

# CLINICAL LAW REVIEW

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SEARCHING FOR JUSTICE: INCORPORATING CRITICAL  
LEGAL RESEARCH INTO CLINIC SEMINAR . . . . . *Priya Baskaran*

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# SEARCHING FOR JUSTICE: INCORPORATING CRITICAL LEGAL RESEARCH INTO CLINIC SEMINAR

PRIYA BASKARAN\* \*\*

*This Article provides educators with a roadmap for incorporating Critical Legal Research into Clinical Pedagogy. Critical Legal Research is a social justice-oriented critical intervention that provides a theoretical framework and practical application. Critical Legal Research provides lawyers with tools to deconstruct but also reconstruct legal research and analysis modes to engender more just, client-focused outcomes that fall outside dominant legal narratives. The problematic advent of ChatGPT and the broader incorporation of Artificial Intelligence (AI) within the legal research regime has made the Critical Legal Research project more urgent than ever. Ultimately, introducing Critical Legal Research in the clinic seminar is both a necessity and an opportunity: It liberates the minds of our students and challenges them to think creatively in the greater fight against injustice.*

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\* Priya Baskaran — person, parent, work in progress, and Associate Professor of Law, American University Washington College of Law. My deepest thanks to the scholars and experts in Critical Legal Research and Critical Legal Information Literacy who have challenged me to become a better lawyer, teacher, and advocate. I am especially grateful to Nicholas Stump, Nicholas Mignaneli, LaTia Ward, Courtney Selby, and Ellie Campbell who were unfailingly generous with their time. My pedagogical experiments would have been impossible without the support and graciousness of Adeen Postar, Ripple Wiestling, and the Pence Law Library at American University's Washington College of Law. Early versions of this Article were presented at the Margaret Montoya Writing Retreat and the Mid-Atlantic People of Color Workshop. I am incredibly grateful to both these groups for creating such an important space for scholars of color. This Article was greatly improved by the editing acumen of the inimitable Daria Fisher Page and indomitable Gautam Hans. For sage advice, constructive criticism, collaboration, community, and joy – I am ever indebted to Laila Hlass, Allison Korn, and Sarah Sherman-Stokes. For exceedingly diligent research assistance, I thank Alexandra Hulit.

\*\* I have made an intentional choice to write in the first person to speak directly to my fellow clinical faculty during certain sections of this Article. This piece also includes a table of contents. I encourage readers to treat this work like a treatise and navigate to the sections most useful for your pedagogical needs.

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## INTRODUCTION

If traditional, doctrinal legal education allegedly proscribes clarity and certainty—transcendent—principles, narrowly defined problems, and clear resolution—then clinical legal education focuses on, in large part, messiness—the complexity of human clients, overlapping and interwoven problems, our own feelings, and the constraints and failures of the law. Despite these fundamentally different perspectives, both doctrinal and clinical legal education approach legal research as a straightforward skill that, once mastered, can be applied by rote, with unquestioning trust in the “objective” research resources themselves.

The myth of law as science informs this myth of legal research as objective and neutral. But numerous scholars — including Ronald Wheeler, Yasmin Sokkar Harker, Richard Delgado, and Jean Stefancic —



have shed light on the bias inherent in classification systems<sup>1</sup> and on-line databases.<sup>2</sup> Critical Legal Research “seek[s] to expose how external power structures shape the organization of legal information and embed biases in the tools of legal information retrieval.”<sup>3</sup> Critical Legal Research (CLR) is a critical intervention, oriented toward social justice, which reconstructs traditional legal research. It provides a theoretical framework and a means of practical application, both of which center social justice. It reorients our conceptualization of the research process to advocate for more equitable outcomes using imperfect legal resources designed to reify hegemonic norms. CLR provides lawyers with tools to deconstruct and reconstruct legal research to reach more just, client-focused outcomes that fall outside dominant legal narratives.<sup>4</sup>

Many scholars have advocated for broad-based critical legal education,<sup>5</sup> which incorporates critical pedagogy into legal education. The critical approach “emphasizes the intersection between social justice and legal education,”<sup>6</sup> framing law as a system of power struggles and interlocking networks of oppression.<sup>7</sup> The critical perspective counters the dominant narrative of law as neutral; it criticizes the normalization of subordination and oppression of not only marginalized groups, but

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<sup>1</sup> Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) [hereinafter Delgado & Stefancic, *Same Stories?* (1989)]; Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 LAW LIBR. J. 307 (2007) [hereinafter Delgado & Stefancic, *Same Questions?* (2007)].

<sup>2</sup> See generally Yasmin Sokkar Harker, *Invisible Hands and the Triple (Quadruple?) Helix Dilemma: Helping Students Free Their Minds*, 101 B.U. L. REV. ONLINE 17 (2021); Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 LAW LIBR. J. 359, 366 (2011).

<sup>3</sup> Nicholas Mignaneli, *Critical Legal Research: Who Needs It?*, 112 LAW LIBR. J. 327 (2020).

<sup>4</sup> Nicholas F. Stump, *COVID, Climate Change, and Transformative Social Justice: A Critical Legal Research Approach*, 47 WM. & MARY ENV'T. L. & POL'Y REV. 147, 172 (2022).

<sup>5</sup> See FRANCISCO VALDES, STEVEN BENDER & JENNIFER J. HILL, *CRITICAL JUSTICE: SYSTEMIC ADVOCACY IN LAW AND SOCIETY* (2021).

<sup>6</sup> Yasmin Sokkar Harker, *Legal Information for Social Justice: The New ACRL Framework and Critical Information Literacy*, 2 LEGAL INFO. REV. 19, 43 (2016-2017).

<sup>7</sup> Anibal Rosario-Lebrón, *If These Blackboards Could Talk: The Crit Classroom, a Battlefield*, 9 CHARLESTON L. REV. 305, 314 (2015). See also Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. SOC. JUST. 1, 3 (2018); Kimberlé Williams Crenshaw, *Race Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) (noting that “racism is a central ideological underpinning of American society.”); VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER (Society of American Law Teachers & Golden Gate University School of Law eds., 2011); Janel George, *Deny, Defund, Divert: The Law and American Miseducation*, GEO. L.J. (forthcoming), <https://ssrn.com/abstract=3987248>; Llezlie Green Coleman, *Exploited at the Intersection: A Critical Race Feminist Analysis of Undocumented Latina Workers and the Role of the Private Attorney General*, 22 VA. J. SOC. POL'Y & L. 397 (2015).

also basic human rights.<sup>8</sup> In the legal research context, leading scholars frame “legal information as a social construct” in the legal research classroom.<sup>9</sup>

Clinical legal education emphasizes three important elements of the practice of law: (1) inclusion of diverse and often excluded voices, (2) critical thinking about who defines a problem and how, and (3) the role of the law and justice in problem resolution for actual clients. Yet few professors intentionally incorporate discussions of critical theories when supervising or teaching legal research in clinic. Absent are discussions of who creates legal databases and for what purpose? What systems organize our resources and who creates them? What preferences, biases, and choices are baked into these systems? Who is included and excluded? What are the impacts? Introducing CLR into the clinic setting is both a necessity and an opportunity: it liberates the minds of our students and challenges them to think creatively in the greater fight against injustice.

In writing this piece, I hope to persuade fellow clinical faculty to engage critically with our own perspectives and pedagogies surrounding legal research. Clinical pedagogy embodies innovation. Our classrooms serve as living laboratories where students experience, reflect on, and adapt to dynamic and challenging lawyering moments. Our pedagogy constantly evolves as we incorporate new theoretical frameworks, engage in interdisciplinary advocacy, leverage varied learning modalities, and respond to the needs of our clients.

Clinicians innovate with purpose. Our work, and thus our pedagogy, flows from our collective commitment to social justice. Clinic classrooms meld theory and praxis, training students while simultaneously anchoring them in broader concepts of justice. This commitment to pedagogical innovation has produced client-centered lawyering, trauma-informed counseling, critical interviewing, and other pedagogical strategies and frameworks that are necessary to further social justice. This Article presents CLR as another transformative pedagogy.

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<sup>8</sup> See, e.g., Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1 (1988); Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65, 72 (2003); Karl Klare, *Teaching Local 1330—Reflections on Critical Legal Pedagogy*, 7 UNBOUND: HARV. J. LEGAL LEFT 58 (2011); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 309 (2000); Sheila I. Vélez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHL.-KENT L. REV. 585 (2015); SpearIt, *Priorities of Pedagogy: Classroom Justice in the Law School Setting*, 48 CAL. W. L. REV. 467 (2012).

<sup>9</sup> Sokkar Harker, *supra* note 6, at 46; Laura B. Wilcoxon, *A Next-Generation Framework: Using Critical Legal Research Pedagogy to Prepare Law Students for the NextGen Bar Exam*, 42 LEGAL REFERENCE SERVS. Q. 71 (2023).

Clinics provide a perfect space to incorporate CLR. Clinical students engage deeply with the intersection of law and social justice as active participants within our legal system in a myriad of ways.<sup>10</sup> As student-attorneys engaged in direct representation, they encounter the complex nexus of legal regimes and the subsequent legal consequences for their clients.

Student exposure to alternate perspectives extends beyond clinic fieldwork. It includes introductions to various lawyering movements and theories that are oriented toward social justice, including Movement Lawyering, Rebellious Lawyering, Critical Race Theory, Feminist Legal Theory, client-centered lawyering, trauma-informed lawyering, and others. Seminar classes routinely address social justice topics that dovetail with student casework or the specific subject matter of their clinic, such as prison abolition, environmental justice, workers' rights, racial justice, community economic development, and solidarity economies. All of these components serve as fertile ground for introducing the theoretical framework of critical information literacy and applying the methodology of CLR to advocate for transformative change.<sup>11</sup>

Legal research exists as a core competency for lawyers, thus teaching it in the clinic certainly has generic benefits. Equally important but less obvious to the novice attorney are the ways in which legal research can promote — or inhibit — both procedural and substantive justice. Legal research, lawyering, and greater social justice advocacy remain entwined. The legal research paradigm supports the status quo, making systemic advocacy and law reform difficult. We need critical interventions within legal research education and application to understand the limitations of the existing systems and resources. Clinics, the pinnacle of legal education,<sup>12</sup> provide fertile ground to develop necessary CLR skills. Moreover, confronting false narratives of neutrality within legal research regimes forces students to reconstruct the law along more emancipatory lines.

This Article advocates for incorporating CLR into the clinical professor's pedagogical arsenal as a means to further the tenets of clinical legal education. Part I introduces CLR as a theoretical framework through a review of leading legal research scholars and distinguishes CLR pedagogy from traditional legal research instruction methods. Part II highlights the natural intersections between clinical pedagogy and CLR, emphasizing the benefits of incorporating the latter to further the goals

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<sup>10</sup> Carolyn Grose, *Beyond Skills Training, Revisited: The Clinical Education Spiral*, 19 CLIN. L. REV. 489, 495 (2013).

<sup>11</sup> Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 573, 657 (2015).

<sup>12</sup> Grose, *supra* note 10.

of clinical legal education. Part III of this article moves from theory to praxis, providing a roadmap for deploying CLR within the clinic seminar. Part IV outlines ongoing challenges for incorporating CLR into clinical education, and concludes with a cautiously optimistic summary of possible areas for future investigation and growth.

### I. CLR: A LITERATURE REVIEW

CLR<sup>13</sup> is a theoretical framework, pedagogy, and praxis that exposes and challenges the reification of hegemonic norms through dominant legal research processes and resources.<sup>14</sup> CLR draws upon critical legal theory and applies critical methods to conducting legal research.<sup>15</sup> CLR scholars engage in important pedagogical practices that expose students to selective informational warehousing in both print and digital resources, and counter the false narrative that research results are normatively neutral and therefore accurate.<sup>16</sup> As a discipline, it intentionally incorporates critical thinking into legal research, challenging students to rethink their research questions and strategies, and to develop more expansive and thoughtful research plans in order to account for systemic bias.<sup>17</sup>

Contemporary CLR work draws upon such schools as critical legal information literacy, critical race theory, LatCrit, feminist legal theory, critical race feminism, queer legal theory, law and political economy, law and socioeconomics, law and critical ecology, critical legal studies,<sup>18</sup>

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<sup>13</sup> See generally Stump, *supra* note 11.

<sup>14</sup> *Id.*

<sup>15</sup> Sokkar Harker, *supra* note 6, at 45; see also Stump, *supra* note 11, at 600.

<sup>16</sup> See generally Nicholas Mignanelli, *Legal Research and Its Discontents: A Bibliographic Essay on Critical Approaches to Legal Research*, 113 LAW LIBR. J. 101 (2021); Grace Lo, *Biases in Law Library Subject Headings*, 101 B.U. L. REV. ONLINE 26 (2021); Jennifer Allison, *Critical Legal Studies*, in INTRODUCTION TO LAW LIBRARIANSHIP (Zanada Joyner & Cas Laskowski eds., 2021), <https://pressbooks.pub/lawlibrarianship/chapter/critical-legal-studies/>.

<sup>17</sup> See generally Sokkar Harker, *supra* note 2; Mignanelli, *supra* note 3; Mignanelli, *supra* note 16. Regarding the legal research plan, it is “generally conceived to have five common elements: (1) identification of the legally relevant facts both known and unknown, (2) statement of the legal issue or issues, (3) statement of jurisdiction, (4) identification of useful sources and the order in which they are to be used, and (5) identification of search terms.” Caroline L. Osborne, *The Legal Research Plan and the Research Log: An Examination of the Role of the Research Plan and Research Log in the Research Process*, 35 LEGAL REFERENCE SERVS. Q. 179, 181 (2016).

<sup>18</sup> The earliest work in what would come to be termed Critical Legal Research emanates from the application of the Critical Legal Studies precepts of the 1970s and 1980s to legal information and legal research. See generally Stump, *supra* note 11. The Critical Legal Studies movement underscored the subjective, indeterminate, and even incoherent nature of law. Thus any “categorization” or “organization” of information is a fiction “because any given body of precedent — no matter how comprehensive — is incapable of covering all conceivable fact situations.” Stump, *supra*, note 11, at 601. Accordingly, relying on “historically legitimated doctrinal categories gives the law student, the teacher, and the practitioner

and disability theory.<sup>19</sup> Scholars use these various discourses to challenge notions of neutrality,<sup>20</sup> fairness,<sup>21</sup> and order<sup>22</sup> within legal regimes. Because these critical perspectives engage in deeper, more comprehensive, and nuanced forms of investigation and analysis, they are able to unveil not only systemic bias, but also the creation of interlocking

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a false sense of the orderliness of legal thought.” Stump, *supra* note 11 at 603. Critical Legal Research has evolved beyond the earlier frameworks to intentionally incorporate intersectional frameworks for more comprehensive anchoring in critical theories.

<sup>19</sup> Stump, *supra* note 4.

<sup>20</sup> See Crenshaw, *supra* note 8 (describing “Perspectivelessness” in the law).

<sup>21</sup> See, e.g., Anjali Vats & Deidre A. Keller, *Critical Race IP*, 36 CARDOZO ARTS & ENT. L.J. 735, 764 (2018) (encouraging the use of critical intellectual property scholarship “as a means of theorizing and remedying the many ways intellectual properties are racially non-neutral and mutually constitutive of the category of race and processes of racial formation”); Bret N. Bogenschneider, *A Philosophy Toolkit for Tax Lawyers*, 50 AKRON L. REV. 451 (2016) (“Much of what has been labeled “Critical Tax Studies” ... relates primarily to fairness criticisms of the tax system premised on group identity.”); Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN’S RTS. L. REP. 288, 297 (2009) (describing how critical transgender law scholars oppose the idea that “formal legal equality” indicates that the legal system is has been transformed in a way that ensures fairness, because “[t]he people who were most vulnerable to premature death under the system or institution before the reform often remain the most vulnerable.”); Jane E. Larson, *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990s?*, 87 NW. U.L. REV. 1252, 1256 (1992) (explaining how legal feminism scholars “theorize about broad principles of justice and fairness [in the legal system] from quite intimate and particular settings—sexuality, abortion, childbirth and childrearing, and education”).

<sup>22</sup> The critical legal studies movement also underscored that the law itself lacks neutrality or organization; any order applied to it is thus subjective, not intrinsic. Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, 79 LAW LIBR. J. 617, 630-61 (1987). The view of law as an ordered and scientific subject was championed and popularized by Christopher Columbus Langdell. See HAROLD GILL REUSCHLEIN, *JURISPRUDENCE, ITS AMERICAN PROPHETS: A SURVEY OF TAUGHT JURISPRUDENCE* 78 (1951). The Langdellian perspective required a pedagogy modeled after scientific inquiry, focused on an examination of “original sources” by law students as they worked to uncover the underlying fundamental legal principles, which Langdell himself described as follows:

Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law.” Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases[.]

C. C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871). The Langdellian methodology remains the dominant discourse in legal education, although it has—correctly—drawn considerable criticism over time. See, e.g., Eugene Wambaugh, *Next Step in the Evolution of the Case-Book*, 21 HARV. L. REV. 92 (1907) (arguing that Langdell’s case-book model, with its emphasis on English cases, does not adequately prepare law students to practice in local jurisdictions in the United States); G. Edward White, *The Impact of Legal Science on Tort Law, 1880-1910*, 78 COLUM. L. REV. 213, 221 (1978) (claiming that Langdell, because of his reliance on this method, had less of a “sense of the diversity and complexity of American law” than did some of his contemporaries); Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562, 574 (2015); Beth H. Wilenski, *Dethroning Langdell*, 107 MINN. L. REV. 2701 (2023).

systems of subordination based on race, class, gender, national origin, socio-economic status, etc. Some critical legal theory perspectives also incorporate the role that extractive capitalist worldviews have in promoting and entrenching “the dominant, homogeneous interests of society at the expense of subordinated groups.”<sup>23</sup>

If we accept that law itself is not neutral or formulaic, then we can more clearly ascertain that any “tools” constructed to understand the law are also destined to be flawed and skewed toward the societal status quo. This logic extends to research categories, search tools, and other resources upon which we build legal research skills and competence.

Scholars immersed in CLR and critical legal information literacy<sup>24</sup> concretize the impacts of the faulty foundation of beliefs about legal information and legal research. Steven Barkan’s foundational 1987 article in this tradition, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, applies the Critical Legal Studies framework to the legal research process for practicing attorneys, illustrating the dangers of creating a “bibliographic determinism.”<sup>25</sup> Barkan cautions that researchers “establish rules without admitting their own value judgments” by “attributing meaning to courts or legislators” while obscuring that “judicial opinions, statutes, legislative history materials, regulations and other sources are indeterminate.”<sup>26</sup> This position, according to Barkan, is particularly problematic, as it assiduously ignores the human element of legal regimes. As Barkan points out, judges have “subjective preferences” and they make choices in each case about “how precedence and statutes are interpreted, which ones are followed,

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<sup>23</sup> Stump, *supra* note 11, at 603.

<sup>24</sup> Legal research professors writing in the explicit critical legal information literacy tradition generally focus on pedagogy within the legal research classroom, applying critical information literacy precepts to legal information and instruction. Latia Ward, *A Librarian’s Experience Teaching Critical Information Literacy*, 41 LEGAL REFERENCES SERVS. Q. 52 (2022). Critical Legal Research advocates draw in part on critical legal information literacy but are ultimately more concerned with how the overarching de- and reconstruction of the legal research paradigm can specifically aid in movement lawyering and social justice lawyering, both in the legal research classroom context and beyond. *See, e.g.*, Nicholas Mignanelli, *The Case for a Social Justice Research Course?*, RIPS LAW LIBRARIAN BLOG (August 31, 2020), <https://ripslawlibrarian.wordpress.com/2020/08/31/the-case-for-a-social-justice-research-course/> (detailing a legal research course built on Critical Legal Research principles that was explicitly geared towards movement lawyering); Allison, *supra* note 16. This Article therefore uses Critical Legal Research as its predominant frame, given the focus here on clinical social justice lawyering. Note that there exist other critically informed or allied approaches to legal research. For example, legal research professors have engaged in work on incorporating race, DEI, or cultural competencies within the legal research classroom. *See, e.g.*, Shamika Dalton, *Incorporating Race into Your Legal Research Class*, 109 LAW LIBR. J. 703, 706-07 (2017); Shamika Dalton & Clanitra Stewart Nejdil, *Developing a Culturally Competent Legal Research Curriculum*, AALL SPECTRUM, Mar./Apr. 2019, at 18.

<sup>25</sup> Barkan, *supra* note 22, at 632.

<sup>26</sup> *Id.* at 628.



and which ones are ignored.”<sup>27</sup> Barkan further argues that research databases also have a human element at play, though it is both less visible and less known.<sup>28</sup>

In the end, Barkan advocates for “a more enlightened understanding of legal research” to promote “better practices, better research” and “to help improve the way legal thinkers respond to social problems.”<sup>29</sup> Ultimately, the organization and categorization of legal research sources affects the interpretation of laws, which “can reinforce and reify dominant ideologies, can narrow perspectives, and can make contingent results seem inevitable.”<sup>30</sup>

Classification systems, like those used to organize legal sources and materials, magnify the problems already inherent in the sources. Richard Delgado and Jean Stefancic, drawing on the critical race theory tradition, highlight the dangers of classification systems in their foundational 1989 article titled *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*.<sup>31</sup> Delgado and Stefancic argue that replicating “preexisting ideas, thoughts, and approaches,” which is generally done through standard, non-critical classification of legal resources, essentially functions like molecular biology’s double helix.<sup>32</sup> These classification systems, they posit, “shape and constrain thought, reinforce dominant paradigms, and stifle creativity and innovation.”<sup>33</sup> Classification systems — as well as other fabricated ordering systems used to catalog research resources — steer individuals “toward the familiar, the conventional,” while obfuscating inventive and novel legal arguments and theories.<sup>34</sup>

Other scholars extend this analysis even further: Classification systems are not neutral, historical, and naturally ordered, and these systems reflect human ideas, preferences, judgments, and *specific* humans’ biases. Jill Anne Farmer ascribes this “conceptual lock on legal information” to the economic, political, personal, and similar interests of publishers, editors, and librarians,<sup>35</sup> while Yasmin Sokkar Harker unpacks the “invisible hands” that shape information through “classification and algorithmic work” from the critical legal information literacy perspective.<sup>36</sup>

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<sup>27</sup> *Id.* at 630.

<sup>28</sup> *Id.* at 630–31.

<sup>29</sup> *Id.* at 632.

<sup>30</sup> *Id.* at 632.

<sup>31</sup> Delgado & Stefancic, *Same Stories? (1989)*, *supra* note 1.

<sup>32</sup> *Id.* at 217.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 *LAW LIBR. J.* 391, 402 (1993).

<sup>36</sup> Sokkar Harker, *supra* note 2, at 21.

The “invisible hands” that do so much of the classification and algorithmic work belong to actual people who may, in fact, not be aware of the biases they bring to their work. For example, humans at the Library of Congress create and maintain Library of Congress Subject Headings, and human catalogers decide which headings to apply. This phenomenon is not limited to print resources, as humans who work for Westlaw not only create and maintain the Topic and Key Number taxonomy, but also decide how to organize West headnotes. Furthermore, countless software developers, engineers, and programmers design and develop the algorithms and artificial intelligence systems that power our legal research platforms.<sup>37</sup>

Technological innovation has continued to perpetuate bias within information systems and even added new problems.<sup>38</sup> Susan Nevelow Mart’s empirical study of six legal databases reaffirms the role of “invisible hands” in technology-based research resources, and “shows that every algorithm starts with a different set of biases and assumptions.”<sup>39</sup> Accordingly, Nevelow Mart points out, “every algorithm draws on a different set of sources and processes, whether those sources and processes are classification systems, secondary sources, citation networks, internal case analyses, mined user search history, or machine learning deployed in the unique environment each legal database provider offers.”<sup>40</sup>

Nevelow Mart’s observations are reflected in the results of Ronald E. Wheeler’s research on Westlaw, one of the most frequently-used

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<sup>37</sup> *Id.*; see *infra*, section IV.D.

<sup>38</sup> Several scholars have explored in depth the reification of racial, gender, and class bias in algorithms as well as AI. See, e.g., Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. REV. 1384 (2023); Sonia M. Gipson Rankin, *The MiDAS Touch: Atuahene’s “Stategraft” and Unregulated Artificial Intelligence*, 98 N.Y.U. L. REV. ONLINE 225 (2023); Anita L. Allen, *Dismantling the “Black Opticon”: Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J. F. 907 (2021-2022); Michele Estrin Gilman, *Expanding Civil Rights to Combat Digital Discrimination on the Basis of Poverty*, 75 SMU L. REV. 571 (2022); DANIELLE KEATS CITRON, *THE FIGHT FOR PRIVACY: PROTECTING DIGNITY, IDENTITY, AND LOVE IN THE DIGITAL AGE* (2022), Aziz Z. Huq, *Constitutional Rights in the Machine-Learning State*, 105 CORNELL L. REV. 1875 (2020); Sarah Valentine, *Impoverished Algorithms: Misguided Governments, Flawed Technologies, and Social Control*, 46 FORDHAM URB. L.J. 364 (2019); RUHA BENJAMIN, *RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CROW* (2019); Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54 (2019); JULIE E. COHEN, *BETWEEN THE TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* (2019); VIRGINIA EUBANKS, *AUTOMATING INEQUALITY: HOW HIGH TECH-TOOLS PROFILE, POLICE, AND PUNISH THE POOR* (2018); SAFIYA UMOJA NOBLE, *ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM* (2018); Mary Madden, Michele Gilman, Karen Levy & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53 (2017). Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CALIF. L. REV. 671 (2016).

