met an attorney until college or law school. Those connections may not have been established, and there is no lawyer model to emulate or follow. Legal professional identity then takes place at the law school through clinics or externships.¹²⁸ In

¹²³ Jacqueline M. O'Bryant & Katherine Traylor Schaffzin, *First-Generation Students in Law School: A Proven Success Model*, 70 ARK. L. REV. 913, 916 (2018) (using the internal and anecdotal data of the University of Memphis School of law to develop a program that helps first-generation college students become better prepared for law school).

¹²⁴ Carolyn Young Larmore, *First-Gen in the Field*, 31 CLIN. L. REV. 239, 245 (Fall 2024).

¹²⁵ *Id.* at 246; *see also* O'Bryant et al., *supra* note 123, at 926. From several undergraduate studies and programs, an emergent writer could be helped in the following ways: connect secondary or undergraduate programs to a professional program (e.g., prelaw courses in undergraduate colleges that focus on writing to help prepare college students to law school); allow for an intermediate program focused on writing in law school before going to law school; provide financial and emotional support to the emergent writer; identify who is an emergent writer so that resources can be applied; set up network opportunities for emergent writers to meet others like them or meet those that were emergent writers; and involve faculty to provide academic, network or emotional support that recognizes the assistance that emergent writers will need; *id.* at 925-9. All these innovations by law schools and universities stresses the importance of a way that the emergent writer can connect with someone who knows, such as a mentor.

¹²⁶ Larmore, *supra* note 124, at 243-6. The concept of a knowledge mentor will be further explored *infra* Part IV.B.).

¹²⁷ *Id.* at 245.

¹²⁸ *Id.* at 247.

Larmore's groundbreaking article about first-generation law students, she interviewed 10 law students going through the process of bridging the gap in their legal knowledge with externships.¹²⁹ Larmore notes that with the proper intra-law school support as well as externship support, the single biggest factor that leads to success among first-generation law students is having a supervisor who can offer mentoring, feedback, and networking opportunities.¹³⁰ In another groundbreaking article by O'Bryant et al., the authors offer another idea to help first-generation college students going to law school.¹³¹ The law school and undergraduate colleges can offer first-generation college students a summer pre-law program that emphasizes providing guidance, financial support, preparation, mentorship, and nurturing interdependent relationships.¹³² It seems that having someone assisting the student navigate a new world is what helps a student make a transition from a world of no legal experience to one filled with legal jargon, expectations, and writing.¹³³

Legal writing may be confusing to an emergent writer. On the one hand, boilerplates and templates guide the writer through an array of factors that the writer must understand and for which a response is necessary. On the other hand, filling out the form is not enough. Without the proper guidance from someone who knows about the art of pleadings or briefs, for example, how does the emergent writer navigate the nuances in the legal argument or law? How can the emergent writer introduce facts relevant to the law and other facts conveying a client's problem holistically to a court, legislative body, or on a legal assignment? How can the emergent writer understand basic contract drafting language of "shall" and "will" to distinguish a covenant from a declaration?

To capture the ideas noted so far, review the slip and fall scenario from an emergent writer's point of view. Law school has taught the emergent writer that when someone slips and falls on a store's floor, there is a tort action. The doctrinal course has taught the emergent writer to spot the problem, identify it, and propose legal theories that

¹²⁹ *Id.* at 251-2.

¹³⁰ *Id.* at 258-60 and 265-6 (highlighting that supervisors in externships "should offer more in-depth mentoring." According to Larmore, in-depth mentoring can include coaching, advice, counseling, friendship, and role modeling. While quoting Ida O. Abbott in *The Lawyers Guide to Mentoring*, Larmore explains that a "good mentor can also help a first-gen student extern 'build self-confidence, a sense of self-worth, professional judgment, and intuition. Mentors offer acceptance and validation, confirm mentees' competence as professionals, and help mentees see that they have the ability to turn their aspirations into achievements.'" *Id.* As the reader will note a supervisor or mentor is akin to a knowledge mentor).

¹³¹ O'Bryant et al., *supra* note 123, at 946.

¹³² *Id.*; again, mentors being involved in the lives of first-gen students makes a significant difference. Three out of the five students explore relationships and people.

¹³³ An analogous conclusion leads to the same solution that mentoring of a different sort can be applied to the emergent writer.

would support an action for the person injured. Also, these courses ask the emergent writer to identify the same problem from the store's point of view, to defend itself from an action by the injured person, and base that defense on tort theories. When the emergent writer is asked to take those theories and turn them into a pleading, the emergent writer must then deal with the form of the pleading as well as the tort theories. Most law schools have responded to that problem of translation and form by incorporating courses exclusively dealing with legal writing, research, and analysis.¹³⁴ These courses were exclusively set up to help the law student navigate this gap-in-knowledge problem by connecting theory to form.¹³⁵

In these courses, the emergent writer is expected to emerge. By working through several assignments mimicking law practice, the emergent writer begins to connect the theories of the law with the various legal forms used by most first-year barred attorneys: the legal research or predictive memo; the initial pleading, either complaint or answer; the brief; and several types of correspondences. Even under the steady hand of a law professor specialized in legal writing, the emergent writer will encounter problems with any assignment, but the hope is that through personal feedback,¹³⁶ teaching editing and revising skills, and kindness, the emergent writer will begin to understand and perform the task.¹³⁷ This is an iterative process: where the professor gives an assignment; the emergent writer performs the assignment; the professor collects, reviews and critiques the assignment; the professor gives feedback to the emergent writer; the emergent writer either revises the assignment based on the professor's feedback or will take the feedback and apply them on the next assignment.¹³⁸ Using a triage method pioneered by Barnett, the professor can focus on substance or analysis first, then on style, such as grammar and syntax.¹³⁹ This process, done over and again, will help the emergent writer understand the connection between the theory of law and its application in documents that are relied on by decision-makers. These courses help the emergent writer apply IRAC or CREAC in ways that slow down the process of writing for the better. The courses model for the emergent writer a way of understanding legal analytical thought with contextual explanation. The emergent writer

¹³⁴ STUCKEY, *supra* note 117, at 57.

¹³⁵ *Id.* at 206.

¹³⁶ Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. OF TOL. L. REV. 651, 653 (Winter 2007) (noting that the Legal Writing Institute offers a half-day seminar for legal writing scholars and professors on giving critical feedback to students).

¹³⁷ *Id.* at 669.

¹³⁸ *Id.* at 656 and 673-8.

¹³⁹ *Id.* at 678.

will have to identify the problem through facts, demonstrate the law, apply those laws to the specific facts, and conclude that the law does or does not apply to these particular facts. The goal in these courses is to help students move from emergent writers to competent and complete writers of law. Could GAI enhance that learning in these courses?¹⁴⁰ The answer, of course, is yes. The challenge is how.¹⁴¹

2. *Clinical Legal Education: The Hands-On Approach to Help the Emergent Writer Overcome Obstacles*

While doctrinal courses introduce the emergent writer to novel theories and ideas concerning the law, and legal writing courses propel the emergent writer to write continuously to perfect the basic forms of lawyer documents, clinical legal education's hands-on approach puts all the skills and knowledge that the emergent writer has obtained to help clients in real-world situations.¹⁴² As stated above, clinical legal education is a teaching method that incorporates theory, writing, and practice.¹⁴³ Emergent writers are expected to synthesize, identify, analyze, summarize, and write legal concepts into a legal proto-practice. Using the metacognitive thinking strategy, the emergent writer must develop new skills: discernment; counseling; listening; and judgment, among other skills. These skills require the emergent writer to plan out from where they start to how they will end.¹⁴⁴ While an apprenticeship-type approach might help the emergent writer perform all the legal work entailed in advocating for a client, it might not help the emergent writer understand or synthesize new knowledge or look for the big picture in their advocacy. As explained above, the metacognitive thinking approach is equally an iterative process. The emergent writer writes out a plan that

¹⁴⁰ Regalia, *supra* note 89, at 25; Kirsten K. Davis, *A New Parlor is Open: Legal Writing Faculty Must Develop Scholarship on Generative AI and Legal Writing*, 7(1) STETSON L. REV. FORUM 1 (2024); Nicholas Mignanelli, *The Legal Tech Bro Blues: Generative AI, Legal Indeterminacy, and the Future of Legal Research and Writing*, 8 GEO. L. TECH. REV. 298 (May 2024); Jonathan H. Choi, Kristin E. Hickman, Amy Monahan & Daniel Schwarcz, *ChatGPT Goes to Law School*, 71 J. LEGAL EDUC. 387 (2022); Hadar Y. Jabotinsky & Roe Sarel, *Co-Authoring with an AI? Ethical Dilemmas and Artificial Intelligence*, 56 ARIZ. ST. L. J. 187 (Spring 2024); and Carolyn V. Williams, *Bracing for Impact: Revising Legal Writing Assessments Ahead of the Collision of Generative AI and the Nextgen Bar Exam*, 28 LEGAL WRITING 1 (2024).

¹⁴¹ *Id.*

¹⁴² CLINICAL PEDAGOGY, *supra* note 118, at 37 (acknowledging that externships do a similar job as the clinic, but my focus is on the use of GAI in in-house clinics). Perhaps a future article may focus on obtaining information from the legal world as to how it uses GAI in its practice and contemplating the ethical requirements where the practitioners in that world fall short.

¹⁴³ *Id.*; see also Levin, *supra* note 30, at 165.

¹⁴⁴ Lee, *supra* note 115, at 237.

maps out the thinking involved in a specific task.¹⁴⁵ The plan involves choices that are identified by goals or outcomes.¹⁴⁶ The plan includes looking inward for internal intellectual resources that the emergent writer already has and outward for resources that she has and will need to accomplish the task.¹⁴⁷ After looking for resources, the emergent writer identifies strategies to achieve the task that would be most effective and efficient.¹⁴⁸ Once the emergent writer selects a strategy, she performs the task.¹⁴⁹ An assessment of whether the task was successful is done by the emergent writer, who collects and synthesizes information that helps in that assessment.¹⁵⁰ The emergent writer identifies whether resources or strategies completed the task or fell short in some way.¹⁵¹ The emergent writer then evaluates improvements for continued success or to become successful in the next performance.¹⁵² The process is repeating again and again to improve performance and, most importantly, for educational purposes.¹⁵³ In clinical legal education, this process is done with the aid of a supervising attorney or clinical professor.¹⁵⁴ The opportunity for giving feedback and reflection is a feature of clinical legal education.¹⁵⁵

A few more words about the metacognitive thinking process. Devising a plan for a writing task (or almost any task requiring cognitive skills) involves writing it up. Writing it up gives the emergent writer a chance to read through her thoughts and analyze whether the path she is choosing has consequences that can be anticipated.¹⁵⁶ Next, looking inward helps the emergent writer assess the resources she has, does not have, and will need.¹⁵⁷ Putting those assessments down in writing and reviewing them supports the emergent writer to reflect on what she has put down. If the task is a writing task, a correspondence to a client or agency on behalf of a client, the iterative process would be helpful to the emergent writer as well as her professor for future evaluation of the writing task. The more complex the task, the more involved the iterative process is in breaking down the complex task into smaller assignments to complete the task.¹⁵⁸ The use of self-reflection, strategies, evaluation,

¹⁴⁵ *Id.* at 230.

¹⁴⁶ *Id.* at 238.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 239.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ CLINICAL PEDAGOGY, *supra* note 118, at 172.

¹⁵⁵ *Id.* at 25.

¹⁵⁶ Lee, *supra* note 115, at 249.

¹⁵⁷ *Id.* at 266.

¹⁵⁸ See *infra* p. 53 and note 230.

performance, and judgment promotes a feedback loop that, in time, becomes unconscious to the emergent writer.

As mentioned above, clinical legal education assists students in thinking critically beyond achieving the task. Students' writing tasks include letters, internal memoranda, pleadings, discovery requests, memoranda of law, trial and appellate briefs, witness examinations, opening and closing statements, testimony, articles of incorporation, contract drafting, presentations, meetings, and interviews, among others, for all types of audiences.¹⁵⁹ If the client needs her attorney to write a pleading, then the emergent writer has to integrate all their previous skills, learning, and doctrinal knowledge into a new task. This involves a deep dive into an area of law only tangentially previously explored and prior writing assignments that provide glimpses of the sophistication of a real client pleading. The emergent writer will have assessed for themselves what skills they have to write a pleading, what they will need, and to whom they can go to get the resources they need. They will have to assess if their writing is up to the task for which their clients need them to perform. This is where the supervising faculty could help the emergent writer by asking questions focused on them, their resources, their previous writing experience, and their plans or strategies, which in the writing space means investigating their research, their assumptions, and their analysis of the case. The professor has the time to discover with the emergent writer their thinking involved in the case before executing the written task. The professor looks for the document's organization, format, wordiness, word choice, proofreading, tone, correct spelling, grammar, and punctuation, among others.¹⁶⁰ Professors can also do more creative sessions with students so that all share in the wisdom of the group. This helps the emergent writers share their insights in writing to peers who can provide more feedback. In her seminal essay, Levin gives an example that the professor can slow the process further by having the professor lead a discussion with students about a business letter to the IRS that the students were instructed to write and then edited by their peers for a clinic seminar.¹⁶¹ In this scenario, peers help by reviewing, editing, and giving feedback to their peers.¹⁶² The professor can also provide personal feedback after their performance. In the end, the professor and her collaborative techniques provide the emergent writer with best practices for future legal practice.

Other assignments or tasks in the clinical legal education space that expose the emergent writer to other opportunities are: investigating,

¹⁵⁹ Levin, *supra* note 30, at 164.

¹⁶⁰ *Id.* at 168.

¹⁶¹ *Id.* at 171-2.

¹⁶² *Id.* at 172.

evaluating, and analyzing a claim; interviewing and counseling a client; and strategizing with the client on the claim. These opportunities help the emergent writer synthesize the use of words, forms, and procedures for a real client. Throughout these opportunities, the steady, patient, guiding hand of a professor, someone with expert knowledge in the law and practice, encourages and teaches the emergent writer to improve continuously with a specific focus on the strengths and weaknesses of the emergent writer.¹⁶³ As it has been expressed, the professional mentor increases the chances that the emergent writer can improve and overcome the writing obstacles that have alluded them in the past. But the professional mentor is also not alone. Peers can help. The professional mentor and peer support the emergent writer to understand, debate, question, and research the case, words, forms, and procedures used in the practice of law. With the techniques mentioned throughout this article, the question is: how can GAI add to the further improvement of the emergent writer?

III. THE NEW LANDSCAPE: THE CASE FOR THE USE OF GENERATIVE AI IN CLINICAL LEGAL WRITING AND EDUCATION

A. *Demystifying the Notion That Good Writers are Born Good Writers*

Writing an opinion in *Inside Higher Ed* in 2017, Jill Parrott, then Professor of English at Eastern Kentucky University, wrote, “Sometimes when I hear colleagues complain about student writing, my response is ‘But isn’t that why we’re here? Is it not our job to teach them?’”¹⁶⁴ Professor Parrott expresses a frustration shared by law professors across a wide swath of law schools. In 2017, Professor Parrott did not have to conceive of a new pedagogy that would include GAI. Maybe the quote would change to “Is it not our job to teach them with every available tool and agent we have?”¹⁶⁵ The use of GAI in writing in general has

¹⁶³ *Id.* at 176.

¹⁶⁴ Jill Parrott, *Some People Are Just Born Good Writers*, INSIDE HIGHER ED (November 16, 2017), <https://www.insidehighered.com/views/2017/11/17/good-writers-are-made-not-born-essay> [https://perma.cc/3C7F-UWDY].

¹⁶⁵ MOLICK, *supra* note 31, at 123 (discussing the possibility of GAI as an agent that can do an item or task based on the prompting of the user. Mollick expounds that “almost all our jobs will overlap with the capabilities of AI”); see Regalia, *supra* note 89, at 197 (explaining how GAI as a tool can be helpful to lawyers, “legal writers can use [GAI tools] to save time and do better work for clients and colleagues”); Murray, *supra* note 6, at 3, *Prompt Engineering and Priming in Law* (saying, “[GAI] is only a tool — a very impressive, sophisticated tool, but a tool nonetheless”). The distinction here is important. As a tool, GAI can aid the emergent writer to come up with ideas or draft a rough draft of a legal document, but it cannot solve the legal problem that the legal document is intended to help resolve. An agent, however, will do most of the legal tasks possible including drafting a complete legal document. An agent could be a paralegal who culls all the documents together, drafts preliminary pleadings in

been hotly debated by English teachers in high school and professors in college.¹⁶⁶ At law schools, legal writing professors have taken the lead to figure out how the technology works and how it can be utilized within the law school andragogy.¹⁶⁷ This lead may persuade law professors in other areas to reexamine the utility and advantages of this tool for themselves and their students.

This section scrutinizes the appropriate use of GAI to help teach legal writing in the legal clinical space. While not exclusively focused on legal writing, the next parts will advance three ideas: clinical law professors must carefully assess the use of GAI before applying its use in the classroom; clinical law professors must act as a GAI knowledge mentor with students, especially the emergent writer; and clinical law professors must use the recommended strategies in the classroom to assist the emergent writer with GAI. Clinical law professors who believe that they can influence the emergent writer for the better will benefit from understanding GAI's limitations and strengths. In general, GAI's hallucinations and imprecise outputs are both a benefit and a disadvantage. With a framework that any writer can improve, clinical law professors can expose those GAI features to teach editing, revising, and critical thinking. Expanding upon metacognition thinking, peer review, and hybrid legal writing approaches, clinical law professors can build learning models and environments that benefit all students.

B. The Lost Opportunity of Teaching Moments with GAI

This should come as no surprise that the use of GAI in legal education is controversial, and arguments over its use are necessary.¹⁶⁸ As the legal industry employs GAI more and more, law schools will have to grapple with the fact that the legal industry has embraced GAI. While not an exhaustive list, GAI is used to summarize long documents, create first drafts of documents, sift through multiple files to find words or ideas that can be used in discovery, exercise dialogue in pre-trial or pre-argument ideas with prompted and simulated questions, brainstorm

Word, and begins a search for cases as defined by the lawyer and her client. It is possible that GAI can take on that role in Protégé™, for instance. The use of GAI as an agent is far more problematic for the profession and the emergent writer if the agent is left to its own devices. That topic will be covered in a future article.

¹⁶⁶ Roose, *supra* note 35; Parrott, *supra* note 164.

¹⁶⁷ Regalia, *supra* note 89; *see generally* Davis, *supra* note 140; Mignanelli, *supra* note 140; Williams, *supra* note 140 (these authors began delving into the possibilities and real-world solutions of GAI as a writing tool to assist law students in their writing assignments. They have observed GAI remarkable ability to state things in a way a subject-matter expert would say things. But only the expert knows whether GAI provides an accurate and truthful assessment of what it outputs. Their insights help law school professors help law students fill-in knowledge and skills gaps that will aid law students to become competent attorneys).

¹⁶⁸ Karr et al., *supra* note 7.

legal points and counter-points, automate case management workflows and billable hours, and organize disparate notes into a cohesive and unified whole.¹⁶⁹ Legal employers will start to look for law school graduates who have used the technology and feel comfortable with its use.¹⁷⁰ Some law firms have started to train their attorneys on the use of GAI.¹⁷¹

When GAI is used widely, past pedagogical controversies will arise anew. Moving from the Socratic method to other methods of teaching the law, it took law schools a long time to shift. The Socratic method's purely asking questions about the holding of an appellate case to divine a legal pattern or underlying idea shifted to asking questions about the meaning of law or nuanced questions about the correctness of a holding.¹⁷² Also, with every novel technology, law schools have lagged behind the legal profession in embracing the potential advantages of the new technology. Prime examples are electronic research in a fixed database, apps used in personal computers, electronic discovery and case management, and emails. In this case, scholars have seen the writing on the wall and have jumped at the chance to assess GAI's effectiveness and efficiency in legal tasks.¹⁷³ Some legal scholars have begun to use GAI as an assistant to help with assignment creation and performing legal tasks.¹⁷⁴ While other legal scholars have incorporated the use of GAI in legal andragogy.¹⁷⁵

While more studies are needed to evaluate how GAI can be effective in performing legal tasks, a study showed improvements in writing and production tasks for lower-skilled users when they perform those tasks after using GAI.¹⁷⁶ Professors Choi, Monahan, and Schwarcz conducted a controlled trial to study whether legal tasks performed with and without GAI improved the quality of the participants' legal analysis through the quality of the participants' written end-product.¹⁷⁷ The professors found that using GAI "slightly and inconsistently

¹⁶⁹ Andrew Perlman, *The Legal Ethics of Generative AI*, SUFFOLK U. L. SCHOOL Research Paper 24-17, 9 (Forthcoming February 22, 2024), <https://ssrn.com/abstract=4735389> [<http://dx.doi.org/10.2139/ssrn.4735389>].

¹⁷⁰ Patrick Smith, *Latham's New Academy Starts Associate Training on AI*, THE AMERICAN LAWYER, LAW.COM (October 31, 2024), <https://www.law.com/americanlawyer/2024/10/31/welcome-to-lathams-ai-academy-now-accepting-internal-applications/?slreturn=20241103184234> [<https://perma.cc/MC92-WHPP>].

¹⁷¹ *Id.*

¹⁷² Lee, *supra* note 115, at 232.

¹⁷³ Murray, *supra* note 6, *Prompt Engineering and Priming in Law*, at 4; see Choi et al., *supra* note 87, *Lawyering in the Age of Artificial Intelligence*.

¹⁷⁴ Murray, *supra* note 6, *Prompt Engineering and Priming in Law*, at 4.

¹⁷⁵ Davis, *supra* note 140, at 19.

¹⁷⁶ Choi, et al., *supra* note 87, *Lawyering in the Age of Artificial Intelligence*, at 153.

¹⁷⁷ *Id.*

improved” the end-product.¹⁷⁸ What was surprising was that the use of GAI “induced large and consistent increases in speed.”¹⁷⁹ When it came to the question of quality while using GAI, the professor found consistent improvements from the lowest-skilled participants, who were law students from the University of Minnesota Law School.¹⁸⁰ The professors go on to describe lowest lowest-skilled participants as those who scored poorly on tasks that were performed without the assistance of GAI.¹⁸¹ The tasks were drafting a complaint, a contract, a section of an employee handbook, and a client memo.¹⁸² The professors conclude that the implications are clear that using GAI improves the efficiency of doing the task without adversely affecting the quality of the work product or legal analysis.¹⁸³

This study is only preliminary because the study was conducted in 2023, it used only ChatGPT 4, which is an older model than used at the time of this writing, and many more legal products have been created since the time of the study. A key note in the study was that the participants received a couple of hours of training on online modules developed by the professors.¹⁸⁴ The participants had to learn and use ChatGPT in a very limited amount of time, and yet, improvements to efficiency were noted.¹⁸⁵ In its final implication of the study, the professors in the study predict that the use of GAI in the legal profession will change the normative practice, service, scholarship, and education of legal professionals.¹⁸⁶ “While law schools might restrict student access to [GAI] tools in some [1L] classes, we believe that law schools should simultaneously develop upper-level classes that explicitly train students on how to use [GAI] tools effectively.”¹⁸⁷ They reason that 1Ls continue to benefit from legal reasoning in the more traditional doctrinal courses. Without that legal reasoning, they explain, it would be difficult to assess the quality of the GAI’s output in drafting legal documents.¹⁸⁸

C. *The Other View of GAI*

The running theme in previous studies and scholarship on the use of GAI is this: GAI is a transformative technology that has a place in

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 153.

¹⁸² *Id.* at 152.

¹⁸³ *Id.* at 191-192.

¹⁸⁴ *Id.* at 167.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 199-200.

¹⁸⁷ *Id.* at 207.

¹⁸⁸ *Id.* at 204-208.

legal education.¹⁸⁹ Harnessing its potential will assist law students for years to come. Law schools and their faculty must start to incorporate the use of GAI in courses where writing and analysis are vital. Without assessing how GAI can be used and where to use it, law students may be delayed in their knowledge and ethical use of this technology. That is not to say that the competitive disadvantage law students will face is for not being exposed to working with technology. There is no better place for continued scholarship and experimentation with the use of GAI in legal practice than in clinical legal education.

Before expanding on ideas to incorporate the use of GAI in clinical legal education, some critics have begun to sound the alarm about its use in clinical legal education as well as legal education (and in other fields of education). In their thoughtful essay, *The Legal Imitation Game: Generative AI's Incompatibility with Clinical Legal Education*, Professors Karr and Schultz argue that GAI is incompatible with clinical legal education because the tool will not make clinical students ready for practice, justice, and CCL.¹⁹⁰ With regard to readiness, they point out that the American Bar Association (ABA) has learning outcome standards that are too vague to apply to include the use of GAI in legal education.¹⁹¹ As a result of this vagueness, according to Professors Karr and Schultz, the correlation between the use of GAI with productive legal outputs does not mark the user with competence in legal analysis and reasoning or proper interpretation of legal materials.¹⁹² They believe that use of GAI in legal preparation courses “may in fact stifle a student’s intellectual and professional growth rather than foster it.”¹⁹³ As for CCL, the authors make it clear that the use of GAI goes against any learning opportunity, experience, or skill that is centered around listening, dialogue, empathy, and other human relational skills

¹⁸⁹ Williams, *supra* note 140, at 35-6.

¹⁹⁰ Karr et al. *supra* note 7, at 1869. This article will focus on their arguments against the use of GAI in clinical legal education because the technology renders law students unable to be practice and client-centered lawyering (CCL) ready; *see supra* p.32. The concept of justice readiness is a topic too broad to discuss in this article. It is sufficient to say that the authors note on the corporation capture, pollution, and energy needed to maintain GAI’s functions is a concern as much as using Microsoft’s Office 365 or Google’s browser are. Those concerns may be addressed in a different paper focusing on a better, more just technological system that can be built and would alleviate those injustices.

¹⁹¹ *Id.* at 1873. The authors also note that the Institute for the Advancement of the American Legal System has “building blocks” to measure “minimum” competency.

¹⁹² *Id.* at 1876.

¹⁹³ *Id.* at 1876 – 77; *see also* Hamsa Bastani, Osbert Bastani, Alp Sungu, Haosen Ge, Özge Kabakçı & Rei Mariman, *Generative AI Can Harm Learning*, THE WHARTON SCHOOL Research Paper (July 15, 2024) (unpublished manuscript) <https://ssrn.com/abstract=4895486> [<http://dx.doi.org/10.2139/ssrn.4895486>] (concluding that using GAI can act as a crutch to learning meaning that once GAI is removed from learning the student who used GAI do worst in math problems in high school despite the fact that the student began to excel in math problems while using GAI).

and traits.¹⁹⁴ The mere engagement with another human being is at the heart of CCL pedagogy. The use of GAI, according to the authors, teaches away from that pedagogy.¹⁹⁵ They infer that the passive activity of entering prompts into a static system with a static result is counter to the dynamic process of engaging with live people, their hopes, dreams, problems, and biases.¹⁹⁶

While these concerns are valid, they may not comprise all the possible ways by which GAI can enhance readiness. At least, not in the way Professors Karr and Schultz envision GAI. Their legitimate concerns of a technology that hallucinates “facts” or delivers unethical advice are to be taken seriously.¹⁹⁷ For that reason, a human must remain in the loop of GAI in clinical legal education.¹⁹⁸ Clinical law professors must enter the loop and navigate students through the pitfalls identified by Professors Karr and Schultz. Clinical law professors must integrate GAI in the clinical legal space because the benefits of this technology outweigh the risks of impaired readiness. Through the supervision of clinical law professors and their use of GAI, they can enhance the writing ability for all students, especially the emergent writer. Professors Karr and Schultz’s argument simplifies the use of GAI as a replacement for building other lawyering skills. They also do not confront the notion that using GAI has brought benefits to the practice, along with some notable problems. They also do not argue that using GAI in legal writing and analysis courses is incompatible, which is worth noting. They do not offer guardrails around the limits and concerns noted above. Their concerns must be addressed.

IV. THE NEW CLINICAL LANDSCAPE: INTEGRATING GAI INTO CLINICS

A. *The Use of Fair Advance Notice for the Use of GAI as a Policy*

A note on the GAI use in the classroom or clinic. There seem to be three perspectives that most institutions have relied on when permitting faculty to allow students to use GAI: restrictive; permissive; and permissive with specific instructions.¹⁹⁹ Some institutions of higher

¹⁹⁴ Karr et al., *supra* note 7, at 1885.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ MOLICK, *supra* note 31, at 53.

¹⁹⁸ *Id.* at 52.

¹⁹⁹ Nachman N. Gutowski & Jeremy W. Hurley, *Forging Ahead of Proceeding with Caution: Developing Policy for Generative Artificial Intelligence in Legal Education*, 63 U. LOUISVILLE L. REV. 581, 597-614 (2025); see also Tom Morgan, *How to Craft a Generative AI Use Policy in Higher Education*, EdTECH, ARTIFICIAL INTELLIGENCE (July 3, 2024), <https://edtechmagazine.com/higher/article/2024/07/how-craft-generative-ai-use-policy-higher-education-perfcon> [https://perma.cc/NSN6-23M8]; Gutowski et al., also mention that law schools could decide to have no policy at all.

learning have restricted the use of GAI at their universities or colleges.²⁰⁰ These institutions have imposed a high standard of no use of GAI in the classroom. It is a high standard, because student surveys suggest that a high percentage of the student population across university institutions frequently use GAI and other AI tools.²⁰¹ If left with a restrictive standard of GAI use, these institutions will have a phantom policy, where enforcement will be nearly impossible, compliance will be discriminatorily imposed against students, and procedures will be applied inconsistently.²⁰²

Permissive GAI use policies are the opposite side of the spectrum. These policies often contain neither instructions on the proper use of GAI nor require professors to guide students on the appropriate use of GAI or feedback for using GAI.²⁰³ While the permissive use of GAI absolves the institution of the problems described with the restrictive use, it misses the opportunity for professors to teach how the technology can help and how it is limited. It also leaves the teaching and use of technology to commercial providers or legal tech firms that may emphasize efficiency over ethics.

Finally, permissive use with specific instructions creates a happy medium between the former general policies. Under this use, students would be allowed to use GAI under the guidance of a professor with the professor's specific instructions.²⁰⁴ This allows students to explore the outlines of GAI under the guiding hand of a subject-matter expert in the field of law.²⁰⁵ Of course, this requires the professor to know the technology themselves and how a student can benefit from its use. The professor can also point out the limits the technology imposes, such as hallucinations, not an epistemological chatbot, confidentiality and privacy, and the garbage-in-garbage-out training problems. The professor can constrain the use to specific lessons and activities. The policy, however, still has flaws. For example, it is difficult to enforce, and procedures would have to be detailed and expressed repeatedly. The opportunity, however, to invite students to use the technology transparently and ethically cannot

²⁰⁰ Gutowski et al., *supra* note 199, at 597.

²⁰¹ Digital Education Council Global AI Student Survey 2024, *AI or Not AI: What Students Want*, <https://www.digitaleducationcouncil.com/post/digital-education-council-global-ai-student-survey-2024> (last accessed on June 28, 2025). The study found that 86% of students already use AI in their studies. The responses come from 3,839 students in bachelor, masters, and doctorate programs across 16 countries.

²⁰² Gutowski et al., *supra* note 199, at 599.

²⁰³ *Id.* at 600.

²⁰⁴ *Id.* at 602-3.

²⁰⁵ A subject matter expert in the field of law does not have to be an expert in GAI. An intermediate user of GAI is sufficient to teach a law student to use GAI. The subject matter expert can catch hallucinations or other inaccurate or erroneous outputs to direct the student through the thinking process of tasks and end-product documents. *See infra* Part IV. B. 4.

be overstated. As industry and governments use GAI in their work and AI generally, students can benefit from the technology's exposure in the classroom to mimic situations or its equivalence in the real world.

Another note is the use of fair advance notice. If the professor is convinced that permissive with specific instruction is the way to go, then giving students fair advance notice is paramount. While this article advocates for administrators and faculty to apply the use of fair advance notice for the use of GAI in the classroom, conditions in the classroom and university setting may take a different shape. In law schools, fair advance notice is defined by the word "advance." Notice should be sent to students either before the start of the semester or very early at the beginning of the semester. A law school-wide policy notice could include promoting an expectation that professors are allowed to use GAI under certain circumstances, listing the following ways a professor may teach with GAI.²⁰⁶ Professors can then send their notices on the use of GAI in their syllabi. The professor can outline: when GAI will be used and under what circumstances and which assignments; how it will be used, with a description of an inappropriate use of GAI as well as the consequences for the inappropriate use of GAI; and why transparency and attribution of the student's use of GAI helps the student.²⁰⁷ Professors could include a comment on the use of substantive citation to disclose how the use of GAI is a learning tool, with a description of the type of citation, submission of both the prompt and the output for use with reflections, and a copy of the final student-produced document for comparison and revisions.²⁰⁸ A policy, as pointed out above, would be the beginning of practice that incorporates elements of universal design for all students. This approach in policy will assist emergent writers the best because the advanced notice fairly allows them to experiment with different forms of GAI and AI in general.

B. *The Clinical Legal Space*

As has been discussed above, clinical legal education consists of an andragogical approach that bridges courses on pure legal information, reason, and analysis to professional identity formation with the practical skills of an attorney. Using GAI alone, as noted above, does not get the student ready for legal practice as much as a professional review course or bar review preparation course gets the student to become an ethical attorney. But a law student cannot be an attorney without those course

²⁰⁶ Gutowski et al., *supra* note 199, at 613.

²⁰⁷ *Id.* at 598.

²⁰⁸ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18.3(a) at 191 (Columbia L. Rev. Ass'n et al. eds., 22d ed. 2025) (demonstrating a form of citation that knowledge mentors can adopt along with the suggestions made in this article).

interventions. Using GAI is fraught with complications that this article addresses.²⁰⁹ First, the clinical law professor must carefully assess the use of GAI before applying it in the seminar classroom or clinical practice. This much is certain: knowing a little bit about GAI will not reveal all the ways GAI can enhance the performance of the student while avoiding the crutch effect.²¹⁰ Second, clinical law professors must act as a GAI knowledge mentor with students, especially the emergent writer. While the focus in this section is on the emergent writer in the clinical legal space, the following guidance can apply to all students in the writing spectrum. The focus on the emergent writer requires knowledge mentors to pay attention to the writing outputs of the emergent writer who can be helped with GAI. Finally, this section will recommend to clinical law professors some best practices and strategies that can be employed in the classroom to assist the emergent writer with GAI. From flipping the classroom, using metacognitive thinking in practice, and applying scaffolding, the clinical law professor can use these strategies and techniques to explore further their education andragogy with the teaching skills that they have developed in the past. These three strategies or techniques will help the emergent writer emerge because by using these strategies/techniques, the emergent writer will become conscious of the need to write and think better.

Current law school pedagogy assigns clinical legal education as a space where the practice of law is harmonized with the analysis of law.²¹¹ This is great for students because it creates a sandbox in which to try out innovative thinking about an issue or empathetic lawyering for a client. The introduction of GAI can be tricky if entered thoughtlessly.²¹² In the classic clinical legal education pedagogical framework of Plan, Do, and Reflect, a professor in this space must plan the use of GAI to then execute the plan with further knowledge to reflect on what was done. So, what does that look like?

²⁰⁹ This article does not tackle the whole of clinical legal education andragogy, but only how faculty can use GAI with their students in a way that benefits all students, especially the emergent writer. Perhaps another article can tackle whether GAI use is compatible with clinical legal education. This article merely implies that it could with the right guidance and approach.

²¹⁰ Kemp, *supra* note 86, at 642.

²¹¹ CLINICAL PEDAGOGY, *supra* note 118, at 170.

²¹² Karr et al., *supra* note 7, at 1868. The authors present good questions to answer: "... whether they should teach GenAI tools to law students, how they should teach these tools, and whether to allow students to use the technology in client casework or coursework." See also Karen Sloan, *Some Law Professors Fear ChatGPT's Rise as Others See Opportunity*, REUTERS (Jan. 10, 2023, 7:19 PM), <https://www.reuters.com/legal/legalindustry/some-law-professors-fear-chatgpts-rise-others-seeopportunity-2023-01-10> [<https://perma.cc/76NV-G3SX>].

1. The Plan – How Do Clinical Professors Begin To Think About GAI's Use In Clinics?

In the Mediation Clinic for Families at the University of Baltimore School of Law, Professor Robert Robinson and I plan early on for a semester's worth of teaching by planning out what cases we will take on and how we want to teach mediation in the legal context. Our structure is quite familiar, orient the students with the clinic (soup to nuts), conduct training on several aspects of lawyering and mediation, assign cases, set up routine supervisory meetings and case rounds, and meet with individual students or with partners. Throughout the process, we are clear that one of our learning objectives is for law students to be lawyers who are ready to represent clients in appellate mediation and to act as mediators in custody/visitation cases. This requires the student to understand several lawyerly tasks: interview clients or participants; help clients or participants understand the scope of the student's representation in mediation or the nature of mediation; analyze the legal dispute among the client and their adversary in representation or participants in mediation; research those legal questions that emanate from their legal dispute; through interviews and follow-up correspondences understand the client or participants holistically; prepare for competent representation of clients in mediation or competent mediation with participants; represent their clients or conduct the mediation; negotiate with opposing counsel or coach participants in mediation; draft agreements and consent orders; and terminate the relationship with clients and participants. This is a semester cycle. Within each task, several sub-tasks would assist the student's learning of the overall picture of her obligations to the clients.

Along with our learning objectives, I wanted to incorporate GAI into several facets of the tasks that students were doing. I kept noticing that new students would go into our case management system and look for a copy of an old document to begin creating an interview plan, agreement to mediate, mediation plans, negotiation plans, sample consent orders, etc. Based on those documents and depending on what stage of the representation or mediation the students were in, they would submit a new plan that more or less looked like the old document without further thought as to who the clients or participants were and their circumstances. After reviewing the documents and asking probing questions during supervisory meetings, I discovered that our students felt empowered that they got the task done, but they did not think about how the document they were creating benefited their client or

the mediation process.²¹³ The dependency on boilerplates was a crutch we had to help students overcome.

When ChatGPT 3.5 came onto the scene, I wondered whether that technology could assist students with the written part of their tasks. I discovered that it could and more. Before discussing the discovery, I wanted to understand how ChatGPT could help the students. My learning objective in the clinic was to coach students to become attorneys who focus on CCL or mediators who focus on a participant-centered process, instead of resolving their disputes.²¹⁴ I had to think about how GAI would accelerate those objectives. For example, could a student ask ChatGPT questions about what to ask a client during their representation? Could GAI draft plans that took unique factual circumstances into account? Early in 2023, I discovered that it could, but it would make mistakes or be very vanilla. Since LLMs have improved over time, GAI's outputs have been better despite some hallucinations.

My next concern was whether GAI's flaws would slow down my learning objectives. I found that it did not. While it did not save me time during supervisory meetings or reviewing documents, it did shift my focus to what they were learning from GAI. Questions, such as where did you get that information, how did you assess the accuracy of the information you received, what will you do next time, were common and helpful. Over time, the balance of the good use of GAI began to outweigh the bad. Its flaws were an opportunity to discuss legal and client-centered knowledge, such as do you know the participants or clients, or about their circumstances, does GAI give you more or fewer ideas depending on what you feed it? My assignments had instructions, such as "without giving GAI any client or participant personal information, ask GAI to give you possible scenarios that would help participants in a mediation resolve a scheduling conflict where both parents are on a rotating work schedule like a police officer, firefighter, or nurse, but want to have as much time as possible with a two-year-old. What schedule would you come up with that could help them?" Regardless of the output, our conversations would delve deeply into the ethics of the "solutions" or how the students could determine whether the suggested solution would help based on the law or the client's/participants' parental practices.

²¹³ Using the Formalists framework, the students should feel empowered because the final product was written and completed. The problem is that the final product is not completed. After an interview or counseling session, the students' feedback was often that the written document did not prepare them enough for what was discovered in the session. Some students complained that the clients or participants would talk about other things for which the students had not prepared. This is a lesson in the CCL approach to viewing a client, participant, or person holistically. With other feedback from Professor Robinson and me, we explore those issues with the students.

²¹⁴ See definition of CCL *supra* p. 24.