<sup>39</sup> Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, 420 (2017).

<sup>40</sup> *Id.*



subscription legal databases.<sup>41</sup> Wheeler observed that Westlaw Next uses crowdsourcing to rank results, which means that items that appear at the top of search results lists are those which previous users have viewed more times or saved more often to folders.<sup>42</sup> This visual ranking makes it appear as though the results at the top are more relevant or important, but such an ordering is not necessarily based on unique facts, goals, or needs of the researcher's case. Equally troubling, the use of this kind of data to determine the order of search results lists cloaks or obscures potentially relevant information, simply because it is "less popular" and thus not displayed as a top result.<sup>43</sup>

In his article, Wheeler highlights the potentially devastating impact of using popularity as the ranking metric.

If legal researchers are unable to find unpopular or less used tidbits of legal information, this has the potential to change the law. If the applicable legal precedent is unfindable and therefore unusable, hasn't the law been effectively changed? Existing but less popular legal precedents could effectively become invisible. Rarely used but valid laws, doctrines, or arguments might fade into nonexistence... The result would be to limit the possibilities of legal writing, to limit the reach of creative thinking about the law, to narrow the range of alternative legal perceptions, to close the door to the unknown. Alternative views of the law or of the possibilities of the law would never be exposed.<sup>44</sup>

It is not only potential arguments, different views, and possibilities of the law — the could-have-beens and what-ifs — that are lost. A database's use of search data could have potentially devastating effects. For example, Sarah Lamdan exposes the complicit role of legal publishers in the weaponization of data and its use in government surveillance.<sup>45</sup> Companies like Lexis and Westlaw are increasingly "building and maintaining surveillance tools for local, state, and federal law enforcement entities, including ICE [Immigration & Customs Enforcement]."<sup>46</sup> Companies like Thomson Reuters, which owns Westlaw, have access to

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<sup>41</sup> See generally Wheeler, *supra* note 2. Much like the iPhone, WestLaw's commercial database has had numerous versions and upgrades over the years. Ron Wheeler's article focuses on WestLaw Next. The current version of WestLaw's online commercial database is called WestLaw Precision.

<sup>42</sup> See Wheeler, *supra* note 2, at 364-65.

<sup>43</sup> Wheeler, *supra* note 2, at 366.

<sup>44</sup> *Id.* at 368-69.

<sup>45</sup> Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255 (2019); See also Margaret Hu, *Big Data Blacklisting*, 67 FLA. L. REV. 1735 (2015).

<sup>46</sup> Lamdan, *supra* note 45, at 257-58.

extensive data and information as part of their traditional function as research resources for attorneys.<sup>47</sup> According to Lamdan, they are re-packaging and refining data to enable big data policing, and entering, “unapologetically,” into lucrative contracts with law enforcement.<sup>48</sup>

This method of “big data policing,”<sup>49</sup> enabled by legal publishers and indirectly supported by the legal academy, has real life impacts. In the immigration context, access to surveilled, captured, and specially curated data allows ICE to “employ increasingly cruel and invasive techniques as they accelerate arrests, detentions, and deportations of immigrants without legal status;” arresting immigrants at church, home, driving their children to school, and even when driving their family members to the hospital.<sup>50</sup>

As their understanding of the dangers and shortcomings of the existing legal research resources and tools has grown, scholars have begun to advocate for change. On the individual level, Nevelow Mart advocates for increased information literacy rather than blind reliance on technology, as “algorithmic variations lead to substantial variations in the unique and relevant results each database provides.”<sup>51</sup> She argues that students need to understand that research technologies are not infallible, and that algorithms are tools that can be wielded by the effective researcher who understands the technology.

On the institutional level, Lamdan argues that law schools and legal employers should, indeed must, demand greater accountability, and ultimately divest from vendors engaged in this behavior and switch to alternative legal research services.<sup>52</sup> Nicholas Mignanelli advocates for “critical dialogue” regarding the impacts of “black box algorithms and new AI powered legal research products,” encouraging librarians to demand greater transparency from vendors to better understand possible biases and structural blindspots.<sup>53</sup>

In his powerful article, *Following New Lights: CLR Strategies as a Spark for Law Reform in Appalachia*, Nicholas Stump coined the term “Critical Legal Research (CLR).”<sup>54</sup> Relying on the work of Barkan and others,<sup>55</sup> Stump demonstrates the importance of “deconstructing the legal research regime.”<sup>56</sup>

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<sup>47</sup> *Id.* at 258.

<sup>48</sup> *Id.* at 283.

<sup>49</sup> Andrew Ferguson, *THE RISE OF BIG DATA POLICING* (2017) (defining the term as utilizing technology – including predicative algorithms – as part of modern policing).

<sup>50</sup> Lamdan, *supra* note 45 at 258-59.

<sup>51</sup> Nevelow Mart, *supra* note 39, at 420.

<sup>52</sup> See Lamdan, *supra* note 45, at 261.

<sup>53</sup> Mignanelli, *supra* note 3, at 341.

<sup>54</sup> Stump, *supra* note 11.

<sup>55</sup> Nicholas F. Stump, “Non-Reformist Reforms” in *Radical Social Change: A Critical Legal Research Exploration*, 101 B.U. L. REV. ONLINE 6, 8 (2021).

<sup>56</sup> *Id.*

Stump also advocates for “reconstruction” strategies, such as promoting “an intensive practitioner reliance on critical legal theory-steeped resources,” as well as cultivating “a nonhegemonic grassroots approach” that includes “radical cause lawyering.”<sup>57</sup>

Stump strongly emphasizes the need for “true systemic reformations of the ecological political economy over mere intra-systemic law reform[,]” and highlights the role CLR can play in working to transcend the “liberal capitalist paradigm.”<sup>58</sup> Although he discusses deploying CLR in more traditional social justice lawyering contexts in much of his foundational work,<sup>59</sup> he ultimately pushes scholars, practitioners, and activists to look beyond law reform and strive for transformative change.<sup>60</sup>

In the context of legal education, a CLR pedagogy asks law professors to “take up the mantle of engaging in algorithmic activism, creating transgressive bibliographies, practicing unplugged brainstorming, teaching CLR methods to students, and developing new strategies.”<sup>61</sup> This framework, developed by Nicholas Mignanelli, stresses the need “to instill in our students a healthy dose of skepticism about claims of objectivity and neutrality” within AI-powered legal research products.<sup>62</sup>

CLR is even more vital for the next generation of law students, the “Zoomers, who struggle with critical skills and information literacy because of their early education.”<sup>63</sup> Older legal research tools, like “indexes and keyword searches” have always had problems, but “did not inspire the blind faith that artificial intelligence does, nor did they invite users to cede so much control over the research process.”<sup>64</sup> Thus legal research pedagogy must “better evaluate sources and hone their analytic and metacognitive skills in a practical and realistic context.”<sup>65</sup>

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<sup>57</sup> *Id.* Stump also discusses Critical Legal Research in the context of related transgressive lawyering modes, such as community lawyering, rebellious lawyering, and critical case lawyering. *See, e.g.,* Nicholas F. Stump, *Mountain Resistance: Appalachian Civil Disobedience in Critical Legal Research Modeled Law Reform*, 41 ENVIRONS: ENV'T. L. & POL'Y J. 69, 90-91 (2017).

<sup>58</sup> Stump, *supra* note 55.

<sup>59</sup> Stump, *supra* note 11.

<sup>60</sup> Stump, *supra* note 55, at 12. In his most recent article, Stump concretely applies such transformative-steeped Critical Legal Research methods to a range of contemporary social issues. *See generally* Stump, *supra* note 4.

<sup>61</sup> Mignanelli, *supra* note 3, at 341.

<sup>62</sup> *Id.* at 342.

<sup>63</sup> Olivia R. Schlinck, *Ok, Zoomer: Teaching Legal Research to Gen Z*, 115 LAW LIBR. J. 269 (2023). People in what has become known as “Generation Z,” who are nicknamed “Zoomers,” were “born in the late 1990s or the early 2000s.” *Zoomer*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/Zoomer>.

<sup>64</sup> Mignanelli advocates for “critical dialogue” regarding the impacts of “black box algorithms and new AI powered legal research products.” Beyond the classroom, he encourages librarians to demand greater transparency from vendors to better understand possible biases and structural blind spots. Mignanelli, *supra* note 16, at 102.

<sup>65</sup> *See* Sokkar Harker, *supra* note 2.

In sum, relying on standard legal research regimes without a critical approach can be harmful for both marginalized populations and anyone interested in pursuing justice. The dominant methodology establishes a false narrative that search results are neutral and accurate and obscures the “invisible hands”<sup>66</sup> curating data to prioritize the status quo. Moreover, the dominant approach fails to engage in critical thinking and dialogue that questions the motives and operations of the law; in particular, whether the results are just. This flawed approach conveniently whitewashes the laws’ ability to perpetuate oppression by cloaking it in seemingly neutral historical precedent. CLR dismisses the trope of neutrality and works to deconstruct legal research, challenging researchers to think critically about the “invisible hands” shaping information, the materials and voices excluded from the resources and dominant systems, and strategies to account for the biases and blind spots baked into traditional research resources and tools.

In contrast, “CLR seeks to expose how external power structures shape the organization of Legal Information and embed biases in the tools of Legal Information retrieval.”<sup>67</sup> CLR encourages students to “think outside the box” when researching, and to interrogate which stakeholders, actors, or perspectives are being excluded.<sup>68</sup> Starting with this critical perspective can lead to more thorough research that incorporates alternative materials, including legal scholarship authored by those who have been historically excluded from the academy and interdisciplinary scholarship, and are often ignored by traditional research.<sup>69</sup> After all, as Wheeler argues, limiting legal research to precedent simply buttresses existing norms and fails to lead to innovation.<sup>70</sup>

One way to reinforce the importance of CLR is to distinguish it from standard legal research. Any practicing attorney can attest to the centrality of legal research to the profession. This Article does not advocate for eliminating the teaching legal research altogether, but instead argues for incorporating CLR into legal research instruction to foster a comprehensive, equitable, and social justice-oriented approach to the law. Such a critical pedagogical approach may indeed result in a more robust and potent form of legal research instruction in clinics.

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<sup>66</sup> See Sokkar Harker, *supra* note 2.

<sup>67</sup> Mignanelli, *supra* note 16, at 102.

<sup>68</sup> *Id.* at 102.

<sup>69</sup> See generally Stump, *supra* note 11.

<sup>70</sup> Wheeler, *supra* note 2, at 366.

### A. Traditional Legal Research — Goals & Methodology

Since new attorneys typically spend a third of their time researching,<sup>71</sup> it is unsurprising that leading scholars emphasize the importance of framing legal research as an “intellectual, analytical, and iterative process.”<sup>72</sup> For example, Barbara Bintliff makes clear that legal research education should:

“teach students to think strategically about their research processes, understand the sources they are using and why they are useful, analyze their results, and engage in continual adjustment of their strategy and evaluation of their results until reaching a resolution to the research problem. The pedagogy based on the statements is intended to be flexible, to allow for a variety of teaching methods, and above all, to emphasize the intellectual aspect of legal research and its pivotal place in legal education.”<sup>73</sup>

Legal research classes teach far more than navigating search engines. As Sarah Valentine argues, they begin by providing the basic scaffolding and foundational civics knowledge necessary for the study of law, including “the structure of the American system of government, the structure of the court system, the multiple concepts of jurisdiction, the concepts of precedent and stare decisis, the different sources of primary authority and how to read and track them, and how these primary authorities affect one another.”<sup>74</sup> Traditional legal research also includes building bibliographic knowledge, as well as using one’s understanding of various authorities and how to search them.<sup>75</sup>

Most importantly, legal research education emphasizes that research is a process.<sup>76</sup> Students must learn that “the goal of legal research is to educate oneself about the potential legal theories and solutions applicable to a client’s factual situation, determine likely legal and non-legal outcomes, and use the accumulated information to strategize” on behalf of their clients.<sup>77</sup> This, according to Valentine, requires viewing

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<sup>71</sup> STEVEN A. LASTRES, REBOOTING LEGAL RESEARCH IN A DIGITAL AGE 3 (2013), [https://www.lexisnexis.com/documents/pdf/20130806061418\\_large.pdf](https://www.lexisnexis.com/documents/pdf/20130806061418_large.pdf) [<https://perma.cc/SH5Q-Z2D3>].

<sup>72</sup> Barbara Bintliff, *Introduction*, in THE BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION: THE INTERSECTION OF INTELLECTUAL AND PRACTICAL SKILLS XII (Susan Nevelow Mart ed., 2014).

<sup>73</sup> *Id.*

<sup>74</sup> Sarah Valentine, *Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools*, 39 U. BALT. L. REV. 173, 210 (2010).

<sup>75</sup> *See id.*; *see also* Stump, *supra* note 11, at 597-98.

<sup>76</sup> Matthew C. Cordon, *Task Mastery in Legal Research Instruction*, 103 LAW LIBR. J. 395, 400 (2011).

<sup>77</sup> Valentine, *supra* note 74, at 218.

legal research as a dynamic and iterative process, one that involves “creating a research plan, researching, reflecting on what has been found, applying it to both the issue at hand and to the original research plan, and repeating the process as needed until applicable legal context and specific rules and procedures are distilled.”<sup>78</sup>

In sum, the broad goals of legal research education are straightforward — teach students to embrace legal research as an iterative process, requiring critical thinking, legal analysis, planning, and reflection. However, the methodology of teaching legal research is far more fraught. Despite the centrality of legal research in law practice, according to Alyson Drake, most students have limited curricular opportunities to learn and master legal research.<sup>79</sup> Drake points out that the standard legal research course is taught during the first year curriculum and is often combined with legal writing,<sup>80</sup> leaving limited class time to dedicate to learning the research process and corresponding skills.<sup>81</sup> These time constraints have maintained the use of certain ineffective and outdated pedagogical methods, some of which prevent student comprehension of research as a process, thus impacting their ability to become effective researchers.<sup>82</sup> The next sections provide a brief synopsis of the traditional pedagogical approaches used to teach legal research.

### 1. *Bibliographic Methodology*

Bibliographic methodology focuses on introducing students to specific tools and resources, which, as Valentine explains, inadvertently reduces legal research to “a series of discrete legal tools or tasks.”<sup>83</sup> This method uses activities like “treasure hunt exercises” where “students find a single authority on a very narrow issue.”<sup>84</sup> Students do not engage in active problem solving or creative thinking, and instead learn, at least superficially, how to use a very specific resource.

The bibliographic method presents two very concerning problems. First it fails “to prepare students to work on the kind of ill-defined problems without clear answers that characterize the practice of law.”<sup>85</sup> It lulls students into believing that the law is clear and that there is a “correct answer” by never presenting a complex and indeterminate problem. Second, this method does not acknowledge that research is an

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<sup>78</sup> Valentine, *supra* note 74, at 219.

<sup>79</sup> Alyson Drake, *The Need for Experiential Legal Research Education*, 108 LAW LIBR. J. 511, 518 (2016).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 519.

<sup>82</sup> Valentine, *supra* note 74, at 226.

<sup>83</sup> *Id.*

<sup>84</sup> Drake, *supra* note 79, at 529.

<sup>85</sup> Valentine, *supra* note 74, at 201.

iterative process anchored in creative thinking, strategic analysis, reflection, and repetition.<sup>86</sup> The bibliographic method perpetuates the myth that finding the correct resource will magically crack the code, produce the answer, and win the case.

## 2. *Process Methodology*

According to Judith Rosenbaum, the process method of legal research instruction refers to “process-oriented exercises” that are implemented “to teach students about the sources of legal research” by using hypothetical client problems.<sup>87</sup> Valentine argues that methodology falls short because the simulated client matters are far too simple, lacking the complexity in both facts and intersecting legal regimes, and thus failing to adequately reflect live practice.<sup>88</sup>

The simplicity of simulated client scenarios is an unfortunate by-product of existing curricular limitations and constraints. As Drake points out, research instruction must share classroom time with legal writing, oral advocacy, and other topics in the syllabus.<sup>89</sup> Caroline Osborne, in her survey of first-year legal research programs, found that the simulated hypothetical is often connected to the underlying writing assignment in the legal research and writing course.<sup>90</sup> In fact, most often the dominant objective and focus of the hypothetical is to teach and refine legal writing skills. This, as Drake argues, can lead to a simpler research problem and a closed circuit of legal information,<sup>91</sup> failing to generate a sufficiently complicated problem that warrants creative thinking, strategic planning, reflection, and refinement necessary for learning legal research.<sup>92</sup> Basic, writing-focused simulations can reinforce the idea that legal research is simple, narrow, and limited to binding precedent and correct answers.<sup>93</sup>

## 3. *Alternative Methodologies*

Fortunately, leading scholars in the field have developed alternative methodologies. In her groundbreaking article, Valentine reframes legal research as both a lawyering skill and legal skill. Lawyering skill refers

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<sup>86</sup> *Id.*

<sup>87</sup> Judith Rosenbaum, *Why I Don't Give a Research Exam*, 11 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 1, 1 (2002).

<sup>88</sup> Valentine, *supra* note 74, at 201.

<sup>89</sup> Drake, *supra* note 79, at 519.

<sup>90</sup> Caroline Osborne, *The State of Legal Research Education; A Survey of First Year Legal Research Programs or 'Why Johnny and Jane Cannot Research'*, 108 LAW LIBR. J. 403 (2016).

<sup>91</sup> Drake, *supra* note 79, at 519.

<sup>92</sup> *Id.* at 529-30.

<sup>93</sup> *See id.* at 519; 529-30.



to the skills necessary for the practice of law,<sup>94</sup> including framing the problem, understanding the source materials, creating a research plan and strategy, and refining the plan.<sup>95</sup> This position also emphasizes the importance of embracing uncertainty, and developing the ability to navigate the shifting world of legal information in the wake of constant technological innovations.

Yolanda P. Jones, introducing her concept of “expansive legal research,” describes the legal research status quo as follows: “Traditionally[,] legal research has been seen as a closed system. It is often depicted in terms of a closed loop or flowchart with sequential steps that involve unchanging hierarchical authorities.”<sup>96</sup> This, of course, is an inaccurate description of the law itself, which can be ambiguous. Accordingly, Valentine argues that legal research instruction reform is necessary because law students need to stop being encouraged to seek direct answers, and should instead be using their research results to build a larger case theory.<sup>97</sup>

Legal skill, while it overlaps with lawyering skills, focuses more on “the acquisition of basic legal knowledge and legal analysis abilities” and “the doctrinal and analytic components of the process used to teach students to think like a lawyer.”<sup>98</sup> Teaching legal research as a legal skill counters the myth that research consists of routine, repetitive tasks and is wholly disconnected from legal analysis and doctrine.<sup>99</sup>

To teach students both the requisite legal skills and lawyering skills, Valentine advocates for teaching legal research “as an iterative process of problem solving and to include concepts of information literacy.”<sup>100</sup> She warns that the outdated methods “leave students alone to face the ocean of information currently eroding their abilities to find, manage, and understand the law.”<sup>101</sup> This reimagining of legal research, she argues, can provide significant advantages not only to these future lawyers, but also the law professors who are charged with teaching them the law.<sup>102</sup>

Alyson Drake also advocates for incorporating more experiential education components into legal research.<sup>103</sup> Departing from the

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<sup>94</sup> Valentine, *supra* note 74, at 177.

<sup>95</sup> For a discussion of how to create and refine a legal research plan, *see generally* Osborne, *supra* note 17.

<sup>96</sup> Yolanda P. Jones, *Expansive Legal Research*, 44 INT’L J. LEGAL INFO. 241, 241 (2016).

<sup>97</sup> *See* Valentine, *supra* note 74, at 201-203.

<sup>98</sup> Valentine, *supra* note 74, at 208.

<sup>99</sup> *Id.* at 199.

<sup>100</sup> *Id.* at 210.

<sup>101</sup> *Id.* at 226.

<sup>102</sup> *See id.* at 226.

<sup>103</sup> *See* Alyson Drake, *An Experiential Learning Primer*, RIPS L. LIBR. BLOG (Jun. 27, 2016), <https://ripslawlibrarian.wordpress.com/2016/06/27/an-experiential-learning-primer/>.



traditional method, which generally “combines lecture with some classroom practice of research skills,”<sup>104</sup> Drake advocates for centering active learning and formative assessments to promote learning for transfer.<sup>105</sup> By using a flipped classroom, in which “most or all of the lecture component of the course takes place prior to class,” Drake argues that instructors can introduce students to truly complex legal issues that are more reflective of practice, driving home that research is a dynamic and iterative process, while also being able to offer opportunities for live searching and formative feedback.<sup>106</sup> In this model, the student takes their nascent knowledge and applies it in class, creating a search strategy and starting the search process in a “guided atmosphere.”<sup>107</sup> The instructor can provide real-time, ongoing feedback — helping students “tie the skills they are practicing back to the theories the students have learned, using their new experiences as the basis for reflection.”<sup>108</sup> In addition to learning the process, this approach increases retention by providing more opportunities for repetition — an essential factor in “embedding skills into a learner’s memory.”<sup>109</sup>

CLR is yet another pedagogical innovation. In its absence, we train students to be highly-educated technocrats who perpetuate harmful hegemonies as a matter of rote practice. Students are more likely to accept the myth of normative neutrality. If we do not teach students CLR skills, we cannot necessarily expect them to engage in critical analysis or interrogate the search resources, processes, or results. A lack of critical thinking invariably subverts synthesizing doctrine and creative problem solving. This severance of analytical abilities from legal research reduces research to rote and repetitive tasks, leading to a failure of lawyering skills as well.

Practicing attorneys know there is rarely a “right” answer for complex legal problems. Instead, the lawyer is navigating a veritable sea of uncertainty with few established and tested islands of precedent. As a lawyering skill, legal research identifies the existing islands of known law and charts a course forward for the client. Just as a sea journey changes with the type of boat and time of year, and must accommodate unforeseen circumstances during the voyage, the legal research process must change depending on jurisdiction, client objectives, and other facts and circumstances. The legal researcher, therefore, must understand research as an iterative process rife with

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<sup>104</sup> Drake, *supra* note 79, at 529.

<sup>105</sup> Learning for transfer refers to the ability to use skills or knowledge acquired in one setting and apply it to others. *See infra* Section III.C.

<sup>106</sup> Drake, *supra* note 79, at 530.

<sup>107</sup> *Id.* at 521.

<sup>108</sup> *Id.* at 521, 530-31.

<sup>109</sup> *Id.*

uncertainty, requiring constant adjustment and refinement so that the ship can be steered safely through both known dangers and emerging obstacles.

Understanding what is needed for effective advocacy requires, as an initial step, a tacit acknowledgement of the limitation of the resources, devices, and systems. Then, the good researcher must craft a plan and strategies that work to navigate these numerous blindspots. CLR equips students to construct an expansive and comprehensive plan and build the requisite skills to be more effective, thoughtful, and discerning researchers.

### B. CLR and Pedagogical Application

Many scholars have advocated for critical legal education,<sup>110</sup> which involves the incorporation of critical perspectives into legal education. The critical approach “emphasizes the intersection between social justice and legal education”<sup>111</sup> framing law as a site of power struggles and interlocking systems of oppression.<sup>112</sup> The critical perspective not only counters the dominant narrative of law as neutral, but it also denounces normalizing the subordination and oppression of marginalized groups and basic human rights.<sup>113</sup> Accordingly, Yasmin Sokkar Harker emphasizes the importance of “treating legal information as a social construct” in the legal research classroom.<sup>114</sup>

As a pedagogical framework, CLR is broadly applicable across the law school curriculum. This includes the incorporation of CLR into not only first year legal research and writing courses, but also into specialized research classes, such as regulatory research.<sup>115</sup> Some scholars have even developed specialized higher-level research courses that weave together CLR with social justice advocacy.<sup>116</sup>

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<sup>110</sup> See, e.g., Valdes, *supra* note 8, at 72 (noting critical legal education “provides lifelines of power based on knowledge and principle to marginalized students struggling to become aware of the ways and means through which felt and known oppressions are normalized, materialized, even valorized.”).

<sup>111</sup> See Sokkar Harker, *supra* note 6, at 43.

<sup>112</sup> Rosario-Lebrón, *supra* note 7, at 314.

<sup>113</sup> See, e.g., Valdes, *supra* note 8, at 72; Klare, *supra* note 8.

<sup>114</sup> Sokkar Harker, *supra* note 6, at 46. See also Sokkar Harker, *supra* note 2, at 17; Wilcoxon, *supra* note 9, at 76-78; Kathleen D. Fletcher, *Casebooks, Bias, and Information Literacy – Do Law Librarians Have a Duty?*, 40 LEGAL REFERENCE SERVS. Q. 184, 197-98 (2021).

<sup>115</sup> See generally Stump, *supra* note 11 (explaining how critical legal research strategies can be employed in the development of cases involving challenges to federal and state regulation of mountaintop mining and the coal extraction industry).