What questions did they need to ask? Before giving out an assignment like this, I had to develop my prompts and see how various LLMs handle the prompts. I believe that students become experts in the field of their clinical space with an active professor who understands how GAI works and does not work to best support the students' understanding of their obligation as attorneys with this technology.

Thus, in the planning stage, the professor must ask themselves the following questions before implementing GAI in their clinic:

- What are my learning objectives?
- Can GAI accelerate those objectives?
- Can GAI slow those objectives down?
- What is the good in the use of GAI?
- What is the bad?
- Does the good outweigh the bad?
- Should I write up prompts before creating an assignment?
- How should I follow through once assigned?
- What does an assignment with prompts look like with the outputs?
- Should the students be knowledge experts in the area of law before I assign the project using GAI?
- How transparent should I and my students be about their use of GAI?

This technology also works with the emergent writer in the clinical space. One of the problems I have observed, in my short time as a clinical teaching fellow and as an adjunct professor, is the emergent writer offering conclusionary statements as statements of the law. The emergent writer gives a few factual sentences, states the law, and concludes that the client deserves relief from the violations of the law. The analysis part is weak and needs more development. For example, if a professor uses the tort action where the emergent writer represents a pedestrian who slipped on some water that dropped from an air conditioning duct in a mini-mart store and fell while entering the store in Baltimore, Maryland, then what must an emergent writer do. The emergent writer must draft a complaint that the pedestrian could use to sue the minimart store owner in a Baltimore state court. The emergent writer begins with a boilerplate that he has to find either in research on Westlaw or LexisNexis, in the library, or in the case management system that keeps documents from other cases. The emergent writer finds one that he thinks is pretty close to what he thinks he needs and begins to fill out and modify the boilerplate. He adds names, dates, current law, and facts as he knows them. Then, he realizes he did not ask the client enough information, such as the time of the fall, the purpose of going into the

mini-mart, medical information before and after the fall, and the client's needs, goals, and desired outcome. He has promised his supervisor that he will have a draft before the next supervisory meeting tomorrow, although the draft was assigned a week ago. He submits the incomplete draft to his supervisor that evening.

When confronted with this problem, it is difficult for the supervising professor to assess whether the emergent writer has no clue about the analysis of facts to law, is not thinking like a lawyer, ran out of time, or does not know where to start. This is a common experience among clinical law professors. As will be discussed in the next section, clinical law professors do a great job of reflecting the writing, discovering what could be the problem (in this case, running out of time or time management), and leading the emergent writer to self-discovery or self-improvement. Imagine now that the emergent writer used GAI through the supportive guidance of a knowledgeable mentor. A quick boilerplate language would have popped up in ChatGPT 4o (free version) as discussed previously. The emergent writer would have begun the task earlier because the output would have given him a head start to see what the boilerplate would look like and what he would need to search for. In this scenario, the writing process ebbs and flows with more information and adding more meaning to his task. The emergent writer would have discovered that he needed to ask his client more questions in order to craft the pleadings to meet the objectives of the client. While the output in the end is important, the thinking and reflecting process could be more guided. As Mollick points out, the use of GAI reallocated time spent, not the time itself.²¹⁵

The knowledge mentor needs to assess whether the emergent writer could benefit from GAI or help the emergent writer achieve an understanding of their weaknesses and strengths. GAI can help the knowledge mentor with those assessments. It requires the knowledge mentor to set up time and treat GAI in a sandbox environment where they can explore how the technology could be applied in their specific clinic.

2. *The Do — How Does A Knowledge Mentor Implement The Plan Of Using GAI In Their Clinic?*

Once the plan has been established, how should the professor, the knowledge mentor, execute it? The following questions should guide:

- Should I practice my prompts before assigning the task with GAI's use?

²¹⁵ MOLLICK, *supra* note 31, at 134; *see also* Choi et al., *supra* note 87 *Lawyering in the Age of Artificial Intelligence*, at 153.

- Should I monitor the use of prompts as the students use them?
- Have I built in that monitoring?
- What questions should I ask during the follow-through?
- How can I practice the art of editing, revising, editing, and revising before demonstrating it?
- Then, teach it?

In the above outline of questions, knowledge mentors must keep in mind their learning objective. In the drafting complaint example, the learning objective might not be the end-product, the complaint, but the process by which the complaint is thought through. Without GAI, most clinic professors through a non-directive approach would guide the student to self-discovery of what is missing in the complaint, how to obtain the missing information, does client feedback help or hinder the complaint process, how does the student go through the process of getting client feedback, and is it a one-time only activity. With GAI, before the clinic begins, the knowledge mentor must practice through their assignments with the use of prompts. An assignment can be given with prompts already established, and the emergent writers copy and paste to the chatbot to see the output.²¹⁶ The goal of this assignment is to see whether the emergent writer does anything with the output. The assignment could be built around a knowledge base of what the GAI gets right and what it gets wrong. The same can be applied to Protégé™ or other legal LLMs. But the knowledge mentor must do the work first.

Another assignment would be to give the emergent writer no prompts and allow the emergent writer to craft prompts that would approximate what the emergent writer needs to complete the assignment. For example, ChatGPT-5 can communicate with the user by voice. The knowledge mentor would ask the emergent writer to simulate an interview with a potential client who slipped and fell in a mini-mart store in Baltimore, Maryland. The knowledge mentor would give a brief description of what to do and allow the emergent writer to discover what types of questions they would ask of the potential client. In a voice simulation assignment using GAI, the emergent writer would give the chatbot a role as the injured pedestrian. The role could include an angry pedestrian, or traumatized pedestrian. The emergent writer would tell the chatbot who they are supposed to be and give it directions that it should respond after being asked a question. The chatbot would respond as the role is being played. Then, the emergent writer would begin to

²¹⁶ This assignment would assume that the emergent writers would get a class or module orientation about the use of GAI or an LLM before giving the assignment. This article does not explore what a typical module would look like, but scholars in legal writing and analysis have discussed what a module could look like; Davis, *supra* note 140, at 1.

depose the chatbot witness. The GAI could record everything for future analysis in the form of a voice recorder or transcript. This will give the knowledge mentor something to work with the emergent writer.

The goal would be to ask enough questions that the emergent writer would think or feel that they are confidently representing the client. After the simulation with specific instructions from the knowledge mentor, the emergent writer would print out or email the prompt, the output of the prompt, questions, and responses from the LLM.²¹⁷ The knowledge mentor would go over the assignment with the emergent writer to review and coach the emergent writer through changes, challenges, and proficiencies.²¹⁸ Noting that the emergent writer should do it again and submit an interview plan based on their simulated experiences. The iterative process will serve the emergent writer well to understand that the CCL process is a continuous process that improves over reviews and revisions.

3. *The Reflect — How Does A Knowledge Mentor Promote Reflective Feedback and Thinking in Tasks Using GAI?*

After having the students do the assignment or task, the knowledge mentor should spend time reflecting on what is happening to the emergent writer by asking the following:

- What did the emergent writer like/not like about using GAI?
- What questions would help the emergent writer understand how they have used GAI?
- What do they think would help them improve their writing with the use of GAI?
- What would the emergent writer do next time?

Reflecting is one of the best parts of giving and receiving feedback, both for the knowledge mentor guiding the emergent writer and the emergent writer, because it slows the process of getting an output to thinking about the process of generating an output. The knowledge mentor and emergent writer can discuss some of the ethical issues pointed

²¹⁷ For example, on ChatGPT-5, the voice simulator can keep what was said in transcript or captioned form. Either form can be copied, printed, or downloaded.

²¹⁸ In the past, the clinical professor would meet with the student who would conduct the interview and ask other students to “moot” with the interviewing student in a mock interview simulation. Time and resources would be spent to make sure the interview simulation aided the interviewing student through to the actual interview. ChatGPT-5 could record in writing and audio for the professor to review and focus the students in specific areas that require the professor’s attention. While the real-time feedback from the professor and other students may be lost, the time gained to focus on specific problems is immeasurable. The student has gained a tailor-made educational focus.

out by scholars, such as Professors Karr and Schultz. They can point out GAI's limitations and hone in on its strengths. They can question the utility and considerations for using this technology. When is it beneficial to the client? When is it not? If it is beneficial, should a discussion with the client about the use of GAI in her case be applicable? What would be said? For what purpose? Should the explanation be memorialized in the retainer agreement? What would be the concerns from the client's perspective?

By learning through reflection, the emergent writer can establish for herself a process that she can employ later on.²¹⁹ A hallmark of clinical legal education is to supervise students through reflection.²²⁰ To help the student build on their learning, the supervising attorney or faculty asks questions of the student to help them reflect on what they did, what resources were used to conduct the tasks or develop the idea behind the tasks, and what helped them think through the problem faced by a client's situation. A knowledge mentor could help the emergent writer with similar questions regarding their writing task or output. These questions help the emergent writer understand what resources they still need to write better or clearly. How not to use GAI as a crutch for completing writing assignments by exposing them to thinking through the writing assignment. A knowledge mentor would patiently review the output asking the questions mentioned above. Reflection most importantly teaches the emergent writer to think through problems independently in the future.²²¹ The technique sets up a cognitive template that the emergent writer applies to prompting and evaluating future outputs by GAI. It also sets up the idea that collaboration with others is necessary and vital to working with GAI.

Next is inverting the idea that using GAI should be a solo venture.²²² Throughout this article, legal andragogy has been promoted with the idea that learning in law school is not a solo venture.²²³ It requires the steady and kind hand of a professor, a GAI knowledge mentor. GAI, like any other software program, should be taught as a tool so that it can be used as an agent when the emergent writer reasonably believes they can work with the GAI as an agent. To be taught as a tool, this technology needs knowledge mentors who can be more than a guiding force to use the technology ethically and competently. The knowledge

²¹⁹ CLINICAL PEDAGOGY, *supra* note 118, at 24.

²²⁰ *Id.* at 169.

²²¹ *Id.* at 189.

²²² *Id.* at 36 (theorizing that case rounds is a specific teaching technique utilized by clinical law professors to encourage collaboration among student peers to work through complex problems and legal strategies).

²²³ *Id.* at 24.

mentor must know the user.²²⁴ She must know the user's weaknesses and strengths, the user's baseline knowledge, and the user's ability to synthesize current knowledge with the use of GAI. Paying attention to the user is as important as learning how to use GAI. If an emergent writer is struggling with editing a pleading, the knowledge mentor must intervene to ask the user questions about the audience, persuasive facts, acknowledging counter or exculpatory facts, or the sufficiency of the pleadings. The metacognitive thinking strategies explained before are crucial in this stage. The knowledge mentor is both a guide to the substance of the thing being tasked as well as to the process of using GAI to complete those tasks. Who is better equipped to be that knowledge mentor in law school?

4. *The Knowledge Mentor — What Strategies To Use In The Classroom? What Does Supervision Look Like? A Plea For Patience And Understanding*

This article does not argue that the knowledge mentors must be experts in GAI. The professor could be an intermediate user who goes with the emergent writer's journey of learning to use GAI. At a minimum, the knowledge mentor must understand how GAI is used, its capabilities, and its flaws. Knowledge mentors must advance the notion that GAI, left to determine accuracy, will fail the emergent writer. It is as if the knowledge mentor must figuratively stand behind the emergent writer to help them understand the role GAI can play in learning the law and using technology professionally and ethically. Woven into the classroom strategy is the use of feedback, supervision, and reflection. The knowledge mentor is also the emergent writer's supervisory attorney in most clinics. Supervision entails reflection and feedback.²²⁵ These classroom strategies can also include supervising the emergent writer's use of GAI and demonstrating the possibilities and pitfalls of GAI.

Then, what are some techniques or strategies that professors can apply in the clinic space that would help the emergent writer? One technique used in writing courses at the high school, undergraduate, and graduate levels is flipping the classroom.²²⁶ In the clinic space, the professor, in most cases, uses the non-directive approach to teach students how to think through a problem or assignment. This approach is best for flipping the classroom. Give a writing assignment, an interview plan, for example, based on a discussion of the client's intake sheet. Before

²²⁴ *Id.* at 35 (indicating that "student motivation increases when teachers build the [clinical] seminar from the student's actual legal work").

²²⁵ *Id.*

²²⁶ MOLICK, *supra* note 31, at 174.

case rounds, linked seminars, or team meetings, the clinic students will be assigned to read some literature on interviewing clients. Before the reading is due, the professor will also direct students not to submit any writing assignments due to the reading. The professor makes sure that students will write an interview plan during the time that the professor and students are together. The writing could be on a laptop with emails to the professor, or uploaded to Canvas or a similar system, or on a piece of paper. The professor will collect the interview plan after 15 or 30 minutes as in a quick write. If the setting is a case round or seminar, the professor could pass the writing to peers so that the peer can edit the interview plan in front of them. This is to encourage critical thinking, collaborative practice, and active learning in the classroom.²²⁷ Then, by using the reading materials handed out earlier, the professor begins to cover the type of questions that should be included in an interview plan. The point here is that the writing assignment is not lost to the professor. She can read and grade the interview plan and assess who will need more help with their writing and perhaps thinking. The professor can then follow up. After the assignment is over, the professor can then repeat the assignment using GAI. Depending on what the prompt is or the output given, each iteration of the output can be done in the classroom, with the professor displaying the output to spark critical thinking about the output. The professor here can help the students evaluate the substance of the output together and monitor the work of the emergent writer.

As discussed above, the metacognitive thinking strategy works well in the clinical classroom using GAI.²²⁸ It offers the knowledge mentor a way to discuss with the emergent writer about what they are going through and what they can do about it. It also offers the emergent writer the time and ability to figure out how to strategize their thinking. Although generating a high-quality end-product is the goal in most clinical classrooms, it has never been solely about the end-product. As discussed in a previous section under IV.B.2., implementing metacognitive thinking strategies means practicing chatbot prompts before assignments are handed out. The knowledge mentor will know the possible outputs produced by the chatbot through precise prompts and questions that can generate an approximate end-product document. The knowledge mentor will have the basis to display an end-product document that still needs work. The knowledge mentor can teach the student the value of editing, revising, and editing documents produced by GAI. The prompting alone does not produce a complete document, but the emergent writer's experience going through the steps with

²²⁷ *Id.*

²²⁸ Lee, *supra* note 115, at 271.

the knowledge mentor is constructive to the emergent writer's self-confidence, thinking, and ethical development. The knowledge mentor will have to be aware that the emergent writer needs more help with writing fundamentals, grammar, word choice, tone, audience knowledge, persuasion style, etc. The knowledge mentor would lead the emergent writer to prompt the chatbot for more information or suggestions. Then, with the output in hand, the knowledge mentor would go over the output with an eye to teach the emergent writer to discern what the chatbot provided, how it compares with the emergent writer's first draft or output, and why choose the latest draft or any other version of drafts.

The clinical classroom has been about helping students form themselves into competent attorneys who are ethical and view the world holistically. The metacognitive thinking is malleable to help any kind of student with any kind of task. One task using GAI with the metacognitive thinking approach for the emergent writer is the deposition of an opposing party. To prepare for the deposition, most professors expect the students to write out the questions that will be used during the deposition. Under the metacognitive thinking approach, the professor would ask the emergent writer:

- What resources do you think you will need to accomplish the task?
- Why do those resources matter?
- What is it that the emergent writer is trying to accomplish?
- Where did the emergent writer's thinking not connect with the goal in mind?
- What can be done next time to repeat what was good and what were the challenges?

The key thing here is for the emergent writer to craft the deposition without the use of GAI first. This will help the emergent writer think through what they did, what they missed, and what will help next time. After discussions with the emergent writer about their writing, ask the emergent writer to do the same thing with GAI using prompts.²²⁹ This same line of questions under the metacognitive thinking approach could be asked of the emergent writer when they are producing outputs based on their prompt. The knowledge mentor can work with the emergent writer to become an editor of the GAI's output.

Lastly, the use of scaffolding with GAI and the emergent writer is another technique that will help improve the quality of the written

²²⁹ This assumes that the professor is a knowledge mentor who has used GAI, has yielded outputs that were helpful for andragogical purpose and measure, and has worked through the editing process with the output.

product because the process builds the emergent writer up in order to let her do it alone. As discussed before, scaffolding is a teaching technique designed to give students extensive explanations at the beginning of a task or assignment to help the student learn and then progressively enable the student to become independent.²³⁰ Most professors know that scaffolding takes time to implement as well as to think through the process. But scaffolding is best used when introducing new concepts or techniques, especially if they are complex and not easy to teach. Scaffolding requires breaking down an assignment into steps or phases that the emergent writer can use to begin assembling a coherent and well-written document.²³¹

An assignment typical in most clinics requiring writing is the internal memorandum. A scaffolding plan would look like this:

- What is the student writing about?
- Would an outline help the student clarify ideas?
- What research has the student done?
- What research is the student doing?
- When will the student submit an outline?
- After the outline is submitted, will the professor give feedback? Will the student? Does the student submit a new outline based on the feedback?
- When will the student submit a rough draft based on the outline?
- After the student submits the rough draft, will the professor give feedback? Will the student submit a new draft?
- When will the student submit the final memorandum?
- After the students submit the final memorandum, will the professor give feedback? Will the student submit a new final?

Once this scaffolding is complete, the professor would need to meet with the student to reflect on the process. If the situation is about an emergent writer, then the scaffolding slows down to allow the professor to focus on the writing and what the emergent student is struggling with in the writing. Scaffolding encourages independence because it can allow the emergent writer to use a similar approach to the next assignment. It is in the next assignment where the knowledge mentor can help the emergent writer excel.

²³⁰ Matthew Callison, Carrie Hagan, Alexandria Fox & Malorie Palmer, Acting on Assessment: Increasing and Supporting Student Success Through Scaffolding, 11th International Conference on Education and New Learning Technologies 8864 (July 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3578603 (manuscript on file with author).

²³¹ *Id.* at 8867.

As discussed before, the emergent writer will benefit from the use of GAI. In the scenario above, if the knowledge mentor has another similar assignment, such as an internal memorandum, the knowledge mentor could easily add GAI when giving feedback. The knowledge mentor can show the emergent writer what the professor would do if she needed GAI to review her document for tone, grammar, spelling, and word choice. She would do a prompt, such as, “Imagine you must submit this outline [which is attached] to your very smart law professor. Could you review the outline to look for a professional tone, proper legal syntax, grammar, spelling, punctuation, and organization? Please draft changes into a new outline, comparing my outline with the new one in a table. Thank you.” The output should look like a table with two columns comparing the attached outline with suggested changes. The knowledge mentor can then go through the output with the emergent writer to assess their decision to improve the outline. A similar thing can happen with rough drafts and the final paper. Research can also be done with the legal LLMs, and review and feedback from the knowledge mentor.

One of the LLMs that gives links to cite in an extractive AI way is Microsoft’s Copilot.²³² Copilot is helpful to brainstorm new ideas or to look backwards at old ideas and find website links that can inform you more about those ideas. Copilot, however, is not as creative as Claude Sonnet 4 or ChatGPT-5. Both of those chatbots will give you links if you ask for them, but the chatbots may hallucinate those links. Alphabet’s Gemini 2.5 is another that can give you links, but they must be checked for accuracy. In the prompts, however, you could ask those chatbots not to hallucinate or to give you website sources that exist on the internet. Those requests have been spotty.²³³ While Copilot is better at providing real websites, the information is typically not complete or not enough of a legal resource. Then, there is LexisNexis Protégé™ chatbot. It is pretty good with the legal resources, but a knowledge mentor is needed to help guide the emergent student, or any student, through the prompts and products available on Lexis. It can be helpful with crafting basic legal documents, too, but a knowledgeable mentor is needed to guide the emergent writer through the choices offered.

A note on transparency, privacy, and confidentiality. The LLMs, in general, especially the free ones, may continue to learn from prompts provided by the user. It is imperative to read the terms and conditions of

²³² Perplexity.ai is another LLM that gives the user cites on the website. Another is LexisNexis Protégé™. The user there can see a draft of an outline, a summary of arguments, a draft pleading with preliminary cites to cases, treatises, or other secondary sources. These LLMs are similar in operation to Copilot and should be treated cautiously because hallucinations will occur.

²³³ Magesh, et al., *supra* note 31, at 219.

each of the LLMs to be assured that the LLM is or is not learning from the users' interactions with the chatbot. If the chatbot is still learning, then your prompts should exclude client and personal information, as well as any identifiable information that could be traced back to a specific person. Confidentiality is paramount in the use of LLMs. Some LLMs claim that prompts are private to the user. As with any technology that is based on a cloud networking and storing system, information logged into a prompt may be private until it is not. When working with an emergent writer, a knowledge mentor should be transparent with the emergent writer about how the emergent writer is using GAI and exhibit the same to the emergent writer. The emergent writer should be able to give you prompts, outputs of those prompts, and a draft of writing based on the output given by the LLM. It is recommended that the emergent writer give dates, the LLM's name, and a brief explanation of the purpose for the GAI use. This helps the knowledge mentor assess how GAI is being used.

CONCLUSION

GAI is a breakthrough technology that will be added to a lawyer's toolbox. GAI as a tool has shortcomings, as does any other tool, and thus, law schools should embrace it and teach with it. As law students go from students to lawyers, they will use it in their profession and must learn from law schools to use it effectively and ethically. This article argues that the biggest beneficiaries of this tool are the emergent writers who do not have the privilege or resources to become full and complete writers. To teach the emergent writer, a professor must have an intermediary knowledge of the tool to guide the emergent writer as they begin to use the technology. This type of professor is a knowledge mentor who influences the emergent writer to tackle new writing skills and reflect upon what the emergent writer has learned.

There are several reasons for the knowledge mentor to reveal to the emergent writer the flaws and benefits of GAI. GAI is not an epistemological box that gives answers. A knowledge mentor can steer emergent writers in the correct direction towards improving writing and accuracy. GAI will not replace the tried-and-true method of editing written work that caters to specific clients in legal representation or written work assignments in legal education. A knowledge mentor using a metacognitive thinking approach can employ flipping the classroom techniques or scaffolding to facilitate the emergent writer's learning. While expanding the emergent writer's ability to use different tools, the knowledge mentor must enrich the emergent writers' discernment of GAI to avoid using it as a crutch in classroom assignments and in their professional careers. The knowledge mentor can teach the emergent

writer to enhance legal strategies or options, write templates from pleadings to briefs to memos, summarize documents, draft contracts, and correct grammar in their written work. A knowledge mentor's careful attention to and observation of the emergent writer's written progress will augment their progress. Not doing so leaves the emergent writer in the same quandary with which they came to law school.

TRANSFORMING TEACHING THROUGH THEATRE

GENEVIEVE MANN*

"I regard the theatre as the greatest of all art forms, the most immediate way in which a human being can share with another the sense of what it is to be a human being." Thornton Wilder

Law school curricula are often criticized for over-emphasizing the development of analytical skills at the expense of other indicia of professional competence. Effective legal practice requires more than legal acumen; it demands emotional intelligence, skilled communication, and creative problem-solving. To produce "practice-ready lawyers" legal education should develop and nurture creativity, compassion, and empathy. Recognizing that law students need to practice legal skills, it is now the norm to infuse experiential elements into law school classrooms. Clinical programs continue to shoulder responsibility for molding law students into competent lawyers. While clinicians utilize a variety of useful and imaginative exercises to enhance student confidence and skills, there are still students paralyzed by fear as they contemplate meeting their first real client. Educators are constantly evolving to find innovative ways to support, nurture, and buoy students to ease their stress and anxiety.

This article offers a new pedagogical tool—theatrical performance—as a reflective opportunity for students to contemplate, prepare, and envision themselves as effective, empathetic lawyers. Theatre encourages us to view the world through the perspective of someone else. As audience members we are shown humanity, conflict, compassion, and resolution and experience those feelings alongside the actors. The foundation for

* Prior to law school, I obtained my master's in social work which greatly influences my legal practice. I am deeply grateful to award-winning playwright, lawyer, adjunct, and all-around lovely person, Bryan Harnetiaux, who generously shared his wonderful play, *Lily*, with me for this project. We spent many hours discussing how to talk to clients and law students about planning for end-of-life. This project would have been less realistic without the talented acting duo, and real-life married actors, Peter and Susan Hardie. They brought family members Lily and Joe to life with compassion and empathy. I am thankful to my research assistant Carigan Pereiro who provided early research for this project. I am grateful to Gonzaga University Professor Emerita Mary Pat Treuthart who provided critical editing and advice, and Professor Kim Hai Pearson who offered important guidance. Lastly, I dedicate this article to my mother, Janet C. Mann, who died unexpectedly while I was writing it. From an early age, she instilled in me a love of theatre. More importantly, she instilled in me a desire to understand and appreciate the journey of each individual and to show compassion to everyone.

this article is a project that required law students at the beginning of their clinical experience to view the short play titled “Lily,” about end-of-life planning. This piece proposes that using theatre—or the arts generally—in legal education allows students to vicariously participate in the lives of their future clients and facilitates a better understanding of their challenges, values, and wishes. The emotional impact of theatrical performance emphasizes the human aspect of lawyering and stimulates student engagement, deepens learning of substantive material, and facilitates creative thinking. This article concludes that theatre cultivates empathy and creativity to nurture student confidence, self-awareness, and resilience.

INTRODUCTION

As law schools continue to evolve and find new and innovative ways to infuse experiential elements into curricula, the stranglehold on traditional methods of instruction is loosening.¹ Since students process information in various and unique ways, utilizing innovative methods may allow students to connect to the material and substantive law much more profoundly.² Effective lawyering demands more than static legal analysis; possessing substantive knowledge is not enough. Lawyers also need the ability to communicate with complex clients and to engage in creative problem-solving to find useful solutions. To prepare law students for today’s practice world, legal education can benefit from introducing innovative tools to enhance student learning, emotional intelligence, and professional competence.

This article suggests that exposing law students to artistic practices enhances their understanding of legal concepts, builds and nurtures empathy, and encourages creative problem-solving. Using theatrical performance encourages students to use their imaginations to engage, to wonder, and to improve their problem-solving ability.³ Legal education has long used narrative, drama, and storytelling to teach advocacy skills; and clinicians have infused art, creativity, and stories into their

¹ The suggestion that legal education loosen its rigidity and expand its narrow vision is not novel. Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education of Law Practice*, 74 WASH. L. REV. 319, 322 (1999), quoting James M. Cooper, *Towards a New Architecture: Creative Problem Solving and the Evolution of Law*, 34 CAL. W. L. REV. 297, 314 (1998). See also, Katharine Rosenberry, *Organizational Barriers to Creativity in Law Schools and the Legal Profession*, 41 CAL. W. L. REV. 423, 24 (2005).

² Becky L. Jacobs, *Cultivating Purposeful Curiosity in a Clinical Setting: Extrapolating from Case to Social Justice*, 21 CLIN. L. REV. 371, 385 (2015).

³ Bernard P. Perlmutter & Xavier Cortada, “Communities That Care”: Incorporating Socially Engaged Artistic Practices into Clinical Legal Education”, 29 CLIN. L. REV. 307, 309 (2023).

clinics.⁴ The client-centered grounding and well-established experiential methodologies make clinical education an ideal laboratory for bringing theatre into teaching.⁵

The project at the foundation of this article exposed students to a theatrical performance in preparation for their work with clients. The play was then performed for client audiences at several facilities followed by a presentation by clinic students on legal issues. The project was born from a desire to give high-anxiety students a greater opportunity to stop and reflect before jumping into case work. It was designed as a respite from the intensity of law school and intimidation many students feel upon meeting their first client. In creating space to sit, learn, and reflect as audience members, it was intended that students would feel more confident and experience less trepidation. Instead of solely focusing on their legal responsibilities, the students could view their professional role in a more holistic way.

One scholar of drama studies has noted, “When we watch a play in the theatre, we enter an imaginary world, a realm of illusion . . .”⁶ Theatre allows us to be present and immerse ourselves in a story with real people experiencing that story along with us.⁷ As we watch, we get to put ourselves in the role of the character and wonder what they are feeling. Inclusion in the narrative creates a sense of belonging among the actors and audience alike. This shared space and proximity to the action creates a moving experience, one that encourages and cultivates our empathy and care for other people.⁸

Legal practice requires more than astute legal analysis and substantive knowledge. As educators, we must strive to teach students to understand the “rich complexity of actual situations that involve full-dimensional people,” to encourage “thinking through social consequences of ethical aspects of cases,” and to respond to students’ “desire for justice . . . moral concerns [and] compassion.”⁹ Effective lawyers recognize that practice requires a deep understanding of

⁴ See e.g., *Id.*, Michael Millemann, *et al.*, *Teaching Professional Responsibility Through Theater*, 17 HASTINGS RACE & POVERTY L.J. 399, 436 (2020); Jo A. Tyler & Faith Mullen, *Telling Tales in School: Storytelling for Self-Reflection and Pedagogical Improvement in Clinical Legal Education*, 18 CLIN. L.REV. 283 (2011).

⁵ JoNel Newman *et al.*, *Theatre and Revolution in Clinical Legal Education*, 26 CLIN. L. REV. 465, 473 (2020).

⁶ Cecily O'Neill, *Imagined Worlds in Theatre and Drama*, THEORY INTO PRACTICE, EDUCATING THROUGH DRAMA, 158, 158 (VOL. 24, NO. 3 SUMMER 1985).

⁷ #THEATREAPPRECIATION, loc. 1.2.1. (Kiara Pipino ed., 2022)(ebook), [https://human.libretexts.org/Bookshelves/Theater_and_Film/Theatre_Appreciation_\(Pipino\)/01%3A_Theatre_-_The_Basics/1.02%3A_Why_Theatre](https://human.libretexts.org/Bookshelves/Theater_and_Film/Theatre_Appreciation_(Pipino)/01%3A_Theatre_-_The_Basics/1.02%3A_Why_Theatre) (last visited August 29, 2025).

⁸ *Id.*

⁹ Millemann, *supra* note 4, at 438 citing WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 187 (2007) [hereinafter CARNEGIE REPORT].

client lives and experiences, the ability to connect on a personal level, and strong interpersonal and communication skills. Problem-solving involves the requisite legal analysis but also imagination and innovation. Students are acutely aware of this host of necessary skills and enter their clinical experience often anxious and terrified. For many, this stress creates a roadblock that prevents students from engaging in meaningful client work.

This article offers an innovative, artistic method to prepare students to develop critical professionalism skills to more effectively understand clients and represent their needs. It uses theatre as a pedagogical tool to give students the opportunity to engage and reflect on their future role. The first section posits that legal education fails to train students to fully understand client situations and to communicate effectively with them. It argues that building and nurturing empathy and creativity are vital components of lawyering. The second section highlights the inherent power of theatre to move people, foster empathy, and build connection. It discusses other uses of drama and theatre as teaching methodologies, in particular medical training's success using theatre to educate future doctors. Lastly, this article outlines how theatre can enhance student learning and better prepare students for effective lawyer practice.

I. WHAT LEGAL EDUCATION LACKS

Law School effectively prepares students to understand, analyze, and synthesize legal knowledge. Critics have long argued this is only part of the equation for creating competent lawyers.¹⁰ Like other professions, legal education is dominated by the technical substance “at the expense of neglecting ‘professional artistry’—dealing with complexity, subjectivity, and uncertainty.”¹¹ To be fair, many podium professors must impart substantial amounts of doctrine while also ensuring their students grasp complicated concepts and acquire a daunting new legal language.¹² The evolution in law school education now includes experiential opportunities that provide students with concrete application of knowledge needed to practice law. It is a nearly universal belief that educating students only on abstract theory and doctrine is incomplete, but schools vary in their attempt to educate students to be practice-ready.¹³

¹⁰ *Id.*

¹¹ Louise Younie, *Introducing Arts-based Inquiry into Medical Education: ‘Exploring Creative Arts in Health and Illness’*, CREATIVITY IN THE CLASSROOM 28 (Paul McIntosh and Digby Warren eds., 2013).

¹² Kathleen Magone & Steven I. Friedland, *The Paradox of Creative Legal Analysis: Venturing into the Wilderness*, 79 U. DET. MERCY L. REV. 571, 576-77 (2002).

¹³ CARNEGIE REPORT, *supra* note 9, at 95.

Certainly, knowledge and legal analysis are practice-ready components. Equally important, however, is the ability to communicate that knowledge and understanding, especially in the face of clients with complicated legal issues and chaotic lives.¹⁴ Legal theory is only as useful as the lawyer's skill to apply it to actual clients.¹⁵ Real-world problem solving requires lawyers to bring legal acumen but also to understand the larger context and range of client interests, experiences, and emotions.¹⁶ To prepare students to effectively understand and communicate with clients, legal educators must develop and foster not only knowledge and initiative but also emotional resilience, creativity, and empathy.¹⁷

A. *Why Future Lawyers Need Empathy*

The now renowned authors of the Carnegie Report posited that law school's consuming focus of legal reasoning over compassion is misguided. This emphasis assumes "that law school can flip off the switch of ethical and human concerns, teach legal analysis, and later, when students have mastered the central intellectual skill of thinking like a lawyer, flip the switch back on."¹⁸ This led one academic to quip that "the empathetic response is systematically trained out of them."¹⁹ The current approach to legal education is limiting and "to the extent we succeed in making our students think only as lawyers, we make it difficult, if not impossible, for them to think like nonlawyers."²⁰

Much of legal education could be described as "operat[ing] at a safe neutral level without the space for emotional engagement . . ."²¹ In other fields, it is well established that emotional engagement in a task contributes to learning and retention. In particular, psychology and neuroscience researchers found that when experiencing strong emotions, the underlying events are also more accurately and easily recalled.²² Even though much of lawyering involves communicating

¹⁴ ALLI GERKMAN & LOGAN CORNETT, FOUNDATIONS FOR PRACTICE: THE WHOLE LAWYER AND THE CHARACTER QUOTIENT, 133-34 (2016), available at https://iaals.du.edu/sites/default/files/documents/publications/foundations_for_practice_whole_lawyer_character_quotient.pdf (last visited September 3, 2025).

¹⁵ *Id.*, at 134.

¹⁶ Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. L. REV. 529, 538 (2019).

¹⁷ GERKMAN & CORNETT, *supra* note 14, at 134-35.

¹⁸ CARNEGIE REPORT, *supra* note 9, at 141.

¹⁹ Ian Gallagher, *Thinking Like Nonlawyers: Why Empathy is a Core Lawyering Skill and Why Legal Education Should Change to Reflect its Importance*, 8 LEGAL COMM. & RHETORIC: JALWD (2011).

²⁰ *Id.*, at 117.

²¹ Paul Heyward, *Emotional Engagement Through Drama: Strategies to Assist Learning through Role Play*, INTL J. OF TEACHING AND LEARNING IN HIGHER ED., 2010, Vol 22, No. 2, 197-203, 197.

²² *Id.*, at 197.

with nonlawyers, law school continues to ignore the critical role of empathy.²³

Professional competency requires empathetic understanding of the interests of others, in addition to legal aptitude.”²⁴ Empathy—defined as the ability to place yourself in the shoes or thoughts of another²⁵—is a necessary component to persuade, convince, or connect with non-lawyers, or clients.²⁶ An empathetic lawyer seeks to see a situation the way her client sees it. This demands an understanding of the client’s important relationships, goals, fears, and needs.²⁷ The opposite is also true: lawyers without empathy are less effective at communicating with nonlawyers. It is an essential lawyer skill to fully understand the client and their goals, as well as to facilitate client decision making.²⁸

Lawyers, mediators, judges alike advise that law students need to recognize the complexity of their clients’ stories, lives, and desired outcomes. Things are often messy, with difficult-to-determine facts, significant nonlegal issues, conflicting goals and multiple potential outcomes.²⁹ Generations of lawyers have been told that “thinking like a lawyer” demands putting emotion aside.³⁰ Emotion is often dismissed as the “opposite of reason” and to be avoided.³¹ This antiquated view of emotion is now dismissed as a narrow simplification. Instead, recent scholars are highlighting the benefits of emotion to legal reasoning and decision-making recognizing that emotions connect human beings to each other and are part of our cognitive functioning.³² A mechanical approach to lawyering is the “law forgetting its essence—the balancing of human values, with the goal of justice, fairness. A legal system or a legal analysis that is devoid of emotional analysis ... is deeply estranged

²³ Gallagher, *supra* note 19, at 109.

²⁴ Thomas W. Mayo, *Twyla Tharp Goes to Law School: On the Use of the Visual and Performing Arts in Professional Education*, in *THE MORAL IMAGINATION AND THE LEGAL LIFE* 169-187, 181 (Zenon Bankowski & Maksymilian Del Mar, eds., 2013).

²⁵ The Oxford English Dictionary defines “empathy” as “the ability to imagine and understand the thoughts, perspective, and emotions of another person.” *Empathy*, OXFORD ENGLISH DICTIONARY (3rd ed., 2023). Joshua D. Rosenberg, *Teaching Empathy in Law School*, 36 U.S.F. L. REV. 621, 632 (2002) (“Empathy ... is simply the sense, emotional and cognitive, of knowing what it is like to be the other at a particular point in time.”) Carl Rogers declared that empathy is “the most effective agent we know” for creating growth and “improving a person’s relationships and communication with others.” CARL ROGERS, *ON BECOMING A PERSON* 332 (1961).

²⁶ Gallagher, *supra* note 19, at 112.

²⁷ Mayo, *supra* note 24, at 180.

²⁸ Dr. Chasul Phogat and Dr. Garima Tiwari, *Using Drama as a Pedagogical Tool for Law Students*, 2 INTL. ACAD. J OF LAW, no. 2, at 1-2 (2021).

²⁹ Kristen Holmquist, *Challenging Carnegie*, 61 J. OF LEGAL ED 353, 353-4 (2012).

³⁰ Susan A. Bandes, *Feeling and Thinking Like a Lawyer: Cognition, Emotion, and the Practice and Progress of Law*, 89 FORDHAM L. REV. 2427, 2427 (2021).

³¹ *Id.*, at 2428.

³² *Id.*, at 2429.

from the only thing which makes it relevant—humans and human values.”³³

Empathy is teachable but requires more than the traditional classroom instruction. Instead, empathy must be modeled, practiced, and discussed.³⁴ At the very least, we must alert students to the importance of client connection to their future work as lawyers.³⁵ Other academics have suggested ways to infuse or at least not eliminate humanity from the law school curriculum. This includes classroom courses designed to develop student empathy, as well as courses intentionally incorporating more human aspects into lessons.³⁶ However, teaching empathy is no easy task, if it is even possible in a classroom setting.³⁷ It requires more than lecturing on morality or empathic behavior. Instead, it involves the opportunity to see and practice it just like any other skill.³⁸

B. Why Future Lawyers Need Creativity

Practitioners and academics alike call for an infusion of creativity into legal education as an essential component to modern practice.³⁹ Unfortunately, much of law school teaching is antithetical to creativity. Despite the evolution of legal teaching to be more inclusive of varied learning styles and an increased emphasis on student learning, legal curricula remain stodgy and bereft of imagination.⁴⁰ Some of the traits associated with creativity—non-conformity, playfulness, and innovation—are not nurtured or celebrated in law school.⁴¹

Law students learn of the “art form” of stellar advocacy of Learned Hand, Thurgood Marshall, or Ruth Bader Ginsburg, but that is where

³³ Jeremy M. Miller, *Essay and Play: Law's Estrangement From Drama*, 18 WESTERN ST U L REV 265-311, 266 (1990).

³⁴ Mayo, *supra* note 24, at 180. at 181.

³⁵ Gallagher, *supra* note 19, at 147-48.

³⁶ See e.g. Charles A. Cox, Sr. & Maury S. Landsman, *Learning the Law by Avoiding It in the Process: And Learning from the Students What They Don't Get in Law School*, 58 J. LEG. EDUC. 341 (2008); Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265 (2003); Rosenberg, *supra* note 25, at 622; Mayo, *supra* note 24, at 169-70.

³⁷ Rosenberg, *supra* note 25, at 623 (“The notion that one can teach values merely by explaining what is right and wrong assumes that reason and logic are the starting point for our values and our actions.”)

³⁸ *Id.*, at 637.

³⁹ Brescia, *supra* note 16, at 538; Samantha Moppett, *Lawyering Outside the Box: Confronting the Creativity Crisis*, 37 S. ILL. U. L.J. 253, 255 (2013), citing Kyung Hee Kim, *The Creativity Crisis: The Decrease in Creative Thinking Scores on the Torrance Tests of Creative Thinking*, 23 CREATIVITY RES. J. 285, 292-93 (2011).

⁴⁰ Magone & Friedland, *supra* note 12, at 579-80.

⁴¹ Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 112 (2001); Janet Weinstein & Linda Morton, *Stuck in a Rut: The Role of Creative Thinking in Problem Solving and Legal Education*, 9 CLIN. L. REV. 835, 836 (2003).

it often ends.⁴² Students aspire to become creative, inspirational, and persuasive advocates one day but often first must deal with the Socratic method in their classes. Legal analysis remains formulaic; students are expected to learn rules and laws and apply them to known facts and then reach a specific conclusion. Law school does not train students to bring ingenuity to solving client problems.⁴³

As legal practice evolves, so does the need for traditional practice to think differently about finding solutions to complex legal issues.⁴⁴ As society's problem solvers, lawyers are tasked with avoiding as well as resolving disputes.⁴⁵ Conventional problem-solving focuses on narrowing issues and limiting relevant factors. Students are taught to remove seemingly irrelevant options that are considered a waste of time.⁴⁶ But optimal outcomes demand abandoning binary thinking and instead considering a multitude of possibilities.⁴⁷ Effective lawyers do not restrict their thinking with cramped legal rationalization and instead offer imagination, common sense, and judgment to help clients consider and solve problems.⁴⁸

Despite the dearth of creativity in the law school curriculum, effective legal practice is enhanced by inspired solutions.⁴⁹ If you ask many lawyers whether creativity or imagination adds to their legal prowess, most say it does. Good lawyers use the law and facts in inspired ways, infusing style, creativity, and flare.⁵⁰ Client problems are often more than just legal in nature and require novel solutions. Many clients, in particular those served by civil legal aid agencies and legal clinics, present with multiple legal problems with tentacles spreading into a

⁴² Magone & Friedland, *supra* note 12, at 572-74, suggesting that law school on the one hand presents a conundrum of conflicting messages that law is a science to be analyzed but, on the other hand, it is an art form requiring creativity. Despite this paradox, legal education ultimately rewards technical and analytical ability over innovation.

⁴³ David R. Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMP. L. REV. 61, 61 (1994).

⁴⁴ Weinstein, *supra* note 1, at 323-328 (suggesting the shortcomings of traditional law school and lawyering is an inability to see and address the multidisciplinary nature of client problems and solutions.). See also Rosenberry, *supra* note 1, at 423-24 ("Even when admissions decisions place a higher value on students from a creative background, those students quickly realize their creative ability has no place in their legal education."); Magone & Friedland, *supra* note 12, at 580.

⁴⁵ Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLIN. L. REV. 445, 482-83 (2002).

⁴⁶ Weinstein & Morton, *supra* note 41, at 842.

⁴⁷ Jason G. Dykstra, *Teasing the Arc of Electric Spark: Fostering and Teaching Creativity in the Law School Curriculum*, 20 WYO. L. REV. 1, 35 (2020).

⁴⁸ Seielstad, *supra* note 45, at 492-83, quoting Paul Brest & Linda Krieger, *On Teaching Professional Judgment*, 69 WASH. L. REV. 527, 529 (1994).

⁴⁹ Dykstra, *supra* note 47, at 27.

⁵⁰ Magone & Friedland, *supra* note 12, at 572.

variety of realms.⁵¹ In order to best serve clients, lawyers need to have a variety of tools and resources, as well as the ability to think outside of traditional solutions.⁵² Creative problem solving focuses on the client's specific underlying needs and interests.⁵³ Lawyers must understand the legal issues facing a client, the client themselves, and the interaction between the two.⁵⁴

C. Enhancing Experiential Education

One of the primary goals of clinical legal education is to teach students how to transfer the doctrine they learned in the classroom to their future legal practice.⁵⁵ Clinics integrate the various elements of legal education, as students draw on their doctrinal reasoning, lawyering skills, and ethical foundation.⁵⁶ Clinical pedagogy was designed to maximize the opportunities for students to think, feel, react, and behave as a practicing lawyer.⁵⁷ Clinical teachers are constantly challenged by how to better understand and assist law students develop judgment and practice skills and to adequately prepare them for ethical practice. In essence, the goal is to move law students from novice to expert (or at least on the path in that direction).⁵⁸

The primary task for developing lawyers is to gain a basic understanding of lawyer work. With coaching, teaching, and supervision, the student gradually increases in ability and moves toward competence.⁵⁹ The key shift that happens from the classroom to the clinic is the move from the hypothetical to real-life. Students are suddenly faced with real clients and real legal problems for which they share responsibility.⁶⁰ Engaging in this work with possible severe consequences and

⁵¹ Weinstein, *supra* note 1, at 323-24.

⁵² Brescia, *supra* note 16, at 539. *See also* Weinstein, *supra* note 1 at 324-26 (viewing problems as requiring both a multidisciplinary approach and an opportunity to collaborate with other professionals.)

⁵³ Linda Morton, *Teaching Creative Problem Solving: A Paradigmatic Approach*, 34 CAL. W. L. REV. 375, 378 (1998) ("Given the complexity of the problems and the need for creative solutions to address them, it will not be just any lawyers at the center of this change but rather creative ones.") *See also* Brescia, *supra* note 16, at 532.

⁵⁴ Younie, *supra* note 11, at 28 (positing that medical education should teach students to understand the disease and understand the patient.)

⁵⁵ Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Legal Problem Solving*, 11 CLIN. L. REV. 149, 152 (2004).

⁵⁶ CARNEGIE REPORT, *supra* note 9, at 121.

⁵⁷ Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLIN. L. REV. 39, 65 (2013).

⁵⁸ CARNEGIE REPORT, *supra* note 9, at 116 ("Over time, the learner gradually develops the ability to see analogies, to recognize new situations as similar to whole remembered patterns, and, finally, as an expert intuition or judgment, such ability is the goal of professional training.")

⁵⁹ *Id.*, at 116-117.

⁶⁰ *Id.*, at 121.

accountability to clients is part of what enables students to move from novice to practitioner. The experience of lived responsibility allows students to grasp the importance of ethical legal work.⁶¹

It is now well-settled that students must encounter hypothetical or real-world legal contexts to build their problem-solving muscle.⁶² Experiential education often begins with role plays or simulations. Certainly, these are useful tools that give students legal training and an understanding of the human side of lawyering.⁶³ Role-playing permits students to practice lawyering and recognize that their job is more than knowing the law and facts. Real-world exercises unlock student awareness of their own value systems and of the effect of their values on their professional roles and client interactions.⁶⁴ The most notable drawback to simulated work is the lack of real consequences inherent in working with actual clients.⁶⁵ But the safety of simulation enables students to experiment and test their skills without the stress of working with clients. Some students can absorb more information and take more risks when some of the stress is removed.

Client-centered lawyering is now the accepted approach taught in clinical legal education. Positioning the client as decision-maker requires lawyers to listen deeply to clients, their stories, and their emotions.⁶⁶ At the heart of client-centered lawyering is respecting and allowing the client as primary decider.⁶⁷ In response, clinical teaching shifts responsibility from solely that of an attorney to a shared responsibility of lawyer and client. This goes beyond theory and requires clinicians to give concrete instruction to students in how to place clients in the center in a meaningful and real way.⁶⁸ To allow for consequential client participation students must understand and practice reflective listening and explore with clients their goals and values.⁶⁹ In many clinics, client-centered lawyering is taught in the context of practicing client interviewing and counseling. Some critics argue this basic mold does not account for the

⁶¹ *Id.*, at 116-117.

⁶² *Id.*, at 95, citing STUCKEY ET AL. BEST PRACTICES FOR LEGAL EDUCATION 109 (2007). Some clinicians question whether it is ethical to put future law students in front of real clients without practicing the full array of lawyering skills. Peggy Cooper Davis & James Webb, *Learning from Dramatized Outcomes*, 38 WILLIAM MITCHELL L. REV. 1146, 1146 (2012).

⁶³ Ross Hyams, *The Teaching of Skills: Rebuilding – Not Just Tinkering Around the Edges*, 13 J. Prof. Legal Educ., 63, 69 (1995).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Ann Shalleck, *Constructions of the Client Within Legal Education*, 45 STAN. L. REV. 1731, 1742 (1993).

⁶⁷ *Id.*

⁶⁸ *Id.*, at 1743.

⁶⁹ *Id.*

diversity of client experiences.⁷⁰ Students cannot rely solely on applying learned rules and content; instead, they must fully understand the context and be able to think critically about all of the possible outcomes and solutions.⁷¹ This deeper level of comprehension and critical thought enables creativity, innovation, growth, and professional progress.⁷² Many clinical instructors focus on harnessing students' inherent curiosity, as well as improving the "situational" curiosity of students who do not come by it naturally.⁷³ This task is sometimes herculean, but also delightful. It involves encouraging students to see their clinical semester as more than legal work but "about responsibility to and for another human being."⁷⁴

While building problem-solving capability is always a goal of clinical instructors, the how-to is more difficult. One scholar suggests using exercises that encourage students to think outside the box or engage in creative problem solving can effectively teach problem-solving skills.⁷⁵ This includes assisting students in developing awareness of the various perceptual, cultural, emotional, and other kinds of barriers to problem-solving.⁷⁶ By using innovative exercises, students are encouraged to transcend conventional modes of thinking and expand upon their typical approaches.⁷⁷

D. Meeting The Needs Of Today's Law Students

In addition to the lack of creativity and empathy, legal educators today encounter more students struggling with anxiety and depression.⁷⁸ It is not news that law school is stressful or that law students feel this stress more than graduate students in other disciplines.⁷⁹ Legal education

⁷⁰ *Id.*, at 1743-44. "There is no sense that these situations pose different issues for the lawyer. The model neglects to recognize the importance of the context of each case in the decisionmaking process." *Id.*, at 1747.

⁷¹ Davis & Webb, *supra* note 62, at 1149.

⁷² *Id.*, at 1149.

⁷³ Jacobs, *supra* note 2, at 378.

⁷⁴ *Id.*, at 378, quoting Ian Weinstein, *Teaching Reflective Lawyering in a Small Case Litigation Clinic: A Love Letter to My Clinic*, 13 CLIN. L. REV. 573, 576 (2006).

⁷⁵ Seielstad, *supra* note 45, at 503.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Abigail A. Patthoff, *This is Your Brain on Law School: The Impact of Fear-Based Narratives on Law Students*, 2015 UTAH L. REV. 391, 424 (2015).

⁷⁹ Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 77 (2002) ("Law students regularly top the charts as among the most dissatisfied, demoralized, and depressed of graduate-student programs."); Patthoff, *supra* note 78, at 424. In one recent study, 37% of law students reported anxiety compared to 15% of students in other graduate programs, and 17% of law students reported experiencing depression compared to 14% of non-law students. Jerome M. Organ *et al.*, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Abuse and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 136-37 (2016).

was designed to teach that “tough-minded analysis, hard facts, and cold logic are the tools of a good lawyer, and it has little room for emotion, imagination, and morality.”⁸⁰ Students quickly absorb that learning “to think like a lawyer” requires “abandoning their ideals, ethical values, and sense of self.”⁸¹ The law school environment—filled with stress, competition, and hostility—leads to law students feeling alienated, depressed, and lacking in self-esteem and confidence.⁸²

Compared to their predecessor Millennials who some described as “confident and optimistic,”⁸³ current Gen Z students seek more guidance in how to engage with clients. Enduring stress affects the process of maturing and may cause students to regress developmentally.⁸⁴ High levels of stress, not surprisingly, decrease the academic performance of students, limit their capacity to learn, and interferes with their ability to process and retain information.⁸⁵ While some anxiety can be useful, overly anxious students can fall deeply into negative thinking cycles that weaken executive functioning and prevent productivity.⁸⁶

Often law students enter law school motivated by “justice” or “making their community better,” but these desires diminish as legal education fails to nurture them.⁸⁷ Countless students experience a shift from intrinsic to external motivation with an accompanying decline in well-being.⁸⁸

As a starting point, most students enter their clinical experiences eager to transfer their learned doctrinal material to real-world experiences.⁸⁹ They are both excited and terrified to see if they have what it takes to succeed as practicing lawyers. Facing clients for the first time, some students struggle with the inherent contradictions and ambiguities, client misperceptions, alternative truths, and varied world views.⁹⁰ Without significant life experience to uncover the multi-layered aspects of client lives, students can become stuck or paralyzed by their

See also Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649, 657 (2018).

⁸⁰ Hess, *supra* note 79, at 78-79.

⁸¹ *Id.*

⁸² *Id.* at 77. In fact, large numbers of law students reported that they were more articulate and intelligent before entering law school. Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 328 (1994).

⁸³ Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLIN. L. REV. 1, 8 (2013).

⁸⁴ Judith L. Ritter, *Growin' Up: An Assessment of Adult Self-Image in Clinical Law Students*, 44 AKRON L. REV. 137, 152 (2011).

⁸⁵ Hess, *supra* note 79, at 80.

⁸⁶ Austin, *supra* note 79, at 667.

⁸⁷ Younie, *supra* note 11, at 37.

⁸⁸ Note, *Alienation in Law School*, 137 HARVARD L. REV. 958, 966 (2024).

⁸⁹ Jacobs, *supra* note 2, at 378.

⁹⁰ Helen H. Kang, *Use of Role Play and Interview Modes in Law Clinic Case Rounds to Teach Essential Legal Skills and to Maximize Meaningful Participation*, 19 CLIN. L. REV.

fear of inability.⁹¹ They can struggle to think about, understand, connect to, and work with clients who may be different from them with respect to race, culture, class, or age.⁹²

It makes sense that law students are anxious, unprepared, and generally unable to “present” themselves as lawyers.⁹³ That is the reason clinics exist: to give students support, confidence, and experience. As my students start practicing client interviewing and counseling, I see their minds whirring with all they have to “do”: develop a trusting client relationship, demonstrate strong communication skills, listen empathetically, as well as gather important factual information, determine client goals, and provide sound legal counseling. It is a lot.

Whether due to increasing anxiety, feeling out of place in law school, or the continuing effects of Covid isolation, recent law students seem more hesitant and less sure of themselves; they had a greater need to engage in simulations before they felt ready to deal with actual clients.⁹⁴ Many expressed uncertainty in meeting a client alone and struggled with what to say to form a connection. Students seemed to retain less substantive material, to spend more time preparing for initial client interviews, and to require more supervisor support. In response, I increased the time we spent preparing for interviews, added more role plays, and allowed more time for students to settle into their clinical experience. Still, they struggled. I searched for tools to ease their anxiety, bolster their foundation, and build their confidence. Ultimately, I realized my students needed a way to stop thinking about what they would *do* as lawyers and instead focus solely on their client needs. I needed a new way to provide space for reflection and discovery. The theatre project outlined in section III was the impetus of this article and designed to fill this gap in student learning and confidence.

II. THEATRE AS A PEDAGOGICAL TOOL

It is not uncommon for a moving theatrical performance to leave audience members “feeling buoyed, transported to fantastical places, and dreaming of [themselves] in the role.”⁹⁵ Those who are watching can be confronted with pain, loss, joy, laughter, all conveyed by passionate

207, 237 (2012); Sharan B. Meriam, *The Role of Cognitive Development in Mezirow's Transformational Learning Theory*, 55 ADULT EDUC. Q. 60, 64 (2004).

⁹¹ Kang, *supra* note 90, at 237-38.

⁹² Millemann, *supra* note 4, at 439.

⁹³ Joy Kanwar, *Avatars, Acting and Imagination: Bringing New Techniques into the Legal Classroom*, 43 J. LEGAL PROF. 1, 10 (2018).

⁹⁴ Ritter, *supra* note 84, at 150.

⁹⁵ Carol M. Kaplan, *Voices Rising, An Essay on Gender, Justice, and Theater in South Africa*, 3 SEATTLE J. SOC. JUST. 711, 713 (2004).

actors who excel due to both practice and lived experience.⁹⁶ Spectators can “learn, see, hear, experience, realize and internalize” powerful realities such as bias and discrimination.⁹⁷ Theater provides the ability to “transform, to educate, to create change.”⁹⁸ Other graduate programs effectively use theatre to enhance student learning, self-awareness and critical thinking. Bringing theatre to legal education provides space and opportunity for students to better understand the lives of clients and ultimately solve problems more effectively.

A. Power of Theatrical Performance

The transformative power of theatre to engage the audience dates back thousands of years. For example, Aristotle suggested that audience members “would emotionally participate in the drama through their empathy.”⁹⁹ Watching a dramatic performance has the capacity for transformation for the audience, causing its members to examine their values and beliefs, while teaching them how to empathize and to understand their connections to others.¹⁰⁰ The experience of art requires an appreciation of the experience of others.¹⁰¹ Most people have been affected by a theatrical performance and the compelling “ability to engage its audience mentally, physically, and emotionally.”¹⁰² The audience responds to the performance on three levels: the subject matter, experience of the action, and the characters.¹⁰³ The music, the characters, or the script draws people into the story and wraps them in a new world.¹⁰⁴

Theatre fosters and nurtures a sense of purposeful and intentional community. There is a oneness between the performers and the audience as they witness the same action and emotion at the same time and in the same space.¹⁰⁵ We are reminded that we are not alone and that human connection is necessary.¹⁰⁶ Theater provides more than

⁹⁶ *Id.*

⁹⁷ *Id.*, at 714.

⁹⁸ *Id.*, at 714.

⁹⁹ Heyward, *supra* note 21, at 198.

¹⁰⁰ Leigh Ann Howard, *Speaking Theatre/Doing Pedagogy: Re-Visiting Theatre of the Oppressed*, 53 COMMUN. EDUC. 217, 219 (2004).

¹⁰¹ Mayo, *supra* note 24, at 184.

¹⁰² James G. Boggs *et al.*, *Experiential Learning Through Interactive Drama: An Alternative to Student Role Plays*, 31 J. OF MGMT. ED. 832, 833 (2007)

¹⁰³ RICHARD COURTNEY, *PLAY, DRAMA & THOUGHT: THE INTELLECTUAL BACKGROUND TO DRAMA IN EDUCATION*, 201 (3rd ed. 1974).

¹⁰⁴ Boggs *et al.*, *supra* note 102, at 833-34.

¹⁰⁵ Pipino, *supra* note 7, at 1.2.1.

¹⁰⁶ ACTING STUDIO CHICAGO, 5 REASONS THEATRE IS STILL IMPORTANT, <https://www.actingstudiochicago.com/5-reasons-why-theatre-is-still-important-blog/> (last visited August 28, 2025).

entertainment value: it builds psychological skills—our ability to recognize and understand the emotions of others. It develops and fortifies our “emotional muscle of empathy.”¹⁰⁷ Theatre teaches us how to behave and react by giving us examples and the opportunity to learn from them.¹⁰⁸ We are shown a different perspective from our own and invited to consider situations from the viewpoint of the actors. We are challenged to take risks, think differently, and maybe appreciate diverse voices. Such experiences are valuable for making us think as individuals, but they demand that we also examine larger societal issues.¹⁰⁹

A recent study conducted by academic researchers examined the question, “Can attending live theatre improve empathy by immersing audience members in the stories of others?”¹¹⁰ They conducted three studies with two large regional theatre companies in New York City and Portland, Oregon.¹¹¹ Theatre goers were invited to fill out a survey immediately before or after seeing one of three plays depicting current socio-political issues.¹¹² The results demonstrated that viewing live theatre increased audience members’ empathy for the groups depicted, changed their belief in socio-political issues discussed, and even increased their donations to related organizations.¹¹³ As this article will later discuss, effective lawyering demands an understanding of the unique experiences, values, backgrounds, and life choices of each individual client and their place in larger society.

B. Theory Behind Theatre-Based Education

Educators in elementary through college and even some graduate programs have recognized drama’s emotional power to enhance student learning and understanding.¹¹⁴ The use of drama and performance are well-established pedagogical tools used in K-12 and undergraduate

¹⁰⁷ Steve Rathje, Leor Hackel and Jamil Zaki, *Why Theatre Makes Us Better People: Bring it Back*, L.A. TIMES (May 2, 2021) <https://www.latimes.com/opinion/story/2021-05-02/theater-empathy-live-performance-psychology> (last visited August 28, 2025).

¹⁰⁸ Pipino, *supra* note 7, at 1.2.1.

¹⁰⁹ ACTING STUDIO CHICAGO, *supra* n. 106.

¹¹⁰ Steve Rathje, Leor Hackel and Jamil Zaki, *Attending live theatre improves empathy, changes attitudes, and leads to pro-social behavior*, 95 J. Exper. Soc. Psych. 1, 1 (2021).

¹¹¹ *Id.*, at 2.

¹¹² *Id.*, at 2-8 (the plays were “Skelton Crew”—a play about auto workers in Detroit during the 2008 recession, “Sweat”—a play about factory workers in Pennsylvania, and “Wolf Play”—a play about a same-sex couple trying to adopt a child).

¹¹³ *Id.*, at 9.

¹¹⁴ Heyward, *supra* note 21, at 199.

education.¹¹⁵ While much of the literature specifies the use of “drama”¹¹⁶ as opposed to “theatre,” this paper argues that many of the benefits of theatre-based pedagogy also apply to the ways theatre was used in this project. Many terms are used to describe these methodologies, including “theatre-in-education,”¹¹⁷ “process drama,”¹¹⁸ and “educational drama.”¹¹⁹ Regardless of terms, the pioneers of theatre-based education assert it develops skills of collaboration, critical thinking, and emotional well-being. As a discipline, it fosters creativity, self-awareness, and empathy for others.¹²⁰ Education occurs through theatre “when it initiates or extends a questioning process in its audience.”¹²¹

The use of theatre is a compelling tool because “it contextualizes learning so that students ‘think from within a dilemma instead of talking about the dilemma.’”¹²² Educator Dorothy Heathcote, who taught both children and teachers for over 60 years, designed the “Mantle of the Expert” technique.¹²³ This approach—which asks the student to become the expert—sought to provide a larger context that students could extrapolate to various settings.¹²⁴ Taking on this heightened responsibility elevates student learning from merely ingesting material to using the material to make well-reasoned decisions.¹²⁵ The resulting outcome is that “students are ushered into an imaginative space where

¹¹⁵ MANON VAN DE WATER ET AL., *DRAMA AND EDUCATION: PERFORMANCE METHODOLOGIES FOR TEACHING AND LEARNING* 21-26 (2015) (authors outline history of pioneers utilizing drama-based pedagogies.)

¹¹⁶ Educational theorists contrast “drama,” which means to do or act and focuses on process, with “theatre” which is described as an art form that creates a product for an audience. *Id.*, at 7. For purposes of this paper, I will use the term “theatre-based education” as it more accurately represents the project where law students were audience members rather than part of the production.

¹¹⁷ “Theatre-in-Education” (TIE) emerged in the 1960s as a child-centered approach to educating students using theatre. ROGER WOOSTER, *CONTEMPORARY THEATRE IN EDUCATION*, 1-2 (2007).

¹¹⁸ Craig Duckworth, *A Dramatic Approach to Teaching Applied Ethics*, *CREATIVITY IN THE CLASSROOM*, 75 (Paul McIntosh & Digby Warren eds., 2013).

¹¹⁹ VAN DE WATER ET AL., *supra* note 115, at 7.

¹²⁰ *Id.*, at 8.

¹²¹ Cristina Perez Valverde, *Theatre in Education (TIE) in the Context of Educational Drama*, 7 (2002), available at: https://www.researchgate.net/publication/39252871_Theatre_in_education_TIE_in_the_context_of_educational_drama.

¹²² Davis & Webb, *supra* note 62, at 1149. See DOROTHY HEATHCOTE AND GAVIN BOLTON, *DRAMA FOR LEARNING* (1995) (Authors argue that contemporary education evolved so that students learned material in fragments rather than using the knowledge to do things, leaving them ill-equipped to perform in the real world.)

¹²³ DOROTHY HEATHCOTE: *COLLECTED WRITINGS ON EDUCATION AND DRAMA*, 114 (Liz Johnson and Cecily O’Neill eds., 1984) (“[T]he arts isolate a factor of human experience. They particularize something to bring it to your attention.”).

¹²⁴ Davis & Webb, *supra* note 62, at 1149.

¹²⁵ *Id.*, at 1150.

they can venture beyond comprehension to application.”¹²⁶ Part of the power of using drama is that students can watch as the protagonist acts and then substitute themselves in the action. Then students watch as the actor doesn’t *tell* them a resolution of the conflict but *shows* them.¹²⁷

Beginning in the 1980s, research in other domains such as psychology and neuroscience reinforced the notion that theatre-based methodologies can benefit brain functioning.¹²⁸ Scholars began using brain science to support varied teaching and learning methods and connecting emotion and brain functioning.¹²⁹ Psychologist Howard Gardner’s theory and corresponding book on multiple intelligences posits that individuals possess unique abilities equating to different types of intelligence.¹³⁰ One of the multiple intelligences Gardner lays out is “The Personal Intelligences,” which he defines in part as the capacity “to read the intentions and desires—even when these have been hidden—of many other individuals and, potentially, to act upon this knowledge...”¹³¹ He advocates for educational practices to incorporate these multiple intelligences, allowing students to leverage their strengths and harness them into enhanced learning, creative ideas, and innovative solutions.¹³²

In his popular book, *Emotional Intelligence*, psychologist Daniel Goleman elaborated on Gardner’s work by highlighting the role of emotions as a key dimension of personal intelligence.¹³³ Goleman posits that highly effective people possess self-awareness of their own feelings, the ability to monitor and manage those feelings, and empathy—or attunement to the feelings of others.¹³⁴ High emotional intelligence leads to skillful interpersonal interactions, quality relationships, and effective leadership.¹³⁵ Theatre is “communication and exploration of

¹²⁶ *Id.*

¹²⁷ MADY SHUTZMAN & JAN COHEN-CRUZ, *PLAYING BOAL*, 56 (1993).

¹²⁸ VAN DE WATER, *supra* note 115, at 10.

¹²⁹ *Id.*

¹³⁰ HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES*, 6 (1983) (Use of tests like IQ “fail to come to grips with the higher levels of creativity; and all are insensitive to the range of roles highlighted in human society.”) *Id.*, at 24.

¹³¹ *Id.*, at 239. The other intelligences Gardner enumerates are: Linguistic, Logical/Mathematical, Spatial, Musical, and Bodily/Kinesthetic.

¹³² *Id.*, at 372.

¹³³ DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE*, 40, 43 (2005) (defining “Emotional Intelligence” as including: 1. Knowing one’s emotions, 2. Managing emotions, 3. Motivating oneself, 4. Recognizing emotions in others, 5. Handling relationships.)

¹³⁴ *Id.*, at 43.

¹³⁵ *Id.*, at 43-44. While what is meant by “emotional intelligence” is debated, academics John Mayer and Peter Salovey developed a widely used definition. John Mayer & Peter Salovey, *What is Emotional Intelligence?*, in *EMOTIONAL DEVELOPMENT AND EMOTIONAL INTELLIGENCE: IMPLICATIONS FOR EDUCATORS*, (Peter Salovey and David Sluyter eds., 1997). According to their theory, there are four “branches”: 1) emotional perception and expression, 2) emotional facilitation of thought, 3) emotional understanding, and

human experience”; when used as a teaching tool, it allows students to grapple with their own values in relation to others and the world.¹³⁶

Author Daniel H. Pink refutes the belief that logical and linear thinking is superior and opines that our new normal is “an economy and a society built on the inventive, empathic, big-picture capabilities ...”¹³⁷ He describes six senses that lead to successful personal and professional lives—Design, Story, Symphony, Empathy, Play, and Meaning.¹³⁸ His concept of “story” presupposes that stories are how our mind remembers by “conveying a complex idea in a more memorable and meaningful way.”¹³⁹ While pure logic “tries to generalize, to strip decision making from specific context, to remove it from subjective emotions[,] [s]tories capture the context, capture the emotions ... stories are important cognitive events, for they encapsulate, into one compact package, information knowledge, context and emotion.”¹⁴⁰ Pink asserts that “empathy” is necessary to understand someone else, create connection, and be able to care for others.¹⁴¹ “Empathy is a stunning act of imaginative derring-do, the ultimate virtual reality—climbing into another’s mind to experience the world from that person’s perspective.”¹⁴² And the notion of “play,” including humor and joy, is linked to emotional intelligence and leads to increased productivity and fulfillment.¹⁴³ Using theatre as a teaching tool cultivates all of these—play, empathy, and story—to improve professional competence.

Integrating theatre into clinical education enhances student training beyond what simulation and role play can provide. By watching the drama unfold, students are encouraged to reflect on their values, their place in the world, their notion of how the world works, what they are capable of, and their connection to others.¹⁴⁴ When students think

4) emotional management. Emotional perception requires the ability to identify, decipher and acknowledge the tone and expression expressed. This allows for the self-awareness and self-regulation of emotions as well as the emotions of others. Peter Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOT. J. 301, 303(2005). The second “branch” focuses on the impact of emotion on cognition and can “lead to more effective reasoning, decision making, problem solving, and creative expression.” *Id.* The understanding emotion branch requires the identification of emotion and relationship to other emotions. This is critical for understanding the causes and consequences of emotions. *Id.*, at 304. Lastly, emotional management is the ability to regulate and reflect on our own emotions and well as those of others. *Id.*

¹³⁶ Valverde, *supra* note 121, at 7.

¹³⁷ DANIEL H. PINK, *A WHOLE NEW MIND*, 1-2 (2006).

¹³⁸ *Id.*, at 65-67.

¹³⁹ *Id.*, at 103.

¹⁴⁰ *Id.*, quoting DON NORMAN, *THINGS THAT MAKE US SMART: DEFENDING HUMAN ATTRIBUTES IN THE AGE OF THE MACHINE*, 146 (1994).

¹⁴¹ *Id.*, at 159.

¹⁴² *Id.*, at 159.

¹⁴³ *Id.*, at 188.

¹⁴⁴ Valverde, *supra* note 121, at 7.

critically about alternative courses of action, they expand their capacity for innovation and lawyering ability.¹⁴⁵ Considering the importance of multi-dimensional thinking, employing theatre facilitates “acquiring, experiencing, and enhancing emotional intelligence leading to ... confidence, curiosity, intentionality, self control.”¹⁴⁶

C. *Practical Application of Theatre-Based Learning*

The effectiveness of theatre as a pedagogical tool is that it incorporates the learner into the educational journey.¹⁴⁷ While experiential learning is widely assimilated into legal education, theatrical performance is seldom used as a teaching device but is not completely novel. The next section outlines the prior uses of theatre in teaching and the enormous potential to be explored.

1. *Process Drama And Forum Theatre*

It is well settled that legal training should include practicing legal skills in a safe setting where students can test and refine their abilities prior to obtaining their law license.¹⁴⁸ Law professor Peggy Cooper Davis used a technique called “process drama,” that involves an experiential learning cycle of “act, reflect, and conceptualize” to teach and train students.¹⁴⁹ Unlike a typical performance, process drama is unscripted without an audience designed to be unpredictable and focus students on the process rather than a final product.¹⁵⁰ Professor Davis, in collaboration with playwright James Webb, created exercises that allow students to practice a skill, reflect on their actions, and extrapolate their actions to future practice.¹⁵¹ Students work in role as lawyers with actor-clients and the sessions are often paused for reflection and discussion.¹⁵² Professor Davis asserts that process drama not only enhances students’ interpersonal communication but also deepens their legal analysis when they see the interplay between human functioning and legal interpretation.¹⁵³

This use of process drama was designed to assist students in moving beyond applying rules to deepen their understanding of

¹⁴⁵ Davis and Webb, *supra* note 62, at 1149.

¹⁴⁶ VAN DE WATER, *supra* note 115, at 3.

¹⁴⁷ Phogat & Tiwari, *supra* note 28, at 1-5.

¹⁴⁸ Davis & Webb, *supra* note 62, at 1146.

¹⁴⁹ *Id.*, at 1147-48. Process drama, developed by educator Dorothy Heathcote, “uses theatre in nontraditional, experiential ways to encourage active learning.” *Id.*

¹⁵⁰ *Id.*, at 1148.

¹⁵¹ *Id.*, at 1147.

¹⁵² *Id.*, at 1156.

¹⁵³ *Id.*, at 1151.

possible outcomes and courses of action. This “more ambitious” type of simulation, Davis maintains, creates “intellectual versatility” necessary to solve complex human legal problems.¹⁵⁴ It is argued that as students step into the role of lawyer and carry the responsibility of accountability, their learning transcends ingesting material to more active critical thinking.¹⁵⁵

Recently, Professor JoNel Newman and her clinical colleagues experimented with using a theatrical model called “Forum Theatre” to educate students.¹⁵⁶ Forum Theatre, developed by activist and theatre director Augusto Boal, includes the audience within the performance to strategize for political change.¹⁵⁷ He famously reconceptualized political theatre by transforming a typical sit-and-watch performance into a participatory and collaborative experience for the audience called “spect-actors.”¹⁵⁸ Boal’s groundbreaking work, *Theatre of the Oppressed*, outlines this unique methodology designed to test a possible solution of empowerment by engaging the audience in collaboration.¹⁵⁹ After the actors run through the story one time without interruption, the next time the “spect-actors” are encouraged to shout “freeze” to stop the action. That person takes the place of the actor and completes the scenario by changing the outcome to remove the oppressive element.¹⁶⁰

Forum Theatre has long been used in theatrical education and, more recently, in graduate and higher education but rarely in legal training.¹⁶¹ In a 2020 law review article, Newman and colleagues contend that Forum Theatre offers prospective lawyers the opportunity to recognize and interrupt oppression, increase self-awareness of personal bias, and empower future clients.¹⁶² They argue that clinicians can use Forum Theatre-type exercises to teach legal skills and ethics to incoming clinicians. For example, clinicians can stage a lawyer-client meeting where the lawyer acts unprofessionally and students then serve as “spect-actors” and interrupt the action to dispense the correct legal advice.¹⁶³

¹⁵⁴ *Id.* at 1161.

¹⁵⁵ *Id.* at 1150.

¹⁵⁶ Newman *et al.*, *supra* note 5, at 474-77.

¹⁵⁷ Duckworth, *supra* note 118, at 75.

¹⁵⁸ Newman *et al.*, *supra* note 5, at 477-79.

¹⁵⁹ *Id.*, at 468. The goals of Forum Theatre are: 1) create a democratic space, and 2) empower the audience to engage in strategic problem-solving that brings needed social change.

¹⁶⁰ *Id.*, at 477-79.

¹⁶¹ *Id.*, at 471. See e.g., Peggy Cooper Davis, *What Does Documentary Filmmaking Have to do with Practicing Law*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 7, 14-15 (2008); Davis & Webb, *supra* note 62, at 1148-49.

¹⁶² Newman *et al.*, *supra* note 5, at 474.

¹⁶³ *Id.*, at 477-79.

While these innovative techniques provide students with in-the-moment lawyering opportunities, this article posits that students need a critical first step before serving as “spect-actors”: the theatrical benefit of being in an audience absorbing, reflecting and questioning to prepare for doing. Medical school training has long utilized a theatre-type technique designed to use the power of performance to enhance learning.

2. *Readers’ Theatre in Medical Education*

The use of theater-based pedagogical tools in medical education dates back to the 1960s.¹⁶⁴ Readers’ Theatre is a method in which participants read aloud from a script to an audience followed by a group discussion.¹⁶⁵ It is premised on the belief that a live performance delivers content “that helps learners understand the accumulated knowledge and become active participants in their own learning.”¹⁶⁶ Student engagement is high as the performance is more compelling and participants pay attention and mentally participate in the action.¹⁶⁷ The premise is that listening to a story and then reflecting in a group discussion is quite different than silently reading a story alone.¹⁶⁸

A parallel strand of scholarship advocates for the inclusion of literary fiction in the clinical curriculum to build student empathy.¹⁶⁹ Professor Carolyn Grose used realistic fiction as preparation for client interviewing to ground students in a realistic version of clients varied lived experiences.¹⁷⁰ She argued that for law students to truly understand, and believe, a client’s story, they must confront their own learned stereotypes and misperceptions.¹⁷¹ A student who reads a fictional story prior to interviewing a client will be less likely to discount the client’s experience which enables connection and empathy.¹⁷² Fiction is certainly

¹⁶⁴ Johanna Shapiro & Beverly Cho, *Medical Readers’ Theater: Relevance to Geriatrics Medical Education*, 32 GERON. & GERIAT. ED., 350 (2011).

¹⁶⁵ Khanlou *et al.*, *Readers Theatre as an art-based approach to education: A scoping review on experiences of adult learners and educators*, 116 NURSE ED. TODAY 2 (2022).

¹⁶⁶ *Id.*, at 11.

¹⁶⁷ *Id.*, at 2.

¹⁶⁸ Gretchen A. Case & Guy Micco, *Moral Imagination Takes the Stage: Readers; Theater in a Medical Context*, 2 JOURNAL FOR LEARNING THROUGH THE ARTS 2 (2006). (“When course content is delivered in meaningful ways, learners are more likely to engage as they see the implications and relevance to their professional practice.”) *See also* Khanlou *et al.*, *supra* note 165, at 2.

¹⁶⁹ Peter H. Meyers and Sara D. Schotland, *Integrating Fictional Narratives into Clinical Education Curricula, as a Pedagogical Tool for Law Students*, 31 CLIN. L. REV. 299, 300-01 (2025).

¹⁷⁰ Carolyn Grose, “A Field Trip to Benetton. . . and Beyond: Some Thoughts on ‘Outside Narrative’ in a Law School Clinic,” 4 CLIN. L. REV. 109, 123 (1997).

¹⁷¹ *Id.* at 122.

¹⁷² Meyers & Schotland, *supra* note 169 at 301.

a powerful tool and many readers have been swept away by a gripping story or immersed by a character's journey.¹⁷³ However, theater can do more than transfix an individual in a private moment. The audience as a whole is part of a dynamic communal experience. Instead of one individual's interpretation of a fictional story, actors guide an entire group on a journey of back-and-forth reaction and emotional impact. This is not done through a reader's imagination but seeing an actor's joyful expression or watching the squeeze of hands or punch of a fist.

The benefits of Readers' Theatre include: capturing audience interest, provoking dialogue from performance, developing communication skills, introducing ethical issues, enhancing ethical sensitivity, and preparing students to handle ethical issues.¹⁷⁴ It is advantageous for budding medical students because it "encourages emotional engagement and moral imagination, as well as conceptual and knowledge learning."¹⁷⁵ Readers' Theatre provides a context to better understand others and provide a "closer feel of real-world experiences."¹⁷⁶

The medical profession recognizes that being an excellent doctor requires more than acquiring essential medical and scientific knowledge. Becoming an exceptional medical provider requires being "empathic, patient-centered, compassionate, humble, and respectful."¹⁷⁷ In one 1997 study, medical students who engaged in drama as a pedagogical tool scored significantly higher than a control group on knowledge and communication skills when interviewing patients about embarrassing health conditions.¹⁷⁸ In another, students demonstrated better skill in taking patient histories after using interactive drama.¹⁷⁹ Readers' Theatre engages students on both cognitive and emotional level, which has the potential to enhance their "understanding of complex emotional, interpersonal and psychological dynamics ...which are difficult to fully convey in more traditional forms of dissemination."¹⁸⁰

¹⁷³ *Id.*, at 302 ("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.") citing Jennifer L. Connell, *Reading Cases for Empathy*, 17 U. ST. THOMAS L.J. 772, 772-73 (2022).

¹⁷⁴ GERKMAN & CORNETT, *supra* note 14, at 136.

¹⁷⁵ Shapiro & Cho, *supra* note 164, at 351.

¹⁷⁶ Khanlou, *supra* note 165, at 2.

¹⁷⁷ Carlos Centeno, *Palliative Care and the Arts: Vehicles to Introduce Medical Students to Patient-Centered Decision-Making and the Art of Caring*, 17 BMC MEDICAL ED. 257(2017).

¹⁷⁸ Knowles, C. et al., *A Randomised Controlled Trial of Effectiveness of Combining Video Role Play with Traditional Methods of Delivering Undergraduate Medical Education*, 77 SEXUALLY TRANSMITTED INFECTIONS, 376 (2001).

¹⁷⁹ Littlefield, J.H., et al., *Evaluation of role-play learning exercise in an ambulatory clinic setting*, 4 ADVANCES IN HEAL. SCI. ED. THEORY PRACT., 167 (1999).

¹⁸⁰ GERKMAN & CORNETT, *supra* note 14, at 136-37, citing Kate Rossiter et al., *Staging Data: Theatre as a Tool for Analysis and Knowledge Transfer in Health Research*, 66 SOC. SCI. & MED. 130, 145 (2008).