<sup>116</sup> Stump, for example, “has incorporated [critical legal research] methods as modules within advanced legal research courses and upper-level seminar courses.” Stump, *supra* note 4, at 158 n.50. Laura B. Wilcoxon, Ellie Campbell, and Courtney Selby also have recently chronicled their innovative work in this critical pedagogical vein. See generally Wilcoxon,

Clinics provide an ideal environment to incorporate CLR and advance its broader objectives, including deconstructing traditional legal research and becoming “sites of liberation” within the law school classroom.<sup>117</sup> First and foremost, clinics are an educational laboratory where students engage deeply with the intersection of law and social justice as active participants within our legal system. Clinical Law Professor Carolyn Grose notes that clinics “expose students to the underbelly of the legal system, and its place and role in society; and second, to challenge them to think critically about that system and their place in it.”<sup>118</sup> In the clinic, student-attorneys engaged in direct representation encounter the complex nexus of legal regimes and the subsequent legal ramifications for their clients. However, this exposure extends beyond clinic fieldwork and includes introductions to various lawyering movements and theories oriented toward social justice, including movement lawyering, rebellious layering, community lawyering, critical race theory, feminist legal theory, client centered lawyering, trauma-informed lawyering, and others. Seminar classes routinely include social justice topics that dovetail with student casework or the specific subject matter of their clinic, such as prison abolition, environmental justice, workers’ rights, racial justice, community economic development, and solidarity economies. All of these components serve as fertile ground for introducing the theoretical framework of critical information literacy and applying the methodology of CLR to advocate for transformative change.<sup>119</sup>

Clinics also provide additional opportunities for learning and refining legal research skills generally, leveraging metacognition and active learning. Mary Nicol Bowman and Lisa Brodoff discussed the harmful “silo” effect that can make it difficult for students to apply previously-learned legal research skills in the dynamic, live client

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*supra* note 9; Ellie Campbell, *Critical Legal Research, Artificial Intelligence, and Systemic Racism: Teaching with Jim Crow Text-Mining* 42 LEGAL REFERENCE SERVS. Q. (forthcoming 2023); Courtney Selby, *Integration & Transformation: Incorporating Critical Information Literacy and Critical Legal Research into Advanced Legal Research Instruction* 43 N. ILL. U. L. REV. (forthcoming 2023).

<sup>117</sup> Sokkar Harker, *supra* note 6, at 43.

<sup>118</sup> Grose, *supra* note 10, at 495.

<sup>119</sup> As Stump explains,

The manner in which our laws and legal discourses are organized, accessed, and analyzed has a vital impact on research outcomes...the research paradigm by which such outcomes are reached is defined wholly by insidious systems of constraint. In examining—and transcending—such systems, and in adopting approaches that maximize creative law reform potential, a great deal may be accomplished by the reformist-minded attorney.

Stump, *supra* note 11, at 657.

environment of a clinic.<sup>120</sup> CLR can and should be introduced early on during the first-year legal research instruction and then continuously revisited to ensure retention. However, as Carolyn Grose suggests, because clinics are “the pinnacle of the legal education pyramid,”<sup>121</sup> the opportunity to continue honing CLR skills within the dynamic practice environment of a clinic further equips students to be agents of social change in practice. The next section illustrates how CLR supports and advances the larger goals of clinical pedagogy.

## II. SYNERGIES BETWEEN CLR AND CLINICAL PEDAGOGY

Clinical pedagogy itself enjoys no singular, didactic definition adopted by all teachers. Rather, as Carolyn Grose artfully states, there are certain stated goals and methods that form the foundation of clinical pedagogy generally.<sup>122</sup> As clinical legal education continues to evolve, its methods and goals are further refined. Broadly stated, the goals for clinical education include applied legal knowledge and reasoning, skills training, learning for transfer, and furthering social justice.<sup>123</sup> The sections below briefly outline the goals of clinical pedagogy and highlights intersections and synergies with CLR.

### A. *Thinking Like a Lawyer — Integrating Legal Knowledge and Reasoning*

A false narrative persists that clinical education centers on skills training, intimating that students learn critical thinking and legal analysis skills in their doctrinal courses alone. In practice, it is impossible to teach or learn lawyering skills without a firm foundation in critical thinking and legal analysis skills. While doctrinal classes are inevitably taught in silos — contracts, property, tax, etc. — the world of practice demonstrates the complex intersection of various legal regimes and their impacts on claims, transactions, remedies, etc.<sup>124</sup>

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<sup>120</sup> See generally Mary Nicol Bowman & Lisa Brodoff, *Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference*, 25 CLIN. L. REV. 269 (2019).

<sup>121</sup> Grose, *supra* note 10, at 512.

<sup>122</sup> *Id.* at 494.

<sup>123</sup> Elliott S. Milstein, *Experimental Education and the Role of Law: Teaching Values through Clinical Education in China*, 22 PAC. MCGEORGE GLOBAL. BUS. & DEV. L.J. 55, 55 (2009).

<sup>124</sup> Steven Keith Berenson, *Preparing Clinical Law Students for Advocacy in Poor People's Courts*, 43 N.M. L. REV. 363, 365 (2013) (arguing that clinics serve as a bridge from theory to practice by demonstrating the complexities of how the justice system truly works). For an early discussion of this issue, see Anthony Amsterdam, *Clinical Legal Education - A 21<sup>st</sup> Century Perspective*, 34 J. LEGAL EDUC. 612 (1984). Amsterdam criticized legal education as “too narrow because it failed to develop in students ways of thinking within and about the

Therefore, teaching a skill like interviewing in the clinical setting requires a conceptual framing of the law — deconstructing the legal issues, examining the client’s goals, mapping facts, and engaging in a holistic and comprehensive analysis of the case.<sup>125</sup> Clinical professors push students “to employ legal knowledge, legal theory, and legal skills to meet individual and social needs.”<sup>126</sup> Moreover, this approach exposes students “to the ways in which law can work either to advance or to subvert public welfare and social justice.”<sup>127</sup>

Much like clinical pedagogy, CLR challenges students to apply critical thinking and legal analysis to better understand the complex intersections of law and justice. CLR creates “a people-based analytical methodology” and advocates for “unplugged brainstorming” when researching.<sup>128</sup>

Delgado and Stefancic, in their 2007 article, describe why this is necessary:

Lawyers interested in representing individuals as clients, who, unlike corporations, do not find a ready-made body of developed law in their favor, need to spend time with the computer shut down, mulling over what an ideal legal world would look like from the client’s perspective. In this exercise, the free association of ideas, policies, and social needs will play a large part.<sup>129</sup>

Both Nicholas Mignanelli and Nicholas Stump have recognized the value of this part of the legal research process. CLR pedagogy, according to Mignanelli, involves training students to “think carefully about the information they are accessing” and “consider the implications of what they have found.”<sup>130</sup> As Stump explains, this requires the ability to “unplug” from the search results and take the time to analyze and evaluate their research process and findings.<sup>131</sup>

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role of lawyers - methods of critical analysis, planning, and decision-making which are not themselves practical skills but rather the conceptual foundations for practical skills...” and described the types of critical thinking that can be developed in a clinical environment, such as “ends-means thinking” and “decision making in situations where options involve differing and often uncertain degrees of risks.” *Id.* at 612-15.

<sup>125</sup> Stephen Wizner, *The Law School Clinic: Legal Education in the Interests of Justice*, 70 *FORDHAM L. REV.* 1929, 1935 (2002) (“It was to get students out of the classroom into the real world of law, from which they would return to the classroom with a deeper understanding of how legal doctrine and legal theory actually work—or don’t work.”).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Stump, *supra* note 11, at 621-22.

<sup>129</sup> Delgado & Stefancic, *Same Questions? (2007)*, *supra* note 1, at 328.

<sup>130</sup> Mignanelli, *supra* note 3, at 343.

<sup>131</sup> Stump, *supra* note 11, at 621-22.

Students must be able to engage in this analysis using a comprehensive and holistic approach: within the context of their client's goals, the specific facts of their case, the limitations of the existing resources or technologies, and other factors. Moreover, students may need to creatively assess and incorporate secondary legal and non-legal sources to gain a more robust understanding of potential arguments or solutions. Sometimes this can only be accomplished by turning off the computer to stem the continuous flow of additional information.<sup>132</sup>

Unplugging is particularly important in the wake of the increasing impact that artificial intelligence (AI) exerts in modern legal research tools.<sup>133</sup> AI often “conceals the legal research process and entrenches the biases of society’s dominant interest[,]” which threatens to “close the legal imagination and turn the law into a monolith.”<sup>134</sup> Indeed, clients, communities, and individuals seeking to challenge the status quo and pursue solutions — and justice — outside of dominant hegemonic interests are relegated to the fringes by AI.<sup>135</sup>

In the clinical classroom, unplugging connects perfectly with the professor’s desire to teach critical analysis and legal analysis skills in context. Applied learning requires reckoning with the realities of your client’s situation and the laws that impact their lives, goals, and objectives. Focusing on cases or problems in the abstract is merely an issue spotting exercise that leads to blind reliance on a “black box” algorithm to populate results that may or may not match the specific circumstances of the case.<sup>136</sup> Law cannot merely be reduced to scientific or mathematical calculations and much of litigation or transactional lawyering involves making creative arguments. Simply adhering to the status quo

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<sup>132</sup> *See id.*

<sup>133</sup> *See infra* Section V.D.

<sup>134</sup> Nicholas Mignanelli, *Prophets for an Algorithmic Age*, 101 B.U. L. REV. ONLINE 41, 44 (2021);

<sup>135</sup> As Mignanelli points out,

Most material on the internet comes arranged in order of frequency of use ... this popularity contest approach to listing information builds in a structural bias in favor of commonplace items that have found wide use. New ideas that are just beginning to be noticed may easily escape the attention of a busy searcher.

*Id.* at 45. *See also* Danielle Keats Citron, *Technological Due Process*, 85 WASH. U. L. REV. 1249,1256 (2008); Emily Berman, *A Government of Laws and Not of Machines*, 98 B.U. L. REV. 1277, 1279 (2018).

<sup>136</sup> One study found “Third-year law students without a clinical experience seemed to be focused on the traditional law school task of issue spotting, to treat the problem as an abstract exercise, and to overlook the actual needs of the client.” Stefan H. Krieger, *The Effect of Clinical Education on Law Student Reasoning: An Empirical Study*, 35 WM. MITCHELL L. REV. 359, 395 (2008).

delivered by legal research technologies is inadequate. Because legal research resources have embedded biases that reinforce hegemonic norms, the consequences of how they are used by lawyers representing marginalized communities or constituencies who are seeking real justice can be significant.

Imagine the following client as an illustrative example. A group of domestic workers is interested in starting a house-cleaning business together. The founders know they provide a popular and in-demand service; however, they face less stability and more vulnerability working as independent contractors. By working together, they can build a stronger business model where 1) everyone earns a living wage, and 2) no one is subjected to unprofessional situations by potential clients (failure to pay, harassment, etc.) without support. The founders have varying amounts of start-up funds, supplies, and customers they will be contributing to the business. They also have varying immigration statuses.

The above synopsis demonstrates how any case implicates numerous overlapping legal regimes. Some of the elements of this case require further research into the administrative state, delving into regulations involving taxation, domestic workers, and perhaps even occupational health and safety regulations. As the founders are starting a business, research into relevant state statutes governing various business entities will certainly be required. Federal regulations surrounding not only immigration, but also fundraising or financing, may be required as well.

Clinic students must identify the intersecting legal regimes and forecast the impacts on their client's case. As part of comprehensive and holistic representation, students synthesize the law and basic facts, but also work to incorporate the goals, preferences, and concerns of their clients as part of the lawyering process. This is best accomplished by unplugged brainstorming and broad framing, both of which help students conceptualize the case and map possible avenues for research.

The danger lies in rushing into legal research without “unplugging” and engaging in critical thinking and analysis. A failure to understand the case will lead to partial and inaccurate legal research. Once the case is properly conceptualized, however, students can then design their legal research plan, building on the foundation of their unplugged brainstorming and constructing search strategies that account for biases and hegemonic-related constraints of existing research tools and resources. The actual construction and design of the research plan and attendant strategies corresponds with another core tenet of clinical pedagogy — skills training.



### B. Skills Training and Legal Research

Although clinical pedagogy is far more than skills training, the clinical classroom provides an immersive, guided learning opportunity to develop key lawyering skills in-role. Often skills discussions center on client-facing skills like interviewing,<sup>137</sup> counseling,<sup>138</sup> mediation,<sup>139</sup> and negotiation.<sup>140</sup>

Legal research is another core skill for attorneys: in fact, it is “a prerequisite of creative lawyering.”<sup>141</sup> To gain a working mastery of legal research skills, clinical professors must reinforce that legal research is an iterative process.<sup>142</sup> Moreover, students should be trained in CLR methods to ensure that they develop superior critical thinking skills, and are capable of building more robust research plans and executing more comprehensive searches.<sup>143</sup>

Students incorrectly believe that navigating the search platforms is the sum total of legal research. In actuality, the true heart of legal research is crafting a thorough research plan after carefully analyzing and framing of the legal issues in concordance with the client’s goals.<sup>144</sup> The research plan combines the legal reasoning and critical analysis skills

<sup>137</sup> See, e.g., Laurie Shanks, *Whose Story Is It, Anyway? – Guiding Students to Client-Centered Interviewing Through Storytelling*, 14 CLIN. L. REV. 509, 516 (2008) (“Law students require effective client interviewing skills *before* they become practitioners.”).

<sup>138</sup> See, e.g., Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventive Law into the Law School Curriculum*, 5 PSYCH. PUB. POL’Y & L. 1123, 1123 (1999) (“[L]egal scholars have advocated training attorneys to integrate their planning and counseling roles to become ‘therapeutically oriented preventative lawyers: Skills and clinical programs are well-suited for such training.”)

<sup>139</sup> See, e.g., Barbara Glesner Fines, *The Future of Family Law Education*, 33 J. AM. ACAD. MATRIMONIAL LAW. 1, 28 (2020) (“Perspective taking, a skill developed in mediation training that is a core aspect of family law dispute resolution[,] is also a critical skill for de-biasing. While ... [this skill] ... can be taught in the classroom, the most effective way to develop [it] is in clinical experiences.”); SpearIt & Stephanie Smith Ledesma, *Experiential Education as Critical Pedagogy: Enhancing the Law School Experience*, 38 NOVA L. REV. 249, 268 (2014) (describing the mediation certificate program at Thurgood Marshall School of Law, in which students receive, in addition to mediation instruction, “experience ... in the live-client mediation clinic,” which prepares them “to enter the legal community credentialed and experienced in the area of legal dispute resolution.”).

<sup>140</sup> See, e.g., Daniel Del Gobbo, *The Feminist Negotiator’s Dilemma*, 33 OHIO ST. J. ON DISP. RESOL. 1, 30 (2018) (discussing how law schools in both the United States and Canada, “are offering students the opportunity to learn the practice of principled negotiation ... in supervised experiential and clinical settings,” while also proposing that the principles of “cultural feminist negotiation” play a greater role in teaching negotiation skills in clinical settings); Susan L. Brooks & Robert G. Madden, *Epistemology and Ethics in Relationship-Centered Legal Education and Practice*, 56 N.Y. L. SCH. L. REV. 331, 365 (2011) (advocating for adding “negotiation skills” to the essential competencies law students are required to master during law school, which can be “observed and measured in clinical practice experiences[.]”).

<sup>141</sup> Mignanelli, *supra* note 3, at 337.

<sup>142</sup> Valentine, *supra* note 74, at 216.

<sup>143</sup> See Schlinck, *supra* note 63, at 302-04.

<sup>144</sup> See Osborne, *supra* note 17, at 182-83.



stated in the previous section with practical application, creating a strategy and process for each case. The remainder of the research process involves expanding and refining the research plan. This is why it is essential to make sure students understand that legal research starts with the research plan, not with a commercial search engine.<sup>145</sup>

The focus and popularity of high-powered legal research tools is a consequence of the fast-paced world of private practice.<sup>146</sup> The sheer volume of legal information, when coupled with restrictions on the researcher's time, necessitates reliance on indexed and categorized information.<sup>147</sup> However, the dependence on these very tools can negatively impact the ability of the lawyer to think creatively, as well as the quality of the ultimate work product.<sup>148</sup>

Information within commercial databases is curated and partial.<sup>149</sup> The researcher is not viewing the "correct" answers, but a limited list of results chosen by the commercial publisher and proprietary algorithms based on an ultimately subjective determination of "relevant" law.<sup>150</sup> This process can be conceptualized as the Family Feud approach to Legal Research.

In Family Feud, a popular game show that has been aired on American television since the 1970s,<sup>151</sup> the contestant is supposed to guess the common, popular responses to a question based on a survey of the audience.<sup>152</sup> Through the survey, the audience is indexing and sorting the information, placing the responses into a certain order. This order is not based on accuracy, but on preference and bias. Imagine, for example, the contestant is asked to identify green fruits. The optimal answer to this question is completely subject to the knowledge, preferences, and whims of the crowd. For example, a crowd of North American respondents may answer apples, grapes, honeydew, and other fruits grown in temperate zones, whereas tropical fruits, like guanabana, jackfruit, sweetsop, and durians, may be completely omitted from the responses. Therefore, to truly understand the limitations and implications of the

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<sup>145</sup> "Immediately pulling up your favorite search engine and commencing to type upon receipt of a research project is not a plan and does not employ any analysis or strategy." Osbourne, *supra* note 17, at 180.

<sup>146</sup> See Mignanelli, *supra* note 3, at 343.

<sup>147</sup> Indeed, this has been the prevailing situation in American law for well over 100 years, given the vast number of cases that lawyers have to be able to navigate relatively quickly. See generally Patti Ogden, *Mastering the Lawless Science of Our Law: A Story of Legal Citation Indexes*, 85 LAW LIBR. J. 1 (1993).

<sup>148</sup> See Mignanelli, *supra* note 3, at 341-43.

<sup>149</sup> See *id.* at 335-340.

<sup>150</sup> See *id.*

<sup>151</sup> *Family Feud*, TELEVISION ACADEMY FOUNDATION: THE INTERVIEWS, <https://interviews.televisionacademy.com/shows/family-feud>.

<sup>152</sup> See *id.*

survey results, we must examine who gets to participate as an audience member. Family Feud is taped in Atlanta, Georgia during standard business hours. This makes audience participation from residents of tropical nations unlikely, reinforcing the culturally dominant responses of North Americans.

Extending the analysis to structural components and barriers is an important element of understanding the responses and potential skews in the data. Much like Family Feud, AI-powered legal research tools also rely on third-party indexing, as well as, in certain areas, some element of crowdsourcing.<sup>153</sup> Research results depend heavily on the architects of the algorithm and their choices, biases, and preferences as they design and build the tools.<sup>154</sup>

However, unlike Family Feud, legal research tools present a “false impression” of neutral and correct “answers.”<sup>155</sup> Moreover, structural biases exist in commercial legal research tools in that “the crowd is self-selecting,” meaning that the data is based largely on “those who can afford to license” and use these tools.<sup>156</sup> As Nicholas Mignanelli wryly observes, “What can we expect but for the crowd to imprint its biases on the historical data it creates?”<sup>157</sup>

In legal research, the myth of neutrality obscures both the influence of commercial publishers and the preferences of respondents. Researchers do not always understand that the database narrows and curates the results based on a number of factors, ranging from attracting consumers to bias. Similarly, researchers may assume that the ordering of the results indicates the strength or relevance of authority, which may not be true for their particular client or research objective.

From a skills training perspective, students must be taught to navigate this flawed system, discarding any assumptions of neutrality. Students must learn how to create a research plan after synthesizing the goals, facts, intersecting legal regimes, and other factors implicated in their case.<sup>158</sup> As part of their research plan, students must expressly acknowledge the limitations of relying on the dominant legal research

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<sup>153</sup> Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 LAW LIBR. J. 359, 372 (2011). Wheeler also critiques Westlaw’s reliance on crowdsourcing — i.e., drawing directly on user activity to enhance the algorithm vis-à-vis the “wisdom of its users.” *Id.* at 365.

<sup>154</sup> See Kim P. Nayer, Marcelo Rodriguez & Sarah Sutherland, *Artificial Intelligence & Implicit Bias: With Great Power Comes Great Responsibility*, AALL SPECTRUM, May/June 2020, at 14; Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387 (2017); Jamie J. Baker, *2018: A Legal Research Odyssey: Artificial Intelligence as Disruptor*, 110 LAW LIBR. J. 5, 7 (2018).

<sup>155</sup> Mignanelli, *supra* note 3, at 338.

<sup>156</sup> *Id.* at 340.

<sup>157</sup> *Id.*

<sup>158</sup> See generally Osborne, *supra* note 17.

tools and databases. Only by accepting the problems created by bias and blind spots can they begin to design research plans and strategies that work to balance the structural skews.

Towards this end, students must consider what voices and sources are being excluded by the dominant legal research resources and tools. This helps students begin to broaden their research plans to include alternate resources, such as interdisciplinary materials and other secondary sources, that may lead to more fruitful and creative solutions to the legal problems they are researching. This is especially important for transactional attorneys and lawyers who work in other innovative areas of practice, in which there is often reliance on non-case law sources, including, for example, non-legal materials related to business standards.

### C. Learning for Transfer

Learning for transfer refers to the ability to use skills or knowledge acquired in one setting and apply it to others. It can be viewed as two distinct functions, requiring “both the initial acquisition of skills or knowledge[,] and the later use of that skill or knowledge to perform a different but related task.”<sup>159</sup> Legal research faculty also subscribe to the importance of learning for transfer in developing research skills. A good researcher does not need to be a leading subject matter expert to find relevant and useful materials. In fact, developing a research strategy to navigate new topics with facility is a central learning goal.<sup>160</sup>

In pedagogical literature, learning for transfer is often framed in the skills context for ease of explanation.<sup>161</sup> However, this is only the most basic understanding of what students are learning in the clinic. Clinical instructors know transference does not only apply to interviewing, trial tactics, or legal research. Rather, instructors frame lawyering as a holistic and comprehensive process that leverages critical thinking, legal analysis, strategic advocacy, compassionate and zealous representation — and, yes — an array of lawyering skills as well. The focus of

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<sup>159</sup> Bowman & Brodoff, *supra* note 120, at 275.

<sup>160</sup> We want students to understand how to develop a research strategy so that regardless of the substantive area their issue involved, they will be able to research that issue with facility.” Rosenbaum, *supra* note 87, at 1-6.

<sup>161</sup> Tiffany D. Atkins, #fortheculture: *Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 164-65 (2020); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 120 (1999); Tracy A. Thomas, *Teaching Remedies As Problem-Solving: Keeping It Real*, 57 ST. LOUIS U. L.J. 673 (2013); Cheryl B. Preston, Penée Wood Stewart & Louise R. Moulding, *Teaching “Thinking Like A Lawyer”: Metacognition and Law Students*, 2014 B.Y.U. L. REV. 1053, 1076-1080 (2014); 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, 515 (2022).

transference is not on one set of particular skills, but on the complex, dynamic, challenging, and rewarding process of lawyering.

But to really achieve transference, students need to both learn the foundational knowledge and have ample opportunity for repetitive practice to ensure it is embedded.<sup>162</sup> In the case of legal research, however, transference is stymied by the dominant curricular structure within law schools, which does little to encourage it. Mary Nicol Bowman and Lisa Brodoff define this phenomenon as “siloeing,” and describe it as follows:

[L]egal writing and clinical programs and faculty operate in “silos,” with relatively little interaction or collaboration. This separation of programs makes it very hard for students to break out of their own course-dependent learning silos to transfer what they learn in a class such as legal writing to other settings such as clinics, externships, and legal practice. Our joint retreat drove home to us how much that was true for our students, despite our prior collaborative efforts and the features of our own courses to encourage transfer.<sup>163</sup>

Moreover, the silo effect can mask the complexity of legal issues, making it difficult for students to identify, understand, and connect the various facets and legal regimes within a given problem.<sup>164</sup> Researchers have established that “novices tend to focus on surface level features rather than underlying structures.” For example, students often fixate on the specific facts of a case rather than considering structural components that may uncover alternative theories.

Richard Delgado and Jean Stefancic illustrated the consequences of such a narrow conceptualization of a legal issue in their 2007 article, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*.<sup>165</sup> They described a Title VII workplace discrimination claim where the employee, a Black woman with braids, is fired because her employer associated her hairstyle with defiance toward management.<sup>166</sup> A lawyer who builds his case theory (and legal research process) around the most obvious fact — that his client was discriminated against at work because of her hairstyle — finds little precedent for a successful claim.<sup>167</sup> Specifically, by framing his search this way, he develops “a theory of the case as a deprivation of a right to personal

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<sup>162</sup> As it is a two-part process, “problems can arise at both stages that hinder students’ ability to transfer learning from one situation to another.” Grose, *supra* note 10, at 495.

<sup>163</sup> Bowman & Brodoff, *supra* note 120, at 279.

<sup>164</sup> *Id.* at 278.

<sup>165</sup> Delgado & Stefancic, *Same Questions? (2007)*, *supra* note 1.

<sup>166</sup> *Id.* at 319.

<sup>167</sup> *Id.*

appearance-in short, as a substantive due process claim seeking relief under Title VII or the Equal Protection Clause.”<sup>168</sup> Delgado and Stefancic are skeptical about this choice, stating that, in their opinion, “this claim has only a remote chance of prevailing.”<sup>169</sup>

In contrast, a different lawyer may be open to reframing the issue as intersectional discrimination, and claim that the client is being targeted “because of her [B]lack womanhood[.]” which may be more likely to be a winning argument.<sup>170</sup> Thus, Delgado and Stefancic conclude, the ability to reframe the argument and explore underlying structural components can lead to a better result for the client than foreclosing options based on facts alone.<sup>171</sup> In other words, this is not to say that obvious facts are irrelevant, but that overreliance on facts may prove to be a novice mistake that represents a lack of creative thinking on the attorney’s part.