Law students, and lawyers as well, often feel unprepared to discuss death and dying with clients. Similarly, medical students and physicians are equally unprepared to discuss impending death with a patient. To address this shortcoming in such a critically necessary area, some schools have supplemented passive didactic models with theatrical performances to enhance student learning, empathy, and reflection.¹⁸¹ Medical schools have had success using Readers' Theatre to educate medical students on end-of-life care.¹⁸² Educators want to build empathy in students so they can work from a place of "what is it like to be my older client?"¹⁸³ Instead of being passive spectators at a lecture, in the audience students become "entangled in a dramatic scenario yet have sufficient emotional distance to simultaneously engage in critical analysis."¹⁸⁴ The students describe the play as a positive experience and reported an increase in understanding and in their confidence to discuss end-of-life issues.¹⁸⁵ Additionally, in comparing the performance to classroom teaching methods, most students described it as "much more useful" or "more useful."¹⁸⁶ Students could enter a more emotional atmosphere as the play was presented in a safe space where students could later reflect on the challenges they and their patients may face.¹⁸⁷

This deeper level of engagement allows students to contemplate and address difficult areas such as death and dying, ageism, and the general aging process.¹⁸⁸ Readers' Theatre has been used to enhance student insight into aging and bias, understand elders views on aging, and suggestions for how to interact and communicate with older adults.¹⁸⁹ Research shows that students who participated in Medical Readers' Theatre regarding older patients held more positive views of

¹⁸¹ Anna M. Kerr *et al.*, *Confessions of a Reluctant Caregiver Palliative Educational Program: Using Readers' Theatre to Teach End-of-Life Communication in Undergraduate Medical Education*, 35 HEALTH COMMUNICATION 192 (2020).

¹⁸² *Id.*, at 194. See e.g. Wayne A. Beach *et al.*, *The Conversations About Cancer (CAC) Project: Assessing feasibility and audience impacts from viewing the cancer play*, Health Communication, 29, 462-472 (2014); Karl A. Lorenz *et al.*, *End-of-life Education Using the Dramatic Arts: The Wit Educational Initiative*, 79 ACAD. MED., 481 (2004))(Drama-based learning programs can "promote humanism, empathy, and self-reflection in the care that medical trainees provide to dying persons."); Kerr, *supra* note 181, at 196; citing Lorenz *et al.* at 485; Khanlou *et al.*, *supra* note 165, at 10 (Readers Theatre used to teach medical students end-of-life care skills, talking to clients about illness and death, advance directives, and managing pain.)

¹⁸³ Case & Micco, *supra* note 168, at 1.

¹⁸⁴ Shapiro & Cho, *supra* note 164, at 351.

¹⁸⁵ Kerr, *supra* note 181, at 196.

¹⁸⁶ *Id.*

¹⁸⁷ Kerr, *supra* note 181, at 197.

¹⁸⁸ Khanlou, *et al.*, *supra* note 165, at 2.

¹⁸⁹ *Id.*, at 10. In particular when students who have little contact with older adults, it can help bridge "the human connection that really promotes understanding of the whole spectrum of the aging process." Shapiro & Cho, *supra* note 164, at 352.

older adults, and the experience improved their ability to interact and communicate with their older patients.¹⁹⁰

The *Wit* Educational Initiative is one example. The project delivered live productions of the play, *Wit*, in clinical medical settings to promote empathy and humanistic care of dying patients.¹⁹¹ *Wit* relates the story of a poetry professor undergoing experimental chemotherapy for metastatic ovarian cancer. The staged reading was followed by a discussion of the play's themes that allowed a "safe haven" for the audience members to express their emotions relating to end-of-life care.¹⁹² Part of its lauded success was the reported ability of audience members to learn from "the emotional safety of a theater seat compared to a dying patient's room..."¹⁹³

The educational benefits of Readers' Theatre sets the stage for similar success using theatre in legal education. A recent study measured the perceptions of law students regarding the effectiveness of Readers' Theatre as a teaching strategy.¹⁹⁴ Participants performed vignettes in which an associate attorney faces an ethical dilemma and was pressured by a senior lawyer to act improperly.¹⁹⁵ Each performance was followed by a group discussion on the ethical issues at play and on the perspectives of the characters. The discussion was followed by a survey on the effectiveness of the methodology in increasing awareness of the ethical issues.¹⁹⁶ Students rated it as an important methodology because it highlighted substantive material and it increased opportunities for discussion and analysis.¹⁹⁷ All but one participant rated Readers' Theatre as more effective than classroom lectures.¹⁹⁸ These findings demonstrate law students are eager and willing to engage in innovative teaching methods to further hone their lawyering skills. Theatre provides an excellent methodology to refine skill development, professional self-awareness, and critical thinking.

III. PROJECT

I first contemplated using theatre as a teaching tool several years ago when I attended a conference that started with a staged reading

¹⁹⁰ Shapiro & Cho, *supra* note 164, at 359.

¹⁹¹ Lorenz *et al.*, *supra* note 182, at 483-85. The initiative held 67 productions at 32 sites with 2,582 participants (1,401 were medical students) completing surveys of the program.

¹⁹² *Id.*, at 483-85.

¹⁹³ *Id.*, at 485.

¹⁹⁴ Kelly VanBuskirk & George Filliter, *An examination of the effectiveness of Readers' Theatre as a teaching strategy in legal education*, 54 THE LAW TEACHER 129, 137 (2020).

¹⁹⁵ *Id.*, at 138.

¹⁹⁶ *Id.*, at 138.

¹⁹⁷ *Id.*, at 140.

¹⁹⁸ *Id.*, at 140-41.

of a play on end-of-life planning.¹⁹⁹ Although it was a staged reading in a sterile, bland community space and the actors were wearing street clothes and not in costume, just reading at music stands, I was transported by the talented actors. I truly felt I was watching this family wrestle with end-of-life issues. I was connected to each character's role in the family dynamics and how they engaged with the patriarch who was struggling with his own mortality. I enjoyed it as an artistic performance, and I noticed throughout the remainder of the conference, I kept returning to the characters, the family, and their story.

This play stuck with me over the years and resurfaced in 2022 when I had the opportunity to bring it to my law school as part of health care decision-making day. The performance was followed by an interdisciplinary panel of professionals from law, social work, nursing, and medicine. It was targeted at students in various fields to demonstrate the importance of communicating early and often with clients or patients. Afterwards a teary law student said to me, "*End of life planning is so much more than completing estate planning documents.*"

Yes! A lightbulb went off. As Director of Gonzaga's Elder Law Clinic, I recognized that an obstacle for some emerging law students is how to genuinely connect with a client while also counseling the client on the legal elements in estate planning documents. Students feel insecure about their legal knowledge, flummoxed by complicated legal and medical terms, and anxious about the added emotional layer of death. As a clinical educator, I see my role as creating a bridge for students from the classroom to the clinical experience to future practice.²⁰⁰ To this end, it is crucial that educational experiences prepare students to see themselves as the lawyer and to practice being one. Those opportunities close the divide between formal skills of legal analysis and the more fluid dimensions of professional work.²⁰¹ I already provide experiential exercises for new students, but I noticed that recent students seem less confident to meet their new clients.

As luck would have it, the talented playwright of the earlier play and accomplished lawyer and long-time adjunct professor, Bryan Harnetiaux, had written a ten-minute play on end-of-life planning.

¹⁹⁹ BRIAN HARNETIAUX, *DUSK*, (Hospice Foundation of America, 2004) <https://hospicefoundation.org/?s=Dusk>. *Dusk* is a poignant and touching 70-minute story about 68-year-old Gil and his adult children exploring end-of-life treatment options. Harnetiaux has chosen not to publish the text of the play. For more information on the Hospice Foundation of America's Advance Directives Project, see Hospice Foundation of America, <https://hospicefoundation.org/hfa-product/the-ad-advance-directives-project/> (last visited August 28, 2025). See also Jim Parker, *Playwright, Foundation Teaching Hospice Through Theater*, *HOSPICE NEWS* (May 18, 2023) <https://hospicenews.com/2023/05/18/playwright-foundation-teaching-hospice-through-theater/> (last visited August 28, 2025).

²⁰⁰ Tyler & Mullen, *supra* note 4, at 290 (2011).

²⁰¹ CARNEGIE REPORT, *supra* note 9, at 88.

My dream of a traveling road show—a performance in an assisted living facility followed by a presentation on end-of-life planning by law students—was born. The play, *Lily*, is a thoughtful and powerful glimpse into client decision-making after a terminal diagnosis.²⁰² In just ten minutes with only two characters, the audience is immersed in loss, love, regret, and courage. It opens with Lily asleep in the hospital with a man quietly sitting next to her as she sleeps. We soon discover the man is Joe, her ex-husband, and Lily has summoned him to discuss her advance medical directive. Through thoughtful dialogue, they discuss the end of their marriage due to Joe's drinking, their remarriages, their children, and their respective feelings about Lily's impending death. At the end, Lily gently asks Joe to be her surrogate decision-maker and shares her trust in Joe to follow her wishes.

In a short ten minutes, *Lily* captures the audience as she confronts her impending death and convinces her ex-husband to bravely agree to be her health care proxy. The power of *Lily* is that it seamlessly includes moments of humor and compassion intertwined with regret and fear. The audience watches as Lily, with courage and grace, makes her end-of-life wishes known and Joe eventually agrees to support her right to terminate medical treatment.

Lily was performed by paid actors who also happened to be married to each other.²⁰³ They memorized the parts and were dressed appropriately for the roles, which included Lily in a nightgown lying on a couch to make the scene more realistic. *Lily* was performed first for my clinic students at the beginning of the semester in preparation for their client work. It was then performed at two 55 and older living facilities. At the conclusion of these two performances, audience members had a chance to reflect on the play in the presence of the playwright and ask questions. Then law students provided an overview of estate planning documents and answered legal questions about advance directives. Finally, students completed a reflection paper on their experiences watching *Lily* and how it affected them, whether it enhanced their understanding of the legal material, and whether it facilitated their connection to clients.

I had a multitude of educational goals for the students. I hoped the play would provide a pause, or respite, from the high-level of stress law students experience and the pressure they put on themselves to perform. In creating an opportunity for students to watch and learn, rather than do and learn, I wondered if the students would demonstrate

²⁰² BRIAN HARNETIAUX, *LILY* (Hospice Foundation of America, 2014). Harnetiaux has chosen not to publish the text of the play. A license to use the text of this play can be acquired at <https://hospicefoundation.org/hfa-product/play-license/>.

²⁰³ This play was made even more impactful by the heart-felt acting of wife and husband, Susan and Peter Hardie, who brought Lily and Joe to life.

a greater understanding of the substantive material. Would the break from doctrinal learning allow students to generate more creative and thoughtful solutions? Would they develop a deeper understanding of their professional role and client relationships?

Importantly, the play focused on the human aspect of lawyering. It was my hope that being in the audience would allow students to place themselves in the story and relate to the characters.²⁰⁴ They would be able to imagine how they might comfort Lily as she discusses dying or how to support her as she shares her choices with unsupportive children. Students might consider their lawyering role from the perspective of the client instead of solely from their own experience. Instead of students worrying about how they would perform in a role play, they could just listen to Lily and her expressions of needs and wishes. As audience members, instead of doers, students would have space to begin to picture themselves in future scenes with clients or family members and how they would communicate with them. Instead of focusing only on their fear or anxiety, the students could recall a more complete picture that includes compassion and empathy.

Lastly, I wanted to create a fun experience that provided an opportunity for creativity, artistic expression, and enthusiasm. I hoped to reconnect students to the reasons why they chose law school. I aspired to provide a place to nurture a sense of belonging and connection. Finally, I sought to support their confidence, self-awareness, reflection, and resilience.

While this project may seem like the result of serendipitous events, similar luck is not required for other clinicians to incorporate theater, or art generally, into their clinics. As other clinicians have noted, we “call on our creativity and imagination to engage, to question, and to solve problems.”²⁰⁵ Many of us are connected to larger universities with flourishing theater departments that would welcome collaboration. Similarly, local theater companies and playwrights often seek ways to connect with community members. The brevity of *Lily* and the no-frills production simplified my ability to incorporate the play into a clinic seminar than a typical full-length play.²⁰⁶ The “ten-minute play” is a specific genre in the theater world with separate festivals that increases

²⁰⁴ Gail J. Mitchell *et al.*, *The Experience of Engaging with Research-Based Drama: Evaluation and Explication of Synergy and Transformation*, 17 *QUALITATIVE INQUIRY* 379, 384 (2011).

²⁰⁵ Perlmutter and Cortada, *supra* note 3, at 309.

²⁰⁶ Donna Hoke, *Ten Reasons You Should be Writing Ten-Minute Plays* (May 1, 2016), <https://blog.donnahoke.com/ten-reasons-you-should-be-writing-ten-minute-plays/> (last visited August 29, 2025).

opportunities across states.²⁰⁷ The shorter form also likely makes it easier to find a playwright, actors, and bring the show to life!

IV. LEARNING OUTCOMES FOR PRACTICE-READY STUDENTS

“The function of art is to do more than to tell it like it is—it is to imagine what is possible.” bell hooks

First and foremost, showing the students *Lily* at the beginning of the semester set the stage (pun intended) for thoughtful reflection on the role of lawyers working with clients in an empathetic way. Students reflected on a variety of benefits of viewing the play for future lawyering. All students enjoyed the performance, the story, and the actors’ skill. Many commented that they were moved by the story and that they appreciated a new, engaging learning method.²⁰⁸

Some students struggle with how to incorporate lawyering skills and substantive law with compassion and empathy.²⁰⁹ As a teacher, I often saw it as a linear process, a task of arranging learning in a sequence—*what should I focus on first? What are the primary competencies students should acquire before meeting a client? Do they need to know the substantive law of estate planning? Or should I focus on communication and listening skills? How do I get students to stop thinking about what they are going to say or do and just listen to their clients?* I wanted my students to view their role more holistically. I wondered, how can I help students sit with it all—interviewing tasks, substantive law, professional development, emotional connection—and not feel overwhelmed but instead let the various dimensions of lawyering meld together? As I often say to students, *“How can I help you get out of your head and move away from yourself to focus on your client?”*

Attending a performance of *Lily* allowed students to do just that. Their focus shifted from their own task-oriented perspective to that of the client who was confronting end-of-life decision-making. During the performance, the students’ only task was to sit and listen. By removing their responsibility to act, I hoped I was alleviating some of their anxiety, which allowed them to be present and connect with the characters of

²⁰⁷ *Id.* See e.g., Bryan Harnetiaux’s annual Playwrights’ Forum Festival held for 35 years in Spokane, Washington. SPOKANE CIVIC THEATRE, *Playwrights’ Forum Festival*, <https://spokanecivictheatre.com/productions/playwrights-festival-2025/> (last visited August 29, 2025).

²⁰⁸ After watching the performance of *Lily*, students were given a handout of questions to answer regarding their reaction to the performance. Responses are on file with the author.

²⁰⁹ Eli Wald & Russell G. Pearce, *Making Good Lawyers*, 9 U. ST. THOMAS L.J. 403, 412 (2012) (contending that becoming a lawyer requires mastering a new body of knowledge, acquiring new skills, developing new ways of communicating, acting ethically, and maintain client loyalty above all. In addition, law students are expected to follow the rule of law while also striving to improve inequities and serve the public good.)

Lily and Joe. The result would be, hopefully, a better prepared, more empathetic, creative future lawyer.

The following sections identify and offer a theoretical grounding for some of the significant learning outcomes of theatre-based learning: enhancing knowledge transfer and building such critical lawyering skills as good judgment, empathy, and creative problem-solving.

A. Enhanced Knowledge Transfer

Suggestions abound as to how best assist students in transferring theoretical knowledge from the classroom to their clinical experience and beyond.²¹⁰ The transfer of translating substantive legal concepts into effective problem-solving does not happen automatically and much has been written about how to enhance this critical transference.²¹¹ Clinicians have long considered transfer “the heart of clinical pedagogy ... [and its] theoretical base.”²¹² Transfer is what happens when familiar content and skills are applied to new facts or a new situation. It is what enables students to easily and flexibly adapt their legal knowledge and ability to a novel context.²¹³ Research data supports the effectiveness of experiential education to enhance student cognitive aptitude, self-directed learning, and the ability to apply newly acquired content to real-life scenarios.²¹⁴

Adult Learning Theory, known as “andragogy,”²¹⁵ has shaped clinical teaching and explains how adults gain, retain, and understand information.²¹⁶ Adult learning generally has moved away from the

²¹⁰ April Land & Aliza Organick, *Moving Law Schools Forward by Design: Designing Law School Curricula to Transfer Learning from Classroom Theory to Clinical Practice and Beyond*, 71 J. LEGAL EDUC. 503, 505 (2022).

²¹¹ See e.g., ROBIN FOGARTY ET AL., *HOW TO TEACH FOR TRANSFER*, XVI (1992).

²¹² Jaime Allison Lee, *From Socrates to Selfies: Legal Education and the Metacognitive Revolution*, 12 DREXEL L. REV. 227, 265 (2020), quoting Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLIN. L. REV. 489, 494 (2013). There are many uses of the concept of “transfer” in legal teaching. For purposes of this section, transfer is used to describe when students transfer their knowledge of substantive law and apply it to legal decision-making.

²¹³ *Id.*

²¹⁴ Boggs et al., *supra* note 102, at 833.

²¹⁵ The term “Andragogy” was introduced by Malcolm Knowles in his book, *THE ADULT LEARNER: A NEGLECTED SPECIES*, 57 (4th ed. 1990) (term introduced in the first edition, 1973). Knowles outlined four traits of adult learning that differentiated it from child learners: 1. Adults are self-directed learners, 2. An adult’s personal experience can be a basis of learning, 3. Adult readiness to learn is quite high if it relates to their social role or job task, and 4. Adult learners are more likely to gain knowledge if it can be applied immediately. In his seminal article, academic Frank Bloch first examined the application of the theory of andragogy to clinical methodology and how it demonstrates the effectiveness of clinical teaching. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 337 (1982).

²¹⁶ “Adult Learning Theory, referred to as “Andragogy” differentiates the adult cognitive process of gaining knowledge, compared to “Pedagogy” and that of children.” Fran Quigley,

traditional transfer of knowledge in the classroom setting to a more interactive learning style.²¹⁷ This methodology is premised on creating a space where adults are accepted, respected, and supported.²¹⁸ Unlike children, who are seen as passive learners, adults are self-directed and learn through a combination of experience and reflection.²¹⁹ Adult learners are more readily able to understand and retain new information by doing and also more likely to transfer that learning to future experiences.²²⁰ As such, adult learners have a strong preference for experiential education. It follows that as “the parallels between adult learning theory and effective clinical law teaching begin with the shared reliance on experiential learning and opportunities for reflection.”²²¹

There are numerous models for effective learning environments that demonstrate the effectiveness of using drama or theater to engage students—in particular adult learners. Clinical psychologist Joseph Lowman identifies intellectual excitement and interpersonal connection as the two critical aspects of effective adult education.²²² Stimulating student emotion—whether by teacher energy or a dramatic presentation—increases student interest, motivation and self-directed learning.²²³ Influential education and leadership writer and speaker, Parker Palmer, emphasizes the importance of creating a learning space that is safe but open to exploration and grounded in an ethos of self-discovery.²²⁴ Traits of a beneficial learning space include ensuring that students can remain focused on the specific learning but remain “open to alternative paths and new discoveries that lead to deep learning.”²²⁵

A second element of andragogy is that adults place significant importance on learning from experiences.²²⁶ Both the life events and activities the student brings to their education constitute experiences along with those they will have while in the clinic. The clinical method, and andragogy theory, reinforce that both types of experiences impact student learning.²²⁷ As such, both are grounded in experiential techniques—role plays, exercises, field work, seminars, and simulations—and the

Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics, 2 CLIN. L. REV. 37, 47 (1995).

²¹⁷ Boggs *et al.*, *supra* note 102, at 832.

²¹⁸ Knowles, *supra* note 178, at 41.

²¹⁹ Carpenter, *supra* note 57, at 65. Bloch, *supra* note 215, at 330.

²²⁰ Carpenter, *supra* note 57, at 66.

²²¹ Quigley, *supra* note 216, at 49.

²²² JOSEPH LOWMAN, *MASTERING THE TECHNIQUES OF TEACHING*, 31-33 (2nd ed. San Francisco, 1995).

²²³ Hess, *supra* note 79, at 83.

²²⁴ PARKER PALMER, *THE COURAGE TO TEACH: EXPLORING THE INNER LANDSCAPE OF A TEACHER'S LIFE*, 73 (San Francisco, 1998).

²²⁵ Hess, *supra* note 79, at 83.

²²⁶ Bloch, *supra* note 215, at 331.

²²⁷ *Id.*, at 341.

connection to enhanced learning.²²⁸ The opportunities available to clinic students involve technical lawyering skills acquisition but also developing human relations skills.²²⁹

A leading scholar on effective teaching, Professor Gerald Hess, has identified eight interrelated elements to a beneficial educational environment: respect, expectation, support, collaboration, inclusion, engagement, delight, and feedback.²³⁰ But how often is delight present in law school? There are many ways a teacher can create delight—sharing enthusiasm for content, using humor, nonverbal communication, and connecting with students on a personal level.²³¹ Including theatre in the learning experience is another way to infuse delight.

Experiential education opportunities, such as theatre, provide those students who learn better by doing the chance to put the concepts of emotional intelligence into practice.²³² This “training in emotions” allows law students to recognize their own emotions and those of the client. They can consider how the emotions will impact their work, and then practice client counseling and problem solving through this new lens.²³³ As students develop their emotional intelligence, they will form more satisfying attorney/client relationships and become more effective lawyers.²³⁴ Alternative teaching methods, such as dramatization, allow students to draw upon past life experiences and relate those experiences to their current learning situation.²³⁵ Arts-based learning offers strategies that complement typical podium classroom learning and traditional forms of knowledge transfer.²³⁶ Performance allows the audience to assimilate knowledge based on watching, hearing, and feeling rather than typical transfer of information.²³⁷

In considering cognition and how we think about, approach, obtain, and process information, “[s]tories are the way humans learn best.”²³⁸ The brain is hard-wired to detect patterns; stories are a simple and moving way to convey information that encourages recognition of those

²²⁸ *Id.*, at 331.

²²⁹ *Id.*, at 341.

²³⁰ Hess, *supra* note 79, at 87.

²³¹ *Id.*, at 105.

²³² Reilly, *supra* note 135, at 304-05.

²³³ *Id.*, at 308.

²³⁴ *Id.*, at 310.

²³⁵ Victor Whiteman & Margaret Nielsen, *An Experiment to Evaluate Drama as a Method for Teaching Social Work*, 22 J. OF SOCIAL WORK ED. 31, 34 (1986).

²³⁶ Khanlou *et al.*, *supra* note 165, at 1.

²³⁷ Angela Colantonio *et al.*, *After the Crash: Research-Based Theatre for Knowledge Transfer*, 28 J. OF CONT. ED IN THE HEALTH PROFESSIONS 180 (2008).

²³⁸ Nancy Levit, *Legal Storytelling: The Theory and the Practice – Reflective Writing Across the Curriculum*, 15 LEGAL WRITING: J LEGAL WRITING INST. 253, 276-77 (2009).

patterns.²³⁹ Stories are how we all see, understand and process the world around us.²⁴⁰ It is also how many of us remember events—they evoke emotion and engage people in a way the law alone cannot.²⁴¹ The listener is more interested, more invested and that leads to a connection that deepens thinking and understanding.²⁴² Some students may understand legal doctrine better through stories; they allow for the development of empathy, but students can also use stories “to distill analysis into succinct packages.”²⁴³

Optimal learning based in experiential methods involves a continuous four stage sequence of experience, reflection, theory, and application.²⁴⁴ This learning is divided into three domains: cognitive (legal analysis), psychomotor (lawyering activities), and the feeling domain (values attitudes and beliefs).²⁴⁵ Providing a space for silence to maximize deep student reflection allows students to both absorb substantive material and test their understanding.²⁴⁶ A safe space is one where students can be vulnerable (not the typical law school classroom) and where they can make mistakes, ask uncomfortable questions, and feel embarrassed.²⁴⁷ The arts can facilitate creativity and lead to “transformative learning.”²⁴⁸

More than 20 years ago, Professors Magone and Friedland wrote that the arts promote legal analytical ability as much as the traditional case method and—for some students—it offers a preferable method of learning.²⁴⁹ In one study, researchers evaluated the education intervention of using a play for health care providers to better understand the injury and functioning. Findings demonstrate that using theatre is a highly useful means for knowledge transfer for both reinforcing existing information and gaining new insight.²⁵⁰ Theatre is a useful pedagogical tool that communicates the experience of others allowing the audience to wrestle with challenging concepts. For example, in one study audience

²³⁹ *Id.* “Narratives ‘light up’ the areas of the brain that produce an affective response.” *Id.* at 277, quoting John Batt, *Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning*, 40 J. LEG. EDUC. 19, 25 (1990).

²⁴⁰ While outside the scope of this article, Applied Legal Storytelling “examines the use of stories – and of storytelling or narrative elements – in law practice, in law-school pedagogy, and within the law generally.” J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography*, 12 LEGAL COMM. & RHETORIC: JALWD 248 (2015).

²⁴¹ Levit, *supra* note 238, at 263.

²⁴² Tyler & Mullen, *supra* note 4, at 314.

²⁴³ Levit, *supra* note 238, at 266.

²⁴⁴ Roy Stuckey, *Teaching with Purpose: Defining and Achieving Desired Outcomes in Clinical Law Courses*, 13 CLIN. L. REV. 807, 813 (2007).

²⁴⁵ *Id.*, at 813-14.

²⁴⁶ Hess, *supra* note v, at 84.

²⁴⁷ Rosenberg, *supra* note 25, at 646.

²⁴⁸ Younie, *supra* note 11, at 28-29.

²⁴⁹ Magone & Friedland, *supra* note 12, at 575-76.

²⁵⁰ Colantonio, *supra* note 237, at 183.

members who watched a play on dementia reported it positively impacted their knowledge. Viewers were emotionally impacted after a single production and felt more comfortable discussing dementia after the performance.²⁵¹

This is the sweet spot for students viewing *Lily*—it is a prolonged quiet, reflective moment where they can drop into the story and study the substantive legal material, consider the client's emotions, and visualize themselves in the role of lawyer. For students stuck in their anxiety, creating a safer environment may unblock the stress impairing their concentration, memory, and problem-solving ability.²⁵² "Drama tends to be associated with pleasure and entertainment in the minds of adult learners and tends to reduce anxiety related to learning."²⁵³ When ideas, even unsettling ones, are integrated into art forms, the concepts are more easily understood.²⁵⁴ Further, research demonstrates that anxiety impairs cognitive functioning and is detrimental to acquisition of complex material.²⁵⁵ The damage caused by chronic stress can be repaired when stress is controlled by healing activities such as sleep, exercise, and restorative contemplative practices.²⁵⁶ Providing a less threatening presentation technique may reduce law student anxiety and allow for a better learning experience.

Theatre creates opportunities "where nuances of lived experiences were portrayed in novel ways such that persons saw things not seen before."²⁵⁷ For law students concerned about getting the law correct or answering client questions, watching a performance is beneficial. It showed moments of peace and love interspersed with sadness and anxiety and allowed students to see clients in a more holistic way. For example, students often worry about discussing death and see the topic as scary or anxiety-provoking. But to watch Lily interact with Joe, her ex-husband, and exhibit humor, love, and compassion shows the "ways that persons live quality moments ... [that] are often invisible to others who only see the disease, only the loss and decline, only the doom."²⁵⁸ Students working with older clients need to see them as more than a disease, more than their life being over, more than planning for death.

²⁵¹ Nicole C. Burns *et al.*, *The Impact of Creative Arts in Alzheimer's Disease and Dementia Public Health Education* 63 J. OF ALZHEIMER'S DISEASE, 457, 461 (2018).

²⁵² Austin, *supra* note 79, at 668.

²⁵³ Whiteman & Nielsen, *supra* note 235, at 33.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ Austin, *supra* note 79, at 669.

²⁵⁷ Mitchell *et al.*, *supra* note 204, at 383.

²⁵⁸ *Id.*

Watching a play that provides one viewpoint gives students the opportunity to consider a new perspective.²⁵⁹ Students may have a certain belief about the ways family members will handle death and dying. But then observing someone who responds in a different way can lead to more flexible thinking. This may expand student understanding and allow for a wider repertoire of client counseling. It is “through bringing our mind, body and spirit to drama, we gain insight into ourselves.”²⁶⁰

After viewing *Lily*, my clinic students demonstrated a better understanding of the substantive legal concepts and legal process necessary to engage in legal problem-solving with clients. Notably, in their reflection write-ups, several students indicated that watching *Lily* enhanced their understanding of the substantive law of estate planning. All of the students found the legal comprehension and confidence to discuss the issues with clients increased after the play. One respondent astutely noted that “it is more than learning elements for an exam but learning them to better someone’s life.”²⁶¹ Another commented, “I understand [estate planning] documents a lot more and I feel comfortable explaining them to a lay person.” Lastly, a student noted that “end of life planning is so far in the future in my mind, and when we talk about it it’s always in the abstract. The play made it real.” Even a less-than enthused student who remarked “I generally don’t enjoy theater or plays” found the performance helpful in providing ideas for how to describe a health care directive to a client.

Several weeks after viewing the play, the students provided an overview of estate planning documents at two assisted living facilities for older adults. Although the semester had just started, all six students demonstrated a stronger grasp of the substantive law than is common with new clinic students. In fact, I noticed one student field a difficult audience question by relying on the story in *Lily*. The question was who to choose as your healthcare agent. The student not only provided the correct legal response as to who can serve as an agent but expanded by sharing that there may be people in a client’s life that have a better understanding of the client’s values and wishes. This demonstrated that the student grasped that a healthcare agent is not just someone who makes medical decisions but that a client wants to choose someone who aligns with, or can follow, the client’s desires.

During the course of the semester each student handles approximately 3-4 estate planning clients. In meeting with my students in weekly supervision I ask them to reflect on their legal counseling

²⁵⁹ *Id.*, at 387.

²⁶⁰ Mitchell *et al.*, *supra* note 204, at 389, quoting S. CLIFFORD ET AL., MAKING A LEAP: THEATRE OF EMPOWERMENT, . 17 (1999).

²⁶¹ Excerpted from six anonymous student evaluation narrative responses received in the Elder Law Clinic course during fall semester 2023. (Originals on file with the author).

skills. Often students can be robotic about how they present end-of-life planning options. Some students lament they feel their legal counseling presents as “box-checking” to the client—who will be the personal representative etc. The semester during the *Lily* project, I noticed an increase in many students’ confidence and willingness to be curious and comfortable with uncertainty. In one meeting, I asked a student why after he revealed he felt more comfortable counseling clients. He mentioned thinking back to the play and how he remembers the legal elements of a power of attorney better when considering the context of Lily’s life. He recalled, “It makes sense she would choose Joe as her agent when I think about the importance of that role.” The same student in his end-of-the semester self-evaluation reflected on his overall increased comfort with the substantive law and how to engage in a conversation with the client about estate planning documents.

B. *Developing Critical Lawyering Skills*

A primary goal of legal education is to develop student competence to effectively prepare for legal practice.²⁶² This requires expertise in legal analysis, skills acquisition, and professional identity development.²⁶³ Alternative methodologies can better engage and excite students as well as establish a connection between theory and practice.²⁶⁴ Lawyers must slide back and forth between a “detached stance of theoretical reasoning and a highly contextual understanding of client, case, and situation.”²⁶⁵ This requires judgment, astute problem-solving, and an empathic understanding of client needs.

A 2016 study by the Institute for the Advancement of the American Legal System (IAALS) surveyed 24,000 lawyers from all 50 states to determine what lawyers considered the most important characteristics and competencies needed by law school graduates.²⁶⁶ The results demonstrated that practicing lawyers valued reliability, integrity, and other interpersonal skills as the most critical, more so than substantive legal knowledge and analytical abilities.²⁶⁷ The survey resulted in a report that recommended law schools teach character traits such as humility, sensitivity, and compassion, as well as self-care and self-regulation skills such as exhibiting flexibility, adaptability and resilience.²⁶⁸

²⁶² Stuckey, *supra* note 244, at 809.

²⁶³ *Id.*, at 810.

²⁶⁴ Khanlou, *et al.*, *supra* note 165, at 1.

²⁶⁵ CARNEGIE REPORT, *supra* note 9, at 115.

²⁶⁶ GERKMAN & CORNETT, *supra* note 14, at 131.

²⁶⁷ *Id.*

²⁶⁸ Austin *supra* note 79, at 657, citing GERKMAN & CORNETT, *supra* note 14, at 30, 33.

1. *Building Good Judgment*

One of the core elements of competent legal practice is the ability to exercise good judgment. Effective judgment includes “the ability to size up a situation well, discerning the salient features relevant not just to the law but to legal practice, and most of all, knowing what general knowledge, principles, and commitments to call on in deciding on a course of action.”²⁶⁹ This is honed by experience in determining what is pertinent, assessing consequences of choices, and determining next steps.²⁷⁰ Deliberate reflection provides law students an intentional process to develop professional judgment.²⁷¹ Since many law students lack past experience to develop judgment, reflection is necessary “to de-couple the action from the thinking about the action.”²⁷²

Emotion helps us decide what is important. It makes us wonder and moves us to act. It helps us care about the consequences and outcomes of a decision.²⁷³ High emotional intelligence requires the ability to perceive and understand emotions.²⁷⁴ Research corroborates the power of drama in education as findings demonstrate a link between emotion and brain function.²⁷⁵ Researcher Mary-Helen Immordino-Yang posits that thinking and feeling do not take place in a vacuum but decisions are made based on past experiences and cultural history.²⁷⁶

The use of fictional stories, rather than the situations involving real clients, allows students as viewers to experience difficult emotions which will allow them to gain a better understanding of client emotions.²⁷⁷ To prepare students to discuss emotional topics with clients, they need opportunities to experience and reflect. Employing fictional characters removes responsibility and worry and allows students to identify and understand the complex emotions their future real clients will present.²⁷⁸

The student reflections all noted the deep emotion they felt in watching the scene between Joe and Lily unfold. Many noted how they assumed estate planning was “dry” or “detached from emotion” before viewing the play. Upon reflection, not only did students consider new ways to approach the difficult subject with clients, but each recognized and experienced the emotions themselves as audience members. In an

²⁶⁹ CARNEGIE REPORT, *supra* note 9, at 115.

²⁷⁰ Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317, 318 (2014).

²⁷¹ *Id.*, at 319.

²⁷² *Id.*

²⁷³ Bandes, *supra* note 30, at 2436.

²⁷⁴ Kerr, *supra* note 181, at 197.

²⁷⁵ VAN DE WATER, *supra* note 115, at 2.

²⁷⁶ M.H. Immordino-Yang, *Implications of Affective and Social Neuroscience for Educational Theory*, 43 EDUCATIONAL PHILOSOPHY AND THEORY, 98, 99 (2011).

²⁷⁷ Kerr, *supra* note 181, at 197.

²⁷⁸ *Id.*

end-of semester self-reflection, one student noticed a newfound ease and comfort talking about death with clients and sitting with their varied emotions of sadness and regret. Another student (the one disinterested in theater generally) discovered that he was not interested in emotionally fraught work inherent in estate planning. In a supervision meeting he reacted with relief when I shared that part of the clinical experience is to also decide which aspects of lawyering you do not want to do in the future.

2. *Nurturing Empathy*

Empathy is a critical trait for lawyers and one that can be nurtured and strengthened through the arts.²⁷⁹ Compassion for clients is enhanced when we can understand another's experiences and place ourselves in that context."²⁸⁰ Empathy is a source of information; it gives us a hint of what another is feeling.²⁸¹ Law students cannot just learn or consider empathy, but dramatic presentations allow students to *feel* empathy. They can develop "the ability to see the social or human implications of their work."²⁸²

"[E]mpathy is an essential part of drama, as it involves putting ourselves in the situation of others, comparing their moods, motives, and character."²⁸³ Infusing the arts into legal education situates *empathy* as part of professionalism and the practice of law; artistic endeavors develop and nurture law students' empathic capability.²⁸⁴ Dramatic performance immerses the audience in a personal journey that can challenge a student's preconceived views of clients.²⁸⁵

Specific to end-of-life care, it is critical that lawyers are able to discuss the emotional and psychological aspects of death and dying with clients. Using theatre enables students to go beyond the theoretical substance of end-of-life planning "to make room for felt emotions."²⁸⁶

²⁷⁹ Mayo, *supra* note 24, at 170.

²⁸⁰ Mitchell *et al.*, *supra* note 204, at 385.

²⁸¹ Mayo, *supra* note 24, at 179-80 ("Sympathy, by contrast, is the moral sentiment that aligns our interest with that of another in pain."), quoting R. WEST, *THE ANTI-EMPATHIC TURN* (2011).

²⁸² Anne Scully-Hill *et al.*, *Beyond Role Playing: Using Drama in Legal Education*, 60 J. OF LEGAL ED. 148, 150 (2010).

²⁸³ Elena Briones *et al.*, *Creative Drama and Forum Theatre in initial teacher education: Fostering students' empathy and awareness of professional conflicts*, 117 TEACHING AND TEACHER EDUCATION 1 (2022).

²⁸⁴ Mayo, *supra* note 24, at 179.

²⁸⁵ Burns *et al.*, *supra* note 251, at 458.

²⁸⁶ Sue Spencer, *Beyond Words: Surfacing Self in End-of-Life Care Using Image-making*, CREATIVITY IN THE CLASSROOM, 127 (2013). "End-of-life care inevitably exposes emotional layers, and, if this is not heeded, can inhibit practitioners in their work as they 'block' discussion about death and dying." *Id.*

End-of-life planning “is more than planning for the future: it is about understanding past and present selves ... it exposes layers of uncertainty and anxiety.”²⁸⁷ Conversations about future planning with clients must include the context of the person themselves and the life they have lived. To facilitate these conversations and communicate effectively, law students must acknowledge their own experiences and feelings about death and dying.²⁸⁸

Role play is an effective means of allowing law students to try on their lawyering role and practice speaking with clients about death. However, my experience is that law students are often resistant to active participation, which can curtail effective lawyering. Students can just “go through the motions” rather than truly drop into the role and engage with the client on a personal level.²⁸⁹ Instead, watching a performance, allows students to connect deeply with the character and material “that might surface feelings and emotions in a safe and supportive way.”²⁹⁰ *Lily* provided a reflective space for students to uncover hidden feelings and thoughts and begin to process and develop insight into how their own responses might impact future client interactions. This includes challenging students to reconsider bias, ageism, and their preconceived notions of older individuals.²⁹¹

As part of their post-play reflection, my law students reported strong emotional reactions to the performance that highlighted the importance of connecting with clients. Several students felt empowered to be the type of lawyer that came naturally to them but was not reinforced in law school: “personable, human, approachable.” One student in particular started her clinic experience expressing a desire to “manage her boundaries” with clients. When I asked what that looked like she responded, “knowing when I care too much or share too much.” Over many weeks in supervision, she considered this topic at times within the context of *Lily*. She pondered questions such as “I wanted to cry the whole time watching *Lily*. Will I do that with a client?” These were wonderful opportunities for her to share her life experiences and prepare for client interaction. Ultimately, she seemed empowered when she could recognize that her emotional intelligence was a strength, when harnessed with clear boundaries.

While some students have nurtured their own empathy before law school, others noticed a newfound desire to connect with clients. One student noted, “it reinforced the desire to connect with the clients rather than making them list their choices robotically.” Another wrote,

²⁸⁷ *Id.*, at 128.

²⁸⁸ *Id.*, at 127-28.

²⁸⁹ *Id.*, at 129.

²⁹⁰ *Id.*, at 129.

²⁹¹ Millemann, *supra* note 4, at 440.

“it made me think less about reciting facts about the [estate planning] documents and focus more on the human side of things.” One student said, “seeing what it really looks like and how emotional it can make people changed how I think about it when I am talking to my clients.” Lastly, one commented, “it helped me be more sympathetic to helping people decide what they would want at the end of their life.”