In the end, a shallow understanding of a problem leads to not only a weak argument, but also poor learning for transfer. Furthermore, the inadequate framing of the legal issue makes it difficult to recognize a complex problem and pursue creative solutions in future cases. Using a concept they call “far transfer,” Bowman and Brodoff outline the challenges students face when transferring more complex learning across contexts and delving beyond surface level details.<sup>172</sup> They note that students struggle to apply research and writing skills “when confronted with the messiness of real client work.”<sup>173</sup> Thus, “even if students successfully learn foundational material by storing it into long-term memory and creating a framework in which they can retrieve the information, they may still encounter other barriers to effectively applying that foundational learning to a new situation.”<sup>174</sup>

Bowman and Brodoff offer suggestions to bolster learning for transfer, including improving collaboration across the curriculum, to ensure that law professors are “stretching forward” and “reaching back” to foster continuity and retention in their students’ thought processes.<sup>175</sup> This includes working on joint hypos that mimic clinic cases during the first year, and incorporating exercises that reference earlier learning in clinic.<sup>176</sup>

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<sup>168</sup> *Id.* at 319.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 319-20.

<sup>171</sup> *Id.* at 320.

<sup>172</sup> See generally Bowman & Brodoff, *supra* note 120.

<sup>173</sup> *Id.* at 296.

<sup>174</sup> *Id.* at 278.

<sup>175</sup> *Id.* at 280-81.

<sup>176</sup> This is only one example. Bowman and Brodoff also expound on opportunities to engage in client centered lawyering, modeling, and reflection in their tremendous article. See generally *id.* at 280-81.

CLR is yet another useful scaffolding method that is capable of breaking substantive silos, showcasing intersections between legal regimes, and prompting nuanced and thoughtful approaches to fully understand the underlying structures of the client's problems. It can also demonstrate the dangers of reductive or siloed thinking, and showcase the numerous gaps in existing resources, while at the same time exposing students to the dangers of relying on precedent, especially when resources and knowledge are intentionally curated to promote a limited set of ideas, values, and hegemonic norms. Thus, by teaching students to understand the complexity of the system, forcing them to conduct ongoing critical inquiry, helping them to make key connections between intersecting laws and facts, and demanding that they think creatively to execute a research strategy, CLR expands the framework students use to understand and apply learned knowledge. This helps them "stretch forward," applying their substantive knowledge and research strategy in new and challenging situations.<sup>177</sup>

Put simply, CLR forces students to reckon with the reality that certain perspectives and voices are excluded during the intentional curation of resources. Students must consider how this exclusion impacts their clients' unique case, as well as broader issues of systemic injustice. By default, students often focus on minutiae and technical details when they conduct legal research, thereby failing to understand the true problem. Without a broader, comprehensive understanding of the legal issues, students cannot effectively create a problem statement, which in turn leads to an inability to create appropriate research questions and an effective research plan. CLR helps improve learning for transfer by building student capacity to understand the complexity of legal issues and intersecting legal regimes.

#### D. *Furthering Social Justice*

Because "clinical legal education has never been limited to skills training,"<sup>178</sup> it is a well-established principle that our work as clinicians is anchored in social justice.<sup>179</sup> Clinicians are committed to furthering

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<sup>177</sup> Shaun Archer, James P. Eyster, James J. Kelly, Jr., Tonya Kowalski & Colleen F. Shanahan, *Reaching Backward and Stretching Forward: Teaching for Transfer in Law School Clinics*, 64 J. LEGAL EDUC. 258, 259–60 (2014).

<sup>178</sup> Stephen Wizner, *Beyond Skills Training*, 7 CLIN. L. REV. 327, 338 (2001).

<sup>179</sup> The inclusion of social justice as a core component in transactional clinics has been the subject of some scholarly debate. See generally Praveen Kosuri, *Losing My Religion: The Place of Social Justice in Clinical Legal Education*, 32 B.C. J. L. SOC. JUST. 331 (2012); Praveen Kosuri, *Clinical Legal Education at a Generational Crossroads: X Marks the Spot*, 17 CLIN. L. REV. 205 (2010). However, this author firmly refutes that position in support of more community oriented transactional clinical work. See generally Priya Baskaran & Michael



social justice in a myriad of ways, including direct representation, policy work, impact projects, community lawyering and rebellious lawyering partnerships, and scholarly engagement. Accordingly, work inside and outside the classroom deconstructs traditional narratives of power and inclusion, focusing on collaborating with clients to achieve a more equitable reordering of power and resources.

As Julie Graves Krishnaswami, a law librarian and legal research professor at Yale Law School, explains, the use of critical perspective within legal research “prompts users to ask questions not only about access and cost but whether our structures for using information have a chilling effect on certain groups of users.”<sup>180</sup> Moreover, Krishnaswami reiterates that “awareness of the political, social, and cultural ramifications of information flow can arm a law student with the ability to use these materials ethically and in the service of vulnerable populations as well as construct paradigm-shifting arguments based on new sources of primary and secondary Authority.”<sup>181</sup>

CLR pushes students to find more innovative solutions rather than to rely on search results alone. It provides a framework for understanding why legal research may not produce a clear answer, or why search results, as inherently limited as they are, seem to work against their vulnerable clients.<sup>182</sup> The categorization of information, the algorithmic bias, the flaws in the underlying laws themselves

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Haber, *Transactional Clinics as Change Agents in the Trump Era: Lessons from Two Contexts*, 26 J. AFFORDABLE HOUS. & CMTY DEV. L. 335 (2017); Alina Ball, *Transactional Community Lawyering*, 94 TEMP. L. REV. 397 (2022); Priya Baskaran, *The Economic Justice Imperative for Lawyers in Trump Country*, 7 TENN. J. RACE, GENDER & SOC. JUST. 161 (2018); Lynnise E. Phillips Pantin, *The Legacy of Civil Rights and the Opportunity for Transactional Law Clinics*, 7 TENN. J. RACE, GENDER & SOC. JUST. 189 (2018); Gowri Krishna, *Growing the Resistance: A Call to Action for Transactional Lawyers in the Era of Trump*, 7 TENN. J. RACE, GENDER & SOC. JUST. 206 (2018); Casey E. Faucon, *Economic Empowerment in the Alabama Black Belt: A Transactional Law Clinic Theory and Model*, TENN. J. RACE, GENDER & SOC. JUST. 225 (2018); Renee Hatcher, *Solidarity Economy Lawyering*, 8 TENN. J. RACE, GENDER & SOC. JUST. [23] (2019); Patience A. Crowder, *Impact Transaction: Using Collective Impact Relational Contracts to Redefine Social Change in the Urban Core*, 8 TENN. J. RACE, GENDER & SOC. JUST. [1] (2019); See also Anna E. Carpenter, *The Project Model of Clinical Education: Eight Principles to Maximize Student Learning and Social Justice Impact*, 20 CLIN. L. REV. 39 (2013) (noting the benefits of project work in clinics).

<sup>180</sup> Julie Graves Krishnaswami, *Critical Information Theory: A New Foundation for Teaching Regulatory Research*, in THE BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION: THE INTERSECTION OF INTELLECTUAL AND PRACTICAL SKILLS 179 (Susan Nevelow Mart ed., 2014) (quoting Siva Vaidhyanathan, *Afterword: Critical Information Studies: A Bibliographic Manifesto*, 20 CULTURAL STUD. 292, 203 (2006)).

<sup>181</sup> Krishnaswami, *supra* note 180.

<sup>182</sup> Delgado & Stefancic, *Same Questions? (2007)*, *supra* note 1, at 323 (“[C]omputer searching teaches formalism, a conservative approach to law, because it conceals the lesson of contingency. It masks how most decisions could easily have gone the other way.”).

compound and create a dearth of clear or favorable law.<sup>183</sup> However, this does not mean the lawyer should give up; instead, they must be critical and tireless in creating innovative solutions and mounting challenges to demand justice.<sup>184</sup> Students must learn to use a creative process that questions unfair legal regimes, rather than accepting an inadequate legal status quo.<sup>185</sup>

One timely example of this phenomenon involves the operations and legal implications of mutual aid organizations in the wake of the COVID-19 pandemic.<sup>186</sup> Broadly, mutual aid refers to community building, resource sharing, and mutual support and assistance efforts, all of which are anchored in principles of solidarity and anti-authoritarianism.<sup>187</sup> In the United States, well known examples of mutual aid organizations and initiatives include the Catholic Worker Party,<sup>188</sup> Food Not Bombs,<sup>189</sup> the community projects organized and led

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<sup>183</sup> *Id.* at 324 (“Computer searching is better at helping one find concrete examples rather than broad, abstract patterns unless of course these happen to be the ones the Searchers expressly looking for. And searching by itself does little to help organize disparate strands of cases into a new legal Theory and can easily cause you to miss one that is emerging in another jurisdiction.”).

<sup>184</sup> *Id.* at 323 (“Legal Innovation requires dissatisfaction with the world and a personal commitment to making it better.”).

<sup>185</sup> *Id.* at 323.

<sup>186</sup> Jenny Fathright, *D.C. Mutual Aid Groups Face Dwindling Funds and Burnout Months Into The Pandemic*, WAMU (Sep. 17, 2020), <https://wamu.org/story/20/09/17/dc-mutual-aid-network-funding-groceries-hotline/>.

<sup>187</sup> See generally Michael Haber, *Transactional Clinical Support for Mutual Aid Groups: Toward A Theory of Transactional Movement Lawyering*, 68 WASH. U. J. L. & POL’Y 215, 228-229 (2022) [hereinafter Haber, *Transactional Movement Lawyering*]; Michael Haber, *COVID-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOYOLA L. REV. 115 (2021) [hereinafter Haber, *COVID-19*]; Rebecca Solnit, ‘The Way We Get Through This is Together’: The Rise of Mutual Aid Under Coronavirus, THE GUARDIAN, May 14, 2020, <https://www.theguardian.com/world/2020/may/14/mutual-aid-coronavirus-pandemic-rebecca-solnit>; Michael Haber, *Legal Issues in Mutual Aid Operations: A Preliminary Guide*, HOFSTRA UNIV. LEGAL STUD. RSCH. PAPER No. 2020-06 (June 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3622736](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3622736) [hereinafter Haber, *Legal Issues in Mutual Aid Operations*].

<sup>188</sup> Throughout its history, the Catholic Worker movement has centered the Catholic Church’s social justice teachings, including labor rights, anti-poverty initiatives, racial equity, and pacifism. See Mary C. Segers, *Equality and Christian Anarchism: The Political and Social Ideas of the Catholic Worker Movement*, 40 REV. POL. 196 (1978).

<sup>189</sup> Food Not Bombs began by organizing large, publicly visible anti-nuclear protests that provided free food, and eventually expanded its mutual aid work to include initiatives to eradicate hunger and poverty and to challenge surveillance of peaceful protests by the police and the state. See Nik Heynen, *Cooking Up Non-Violent Civil Disobedient Direct Action for the Hungry: ‘Food Not Bombs’ and the Resurgence of Radical Democracy in the U.S.*, 47 URB. STUD. 1225 (2010).



by the Black Panther Party<sup>190</sup> and Young Lords,<sup>191</sup> and numerous other efforts led by and anchored in local communities.<sup>192</sup>

During the pandemic, mutual aid organizations provided direct assistance to vulnerable communities, including goods - food, diapers, cleaning supplies, and PPE — and direct payments to help with rent and utility bills.<sup>193</sup> Unlike some social services organizations, many mutual aid groups provide assistance to people regardless of their immigration status, proof of residency, or access to Government IDs.<sup>194</sup>

While many mutual aid organizations continue operating as grassroots groups with no formal legal structure, some have pursued such recognition from state and federal authorities in order to access additional funding and support for their work.<sup>195</sup> For example, many organizations in general are interested in receiving 501(c)(3) tax exempt status from the IRS as a means of raising more money through direct donations as well as competing for grant funding.<sup>196</sup> Unfortunately, mutual

<sup>190</sup> The Black Panther Party created and ran “over 30 community programs and services, ranging from the ... Free Breakfast for Children and Free Clothing Programs to the Free Bussing to Prison Service and the Free Health Care Clinics.” Meredith Roman, *The Black Panther Party and the Struggle for Human Rights*, 5 SPECTRUM: J. ON BLACK MEN 7, 17 (2016). See also Mary Potorti, “Feeding the Revolution”: *The Black Panther Party, Hunger, and Community Survival*, 21 J. AFR. AM. STUD. 85 (2017).

<sup>191</sup> The Young Lords Organization, based in Chicago and especially active during the late 1960s, provided similar social services to that city’s Puerto Rican community as those of Black Panthers to the African American community, including free breakfasts for children, a daycare center, and a healthcare clinic. Judson Jeffries, *From Gang-Bangers to Urban Revolutionaries: The Young Lords of Chicago*, 96 J. ILL. STATE HIST. SOC’Y 288, 293-94 (2003).

<sup>192</sup> Haber, *COVID-19*, supra note 187, at 72-77.

<sup>193</sup> See, e.g., Jenny Fathright, *D.C. Mutual Aid Groups Face Dwindling Funds and Burnout Months Into The Pandemic*, WAMU (Sep. 17, 2020), <https://wamu.org/story/20/09/17/dc-mutual-aid-network-funding-groceries-hotline/>. In Washington, D.C., “[m]utual aid groups in each ward of the city (the network for wards 7 and 8 is combined) [packed and delivered] groceries and other basic necessities to neighbors, [organized and attended] protests, [read] radical texts together and [formed] a community of politically-aligned people committed to providing for one another.” *Id.* The impact of this assistance was profound: “Put together, they are helping to support thousands of D.C. residents across all eight wards, funded by a system of crowdsourced donations, without any government help.” *Id.* Cash assistance was provided also, although its distribution eventually had to be strictly limited: “Towards the beginning of the pandemic, the Ward 5 mutual aid network gave out direct cash assistance for people who called requesting it. Later, they had to cut back to a cap of \$100 per caller.” *Id.*

<sup>194</sup> According to Rita Radostitz, one of the organizers of Washington, D.C.’s mutual aid effort during the pandemic, “the mutual aid group in Ward 4 provide[d] groceries to about 200 families a week, many of whom [were] undocumented and ineligible for many forms of government assistance.” *Id.*

<sup>195</sup> For example, Ward 4 Mutual Aid in Washington, D.C. is a DC Nonprofit Corporation; however, it does not have 501(c)(3) tax-exempt status. *Donate*, WARD 4 MUTUAL AID (W4MA), <https://ward4mutualaid.org/donate/>. In contrast, Washington, D.C.’s Ward 6 Mutual Aid organization is a tax-exempt 501(c)(3) organization. *About*, SERVE YOUR CITY/WARD 6 MUTUAL AID, <https://serveyourcitydc.org/about/>.

<sup>196</sup> Priya Baskaran, *Respect the Hustle: Necessity Entrepreneurship, Returning Citizens, and Social Enterprise Strategies*, 78 MD. L. REV. 323, 351 (2019).

aid organizations have faced several hurdles to obtaining 501(c)(3) tax exempt status because the IRS places a number of restrictions regarding direct payments to individuals from 501(c)(3) organizations.<sup>197</sup> It is unclear whether the work of mutual aid groups is considered “a charitable purpose” under the Internal Revenue Code.<sup>198</sup> The very ethos of mutual aid and neighbors assisting neighbors could trigger issues of non-incidental private benefit and private inurement, which could prevent obtaining 501(c)(3) status.<sup>199</sup> Furthermore, mutual aid organizations, because of their focus on community justice, often also have deep political roots, which may cause them to run afoul of IRS restrictions on lobbying and political activities for 501(c)(3) organizations.<sup>200</sup>

Simply foreclosing the option for 501(c)(3) status for mutual aid organizations based on a strict interpretation of the statute demonstrates a lack of creativity and real harm to the client. The question must be reframed, asking “How can mutual aid organizations navigate this complex landscape?” instead. Thus reimagined, new structures and relationships may emerge. Professor Mike Haber is one scholar who has engaged in exactly this type of critical, radical thinking. He has written extensively on reframing mutual aid as disaster relief in the wake of the pandemic, and on using this framing as a way mutual aid organizations can obtain and maintain 501(c)(3) tax-exempt status.<sup>201</sup>

Professor Haber’s work reiterates the importance of exploring all available argument, structures, and interpretations.<sup>202</sup> Ultimately the client must still agree to bear the risk and make any necessary compromises or concessions to obtain 501(c)(3) status. This type of novel argument may be desperately needed to challenge the status quo, and

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<sup>197</sup> Haber, *Legal Issues in Mutual Aid Operations*, *supra* note 187, at 23-28.

<sup>198</sup> The IRS describes the exempt purposes in section 501(c)(3) of the Internal Revenue Code as follows:

The exempt purposes set forth in section 501(c)(3) are charitable, religious, educational, scientific, literary, testing for public safety, fostering national or international amateur sports competition, and preventing cruelty to children or animals. The term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency.

*Exempt Purposes – Internal Revenue Code Section 501(c)(3)*, INTERNAL REVENUE SERVICE, [https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501\(c\)\(3\)](https://www.irs.gov/charities-non-profits/charitable-organizations/exempt-purposes-internal-revenue-code-section-501(c)(3)).

<sup>199</sup> Haber, *Legal Issues in Mutual Aid Operations*, *supra* note 187, at 23-28.

<sup>200</sup> Haber, *Transactional Movement Lawyering*, *supra* note 187, at 221 (noting the need to manage an organization’s lobbying efforts and mutual aid efforts to prevent compliance issues).

<sup>201</sup> Haber, *Legal Issues in Mutual Aid Operations*, *supra* note 187.

<sup>202</sup> *Id.* at 11-18; Haber, *Transactional Movement Lawyering*, *supra* note 187, at 227-229.

to demand new vehicles to address poverty and pursue social justice beyond the outdated charity model.<sup>203</sup>

Private industry has already embraced this perspective, and has even coined the term “disruptor” to laud entrepreneurs and businesses who challenge cumbersome legal regimes or exploit gray areas in the law. For example, the ride-sharing company Uber’s flagrant disregard of municipal tax regulations was viewed as “disruption” and “innovation.”<sup>204</sup> But why should this portrait of innovation be the sole purview of venture capital-backed Silicon Valley enterprises? A mutual aid organization receiving a large federal government grant may wish to pay funds directly to individual Black community members as reparations. This type of action would challenge and disrupt the dominant nonprofit industrial complex and the outdated legal regimes that govern 501(c)(3) organizations. If successful, this innovative use of federal funds to directly assist Black people, who have been the target of racialized violence and exclusion by the federal government for much of this nation’s history, could have very real and direct impacts on individual poverty.<sup>205</sup>

Integrating CLR into the law clinic provides clear benefits to student learning and client outcomes. The critical approach is necessary to help transform students into thoughtful, creative, process-oriented attorneys capable of engaging in justice-oriented work. The next section provides a roadmap for incorporating CLR components into a clinic seminar.

### III. DIY RESEARCH CLASS: THE BRASS TACKS OF TEACHING CLR IN A CLINIC SEMINAR

This section presents a model transactional research module that incorporates and centers CLR skills. This model addresses the following learning goals: 1) building a foundation in basic transactional research skills; 2) understanding the intersection of critical thinking and legal research; 3) embracing uncertainty; 4) exploring the justice gaps uncovered by legal research. This section expands on each of these elements in detail.

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<sup>203</sup> Haber, *Transactional Movement Lawyering*, *supra* note 187, at 226.

<sup>204</sup> See generally Elizabeth Pollman, *Corporate Disobedience*, 68 DUKE L.J. 709, 712–16 (2019); Judd Cramer & Alan B. Krueger, *Disruptive Change in the Taxi Business: The Case of Uber*, AM. ECON. REV., May 2016, at 177.

<sup>205</sup> See generally Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (2006); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2022); CEDRIC ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (3rd ed. 2021); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); DESTIN JENKINS, *THE BONDS OF INEQUALITY* (2021); NIKOLE HANNAH-JONES, *THE 1619 PROJECT: A NEW ORIGIN STORY* (2021).

## A. Learning Goals

### 1. Transactional Research Skills — Building a Baseline

Creating a strong foundation for transactional research requires some conceptual framing of the relevant actors and legal structures, including the continued importance of the American administrative state. As Sarah Valentine notes, “regulations and statutes now play a more important role in the creation and elaboration of law than judicial opinions,” which requires “law schools to provide students with training in statutory and regulatory research.”<sup>206</sup> While students often enter the clinical setting with the research skills to locate relevant case law and statutory authority, this is inadequate for transactional practice. Transactional practice often implicates a number of administrative agencies — including the Securities and Exchange Commission (SEC), the United States Patent and Trademark Office (USPTO), the Occupational Safety and Health Administration (OSHA), and the Internal Revenue Service (IRS) — as any single deal or transaction may feature a wide range of components, from employment to intellectual property.

Although transactional clinics represent a variety of enterprise clients, this particular module uses tax law to introduce students to transactional research. Tax is a useful pedagogical device for three reasons. First, it introduces students to an expanded world of legal authorities beyond case law and statutes. Tax law encapsulates the spectrum of legal authorities, including familiar sources like statutes, case law, and regulations. Tax law also introduces students to administrative law, including various types of administrative rulings and other important agency materials.<sup>207</sup> Second, conducting tax law research expands students’ knowledge of search tools to include transactional resources and databases, such as Bloomberg Law<sup>208</sup> and Practical Law,<sup>209</sup> in addition to frequently requiring the students to navigate specialized databases, like Thomson Reuters Checkpoint (formerly RIA Checkpoint).<sup>210</sup> The instructor can also revisit how different databases work in tandem, including when

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<sup>206</sup> Valentine, *supra* note 74, at 184-85.

<sup>207</sup> *Checkpoint Products*, THOMPSON REUTERS, <https://tax.thomsonreuters.com/en/checkpoint> (click “Tax” on the left side of the page) (last visited Jul. 25, 2023).

<sup>208</sup> BLOOMBERG LAW, <https://wsauth.bloomberglaw.com/wsauth/blawauth?stchk=1&target=https%3A%2F%2Fwww.bloomberglaw.com%2Fstart> (last visited Aug. 14, 2023).

<sup>209</sup> Practical Law, THOMPSON REUTERS, [https://content.next.westlaw.com/practical-law/?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&tabName=Practice%20Areas](https://content.next.westlaw.com/practical-law/?transitionType=Default&contextData=(sc.Default)&firstPage=true&tabName=Practice%20Areas) (last visited Aug. 14, 2023).

<sup>210</sup> *Id.*

and how to Shepardize<sup>211</sup> and check for “good law.” Third, tax research forces students to engage with a highly specialized and detailed area of law, challenging them to become comfortable with uncertainty and develop expertise during the research process itself.

## 2. *Critical Thinking and Legal Research*

Mastering the ability to understand the client’s goals, establish the relevant facts, and identify possible legal issues is not only essential for effective practice, but also impossible without embedding critical thinking into the legal research process. During the first year of law school, students learn to extrapolate potential legal issues from generic facts represented in appellate cases.<sup>212</sup> In practice, students need to refine their issue spotting skills, striking a delicate and difficult balance. Students cannot engage in unfettered issue spotting, identifying and pursuing every possible risk. Rather, they must tailor the scope of their inquiry to include what is relevant for their client, taking into account the various legal regimes involved. At the same time, students must avoid an overly restrictive approach in processing the facts, issues, goals, and other components of the client’s case. A limited perspective will foreclose too many options, resulting in negative consequences both for the client and for learning for transfer.

Legal research, much like critical thinking, is an iterative and dynamic process. The research process will uncover new information that will affect the research questions and require new strategies. For example, students may uncover persuasive authority that answers part of their original research question. However, this persuasive authority may also highlight new issues that had not been considered previously. Depending on what is relevant for the client, the student must determine how to proceed with the research plan. Should the student continue along the original research trail? Should the student pursue any of the new questions raised by your research results? Should the student engage in a combination of both?

Inherent in this analysis is a tacit understanding that additional research will not result in a correct answer. Often, the law is not clear, especially for clients engaged in innovative programs and projects. Inevitably, the research will result in some answers and some unknowns.

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<sup>211</sup> For a definition, see *Shepardize*, Wex by Cornell Law, <https://www.law.cornell.edu/wex/shepardize#:~:text=To%20Shepardize%20a%20citation%20is,the%20treatment%20of%20specific%20decisions> (last visited Aug. 14, 2023).

<sup>212</sup> Edward Rubin, *What’s Wrong with Langdell’s Method, and What to Do About It*, 60 VAND. L. REV. 609, 649 (2007) (noting that the casebook method “is inconsistent with the learning process” and fails to incorporate skills-based education.); Jamie R. Abrams, *Legal Education’s Curricular Tipping Point Toward Inclusive Socratic Teaching*, 49 HOFSTRA L. REV. 897, 900 (2021).

### 3. *Embracing Uncertainty in Transactional Law*

Transactional lawyering charts a course through uncertain waters. Transactional research uncovers data points that the lawyer must synthesize and connect to create guardrails or guidelines for the client's innovative idea. Rarely will research uncover law or precedent that directly addresses every element of the client's unique business idea. Accordingly, students must be explicitly taught to embrace this uncertainty.<sup>213</sup>

### 4. *Exploring Justice Gaps*

CLR highlights existing hegemonies and hierarchies within traditional legal research resources and processes.<sup>214</sup> This inherent bias skews the research results toward supporting existing systems, which may not provide helpful guidance for social entrepreneurs seeking to disrupt the status quo. Precedent often upholds existing power structures and rarely drives innovation. Thus, anyone attempting to create novel solutions to systemic injustice will find few supporting sources or authorities. This serves as an excellent entry point to challenge the neutrality and hidden injustices of legal research resources, pushing students to deconstruct legal research tools.

## B. *In-Class Module Description*

### 1. *Seminar Format and Goals*

Before exploring the hypo and designing our research process, the seminar begins with establishing the legal landscape for tax law generally. The goal is to use the readings to create a shared foundation for various authorities, how they work, and why they matter.

### 2. *Conceptual Framework*

The assigned reading divides tax authorities into three categories:<sup>215</sup>

- Legislative
- Administrative
- Judicial

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<sup>213</sup> A transactional law clinic is ideally situated to fulfill this pedagogical role, as it “provides a set of analytical tools for dealing with uncertainty [and] also offers paradigms which lend themselves to comparing choices under uncertainty from an ex ante perspective.” Karl S. Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69, 124 (2009).

<sup>214</sup> See *supra* notes 2-4 and accompanying text.

<sup>215</sup> LEAH LEDERMAN & STEPHEN MAZZA, *TAX CONTROVERSIES: PRACTICE & PROCEDURES* 981 (4th ed. 2018).



The legislative category includes the Internal Revenue Code, legislative history (committee reports, special compilations, and Joint Committee on Taxation reports (Bluebook). Under the administrative category are Treasury Regulations, Revenue Rulings, Private Letter Rulings, IRS Pronouncements (Technical Advice Memorandum, General Counsel Memorandum, Internal Revenue Manual, Action on Decisions, Chief Counsel Advice, IRS publications). The judicial category includes case law from tax courts and federal courts.<sup>216</sup> Students are most comfortable with case law and statutes, but have varied familiarity with agency law, necessitating some discussion of the legal landscape and the foundational elements of executive branch agencies and administrative rulemaking under the Administrative Procedure Act.<sup>217</sup>

Seminar begins with a conceptual framing of administrative law generally, emphasizing that clinic work involves administrative agencies — e.g. Securities and Exchange Commission (SEC),<sup>218</sup> United States Patent & Trademark Office (USPTO),<sup>219</sup> and the Internal Revenue Service (IRS).<sup>220</sup> The class identifies that the IRS is an administrative bureau located within the Department of Treasury.<sup>221</sup> The IRS is tasked with both creating regulations and interpreting existing law. The IRS also plays a quasi-judicial role when issuing rulings connected with its administrative hearings, thereby creating legal precedent.<sup>222</sup> This discussion is important as it expands students' understanding of relevant legal authorities beyond statutes and case law, the main emphasis in many doctrinal courses.

After establishing a baseline understanding of administrative agencies, the class transitions to a more detailed and focused discussion on tax law and indexing. CLR and critical information theory demonstrate that the types of authorities that are persuasive or important are not always hierarchical, but can be deconstructed and reconstructed based on the goals and objectives of the researcher.<sup>223</sup> To demonstrate this, the class plays a game called “Top 5” where students rank their top five authorities. We divide students into two teams. The first team is

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<sup>216</sup> *Id.* at 982-998.

<sup>217</sup> This type of foundational knowledge is also available in both substantive administrative law courses and, perhaps more importantly from the standpoint of a clinical law student, advanced legal research courses that focus on administrative law specifically. See Jason R. Sowards, *Teaching Specialized Legal Research: Administrative Law*, 29 LEGAL REF. SERVS. Q. 101 (2009).

<sup>218</sup> *About the SEC*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/about>.

<sup>219</sup> *About Us*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/about-us>.

<sup>220</sup> *About IRS*, U.S. INTERNAL REVENUE SERV., <https://www.irs.gov/about-irs>.

<sup>221</sup> DEP'T OF THE TREASURY, INTERNAL REVENUE SERV. ORGANIZATION AND TOP OFFICIALS (Jan. 2024), <https://www.irs.gov/pub/newsroom/marketing/internet/irs-organization-chart.pdf>.

<sup>222</sup> LEDERMAN & MAZZA, *supra* note 215, at 989-991.

<sup>223</sup> See *supra* note 4 and accompanying text.



representing QWERTY (from the assigned hypo) and assisting them in structuring the Building Bridges project. The second team is representing Mike “The Situation” Sorrentino in a tax evasion case.<sup>224</sup>

Drawing from the readings, students must list and rank their top five tax authorities. Ranking criteria include importance for three factors: the students’ assigned client, the expected deliverable, and the research strategy.

We then discuss the rankings and the differences. Some of the questions we ask include:

- What can we agree has binding, precedential value?
- What are other authorities that you ranked as important?
- What is the reasoning behind your ranking choice?
- Which listed sources are new or confusing?

The exercise underscores that certain authorities may take precedence over others based on the case, client, and objectives. For example, students representing QWERTY may rely heavily on revenue ruling and non-binding private letter rulings to design an acceptable corporate structure or similar solution for the client. Students will not focus as closely on IRS pronouncements as these sources provide guidance in controversy situations. QWERTY’s legal team is focused on structuring the transaction to avoid controversy, not seeking guidance on building a successful substantive and procedural case. Therefore, in the QWERTY group, a student’s top five authorities may include:

- Internal Revenue Code
- Treasury Regulations
- Revenue Rulings
- Tax Court Cases
- Private Letter Rulings

In contrast, the team representing “The Situation” is helping their client navigate an existing controversy – tax evasion. Accordingly, procedural rules governing an appeal or request, substantive law surrounding

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<sup>224</sup> In October 2018, Michael Sorrentino, a television personality, and his brother Marc were sentenced to federal prison “for violating federal tax laws.” Press Release, U.S. DEP’T OF JUST., *Michael ‘The Situation’ Sorrentino and His Brother, Marc Sorrentino, Sentenced to Federal Prison on Tax Charges* (Oct. 5, 2018), <https://www.justice.gov/usao-nj/pr/michael-situation-sorrentino-and-his-brother-marc-sorrentino-sentenced-federal-prison-tax>. In September 2019, Michael Sorrentino was released from the Otisville Federal Correctional Institution in New York after completing his eight-month sentence. Aurelie Corinthios, *‘Jersey Shore’ ‘s Mike ‘The Situation’ Sorrentino Released from Prison After 8-Month Sentence*, PEOPLE (Sept. 12, 2019), <https://people.com/tv/jersey-shore-mike-the-situation-sorrentino-released-prison>.

acceptable defenses, and materials associated with cases involving similar facts are very important.

The top five authorities for students in the “The Situation” group may rely heavily on materials that can help illuminate what the IRS may consider in making a determination and any procedural requirements, such as:

- Treasury Regulations
- Tax Court Cases
- Revenue Rulings
- IRS Pronouncements
- IRS Examiner’s Manual

The ranking exercise provides an important opportunity for professors to emphasize the uniqueness of regulatory research. Although much of law school emphasizes case law, this is only a portion of the relevant authorities ranked by the end of this exercise, making it clear that relying on statutes and case law alone is not an effective research strategy. Additionally, the ranking exercise exposes students to the various ways in which administrative materials interact with one another, whether they hold precedential or persuasive value, etc.

### 3. *Generating a Research Plan and Search Terms*

The remainder of class is dedicated to learning transactional legal research skills by identifying the issues, creating research questions, outlining a tentative research strategy, and creating search terms, which are all part of a successful research plan. During this exercise, students create a list of the results of their legal issue spotting for the QWERTY hypo – our social enterprise client.

This list often includes the following items:

- Supervised release/parole and employment contracts
- Job training program requirements for 501(c)(3) organizations
- Unrelated Business Income Tax (UBIT) related to permanent employment
- Tax law implications for a new program that does not engage in job training
- Returning Citizens and employment restrictions, including building trades
- Structuring of the program - part of QWERTY? Housing in a subsidiary?

*a. Issue Spotting and Critical Thinking*

From the generated list, we then engage in a class discussion to cull less relevant topics. We agree as a class that the most salient issues to start our search include:

- 501(c)(3) status issues,
- Unrelated business income (UBI)<sup>225</sup> tax
- Job training program requirements
- Corporate structuring
- Construction business requirements

*b. Drafting Research Questions*

We then create research questions as a group based on the issues we have identified, weaving together our issue spotting with our client's goal and objectives, as well as other important facts. By doing so, we are not engaging in generic issue spotting, but using critical thinking to direct and guide our inquiry.

Questions listed below may emerge as our group research questions:

- *What is required for a 501(c)(3)?*
- *Can QWERTY operate a business without endangering their 501(c)(3) status?*
- *Are there any requirements for job-training programs generally?*
- *Are there any potential problems from restricting hiring to job training program graduates or phasing employees out when they become eligible for jobs elsewhere?*
- *What, exactly, is required to set up a construction company in D.C.?*
- *Are there any specific requirements for firms doing "energy audits" or offering "energy saving" upgrades?*
- *How should employment contracts be drafted for the different new positions?*

The instructor can use guided discussion to evaluate the various questions, eliminating ancillary topics or issues. Then, the instructor can underscore the topics that do require additional research or

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<sup>225</sup> "UBI" is the acronym used throughout this section for "unrelated business income." Its use in this research exercise could offer the students an additional point of reference related to critical legal research (specifically, the value of precise use of language, especially when running searches), as this acronym has additional other meanings in the legal literature, such as "universal basic income."

investigation, combining these to form a new research question that will likely look something like this:

- *Can QWERTY run the construction company as a job training program, without affecting its 501(c)(3) status or incurring UBI?*

This question highlights the main legal issues that fall within the clinic's area of expertise — taxation, 501(c)(3) organizations, and social enterprise activities. It also incorporates the “terms of art” from the substantive bootcamp, which alerts students to possible issues — “unrelated business income” and “501(c)(3) status.” Finally, it also incorporates important facts like the industry (construction) and the program (job training).

### *c. Research Strategy Creation*

Once we have confirmed the questions and problems we are attempting to solve, we discuss our potential next steps. Students are asked to share their responses to the process question, “Where do you begin your research?”

Responses often include Google, Wikipedia, Lexis, Westlaw, and Bloomberg. Students are asked to explain their choices, and their responses cover a wide range of reasons, including: (1) unfamiliarity with terms of art and needing a broader context, (2) the familiarity of Google, and (3) a belief that the legal database holds the answer.

Professors should use this opportunity to explore appropriate uses of each type of search engine, examining the benefits and limits of each. Google may prove useful to understand a broader concept, but risks inundating the researcher with overly generic and possibly inaccurate results.<sup>226</sup> Similarly, Westlaw and Lexis may provide too granular an analysis, emphasizing case law and not including or foregrounding other types of authorities. As we demonstrated during the “Top 5” ranking exercise, case law is only a small portion of relevant tax authorities. Relying exclusively on legal databases, therefore, risks partial or incomplete research results.

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<sup>226</sup> At this point, if the students are absolutely committed to Google searches, it can be an ideal time to introduce students to the concept of “smart” Googling. This means many things, include using phrases and limiting your search to a single domain only. One example of this type of search is as follows: “job training” AND “501(c)(3)” site:.gov. While this search still returns over 20,000 results, they are a lot more likely to be relevant, since they (a) must contain both search terms and (b) can only come from websites that are on the U.S. government’s “gov” internet domain.

This discussion provides the opportunity to introduce students to the concept of Critical Legal Information Literacy and deconstructing databases. We have just reiterated we cannot blindly rely on Google or narrow legal databases. The question now becomes: how can we identify the relevant law given the specific circumstances of our client?

*d. Secondary Sources*

Every specialized area of practice has one or more carefully curated secondary sources that encapsulate the foundational concepts.<sup>227</sup> These sources are better in terms of both accuracy and thoroughness than any Google search. Accordingly, students should begin their research here rather than with Google.

Students may also complete a “Man vs. Machine” exercise to test human accuracy against an algorithm. Rather than resorting to Google, students must answer our research question (*Can QWERTY run the construction company as a job training program, without affecting its 501(c)(3) status or incurring UBI?*) using a secondary source. Students first read the table of contents for a nonprofit organization secondary source.<sup>228</sup> Students must identify which sections of the treatise they will use to start the research, based on their reading of the table of contents. They must share their reasoning, which often underscores that they are connecting terms of art or concepts to narrow and refine their choices of “where” to begin their research.

The “machine” part of the exercise follows. Strips of paper containing subheadings from the table of contents from a leading secondary source are placed into a hat. One student volunteer is asked to randomly draw a strip out of the hat. This activity demonstrates how Google functions; sorting what the algorithm thinks may be relevant based on a researcher’s wording. Thus the machine is starting the research trail based on a “best guess” rather than a human analysis. This exercise reiterates for students that using their critical thinking skills will lead to a more efficient and effective research strategy than defaulting to Google.

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<sup>227</sup> For examples of leading treatises in specific areas, *see generally* THOMAS J. MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION (2010); MELVILLE NIMMER, NIMMER ON COPYRIGHT (1963); STEVEN PLITT ET AL., COUCH ON INSURANCE (1995); HENRY J. SOMMER & RICHARD LEVIN, COLLIER ON BANKRUPTCY (2009); LEX K. LARSON & KIM HOSTETTER HAGAN, EMPLOYMENT DISCRIMINATION (1974).

<sup>228</sup> *See, e.g.*, MARILYN E. PHELAN, REPRESENTING NONPROFIT ORGANIZATIONS (Westlaw); MARILYN E. PHELAN, NONPROFIT ORGANIZATIONS: LAW AND TAXATION (Westlaw) [hereinafter PHELAN, NONPROFIT TAXATION]; ROBERT J. DESIDERIO, PLANNING TAX-EXEMPT ORGANIZATIONS (Lexis); BRUCE R. HOPKINS & SHANE T. HAMILTON, THE TAX LAW OF PRIVATE FOUNDATIONS (Bloomberg Law).

Once we know what we are asking (Research Questions), where to start our research plan (Sources), we move on to search terms.

*e. Creating Search Terms*

The next portion of the class involves an important aspect of CLR: creative and unplugged brainstorming.<sup>229</sup> For this portion of the class, we match search terms from the homework assignment to the research questions we have generated. We begin by asking for search terms from the homework assignment. We circle possible terms that may also work for our specific research question: *Can QWERTY run the construction company as a job training program, without affecting its 501(c)(3) status or incurring UBI?*

As we identify possible terms, we take a minute to revisit the terms and connectors search as students often rely on natural language search.<sup>230</sup> We evaluate the efficacy of certain terms and combinations of terms based. For example, a term that is very narrow (supervised release & job-training & unrelated business income) may yield too few or no results because of its specificity. In contrast, an overly broad term — unrelated business income tax & nonprofit — may yield far too many results. We emphasize that although research (and searching) is an iterative process of trial and error, we should still be strategic in crafting searches that are neither too broad nor too narrow.

Eventually, we generate two search queries for our research question:

- Exempt organization + job training + unrelated business income
- Exempt organization + commercial activity + unrelated business income

Instructors then transition to the “live search” portion of the class. Typically, we use one search term to demonstrate the specialized database and the mechanics for completing the research log. Students then use the second search term combination to conduct their own search during class. We explain the importance of completing the research log as a way to assess research by tracking what terms and sources yield useful results, but also demonstrating where the research may have holes that require more creative search techniques.

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<sup>229</sup> See *supra* notes 128-131 and accompanying text.

<sup>230</sup> Instructors emphasize again that a terms and connectors search enables control and specificity, invoking the *Man v. Machine* table of contents exercise.

*f. Live Search: Application of Research Plan and Strategies*

After generating the search terms, we introduce students to transactional legal research resources generally<sup>231</sup> and Thomson Reuters Checkpoint (“Checkpoint”). Checkpoint is a specialized and comprehensive tax database used by many transactional and tax attorneys.

The research librarian introduces Checkpoint and how to access the database via the Entrepreneurship Library Guide.<sup>232</sup> We actually conduct a search using our search term, including applying any filters we deem may be helpful. By doing so, we connect back to our “Top 5” exercise and apply the filters for sources we determined to be most relevant.

Students are then required to enter the search term and results into the research log.<sup>233</sup>

SEARCH (Keywords, Topics, etc.)	Database and library (be specific)	# of results	Citation to Source	Usefulness	Follow-up Needed
<i>Exempt or- ganization + Job Training + Unrelated Business Income</i>	<i>Thomson Reuters Checkpoint</i>				

We ask students to look through the results and identify anything they plan on reading and, possibly, citing as a source. We then use one of these results to demonstrate how to use the citators in Lexis (Shepard’s) and Westlaw (KeyCite).<sup>234</sup>

Once we have demonstrated the mechanics, we then have students conduct in class research using the second search term: “Exempt organization & commercial activity & unrelated business income.” Students have 30 minutes to start their research trail, and are required to complete the research log as part of the search process. Instructors are

<sup>231</sup> The Pence Law Library has created a specialized legal research guide (lib guide) specifically for the Entrepreneurship Law Clinic. The guide includes links to key statutes, secondary sources, as well as common databases. Students are required to bookmark the lib guide and begin their research by visiting the lib guide.

<sup>232</sup> PENCE L. LIB. GUIDES (Sept. 8, 2023) <https://wcl.american.libguides.com/entrepreneurshipclinic>.

<sup>233</sup> A sample research log is available on the website resource listed in Appendix A.

<sup>234</sup> The process requires going through Westlaw or LexisNexis as of the writing of this Article. These databases have superior citator services that are heavily trusted by legal practitioners; accordingly, any practice-oriented research project must include a step in which they are consulted.



available to provide assistance to students who encounter obstacles or need guidance on possible next steps or avenues.

After 30 minutes, we reconvene as a group to discuss our research results. Students are encouraged to share their experience with the process, as well as discuss their ideas for follow-up or next steps. Additionally, we reserve time to reflect on the importance of creating a thorough research process, and talk about how students should incorporate this knowledge into their future legal research tasks.

The structure of the exercise reinforces metacognition through practice, reflection, and live instructor feedback. The complexity of the hypo — which mimics a true clinic case and the messiness of practice — mitigates traditional criticisms regarding the process method of legal research pedagogy.<sup>235</sup> Moreover, the complex hypo underscores and reiterates the lessons from CLR. Namely, we must engage in creative and unplugged brainstorming to meet the needs of our clients.<sup>236</sup> The search results indicate there is some law and guidance related to our research question, but no magic puzzle piece that advises us to proceed in a specific manner.<sup>237</sup> The rulings and cases are also from the 1970s and 1980s, indicating little development or evolution in the law.<sup>238</sup> However, because the client needs to structure this social enterprise to meet their stated goals, simply relying on precedent for guidance is unhelpful.

#### 4. Room for Growth

This module provides only an introduction to the robust field of CLR, focusing primarily on one component — using unplugged brainstorming to understand the problem and construct a meaningful search. Instructors should robustly develop their curricula to introduce other components of CLR as well, such as deconstructing databases and re-constructing the search process to account for entrenched hegemonic

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<sup>235</sup> See *supra* notes 172-176 and accompanying text.

<sup>236</sup> See *supra* notes 128-131 and accompanying text.

<sup>237</sup> Teaching today's students not only to slow down and thoughtfully address a screen full of research results, but also to dissuade them from their natural tendency to just look for a perfect case, can be a particular challenge in legal research pedagogy. See Ellie Margolis & Kristen Murray, *Information Literacy for the Next Generation*, 23 LEGAL WRITING: J. LEGAL WRITING INST. 11, 12 (2019). Because search algorithms are so likely to always return something, “[t]he challenge of legal research has shifted from finding results to sifting through numerous results and identifying what sources are relevant and important for legal problem-solving and analysis.” *Id.*

<sup>238</sup> As an example of this phenomenon, a section on unrelated business income in Westlaw's *Nonprofit Organizations: Law and Taxation* cites and describes two private letter rulings, one issued in 1986 and another in 1993, in cases that considered the connection between training programs and unrelated business income. PHELAN, NONPROFIT TAXATION, *supra* note 228, at § 11:2: *Income from Unrelated Trade or Business*, n.1.

norms.<sup>239</sup> For example, while this module does introduce students to the broader concept of deconstructing databases through its “Top 5” exercise, an instructor could enrich this understanding by assigning background readings from the CLR literature that explain this phenomenon in detail.<sup>240</sup> Selected readings can introduce students to the relationship between the commercialization of data entrenchment of hegemonic norms.<sup>241</sup> Professors can then explore how this flawed system and its false neutrality works to the detriment of social justice, affecting systemic reform efforts and individual client representation. Professors can also reinforce the importance of reconstructing search strategies to counter the biases in existing legal research resources.

#### IV. CHALLENGES

Change is hard. Meaningful implementation of innovative pedagogies requires care, discussion, thoughtful collaboration, and resources. This section outlines some key constraints that professors should consider. Some of the challenges addressed below are universal to all institutions and clinics; others depend on existing personnel resources and implicate security of employment issues.

##### A. Seminar

Incorporating any new material into a clinic seminar is always a delicate balancing act. We are often stretching ourselves to cover the very minimum — skills, substantive materials, rounds, and reflection. We must also save space for exploring emerging issues of justice in our clinics, centering the work of our clients, and engaging in important community and rapport-building moments for our clinic students and teams. Those of us teaching in one semester clinics certainly feel the pressure of too much content and the need to pare down our syllabi.

There may be creative solutions for structuring out-of-class time for introducing CLR modules. For example, it may be possible to schedule a mandatory lunch presentation to introduce students to the concepts. This will likely eliminate the opportunity for students to conduct a live

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<sup>239</sup> See *supra* notes 54-62 accompanying text.

<sup>240</sup> Nicholas Mignanelli’s 2021 article, *Legal Research and Its Discontents: A Bibliographic Essay on Critical Approaches to Legal Research*, provides a comprehensive examination of the literature in this area. See Mignanelli, *supra* note 16.

<sup>241</sup> See generally Tiffany Li, *Algorithmic Destruction*, 75 SMU L. REV. 479 (2022) (on bias, data deletion, and consequences); Stump, *supra* note 11, at 578 (describing the exclusionary effect of the fact that “ascendant producers of commercial legal resources ... have exercised a century-long marketplace hegemony”); Stephanie Plamondon Bair, *Impoverished IP*, 81 OHIO STATE L.J. 523, 559-60 (2020) (discussing gaps in demographics, innovation, and incentives).

search; however, instructors could demonstrate the search and lead a discussion on blind spots and biases using the initial result as an example. There are consequences to this abridged model. First and foremost, CLR emphasizes the importance of injecting critical analysis into the legal research process, which means highlighting structural imbalances in legal research resources. However, it also extends to questioning the law itself, the legislative or rulemaking processes, accessibility of legal information, and the structural injustices inherent in the U.S. legal system. Thus, simply teaching students how to find the law is inadequate. Students must be taught and encouraged to draw connections and criticize injustice perpetrated by the system as they are researching. This may be difficult to achieve in a lunch presentation.

A second consequence of the abridged model is the loss of active learning.<sup>242</sup> Data from cognitive science studies indicate greater student retention and learning outcomes with active learning as opposed to attending lectures.<sup>243</sup> Legal research scholars, including Alyson Drake, advocate for increased active learning in the legal research classroom. Drake argues that using formative assessments provides vital opportunities for feedback, reflection, and applied learning throughout the semester:

Formative feedback allows students to put what they have learned into practice in a guided atmosphere, where they can comfortably make mistakes and be corrected, at a point in the semester when they still have an opportunity to improve based on the feedback they receive. The supervision allows for the instructor to help students tie the skills they are practicing back to the theories the students have learned, using their new experiences as the basis for reflection.<sup>244</sup>

The lunch presentation model provides limited opportunities for active learning and learning for transfer, making the entire enterprise less efficacious.

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<sup>242</sup> In the context of legal research instruction, active learning centers “active, dynamic interactions with students” and requires that lessons are designed “around what students will take away rather than what students will present.” Scott Uhl, *Using Active Learning Techniques to Implement PSLRC Learning Outcomes in Legal Research Class Exercises*, 115 LAW LIBR. J. 349, 352 (2023). This can cause difficulties in a legal research instructional environment, especially in the lunch presentation scenario proposed here, as “[a]ctive learning strategies ... take more time to cover the same content as passive instruction.” *Id.* Furthermore, “[a]n instructor incorporating active learning techniques – such as group exercises, the Socratic method, or student presentations – faces diminished control over the pacing of the material.” *Id.* at 350.

<sup>243</sup> See generally Alyson Drake, *Cognitive (Over)Load in First Year Legal Research Instruction*, LEGAL RSCH. PEDAGOGY (Mar. 19, 2018); Elizabeth Adamo Usman, *Making Legal Education Stick: Using Cognitive Science to Foster Long-Term Learning in the Legal Writing Classroom*, 29 GEO. J. LEGAL ETHICS 355 (2016).

<sup>244</sup> Drake, *supra* note 79, at 21.