3. *Strengthening Creative Problem Solving*

Watching a performance can unlock creative thinking by allowing a student to see multiple perspectives since each of us processes a performance in a different way.²⁹² “Excellence in legal practice requires intellectual versatility.”²⁹³ The MacCrate Report identified problem-solving as one of ten fundamental lawyering skills.²⁹⁴ Problem solving has been defined as “complex, multi-faceted, and ambiguously-structured ... a process that requires technical expertise, creative artistry, and empathy.”²⁹⁵ For some “lawyering means problem-solving.”²⁹⁶ One author suggests that problem solving requires both technical skills and creative processes.²⁹⁷ The technical aspect includes identifying the issue that needs to be resolved and how to enact a solution.²⁹⁸ Creative thinking unlocks a deeper and more expansive analysis of the problem.²⁹⁹

The ambiguity inherent in legal problem solving requires more original thought than is taught and expected in law school. A narrow analysis of cases in many courses stifles students’ innovative thinking.³⁰⁰ Developing creative problem solving broadens a student’s understanding of their lawyer role. It expands a lawyer’s focus beyond legal rules to include societal justice, awareness of values, and reflection.³⁰¹ Although imagination underlies persuasive trial advocacy and valuable problem

²⁹² Scully-Hill, *supra* note 282, at 150.

²⁹³ Davis & Webb, *supra* note 62, at 1161.

²⁹⁴ AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM (1992) (hereinafter cited as MACCRATE REPORT).

²⁹⁵ Seielstad, *supra* note 45, at 449.

²⁹⁶ *Id.*, at 478, quoting Gerald Lopez, *Lay Layering*, 32 UCLA L. REV. 1, 2 (1984); A lawyer is a “professional with formal legal training who employs law, as well as other relevant disciplines, to solve problems and disputes ...” Carrie Menkel-Meadow, *The Lawyer as Problem Solver and Third-Party Neutral: Creativity and Non-Partisanship in Lawyering*, 72 TEMP. L. REV. 785, 793-94 (1999).

²⁹⁷ Seielstad, *supra* note 45, at 448.

²⁹⁸ *Id.* See also, Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 331-34 (1995) (Another way to view technical problem solving is “perceiving that the world we would like varies from the world as it is and trying to move the world in the desired direction.”.)

²⁹⁹ Seielstad, *supra* note 45, at 448, citing Morton, *supra* note 53, at 377.

³⁰⁰ Morton, *supra* note 53, at 378.

³⁰¹ *Id.*, at 380.

solving, the legal profession is not known for promoting creativity.³⁰² While the practice of law may contain innovative aspects, law firm culture is “less likely to foster, encourage or exploit creativity.”³⁰³ The structures of the legal profession dampen creativity;³⁰⁴ the law can be stagnant and driven by precedent, and legal practice is often built on avoiding risk.³⁰⁵

Professors Magone and Friedland coined the phrase “creative exclusionary rule” to demonstrate the omission of the creative arts from the law school classroom.³⁰⁶ They posit that legal education views the arts as counterproductive to the development and mastery of cognitive abilities.³⁰⁷ Creative tools “are considered distractions, diluting the essence of the educational process.”³⁰⁸ To test their exclusionary rule, Magone and Friedland allowed students to use music, visual arts, language arts, or movement/dance to illustrate a legal concept.³⁰⁹ Students penned haiku and odes, created collages and dioramas, and wrote stories and scripts. They created art with pastels, watercolors, papier mâché, photographs, and fabric.³¹⁰ Overall the results demonstrated that students thoroughly enjoyed the chance to be creative.³¹¹ Students could create and implement their own learning framework and supplement the instructor’s explanation of a legal concept. Additionally, students could practice “deliberation in thinking” by experiencing the importance of plotting strategy in their creative project.³¹² For students who process information differently, creativity may be the spark that unlocks their ability to think analytically and argue persuasively.³¹³

Examining the traits associated with creativity demonstrates the useful application of creativity to effective lawyering. One facet of a creative personality is remaining open-minded when faced with ambiguity.³¹⁴ How often have we all been on the receiving end of a frustrated student who hears “*it depends*”? Many students who are attracted to law school are also drawn to rules and clear lines delineating action. These “Type A” students cringe when there is no bright line

³⁰² Dykstra, *supra* note 47, at 22.

³⁰³ *Id.*, quoting Menkel-Meadow, *supra* note 41, at 112.

³⁰⁴ Moppett, *supra* note 39, at 255.

³⁰⁵ Dykstra, *supra* note 47, at 23 (“This myopic focus on risk reduction often quashes creation and development and also discourages risk taking.”)

³⁰⁶ Magone & Friedland, *supra* note 12, at 576.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*, at 583.

³¹⁰ *Id.*, at 584-85

³¹¹ *Id.*, at 589-90.

³¹² *Id.*, at 591-92. “Creativity promotes active, participatory learning and personal involvement in the learning process.” *Id.* at 582.

³¹³ *Id.*, at 583.

³¹⁴ Moppett, *supra* note 39, at 268; Rosenberry, *supra* note 1, at 428-29.

rule to direct their action. If our students were better equipped to embrace uncertainty and the unknown, they could respond more effectively.³¹⁵ Additionally, creativity breeds flexibility. When a student confronts ambiguity and no structure exists, instead of being stymied, a creative person sees the opportunity for innovation.³¹⁶ Lastly, creative personalities are risk takers.³¹⁷ At its core, creative thinking requires trying original, untested theories and risking failure.³¹⁸ Certainly, open-mindedness, flexibility and risk-taking foster not just creativity but real solutions to complex legal problems.

There are many structural barriers to fostering creativity in law students, including the insistence on mandatory grade curves and other means of fostering competition.³¹⁹ While other academics have suggested changes, rarely do they include the creative product itself—such as infusing theater into the curriculum. Academically, curiosity has been identified as one of the most primary determinants of educational success.³²⁰ Research indicates that curiosity is an essential trait that lawyers, judges, and clients alike view as necessary for successful lawyering.³²¹ This includes both “intellectual curiosity” and general curiosity about the lives and perspectives of clients.³²²

Brain science tells us that one of the primary functions of the brain is to receive and process information by forming recognizable patterns. This is an essential system to order the onslaught of stimuli we encounter each second.³²³ While established knowledge pathways are necessary, they also lead to knowledge ruts where thinking can get stuck. These pathways become relied upon and overused and can dominate our thinking processes.³²⁴ However, once we receive new information, we can generate new ideas or revise old ones. This expansive process leads to creative thinking but requires some type of intervention or facilitation to exist.³²⁵ Since our brains like established routes and resist change, the opportunity for creative thinking is hard and resistant. Law school is structured to reinforce “rutted thinking” by training students to think in a linear way and to search for past answers.³²⁶

³¹⁵ Moppett, *supra* note 39, at 268.

³¹⁶ *Id.*, at 268-69.

³¹⁷ *Id.*, at 269.

³¹⁸ Rosenberry, *supra* note 1, at 433.

³¹⁹ Moppett, *supra* note 39, at 295-298.

³²⁰ Jacobs, *supra* note 2, at 373 (Research indicates that students who display curiosity perform better academically than those who do not.)

³²¹ *Id.*, at 379.

³²² *Id.*, at 379-80.

³²³ Weinstein & Morton, *supra* note 41, at 844.

³²⁴ *Id.*, at 844-45.

³²⁵ *Id.*, at 845-46.

³²⁶ *Id.*, at 848.

Cognitive scientist, Mihaly Csikszentmihalyi, developed a theory called “flow”—a psychological process that enhances creativity.³²⁷ He defines flow as “the enjoyment that comes from surpassing ourselves, from mastering new obstacles, from making new discovery”—motivating the creative process.³²⁸ According to Csikszentmihalyi, flow occurs when a person is fully immersed in an event and is transported to a “new reality” or “more complex self.”³²⁹ The process walks the line between creating challenge but not producing excessive anxiety. Flow allows the individual to relax but not become bored.³³⁰ This leads to both “convergent” thinking—conventional understanding of the “correct” answer—and “divergent” thinking—producing several possible solutions. This tension is when a creative idea is born.³³¹ Creative flow is inhibited if the person experiences too much anxiety or stress. Thus, to be available for “flow” the person must possess a basic level of knowledge so as not to become overwhelmed and able to engage in both convergent and divergent thinking.³³²

It is not uncommon for law professors, in particular clinicians, to explore new and innovative ways to capture student attention and foster curiosity.³³³ Aware of the importance of the “curious” mindset, many clinicians intentionally cultivate this critical lawyering skill.³³⁴ Incorporating creativity into clinical teaching improves and refines a student’s professional identity, performance, and confidence.³³⁵ Introducing art and creativity into clinical teaching encourages students to envision innovative approaches to fashioning solutions for client problems.³³⁶

Curiosity is inextricably linked to effective problem solving in both the classroom and clinical setting. Inspiring students to flex their curiosity muscle will prepare students for future lawyering success.³³⁷ Curiosity is directly impacted by work that is varied and novel.³³⁸ This

³²⁷ MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW & THE PSYCHOLOGY OF DISCOVERY & INVENTION* (1996).

³²⁸ Krieger, *supra* note 55, at 173 citing MIHALY CSIKSZENTMIHALYI, *THE EVOLVING SELF*, 175-76 (1993).

³²⁹ *Id.*, at 174, citing Csikszentmihalyi, *supra* note 327, at 74.

³³⁰ *Id.*

³³¹ *Id.*

³³² *Id.*, at 174-75.

³³³ See Dykstra, *supra* note 47, at 27-41; Moppett, *supra* note 39, at 92.

³³⁴ Jacobs, *supra* note 2, at 375-76.

³³⁵ Perlmutter and Cortada, *supra* note 3, at 309.

³³⁶ *Id.*, at 317.

³³⁷ Jacobs, *supra* note 2, at 376. “Curiosity contributes to the acquisition and mastery of [all legal skills] by piquing interest, improving engagement, inviting doubt, inspiring exploration of and the formulation of questions, and then by providing the persistent mindset required to seek information about, answer, and reflect upon the answers to those questions and to strive for constant improvement.” *Id.*, at 377.

³³⁸ *Id.*, at 384.

is compared to the other way of thinking: “analytic” which “detaches things and events from the situations of everyday life and represents them in more abstract and systematic ways.”³³⁹ This is what law school can foster to the detriment of law students.

Enter *Lily*. Students watching *Lily* not only have the time and space to think creatively, but also the chance to alter an old established pathway. The performance “encourages our more spatial, tactile right brains to collaborate with your left, thereby awakening unused pathways.”³⁴⁰ Student reflections demonstrate that the performance encouraged students to think differently about end-of-life planning. One noted, “the personal quality of the performance gave me new ideas about how to approach the topic with clients.” Another student wrote, “I realized there is not one answer or set way to complete estate planning documents. I was more open to various ideas clients might have.” In considering the performance, one student observed, “It made me realize every document should be tailored to the client’s goals, wants and needs.”

CONCLUSION

Theatre can be a tool for exploring morality and promoting empathy.³⁴¹ This happens as “audience members are simultaneously involved in the fictional events, they occupy the world of the fictional characters, and [they] are also aware of themselves as spectators, as onlookers.”³⁴² The power of theatre is to transport the observer into the world of the play and view things from the experience of the characters—“the lived emotional and factual complexity of moral issues.”³⁴³

The focus on the stories of others can lead to more open dialogue, self-awareness, and ultimately more genuine and honest decisions.³⁴⁴ While some students can become stuck or paralyzed when faced with meeting a client, listening to someone else’s story creates greater awareness and allows for more open-minded thinking.

Art reveals itself through an audience’s “lived experience.”³⁴⁵ The audience has an “experiential encounter, one that builds upon all of our life experiences and lessons, but it is also an encounter that transcends the search for meaning or significance by first drawing us into the world it creates.”³⁴⁶ Integrating theatre into education has the potential

³³⁹ SULLIVAN ET. AL, *supra* note 9, at 96.

³⁴⁰ Weinstein & Morton, *supra* note 41, at 859.

³⁴¹ Duckworth, *supra* note 118, at 76.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ See LEE ANNE BELL, STORYTELLING FOR SOCIAL JUSTICE, 7 (2010).

³⁴⁵ Mayo, *supra* note 24, at 184.

³⁴⁶ *Id.*

to create more flexible thinking and problem solving.³⁴⁷ Including performance as a teaching technique can help students navigate “the ambiguous nature of a partially ordered world.”³⁴⁸ While many law students tire of the answer “it depends,” many legal problems do not have a single, correct answer. The solution is not necessarily found by following a fixed path with a rational outcome.³⁴⁹ Legal education has the opportunity to expand student learning to incorporate critical skills—empathy and creative problem solving—to better prepare future lawyers for practice.

³⁴⁷ Boggs at al., *supra* note 102, at 833.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

HOPE AS A HUMAN RIGHTS PRACTICE: CULTIVATING AND SUSTAINING TRANSFORMATIVE HOPE TO ADVANCE SOCIAL CHANGE

GULIKA REDDY¹

Human rights advocates address a range of protracted and systemic harms, from multi-decade conflicts to entrenched racism and identity-based injustice. While engaging in this work is deeply rewarding, advocates can often feel overwhelmed or despairing about the uncertain way forward and unknown probability of success. Navigating challenges, including these feelings, is central to human rights work. Hope can be profoundly important in moments of challenge. Yet not all forms of hope are effective. Indeed, some types of hope can be counterproductive or even dangerous. Though some form of hope is essential to human rights advocacy, existing scholarship fails to answer crucial questions: What is the role, if any, of hope in advancing change? Is hope a skill or practice that advocates can cultivate? And how can we, as advocates, sustain hope through setbacks without being naïve or dismissive of the gravity of the challenges that we face? To address these questions, this Article does three things. First, it draws on multidisciplinary scholarship to set out a novel typology of hope that reveals the utility, or lack thereof, of each form of hope to the human rights field. In doing so, it brings rigor to hope as a theory of change. Second, it argues that transformative hope is what the human rights field needs, then explains how individuals and institutions can cultivate it. Finally, the Article proposes ways that institutions can best support the sustained practice of transformative hope. The Article concludes by explaining how these insights, though designed for the human rights field, apply to the social justice field more broadly.

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INTRODUCTION

Hope is a word that is part of our daily, even mundane, conversations.² At the same time, it can play a profound role in our advocacy efforts in the human rights field. Yet hope can often feel elusive given the uncertain and challenging nature of human rights work. How, then, can human rights advocates cultivate and sustain hope in the face of the constant and seemingly insurmountable barriers they encounter?

This question lingered with me after a conversation I had with another advocate. This advocate, a longtime partner in my work, has spent the last twenty years working on a protracted conflict. She is one of the most hopeful, inspiring, and creative people I know. Even when she experiences significant setbacks to her work, she retains a hopeful attitude that we can collectively make the situation better. In this particular conversation, however, she confided that she feared that if she was not hopeful, it would impact the morale of the people who were working alongside her and that their decades of work would be negatively affected. “I feel like I am a salesperson of hope,” she said. While talking to her, I realized two things. First, to reduce the burden of being hopeful on any one individual, hope should be cultivated and sustained as a collective practice in human rights and social justice work. Second, although I knew that hope was a valuable skill in human rights work, the term hope still felt abstract. I began seeking greater clarity and concrete guidance on how to cultivate and sustain hope.

As I began to think about the role of hope in human rights work, I also recalled various conversations with my students over the years wherein they seemed to be asking for a reason to be hopeful. They wanted a confirmation that change was possible, that our collective efforts in the human rights field were worthwhile. I realized that to be able to offer an honest and effective response, I needed to develop and teach a theory of hope.

Such conversations also serve as reminders of the integral role of hope in these challenging times. We are experiencing global inequities, protracted conflicts, and the climate crisis. And all of this is occurring

² Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 2007, at 319, 324 (“People understand hope in many different ways. Some view hope as synonymous with wish or desire. This conception comprehends both the monumental (e.g., a hope for world peace) and the mundane (e.g., ‘I hope it doesn’t rain today’).”); Darren Webb, *Modes of Hoping*, 20 HIST. HUM. SCI. 65, 66 (2007). Webb notes that hope is “an integral part of what it is to be human.” *Id.*; see also Richard S. Lazarus, *Hope: An Emotion and a Vital Coping Resource Against Despair*, 66 SOC. RSCH. 653, 664 (1999) (noting that sometimes, of course, the word hope is used only in a pro-forma, unemotional way, as when we say “[I hope you] have a nice day,” which is a pleasant but trivial ending to a routine social transaction. In this case, there should be little or no activation).

alongside a global pandemic and rising populism.³ But while the specific challenges of our time may be unique, the fact that this time period is challenging is not—every moment in history has had challenges. This realization set me on the path to study hope.

Hope is an important attitude or orientation in moments of challenge. It can be harnessed to generate commitment, action, and creative problem solving, which are all critical to advancing change.⁴ For one, it can open up a sense of possibility for the future⁵ and help us believe that our work will contribute to change.⁶ Also, hope can instill resilience⁷ and allow us to persevere despite seemingly insurmountable barriers.⁸ As bell hooks, a scholar and activist who has produced seminal work on education and social change, noted, “hopefulness empowers us to continue our work for justice even as the forces of injustice may

³ Patricia Lopez, *For a Pedagogy of Hope: Imagining Worlds Otherwise*, 47 J. GEO. IN HIGHER EDUC. 1, 1 (2022).

⁴ Darren Webb, *Pedagogies of Hope*, 32 STUDS. PHIL. & EDUC. 397, 409 (2013) (stating that “[t]o hope in this mode is to experience the world as open to collective human design and history as an adventure”); see also GUSTAVO GUTIÉRREZ, A THEOLOGY OF LIBERATION 125, 139 (1988) (noting that hope “fulfils a mobilizing and liberating function,” “makes us radically free to commit ourselves to social praxis, motivated by a liberating utopia,” and “not only frees us for this commitment, it simultaneously demands and judges it”); Abrams & Keren *supra* note 2, at 338 (explaining that hope develops “purposive self-assertion” and is “a vital coping resource that guides goal-directed behavior”); Smandar Cohen-Chen et.al, *A New Appraisal Based Framework Underlying Hope in Conflict Resolution*, 9 EMOTION REV. 208, 209 (2017) (“Empirical research has found that hope leads to cognitive flexibility, creativity, and problem-solving abilities.” (citation omitted)).

⁵ See Dale Jacobs, *What's Hope Got to Do With It? Toward a Theory of Hope and Pedagogy*, 25 J. ADVANCED COMPOSITION 783, 784-92 (2005). The author points out how hope helps and empowers us to continue working for justice, *id.* at 784, and helps us work against despair so that we can see the future as possibility rather than historical inevitability, *id.* at 792.

⁶ SARA AHMED, *LIVING A FEMINIST LIFE* 46-47 (2017) (discussing hope as an “investment” that will get us somewhere in the future).

⁷ Forrest C. Lane & Natasha H. Chapman, *The Relationship of Hope and Strength's Self-Efficacy to the Social Change Model of Leadership*, 10 J. LEADERSHIP EDUC. 116, 121 (2011) (“In higher education, hope predicts resilience, academic success, and persistence.” (citations omitted)); Abrams & Keren, *supra* note 2, at 338 (“[T]hrough cultivation and over time, the process of hoping produces subjects who are more resilient in the face of difficulty, and more resourceful as individuals.”); Katerina Standish, *Learning How to Hope: A Curriculum*, 43 HUMAN. & SOC'Y 484, 487 (2019) (discussing how hope prevents despair in the face of difficult circumstances); see also KEVIN M. GANNON, *RADICAL HOPE: A TEACHING MANIFESTO* 4 (2020) (“For those of us committed to changing higher education for the better, to making a genuine difference in our classrooms and on our campuses, a commitment to radical hope offers the chance to do so in a clear-eyed and sustainable manner without succumbing to hostile resignation or burned-out despair.”).

⁸ Travis P. Searle & John E. Barbuto, Jr., *Servant Leadership, Hope, and Organizational Virtuousness: A Framework Exploring Positive Micro and Macro Behaviors and Performance Impact*, 18 J. LEADERSHIP & ORG. STUDS. 107, 113 (2011) (“Hope also embraces success rather than failure, adaptation rather than becoming obsolete, and optimism rather than pessimism. Hope shifts obstacles to challenges, and even when faced with seemingly insurmountable barriers, alternate routes are embraced.” (citations omitted)).

gain greater power for a time.”⁹ Other scholars have similarly explained that hope allows people to believe that they have “some control” over their circumstances—that they “are no longer entirely at the mercy of [outside] forces.”¹⁰ It is an attitude that allows people to justify action.¹¹ Finally, hope serves as a reminder that constraints and crises can also be opportunities for advocates to cultivate creativity and imagination as they search for a new way forward.¹²

As I began studying hope, it was clear why hope was valuable. But there was no scholarship indicating what form of hope would be helpful for the human rights field and how advocates can intentionally cultivate and sustain it. It became apparent that there is no systematic and rigorous study of what hope means for the human rights field. This Article seeks to attend to this oversight and take the affective landscapes of hope seriously. I offer a novel typology of hope that explores the wide variations in the utility of each form of hope to the human rights field. As this Article will show, not all forms or manifestations of hope are helpful. Some are misguided or even dangerous. Others involve the misuse or manipulation of the language of hope. And even helpful forms of hope do not always go far enough. To solve this problem, I construct the concept of transformative hope, which has the potential to fuel and revitalize the human rights field. Transformative hope is a grounded, action-oriented, creative, and imaginative approach that enables advocates to persist in their efforts towards change despite the uncertain way forward. Finally, I argue that even if the value of transformative hope is clear, there is still a need for institutions to create the culture and structures necessary to sustain hope.

These arguments are organized as follows. Part I draws on a range of disciplines to define hope and offer a typology of its myriad forms. Part II introduces the concept of transformative hope and explains how to cultivate the key dimensions of this form of hope. Finally, Part III considers how institutions can support and sustain the practice of transformative hope.

Many of the examples described in this Article are from my experience directing the International Human Rights and Conflict Resolution Clinic at Stanford Law School, where students work in partnership with impacted communities and civil society groups around

⁹ BELL HOOKS, *TEACHING COMMUNITY: A PEDAGOGY OF HOPE* xiv (2004).

¹⁰ Jerome Groopman, Commentary, *The Anatomy of Hope*, 8 *PERMANENTE J.* 43, 45 (2004) (“[A] combination of attitudes that are such that an agent stands ready to justify her engaging in such activities (or is disposed to do so).”).

¹¹ Claudia Blöser & Titus Stahl, *Fundamental Hope and Practical Identity*, 46 *PHIL. PAPERS* 345, 356 (2017).

¹² AHMED, *supra* note 6, at 187.

the world to advance social change,¹³ as well as my years of experience of engaging in human rights advocacy in other institutions. While the Article uses examples from the human rights movement and human rights classrooms, its lessons are intended to apply to the social justice field more broadly.

Before I proceed, two caveats. First, this Article is not about whether or to what extent we should have hope about the effectiveness or legitimacy of the human rights field.¹⁴ Instead, this exploratory Article is about *what* hope is (and is not) and *how* we can foster and sustain hope to advance social change. Second, while this Article focuses on hope, hope does not act alone among emotional drivers for change.¹⁵

¹³ The work of the Stanford Law School International Human Rights and Conflict Resolution Clinic spans three areas: peace and justice, equality and non-discrimination, and rights across borders. We have worked in partnership with civil society groups in ten countries in Asia, Africa, and the Americas. For security reasons, this article anonymizes these countries and the names of our project partners.

¹⁴ Existing scholarship explores the effectiveness of hope (or lack of it) in the human rights field. For discussion on the effectiveness of the human rights field, see KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 3 (2017) [hereinafter EVIDENCE FOR HOPE]; see also GRÁINNE DE BÚRCA, REFRAMING HUMAN RIGHTS IN A TURBULENT ERA 5 (2021). For critiques of the effectiveness of the human rights field, see SAM MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS (2013); ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014). There is also a growing body of constructive, forward-looking scholarship on how to engage in self-reflection and transform the current human rights movement. See GRÁINNE DE BÚRCA, REFRAMING HUMAN RIGHTS IN A TURBULENT ERA 5 (2021); CÉSAR RODRÍGUEZ-GARAVITO, *Human Rights 2030: New Paradigm for the Human Rights Field*, in THE STRUGGLE FOR HUMAN RIGHTS 328 (Nehal Bhuta et al., eds., 2021); CÉSAR RODRÍGUEZ-GARAVITO & KRIZNA GOMEZ, RISING TO THE POPULIST CHALLENGE: A NEW PLAYBOOK FOR HUMAN RIGHTS ACTORS (2019); Dustin N. Sharp, *Through a Glass, Darkly: Three Important Conversations for Human Rights Professionals*, 11 J. HUM. RTS. PRAC. 296 (2019); Lucie White & Jeremy Perelman, *Can Human Rights Practice be a Critical Project? A View from the Ground*, LOY. L.A. L. REV. 157 (2020); KATHRYN SIKKINK, THE HIDDEN FACE OF RIGHTS: TOWARDS A POLITICS OF RESPONSIBILITIES (2020); Philip Alston, *The Populist Challenge to Human Rights*, 9 J. HUM. RTS. PRAC. 1 (2017). In the book *Evidence for Hope*, for example, Kathryn Sikkink responds to what she perceives as increasing “pessimism about the legitimacy and effectiveness of human rights law, institutions, and movements” with powerful examples of how human rights movements have been effective even when change is slow. SIKKINK, EVIDENCE FOR HOPE, *supra*, at 3. Similarly, in *Reframing Human Rights in a Turbulent Era*, Gráinne de Búrca uses concrete case studies of human rights campaigns to highlight how activists have been mobilizing despite serious constraints. However, even hopeful scholars like Sikkink and de Búrca acknowledge that the scale and complexity of the challenges are immense. This suggests that while there may be evidence for hope, feeling hopeful is not straightforward. This Article sets out how to cultivate and sustain hope.

¹⁵ Katie Stockdale, *Hope and Anger*, in HOPE UNDER OPPRESSION 82 (2021).

Anger,¹⁶ love, frustration, fear,¹⁷ grief, trust, bitterness, faith,¹⁸ a sense of duty, and a moral imperative could also be drivers of change.¹⁹ Indeed, many advocates have noted that they had varied—and oftentimes conflicting—emotions when witnessing or experiencing human rights violations and all of those emotions fueled their advocacy.²⁰ Thus, while I privilege “hope” as a hermeneutic in this Article, I do not aim to ignore or disregard the role of other emotions in driving advocacy. Hope alone certainly will not result in change. It is, however, an integral part of being able to imagine and drive change.²¹

I. UNPACKING HOPE

Hope is a term we read about, hear, and often use, and yet it is a contested term defined in multiple ways. There is no theory of hope for the human rights field. This Part draws on literature across multiple disciplines to arrive at a definition and typology of hope for the human rights field.

As it is generally used, the term “hope” has been described as an emotion, disposition, and a state of mind.²² It has also been described

¹⁶ Doug McAdam, *Social Movement Theory and the Prospects for Climate Change Activism in the United States*, 20 ANN. REV. POL. SCI. 189, 204 (2017) (noting that the “combination of anger and hope has proven to be a powerful motivator in many successful movements. In general, rights movements have traditionally relied on this potent mix of emotions”).

¹⁷ *Id.* at 194 (discussing the relevant mobilizing emotions of anger and fear in developing a movement).

¹⁸ Stockdale, *supra* note 15, at 9 (“[H]ope must be understood not in isolation but as an attitude that interacts with other mental states to influence how people experience and engage with the world. . . . I shed light on the relationship between hope and a range of related states including fear, trust, anger, bitterness, despair, and faith.”).

¹⁹ PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 10 (2005) (“Pedagogy of hope is that kind of book. It is written in rage and love, without which there is no hope.”).

²⁰ See, e.g., Abrams & Kerns, *supra* note 2, at 346-48; see also Howard J. Vogel, *The Terrible Bind of the Lawyer in the Modern World: The Problem of Hope, the Question of Identity, and the Recovery of Meaning in the Practice of Law*, 32 SETON HALL L. REV. 152, 176 (2001).

²¹ FREIRE, *supra* note 19, at 8-9 (“[The] idea that hope alone will transform the world, and action undertaken in that kind of naivete, is an excellent route to hopelessness, pessimism, and fatalism. But the attempt to do without hope, in the struggle to improve the world, as if that struggle could be reduced to calculated acts alone, or a purely scientific approach, is a frivolous illusion.”).

²² Webb, *supra* note 2, at 67; John Patrick Day, *Hope*, 6 AM. PHIL. Q. 89, 89 (1969) (explaining that “virtually all philosophers,” ranging from Hume to Aristotle to Descartes, among others, and “perhaps most[] psychologists” believe that hope is an emotion because it “involves (1) desiring, and (2) estimating a probability”); Charles Richard Snyder, *Hypothesis: There is Hope*, in HANDBOOK OF HOPE: THEORY, MEASURES, & APPLICATIONS 3, 8-9 (Charles Richard Snyder ed., 2000) (defining hope as “a positive motivational state that is based on an interactively derived sense of successful [] agency . . . and [] pathways” (quoting Charles Richard Snyder et al., *Hope and Health: Measuring the Will and the Ways*, in HANDBOOK OF SOCIAL AND CLINICAL PSYCHOLOGY: THE HEALTH PERSPECTIVE 285, 287 (Charles Richard

as a “formed habit.”²³ Finally, it has been described as both a biological and/or socially constructed concept.²⁴ For the purposes of this Article, I define hope as a learned mindset and practice that allows you to believe in and work towards the possibility that you can achieve your goals. This learned or socially-constructed view of hope suggests that human rights advocates and teachers can cultivate, teach, and model the practice of hope. Indeed, Mariame Kaba, an activist and organizer, views hope through this precise lens. To her, hope is a discipline—something that we can practice every day.²⁵ Scholars in the education field also believe that hope can be a “learned thinking pattern”²⁶ that sustains action and the commitment to said action despite inevitable challenges. Hope can offer comfort, strength, and the will to go on.²⁷ For example, researchers have found that incarcerated individuals often rely on hope to cope in conditions of confinement.²⁸ In the medical context, Professor Jerome Groopman explains that it took him a few years to finally understand that his patients were asking him for hope and that hope was a part of the “treatment” they needed as true hope can help ease pain and perhaps the odds of responding well to treatment.²⁹

Snyder & Donelson R. Forsyth eds., 1991)); see also Emma Pleeging et al., *Characterizing Hope: An Interdisciplinary Overview of the Characteristics of Hope*, 17 APPLIED RSCH. IN QUALITY OF LIFE 1681, 1682 (2022) (describing hope as “a form of imagination”). Unlike most philosophers, John Patrick Day argues that hope is a “sort of disposition[,]” rather than an emotion. Day, *supra*, at 98; see also THE OXFORD HANDBOOK OF HOPE 19 (Matthew W. Gallagher & Shane J. Lopez eds., 2018) (“Hope is not only an occurrent mental state; it can also be a general orientation or global attitude of positivity and openness toward life.”).

²³ Webb, *supra* note 2, at 67; see also Jo Hockley, *The Concept of Hope and the Will to Live*, 7 PALLIATIVE MED. 181, 182 (1993) (describing hope as “an effect that would seem to be a process of both conscious and unconscious reasoning”); ALAN MITTLEMAN, HOPE IN A DEMOCRATIC AGE: PHILOSOPHY, RELIGION, AND POLITICAL THEORY 25 (2009) (“Hope is a product of our hominid prehistory, of natural selection.” (footnote omitted)).

²⁴ W. Roberts Beavers & Florence W. Kaslow, *The Anatomy of Hope*, 7 J. MARITAL & FAM. THERAPY 119, 119 (1981); Webb, *supra* note 2, at 67; see also MITTLEMAN, *supra* note 23, at 24-25 (suggesting that hope may be embedded in human biology).

²⁵ MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 26-27 (2021).

²⁶ Webb, *supra* note 4, at 398 (questioning whether hope is “a learned thinking pattern such that some human beings are capable of not hoping because they were not taught to think in this manner” (citations omitted)).

²⁷ Vibeke Lohne, ‘Hope as a Lighthouse’ A Meta-Synthesis on Hope and Hoping in Different Nursing Contexts, 36. SCAND. J. CARING SCI. 36, 44 (2022).

²⁸ See, e.g., Serena Wright et al., *Trajectories of Hope/lessness Among Men and Women in the Late Stage of a Life Sentence*, 27 THEORETICAL CRIMINOLOGY 66, 68 (2023) (“The beneficial aspects of hope have specific relevance to surviving . . . under conditions of confinement.” (citations omitted)); see also Derek Spencer, *The Hope Principle: Exploring an Unwritten Principle of Sentencing Law*, 65 CRIM. L. Q. 414, 415 (2018) (“Hope and rehabilitation have a symbiotic relationship, with hope of release [from prison] acting as a motivating factor for rehabilitation and rehabilitation the means to achieve the hope for goal release.”).

²⁹ Groopman, *supra* note 10, at 43, 46.

Given what hope can offer, we have both a strategic and moral obligation to cultivate hope as a practice.³⁰ The absence of hope not only curtails critical action but is also a denial of a core aspect of our humanity.³¹ One of the benefits of viewing hope as a socially constructed concept or a “learned” practice is that it is no longer limited to individuals with a particular disposition. Hope is something that can be cultivated by anyone.

Recognizing that hope can be learned not only challenges the idea of hope as a personality trait that is inherent and fixed³² but frees us to ask the next logical question: How can individuals, institutions, and movements cultivate hope? Moreover, shifting to a learned practice model removes the burden that a static trait can place on individuals.³³ The socially-constructed understanding of hope draws attention to the futility of phrases like “Just have a little hope” or “Be positive.”³⁴ While perhaps well-intentioned, such phrases fail to fully acknowledge the challenges associated with sustaining hope,³⁵ and they also fail to adequately place responsibility on institutions to cultivate or at least not constrain hope.³⁶

Although there are varying definitions and theories of hope across a range of disciplines, two key dimensions of “true” or effective forms of hope stand out in the literature: (a) hope as active versus passive; and (b) hope as grounded in context and material conditions, versus

³⁰ In the medical field, some scholars argue that doctors have a moral and ethical obligation to cultivate hope. See Tobias Kube et al., *Hope in Medicine: Applying Multidisciplinary Insights, Perspectives in Biology and Medicine*, 62 PERSPS. BIOLOGY MED. 591, 594 (2019) (“[T]here is the ethics of hope, and the question whether the medical community has a moral obligation to instill hope in patients, and if so, what kinds of things patients should be encouraged to ‘hope for.’”). Additionally, some scholars have written about the import of “[c]onserving hope” in a liberal society. MITTLEMAN, *supra* note 23, at 14.

³¹ *Vinter and Others v. United Kingdom*, App. Nos. 66069/09, 130/10, 3896/10 (July 9, 2013) (Power-Forde, J., concurring), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-122664%22%7D> (explaining that hope is part of a person’s “fundamental humanity”); *Mathiötsitis and Others v. Lithuania*, App. Nos. 2262/13, 51059/13, 59692/13, 59700/13, 60115/13, 692513, 72824/13, ¶ 180 (Aug. 23, 2017), <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-173623%22%7D> (“To deny [incarcerated people] the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.”); see also Juan Carlos Riofrio, *The Right to Hope: A New Perspective of the Right to Have Expectations, Opportunities and Plans*, 30 WASH. & LEE J. CIV. RTS. & SOC. JUST. 79, 83 (2023) (asserting that hope is “an existential aspect of human life”); Kimberley Brownlee, *Punishment and Precious Emotions: A Hope Standard for Punishment*, 41 OXFORD J. LEGAL STUDS. 589, 605 (2021) (explaining that “hope, like autonomy, is inherently valuable and necessary for a meaningful human life”).

³² Devita Bishundat et al., *Cultivating Critical Hope: The Too Often Forgotten Dimension of Critical Leadership Development*, 2018 NEW DIRECTIONS FOR STUD. LEADERSHIP 91, 100 (2018).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Indeed, describing hope “as an individual responsibility” undermines the connection between hope and the collective and solidarity. See Sarah Trotter, *Hope’s Relations: A Theory of the ‘Right to Hope’ in European Human Rights Law*, 22 HUM. RTS. L. REV. 1, 7, 20 (2022)).

disconnected from reality and the priorities of directly impacted communities. These two dimensions led me to create a typology of hope represented in Figure 1. The typology is intended to allow students and advocates to reflect on, visualize, situate, and shift their mindset and practice, based on where they are in the framework.

Whereas “active” designates ongoing engagement and efforts to advance social change,³⁷ “passive” denotes a lack of such engagement.³⁸ “Grounded” refers to a deep understanding of human rights issues as well as centering the knowledge and priorities of impacted communities. Conversely, “ungrounded” refers to a model of advocacy without the requisite engagement with the context or community needs. The intersections of active, passive, grounded, and ungrounded produce different qualities and effects of hope, and the typology examines how the effectiveness of hope varies substantially depending on the degree to which it embraces these dimensions. It is worth emphasizing that “active” is not limited to overt action, just as being “grounded” does not require limiting our goals based on the reality of the current context, but instead involves grappling with, challenging, and ideally even upending existing material conditions or constraints. As a result, these and other terms in this Article should be understood in the broadest possible sense.

FIGURE 1: TYPOLOGY OF KEY TYPES OF HOPE³⁹

Dimensions of hope	Ungrounded	Grounded
Passive	False hope <i>Examples: optimism, lack of engagement, hope rooted in denial or delusion.</i>	Latent hope <i>Examples: complacency, stuckness, or apathy.</i>
Active	Reckless hope <i>Example: acting without the necessary preparedness.</i> Disingenuous hope <i>Example: manipulation.</i>	Measured hope <i>Example: developing interventions within the framework of current material conditions.</i>

³⁷ See, e.g., ANTHONY SCIOLI & HENRY B. BILLER HOPE IN THE AGE OF ANXIETY 13 (2009) (explaining that true hope is “active” and “offers a real alternative to surrender borne of pain, suffering, or loss” (emphasis omitted)).

³⁸ See, e.g., Christopher Seeds, *Hope and Life Sentence*, 62 BRIT. J. CRIMINOLOGY 234, 239 (2022) (observing that “[a]ction” distinguishes hope from optimism, the latter of which is passive).

³⁹ Because this Article defines “hope” as both a mindset and practice, this typology of hope includes examples of both forms of hope, such as the example of reckless hope as action without preparedness and the example of latent hope as apathy or a sense of stuckness.

This Part illustrates these different forms of hope through historical examples as well as contemporary human rights practice. It is worth noting that individuals and movements employ different forms of hope at the same time, and therefore illustrations here should not be taken to suggest that individual or collective efforts are limited to one form of hope. Instead, they are intended to serve as examples to prompt reflection about ways in which some forms or manifestations of hope may be inadequate to meet the goals of the human rights field.

A. False Hope

False hope suffers from flaws along both the dimensions I have mapped above. A false hope demonstrates both passivity and an ungrounded engagement with issues.

The first element of false hope is that it lacks action. Kevin Gannon, a historian and educator, explains that “hope without action is merely fantasy.”⁴⁰ In that sense, false hope shares some parallels with optimism, which is the belief that an outcome will be positive, even if that is not always the case.⁴¹ Similarly, false hope could involve believing that change will take place but at the same time not doing anything concrete to effect that change. To be sure, optimism is not a bad thing. Optimism has been shown to predict greater well-being even during periods of adversity.⁴² And sometimes true hope and optimism operate together.⁴³ However, the two need not coexist, and what sets them apart is the engagement with context and the degree of action. Human rights victories consistently demonstrate the importance of action and engagement (and, thus, the hollowness of false hope) in engendering change. Victories such as the end of apartheid in South Africa and the dismantling of the Berlin Wall might have involved hope as a catalyst to action but hope on its own could not have resulted in these victories.⁴⁴

⁴⁰ KEVIN M. GANNON, *RADICAL HOPE: A TEACHING MANIFESTO* 4 (2020).

⁴¹ Groopman, *supra* note 10, at 47 (“[T]rue hope differs from optimism. Optimism says everything is going to work out all right. Well, the truth is, everything doesn’t always work out all right. Things sometimes work out very badly. Optimism is a character trait. It is almost a given. Hope is an active emotion. Hope requires meticulously surveying everything in front of you—all the obstacles, all the pitfalls—and finding that path that can bring you to the future. That’s the cognitive part.”).

⁴² Allison D. Martin & Kevin L. Rand, *The Future’s So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 DUQ. L. REV. 203, 208 (2010).

⁴³ See, e.g., Hui-Ching Wu, *The Protective Effects of Resilience and Hope on Quality of Life of the Families Coping with the Criminal Traumatization of One of its Members*, 20 J. CLINICAL NURSING 1906, 1908 (2011) (“[E]ffective coping mechanisms can enhance the dispositional traits of self-efficacy, optimism and self-reliance and that those traits, in turn, reinforce willingness to attempt to actively solve other problems. They create hope.”).

⁴⁴ Peter McInerney, *From Naive Optimism to Robust Hope: Sustaining a Commitment to Social Justice in Schools and Teacher Education in Neoliberal Times*, 35 ASIA-PAC. J. TCHR. EDUC. 257, 257 (2007) (“The overthrow of apartheid in South Africa and the dismantling of

Such victories were a function of agency and tremendous, unrelenting action,⁴⁵ which is a key element that is absent from false hope.

Second, false hope lacks groundedness. Some forms of false hope are “informed by privilege,” which ignores inequities, existing material conditions, and other barriers to change.⁴⁶ Other forms involve a “denial of suffering”⁴⁷ or similar to optimism, could involve people being disconnected from reality.”⁴⁸ Jeffrey Duncan-Andrade’s explanation of false hope draws on Barack Obama’s 2008 election as President of the United States to problematize the ways in which it was equated with the “end of racism.”⁴⁹ Although Obama’s election was certainly a significant moment, equating an election with the elimination of racism is not only “mythmaking,” to quote Duncan-Andrade, but it is also a form of idealism that fails to grapple with racism as a systemic issue.⁵⁰ Hope based on such mythmaking is not grounded in the efforts of social justice movements that have spent decades working towards ending systemic racism.

For these reasons, false hope is insufficient to bring about change. Hope and change require engaging with an “undistorted view of reality” that takes into consideration the complex and “tragic” aspects of one’s material conditions.⁵¹ A study on hope and climate change engagement, for example, found that hope can activate engagement with environmental issues.⁵² However, as psychology scholar Maria Ojala notes, the nature of engagement depends on what the hope is rooted in.⁵³ Denial-based hope can result in a negative relationship with engagement and behavior; whereas hope grounded in contextual

the Berlin Wall reveal the power of human agency and the capacity of citizens to challenge the status quo and to bring about progressive social change Although a large measure of hope may have guided these emancipatory ideals and acted as ‘a spur to action’ hope in itself was insufficient to bring about these changes of this magnitude.”).

⁴⁵ *Id.*

⁴⁶ Jeffrey M. R. Duncan-Andrade, *Note to Educators: Hope Required When Growing Roses in Concrete*, 79 HARV. EDUC. REV. 181, 182 (2009); Marjo Lindroth & Heidi Sinevaara-Niskanen, *Politics of Hope*, 16 GLOBALIZATIONS 644, 647 (2019) (arguing that hope “masks (continuing) acts and processes of othering, subjugation and coercion” and “enables the maintenance of inequality through what is, in essence, a fantasy of the future”).

⁴⁷ Duncan-Andrade, *supra* note 46, at 184.

⁴⁸ Paul W. Pruyser, *Maintaining Hope in Adversity*, 51 BULL. MENNINGER CLINIC 463, 465 (1987).

⁴⁹ Duncan-Andrade, *supra* note 46, at 183.

⁵⁰ *Id.* at 183–84.

⁵¹ Pruyser, *supra* note 48, at 465 (“To hope, then, one must have a tragic sense of life, an undistorted view of reality, a degree of modesty vis-a-vis the power and workings of nature or the cosmos, some feeling of commonality, if not communion, with other people, and some capacity to abstain from impulsive, unrealistic wishing.”).

⁵² Maria Ojala, *Hope and Climate-Change Engagement from a Psychological Perspective*, 49 CURRENT OP. IN PSYCH. 101514 (2023).

⁵³ *Id.*

knowledge—"constructive hope," as Ojala defines it—can result in increased engagement.⁵⁴

B. *Latent Hope*

At the intersection of the grounded and passive dimensions lies latent hope, where contextual engagement does not translate to action. A latent hoper could watch the news all day and talk about the suffering in the world at great length, hoping for change but failing to make an active effort to transform ongoing human rights abuses. This form of hope involves the identification of a desire or goal but does not employ the necessary action or "self-assertion" to implement said goal.⁵⁵ Instead, the identified desire is a "wish."⁵⁶ Latent hopers may rely on others to take action and thus await an improved situation in the future,⁵⁷ when in fact hope needs to be rooted in action.⁵⁸

A range of factors can contribute to latent hope, including indifference, apathy, and complacency. However, a more generous interpretation of what underlies latent hope is "stuckness," which is the desire to effect change without the requisite knowledge about what form of action would be most effective. Though stuckness and other reasons underlying latent hope have key differences, the outcome is

⁵⁴ *Id.*

⁵⁵ Abrams & Keren, *supra* note 2, at 341 ("The process of hoping . . . begins with the embrace of a distant object, the acknowledgment of a desire which may be difficult to fulfill. But without self-assertion, which includes judgment about means and ends, the marshaling of resources and support, and ongoing recalibration of strategy, this desire remains a wish rather than a cornerstone in the process of hoping. The defect we identify as passive hoping is most likely to occur when hopers focus their energies on sustaining a particular desire, rather than asserting themselves in order to bring it about.").

⁵⁶ *Id.*

⁵⁷ Webb, *supra* note 4, at 400 ("Patient hope: The generic features of patient hope can be summarised thus: taking as its objective a process of becoming or perennial enrootedness which defies representation but is instilled with meaning, hope as a cognitive-affective activity is characterised by a secure trust in the behavioural activity of an Other. Such hope is other-directed and patient. In its behavioural dimension, to hope is to take one's time and await an essentially unforeseen future."); Duncan-Andrade, *supra* note 46, at 184 ("They 'hope' for change in its most deferred form: either a collective utopia of a future reformed society or, more often, the individual student's future ascent to the middle class. However, according to S. Leonard Syme, . . . 'hope should be thought of as control of destiny . . . an actively present sense of agency to manage the immediate stressors in one's daily life.'" (citations omitted) (internal quotation marks omitted)).

⁵⁸ Freire notes how hope and action are indivisible. FREIRE, *supra* note 19, at 8-9 ("[H]ope, as an ontological need demands an anchoring in practice. As an ontological need, hope needs practice in order to become historical concreteness. That is why there is no hope in sheer hopefulness. The hope-for is not attained by dint of raw hoping. Just to hope is to hope in vain. Without a minimum of hope, we cannot so much as start the struggle. But without the struggle, hope, as an ontological need, dissipates, loses its bearings, and turns into hopelessness. And hopelessness can become tragic despair. . . . Hopelessness and despair are both the consequence and the cause of inaction or immobilism." (footnote omitted)).

ultimately inaction. bell hooks observes that such stuckness could be the result of the lack of constructive critique, positing that by naming a problem without reflecting on resolution and possible solutions, it is merely a form of cynicism and contravenes hope.⁵⁹

A lack of constructive, forward-looking critique can lead to stuckness and nihilism. This is a reminder that when engaging with human rights issues, it is important to equip ourselves with the skills and capacities necessary to effect change. When we teach students, or anyone, about challenging issues and ask them to carry the burden that comes with such knowledge, we should provide guidance on how to address those issues and move “toward new forms of hope.”⁶⁰ Without such guidance, students can understandably “check out” or default to a nihilistic position.⁶¹ Accordingly, we need to equip people with the capacities and a form of hope that can lead to more critical thinking and creative problem solving.⁶² This can move latent hope to a more constructive form of hope.

C. *Reckless Hope and Disingenuous Hope*

Reckless hope and disingenuous hope occur where action meets ungroundedness. Reckless hope involves acting without an understanding of the issues and needs of impacted communities, and disingenuous hope involves action based on an individual or entity’s deliberate misrepresentation of a community’s material realities. As one might expect, both forms of action are potentially even more harmful than no action at all.

The human rights field is rife with examples of reckless hope, where advocates parachute in and take action without a deep understanding of the context.⁶³ Indeed, some of our clinic project partners have described ineffective, reckless, and even dangerous interventions that have resulted from a lack of understanding.

Advocacy models based on reckless hope are unfortunately fairly common. As an example, Sarah Knuckey and co-authors recount how an international NGO spearheaded a campaign to treat a lagoon in Mexico

⁵⁹ HOOKS, *supra* note 9, at xiv.

⁶⁰ Maggie Rehm, *Agency and Activism as Elements in a ‘Pedagogy of Hope’: Moving Beyond ‘This Class Is Depressing,’* in TEACHING GENDER & SEX IN CONTEMPORARY AMERICA 207, 213 (Kristin Haltinner & Ryanne Pilgeram eds., 2016).

⁶¹ *Id.* at 207.

⁶² *Id.*

⁶³ Sarah Knuckey et al., *Power in Human Rights Advocate and Rightsholder Relationships: Critiques, Reforms, and Challenges*, 33 HARV. HUM. RTS. J. 1 (2020) [hereinafter *Power*]; SARAH KNUCKEY ET AL., *EVERYDAY COLONALITY IN HUMAN RIGHTS* (forthcoming 2025) [hereinafter *EVERYDAY COLONALITY*].

as a natural reserve that would be managed by governmental agencies.⁶⁴ This was done without consulting the indigenous communities who resided on the land where the lagoon is located.⁶⁵ The NGO did not account for those stakeholders' needs and priorities or the possibility that, if successful, the new designation would likely preclude use of the lagoon for basic subsistence by the local population.⁶⁶

Another poignant example of reckless hope was shared by one of my clinic project partners. He described how an international human rights organization pursued and published its findings from a human rights investigation without consulting local human rights groups and without regard to the possible risks its actions could pose to interviewees. The organization's reckless intervention ultimately resulted in the interviewees being arrested and detained, and it created a serious trust deficit with other human rights actors. This example highlights how reckless hope can create harm on three levels: first, on the individuals who are directly impacted; second, on the relationship between human rights advocates and that community; and third, on the reputation and legitimacy of the human rights movement as a whole.⁶⁷

Distinct from the ungroundedness that characterizes reckless hope, disingenuous hope is characterized by the manipulation of knowledge or the manufacture of false knowledge. Perpetrators of human rights abuses, including government actors, sometimes employ this form of hope. History has many examples of governments deploying disingenuous hope to further political agendas that undercut notions of equality.⁶⁸ A well-known (and extreme) example is the Nazis' use of disingenuous hope—specifically, their promise of national revival and racial superiority—to rise to power in Germany.⁶⁹

⁶⁴ Knuckey et al., *Power*, *supra* note 63, at 14.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 15 (“These practices not only harm rightsholders in specific situations, but may also adversely impact the future of human rights work in that region as it may result in a trust deficit between rightsholders and human rights advocates.”).

⁶⁸ E.g., Katie Stockdale, *Hope's Place in Our Lives*, in *HOPE UNDER OPPRESSION* 13, 32 (2021) (“Politicians’ responses to the suicide crisis in many Indigenous communities illustrate one way in which the language of hope figures into political discussions about how governments and citizens should address social, political, and public health issues. And perhaps hope really is part of what individuals and communities need in certain cases—it might be beneficial for individual and collective wellbeing, for example. But this example also sheds light on the fact that politicians and, as we will see, corporations and other agents in positions of power employ the language of hope to further their ends. Hope is not just a mental state that exists in individual minds. It is also a political and marketing tool that influences human psychology and behavior.”).

⁶⁹ *Why Did the Holocaust Happen?*, THE HOLOCAUST EXPLAINED, <https://www.theholocaustexplained.org/how-and-why/why/rise-of-the-nazis-and-adolf-hitler/> (last visited July 26, 2024) (“The Nazis’ ideology rested on several key ideas, such as nationalism, racial superiority, antisemitism, and anticommunism. These ideas were popular in Germany in the

We also see disingenuous hope in contemporary politics. Consider, for example, candidates' "promises" to drive economic progress or ensure national security—promises that are ultimately made at the expense of already marginalized groups.⁷⁰ We have seen this happen in a multitude of ways around the world, including instances where politicians and courts have pinned the hopes on "greater" national security at the cost of minorities.⁷¹

Although both reckless hope and disingenuous hope share some similarities, the key difference between these two forms of hope is intent. While reckless hope may not have ill intent, disingenuous hope is often ill-intentioned. Regardless of this difference, however, neither form of hope is helpful in the human rights field.

D. Measured Hope

As Figure 1 shows, "measured hope" sits at the intersection of grounded and active. Measured hope requires a careful survey of the existing material conditions and action taken based on that.⁷² The

1920s and early 1930s, as the economic and political situation fluctuated and then, following the Wall Street Crash in 1929, quickly deteriorated. In these uncertain times, the Nazi Party appeared to offer hope, political stability and prosperity. In 1932, the Nazis became the biggest party in the Reichstag, with 37.3% of the vote.").

⁷⁰ Geoffrey A. Manne & Seth Weinberger, *Trust the Process: How the National Emergency Act Threatens Marginalized Populations and the Constitution—And What to Do About It*, 44 THE HARBINGER 95, 98 (2020) ("When Congress expands executive power for purposes of protecting the nation against an emergency—whether real or imagined—that power is often turned against vulnerable, marginalized populations that are easily scapegoated as threats to the state."); Tim Sahay, *Don't Believe Modi's Economic Success Story*, FOREIGN POL'Y MAG. (June 23, 2023), <https://foreignpolicy.com/2023/06/23/modi-india-economy-success-story/>; Snigha Poonam, *Modi's Message Was Simple: Hindus First*, FOREIGN POL'Y MAG. (May 24, 2019), <https://foreignpolicy.com/2019/05/24/modis-message-was-simple-hindus-first/> (explaining how Modi urged "[a]ll Hindus—distressed farmers, jobless youths, oppressed Dalits, businessmen skeptical of the BJP's economic policies— . . . to forget their circumstances and vote for their nation" after a suicide bombing in Kashmir and retaliatory airstrike by India); Shirin Sinnar, *Courts Have Been Hiding Behind National Security for Too Long*, BRENNAN CTR. FOR JUST. (Aug. 11, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long>.

⁷¹ Sinnar, *supra* note 70.

⁷² This dimension of measured hope bears similarly to Darren Webb's sound hope. See Webb, *supra* note 4, at 405 ("Sound hope can thus be characterised as a hope directed toward a significant future good involving a probability calculation which, in order to prevent the hoper losing their grip on reality, is based on a careful study of the evidence."). Other scholars utilize the terms "pragmatic hope" or "pragmatist hope." See Sarah M. Stitzlein, *Teaching for Hope in the Era of Grit*, 120 TCHRS. COLL. REC. 1, 19 (2018) ("Pragmatist hope is located within and attentive to the muddy and complex circumstances of our daily lives. Unlike grit, it is not invoked only with one's eye to the future, and it requires more reasonable and tempered consideration of one's circumstances."); Mark Sanders, *Rotiyan Hope*, 19 HUM. AFFS. 52, 58 (2019) ("Rortyian hope is a melioristic, pragmatic hope, in other words, a hope that draws from the classical pragmatist tradition of James and Dewey. In line with this pragmatic tradition, Rortyian hope can help engage philosophy with social-political concerns."). But I

history of activism has often involved the struggle between principled idealism with the aim to achieve radical transformation on one side and pragmatists who prioritize progress, including incremental progress, over ideological goals.⁷³ Actors in the social justice field often have to grapple with the question: Should we try to upend the status quo or work towards more subtle, incremental change?⁷⁴ In some moments, advocates might ask: Should we settle for less and do what we think is feasible given the constraints or push forward the radical change we would like to see?⁷⁵ We have seen this play out throughout history, from the civil rights movement in the United States,⁷⁶ to the freedom struggles in India⁷⁷ and South Africa.⁷⁸ Although measured hope in the definitional sense may sound less exciting, it can be valuable because it works towards—and can result in—incremental change.⁷⁹ Moreover, measured efforts that result in even small victories can motivate more ambitious action.⁸⁰

The key difference between measured hope and transformative hope, which is described in the next Part, is their respective relationships with certainty and risk-taking. Measured hope is typically focused

rely on the term “measured hope” to emphasize that this form of hope results in designing and implementing initiatives that are limited to existing power and institutional structures and constraints.

⁷³ Mary Blanus et al., *Bridging the Divide Between Idealism and Pragmatism*, STAN. SOC. INNOVATION REV. (May 25, 2018), https://ssir.org/articles/entry/bridging_the_divide_between_idealism_and_pragmatism.

⁷⁴ James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 2 (2001) (“Some advocate an all-out assault on the status quo as the only way to effect the desired change, a revolution of sorts against stubborn opposition. Others prefer more subtle, gradual processes intended less to defeat the opposition than to convert them.” (footnotes omitted)).

⁷⁵ *Id.* at 3 (contrasting “a strategy of rights incrementalism” with a strategy of “rights wholesale-ism” and describing a set of parallel questions about whether to “limit demands to ‘our’ issues, or . . . embrace a broader agenda defending the rights of all persons” (footnotes omitted)).

⁷⁶ See, e.g., HOPE AMIDST CONFLICT: PHILOSOPHICAL AND PSYCHOLOGICAL EXPLORATIONS 180 (Oded Admon Leshem ed., 2024) (discussing Martin Luther King Jr.’s “I Have a Dream” speech as a key example of “the strength of the wish dimension of hope”).

⁷⁷ See, e.g., BIPAN CHANDRA ET AL., *INDIA’S STRUGGLE FOR INDEPENDENCE: 1857-1947*, at 19-20 (2016) (explaining that this movement relied on “people to make sacrifices” and recognize that its demands could not be overly unrealistic).

⁷⁸ See, e.g., Stephen Zunes, *The Role of Non-Violent Action in the Downfall of Apartheid*, 37 J. MOD. AFR. STUDS. 137, 161-63 (1999) (analyzing the success of non-violent strategies to overturn apartheid in South Africa).

⁷⁹ Webb, *supra* note 4, at 406 (“Sound hope gives rise, in short, to specific projects of incremental change.”); see also Carol Steiker, *Keeping Hope Alive: Criminal Justice Reform During Cycles of Political Retrenchment*, 71 FLA. L. REV. 1363, 1394 (2019) (noting, in the context of criminal legal reforms, that sometimes more incremental “first steps” towards progress are “the only way to get to a second step”).

⁸⁰ See, e.g., Steiker, *supra* note 79, at 1366-69 (discussing federal sentencing reform via the Fair Sentencing Act of 2010 and the First Step Act of 2018).

on developing interventions that are very likely to succeed. While such efforts are necessary in the human rights field, there are several examples of movements advancing change even though change was uncertain and there was a real risk of failure.⁸¹ Measured hope does not leave room for these critical efforts. Measured hope could, for instance, involve addressing the symptoms of human rights abuses rather than trying to upend the power structures and systems behind those abuses.

The danger with measured hope is that it cannot address systemic issues in the human rights ecosystem for which we may not have certainty of success based on current circumstances. Indeed, although there are existential threats facing the system, including rising inequality and the climate crisis, much of the field remains focused on short two-to-five-year funding cycles which are focused on “low hanging fruit”⁸² where success is likely.⁸³ This puts the human rights field at a disadvantage while trying to counter the actions of perpetrators of human rights abuses, including governments, who operate on longer time horizons.⁸⁴ Thus, while the pathway to change might be incremental, there is real value in ensuring that human rights advocates do not limit themselves to short-term goals⁸⁵ or to efforts where there is a clear likelihood of success based on the current circumstances. The challenges facing the human rights field demand action despite the existing circumstances as explained in the next Part on transformative hope.

II. TRANSFORMATIVE HOPE

The prior Part set out a typology of hope for the human rights field. It also examined the limits of the distinct forms of hope. In this Part, I define transformative hope, which I argue is what the human rights field needs, and then describe how transformative hope can be cultivated.

⁸¹ See, e.g., JULIA MARGARET ZULVER, *HIGH-RISK FEMINISM IN COLOMBIA: WOMEN'S MOBILIZATION IN VIOLENT CONTEXTS* (2022) (discussing “women’s high-risk collective action” for gender justice in Colombia); WALTER FRANK, *LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY* (2014) (cataloging the LGBTQ+ rights movement of the twentieth century and noting the risks activists faced through their organizing).

⁸² Rodríguez-Garavito, *supra* note 14, at 333-34 (arguing that “the human rights system is hampered by its slowness and focus on the short term”).

⁸³ See, e.g., Seeds, *supra* note 38, at 240 (explaining that pragmatic or “institutional” hope arises “from working within given institutions”).

⁸⁴ Rodríguez-Garavito, *supra* note 14, at 333-34.

⁸⁵ *Id.* (“Given that the targets of human rights campaigns (from authoritarian governments to fossil fuel and social media corporations) tend to have much longer-term horizons, this is a systemic disadvantage that keeps human rights actors constantly on the defensive.” (footnotes omitted)); Donovan, *supra* note 74, at 62 (observing that “incrementalism is the truer description of what actually happens,” but the task before us is still “to identify the superior a priori strategy for rights advancement” (footnote omitted)).

A. *Defining Transformative Hope*

Whereas measured hope is the culmination of a simultaneously grounded and active intervention, I situate transformative hope as a capacity that exists outside of the proposed intersections set forth in the typology of hope described in Figure 2. It includes the addition of the capacities of imagination and creativity.

FIGURE 2: KEY DIMENSIONS OF TRANSFORMATIVE HOPE

	Ungrounded	Grounded	Grounded + Imagination & Creativity
Passive	False hope	Latent hope	
Active	Reckless hope Disingenuous hope	Measured hope	Transformative hope

The term transformative hope exists in various scholars’ theories of hope.⁸⁶ Scholars and educators Jon C. Dalton and Pamela C. Crosby offer that transformative hope is rooted in context, helps generate solutions, and involves action and engagement.⁸⁷ Additionally, Darren Webb describes a transformative hoper as one who is critical of present material conditions and motivated by hope to work towards more promising possibilities.⁸⁸ Here, Webb underscores the capacity to not limit our imagination based on constraints. Finally, there are other terms in literature that bear similarity to Webb, Dalton, and Crosby’s conceptions of transformative hope. Kevin Gannon’s description of radical hope, for instance, shares parallels with Webb’s transformative hope. He explains that radical hope overcomes despair with the understanding that our efforts can result in a “better future” even if we do not have a full picture of that future will be.⁸⁹ Gannon emphasizes the role of hope in enabling action despite uncertainty. Likewise, Christopher Seeds’s description of “deep” or “transformational” hope emerges from the

⁸⁶ There are other definitions of transformative hope that offer other components of this concept. See Mellissa A. Butler, *Transformative Hope: A Pedagogical Vision*, 94 COUNTERPOINTS 265, 276 (2001) (arguing that transformative hope requires “cultivat[ing] an assertive, collective voice” and “strategies for projecting ideas to diverse audiences”).

⁸⁷ Jon C. Dalton & Pamela C. Crosby, *Hoping in Hard Times: The Transformative Power of Hope in College Student Development*, 10 J. COLL. & CHARACTER 1, 3 (2009).

⁸⁸ Webb, *supra* note 4, at 490 (explaining that “the transformative hoper critically negates the present and is driven by hope to announce a better alternative”).

⁸⁹ GANNON, *supra* note 40, at 405.

lack of a clear path forward.⁹⁰ Seeds contends that deep hope results from an extreme event or breakdown in one's life, such as the beginning of a lengthy sentence of incarceration that is combined with a belief that although there is no roadmap of how to proceed, possibility for change exists.⁹¹ My definition of transformative hope builds on their important scholarship by situating it in a novel typology of hope, setting out the key dimensions of transformative hope—groundedness, action, and creativity and imagination—and more importantly, by exploring *how* advocates and institutions can cultivate these dimensions of hope, which is described in the next Subpart.

However, before describing how to cultivate these dimensions of hope, it is worth distinguishing between measured and transformative hope. Transformative hope does not exclude measured hope. Instead, it represents an expansion of measured hope. In other words, while measured hope includes both goals and approaches that are based on a careful survey of the existing material conditions, transformative hope may include such approaches but is not confined to them. This distinction bears similarity to legal scholar Susan Sturm's description of the tension between legality and proactive lawyering.⁹² She explains that legality and proactive lawyering are informed by distinct methodologies and systems of thinking.⁹³ Legality adopts a "methodology of skepticism" that is "logical, analytical, and backward looking."⁹⁴ Proactive lawyering, on the other hand, employs a "methodology of possibility" which "calls for contextual, forward-looking and creative thinking."⁹⁵ Thus, while addressing gender-based violence, measured hope could involve interventions based on an evaluation of what has worked in the past such as setting up safe houses and hotlines or directly representing clients. Transformative hope could involve those measures along with prevention and efforts that are creative and forward-looking. A transformative approach could, for example, include interventions designed to shift attitudes that are believed to perpetuate gender-based violence.

Both measured hope and transformative hope are valuable orientations and can simultaneously coexist in an effective human rights ecosystem. In fact, we need response and accountability mechanisms as well as efforts that upend existing power dynamics and social attitudes that perpetuate existing harms. And yet, the human rights

⁹⁰ Seeds, *supra* note 38, at 236.

⁹¹ *Id.* at 242-43.

⁹² See generally Susan P. Sturm, *Lawyering Paradoxes: Making Meaning of the Contradictions*, 62 SANTA CLARA L. REV. 175 (2022) (discussing this tension).

⁹³ *Id.* at 202-03.

⁹⁴ *Id.*

⁹⁵ *Id.* at 202-04.

field tends to focus more on the measured form of hope. This is in part because institutions and funders incentive offering greater clarity and certainty about outcomes. But measured hope alone does not have the capacity to move us from the world we have to the world as it should be and a singular focus on measured hope can preclude efforts based on transformative hope that are necessary to address the scale and complexity of human rights issues.

Transformative hope, on the other hand, possesses the capacity of transformation precisely because it exceeds the binaries of active/passive and grounded/ungrounded. As a result, it allows an advocate to take action despite the existing constraints and even in the absence of a clear roadmap.⁹⁶ It does, however, require commitment in the face of uncertainty. In his book *The Courage to Create*, psychologist Rollo May explains that the relationship between this type of uncertainty and commitment is not antagonistic, but rather:

Commitment is healthiest when it is not *without* doubt, but *in spite* of doubt. To believe fully and at the same moment to have doubts is not at all a contradiction: it presupposes a greater respect for truth, an awareness that truth always goes beyond anything that can be said or done at any given moment.⁹⁷

Transformative hope is an embodiment of the form of commitment that May illustrates. In its attempt to reject and upend the structural harms and inequities of the present, transformative hope involves action and requires a deep understanding of the context. However, it has an added layer: creativity and imagination, which when coupled with grounded action can allow us to take a leap of faith. In fact, given that the path forward is not always clear, I would argue that transformative hope is more effective when it is creative.⁹⁸ It enables action despite existing constraints.⁹⁹

⁹⁶ Gannon's description of radical hope describes this form of action. He explains that "[t]o operate from a place of radical hope, though, is a daunting prospect. It requires us to discern ways of being and acting that are far from clear, and to articulate goals that only exist 'at the horizons of one's understanding.'" GANNON, *supra* note 40, at 4.

⁹⁷ ROLLO MAY, *THE COURAGE TO CREATE* 21 (1975).

⁹⁸ James R. Averill & Sundararajan, *Hope as Rhetoric: Cultural Narratives of Wishing and Coping*, in *INTERDISCIPLINARY PERSPECTIVES ON HOPE* 127, 135 (Jacklin A. Elliott ed., 2005) (observing that "[h]ope involves an uncertain future"); *id.* at 127 (observing that "hope must be creative if it is to be effective. This means that an episode of hope can be evaluated in terms of novelty (whether it reveals new approaches or solutions to a problem)").

⁹⁹ Duncan-Andrade's description of critical hope also mirrors this form of hope. He explains that it "demands a committed and active struggle" despite the evidence. Duncan-Andrade, *supra* note 46, at 185-86; *see also* REBECCA SOLNIT, *HOPE IN THE DARK* 64 (2004).

The power of transformative hope became clear to me as I watched my students work alongside advocates who lead imaginative, creative human rights efforts. In fact, a former student articulated the value of transformative hope when she described her experience working with advocates who had been working in a region that had experienced a drastic backsliding of rights. She said that she was struck by their determination to seek out and create every possible opening for change, however small, despite barriers and setbacks. Watching their persistence, this student asked one of her project partners what gave him hope. His answer was illuminating, she noted, in that it did not stress any evidence-based reason to be hopeful. Instead, he touched on faith and the idea that challenges are an opportunity to be creative and experiment with new possibilities.

This anecdote highlights how fostering creativity and imagination can allow advocates to adopt a more transformative approach. Indeed, research from other disciplines shows that creativity and imagination are important capacities that allow us to adapt to change with resilience, to overcome challenges,¹⁰⁰ and to act even when change does not seem feasible. Imagination allows us to generate original ideas that can influence novel ways of viewing the current situation.¹⁰¹ Creativity is the process we undertake to generate a new idea and bring it to life.¹⁰² As a part of this process, we need the ability to think originally, take risks, and sit with uncertainty¹⁰³—all of which can be challenging and uncomfortable. Transformative hope, therefore, is the embodiment of courage, creativity, and grounded action while advancing social change.

In the following Part, I explore how institutions can, at minimum, avoid hindering the cultivation of transformative hope and, at best, help foster this form of hope. It is worth emphasizing that the focus of this Article on transformative hope is not because measured hope does not serve human rights goals. To the contrary, actions based on measured hope have resulted in important changes. Instead, I focus on transformative hope because it encompasses two key dimensions of measured hope—action and groundedness—and because it can magnify the effects of measured hope when we add imagination and creativity to the dimensions of hope. Therefore, an exploration of how to foster and sustain transformative hope is also instructive in terms of measured

¹⁰⁰ Sofia Herrero Rico, *Peace Education in Times of Covid-19: Rethinking Other Kind of Logic from the Imagination, Fantasy, Creativity and Utopia*, in *CREATIVITY—A FORCE TO INNOVATION* 1, 7 (Pooja Jain ed., 2021).

¹⁰¹ *Id.* at 9-10 (explaining that imagination allows us to create “original, new and ingenious situations to be able to glimpse another way of seeing reality” and creativity is the “ability to create what seems improbable”).

¹⁰² MAY, *supra* note 97, at 39.

¹⁰³ KEN ROBINSON, *OUT OF OUR MINDS: LEARNING TO BE CREATIVE* 185 (rev. ed. 2011).

processes. What separates how these two operate in practice, however, is how measured hope can be incentivized by institutions and funders that would rather back low-risk initiatives where there is a guarantee of success while transformative hope must contend with institutional barriers.¹⁰⁴

The varying extent to which the different forms of hope embrace action, groundedness, imagination, and creativity affect their capacity for transformation of the human rights field. As shown above, not all forms of hope are effective. False hope does not embrace either action or groundedness. Latent hope is ineffective, though it could be molded into a more constructive form of hope, such as measured or transformative hope, if an individual has the tools and capacities necessary to take action. Disingenuous hope and reckless hope, on the other hand, are both harmful. Although a deeper, more intentional understanding of situational context could transform reckless hope into a more constructive form of hope, disingenuous hope cannot become constructive since it often involves an intentional misrepresentation of knowledge, not merely a lack of understanding. I argue, however, that measured hope and transformative hope serve important roles in the human rights ecosystem, with transformative hope being the most effective due to the additional dimension of imagination and creativity.

B. Cultivating Transformative Hope

While it may be obvious (or at least noncontroversial) that hope is valuable, what is not clear is how hope can be cultivated. This Subpart explores how advocates and educators can foster transformative hope on both the individual and the institution level.¹⁰⁵

Cultivating transformative hope requires advancing three interrelated goals: first, equipping individuals with the grounded knowledge necessary to foster hope; second, creating spaces where they are empowered to act; and finally, fostering the capacities of creativity and imagination which advocates can then access when they experience inevitable roadblocks.

¹⁰⁴ See, e.g., Joel R. Pruce, *THE MASS APPEAL OF HUMAN RIGHTS* 6 (2019) (“NGOs are too often driven by their tactics, tempted by expediency to utilize devices that become monotonous responses to instrumental needs.”); see also Abby Stoddard et al., *HUMANITARIAN OUTCOMES, NGOs AND RISK: HOW INTERNATIONAL HUMANITARIAN ACTORS MANAGE UNCERTAINTIES* 15 (2016) (finding that fiduciary risk management was most often emphasized in international NGOs’ policies, “with more written words devoted to financial procedures and precautions than any other risk area”).

¹⁰⁵ For further guidance on cultivating hope on an individual, group, or institutional scale, see Appendix: Reflection Questions below.

1. Grounded Knowledge

Knowledge, which includes an understanding of human rights challenges and how to address them, is the pathway to groundedness. As previously noted, advocates need to develop an understanding of the issues we seek to address before acting. Additionally, advocates need to understand and center the needs and priorities of impacted communities. Finally, they need to be equipped with the skills and capacities that will allow us to address these issues. Material knowledge and agentic knowledge are important components of such grounded knowledge. Advocates must have material knowledge to engage in well-informed and constructive human rights work. And agentic knowledge augments the effect of material knowledge to illustrate to advocates that change is possible. In this Section, I define material knowledge and agentic knowledge and explain how institutions can equip advocates with such knowledge.

a. Material Knowledge

Material knowledge is tied to the purpose of legal education—namely, to equip advocates with the knowledge, skills, and capacities necessary to solve complex, and seemingly intractable problems.¹⁰⁶ This includes an understanding of a range of tactics, tools, and strategies that can effect change, as well as an understanding of the context surrounding legal doctrine.¹⁰⁷ An understanding of such context, helps maintain—or

¹⁰⁶ See, e.g., Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 52 (2001) (“Context helps students understand what they are learning, provides anchor points so they can recall what they learn, and shows them how to transfer what they learn in the classroom to lawyers’ tasks in practice.”); Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 FORDHAM L. REV. 1929, 1929 (2002) (“[A] law school, as a professional school . . . has an educational responsibility to prepare its students to be competent practitioners, to socialize and acculturate and to charge its students with a responsibility for addressing malfunctions in the legal system.”).

¹⁰⁷ Sherri Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students’ Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 74 (2022) (arguing that law school should teach students to read opinions “in the broader context in which they arose” and assess them “as the product of a human, flawed and biased, who may or may not have been right, who may or may not have been aware of factors beyond the evidence in the case that drove the decision”); see also, e.g., Kurnisar Kurnisar et al., *The Development of Contextual-Based Textbook on Constitutional Theory and Law Course in Pancasila and Civic Education Study Program of Teacher Training and Education Faculty of Sriwijaya University*, 3 SRIWIJAYA UNIV. LEARNING & EDUC. INT’L CONF. 747, 749 (2018) (“Contextual approach is an approach that can make learning activities become more meaningful.”); Hernawaty Damanik et al., *The Learning of Civics Education Based on Contextual Teaching and Learning (CTL)*, INT’L CONF. ON EDUC. (ICE2) 2018: EDUC. & INNOVATION IN SCI. IN THE DIGITAL ERA, 2018, at 361, 364 (“[S]tudents learn better if what is learned is related to what is already known and with activities or events that occur around them.”).

even spur—hope for the role of public service among law students.¹⁰⁸ Law schools should equip students to consider not just what the law is but also what it should be.¹⁰⁹ Additionally, institutions should push law students to think more about what the roles of lawyers should be rather than merely what doctrinal skills and knowledge they should possess.¹¹⁰

To varying degrees, institutions have attempted to provide students and advocates with material knowledge. Bronwen Morgan and Amelia Thorpe, professors at the University of New South Wales, for instance, focus on the role of law in people's lives, rather than solely the form of substantive law, to encourage law students to develop an understanding of the relationship between law and society as well as to have students view themselves as active participants in this relationship.¹¹¹ More broadly, legal scholar Cara R. Shaffer's concept of "critical-contextual coursework" prompts students to think not merely of black letter doctrine itself but instead the history of law and the varying ways in which scholars and society have viewed the law.¹¹² Additionally, the role of clinical education has been to equip students with skills and tools to effect change.¹¹³

However, much work remains to be done with respect to whose knowledge is centered, and there are ongoing conversations within the human rights field about the need to engage in reflection and reform in this regard.¹¹⁴ An important critique of the human rights field is that it has a Eurocentric understanding of human rights knowledge and

¹⁰⁸ See Maranville, *supra* note 106, at 53-54, 57; see also Bronwen Morgan & Amelia Thorpe, *Place-Based Pedagogies of Hope*, 18 INT'L J.L. IN CONTEXT 427, 436-37 (2022).

¹⁰⁹ Keene & McMahon, *supra* note 107, at 74.

¹¹⁰ Daisy Hurst Floyd, *Lost Opportunity: Legal Education and the Development of Professional Identity*, 30 HAMLINE L. REV. 555, 556 (2007).

¹¹¹ Morgan & Thorpe, *supra* note 108, at 428, 433-34.

¹¹² Cara R. Shaffer, *Context at the Periphery: The Rise of the Critical-Contextual Legal Education Reform Movement*, 30 CARDOZO J. EQUAL RTS. & SOC. JUST. 55, 59 (2023).

¹¹³ See, e.g., Wizner, *supra* note 106, at 150 (characterizing law school clinics as "an integral part of the law student's legal education"); Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1003 (2004) (noting that clinical education can "sensitize" students to the reality faced by many low-income clients and provide students "a deeper understanding of their clients' lives and their relationship to the social, economic, and political forces that affected their lives, and help students develop a critical consciousness imbued with a concern for social justice"); Ivona Shushak Lozanovska et al., *Access to Justice Through Clinical Legal Education: A Case Study of the Faculty of Law, UKLO Bitola, North Macedonia*, 1 J. LEGAL & POL. EDUC. 19, 20 (2024) (explaining that clinical legal education benefits students by "helping to develop their skills," and it "serves as a social tool that improves access to justice for the most marginalized citizens," which in turn helps "make students aware of challenges to social justice and access to justice" in a way that doctrinal coursework does not).

¹¹⁴ Knuckey et al., *supra* note 63; Gulika Reddy, *Pedagogy as Advocacy: The Role of Anti-Racist and Decolonial Pedagogy in Advancing Social Justice*, in DECOLONISATION, ANTI-RACISM, AND LEGAL PEDAGOGY 205, 211-12 (Foluke I. Adebisi et al., eds., 1st ed. 2023).

expertise,¹¹⁵ and that it can treat non-Western knowledge as “simplistic or substandard to Eurocentric knowledge.”¹¹⁶ This negatively affects the transformative potential of human rights efforts.¹¹⁷ When advocates fail to engage in participatory forms of advocacy that center the leadership and knowledge of impacted communities, their advocacy or recommendations could misunderstand and potentially even undermine or harm the needs of rightsholders.¹¹⁸ Thus, in order for transformative hope to be effective, we need to adopt a decolonial approach to material knowledge.¹¹⁹

b. Agentic Knowledge

In this Article, I define agentic knowledge as the belief, grounded in an understanding of the history of social justice movements, that we can collectively influence change. Advocates and educators alike note that the motivation, energy, and hope that comes with agentic knowledge is indispensable to social justice work.¹²⁰ As Smadar Cohen-Chen and colleagues recount, the belief that a conflict is resolvable, even in the case of a protracted and seemingly intractable conflict, can induce hope.¹²¹

Given the importance of agentic knowledge in the human rights field, one way that our institutions can promote such knowledge is to deliberately share stories that generate hope, which can give people the impetus they need to continue their work.¹²² The stories in Jerry Sternin,

¹¹⁵ Reddy, *supra* note 114, at 211; José-Manuel Barreto, *Introduction: Decolonial Strategies and Dialogue in the Human Rights Field*, in *HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW* 3 (José-Manuel Barreto, ed., 2013).

¹¹⁶ Danielle Aldawood, *Decolonizing Approaches to Human Rights and Peace Education Higher Education Curriculum*, 4 INT’L J. HUM. RTS. EDUC. 1, 4 (2020).

¹¹⁷ *Id.* at 5.

¹¹⁸ Knuckey et al., *supra* note 63, at 15-16; cf. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511 (1991) (arguing that educators must incorporate discussions of race in legal curricula, particularly in constitutional law).

¹¹⁹ For examples of how to integrate decolonialization approaches into human rights education, see Reddy, *supra* note 114, at 214-17; Danielle Aldawood, *Decolonizing Approaches to Human Rights and Peace Education Higher Education Curriculum*, 4 INT’L J. HUM. RTS. EDUC. 1, 9-10 (2020).