Ultimately, legal research is a core lawyering skill and clinic students must learn and master such skills while furthering social justice. When we recognize that lawyering skills are important, we pursue and embed nuanced and adaptive pedagogies. Topics like critical interviewing<sup>245</sup> or trauma informed lawyering<sup>246</sup> are designed to help students become better attorneys and advocates by using specialized methods and pedagogies to tailor their practice according to the needs of their clients, the nuances of the case, the structural and societal factors at play, and any critical perspectives and tools that can lead to a more holistic and comprehensive approach to client representation. Implicit in the use of critical pedagogies is the understanding that vulnerable individuals, particularly those in disenfranchised communities, require more thoughtful and intentional interactions, and that the dominant client representation methods fail to serve these clients.<sup>247</sup> Legal research can fall into a similar trap, with the prevailing approaches failing to account for the “invisible hands” that shape information and restrict access.<sup>248</sup> In contrast, “awareness of the political, social, and cultural ramifications of information flow can arm a law student with the ability to use these materials ethically and in the service of vulnerable populations.”<sup>249</sup> Clinical instruction that incorporates, if not centers, these skills allow law students to practice “construct[ing] paradigm-shifting arguments based on new sources of primary and secondary authority.”<sup>250</sup>

Beyond pedagogy, there are compelling practical arguments for dedicating seminar time to CLR instruction. Inevitably, a portion of clinic supervision centers on legal research. Providing a firm foundation in CLR during a clinical seminar means more efficient and meaningful supervision sessions. Rather than spending supervision time conducting remedial reviews of legal research, professors can dedicate time to other important activities, including creative brainstorming, reflection, and problem-solving. Furthermore, during the establishment of foundational lawyering and critical analysis skills during the seminar, students can spend more time

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<sup>245</sup> Laila Hlass & Lindsay Harris, *Critical Interviewing*, 21 UTAH L. REV. 683, 691 (2021).

<sup>246</sup> See generally Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLIN. L. REV. 359, 370-393 (2016); Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 117-19 (2020); Brenda V. Smith, *Stories of Teaching Race, Gender, and Class: A Narrative*, 51 WASH. U. J. L. & POL'Y 11, 12 (2016); Angela Onwuachi-Willig & Anthony V. Alfieri, *Racial Trauma in Civil Rights Representation*, 120 MICH. L. REV. 1701, 1737 (2022).

<sup>247</sup> Critical legal theories and lawyering theories developed to highlight and counter harmful hegemonies include community lawyering, Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLIN. L. REV. 195, 197-98 (2002); GERALD P. LOPEZ, *REBELLIOUS LAWYERING* (1992); Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1660.

<sup>248</sup> See Sokkar Harker, *supra* note 2.

<sup>249</sup> Krishnaswami, *supra* note 180, at 177.

<sup>250</sup> *Id.* at 177.

engaging in active lawyering and critical thinking. Supervision then becomes an opportunity for students to truly engage not only with their client, but also with the larger issues of injustice, the importance of collaboration, ethical considerations, and the role of lawyer.

### B. Varying Methods of Teaching Research

It is very important to emphasize the varying formats and methods of legal research instruction across law schools, especially as the pedagogical offerings are often indicators of limited resources or staffing for dedicated instruction — which in turn impacts student learning. Generally speaking, the primary introduction to legal research occurs in the first-year curriculum.<sup>251</sup> While some institutions have a separate legal research course accompanying the 1L legal writing classes, frequently taught by law librarians,<sup>252</sup> most law schools include legal research within the first-year legal writing course.<sup>253</sup> In the latter model, law librarians may be embedded in the course, and provide a certain number of hours of research instruction in connection with the course's writing assignments.<sup>254</sup> Law schools may also offer advanced legal research courses

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<sup>251</sup> Denisa R. Mavrova Heinrich & Tammy Pettinato Oltz, *Legal Research Just in Time: A New Approach to Integrating Legal Research into the Law School Curriculum*, 88 TENN. L. REV. 469, 489 (2021) (citing ASS'N OF LEGAL WRITING DIRS., ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2017-18 INSTITUTIONAL SURVEY) (“In most law schools, legal research is integrated into the first-year legal writing curriculum.”).

<sup>252</sup> “Introduction to legal research is taught independently [from legal writing] at less than a quarter of law schools.” *Id.* One such example is West Virginia University College of Law. The first-year curriculum includes a one-credit Introduction to Legal Research course, which is taught by law librarians. See *1L Classes: These Are Your Required Courses*, W. VA. U. COLLEGE OF L., <https://admissions.law.wvu.edu/explore/academics/1l-classes> (last visited Nov. 24, 2023). CUNY School of Law requires its first-year students to take a year-long, two-credit legal research class, also taught by law librarians. See *Law Catalog: Legal Research*, CUNY SCHOOL OF LAW, <https://law.catalog.cuny.edu/courses/0365311> (last visited Nov. 24, 2023).

<sup>253</sup> See Mavrova Heinrich & Pettinato Oltz, *supra* note 251, at 489.

<sup>254</sup> One example of this type of writing assignment is known as the “open memo,” in which, for the first time, first-year students “students are required to do their own research to support the answer to a legal question or the analysis of a fact pattern[.]” Frederick B. Jonassen, *On-Line Legal Research Workshops*, 22 ST. THOMAS L. REV. 470, 483 (2010). Librarians are often brought into 1L classes to teach research in support of this assignment. Interestingly, a pair of 2018 surveys of legal writing professors and law librarians showed that, whereas “legal writing faculty are more likely to see occasional or one-off research sessions or librarian classroom visits as useful and productive,” librarians, in fact, “describe the same types of sessions as marginal and inadequate[.]” thus supporting the finding that “librarians are less likely to be satisfied with the status quo of 1L legal research instruction at their law schools.” Genevieve B. Tung, *Collaboration Between Legal Writing Faculty and Law Librarians: Two Surveys*, 23 LEGAL WRITING: J. OF LEGAL WRITING INST. 215, 237 (2019). One reason for this view among librarians could be the fact that, although they are “unquestionably academia’s legal research experts,” they “have seen their influence over this subject specialty slip away as more and more legal writing programs include legal research instruction.” Duncan Alford, *The Development of the Skill Curriculum in Law Schools: Lessons for Directors of Academic Law Libraries*, 28 LEGAL REF. SERVS. Q. 301, 311 (2009).

taught by law librarians for second and third year law students.<sup>255</sup> These courses may delve into a specific area of law, jurisdiction, or just build on existing skills covered during the first year course.<sup>256</sup>

Clinical professors should document the types of legal research courses available at their institution. This can prove instructive for two reasons. First, it is a helpful diagnostic tool for understanding how prepared or familiar students are with legal research. For example, is the student's formal legal research instruction experience limited to guest lectures by librarians during their 1L year? Or can students avail themselves of advanced legal research course offerings, like foreign and international research, regulatory research, transactional legal research, or state specific legal research courses? Second, the format of legal research instruction may be an indicator of limited institutional capacity. For example, budgetary constraints may lead to a law school not prioritizing the hiring of research instructors, which may impact not only the quantity and quality of 1L legal research instruction, but also which, and how many, upper-level legal research classes are available to students. The regularity of these course offerings is also an important data point to assess institutional capacity and commitment to legal research instruction. As discussed more in the next section, limitations on capacity

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<sup>255</sup> According to a 2018 survey, "only 7% of law schools require an advanced legal research course in their upper-level curriculum." Mavrova Heinrich & Pettinato Oltz, *supra* note 251, at 489 (citing ASS'N OF LEGAL WRITING DIRS., ANNUAL LEGAL WRITING SURVEY: REPORT OF THE 2017-18 INSTITUTIONAL SURVEY). Research may also be a necessary component of upper-level legal writing courses, such as those offered by the American University Washington College of Law's Legal Rhetoric and Writing Program. See *Upper Level Courses & Writing Resources*, AM. UNIV. WASHINGTON COLL. OF L., <https://www.wcl.american.edu/academics/legalrhetoric/upper-level-courses-writing-resources/> (last visited Aug. 14, 2023).

<sup>256</sup> See, e.g., *Upper Level Research and Writing Opportunities*, GEO. L., <https://www.law.georgetown.edu/academics/courses-areas-study/legal-writing-and-student-scholarship/upper-level-research-and-writing-opportunities/> (last visited Aug. 14, 2023). Some law schools also offer advanced legal research courses that are narrowly tailored by topic and/or practice specialty. See, e.g., *Advanced Legal Research in Administrative Law*, FLA. STATE UNIV. COLL. OF L., <https://law.fsu.edu/courses/advanced-legal-research-administrative-law> (last visited Nov. 24, 2023) (introducing students to "basic concepts, sources, and specialized tools used in federal, Florida, and other state administrative law research[,] as well as "research strategies for specialized practice areas such as securities, environmental, tax and labor law."); *Advanced Environmental Legal Research*, VT. L. SCH., <https://www.vermontlaw.edu/academics/courses/environmental-law/env7380> (last visited Nov. 24, 2023) (offering "in-depth exposure to the most useful, efficient strategies and resources for environmental law research, including highly specialized information databases, advanced administrative law research, legislative history, and environmental news/updates services."); *Advanced Legal Research: Litigation*, STAN. L. SCH., <https://law.stanford.edu/courses/advanced-legal-research-litigation-2/> (last visited Nov. 24, 2023) (preparing "law students for research in litigation practice and judicial clerkships"). Additionally, some law schools offer advanced legal research courses that focus on foreign and international law, especially since that type of research is "largely excluded from the first year training in legal research." *Legal Research, Advanced: Foreign and International Law*, UNIV. TEX. AUSTIN SCH. OF L., <https://law.utexas.edu/courses/class-details/20229/29094/> (last visited Nov. 24, 2023).



and corresponding resource constraints must be factored into possible class design and faculty collaborations.

### C. *Solidarity and Hierarchy: Collaboration with Librarians or Research Faculty*

Security of employment and the attendant hierarchy can make effective collaboration a challenge. As clinical professors, we ourselves experience varying levels of institutional status, security, compensation, resources, and curricular freedom.<sup>257</sup> Accordingly, we must engage in thoughtful, solidarity politics when collaborating with others who may be subject to unequal institutional status.<sup>258</sup>

Too often, law librarians and other legal research faculty are excluded from any faculty status or protections.<sup>259</sup> As Jamie Baker, director of the library at Texas Tech University School of Law, points out:

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<sup>257</sup> See Deborah N. Archer, Caitlin Barry, G.S. Hans, Derrick Howard, Alexis Karteron, Shobha Mahadev, Jeffrey Selbin, *The Diversity Imperative Revisited: Racial and Gender Inclusion in Clinical Law Faculty*, 26 CLIN. L. REV. 127, 131-139 (2019); see also Sandra Simkins, *The “Pink Ghettos” of Public Interest Law: An Open Secret*, 68 BUFF. L. REV. 857, 874 (2020), (noting twenty-three of the top twenty-five law schools “have a lower tier for their clinical faculty” and that the majority of these faculty engage in both public interest work and skills-based education).

<sup>258</sup> For a general overview of the disparate treatment of skills-based law professors, see Lucille A. Jewel, *Oil and Water: How Legal Education’s Doctrine and Skills Divide Reproduces Toxic Hierarchies*, 31 COLUM. J. GENDER & L. 111, 112–13 (2015); *Secondary Courses Taught by Secondary Faculty: A (Personal) Call to Fully Integrate Skills Faculty and Skills Courses into the Law School Curriculum Ahead of the NextGen Bar Exam*, 107 MINN L. REV. 2663 (2023). For a more detailed discussion of gender and status inequity present in Legal Writing faculty positions within law schools, see Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law School’s Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1 (2001), Tiffany Jeffers, *The Choice to Stay in the Pink Ghetto*, 23 LEGAL WRITING: J. OF LEGAL WRITING INST. 41 (2019), Renee Nicole Allen, Alicia Jackson & DeShun Harris, *The “Pink Ghetto” Pipeline: Challenges and Opportunities for Women in Legal Education*, 96 U. DET. MERCY L. REV. 525 (2019). For a discussion of the status subordination of clinical faculty, see Bryan L. Adamson et al., *The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy*, 2 J. LEGAL PRO. 36 (2012).

<sup>259</sup> “Most law librarian positions below the level of library director are not given faculty status in their law schools.” Paul McLaughlin, Jr., *Leveraging Academic Law Libraries to Expand Access to Justice*, 109 LAW LIBR. J. 445, 457 (2017). There is a long history of scholarship in the law librarianship literature arguing that academic law librarians should have faculty status and be eligible for tenure. See Sharon Blackburn et al., *Status and Tenure for Academic Law Librarians: A Survey*, 96 LAW LIBR. J. 127, 127-28 (2004); see also, e.g., M. Minnette Massby, *Law School Administration and the Law Librarian*, 10 J. LEGAL EDUC. 215, 218 (1958) (pointing out that “there is little excuse to withhold faculty status from an individual who not only qualifies as a member of the law faculty, but in addition has achieved a specialty which also qualifies him (sic) to be the law school librarian”), Carol A. Parker, *The Need for Faculty Status and Uniform Tenure Requirements for Law Librarians*, 103 LAW LIBR. J. 7, 9 (2011) (arguing that those in the profession “must insist on faculty status for law librarians” and that the profession “must make a concerted effort to employ more uniform and consistently rigorous standards for assessing performance for tenure or continuous appointment decisions.”); Jamie J. Baker, *The Intersectionality of Law Librarianship & Gender*, 65



In the legal academy, much has been written about gender bias affecting “skills” positions such as legal writing and clinical positions, noting that these positions make up the “pink ghetto” of the legal academy. The pink ghetto of the legal academy refers to the lower status, lower paid positions that women often occupy. It is interesting, however, that law librarians are often left out of this discussion even though law librarianship is female dominated, and law librarian positions exhibit many of the same gendered attributes as clinical and legal writing positions.<sup>260</sup>

A delicate feature of this problem, at least regarding the proposed pedagogical enhancements to clinical instruction surrounds questions of expertise. For example, research experts at a particular law school may not be versed in CLR. Moreover, their ability to develop requisite subject matter expertise may be constrained by their institutional position. Clinical professors must be thoughtful when navigating these situations. At a minimum, all professors should engage in proper attribution when using resources created by law librarians or other experts in their classroom. A helpful list of classroom exercises and proper attribution etiquette is included in the appendix of this Article.

#### D. *The Growth of AI in Legal Research*

We cannot discuss legal education without addressing the looming specter of generative artificial intelligence (GAI) and its impacts on law practice and justice. GAI refers to a type of artificial intelligence (AI) that uses datasets to “learn” patterns and create content, such as written

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VILL. L. REV. 1011, 1012 (2021) (characterizing the fact that law librarians at many U.S. law schools lack faculty status and tenure as “problematic,” especially in that “law librarians provide substantial support for legal education and have done so since the beginning of the legal academy.”). Some law schools have responded positively to this call. For example, at CUNY School of Law, “Legal Research courses are developed and taught by members of the Law Library’s professional staff who hold the ranks of Associate and Full Professor.” *Welcome to the CUNY School of Law Library*, CUNY SCH. OF L., <https://www.law.cuny.edu/library/> (last visited Nov. 24, 2023). In the end, however, the words that public law librarian Ellie Slade wrote in 2006 generally ring true to this day:

Law schools get quite a bargain in the law library employee. The is especially true when academic law libraries require a JD and an MLS for a reference position. These combined degrees may cost as much as \$150,000 in graduate school tuitions. Unfortunately, academic reference positions are not remunerated on a similar compensation level as law professors, even though these librarians may teach classes, publish articles, and design Web sites.

Ellie Slade, *Under a Bushel – How to Ignite Law Librarians’ Compensation, Recruitment, and Job Satisfaction*, AALL SPECTRUM, Feb. 2006, at 24, 26.

<sup>260</sup> Baker, *supra* note 259, at 110.

prose, images, code, etc.<sup>261</sup> Examples of GAI include tools like OpenAI's ChatGPT.<sup>262</sup> Major legal databases LexisNexis and Westlaw have announced future GAI components of their commercial search engines.<sup>263</sup> Indeed, the likely future of legal tech includes many tools like this that will be able to produce entire legal documents, such as briefs and memoranda, with great rapidity.<sup>264</sup>

All this speed comes at a cost. GAI technology compounds the problems within the dominant legal research systems and accelerates the impact of negative lawyering. How? GAI builds its responses on the existing curated legal resources and datasets, which—as previously discussed—can entrench hegemonic norms to the detriment of social justice.<sup>265</sup> Then, it drafts entire research memos, briefs, and contracts based on biased data. By “doing the research” for the attorney, GAI more deeply obscures the research process and embedded biases than existing research resources.<sup>266</sup>

CLR scholars have already documented the various ways in which existing “extractive AI” tools within commercial search databases – such as suggested cases – can lead researchers towards results that reinforce and entrench hegemonic norms.<sup>267</sup> However, researchers must still make some effort to read and synthesize extractive and create complete draft work product, eliminating the active reading requirement

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<sup>261</sup> Bernard Marr, *The Difference Between Generative AI and Traditional AI: An Easy Explanation for Everyone*, FORBES (Jul. 24, 2023), <https://www.forbes.com/sites/bernard-marr/2023/07/24/the-difference-between-generative-ai-and-traditional-ai-an-easy-explanation-for-anyone/?sh=1156e650508a>.

<sup>262</sup> *Introducing ChatGPT*, OPENAI BLOG (Nov. 30, 2022), <https://openai.com/blog/chatgpt>.

<sup>263</sup> *LexisNexis Announces Launch of Lexis+ AI Commercial Preview, Most Comprehensive Global Legal Generative AI Platform*, LEXISNEXIS (May 4, 2023); <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-announces-launch-of-lexis-ai-commercial-preview-most-comprehensive-global-legal-generative-ai-platform>; *Thomson Reuters Completes Acquisition of Casetext, Inc.*, THOMSON REUTERS (Aug. 17, 2023), <https://www.thomsonreuters.com/en/press-releases/2023/august/thomson-reuters-completes-acquisition-of-casetext-inc.html>.

<sup>264</sup> See, e.g., *Lawdroid Copilot*, LAWROID, <https://lawdroid.com/copilot/>. It has already been observed by law librarians that the “large language models” that are used in generative AI could “assist in the creation of the semi-standardized legal text that makes up the bulk of legal writing.” Jason Eiseman & Nor Ortiz, *Generative AI & Machine Learning in Law Libraries*, AALL SPECTRUM, May/June 2023, at 14, 15.

<sup>265</sup> See *infra* Section II. See also Ignacio N. Cofone, *Algorithmic Discrimination Is an Information Problem*, 70 HASTINGS L.J. 1389, 1394 - 1396 (2019); Michele Estrin Gilman, *Expanding Civil Rights to Combat Digital Discrimination on the Basis of Poverty*, 75 SMU L. REV. 571, 576 - 585 (2022).

<sup>266</sup> Daryl Lim, *AI, Equity, and the IP Gap*, 75 SMU L. REV. 815, 829 (2022) (noting that “while algorithms provide a veneer of impartiality, they obscure how they reach their conclusions, thereby camouflaging bias.”).

<sup>267</sup> See Mignanelli, *supra* note 134, at 44-46.

for many researchers.<sup>268</sup> GAI can potentially undercut critical thinking by removing the thinker, replacing the researcher's careful reading and analysis with an algorithm.<sup>269</sup>

In addition to eliminating critical thinking in its entirety, the generated work product will skew heavily towards hegemony. GAI "learns" through datasets and patterns.<sup>270</sup> As demonstrated by numerous CLR and critical informational literacy scholars, these datasets are far from neutral.<sup>271</sup> They are curated by "invisible hands"<sup>272</sup> to further the commercial interests of dominant societal forces.<sup>273</sup>

Often, the GAI conversation tends to focus on inaccurate responses (known as "hallucinations"). Hallucinations are most likely to occur when the dataset contains insufficient information to create a true response,<sup>274</sup> leading to wholly fabricated arguments and citations, resulting in embarrassment and court sanctions for lawyers.<sup>275</sup> For clinics, we must also actively address the less visible but equally troubling problem of biases in the algorithms, datasets, and design processes that create and drive GAI. Although outside the scope of this Article, many scholars have raised serious concerns connected to equity, transparency, and algorithmic (in)

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<sup>268</sup> See LEXISNEXIS, *supra* note 263; THOMSON REUTERS, *supra* note 263.

<sup>269</sup> Mignanelli, *supra* note 134, at 44 (concluding that "because it conceals the legal research process and entrenches the biases of society's dominant interests, "AI-powered" legal research threatens to "close the legal imagination and turn the law into a monolith.>"). See also Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 8-10 (2014) (explaining the use of algorithms in credit scoring and loan denials).

<sup>270</sup> Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 UCLA L. REV. 54, 71-73 (2019).

<sup>271</sup> See Sokkar Harker, *supra* note 2; Wheeler, *supra* note 2; Mignanelli, *supra* note 3; Nevelow Mart, *supra* note 39.

<sup>272</sup> See Sokkar Harker, *supra* note 2.

<sup>273</sup> See *infra* Section II; see also, Lim, *supra* note 266, at 829 (noting the dangers of profit incentives influencing developers "to prioritize the most commercially relevant segments of the consumer base.>").

<sup>274</sup> Jenny Wondracek, *Why Law Librarians and Attorneys Will Not Be replaced by AI Anytime Soon (a.k.a. The Day Jenny Had to Pull Rank)*, AI LAW LIBR. (Sept. 25, 2023), <https://www.ailawlibrarians.com/2023/09/25/why-law-librarians-and-attorneys-will-not-be-replaced-by-ai-anytime-soon-a-k-a-the-day-jenny-had-to-pull-rank/>.

<sup>275</sup> Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), <https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-law-suit-chatgpt.html> (describing the experience of the plaintiff's attorney in *Mata v. Avianca, Inc.*, 1:22-cv-01461 (S.D.N.Y. Feb. 22, 2022)). The blog *AI Law Librarians* is keeping a running list of cases in which "attorneys have gotten into trouble for incorporating AI into their practice. Sean Harrington, *Beware the Legal Bot: Spooky Stories of AI in the Courtroom*, AI LAW LIBR. (Oct. 31, 2023), <https://www.ailawlibrarians.com/2023/10/31/beware-the-legal-bot-spooky-stories-of-ai-in-the-courtroom/>.

justice.<sup>276</sup> GAI systems are not neutral by design<sup>277</sup> as “technology reflects the values of its creators.”<sup>278</sup> Legal AI is also created for a commercial purpose, thus “bias occurs when developers select data to benefit consumers like themselves.”<sup>279</sup> GAI design is also incredibly opaque.<sup>280</sup> IP law often protects design and other information – including training datasets that inform machine learning – from any form of scrutiny.<sup>281</sup> This results in a truly troubling outcome, whereby “algorithms provide a veneer of impartiality” while simultaneously “obscure[ing] how they reach their conclusions, thereby camouflaging bias.”<sup>282</sup> As Daryl Lim has noted, the worst case scenario “may manifest in a two-tiered justice system – with human judges hearing cases from businesses and wealthy individuals” leaving “AI judges decide lower-value claims.”<sup>283</sup>

### E. CLR as a Pedagogical Counterweight to GAI

In the wake of Legal generative AI, CLR can serve as an incredibly important pedagogical tool. Asking law students to refrain from using GAI may be a lost cause; particularly when law firms<sup>284</sup> and commercial databases<sup>285</sup> are actively launching, promoting, and inundating them with these tools. Additionally, GAI is not the source of injustice within

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<sup>276</sup> For an introduction into some of the equity, bias, and transparency issues, see generally Ari Ezra Waldman, *Designing without Privacy*, 55 HOUS. L. REV. 659 (2018); Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018); *supra* note 38; see generally, ALGORITHMIC JUSTICE LEAGUE, available at <https://www.ajl.org/library/home> (last accessed February 7, 2024).

<sup>277</sup> Kristin N. Johnson, *Automating the Risk of Bias*, 87 GEO. WASH. L. REV. 1214, 1221 (2019); Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1263 (2020); Kate Crawford & Ryan Calo, *There Is a Blind Spot in AI Research*, 538 NATURE 311, 312 (2016), <https://www.nature.com/news/there-is-a-blind-spot-in-ai-research-1.20805>.

<sup>278</sup> Lim, *supra* note 266, at 826.

<sup>279</sup> Lim, *supra* note 266, at 829.

<sup>280</sup> Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 618-19 (2018). (noting the opacity of decision-making in algorithms as a feature, not a bug, and preventing accountability.)

<sup>281</sup> Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 315 (2008); Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 CORNELL L. REV. 1183, 1248 (2019).

<sup>282</sup> Lim, *supra* note 266, at 829; David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn about Machine Learning*, 51 U.C. DAVIS L. REV. 653 (2017).

<sup>283</sup> Lim, *supra* note 266, at 831.

<sup>284</sup> See Matt Reynolds, ‘The Real Game-Changers’: Dentons is the Latest Major Firm to Launch GPT-Powered Chatbot, A.B.A. J. (Aug. 14, 2023), <https://www.abajournal.com/web/article/dentons-law-firm-to-launch-gpt-powered-chatbot> (noting the firm specific Chatbot created by Dentons). Allen & Overy has also entered into a partnership with a firm specific Generative AI tool. *A&O Announces Exclusive Launch Partnership with Harvey*, ALLEN & OVERY (Feb. 15, 2023), <https://www.allenoverly.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey>.

<sup>285</sup> See LEXISNEXIS, *supra* note 263; THOMSON REUTERS, *supra* note 263.

the realm of legal research, but simply an accelerant. To be clear, GAI can be very harmful. As designed, GAI compounds the harms caused by hegemonic forces by further obscuring the bias and inequity inherent in the systems and dataset. Additionally, GAI removes opportunities for critical thinking and analysis, presenting the researcher with a supposedly complete written product at a rapid pace.

However, the underlying problem plaguing the research process and perpetuating injustice remains the same – the curation of information for commercial purposes that entrench dominant interests. This problem existed in print resources created by West and will manifest in GAI as well. The path forward requires introducing students to the concepts contained within CLR and then extending the analysis to the use of GAI. One such example may include the dangers of using GAI for novel arguments for social justice clients – arguments that challenge the existing, pro-corporate status quo. A novice attorney may conduct a traditional search using existing commercial research databases, generating only a few results. This traditional search may make the novice attorney wary of the possible “success” of a case or claim because the search results seem “thin” to them. GAI could compound this harm by both “obscuring” the search process and generating inaccurate work product, like a memo. For example, the novice attorney may ask the GAI tool to conduct the search and draft a legal research memo based on the results. In this scenario, the search generates few results, which could prompt the GAI to “hallucinate” and fabricate citations or law - much like in the case of *Mata v. Avianca, Inc.*<sup>286</sup> In both these scenarios, the limited extractive AI results and the fictitious GAI memo have the potential to cause deep harm to clients by undercutting the possibility of an actual, creative argument that furthers the client’s objectives and goals. The only true solution is to train skilled, thoughtful, critical attorneys who can identify the limitations of these imperfect tools and create strategies to wield them effectively.

#### CONCLUSION

The progenitors of CLR – Delgado and Stefancic – reiterate the importance of “reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively” to pursue justice and law reform.<sup>287</sup> Law is a profession that recreates hierarchy and predictability; thus, law reform and justice require “mulling over what an ideal legal world would look like from the client’s perspective.”<sup>288</sup>

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<sup>286</sup> *Mata v. Avianca, Inc.*, No. 1:22 CV 01461, 2023 WL 4114965 (S.D.N.Y. Jun. 22, 2023).

<sup>287</sup> Delgado & Stefancic, *Same Questions?* (2007), *supra* note 1, at 328.

<sup>288</sup> *Id.*

This type of contextual critical thinking is exactly what clinical legal education seeks to develop. When lawyers focus on the rule and only the rule, they place a specific box around the problem. The problem and potential resolutions, when so narrowly categorized, are limited to the universe of “settled law” and stifle innovative solutions. Such restrictions are in direct opposition to the best interest of the client — who is expecting the lawyer to help engage in creative problem solving and advocacy, rather than simply upholding the status quo and perpetuating harm and injustice. From a metacognition perspective, restrictive and limited construction also harms the students’ intellectual development and capacity. Strict adherence to the rule prevents effective learning for transfer by reinforcing subject matter silos. Students make only surface level connections rather than understanding the underlying structural issues and engaging in applied critical thinking. In contrast, “a conceptual advance that sees old material in a new light” can lead to the type of creative lawyering that is necessary to champion justice.<sup>289</sup> Our current moment desperately calls for wide-ranging, transformative social change. Communities face increasing economic precarity as decades of divestment continue to erode social infrastructure and safety nets. In the wake of this draconian and shameful legal regression that entrenches harmful hegemonies, we cannot train students to merely accept precedent or the myth of a neutral judiciary. Advocating for vulnerable clients will require far more creative and strategic attorneys who are able not only to conceptualize creative arguments, but also to work collaboratively with grassroots groups pushing for greater change through concerted organizing and political mobilization.

Training students in CLR equips them with the critical thinking skills and research strategies to navigate the deeply flawed legal systems and imperfect research resources. Despite the challenges, we should find a way to incorporate CLR into clinical pedagogy as an important step in the continued fight against injustice.

## APPENDIX A

Professor Priya Baskaran, in collaboration with the Pence Law Library and CLR scholars from other institutions, has created a resource guide for legal academics interested in incorporating CLR into their courses. The guide includes pedagogical exercises, background readings, and other resources. Additionally, this guide is a living resource and will continue developing as more scholars and instructors build and share their work.

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<sup>289</sup> Delgado & Stefancic, *Same Questions* (2007), *supra* note 1, at 328.

CRITICAL RESEARCH LIBRARY GUIDE: [https://wcl.american.libguides.com/critical\\_research\\_for\\_clinics](https://wcl.american.libguides.com/critical_research_for_clinics)

Please note, the authors of this guide have taken special efforts to promote proper attribution of all the shared materials. We encourage you to use the shared exercises and readings; in fact we hope you will use them! We ask that you properly cite and credit the original creators and authors who are so generously sharing their materials – both pedagogical exercises, presentations, and scholarly work (published and unpublished).



# ADVANCING HUMAN RIGHTS AND THE RULE OF LAW IN HAITI

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## ABSTRACT

*The rule of law in Haiti is precarious. The ESCDROJ law school clinic in the town of Jérémie champions indigent individuals whose human rights are under siege during their prolonged and unconstitutional pre-trial confinement in prison. To our knowledge, it is the only operating in-house law school clinic in Haiti. Despite myriad obstacles, during its initial pre-pandemic period of operation in 2018-2019, the inaugural clinic team represented clients in 43 cases*

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brought to trial and succeeded in garnering the release of 25 of those individuals. That is a trial release success rate of over 58%. Subsequently, however, the advent of the pandemic and social and political challenges have further eroded the functionality of the Haitian justice system. This Article is the first to chronicle and analyze the launch and impact of this pioneering clinic. It evaluates the clinic's successes and limitations to ascertain what role the clinic might play as a model for advancing human rights and the rule of law in Haiti and beyond.

## INTRODUCTION

The prison officials who have authorized our visit would prefer that we not ask questions of the men behind the barred doors.<sup>1</sup> But one man calls out to us loudly, and the leader of our group of visitors stops to listen.<sup>2</sup> The man explains that he has been held in this prison without trial for five years and that he has no lawyer. Despite the 1987 Haitian Constitution's explicit guarantee that individuals not be detained for more than 48 hours without being brought before a judge,<sup>3</sup> he informs us that he is still waiting for that first judicial audience. Presumed innocent and awaiting adjudication,<sup>4</sup> he is, like the vast majority of his brethren in Haitian prisons, routinely forgotten in the twilight of pre-trial detention.<sup>5</sup>

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<sup>1</sup> The guided visit of the prison in Jérémie, Haiti, described here occurred on March 7, 2018. The visit was conducted by a prison official. The group at the prison that morning included representatives from the Clinique de Recherche, d'Analyse, et d'Assistance Légale de l'ESCDROJ (CRAALE) of L'École Supérieure Catholique de Droit de Jérémie (Catholic Superior Law School of Jérémie, ESCDROJ) and from the Hastings to Haiti Partnership (now known as the Haiti Justice Partnership) at UC Law SF (previously University of California, Hastings College of the Law). At least two co-authors on this Article were in the visiting group.

<sup>2</sup> Co-author Professor Yvon Janvier led the visiting group. During the visit, interpretation from Haitian Creole into English was provided by Professor Janvier and Daniel Tillias. Haitian Creole is one of the two official languages of Haiti and the language spoken by almost, if not, all Haitians. See *Freedom in the Black Diaspora: A Resource Guide for Ayiti Reimagined: Haitian Creole*, LIBR. OF CONG. RSCH. GUIDES, <https://guides.loc.gov/haiti-reimagined/haitian-creole> (last visited July 18, 2023).

<sup>3</sup> See *Haiti's Constitution of 1987 with Amendments through 2012*, Constituteproject.org, (English translation (2012)) [https://www.constituteproject.org/constitution/Haiti\\_2012.pdf?lang=en](https://www.constituteproject.org/constitution/Haiti_2012.pdf?lang=en)

(last visited Dec. 13, 2022) (Article 26: "No one may be kept under arrest more than forty-eight (48) hours unless he has appeared before a judge asked to rule on the legality of the arrest and the judge has confirmed the arrest by a well-founded decision.").

<sup>4</sup> This individual indicated that he was facing a serious homicide charge and that he lacked legal representation.

<sup>5</sup> Many months or even years of such detention without representation was and remains a reality in Haiti. See U.S. DEP'T. OF STATE, HAITI 2022 HUMAN RIGHTS REPORT 6 (2023) [hereinafter HAITI 2022 HUMAN RIGHTS REP.] Prolonged pre-trial detention for women in Haitian prisons is also very common, although women constitute a much smaller fraction of the prison population. See e.g., "*N ap mouri*": rapport sur les conditions de détention en Haïti, Nations Unis, Droits de L'Homme, Haut-Commissariat & BINUH 6 (2021) [Authors' translation: "*N ap mouri*" (*We are dying*): Report on the Conditions of Detention in Haiti,

Not only is the delay unconstitutional and prolonged, but the conditions in the prison are often inhumane and “life threatening[.]”<sup>6</sup> The 2021 U.S. State Department Human Rights report on the conditions in Haiti lamented that “[p]rison facilities generally lacked adequate basic services such as plumbing, sanitation, waste disposal, medical services, potable water, electricity, ventilation, lighting, and medical isolation units for patients with contagious illnesses.”<sup>7</sup>

In addition to delay and devastating prison conditions, incarcerated individuals in Haiti generally cannot afford to hire legal representation.<sup>8</sup> Extensive and longstanding concerns about corruption in the judicial system in Haiti compound the complexities of legal representation and

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United Nations (UN), High Commission on Human Rights & UN Integrated Office in Haiti] [hereinafter *UN High Commission Report 2021*]. For information on pre-trial detention in Haiti, see e.g., HAITI 2022 HUMAN RIGHTS REP., *supra*, at 9-10 (“Many pretrial detainees never consulted with an attorney, appeared before a judge, or received a docket timeline. In some cases, detainees spent years in detention without appearing before a judge. According to estimates in September [2022] from BINUH [United Nations Integrated Office in Haiti], 83 percent of detainees were in unlawful pretrial detention. In some prisons, the rates were much higher . . . Local human rights groups reported prisoners were often held even after completing their sentences due to difficulty obtaining release orders from the prosecutor’s office. Some prisoners were held longer in pretrial detention than the required sentences for their accused crimes . . . While authorities generally acknowledged the right to counsel, most detainees could not afford a private attorney. The Office of Legal Assistance (BAL) is required to provide free legal assistance to anyone, regardless of ‘nationality, sex, age, or any other consideration,’ who the BAL’s coordinator determines cannot afford legal assistance in any judicial proceeding, including civil cases. OPC [Office of Citizen Protection] staff and human rights contacts reported, however, shortages of funding, a limited number of lawyers, and the small number of actual court hearings hampered the BAL’s effectiveness.”). The 2021 U.S. State Department Human Rights report notes that “[s]ome lawyers began to use habeas corpus actions to free clients improperly arrested; however, prisoners unable to afford private legal fees generally faced unlawful and prolonged pretrial detentions.” U.S. DEP’T. OF STATE, HAITI 2021 HUMAN RIGHTS REPORT 9-10 (2022) [hereinafter HAITI 2021 HUMAN RIGHTS REP.]; *UN High Commission Report 2021, supra*, at 1, 6 (As of May 31, 2021, these UN offices reported the following statistics on individuals detained in Haiti: “10,801 men (81% of them in pre-trial detention), 436 women (92% of them in pre-trial detention), 240 boys (94% of them in pre-trial detention) and 23 girls (96% of them in pre-trial detention) were deprived of their liberty in Haiti.”). [Authors’ translation].

<sup>6</sup> HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 6 (“Prison conditions were harsh and life threatening due to food shortages, severe overcrowding, inadequate sanitary conditions, and poorly maintained structures. The UN Secretary-General’s June report on the country condemned deteriorating conditions in prisons and detention centers.”).

<sup>7</sup> HAITI 2021 HUMAN RIGHTS REP. *supra* note 5, at 6.

<sup>8</sup> HAITI 2022 HUMAN RIGHTS REP. *supra* note 5, at 9-10; Blaine Bookey, *Enforcing the Right to Be Free from Sexual Violence and the Role of Lawyers in Post-Earthquake Haiti*, 14 CUNY L. REV. 255, 274 (2011). Cf. Roberson Edouard & Arnaud Dandoy, *Enquête auprès de la Population Carcerale de la Prison Civile de Port-au-Prince (Haïti): Rapport soumis à la Direction de l’administration pénitentiaire - Police nationale d’Haïti* [Authors’ translation: *Survey of the Prison Population of the Port-au-Prince Civil Prison (Haiti)*, Report submitted to the Directorate of Prison Administration - Haitian National Police] viii, x (Sept. 2016).

accessing justice.<sup>9</sup> These corruption concerns and the overall dearth of resources work to undermine the rule of law<sup>10</sup> and foment human rights violations.<sup>11</sup>

The need for legal representation in light of unconstitutional and prolonged pre-trial detention, inhumane prison conditions, and the problematic judicial environment in Haiti lay at the heart of our group's visit to the Jérémie prison in March of 2018. Just months earlier, after a near decade-long gestation, the law school located in Jérémie, L'École Supérieure Catholique de Jérémie (ESCDROJ), had begun the launch of a law school clinic, Clinique de Recherche, d'Analyse, et d'Assistance Légale de l'ESCDROJ (ESCDROJ Clinic for Research, Analysis, and Legal Assistance, (CRAALE)).<sup>12</sup> As we understood and continue to understand the situation in Haiti, CRAALE is the only operating in-house law school clinic in the country.<sup>13</sup>

This Article chronicles the launch of this clinical legal outpost in a country where the rule of law is exceptionally precarious.<sup>14</sup> It

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<sup>9</sup> See, e.g., HAITI 2021 HUMAN RIGHTS REP. *supra* note 5, at 9 (“Illegal and prolonged pretrial detention remained a problem due to the arbitrary application of court rules and discretion, corruption, and poor recordkeeping.”); Jomanas Eustache, *The Importance of Teaching Law and the Reinforcement of the Judiciary System in Haiti*, 32 HASTINGS INT’L & COMP. L. REV. 601, 609 (2009) (“the existence of corruption among judicial personnel greatly undermines citizens’ expectation of being treated fairly.”).

<sup>10</sup> For a definition of the rule of law, see, for example, the definition provided by the United Nations. *What is the Rule of Law*, UNITED NATIONS AND THE RULE OF LAW, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (last visited Aug. 8, 2023) (“For the United Nations (UN) system, the rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency . . . The rule of law is a core element of the humanitarian and human rights agendas.”)

<sup>11</sup> See, e.g., HAITI 2021 HUMAN RIGHTS REP. *supra* note 5, at 9. For access to the Universal Declaration of Human Rights and its limitations on inhuman treatment or punishment, see *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (“Article 5 No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

<sup>12</sup> See Yvon Janvier, *Une clinique légale à Jérémie contre la détention préventive prolongée*, LE NOUVELLISTE (March 19, 2018) [Authors’ translation: *A Jérémie legal clinic against prolonged pre-trial detention*].

<sup>13</sup> See *infra* text accompanying notes 63-80 for a more detailed account of the history that led to the launch of CRAALE.

<sup>14</sup> For a description of rule of law challenges in Haiti, see e.g., CLARE RIBANDO SEELKE & KARLA I. RIOS, CONG. RSCH. SERV., HAITI: RECENT DEVELOPMENTS AND U.S. POLICY, 1, 7-8 (2023) (“As of early 2023, Haiti still lack[ed] an elected president, legislature, and local government. . . . Furthermore, impunity prevails in Haiti’s weak justice system. . . . Gangs overtook several of Haiti’s main courthouses in summer 2022, and many of the courthouses remain inoperable. Without functioning courts, Haitian prisons continue to hold inmates, 82% of whom were in pretrial detention in May 2021, in crowded conditions rife with violence and disease. Many inmates lack access to food, water, and medical care.”).

analyzes CRAALE's impact and potential as a model in the emergence of clinical legal education in Haiti, revealing both where it offers promise and where work remains to be done. The analysis suggests that, through its focus on harnessing judicial process and prosecutorial discretionary review policy, CRAALE is buttressing the rule of law. In addition, CRAALE's success in securing release for individuals, particularly those illegally detained in prison, is furthering human rights in Haiti. However, a range of global and domestic challenges impede CRAALE's progress. The analysis considers how various of the challenges might be addressed as well as potential next steps for the CRAALE endeavor.

Part I offers a summary portrait of prison conditions in Haiti, of impediments to access to justice for those who are detained there, as well as of historical limitations in law school practical training. Part II provides an overview of the vision and pragmatics of CRAALE's launch as well as its early efforts.<sup>15</sup> Part III offers a framework for evaluating CRAALE and then assesses CRAALE's work and impact. It offers insights and takeaways from this pioneering law-school based legal clinic. This first-hand narrative and critique aims to further understanding of what it means to advance human rights and the rule of law through clinical legal education in the most economically impoverished nation in the Western Hemisphere.<sup>16</sup>

## I. LEGAL AND EDUCATIONAL LANDSCAPE

### A. Prison Conditions

According to the U.S. State Department 2022 Human Rights Report for Haiti, an estimated 83% of the individuals incarcerated in Haiti await trial.<sup>17</sup> The Jérémie prison, the venue of the visit described above, serves as the main prison facility for the entire Grand'Anse Department, one of Haiti's ten administrative divisions.<sup>18</sup> At the time

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<sup>15</sup> The discussions in Parts I and II about the prison conditions, the limited availability of legal representation, the law school curriculum, and the history and vision of CRAALE draw in large part from prior work by two of the co-authors here. See e.g., Kate E. Bloch & Roxane Edmond Dimanche, *Human Rights from the Ground Up: Building the First Law School Legal Aid Clinic in Haiti*, 20 U. PA. J. L. & SOC. CHANGE 217 (2017) [hereinafter Bloch & Edmond Dimanche, *Human Rights from the Ground Up*].

<sup>16</sup> CENTRAL INTELLIGENCE AGENCY, HAITI, CENT. INTEL. AGENCY: THE WORLD FACTBOOK HAITI, <https://www.cia.gov/the-world-factbook/countries/haiti/> (last visited July 18, 2023) (explaining that "Haiti is the poorest country in the Western Hemisphere").

<sup>17</sup> HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 9.

<sup>18</sup> Memorandum from Rachel Lopez at Seton Hall Law School: Fact-Finding Concerning Prison Conditions in Jérémie and Recommendations for Reform, 1-2 (Apr. 18, 2012) (on file with co-authors) [hereinafter Lopez, Fact-Finding Memorandum]; Ariel Chéry & Marie Gerda Dorcy, *Programme d'Assistance aux Détenus de la Prison Civile de Jérémie*, ESCDROJ (Mars 2017) [Authors' translation: Assistance Program for Detainees in the Jérémie Civil

of the visit on March 7, 2018, consistent with these overall statistics, our guide informed us that 268 of the 323 persons (just under 83%) incarcerated in the Jérémie prison were awaiting trial.<sup>19</sup>

For the men confined there, incarceration generally involves being held in cells whose intended maximum capacity is perhaps five to seven people but that commonly hold at least forty to fifty men.<sup>20</sup> Such severe overcrowding is the norm for incarcerated men in Jérémie and nationwide.<sup>21</sup> A 2021 United Nations Report describing detention conditions in Haiti noted that, in the cells visited, incarcerated men had, on average, just 0.57 m<sup>2</sup> (6.14 square feet) of floor space per person.<sup>22</sup> That means just under six feet two inches by one foot of ground space, less than the length and width of a standard coffin in the U.S.<sup>23</sup> In Jérémie, this translates into too little floor space for everyone in a given cell to lie down at night; instead, men may sleep in shifts on the unmattressed

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Prison, ESCDROJ (Mar. 2017)] [hereinafter Chéry & Dorcy, *Assistance Program*] (on file with co-authors).

<sup>19</sup> In Jérémie, individuals detained pre-trial and those persons convicted of crimes are held together within the same nine cells. *See, e.g.*, Lopez, Fact-Finding Memorandum, *supra* note 18, at 1-2.

<sup>20</sup> Judith Lamour & Yvon Janvier, Narrative Report Grant No. SHA70018GR0039-M001 from ESCDROJ 2 (June 2020) (on file with co-authors).

<sup>21</sup> HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 6. The more recent information from the March, 2018, visit to the prison supplements descriptions of the prison that one or more of the current co-authors have provided in prior articles that were published before 2018. *See, e.g.*, Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15; Kate E. Bloch & Roxane Edmond Dimanche, *The Rule of Law & Ethical Integrity: Does Haiti Need a Code of Legal Ethics?*, 37 U. HAW. L. REV. 1 (2016); Kate E. Bloch, *Representation for the Accused: Haiti's Thirst and a Role for Clinical Legal Education*, 14 OR. REV. INT'L L. 430 (2013). In these articles, we have also offered information about the purposes, vision, and pre-launch activities of CRAALE. *Id.* The current Article draws on those writings. However, those articles were published before the CRAALE clinic launched. The current Article not only provides a narrative of CRAALE's launch, but it also offers an evaluation and critique of CRAALE's progress and impact.

<sup>22</sup> UN High Commission Report 2021, *supra* note 5, at 9. *See also* HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 6 ("Overcrowding at prisons and detention centers was severe. In June the UN Secretary-General's report estimated the nationwide occupancy rate of prisons was nearly three times the designed capacity; however, individual prisons' occupancy rates were much higher. Nearly half of the cells in the Les Cayes prison, for example, were destroyed by the August 2021 earthquake and were unusable. This doubled the rate of occupancy in individual cells. The National Penitentiary in Port-au-Prince was designed to hold 800 prisoners; as of July, it held more than 3,700. Prison overcrowding grew worse due to high rates of pretrial detention. As of July, 83 percent of prisoners nationwide were in prolonged pretrial detention, or held without charges for longer than the 48 hours allowed by the constitution, most for years at a time; in South Department, the figure was as high as 91 percent.").

<sup>23</sup> Assuming the prison ceiling is a standard height, incarcerated individuals in Haiti have more space above their heads, although not with respect to ground space, than what a standard coffin provides. For information on standard caskets, see *e.g.*, David Tindall, *Are all Caskets the Same Size?* (Feb. 18, 2022) <https://tindallfuneralhome.com/blogs/blog-entries/1/Our-Blogs/147/Are-All-Caskets-The-Same-Size.html> (explaining that a standard casket has dimensions of 84 inches by 28 inches by 23 inches).



concrete floor.<sup>24</sup> It does not take a mathematician to understand that the space allotted is far less than the minimum required under, for example, the European Committee on the Prevention of Torture's minimum standard of four square meters (43 square feet).<sup>25</sup>

Sanitation within the cells in the Jérémie prison is also sorely lacking, with only a shared bucket for use at night.<sup>26</sup> Bathrooms and showers are available during the day in the courtyard during an incarcerated person's brief daily releases from the cell.<sup>27</sup>

Not only does the prison lack adequate space and sanitation, but prison food also generally provides insufficient nutrition to maintain health (and perhaps life), consisting of one or two bowls of porridge, oatmeal, or gruel served to each person daily.<sup>28</sup> In Jérémie, the prison official who led our 2018 visit informed us that incarcerated individuals were given one bowl per person served twice daily. Without family or friends supplying additional food (a very common and often necessary practice in Haiti),<sup>29</sup> the already high malnutrition numbers of incarcerated

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<sup>24</sup> See Lopez, Fact-Finding Memorandum, *supra* note 18, at 1-2. Like in Jérémie, in describing the situation on a national scale, the 2021 U.S. State Department report noted that “[i]n many prisons detainees slept in shifts due to the lack of space.” HAITI 2021 HUMAN RIGHTS REP., *supra* note 5, at 5.

<sup>25</sup> European Committee on the Prevention of Torture of Prisoners and Inhuman or Degrading Treatment or Punishment [CPT], *Living Space per Prisoner in Prison Establishments: CPT Standards 1* (Dec. 15, 2015) <https://rm.coe.int/16806cc449> (“The CPT’s minimum standard for personal living space in prison establishments is: . . . 4m<sup>2</sup> of living space per prisoner in a multiple-occupancy cell + fully-partitioned sanitary facility . . .”) [emphasis removed]; See also UN Minimum Standard Rules for the Treatment of Prisoners, (the Nelson Mandela Rules), UNITED NATIONS OFFICE ON DRUGS AND CRIME 5-6 (2015) [https://www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf) (last visited July 18, 2023) (“Rule 13 All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.”).

<sup>26</sup> See Lopez, Fact-Finding Memorandum, *supra* note 18, at 2.

<sup>27</sup> *Id.*

<sup>28</sup> In describing prison conditions on a more national scale, the U.S. State Department 2021 Human Rights Report indicates that “[p]rison authorities generally gave prisoners one to two meals a day, consisting of broth with flour dumplings and potatoes, rice and beans, or porridge. None of the regular meals provided the recommended caloric intake per day, and authorities allowed regular deliveries of food to prisoners from relatives and friends. According to Health Through Walls, approximately 500 prisoners suffered either minor or major episodes of malnutrition during the year.” HAITI 2021 HUMAN RIGHTS REP., *supra* note 5, at 7. The 2022 report indicates that “[t]he DAP [Directorate of Prison Administration] reported most prisoners did not have two meals a day; many prisoners received only one meal daily, of low nutritional quality. The NGO Health Through Walls reported 83 prisoners died between January and September. Most deaths were caused by starvation and poor living conditions. BINUH and other human rights representatives stated the low initial budget allocated to the DAP for prisoners’ food, as well as diversions of those funds for other purposes including alleged corruption, aggravated nationwide prison food shortages. On July 21, the director of the Saint Marc civil prison appealed to media, saying there was no food or water available for the 500 prisoners held there.” HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 6-7.