¹²⁰ See, e.g., Michael Grinthal, *Power With: Practice Models for Social Justice Lawyering*, 15 U. PA. J. L. & SOC. CHANGE 44-60 (2011) (reviewing past social justice advocacy movements as models for contemporaneous public interest lawyering); Kari M. Grain & Darren E. Lund, *The Social Justice Turn: Cultivating “Critical Hope” in an Age of Despair*, 23 MICH. J. CMTY. SERV. LEARNING 45, 53 (2016) (“An underlying principle that guides these [social justice serving learning] programs is the promotion of a critically informed active citizenship that attends to social justice through gaining a personal connection to social issues, an understanding of the root causes, and a commitment to collective action against oppression and inequity.”).

¹²¹ Smadar Cohen-Chen et al., *supra* note 4, at 211 (“In the case of intractable conflict, which is often perceived as an entity of its own, changing the perception of the conflict from irresolvable to solvable can induce hope.”).

¹²² As noted by Hastings and McDermott, one “method is to infuse hopeful thinking into the subject matter that children are studying.” Diane McDermott & Sarah Hastings, *Children: Raising Future Hopes*, in *HANDBOOK OF HOPE: THEORY, MEASURES, & APPLICATIONS*,

Monique Sternin, and Richard Pascale's book, *The Power of Positive Deviance: How Unlikely Innovators Solve the World's Toughest Problems* provide an example of agentic knowledge: By documenting unlikely success stories, the authors introduce the concept of "positive deviance"—a concept that requires identifying "outliers" that succeed in spite of challenging material conditions.¹²³ This concept reaffirms that solutions to seemingly intractable projects do exist, that such solutions have been created by members of the community, and that innovators (or "positive deviants") have found success despite constraints and barriers.¹²⁴ Although this may sound simplistic, knowledge about how others have made a difference is instructive insofar as it prompts reflection on our own tactics and methods and inspires us to imagine and work towards a more just world.¹²⁵

Currently, the human rights field could do more to prioritize the teaching and documentation of agentic knowledge. A critical contribution of the human rights field is its commitment to documenting and exposing abuses.¹²⁶ As a result, "positive communication" or agentic

supra note 22, at 185, 188. They explain: "There are many books for young people that feature protagonists who are brimming with high agency and pathways." *Id.* As noted by Joe Aharfi in the context of detention: "More positive stories rooted in narratives of hope will help persuade people to be hopeful rather than hopeless about the rights of people in detention. Such a shift towards hope-based communication will help advocates avoid compassion fatigue and give them the energy to sustain their work." Joe Aharfi, *Advocacy for Asylum Seekers: Theory, Practice, and Bending Toward Justice* (MLS Hum. Rts. Working Paper No. 1 2022), https://law.unimelb.edu.au/__data/assets/pdf_file/0005/4627139/Working_Paper_1-Joe-Afhari.pdf.

¹²³ RICHARD PASCALE ET AL., *THE POWER OF POSITIVE DEVIANCE: HOW UNLIKELY INNOVATORS SOLVE THE WORLD'S TOUGHEST PROBLEMS* 3-4 (2010). I was introduced to this book in when I was a student in law school by Susan Sturm. She teaches a class on "lawyering for change" that was designed to introduce students to a range of change agents, each with their own unique theory of change. One of the readings that stayed with me was the one on "positive defiance." I not only found utility in this concept, but I was also energized and inspired by the class itself and proceeded to add the lessons from the class to my toolbox. This class is a powerful example of the value of agentic knowledge.

¹²⁴ *Id.* at 3-4.

¹²⁵ Kathryn Sikkink, a human rights scholar, has explained something similar: "[T]he knowledge that you can make a difference in the world give people the energy to keep working. Knowing more specifically how human rights groups have made a difference can teach us more about effective strategies and tactics to use in the future." Kathryn Sikkink, *A Cautionary Note About the Frame of Peril and Crisis in Human Rights Activism*, in *RIISING TO THE POPULIST CHALLENGE: A NEW PLAYBOOK FOR HUMAN RIGHTS ACTORS* 171, 180 (César Rodríguez-Garavito & Krizna Gomez eds., 2018). Rehm describes the value of sharing examples of activism that has created change—specifically, she notes that such examples give students the sense that we do have the power to effect change and creating experiences that "allow students to imagine and possibly even experience what Webb calls 'transformative hope,' the kind if hope that inspires individuals to envision a better world and work for justice." Rehm, *supra* note 60, at 211 (citation omitted).

¹²⁶ OGR Admin, *A Guide to Hope-Based Communications*, OPEN GLOBAL RTS. (Feb. 19, 2019), <https://www.openglobalrights.org/hope-guide/>.

knowledge “does not come naturally.”¹²⁷ In fact, precisely because we have more knowledge than we have had in the past, many people believe that we are in the worst moment in history.¹²⁸ In other words, the field has been successful at raising awareness about the myriad rights abuses globally,¹²⁹ but, as human rights strategist Thomas Coombes explains, the field needs to do more than merely rely on fear—it needs to offer promise and hope.¹³⁰ He describes hope as a “pragmatic approach” that can be utilized by advocates to rhetorically shift their orientation from problem-centered to solution-focused.¹³¹ Coombes posits that it will be harder for advocacy targets, including governments, to explain why they did not implement solutions than it will be to offer an explanation as to why they were unable to address a problem.¹³² He uses the environmental and LGBTQ+ movements to demonstrate this shift toward solution-based efforts. In the case of the environmental movement, the shift occurred when the movement recognized the difference between narratives that resulted in despondency as opposed to action.¹³³ And the shift occurred in the LGBTQ+ movement when activists working towards marriage equality moved beyond documenting discrimination and began mobilizing people to show support for shared values like love, equality, and family.¹³⁴

Coombes’s theory can also be applied to pedagogy. In fact, my co-teachers and I intentionally implemented this perspective shift in the classroom a few years ago in response to student despondency during class sessions on critiques of the human rights field.¹³⁵ A core aspect of my teaching mission is ensuring that the human rights field engages in ethical, critically responsive advocacy. However, during these critique sessions, students often expressed a feeling of “stuckness”—an effect of latent hope¹³⁶—along with uncertainty as to how to engage in human rights work in an ethical, transformative way. Others questioned

¹²⁷ *Id.*

¹²⁸ SIKKINK, EVIDENCE FOR HOPE, *supra* note 14, at 14.

¹²⁹ *Id.*

¹³⁰ Thomas Coombes, *How to Change Narratives with Hope*, MEDIUM (Nov. 11, 2019), https://medium.com/@the_hope_guy/how-to-change-narratives-with-hope-52f8a15a3b02.

¹³¹ Dickon Bonvik-Stone, *Hope-Based Communications with Thomas Coombes*, COMMUNICATING CLIMATE CHANGE (July 1, 2024), <https://communicatingclimatechange.com/podcast/hope-based-communications-with-thomas-coombes>.

¹³² *Id.*

¹³³ Thomas Coombes, *A New Green Wave of Hope*, GREEN EURO. J. (Jan. 16, 2024), <https://www.greeneuropeanjournal.eu/a-new-green-wave-of-hope/>.

¹³⁴ Thomas Coombes, *Hope, Not Fear: A New Model of Communicating Human Rights*, MEDIUM (Dec. 10, 2017), https://medium.com/@the_hope_guy/hope-not-fear-a-new-model-for-communicating-human-rights-d98c0d6bf57b.

¹³⁵ This refers to my work at Columbia Law School that I have continued at Stanford Law School.

¹³⁶ *See supra* Part I.B.

whether they should engage at all, especially if any form of action could cause further harm. My colleagues and I realized that teaching critiques alone would not provide constructive, agentic knowledge. In response, we combined the sessions on critiques with lessons on transformative advocacy, the latter of which offered agentic knowledge, to cultivate a space where students could grapple with critiques of the field while simultaneously engaging with examples of ethical, transformative modes of advocacy that could inform or guide their action.

The use of agentic knowledge has also played a role in our clinic practice, as partners have often actively asked for documentation of examples of successful advocacy in other contexts. In one of our projects, for example, which focused on a conflict-affected region,¹³⁷ our project partners asked us to conduct research on the Northern Ireland peace process to inform their work. To that end, in 2023, during the twenty-fifth anniversary of the Good Friday Agreement,¹³⁸ my students conducted interviews with civil society, academics, and political actors in Northern Ireland to try to uncover lessons from the work advocates did leading up to, during, and after the peace agreement was signed. Our report documented the notable comparisons between the peace processes in both contexts and identified strategies and lessons from the Northern Ireland context that could apply to our partners' current efforts. Our partners then used this research to design a new dialogue framework and allowed them to complement their existing approaches with new methodologies and tactics.

Notably, the people we interviewed in Northern Ireland revealed that they themselves had benefited from agentic knowledge in the lead up to peace agreement. They had engaged in transnational learning and exchange with groups in South Africa who had shared their experiences with advocacy during and after the apartheid struggle. Many of the interviewees talked about the value of "thinking outside of your situation," while seeking possible solutions.

Our clinic has also used agentic knowledge to support the work of our partners who were developing a range of efforts to address the impact of the relevant conflict on education. In response to our partners' request for a comparative report on what human rights organizations have done to address continual disruptions to education in conflict-affected regions, we conducted a fact-finding investigation, drafted a comparative report, and connected our partners with practitioners in two other regions similarly impacted by conflict. Learning from other

¹³⁷ The name of this region is kept anonymous for confidentiality reasons.

¹³⁸ *25 Years of the Good Friday Agreement: 2023 Marks the 25th Anniversary of the Good Friday Agreement*, IRELAND, <https://www.ireland.ie/en/25-years-of-the-good-friday-agreement/> (last visited Oct. 4, 2024).

practitioners' successes and challenges served as a useful source of inspiration as our partners developed their own strategy and approach. This resulted in our partners developing a new initiative to address ongoing disruptions to education by creating spaces for learning outside of formal educational institutions. We also connected them to education experts who helped create the curriculum for these spaces.

Currently, our clinic is developing a series of case studies that illustrate how LGBTQ+ movements around the world have recovered from setbacks. This work was prompted by practitioners who were experiencing setbacks and were keen to learn lessons from other advocates around the world. Through interviews with other advocates, we are seeking answers to the following questions: What are some of the challenges and setbacks advocates or communities have experienced? How have they responded to them? What tactics and theories of change have worked when traditional human rights tactics have fallen short? And how have advocates remained hopeful, resilient, and creative in the face of these setbacks? The responses we have received offer examples of how other movements have succeeded in dark times, and also examples of how other movements have sustained hope in dark times. Our goal is that the process of creating this report will help facilitate transnational exchange of agentic knowledge and create networks of solidarity amongst LGBTQ+ advocates around the world. This form of solidarity through an exchange of agentic knowledge can enhance the effectiveness of the human rights field.

2. Action

Action is the second dimension or component of transformative hope.¹³⁹ Although some may perceive action as limited to direct or

¹³⁹ While there are differing definitions of hope, an element that is common across multiple definitions is the connection to agency and action. See Duncan-Andrade, *supra* note 46, at 184 ("Hope should be thought of as "control of destiny," an actively present sense of agency to manage the immediate stressors in one's daily life."). Described as an "activating force" that enables people to set and work towards goals despite barriers to progress, hope can overcome despair, hopelessness, and generate new possibilities. See Lane & Chapman, *supra* note 7, at 121 (noting that hope has been defined as "an activating force that enables people, even when faced with the most overwhelming obstacles, to envision a promising future and to set and pursue goals" (quoting Martha R. Helland & Bruce E. Winston, *Towards a Deeper Understanding of Hope and Leadership*, 12 J. LEADERSHIP & ORG. STUDS. 42, 43 (2005))). Ludema and colleagues define hope as having four key aspects that contribute to its transformative character: It is born in relationship; inspired by the conviction that the future is open and can be influenced; sustained through moral dialogue; and generative of positive affect and action. James D. Ludema et al., *Organizational Hope: Reaffirming the Constructive Task of Social and Organizational Inquiry*, 50 HUM. RELATIONS 1015, 1030 (1997); see also Helland & Winston, *supra*; Jacobs, *supra* note 5, at 792 ("[D]espair, then, is not inevitable, but the temptation to despair is and this is why hope is so important. Hope helps us work against this temptation so that we can see the future as possibility rather than as historical

overt action, building knowledge bases and choosing not to act—in lieu of overt action—are also valuable forms of action, especially in cases where solidarity and advocacy are not welcome. As explained in this Section, it is important for the field to reflect on and recalibrate what qualifies as action. This Section sets out a pathway to action that takes into consideration the goals of action as well as the pace and non-linearity of progress. It offers a reimagination of existing conceptions of action, progress, and success that can restrict our ability to engage in transformative advocacy.

a. Goals of Action

The identification of goals is a critical first step to begin action because goals are the “anchors” of hope.¹⁴⁰ Without actionable goals, hope can be without direction or wind up as what the typology classifies as “latent.”¹⁴¹ As a result, advocates need to identify goals, take action, reflect on the action, and then revisit and even shift goals as needed.¹⁴² These steps facilitate the development of pathways to achieve goals—enhancing an individual’s perception of their ability to succeed.¹⁴³ Political scientist Charles Richard Snyder describes this positive self-orientation as agentic thinking, underscoring the ways in which an individual’s positive self-perception of goal attainment encourages them to persist in the face of impediments.¹⁴⁴ It is important to note, however, that an anchored goal does not require the certainty of success—a metric that institutions often mistakenly establish in their incentive structures.¹⁴⁵ After all, in the context of transformative hope, success is possible but not guaranteed. Indeed, in contrast to measures that demand certainty, Snyder explains that even “hopeful goals” have uncertainty and that “absolute certainty” does not lead to hope.¹⁴⁶ In the same vein, “truly

inevitability.”); Jacob, *supra* note 5, 793 (explaining that hope involves “piercing through time by seeing the alternatives, the possibilities available to us in moving beyond a particular limit situation”).

¹⁴⁰ Snyder, *supra* note 22, at 9.

¹⁴¹ See *supra* Part II.B.

¹⁴² This is also in line with traditional modes of clinical pedagogy, where clinicians encourage students to plan, do, and reflect as a part of their practice. Madalyn Wasilczuk, *The Clinic as a Site of Grounded Pedagogy*, 29 CLIN. L. REV. 405, 408 (2023) (“Clinicians coach students to plan, do, and reflect as a matter of course.”).

¹⁴³ Charles Richard Snyder et al., *Hope Theory: A Member of the Positive Psychology Family*, in HANDBOOK OF POSITIVE PSYCHOLOGY 257, 258 (Charles Richard Snyder & Shane J. Lopez eds., 2002).

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., Brian Phillips et al., Dialogue, *Funding Effective Human Rights Work: A Conversation Between Monette Zard and Sara Hossain*, 8 J. HUM. RTS. PRAC. 316, 317 (2016) (explaining that contemporary human rights funding is “very goal driven in a way that is very difficult to work around in terms of either human rights or justice” because “[y]ou can’t really deliver the concrete deliverables” in these contexts).

¹⁴⁶ Snyder, *supra* note 140, at 9.

untenable goals” are not particularly helpful.¹⁴⁷ And as others have observed, something completely outside the realm of possibility is a wish, not hope.¹⁴⁸ James Averill and Louise Sundarajan, psychologists and scholars, make a similar claim: To them, hope “involves an uncertain future.”¹⁴⁹ Averill and Sundarajan explain that “hope may be dismissed as vain or foolish” if “there is little or no chance of obtaining a goal,” but they also note that “if success is a near certainty, hope may be dismissed as mere affectation.”¹⁵⁰

Transformative hope is the embodiment of what lies between certainty and impossibility. Achieving world peace and eliminating all forms of discrimination in a short period of time are not goals that can lead to realistic pathways for change. At the same time, setting an extremely attainable and unambitious goal—like conducting a single workshop on discrimination—is unlikely to generate the kind of momentum that is needed to effect transformative change. Instead, goals that animate the imagination and reflect the needs of impacted communities should guide our action. This may involve taking risks. Human rights advocates have described the value of stable and long-term support that can foster such risk-taking.¹⁵¹ And yet, institutional incentives repeatedly privilege advocacy that is guided by certainty. Often, funding structures in the human rights field serve as barriers to identifying truly imaginative goals as they may be perceived as less capable of producing “deliverables.”¹⁵²

¹⁴⁷ *Id.*

¹⁴⁸ Stockdale, *supra* note 15, at 108 (“I can wish, for example, that the Holocaust had not happened. But I cannot hope that it did not happen. I cannot hope that the Holocaust had not happened because I understand that my backward-looking desire cannot be fulfilled.”).

¹⁴⁹ Averill & Sundarajan, *supra* note 98, at 135.

¹⁵⁰ *Id.*

¹⁵¹ José Guilherme F. de Campos & Lucia Nader, *Taking Chances and Innovating in Human Rights*, CANDID LEARNING (July 18, 2016), <https://learningforunders.candid.org/content/blog/taking-chances-and-innovating-in-human-rights/>.

¹⁵² BETHANY ECKLEY & JENNIE RICHMOND, CIVICUS, UNDERSTANDING THE RESOURCING LANDSCAPE FOR SMALL AND INFORMAL CIVIL SOCIETY GROUPS IN THE GLOBAL SOUTH 6 (2019) (“Driven by their desire for quantifiable results, donors are tending to fund short-term, service delivery projects rather than offering longer-term, strategic funding or funding more controversial work that seeks to address the root causes of poverty through advocacy or mobilisation.”); Heidi Nichols Haddad & Lisa McIntosh Sundstrom, *Foreign Agents or Agents of Justice? Private Foundations, Backlash Against Non-Governmental Organizations, and International Human Rights Litigation*, 57 LAW & SOC’Y REV. 12, 18 (2023) (explaining that “[t]he perverse incentives of funding can also shape NGO behavior to conform to donor priorities, or ‘measurable’ results for donors at the expense of generating agendas based on local needs and priorities, or those that may be more transformative” and noting increased calls “to shift power from donors through ‘localizing’ and ‘decolonizing’ development aid” (citations omitted)); see also Dustin N. Sharp, *Pragmatism and Multidimensionality in Human Rights Advocacy*, 40 HUM RTS. Q. 499, 503 (2018) (“A common thread that unites many human rights pessimists is a general skepticism about the ability of law to foster positive change for human rights, and an argument that rigid, law-based approaches need to give way to alternatives that are more flexible, pragmatic, or otherwise less law-centered.”).

We need funders who are willing to support projects that could fail. Otherwise, the scale of ambition of human rights advocacy will never match the scale of the challenges it is up against. To further complicate this scenario, advocates themselves sometimes identify goals based on pragmatism or their expertise rather than the expressed needs of impacted communities.¹⁵³ Such practices reflect a paternalistic attitude that advocates are better positioned to determine goals and solutions.¹⁵⁴ A recent Advancing Human Rights report would define this circumstance as part of the “trust gap,” wherein non-profits institutions, typically based in the Global North, define the goals and expect local actors to “fit into their framework.”¹⁵⁵ By contrast, in our clinic, we begin conversations with project partners with questions about their goals—even if there is uncertainty about whether we can achieve them.¹⁵⁶ After we have identified their aspirational goals, we jointly identify how we can collectively work towards those goals.

¹⁵³ Susannah Mayhew et al., *Balancing Protection and Pragmatism: A Framework for NGO Accountability in Rights-Based Approaches*, 9 HEALTH & HUM. RTS. 180, 200 (2006) (discussing the authors’ “develop[ment of] a simple, practical framework of activities and indicators” to promote “a rights-based approach to health service delivery” and concluding that “[d]espite the weak capacity of [their] Pakistani partners,” this framework “enabled the protection of clients to be implemented in a pragmatic way” even if “the result may not be ideal”); Alice Robinson, *Speaking with a ‘Soft Voice’: Professional and Pragmatic Civilities Among South Sudanese NGO Leaders*, 11 PEACEBUILDING 257, 258 (2023) (discussing an NGO leader’s use of pragmatism to navigate a region of political repression). *See generally*, JACK SNYDER, HUMAN RIGHTS FOR PRAGMATISTS (2022) (advocating for a “pragmatic approach to human rights,” wherein “power” comes first, and “rights follow”). *But see* Geoff Dancy, *Human Rights Pragmatism: Belief, Inquiry, and Action*, 22 INT’L RELATIONS 512, 530-31 (2016) (“[T]o be methodologically pragmatic, human rights observers need to replace obsession with statistically supported micro-causal relationships in favor of rational analyses that can handle the notion of both negative *and* positive unintended consequences. Many scholars are already engaged in this kind of work.”).

¹⁵⁴ Such practices mirror Andrew Carnegie’s belief that “the ‘poorer brethen’ cannot be expected to know what they need to improve their lot or be trusted to use unrestricted funds responsibly,” so “those with power and wealth are best positioned to devise solutions.” Mark Kramer & Steve Phillips, *Where Strategic Philanthropy Went Wrong*, 22 STAN. SOC. INNOVATION REV. 28, 31 (2024), <https://ssir.org/articles/entry/strategic-philanthropy-went-wrong>.

¹⁵⁵ KELLEA MILLER & RACHEL THOMAS, ADVANCING HUM. RTS., THE TRUST GAP: THE TROUBLING LACK OF DIRECT, FLEXIBLE FUNDING FOR HUMAN RIGHTS IN THE GLOBAL SOUTH AND EAST 64 (2023); *see also* Ezequiel González-Ocantos & Álvaro Morcillo Laiz, *Philanthropic Foundations and Transnational Activist Networks: Ford and the Inter-American Institute of Human Rights*, 67 INT’L STUDS Q., at 1, 4-5 (2024).

¹⁵⁶ Relatedly, in 2012, the Global Fund adopted a new funding model to focus on “predictable and flexible funding.” Krista Lauer, Voices, *New and Improved? Examining the Global Fund’s New Funding Model*, OPEN SOC’Y FOUNDATIONS (May 24, 2013), <https://opensocietyfoundations.org/voices/new-and-improved-examining-global-fund-s-new-funding-model>. Under this model, “the Fund will indicate to each country the total amount of money they can expect at the outside of the proposal process, with an opportunity to get more support through an additional ‘incentive’ funding pool.” *Id.* And as a condition of funding, the organization requires “broader participation by stakeholders, including government agencies, donors, civil society, and affected communities,” in an attempt to “foster[] increased participation by civil society and marginalized communities at each of the key stages.” *Id.*

b. Pace and Non-Linearity of Progress

Within this space between certainty and impossibility arises a clear directive with respect to the pace of progress: the normalization of non-linear action.¹⁵⁷ Highlighting success stories within our institutions is critical to cultivating agentic knowledge. It is important to not only emphasize what individuals did and achieved, but also to share the challenges they encountered and overcame, as well as the initiative and energy that they employed to navigate the sometimes agonizingly slow and circuitous path those challenges necessitated.¹⁵⁸ As Billy Wayne Sinclair, a formerly incarcerated person, explains, “[c]hange did not come with a glorious, religious awakening. It came in painful increments.”¹⁵⁹

Such incremental progress is clear from historical examples of institutional change, which suggests a need to embrace an iterative process of change and redefine success to include setbacks. In his essay, *The Real Rosa Parks*, Paul Rogat Loeb, a social and political activist, explains that the recognition that change is the result of a cumulative set of actions, including those that fail, can be more empowering than the unrealistic notion that change happens overnight and with ease:

Park’s story conveys a far more empowering moral. She begins with seemingly modest steps. She goes to a meeting, and then another, helping build the community that in turn supported her path. Hesitant at first, she gains confidence as she speaks out. She keeps on despite a profoundly uncertain context, as she and others act as best they can to challenge deeply entrenched injustices, with little certainty of results. Had she and others given up after her tenth or eleventh year of commitment, we might never have heard of Montgomery.

Park’s journey suggests that change is the product of deliberate, incremental action, whereby we can join together to try to shape a better world. Sometimes our struggles will fail, as did many earlier efforts of Parks, her peers, and her predecessors. Other times they may bear modest fruits. And at times they will trigger a miraculous outpouring of courage and heart - as

¹⁵⁷ Rehm, *supra* note 60.

¹⁵⁸ McDermott & Hastings, *supra* note 122, at 189.

¹⁵⁹ Billy Wayne Sinclair, Politics, *The Road to Redemption*, MOTHER JONES (Dec. 13, 2005), <https://www.motherjones.com/politics/2005/12/road-redemption/>; PAUL ROGAT LOEB, THE IMPOSSIBLE WILL TAKE A LITTLE WHILE: A CITIZEN’S PERSEVERANCE AND HOPE IN TROUBLED TIMES 350 (2014).

happened with her arrest and all that followed. For only when we act despite all our uncertainties and doubts do we have the chance to shape history.¹⁶⁰

Rosa Park's journey is a realistic reflection of the messy and slow process of change, showcasing a need to recalibrate expectations of what progress actually looks like. At the institutional level, changing incentive structures to account for incremental success and normalizing setbacks as an integral part of progress is crucial for cultivating the action component of transformative hope. Setbacks, as explained by an LGBTQ+ activist with whom we collaborated on a clinic project, are in fact a sign of progress.

Additionally, progress may be narrowly understood as the advancement of rights. Although human rights advocates strive to build on existing rights, we are working equally as hard to ensure that there is no backsliding of rights. To take just one example, consider the passage of an Act in a country where homosexuality was already criminalized worsened the state of LGBTQ+ rights in that country.¹⁶¹ The new Act imposed the death penalty for 'aggravated' homosexual practices and imposed a 'duty to report' penalty on individuals who provide healthcare and other essential services to members of the LGBTQI+ community. In response, our human rights clinic, in collaboration with a leading human rights organization in the region, drafted materials to raise awareness about the act and supported strategic litigation efforts aimed at promoting the rights of the LGBTQI+ community. Our immediate goal was to make sure we did not move backwards in terms of rights, and engaging in this form of human rights work required us to re-imagine what progress or success means.

3. *Imagination and Creativity*

The key capacities of transformative hope include the capacities for creativity and imagination. This Section first explains these capacities and then sets out how they can be cultivated.

Legal scholars Kathryn Abrams and Hila Keren argue that hope requires the ability to imagine new possibilities.¹⁶² Psychologists Averill

¹⁶⁰ Paul Rogat Loeb, Politics, *The Real Rosa Parks*, MOTHER JONES (Oct. 31, 2005), <https://www.motherjones.com/politics/2005/10/real-rosa-parks/>; LOEB *supra* note 159, at 341-42.

¹⁶¹ The country is kept anonymous for confidentiality reasons.

¹⁶² Abrams & Keren, *supra* note 2, at 4 (noting that hope needs "the ability to imagine new possibilities not encompassed by one's present condition; a sense of agency sufficient to consider oneself capable of pursuing, and attaining, distant objectives; and adequate imaginative, strategic, and material resources to develop, assess, and implement means for realizing such goals").

and Sundarajan posit that in order to be effective, hope needs to be creative.¹⁶³ Some people treat imagination and creativity as synonymous and regard both of them as the ability to produce new ideas,¹⁶⁴ while others argue that although they are closely related, imagination and creativity are distinct capacities.¹⁶⁵ I suggest that they are related, but not identical, processes that are both needed for transformative hope.

Social and political theorist Mihaela Mihai proposes that imagination allows us to recover from failure by arriving at alternative possibilities.¹⁶⁶ According to educational psychology scholars Ronald A. Beghetto and Kathy L. Schuh, imagination is the ability to generate new possibilities and ideas.¹⁶⁷ Others suggest that creativity is the ability to use our imagination and undertake the process to bring those ideas to

¹⁶³ Averill & Sundarajan, *supra* note 98, at 135 (“Hope involves an uncertain future, but the relation is curvilinear, not linear. If there is little or no chance of obtaining a goal, hope may be dismissed as vain or foolish; conversely, if success is a near certainty, hope may be dismissed as mere affectation. In the words of Lynch hope is, or should be, realistic imagination.” (citation omitted)); *id.* at 127 (“Hope must be creative if it is to be effective. This means that an episode of hope can be evaluated in terms of novelty (whether it reveals new approaches or solutions to a problem) and authenticity (whether it reflects a person’s own values and interests).”).

¹⁶⁴ JACQUELINE D. WOOLLEY ET AL., CREATIVITY AND THE WANDERING MIND: SPONTANEOUS AND CONTROLLED COGNITION 181 (2020) (“At a very basic level, creativity can be considered the ability to produce novel or original ideas.”)

¹⁶⁵ Dustin Stokes, *The Role of Imagination in Creativity*, in THE PHILOSOPHY OF CREATIVITY (Elliott Samuel Paul & Scott Barry Kaufman eds., 2014) (“Even if there is a distinction to be made between ‘being creative,’ on the one hand, and the mental state of imagining, on the other, there is no margin in denying an important link between the two.”).

¹⁶⁶ Mihai argues that “[t]he faculty of the imagination intervenes in the twin process of building a coherent narrative of our past and of experimenting with strategies and potential trajectories into the future we hope for. . . . [H]ope mediates our relationship with our future, in light of our past.” Mihaela Mihai, *Understanding Complicity: Memory, Hope and the Imagination*, 22 CRIT. REV. INT’L SOC. & POL. PHIL. 504, 508 (2019) (citations omitted). Therefore, she claims, “[i]n hoping, we explore imaginatively what we might achieve through our actions, notwithstanding our limitations, our fears and the negative evidence available.” *Id.* This means that we “continue to have hopes for as long as we believe in the possibility of a future,” and when “we fail, imagination helps us refocus our hopes on alternative objects These processes . . . do not happen in a vacuum: hope is always situated.” *Id.* (citations omitted).

¹⁶⁷ Ronald A. Beghetto & Kathy L. Schuh, *Exploring the Connection Between Imagination and Creativity in Academic Learning*, in CREATIVITY AND THE WANDERING MIND: SPONTANEOUS AND CONTROLLED COGNITION 249, 250 (David D. Preiss et al. eds., 2020); see also Alex, *The Crucial Difference Between Imagination and Creativity*, BASIC ARTS, <https://basicarts.org/the-crucial-difference-between-imagination-and-creativity/> (last visited July 28, 2024) (“Imagination can be best described as the ability to picture something that doesn’t exist.”); Quin Jef, *Imagination vs. Creativity (10 Examples + How to Use Both)*, JEF QUIN, <https://jefquin.com/blog/imagination-vs-creativity-examples-how-to-use> (last visited July 28, 2024) (“Imagination is the ability to think of and vividly visualize ideas, new perspectives, interesting connections and goals. Creativity is the ability to make and turn ideas, things, connections and goals into a tangible reality. . . . [I]magination feeds creativity, and creativity fosters and reinforces imagination.” (emphasis omitted)).

life.¹⁶⁸ Creativity allows us to generate seemingly improbable outcomes, drawing on imagination to create new possibilities.¹⁶⁹

In order to instill a culture of imagination and creativity on the institutional level, creative and imaginative capacities must be cultivated in every individual within the institution.¹⁷⁰ In this Section, I explore how this can be done by committing to a culture of imagination and creativity, fostering generative collaboration among colleagues and across disciplines, and recognizing that creative output takes time.

a. Genuine Commitment

Before an institution can foster the imagination and creativity necessary to employ transformative hope, it must first decide whether cultivating that type of hope is truly an institutional goal—or a mere buzzword. In fact, project goals and strategies of human rights institutions are often predetermined, and the role of staff can all too easily become one of implementing, rather than determining, goals and strategies.¹⁷¹

¹⁶⁸ Etienne Pelaprat & Michael Cole, “*Minding the Gap*”: *Imagination, Creativity and Human Cognition*, 45 INTEGRATIVE PSYCH. BEHAV. SCI. 397, 399 (2011) (“We emphasize that creativity is literally a form of making, the making of ‘the whole world of culture’ based on the products of imagination.”); Alex, *supra* note 167 (“It is not the ability to ‘dream something up’ (valuable as that may be), but rather the ability to shepherd something into existence. To manage its growth, and to allow it to become the most vibrant and life-filled version of what it could be.”); Mark Carter, *Tap into Your Creative Genius*, HARV. BUS. REV., (Jan. 22, 2021), <https://hbr.org/2021/01/tap-into-your-creative-genius> (“Simply put, to be creative is to use our imaginations, which most of us do every single day.”); *Imagination and Creativity: It’s the Work of Childhood!*, DISCOVERY BLDG. SETS (Dec. 23, 2019), <https://discoverybuildingsets.com/imagination-and-creativity/>.

¹⁶⁹ Herrero Rico, *supra* note 100, at 9-10 (“[C]reativity has been considered the ‘ability to create what seems improbable’; While creativity is hard to pin down precisely, it’s generally considered as the ability to create something using the imagination. Creativity is the act of creating something in the real world, while imagination deals with unreal thoughts that are free from the confines of reality.”).

¹⁷⁰ ROBINSON, *supra* note 103, at 191 (“The first role of the creative leader is: To facilitate the creative abilities of every member of the organization.”); *id.* at 228 (“Teaching for creativity is about facilitating other people’s creative work. It involves asking open-ended questions where there may be multiple solutions; working in groups on collaborative projects, using imagination to explore possibilities; making connections between different ways of seeing; and exploring the ambiguities and tensions that may lie between them.”). In general, scholars contend that organizations can enhance creativity in the workplace by “provid[ing] adequate psychological support to their employees” so that they can “feel valued and cared for,” which can enhance their work engagement. Aneeq Inam et al., *Fostering Creativity and Work Engagement Through Perceived Organizational Support: The Interactive Role of Stressors*, 11(3) SAGE OPEN 1, 10-11 (2021). Such support can come from “measures to motivate employees intrinsically,” including “maximiz[ing] challenge stressors and minimiz[ing] hinderance stressors.” Inam et al., *supra*, at 11.

¹⁷¹ See, e.g., Gonzalez-Ocantos & Laiz, *supra* note 155, at 12 (discussing the Ford Foundation’s “micromanagement repertoire” in its staffing and grant decisions and suggesting “that foundations operate as norm entrepreneurs”); David L. Gibson, *Hurdling Creativity Barriers: A Top-Down Approach for Encouraging Innovation in the Workplace*, REGENTS UNIV. (2005), <https://www.regent.edu/journal/leadership-advance-online/>

Such rigidity of an existing institutional vision can result in situations where leaders invite staff to invent “new ideas” as a purely pro forma exercise.¹⁷² In order to foster imagination and creativity, it is important to create an environment where idea generation is not a perfunctory request but an ongoing practice where ideas are encouraged, acted upon, and rewarded.¹⁷³ This will lead to greater investment in the idea generation process.

b. Collaboration

Another way for an institution to foster creativity is through collaboration.¹⁷⁴ Collaboration is a crucial feature of transformative hope because, rather than being about individual aims or ambitions,

hurdling-creativity-barriers-encouraging-workplace-innovation (discussing barriers to creativity, such as fear, poor leadership, bureaucratic red tape, pressure, and biases); see also MILLER & THOMAS, *supra* note 155 (critiquing human right organizations’ funding practices).

¹⁷² See, e.g., Theodore Levitt, *Creativity is Not Enough*, HARV. BUS. REV. (Aug. 2002), <https://hbr.org/2002/08/creativity-is-not-enough> (“The trouble with much creativity today . . . is that many of the people with the ideas have the peculiar notion that their jobs are finished once their ideas have been suggested” without “any responsible suggestions regarding how the whole thing is to be implemented and what’s at stake.”).

¹⁷³ Devin Jopp, *Igniting Imagination in the Workplace*, FORBES (Dec. 13, 2022), <https://www.forbes.com/sites/forbesnonprofitcouncil/2022/12/13/igniting-imagination-in-the-workplace/> (“In addition to leaving space for failure, you can reward imagination. When you see someone trying a creative solution to a problem, share it with the organization and reward it. This is how you walk the walk and create a culture that’s supportive of imagination.”); see also Levitt, *supra* note 172 (“Since business is a uniquely ‘get things done’ institution, creativity without action-oriented follow-through is a uniquely barren form of individual behavior.”); Susie Atherton et al., *Penal Arts Intervention and Hope: Outcomes of Arts-Based Projects in Prisons and Community Settings*, 102 PRISON J. 217, 225 (2022) (“In the context of the prison setting, the engagement offered a safe space for novel activities,” and such “creativity was cited as important, as well as the sense of purpose and meaning these activities had to them”). For an example of such a space within the human rights field, see Ed Rekosh, *Innovation: ‘Conventional Human Rights Structures and Practices May No Longer Be Optimal or Sufficient,’* RIGHTS CoLAB (Oct. 13, 2021), <https://rightscolab.org/innovation-conventional-human-rights-structures-and-practices-may-no-longer-be-optimal-or-sufficient> (explaining that the Rights CoLab was created to “look[] at current challenges in human rights from three very different perspectives” held by its co-founders and “create a space where [they] could continue that dialogue and bring in others to foster experimentation and new approaches”).

¹⁷⁴ César Rodríguez-Garavito, *The Future of Human Rights: From Human Rights: From Gatekeeping to Symbiosis*, 11 HUM. RTS. IN MOTION 499, 507 (2014) (“As in any ecosystem, the strength of the human rights field will depend on symbiosis, that is, the interaction among its different actors, to the advantage of the latter and the broader cause they share. Collaboration and complementarity will thus become even more important to the survival and thriving of the field as a whole.”); Teresa M. Amabile & Mukti Khaire, *Creativity and the Role of the Leader*, HARV. BUS. REV. (Oct. 2008), <https://hbr.org/2008/10/creativity-and-the-role-of-the-leader> (“As leaders look beyond the top ranks for creative direction, they must combat what Diego Rodriguez, a partner at IDEO and the leader of its Palo Alto, California, office, calls the ‘lone inventor myth.’ Though past breakthroughs sometimes have come from a single genius, the reality today is that most innovations draw on many contributions.”).

hope prioritizes joint goals.¹⁷⁵ As Professor Dale Jacobs has observed, hope is “social in nature,”¹⁷⁶ focused on a shared or collective future, not an individual one.¹⁷⁷ This view is reflected in other disciplines including scholarship on leadership, in science, and in technological development. Hope can, for example, serve as an organizing tool to bring people together around common values or goals.¹⁷⁸ And it is often more effective to collaborate rather than tackle a problem alone. In fact, in their article about organizational hope, James Ludema and his co-authors explain that hope is “most generative when it is inclusive” and that action is most effective when it is collective.¹⁷⁹ New perspectives can often bring hope where hope has foundered. Science writer Annie Paul underscores this value of the collective, claiming that the most important resource we all have is each other’s minds.¹⁸⁰ In her view, we are social creatures who are designed to think with others. She believes problems can emerge when we do our thinking alone, including, for instance, the tendency towards confirmation bias.¹⁸¹ Technologists also recognize the enormous value of having different skills, expertise, and perspectives while trying to cultivate, build on, and refine new ideas.¹⁸² Similarly, many of our project partners have observed that one of the most valuable parts of working with students is the fact that they often bring completely new perspectives and ideas to projects that our partners have been working on for several years. For instance, a project

¹⁷⁵ Jacobs, *supra* note 5, at 785 (“Hope is decidedly not about individual aims, desires, or ambitions; it is not possible as an I but only as a we—or, more properly, as the articulation or joining together of individuals.”).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 786.

¹⁷⁸ Ludema et al., *supra* note 139, at 1044.

¹⁷⁹ *Id.*

¹⁸⁰ Annie Murphy Paul, Opinion, *How to Think Outside Your Brain*, N.Y. TIMES (June 11, 2021), <https://www.nytimes.com/2021/06/11/opinion/brain-mind-cognition.html>. For instance, case studies examining creativity in scientific research indicate several techniques to spur productivity and creativity, such as small team size, “highly effective supervisor-student relationship[s], the careful selection of new group members for complementary skills and attributes, and the flexibility to address new problems.” Thomas Heinze et al., *Organizational and Institutional Influences on Creativity in Scientific Research*, 38 RESEARCH. POL’Y 610, 616 (2009).

¹⁸¹ Paul, *supra* note 180.

¹⁸² As the University of Silicon Valley notes, collaborative creativity can be especially beneficial in situations when team members collaborate with others who have different experience or skills, as well as in collaborations with people who think very differently from each other. See *The Importance of Collaboration and Teamwork in the Creative Industry*, UNIV. SILICON VALLEY (July 11, 2017), <https://usv.edu/blog/importance-collaboration-teamwork-creative-industry/>; Kate Vitasek, *How Leaders Can Foster a Culture of Creative Thinking*, FORBES, <https://www.forbes.com/sites/katevitasek/2023/11/20/how-leaders-can-foster-a-culture-of-creative-thinking/> (last updated Nov. 21, 2023) (“When people with different skills, experience and mindsets come together, it enables all involved to introduce multiple perspectives on an issue and its proposed solutions. Ideas can be challenged and shaped to become better than they would have been on their own.”).

partner who has been working on a particular conflict for over three decades described how working with the students who were not jaded or cynical served as a source of inspiration and energy in what otherwise felt like a period of hopelessness due to the protracted and intractable nature of the conflict. He also added that the fact that they had spent less time feeling constrained by existing barriers allowed them to be creative and generative about new possibilities and approaches.

Collaboration can take place within a specific team, across teams, as well as across disciplinary boundaries in an institution. In fact, part of the creative process likely means recognizing that lawyers do not have all the necessary skills to accomplish these substantial goals and choosing to collaborate with experts in other disciplines.¹⁸³ Unfortunately, this has not fully permeated the human rights field. Indeed, a number of scholars have noted that certain segments of the human rights field can be “overly legalistic and formalistic” at the expense of more interdisciplinary tactics.¹⁸⁴ Instead, institutions need to actively challenge traditional disciplinary divides by adopting and teaching interdisciplinary approaches to problem solving, which will, in turn, cultivate the imaginative and creative potential of its students and staff.

In my own advocacy and teaching, I incorporate expertise from a range of disciplines including peacebuilding, mediation, and psychology. On one project involving the impact of conflict on education,¹⁸⁵ for example, my students used traditional human rights tactics, including legal research, interviews, and focus group discussions, but also adopted strategies from the peacebuilding field to design a new dialogue framework that included the voices of impacted communities who had historically been excluded from the peace process. My work on another project involved collaborating with community-based organizations as well as with mental health experts to advance the health needs of impacted communities and incorporate a trauma-informed approach to peace and reconciliation processes. By instilling interdisciplinarity at the level of advocacy and pedagogy, we were able to harness the imaginative capacities of our students and staff and enhance the effectiveness of our advocacy.

¹⁸³ Janeen Kerper, *Creative Problem Solving vs. The Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CASE W. L. REV. 351, 354 (1998) (“In contrast, creative problem solving proceeds on the theory that lawyers can join together with other professionals to provide more effective solutions to clients’ problems. Creative problem solving assumes that not all problems require legal solutions; and not all legal problems require a lawsuit. Instead, problems are viewed as multidimensional, often requiring nonlegal or multidisciplinary solutions.”).

¹⁸⁴ Knuckey et al., *Power*, *supra* note 63, at 10.

¹⁸⁵ This region has not been named for security reasons.

It is important to note, however, that for idea generation through collaboration to be effective, the steps of offering ideas and building on them should be sequential. Critique, while typically invaluable, can stifle creativity if it is poorly timed,¹⁸⁶ especially when offered too early. In law school clinics, one space for idea generation is during clinical “rounds.”¹⁸⁷ Rounds are structured such that students are encouraged to raise a question or challenge related to their project work, and the class collectively brainstorms how to approach it. In our clinic, we borrowed a tactic from a leadership course where the presenting group first presents their challenge, answers clarifying questions from the entire clinic, and then metaphorically goes “on the balcony.”¹⁸⁸ While on the balcony, the presenters are silent while the rest of the group diagnoses the problem and brainstorms possible solutions. Sending the presenting group on the balcony ensures that there is space and time for idea generation prior to any determination of feasibility, and it helps prevent defensive or defeatist knee-jerk reactions. Moreover, it prevents those with more knowledge and context from dominating the conversation. We found that instituting a dedicated period of brainstorming that precedes class-wide discussion helps to cultivate the creativity and imagination of the students by allowing space for new ideas.

c. Time

To foster creativity and imagination, individuals need an environment that allows adequate time to generate and develop ideas.¹⁸⁹ Additionally, down time or rest can also support imagination and creativity. In a discussion about “breakthroughs,” psychologist Rollo May talks about how insights or ideas often emerge during moments of “transition between work and relaxation.”¹⁹⁰ He describes reaching a breakthrough only after stepping away from work, when his mind was “far away from the problem” and he was able to stop consciously

¹⁸⁶ ROBINSON, *supra* note 170, at 133 (“In any creative work the focus of our attention has to be right. Although there are always points where criticism is necessary, generative thinking has to be given time to flower. At the right time and in the right way, critical appraisal is essential. At the wrong point, it can kill an emerging idea.”).

¹⁸⁷ For an overview on the learning goals and theory of rounds, see Susan Bryant & Elliott S. Milstein, *Rounds: A “Signature Pedagogy” for Clinical Education?*, 14 CLIN. L. REV. 195 (2007).

¹⁸⁸ This method is borrowed from the case consultation method of the adaptive leadership class at Harvard Kennedy School that was developed by Ronald Heifetz. For further discussion of this method, see generally RONALD HEIFETZ ET AL., *THE PRACTICE OF ADAPTIVE LEADERSHIP: TOOLS AND TACTICS FOR CHANGING YOUR ORGANIZATIONS AND THE WORLD* (2009).

¹⁸⁹ ROBINSON, *supra* note 170, at 201 (“Original ideas can take time to evolve. Creative organizations understand that time is an essential resource for innovation.”)

¹⁹⁰ MAY, *supra* note 97, at 62.

thinking about and struggling with it.¹⁹¹ Thus, he argues, “the unconscious breakthrough requires the alternation of intense, conscious work and relaxation.”¹⁹²

May’s point that breakthroughs cannot be forced creates a predictable conundrum for institutions, since they are often committed to a linear, fast-paced, and “productive” culture that rarely leaves space for such time. At an institutional level, building in time could mean accounting for the time to be generative in our workplans. A colleague once described how he explains to his students that even “thinking,” or going on a walk with a colleague to discuss ideas, is work; indeed, making the time to do the initial thinking vastly improves the final work product. Another example of making the time for idea generation is in rounds as described earlier in this Section.¹⁹³ Building in this time can help challenge and reframe existing notions of what is regarded as work.

When I identify time as a requisite for creativity, I do not mean to propose that people should only rest to be more effective at work. There is plenty of literature about the role of self-care and rest in enhancing productivity,¹⁹⁴ and that is not what I am proposing. I think rest is important as an end in itself. However, I also want to assert that accounting for the time to be imaginative and creative should be employed as an indispensable component of transformative hope. If the human rights field wants to re-imagine and reconstruct the world we live in, it needs collective and sustained imagination and creativity which will only be possible if institutions adopt a culture that makes the time and space for individuals’ creative and imaginative capacities.

III. SUSTAINING TRANSFORMATIVE HOPE

The prior Part described how we might cultivate transformative hope. It focused on the capacities that advocates can develop and deepen in their practice as well as the actions and environments that institutions can embrace to support their development. This Part describes how human rights advocates can sustain hope to get us through multi-decade struggles and what institutions can do to facilitate the sustained embodiment of transformative hope. To do so, this Part describes five interconnected methods: (1) cultivating a strong scaffolding to navigate uncertainty and productive discomfort, (2) making space for emotion, (3) committing to collective care, (4) investing in community,

¹⁹¹ *Id.* at 62–63.

¹⁹² *Id.* at 63.

¹⁹³ See *supra* II.B.3.ii.

¹⁹⁴ See generally, e.g., Lisa D. Butler et al., *Six Domains of Self-Care: Attending to the Whole Person*, 29 J. HUM. BEHAV. IN THE SOC. ENV’T 107 (2019) (explaining the broad import of self-care to working professionals).

and (5) cultivating joy. These five methods can be implemented at the individual, interpersonal, and institutional level. It is worth noting that while the emphasis of this Part is how to design these methods to sustain transformative hope, they can also serve as pathways for its initial cultivation.

A. Strong Scaffolding

The work of human rights advocates involves addressing systemic problems where there are no clear answers. Given the complex and uncertain nature of human rights work, institutions engaging in this work need a strong scaffolding. And this is true in other disciplines as well. Indeed, as Kevin Gannon sets forth in his book *Radical Hope: A Teaching Manifesto*, there are parallels in education, wherein the lack of an institutional scaffolding can harm the educational process. He notes:

Learning is messy. The deeper and more challenging the learning tasks, the messier the process is likely to be, especially if we are asking our students to do things they have not been asked to do before. We should push our students to test their limits, we should problematize the assumptions they brought with them to college, and we should challenge them to step outside the comfortable and familiar. However, simply doing those things without a corresponding degree of scaffolding and support is more akin to hazing than it is teaching.¹⁹⁵

Gannon's observations highlight the need to create strong scaffolding where human rights pedagogy and advocacy can occur. But what does this type of scaffolding look like? And how can it be created? Within a range of interdisciplinary fields, there is a predominance of literature about the value in creating a psychologically safe work environment.¹⁹⁶ I wholeheartedly agree with the value in creating empowering, psychologically safe spaces. However, building on the research of leadership expert Ronald Heifetz, I propose a pedagogical and leadership approach that can seem counterintuitive to creating "psychologically safe" and empowering environments—namely,

¹⁹⁵ GANNON, *supra* note 40, at 141.

¹⁹⁶ Amy C. Edmondson and Derrick P. Bransby, *Psychological Safety Comes of Age: Observed Themes in an Established Literature*, 10 ANN. REV. ORGANIZATIONAL PSYCH. & ORGANIZATIONAL BEHAV. 55 (2023); Amy Gallo, *What Is Psychological Safety?*, HARV. BUS. REV. (Feb. 15, 2023), <https://hbr.org/2023/02/what-is-psychological-safety>; Youngsam Cho, *Team Diversity, Perspective Taking, and Employee Creativity: The Importance of Psychological Safety*, 50 SOC. BEHAV. & PERSONALITY, 2022, at 1; Karen T. Hallam et al., *Identifying the Key Elements of Psychologically Safe Workplaces in Healthcare Settings*, 13 BRAIN SCI. 1450 (2023).

developing the muscle to sit with discomfort.¹⁹⁷ We need environments that are simultaneously safe and uncomfortable. Courageous work is often antithetical to comfort, and learning to sit with discomfort is an integral lesson in developing an effective human rights advocacy practice.

1. *Normalizing Barriers and Discomfort*

Barriers provide opportunities to learn, and understanding the value of navigating around (or through) barriers is a pathway to cultivating hope.¹⁹⁸ In the context of his research on children, Snyder describes the need to cultivate a “necessary frustration tolerance” for navigating barriers.¹⁹⁹ In his view, such “barriers teach young minds to believe in their capabilities at finding pathways that will work” and that persistence is an important part of the process.²⁰⁰ This is a reminder that it is not only important to incite hope but to also find ways to sustain action despite, or perhaps even as a result of, barriers to progress and the attendant discomfort. Of course, as Snyder also recognizes, if a child is “stuck” and unable to make progress, it is important to provide the necessary scaffolding to “hold” them through the learning process²⁰¹ — advice that applies equally to adult advocates.

In our clinic, I seek to normalize the discomfort that advocates experience when encountering barriers in human rights work. I do this by making explicit the fact that even experienced human rights advocates can feel overwhelmed. This is especially important to counteract the misperception that everyone else has it “together,” which can result in lowered self-efficacy. A law student once described feeling like they were the only one who could not “think like a lawyer” in their first year, when in fact there is research that the “self-esteem rollercoaster” is a common part of the law school experience.²⁰² At the same time, I explain that any confusion is normal and an opportunity to seek guidance. Offering guidance and support does not always mean providing the answers. It

¹⁹⁷ RONALD HEIFETZ ET AL., *supra* note 188, at 305 (noting that the zone of productive disequilibrium is “[t]he optimal range of distress within which the urgency in the system motivates people to engage in adaptive work. If the level is too low, people will be inclined to complacently maintain their current way of working, but if it is too high, people are likely to be overwhelmed and may start to panic or engage in severe forms of work avoidance, like scapegoating or assassination”).

¹⁹⁸ Julia D. Taylor et al., *Genesis: The Birth and Growth of Hope*, in HANDBOOK OF HOPE: THEORY, MEASURES, & APPLICATIONS, *supra* note 22, at 25, 30.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 31.

²⁰¹ *Id.* at 30.

²⁰² Will Pasley, *Resisting the Psychological Effects of Law School*, in NLG RADICAL LAW STUDENT MANUAL (n.d.), <https://www.nlg.org/wp-content/uploads/2016/03/Resisting-the-Psychological-Effects-of-Law-School.pdf>.

could be serving as a sounding board for students or staff to arrive at the answers alongside others. Those in supervisory roles need to strike the right balance between allowing a constructive amount of discomfort and providing guidance to support teams through challenging work.

2. *Individualized and Authentic Supervision*

There is literature on the spectrum of different forms of supervision, and in clinical teaching the value of non-directive supervision is often emphasized.²⁰³ However, a singular emphasis on one supervision style fails to leverage the benefits of other teaching methods.²⁰⁴ Some might argue that more direct supervision does not lead to empowerment of the student, but the reality is that even non-directive teaching involves direction.²⁰⁵ It involves supporting the process of exploration to find answers or resolution to the questions a student might have.²⁰⁶ Therefore, it is not the existence of direction but instead whether the supervisor is thoughtful about *how* that direction is employed that we need to think about.²⁰⁷ Similarly, many people have written about different styles of leadership, noting, for example, that there is not one ideal way to exercise leadership.²⁰⁸ What is often most effective is being able to adopt

²⁰³ For an overview on different styles of clinical supervision, see Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLIN. L. REV. 101 (2012).

²⁰⁴ Harriet N. Katz, *Reconsidering Collaboration and Modeling: Enriching Clinical Pedagogy*, 41 GONZAGA L. REV. 315, 317 (2006) (explaining that “[n]ondirective supervision as a sole teaching method” may “conflict[] with the learning styles of some students” and “overlook[] other powerful teaching methods,” such as working “as assistants to more experienced and skillful attorneys in an environment where skills and values can be directly observed.” (footnotes omitted)). For the value of *adaptive clinical teaching*, see Colleen F. Shanahan & Emily Benfer, *Adaptive Clinical Teaching*, 19 CLIN. L. REV. 517 (2013).

²⁰⁵ Shanahan & Benfer, *supra* note 204, at 518.

²⁰⁶ *Id.* (“Clinical teachers are always ‘directing’ a student in an exploration that leads to new knowledge or a solution to a problem. This is true even when we are merely asking them what their goals are or why they took a particular course of action. How a student is led to the knowledge or resolution involves the degree, not the existence, of directiveness.”).

²⁰⁷ *Id.*

²⁰⁸ Jennifer Jordan et al., *Finding the Right Balance—and Flexibility—in Your Leadership Style*, HARV. BUS. REV. (Jan. 11, 2022), <https://hbr.org/2022/01/finding-the-right-balance-and-flexibility-in-your-leadership-style> (“A single approach to leadership, whether traditional or emerging, is not going to meet the myriad of challenges that today’s leaders face. Thus, rather than perfecting a ‘leadership sweet spot,’ a leader needs to develop and broaden his or her ‘leadership sweet range.’ The wider this range becomes, the more effective or versatile the leader will be.”); Daniel Goleman, *Leadership That Gets Results*, HARV. BUS. REV., Mar.-Apr. 2000, <https://hbr.org/2000/03/leadership-that-gets-results> (“New research suggests that the most effective executives use a collection of distinct leadership styles—each in the right measure, at just the right time. Such flexibility is tough to put into action, but it pays off in performance. And better yet, it can be learned.”); *id.* (“Leaders who master multiple styles, including authoritative, democratic, affiliative, and coaching styles, tend to achieve the most favorable climate and business performance. They demonstrate flexibility in switching styles based on context, showing a keen awareness of their impact.”).

the model of supervision or leadership style that is necessary for the context. This can depend on a range of factors, including the individual student or staff member, the individual's existing familiarity with the context and issues, and the needs of the project.²⁰⁹ In order to build a strong scaffolding to sustain transformative hope, supervisors need to employ a range of pedagogical or leadership methods.

Additionally, as educators or individuals in leadership positions, it is not sufficient to talk about the value of taking risks or being vulnerable if we are not willing to model those capacities.²¹⁰ Creativity involves "originality, curiosity, playfulness, divergent thinking."²¹¹ It also involves "risk-taking, openness to new experiences and an ability to tolerate ambiguity and accept uncertainty."²¹² This demands the ability to sit with the discomfort that comes with uncertainty.²¹³ An ability to tolerate uncertainty requires courage.²¹⁴ It also requires vulnerability, and hope provides a "means of continuing amidst vulnerability."²¹⁵ As Gannon relates, taking risks could also involve admitting gaps in knowledge. For instance, he argues that "the three most powerful words a teacher can say are 'I don't know' (and the next three are 'let's find out')."²¹⁶ He adds an important caveat about identity: Talking about failure and a lack of certainty or clarity about how to proceed on a project may be harder for a junior female faculty of color than for a tenured white male professor because the former's position is less secure than the latter, and they are not always afforded the same "implicit respect" as their male, tenured counterparts.²¹⁷ Still, it is worth finding ways to model that no one is perfect and that mistakes are a necessary part of learning and action.

²⁰⁹ Mlyniec, *supra* note 203, at 518 ("Each choice of a method reflects an assessment of the case needs, the student's mode of learning, and the student's ability and level of understanding. It also reflects an understanding of the faculty member's goals for the course and the shared goals that the faculty member and student have for the case, the clinic, the client, and the student.").

²¹⁰ GANNON, *supra* note 40, at 141 ("We can't ask our students to take risks if we aren't willing to do the same ourselves.").

²¹¹ Anke Schwittay, *Teaching Critical Hope with Creative Pedagogies of Possibilities*, 31(1) PEDAGOGY, CULTURE, & SOC'Y 85, 89 (2025).

²¹² *Id.* at 89-90 (citation omitted).

²¹³ Maria Jarymowicz & Daniel Bar-Tal, *The Dominance of Fear Over Hope in the Life of Individuals and Collectives*, 36 EUR. J. SOC. PSYCH. 367, 381 (2006) ("The psychology of hope refers to higher mental processes involving anticipation, creative imagination, setting goals, planning and consideration of alternatives—all of which require openness and flexibility, as well as tolerance of uncertainty.").

²¹⁴ Adam Renner, *Teaching Community, Praxis, and Courage: A Foundations Pedagogy of Hope and Humanization*, 45 EDUC. STUDS. 59, 74 ("Finally, this work will take great courage. A praxis approach to education will require educators to leave, as Dennis Carlson conceptualizes, the 'safe harbor', and launch into uncharted waters." (citation omitted)).

²¹⁵ Kube et al., *supra* note 30, at 594 (noting that hope provides a "means of continuing amidst vulnerability").

²¹⁶ GANNON, *supra* note 40, at 142.

²¹⁷ *Id.*

Modeling a lack of perfection can help build humanity and vulnerability within institutions, which are both important components of a strong scaffolding to sustain transformative hope.

B. *Space for Emotion*

In addition to building a strong scaffolding, it is essential to recognize that hopefulness is not a constant state and that forcing a hopeful attitude can be counterproductive.²¹⁸ Transformative hope is also not a sanitized experience and does not always produce a “feel-good” emotion. I say this to highlight the need to challenge the forced binary between positive and negative emotions. As the late Richard Lazarus noted, it is “misleading” to create a “sharp division” between negative and positive emotions.²¹⁹ After all, the two are inextricably linked since hope actually “stems from stressful or negative life conditions.”²²⁰ Likewise, Dale Jacob argues that hope can only exist when there is a “temptation to despair,” as hope seeks to overcome this temptation.²²¹ It is true, however, that hope is distinct from despair, in that despair is passive while hope is active.²²²

Duncan-Andrade makes a valuable distinction between different forms of hope and clarifies that while some forms may not acknowledge pain, other forms recognize pain and understand it to be unavoidable in the process of achieving change—it is this latter form of hope that we should strive to embody:

To provide the “authentic care” that students require from us as a precondition for learning from us, we must connect our indignation over all forms of oppression with an audacious hope that we can act to change them. Hokey hope would have us believe this change will not cost us anything. This kind of false hope is mendacious; it never acknowledges pain. Audacious hope stares down the painful path; and despite the overwhelming odds against us making it down that path to change, we make the journey again and again. There is no other choice. Acceptance of this fact allows us to find the

²¹⁸ Emma Lisa Schipper, Shobna Maharaj & Gretta Pecl, Comment, *Scientists Have Emotional Responses to Climate Change Too*, 14 NATURE CLIMATE CHANGE 1010, 1011 (2024) (“In reality, however, individual scientists—including the authors here—often cycle through feelings of both despair and hope, and/or work to actively cultivate optimism (despite despair) to ensure contributions to addressing the problem. . . . [This] emotional toll . . . makes communicating the reality of the future even more difficult.”).

²¹⁹ Lazarus, *supra* note 2, at 657.

²²⁰ *Id.* at 657.

²²¹ Jacobs, *supra* note 5, at 792.

²²² *Id.* at 793.

courage and the commitment to cajole our students to join us on that journey. This makes us better people as it makes us better teachers, and it models for our students that the painful path *is* the hopeful path.²²³

There is also an unavoidable connection between hope and struggle or difficulty.²²⁴ Hope is not the absence of struggle, but rather it is what “animates a struggle” and provides us with the sense of solace that this work is worthwhile and that there is value in trying to continue our efforts even when the pathway is difficult.²²⁵ Clearly, hope can feel hard. There are “high affective costs.”²²⁶ Within an educational context, Maggie Rehm affirms that the affective costs of engaging in social justice work show up in the classroom and suggests that making space for emotion in the classroom is a pragmatic pedagogical decision that can be practiced by modeling behavior and encouraging emotional participation. She demonstrates her own emotional response by voicing her frustrations and desires as a means of humanizing the space and modeling how to share one’s affective world. In Rehm’s view, it is acceptable for the students to exist “on an affective level, too—that they are not failing at being professional if they step outside of stoic detachment.”²²⁷ In turn, Rehm also encourages students to explore their own emotional responses to the material, which while understandable is rarely acknowledged.²²⁸ In our clinic work and classroom, we too have had conversations about emotional responses in an effort to acknowledge that it is not just acceptable to not feel okay, it is often essential.²²⁹

In contrast, research suggests that telling someone else to be positive is likely to make one feel worse.²³⁰ Toxic positivity has been

²²³ Duncan-Andrade, *supra* note 46, at 191.

²²⁴ AHMED, *supra* note 6, at 2.

²²⁵ *Id.* (“Hope is not at the expense of struggle but animates a struggle; hope gives us a sense that there is a point to working things out, working things through. Hope does not only or always point toward the future, but carries us through when the terrain is difficult, when the path we follow makes it harder to proceed. Hope is behind us when we have to work for something to be possible.”).

²²⁶ Rehm, *supra* note 60, at 210.

²²⁷ *Id.* at 211.

²²⁸ *Id.* at 210 (“Students can thus feel burdened by an awakened awareness of individual responsibility. It is little wonder if some become overwhelmed or depressed, yet space to acknowledge this can be rare.”); see also Philip Schrag, *Constructing a Clinic*, 3 CLIN. L. REV. 175, 182 n.171 (1996) (noting that “[m]ost law school courses do not give explicit attention to the emotional aspects of becoming a lawyer”).

²²⁹ For approaches on how to acknowledge, discuss, and model emotions in law school, see MALLIKA KAUR & LINDSAY M. HARRIS, *HOW TO ACCOUNT FOR TRAUMA AND EMOTIONS IN LAW TEACHING* (2024); Vasundhara Sawhney, *It’s Okay to Not Be Okay*, HARV. BUS. REV. (Nov. 10, 2020), <https://hbr.org/2020/11/its-okay-to-not-be-okay>.

²³⁰ Scott Barry Kaufman, *The Opposite of Toxic Positivity*, THE ATLANTIC (Aug. 18, 2021), <https://www.theatlantic.com/family/archive/2021/08/tragic-optimism-opposite->

shown to have multiple harmful effects. It both dismisses and invalidates a current emotional state and induces or exacerbates secondary emotions including shame and guilt,²³¹ which are emotions that human rights advocates already struggle with. Additionally, being told to deny reality or suppress feelings can impact the work. For example, Emma Lisa Schipper and colleagues observed that some scientists have been discouraged from expressing their worries about climate change.²³² Not only does such denial of emotions harm each individual scientist by requiring them to ignore inherent aspects of their humanity, but it also contradicts core principles of scientific inquiry, which emphasizes the consideration of all relevant factors in analyzing any situation.²³³ Indeed, Schipper and colleagues contend that emotional responses to future concerns can serve as catalysts for “scientific curiosity” and critical research.²³⁴ Relatedly, in the medical context, Helen T. Allen’s ethnographic study found that fertility nurses in the United Kingdom were encouraged to ignore and deny their negative emotions as a defense against the pain they witnessed at work.²³⁵ Yet by doing so, these nurses may have been disengaging and emotionally distancing themselves from patients, which could have led them to develop negative views of patients who expressed emotions.²³⁶ Finally, creating a forced state of happiness can lead to burnout,²³⁷ which in turn impacts the sustainability of the work. As I shared in the Introduction, no one should feel the pressure of being a “salesperson of hope” who cannot afford to reveal any other emotions for fear of impacting the morale of their colleagues.

In sum, it is crucial that institutions make space for all forms of emotions, including those that are not “positive,” by encouraging emotional expression. This can certainly occur at the classroom level, but there is also a need for this practice to extend beyond classrooms—to institutions at large. By doing so, institutions can allow the collective to co-create spaces of transformative hope.

toxic-positivity/619786/ (“Refusing to look at life’s darkness and avoiding uncomfortable experiences can be detrimental to mental health. This ‘toxic positivity’ is ultimately a denial of reality. Telling someone to ‘stay positive’ in the middle of a global crisis is missing out on an opportunity for growth, not to mention likely to backfire and only make them feel worse.”).

²³¹ Sawhney, *supra* note 230.

²³² Schipper et al., *supra* note 218, at 1011.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Helen T. Allen, *Nursing the Clinic and Managing Emotions in a Fertility Unit: Findings from an Ethnographic Study*, 4 HUM. FERTILITY 18, 21 (2001).

²³⁶ *Id.* at 21-22.

²³⁷ Mita Mallick, *Does Your Boss Practice Toxic Positivity?*, HARV. BUS. REV. (May 27, 2024), <https://hbr.org/2024/05/does-your-boss-practice-toxic-positivity> (“[T]he pressure employees feel to put on a happy face and erase how they’re really feeling can lead to burnout.”).

C. Collective Care

There is also a need to make time for individual and collective care. Hope can get eroded with the fatigue that comes with the work of countering injustice in the world.²³⁸ To sustain transformative hope, individuals need to operate from a place of “wholeness,” not purely “sacrifice.”²³⁹ Additionally, advocates often experience stress and confront trauma in connection with their work of investigating human rights abuses, visiting sites of violations, and reviewing traumatic material or witnessing abuses; they can also experience direct threats, detention, or abuse.²⁴⁰ An international survey found alarming rates of mental health issues amongst human rights advocates—19.4% of the respondents met the criteria for posttraumatic stress disorder (PTSD), 18.8% had symptoms associated with PTSD, 14.7% had symptoms of depression, and 19% reported burnout.²⁴¹ Additionally, 34.4% of respondents had directly witnessed trauma experienced by others, 89.3% were indirectly exposed to trauma through their work, and up to 21% had been directly exposed to trauma as victims of violence, detention, or threats.²⁴² And yet, a resounding 83% respondents had accessed no or limited counseling, 62% had limited or no education on the possible mental health effects of human rights work, and 75% had limited or no mental health support from their employers or schools.²⁴³ These statistics illustrate the need for mainstream conversations about mental health in human rights settings. In our clinic, for example, we have implemented periodic check-ins about the mental health effects of our work, in both group and individualized settings, to address students’ varying needs.²⁴⁴

Despite our efforts and the fact that there has been an increase in conversations about mental health in human rights organizations,²⁴⁵ there remain individual, organizational, and field-wide barriers to

²³⁸ Bishundat et al., *supra* note 32, at 100.

²³⁹ *Id.*

²⁴⁰ Sarah Knuckey et. al., *Trauma, Depression, and Burnout in the Human Rights Field: Identifying Barriers and Pathways to Resilient Advocacy*, 49 COLUM. HUM. RTS. L. REV. 267, 269 (2018).

²⁴¹ *Id.* at 270.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Sara Knuckey & Su Anne Lee, *Building the Foundations of Resilience: 11 Lessons for Human Rights Educators and Supervisors*, OPEN GLOBAL RTS. (Mar. 7, 2018), <https://www.openglobalrights.org/building-the-foundations-of-resilience-11-lessons-for-human-rights-educators-and-supervisors/>.

²⁴⁵ See, e.g., Margaret Satterthwaite et al., *From a “Culture of Unwellness” to Sustainable Advocacy: Organizational Responses to Mental Health Risks in the Human Rights Field*, 28 S. CAL. REV. L. & SOC. JUST. 443 (2019).

building sustainable careers in this field.²⁴⁶ Consequently, we must ensure that any conversation about mental health includes a discussion of these barriers and how to mitigate or navigate them. Additionally, it is important to move beyond mitigating harm to promoting wellbeing by discussing capacities for resilience.²⁴⁷ Our clinic accomplishes this by creating and monitoring individual and collective care plans, which can foster both openness and accountability. Finally, peer support and time to socialize with other colleagues is a valuable form of support for wellbeing,²⁴⁸ which is described in more detail in the Sections on community and joy below.

D. Community

An important element of sustaining transformative hope is investing in community. While it may appear to be a simple statement, investing in community is profoundly important to fostering hope and joy. Law Professor William Quigley, in his article entitled, *Letter to a Law Student Interested in Social Justice*, explained:

Social justice advocacy is a team sport. No one does social justice alone. There is nothing more exciting than being a part of a group that is trying to make the world a better place

Seek out people and organizations trying to stand up for justice. Build relationships with them. Work with them. Eat with them. Recreate with them. Walk with them. Learn from them. If you are humble and patient, over time people will embrace you, and you will embrace them, and together you will be on the road to solidarity and community.²⁴⁹

This article instantly resonated with me when I first read it in law school, and Quigley's advice has only deepened in meaning since. More recently, I read Mariame Kaba's description of a valuable lesson her father taught her: "Everything that is worthwhile is done with other

²⁴⁶ Gulika Reddy, *Self-Care for Sustainable Movements: Difficult but Necessary*, OPEN GLOBAL RTS. (May 31, 2018), <https://www.openglobalrights.org/self-care-for-sustainable-movements-difficult-but-necessary/>; Margaret Satterthwaite et. al., *From a 'Culture of Unwellness' to Sustainable Advocacy: Organizational Responses to Mental Health Risks in the Human Rights Field*, 28 REV. L. & SOC. JUST. 443, 486-508 (2019) (discussing challenges to promoting wellbeing in the human rights field).

²⁴⁷ Knuckey & Lee, *supra* note 244.

²⁴⁸ Satterthwaite, *supra* note 246, at 527.

²⁴⁹ William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7, 23 (2007).

people.”²⁵⁰ Connection and community have been a central to sustaining my human rights practice and in fostering my sense of transformative hope. Those I work with—colleagues, students, and project partners—have been among my most meaningful sources of hope. They make change seem possible. And they make even the most challenging work feel not just worthwhile but also joyful. My experience of the importance of community is one that is shared by many advocates who have talked about the value of connection, of solidarity, and of seeking wisdom, energy and inspiration from like-minded people. Indeed, Richard Snyder discusses how one of the central characteristics of “high-hope people” is that they work effectively alongside other people.²⁵¹ He suggests that the energy you gain from others and the ability to work together can positively reinforce each other.²⁵²

To foster this type of community, institutions must invest the time to nurture relationships between colleagues and the communities they work alongside. As an example of how institutions can do this, our clinic begins each academic quarter with a day-long retreat focused on community building. We start by identifying our shared purpose and goals. We also collectively determine the group norms that will guide how we work together, and we have explicit conversations about identity to ensure that each individual is able to show up as their full selves. To address the fact that the competitive law school culture can be in tension with the need for collaboration, we provide students with a collaboration guide to help facilitate individual self-reflection and effective collaboration.²⁵³ And following Quigley’s advice, we also invest in building community in way that extends beyond the four corners of effective team functioning. We do this by periodically eating meals together, celebrating milestones in each other’s lives, and investing in getting to know people beyond their professional identities.

In addition to building community within the clinic, the depth of relationships with our project partners has been a central aspect of the clinic. Over the years, I have been struck by, and incredibly grateful for, how the clinic’s project partners have invested in prioritizing community. They have embodied the value of investing in the social dimensions of the work and in cultivating friendships beyond collaboration. Investing in relationships can be done in myriad ways, and our students and project partners have intentionally invested in making time and space to get to know each other. This means building in time together outside

²⁵⁰ KABA, *supra* note 25, at 178.

²⁵¹ Snyder, *supra* note 140, at 3-21.

²⁵² *Id.*

²⁵³ I first co-created this guide with my colleagues at the Smith Family Human Rights Clinic at Columbia Law School. It has since been adapted to meet the needs of the Clinic I direct at Stanford Law School.

of work meetings, and it could involve a meal, a music or game night, sight-seeing in a new place, or even just unstructured time for informal connection.

This emphasis on relationship building is especially pertinent as the human rights field has been critiqued for the extractive relationships between advocates in the Global North and Global South—particularly the ways in which Global North advocates take information and ideas without crediting Global South advocates.²⁵⁴ Although there are Global North actors who are engaging in reflection about how to build more equal relationships and adopt allyship practices,²⁵⁵ multiple advocates in the Global South highlight the continued transactional and asymmetrical nature of these relationships.²⁵⁶ Building community alongside project partners is one way to address this critique and is critical to transforming relationships from a transactional mode to a transformative one.

E. Joy

As a part of the practice of investing in relationships, our project partners have also focused on joy and levity. As one of my partners once said to me: “If we are going to work this hard, we might as well make time for fun.” In fact, our partners have modeled this sentiment for our students through humor—sometimes even dark humor. When a student once asked a practitioner in a region that is experiencing daily egregious rights violations what keeps him hopeful, he joked, “I am a Buddhist and believe in karma, impermanence, and mortality. This means that all human rights perpetrators will die one day, and that gives me hope.” His humor, and the humor of many of our other project partners, have been important reminders that while we should take the work seriously, we should not take ourselves too seriously.

²⁵⁴ KNUCKEY ET AL., *supra* note 63.

²⁵⁵ *Id.*

²⁵⁶ See, e.g., Rodríguez-Garavito, *supra* note 174, at 502 (discussing “the obvious asymmetry between the Global North and South in the human rights field” wherein Global North organizations “receive over 70% of the funds from philanthropic human rights foundations” and “have disproportionate power when it comes to setting the international agenda”); Cecilia MacDowell Santos, *Building and Breaking Solidarity: Learning from Transnational Advocacy Networks and Struggles for Women’s Rights*, in TRANSNATIONAL ADVOCACY NETWORKS: TWENTY YEARS OF EVOLVING THEORY AND PRACTICE 123, 123 (Peter Evans & César Rodríguez-Garavito eds., 2018) (“[T]he relationship between transnational activist actors is often asymmetrical and contentious.” (citations omitted)); Denisse Sepúlveda et al., *Education and the Production of Inequalities Across the Global South and North*, 58 J. SOCIO. 273, 277 (2022) (observing that some “topics of educational research are built on hierarchies of power that resonate with the logic of colonial legacy”); see also Fred Binka, *North-South Research Collaborations: A Move Towards a True Partnership?*, 10 TROPICAL MED. & INT’L HEALTH 207, 207-08 (2005) (noting that there has long been a “lack of control exerted by southern collaborators” and only “a few existing outstanding examples of mutually beneficial north-south research collaborations”).

Another way to cultivate joy is to celebrate wins—big or small. Acknowledging wins ushers in the agentic component of transformative hope as a catalyst for change. Understandably, there are barriers to doing so. Some people, for instance, may view such celebration as a “luxury” that they cannot afford given the endless stream of work. But it is important to make the time—from a quick shout out in a team meeting to a full discussion during a rounds session—to acknowledge and celebrate successes as a way to foster transformative hope.

* * *

What I hoped to convey in this Part is that embodying transformative hope at the individual, interpersonal, and institutional levels is less of a rigid procedure and more of an ongoing and intentional practice. We can embody transformative hope by cultivating strong scaffolding to support advocates through uncertainty and discomfort, making space for emotion, committing to collective care, investing in community, and fostering joy. Indeed, while there are many challenges associated with human rights work, advocates also experience their work as deeply rewarding and a source of meaning and joy.

CONCLUSION

When I began writing this Article, I half-joked and genuinely wondered: Is this the subject of a research article or just an existential question? In conversations with students, project partners, and colleagues, including those engaged in other parts of the social justice field, they suggested that even if it was an existential question, at least it was one shared by others and therefore worthy of exploration. They, too, were struck by how often the concepts of “hope” and “hopelessness” arise in conversations in the social justice field, both explicitly and implicitly.

Throughout my career, I have been asked and have grappled with several questions related to hope. Some questions directly used the word hope. My colleagues and I, for instance, have asked—and tried to answer: How can we stay hopeful during times of challenge and crisis? How can we recover from setbacks? Other questions have not directly used the word hope, but rather, draw attention to the need for hope. Students have asked: Is it worth it to commit to a career in public service? Is there even any possibility of change? All of these questions have a common theme: Do we have any reason to have hope?

I believe that we do. But what led me to this scholarly inquiry was that I was less certain about if and how we can cultivate transformative hope as a theory of change by making it an institutional priority. I was also unsure what shifts needed to be made to institutional structures

and culture to ensure that such hope can be sustained. As a result, this Article sought to answer two overarching questions: What forms of hope does the human rights field need? And how can we cultivate and sustain transformative hope in our institutions?

The answers to those questions can be found in the theory and strategic plan I set out in this Article, which offers guidance on how advocates and institutions can be intentional about employing transformative hope in the human rights field. At the same time, the reasons that hope is integral to the human rights field—because it can foster commitment, action, resilience, and creativity—apply to the social justice field more broadly. Since many of the questions and answers related to hope can be subjective and institution- or field-specific, I also offer additional questions in the Appendix for individuals and institutions working in any part of the social justice ecosystem.

I hope that this Article and these questions prompt reflection and conversation not only in the human rights field but also the social justice field more broadly. Just like hope, engaging in individual and collective reflection will not, in and of itself, result in change—but such reflection is an integral part of being able to generate the commitment, action, resilience, creativity and imagination that is necessary to effect change.

APPENDIX: REFLECTION QUESTIONS

Transformative hope is a practice that needs to be tailored to the needs of each individual and institution. These questions can be used to prompt reflection as advocates and institutions collectively consider how to unpack, cultivate, and sustain transformative hope.

I. *Unpacking Hope*

1. Do you see a connection between hope and your practice/advocacy?
 - a. If yes, what is the connection?
2. Have you observed any of the forms of hope set out in the typology of hope (i.e., false, latent, reckless, disingenuous, measured, and transformative) in your work and in your field?
3. What forms of hope have you witnessed or experienced as valuable? What forms of hope have you witnessed or experienced as less effective?

II. *Cultivating Transformative Hope*

1. How can the dimensions of grounded knowledge, action, and imagination and creativity be fostered and deepened?
2. Are there additional capacities or dimensions that underlie transformative hope? If yes, how can those dimensions be cultivated?
3. Do current incentive structures in your organization and in your field prioritize these dimensions? If not, should these incentive structures be modified, and how can they be modified?

III. *Sustaining Transformative Hope*

1. In moments or spaces that you have felt most hopeful, what factors contributed to that? Are there particular people or forms of work/advocacy that foster your sense of transformative hope?
2. What has been helpful for you during moments of despair? What has helped you sustain transformative hope in moments where hope has felt less accessible?
3. Have your organization adopted any of the structures of sustaining hope (i.e. strong scaffolding, space for emotions, collective care, community, and joy) set out in this Article?
 - a. If yes, are there ways in which they can deepen those structures?
 - b. If not, are there ways in which they can be instituted?

4. Are there additional structures that would be helpful to sustain transformative hope?

- a. If yes, how can they be instituted?

And finally, how can we revisit and reimagine our responses to all of the questions posed in this Article as the needs of the social justice field shift over time?