<sup>29</sup> See HAITI 2021 HUMAN RIGHTS REP., *supra* note 5, at 7.



individuals<sup>30</sup> would likely skyrocket. The Office of Citizen Protection, “[t]he country’s independent human rights monitoring body,”<sup>31</sup> works to identify and remedy human rights violations. Nonetheless, delays in adjudication commonly extend for years and in prison conditions that remain degrading and dire.<sup>32</sup>

In the 2008 matter of *Yvon Neptune v. Haiti*, the Inter-American Court of Human Rights wrote that “[t]he appalling conditions of Haitian prisons and detention centers have been brought to light in this case. It is pertinent to recall that international human rights treaties, particularly the American Convention, oblige States to provide decent living conditions for persons deprived of liberty.”<sup>33</sup> The Court ordered “that the State must adopt, within a reasonable time, the necessary legislative, administrative, political and economic measures to ensure that prison conditions comply with international human rights norms; in particular, to alleviate the problems of overcrowding [and] shortcomings in the physical and sanitary infrastructure . . . .”<sup>34</sup> As the evidence of recent prison conditions attests, well over a decade later, that human rights court order still awaits implementation.

### B. Lack of Legal Representation

In addition to facing the common realities of prolonged pre-trial detention and life-threatening prison conditions, incarcerated individuals in Haiti generally cannot afford legal representation.<sup>35</sup> Over the years, a number of domestic and international entities have focused on trying to provide representation for individuals detained pre-trial.<sup>36</sup> Among others, these have included the United States Agency for International Development (USAID), the United Nations Stabilization Mission in Haiti (MINUSTAH),<sup>37</sup> the local non-governmental organization

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<sup>30</sup> HAITI 2021 HUMAN RIGHTS REP., *supra* note 5, at 7 (“International and local observers said prisoners and detainees continued to suffer from a lack of adequate nutrition. According to the NGO Health Through Walls, approximately 3,700 prisoners in the penitentiary system were acutely malnourished.”).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 6.

<sup>33</sup> *Yvon Neptune v. Haiti*, Merits Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 180, ¶ 181 (May 6, 2008), available at [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_180\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_180_ing.pdf).

<sup>34</sup> *Id.* at ¶ 183 & ¶ 170.

<sup>35</sup> HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 9-10.

<sup>36</sup> Renaud Galand, Helga Klein, Joël Beauchamp, Augustin Benadieu, Lara Deramaix & Thomas Vennen, *Assessment of Legal Aid in Haiti: Lessons Learned*, USAID & UN PEACEKEEPING (MINUSTAH & JUST. AND CORR. SERV. OF THE UNITED NATIONS DEP’T OF PEACEKEEPING OPERATIONS), 1,5 (July, 2017) <https://web.archive.org/web/20220901044852/https://issat.dcaf.ch/download/125808/2568524> (last visited July 31, 2023) [hereinafter *Assessment of Legal Aid in Haiti*].

<sup>37</sup> *Id.* at 5-6.

(NGO) Bureau des Droits Humains en Haïti (BDHH) (Office of Human Rights in Haiti),<sup>38</sup> and the Bureau des Avocats Internationaux (BAI) (Office of International Lawyers).<sup>39</sup> For international governmental organizations, these efforts have largely focused on supporting the development of local legal aid offices, Bureaux d'Assistance Légale (BAL).<sup>40</sup>

A report from a joint USAID and UN team suggests that, from 2009 to 2016, the supported programs “enabled or contributed to the release of” thousands of individuals detained pre-trial.<sup>41</sup> Despite such interventions, however, the World Prison Brief indicates that the prison population in Haiti increased in each two year period reported between 2008 and 2016, with the exception of in 2010, the year of a catastrophic earthquake.<sup>42</sup> Moreover, in a 2016 report focusing on Port-au-Prince’s National Penitentiary, Haiti’s largest prison, researchers found that, in a random selection of 894 incarcerated individuals, just 3% of those individuals indicated that they were represented by an attorney, and 81% reported that they had never been visited by an attorney.<sup>43</sup>

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<sup>38</sup> See BDHH, <https://bdhhaiti.org/>; Seyi Rhodes, *The Prison from Hell*: UNREPORTED WORLD, YOUTUBE (Nov. 11, 2016) [https://www.youtube.com/watch?v=SwE\\_uUgomd0](https://www.youtube.com/watch?v=SwE_uUgomd0).

<sup>39</sup> See BAI, <https://www.ijdh.org/our-work/access-to-justice/bai-lawyer-training/>.

<sup>40</sup> See, e.g., *Assessment of Legal Aid in Haiti*, *supra* note 36, at 5-6.

<sup>41</sup> *Id.* at 6. Specifically, the report opines that “[t]he data provided for this report demonstrate[] that between 2009 and 2016, the MINUSTAH and USAID/PROJUSTICE legal aid . . . enabled or contributed to the release of 15,000 detainees and the conviction of 2,700 pre-trial detainees.” *Id.* However, the report also notes that “[c]ertain constraints were encountered while collecting information: it was not possible to visit all of the BAL; some of the offices, and the Service d’Education et d’Assistance Légale (SEAL), had already ended their activities; and access to the documentation of ProJustice and the Haitian Government was limited. . . . Very little information could be collected from the Ministry of Justice regarding the legal aid programmes put in place by the Government; statistics were available only for the legal aid office of Gonaïves. More generally, it was not possible to fully verify the validity of the available statistics.” *Id.* at 10.

<sup>42</sup> *World Prison Brief Data Haiti*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/haiti> (last visited July 18, 2023); *Welcome*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/> (last visited July 18, 2023) (explaining the World Prison Brief is “an online database providing free access to information on prison systems around the world.”). The year 2010 saw a devastating earthquake inflict death and destruction across much of Haiti and particularly in the capital. The earthquake resulted in damage to the prison and the escape of what was estimated to be thousands of incarcerated individuals. See e.g., Neil Katz, *Haiti Earthquake News, Main Prison Destroyed, 4,000 Prisoners Escape*, CBS NEWS (Jan. 15, 2010), <https://www.cbsnews.com/news/haiti-earthquake-news-main-prison-destroyed-4000-prisoners-escape/>.

<sup>43</sup> See Edouard & Dandoy, *supra* note 8. A joint UN and USAID report from July, 2017, described the situation prior to the passage of the new law as follows: “In Haiti, the right to legal aid has been recognized since the 19<sup>th</sup> century. However, the legal framework remains fragmented and is not fully applied. The Constitution and the Code of Criminal Procedure foresee the right to a lawyer for the accused in criminal cases and the mandatory designation of counsel by judges where individuals are not represented. In practice, the Bar Association designates trainee lawyers to defend the accused in criminal cases warranting trial by jury, but there is little to no legal assistance system organized beyond that.” *Assessment of Legal Aid in Haiti*, *supra* note 36, at 5.

In 2018, just after CRAALE's launch, the government did promulgate the National Legal Assistance Program, a new law requiring government-sponsored representation for indigent individuals in criminal cases.<sup>44</sup> The new law is on the books, and the 2021 U.S. State Department report indicated that, at that time, it was in the process of being implemented.<sup>45</sup> However, more than four years after its passage, the CRAALE co-authors report that the new law has not been implemented in Jérémie.

For a law on the books to translate into real government-financed representation, implementation depends on government prioritization and bandwidth, as well as resources. With respect to resources, however, Haiti suffers a tremendous poverty burden,<sup>46</sup> which makes that translation difficult.

In addition to severely limited financial resources, recent political upheaval further decreases the likelihood that legal representation for indigent individuals will receive the government funding and personnel necessary under the new law.<sup>47</sup> For example, in the wake of the continuing failure to hold legislative elections,<sup>48</sup> in a June 2020 presentation

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<sup>44</sup> Loi Sur L'Assistance Légale (Loi N°. 006-2018) [Authors' translation: Law on Legal Assistance (Law Number 006-2018)], LE MONITEUR (Haiti) (Oct. 26, 2018); *See also, e.g.*, Ruth Cadet, *Justice: une nouvelle loi sur l'assistance légale entrée en vigueur*, LE NOUVELLISTE (Nov. 8, 2018), <https://www.lenouvelliste.com/article/194734/justice-une-nouvelle-loi-sur-l-assistance-legale-entree-en-vigueur/amp> [Authors' translation: *Justice: a new law on legal aid comes into force*].

<sup>45</sup> HAITI 2021 HUMAN RIGHTS REP., *supra* note 5, at 9-10 ("The law mandates that the National Legal Assistance Program provide free assistance to criminal defendants and victims of crimes who cannot afford a lawyer. In May the president appointed the members of the National Legal Assistance Committee charged with overseeing the program, and two of 11 planned legal assistance offices had opened as of November 22."). The United Nations Rule of Law and Global Human Rights Program also reports supporting legal clinics by bar associations to provide representation to individuals detained in prison. *See* United Nations Rule of Law and Global Human Rights Program, Haiti, <https://undprolhr2021.org/latin-america-the-caribbean/haiti.html> (last visited Jan. 16, 2023) [hereinafter UNDP website].

<sup>46</sup> There is debate about the specific causes of poverty in Haiti and the extent of each potential cause's contribution to the prevalence of poverty today, with scholars and commentators citing a variety of causes. *See, e.g.*, Catherine Porter, Constance Méheut, Matt Apuzzo, & Selam Gebrekidan, *The Root of Haiti's Misery: Reparations to Enslavers*, N.Y. TIMES (May 20, 2022), <https://www.nytimes.com/2022/05/20/world/americas/haiti-history-colonized-france.html> (arguing that debt incurred for post-revolutionary payments demanded by France was a powerful initial cause of the country's poverty and concluding that the debt incurred for those payments continues to undermine the Haitian economy today); Chris Cameron, *As U.S. Navigates Crisis in Haiti: Bloody History Looms Large*, N.Y. TIMES (Dec. 19, 2021), <https://www.nytimes.com/2021/12/19/us/politics/us-haiti-intervention.html> (last visited Feb. 3, 2023) (describing U.S. interventions in Haiti); ALEX DUPUY, HAITI IN THE WORLD ECONOMY: CLASS, RACE, AND UNDERDEVELOPMENT SINCE 1700, 4-5 (1989) ("argu[ing] inter alia] that Haiti's underdevelopment stems from its incorporation into the capitalist world-system since the end of the seventeenth century as a peripheral economy specializing in the production of primarily agricultural crops for export and later some manufactured goods").

<sup>47</sup> For a brief overview of the recent political challenges, see, e.g., RIBANDO SEELKE & RIOS, *supra* note 14, at 1-11.

<sup>48</sup> Describing the state of Haiti's legislature in 2020, the U.S. State Department's Human Rights Report noted that "in January 2020 the terms of the majority of parliamentarians expired

to the Security Council on the United Nations Integrated Office in Haiti, Jacques Letang, the president of the Haitian Federation of Bar Associations explained: “There is no more parliament, no more local authorities, no more legitimate government.”<sup>49</sup>

Exacerbating the lack of legislative functionality, in July, 2021, assassins entered the home of then President Jovenel Moïse and took his life.<sup>50</sup> The 2023 World Report on Haiti explained that, “[i]n 2022, Haiti remained in a long-standing political, security and humanitarian crisis that . . . left all government branches inoperative . . .”<sup>51</sup> On October 2, 2023, the UN Security Council condemned the “increasing violence, criminal activities, and human rights abuses and violations[.]”<sup>52</sup> and, in response to a request from Haiti, the Council authorized a “deployment of a Multinational Security Support Mission”<sup>53</sup> to Haiti. Consequently, a government focus on effective implementation of representation for indigent individuals is unlikely to be a priority.<sup>54</sup> This means that the pressing need for legal representation for indigent individuals remains largely unmet.

### C. Law School Focus on Doctrine and Theory

Haitian law schools have historically lacked a practice focus, offering instead an education based almost exclusively on legal theory and doctrine.<sup>55</sup> Admission to the Haitian Bar does require both the writing and defense of a *mémoire* (thesis) and a post-graduation legal practice apprenticeship of one to two years (*stage*).<sup>56</sup> However, formal law

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due to a failure of the country to conduct elections in 2019. Only 10 elected members of 30 remained in the upper house, while the lower house had none. As a result, parliament was unable to reach a quorum and ceased to function.” HAITI 2021 HUMAN RIGHTS REP., *supra* note 5, at 1.

<sup>49</sup> Jacques M. Letang, English version of M[aitr]e Jacques Letang’s statement before the Security Council on the UN Integrated Office in Haiti, BUREAU DES DROITS HUMAINS EN HAÏTI (June 19, 2020), <https://bdhhaiti.org/archives/495>.

<sup>50</sup> *Haiti President’s Assassination: What We Know so Far*, BBC NEWS, <https://www.bbc.com/news/world-latin-america-57762246> (last visited Feb. 3, 2023).

<sup>51</sup> *Haiti: Events of 2022*, HUM. RTS. WATCH: WORLD REPORT 2023, <https://www.hrw.org/world-report/2023/country-chapters/haiti#1070a7> (last visited Sept. 24, 2023).

<sup>52</sup> Press Release, Security Council, Security Council Authorizes Multinational Security Support Mission for Haiti for Initial Period of One Year, by Vote of 13 in Favour with 2 Abstentions, U.N. Press Release SC/15432 (Oct. 2, 2023).

<sup>53</sup> *Id.*

<sup>54</sup> Efforts to address the prolonged pre-trial detention issue are the focus of other international and domestic individuals and organizations. For a discussion of UN efforts to support legal assistance organizations in Haiti, see UNDP website, *supra* note 45. For USAID’s efforts, see, e.g., *Lost While Awaiting Trial: Advocating for Jailed Haitian Citizens*, USAID FROM THE AMERICAN PEOPLE, <https://www.usaid.gov/haiti/news/lost-while-awaiting-trial-advocating-jailed-haitian-citizens-0> (last visited Jan.16, 2023) [hereinafter *Lost While Awaiting Trial*].

<sup>55</sup> See, e.g., Irwin P. Stotsky & Brian Concannon, Jr., *Democracy and Sustainability in Reconstructing Haiti: A Possibility or Mirage?* 44 U. MIAMI INTER-AM. L. REV. 1, 34 (2012) (arguing that “[l]aw school in Haiti is theoretical, with no practice classes or clinics.”) (citation omitted).

<sup>56</sup> Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 237.

school instruction ends before aspiring attorneys undertake either the writing of their thesis or the apprenticeship.<sup>57</sup> Many, if not most, such individuals lack the resources, both financial and mentoring, necessary to complete these requirements.<sup>58</sup> As a result, students have historically graduated law school without formal curricular training in a range of lawyering practice competencies and often without the opportunity and support necessary to master them through a *stage* apprenticeship.

## II. CRAALE'S VISION & LAUNCH

This is the landscape into which CRAALE was born. As one of its primary motivations, CRAALE aims to respond to the lack of adequate legal representation for individuals detained pre-trial in the Jérémie prison.<sup>59</sup> It is in a spirit of public service aligned with the values and principles of respecting and enforcing fundamental human rights that ESCDROJ launched CRAALE. Complementing service to clients, the second primary motivation for CRAALE stems from the identified limitations of practical training in law school for aspiring lawyers in Haiti.<sup>60</sup>

CRAALE aims to address these needs synergistically by providing essential client representation while training law students and recent law school graduates in the legal skills needed to represent individuals detained pre-trial in the prison.<sup>61</sup> In this way, CRAALE hopes to bridge what has often proven to be an intractable gap between law school and becoming a practicing lawyer.<sup>62</sup>

### A. Vision

The idea for the clinic began with the vision of co-author Roxane Edmond Dimanche, then a law student at ESCDROJ.<sup>63</sup> Through her challenging in-court experience handling criminal cases between her second and third year of law school<sup>64</sup> and her interactions with visitors from

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<sup>57</sup> *Id.* at 224, 237.

<sup>58</sup> *Id.*

<sup>59</sup> See e.g., Bloch & Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 219-220, 223-224, 227.

<sup>60</sup> See, e.g., Stotsky & Concannon, Jr., *supra* note 55.

<sup>61</sup> See Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 224, 234. During its initial period of operation, CRAALE interns were recent law school graduates because, due to a rule change by the Bar, students still taking their coursework in the law school were not permitted to represent clients in serious cases in court, even with attorney supervision. However, as of June, 2023, the ESCDROJ dean has allowed students still taking their coursework to intern with CRAALE. See email with attachment from Yvon Janvier (Nov. 12, 2023, 12:33 PM PST) (on file with co-authors). As in many countries around the world, the law school program is an undergraduate degree program.

<sup>62</sup> Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 240.

<sup>63</sup> *Id.* at 225.

<sup>64</sup> *Id.* at 224-25. Subsequent to her experience, the ability to appear in court and handle

legal clinics in the U.S., she perceived the value that clinical opportunities could provide to Haitian law students and to unrepresented individuals detained pre-trial whose constitutional and human rights were at risk.<sup>65</sup>

Roxane Edmond Dimanche and her law school colleague, Georges Gabrielle Paul, began a concerted effort to expand their understanding of law school clinical work and lay the foundation for a clinic at ESCDROJ.<sup>66</sup> They were trailblazers in this endeavor; the process was arduous and lengthy.<sup>67</sup> It drew upon partnerships with organizations and individuals in Haiti and abroad.<sup>68</sup>

During its long incubation, the vision gained practical dimensions. Like many law school clinics around the globe,<sup>69</sup> the clinic would provide service to clients and legal training to aspiring attorneys. This would include supporting law school students and graduates in completing their *mémoires* (theses) and apprenticeship requirements, nurturing a commitment to public service, and modeling ethical practice. By rejecting corrupt practices and demonstrating how to succeed on behalf of clients even in the most difficult of circumstances, CRAALE would strive to undergird and extend the reach of the rule of law and to advance human rights.<sup>70</sup>

### B. Launch

Some months after Roxane Edmond Dimanche began sharing her vision of a clinic, Dean Jomanas Eustache of ESCDROJ announced a focus on the clinic undertaking.<sup>71</sup> He extolled the virtues that a clinic could provide.<sup>72</sup> He explained:

ESCDROJ hopes to start a law clinic in order to provide both clinical training for our students and assistance to those in our community . . . who need representation. Currently, after passing a [pre-mémoire] at

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cases with the supervision of a practicing attorney became more restricted for law students.

<sup>65</sup> *Id.* at 225-26.

<sup>66</sup> *Id.*

<sup>67</sup> A more detailed discussion of the process can be found in Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 223-44.

<sup>68</sup> *See id.* at 223-227.

<sup>69</sup> *See, e.g.*, Colleen F. Shanahan, Jeffrey Selbin, Alyx Mark & Anna E. Carpenter, *Measuring Law School Clinics*, 92 TUL. L. REV. 547, 550 (2018); Serge A. Martinez, *Law Clinics in Taiwan: Can Clinical Legal Education Succeed in this Civil Law Jurisdiction with an Undergraduate Legal Education System?*, 7 NAT'L TAIWAN U. L. REV. 343, 348 (2012).

<sup>70</sup> For a discussion of challenges to the rule of law and human rights in Haiti, *see, e.g.*, RIBANDO SEELKE & RIOS, *supra* note 14. For a discussion of the work of the Bureau des Avocats Internationaux (BAI) in Port-au-Prince rejecting bribery in its approach to client legal representation, *see, e.g.*, Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 244.

<sup>71</sup> Eustache, *supra* note 9, at 606-07.

<sup>72</sup> *Id.*



the completion of their second year, students may represent individuals before the local court. However, by having a clinic, we could more effectively train our students in a manner that combines advocacy with a strong commitment to serve those who cannot afford justice. Students would then have the necessary tools to sharpen their legal advocacy skills. The need is great because these kinds of clinical training opportunities do not currently exist in Haiti.<sup>73</sup>

Between that early call for establishing a clinic and the actual launch in the 2017-2018 academic year, almost a decade passed. Two of the co-authors here have previously written about CRAALE's vision and the obstacles that impeded CRAALE's launch during those years,<sup>74</sup> but this is the first article to offer a detailed account and analysis of the launch, its impact, and subsequent takeaways for the future.<sup>75</sup>

During that near decade of preparation, the co-authors involved in the efforts found no other in-country models to emulate.<sup>76</sup> We came to believe that the anticipated clinic was the first of its kind in Haiti. In 2018, some months after CRAALE's launch, two of us were told that a U.S.

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<sup>73</sup> *Id.* (footnote omitted). A pre-*mémoire* can enable a student to continue their studies until the fourth and final year of law school courses. See email with attachments from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST) (on file with co-authors). Obtaining the final diploma requires successful submission and defense of a *mémoire* (thesis). See *id.* Students who have completed their law school coursework but not yet submitted and defended their thesis are referred to here as students, or graduates, or *finissants*. Law school graduates who have defended their thesis but not yet completed their apprenticeship are generally referred to here as apprentices or *stagiaires*.

<sup>74</sup> See, e.g., Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15.

<sup>75</sup> There was brief newspaper coverage in Haiti announcing CRAALE's launch. See Janvier, *supra* note 12. Similarly, there have been media references to the launch, for example, related to the U.S. Embassy in Haiti grants. See, e.g., *Discours de l'Adjointe au Chef de Mission sur la Vulgarisation de la Loi sur l'Assistance Légale*, AMBASSADE DES ETATS-UNIS EN HAÏTI, (Dec. 18, 2018) <https://ht.usembassy.gov/fr/discours-de-ladjointe-au-chef-de-mission-sur-la-vulgarisation-de-la-loi-sur-lassistance-legale/> [Authors' translation: *Deputy Head of Mission's speech on the popularization of the Legal Aid Law, U.S. Embassy in Haiti*]. There has also been pre-launch media discussion of the clinic. See, e.g., Jessica Carew Kraft, *Establishing the Rule of Law in a Country Where Justice Hardly Exists*, THE ATL. (Apr. 22, 2015) <https://www.theatlantic.com/education/archive/2015/04/establishing-the-rule-of-law-in-a-country-where-justice-hardly-exists/391113/>. Several of the co-authors also presented in-person orally about CRAALE's work at various gatherings, including a conference in Port-au-Prince on prisons and during the academic exchanges under the grants from the U.S. Embassy in Haiti. Various of the co-authors have also submitted required reports on the grants to the grant funder regarding CRAALE's work, and the co-authors had prepared an earlier manuscript in French about CRAALE's work that was not published. In November 2023, Professor Janvier also generated a four-page report, which provides a brief overview and update about CRAALE and its work and "highlights the project's launch, objectives, achievements and limitations[.]" Yvon Janvier, *Clinique de Recherche d'Analyse et d'Assistance Légale (CRAALE-ESCDROJ): Enhancing Legal Assistance for Detainees in Jérémie, Haiti 1* (16 November 2023) (on file with co-authors) [hereinafter *Enhancing Legal Assistance*]. To our knowledge, no previously published law journal article has analyzed the launch and subsequent impact of CRAALE.

<sup>76</sup> Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 223-27.



grant had supported a program described as a law school clinic in perhaps the 1990s at a law school in Port-au-Prince.<sup>77</sup> It was apparently no longer functioning,<sup>78</sup> and we have not unearthed its approach or details of its work. In any event, during that period of preparation, we knew of no law school clinic models in Haiti that could inform the development of CRAALE.<sup>79</sup> Lacking in-country models, we focused on examples of clinical legal education elsewhere, hoping to find approaches that could be modified or re-envisioned to suit a Haitian context.<sup>80</sup>

With its twin primary goals of education and service, CRAALE would need foundational infrastructure. Five building blocks came to furnish that foundation and underpin its launch.

### 1. *Fact-Finding Report: Assessment of Prison Conditions and Representation Needs*

The first event was an assessment of prison conditions and the legal representation status of persons incarcerated there. In 2017, Dean Eustache commissioned a group of law students under the supervision of two of the co-authors here, Jérémie attorney Ariel Chéry and then law student Marie Gerda Dorcy, to conduct that assessment.<sup>81</sup> Their March 2017 fact-finding report noted that 284 individuals were listed as persons being detained pre-trial in the prison facility.<sup>82</sup> The report provides specific information on 134 individuals, from cells one, five, six, seven, and eight, which constitute five of the nine cells in the prison.<sup>83</sup> In terms of individuals about whom specific information was provided, the report notes health issues for most of these individuals, including individuals who acknowledged suffering from fever, cholera, tuberculosis, and HIV.<sup>84</sup> Team members conducting the project described conditions in the facility as “deplorable” and “degrading[.]”<sup>85</sup> They also documented the common lack of legal representation for those confined pre-trial in the

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<sup>77</sup> This information was transmitted to Kate Bloch and Roxane Edmond Dimanche by Jeanne Clark, then-Public Affairs Officer of the U.S. Embassy in Haiti, during a conversation about clinical legal education in Haiti. The conversation took place in Port-au-Prince in August, 2018.

<sup>78</sup> *Cf. supra* text accompanying note 73, where Dean Eustache notes in 2009 that “these kinds of clinical training opportunities do not currently exist in Haiti.” *Id.*

<sup>79</sup> See Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 225.

<sup>80</sup> *Id.*

<sup>81</sup> Chéry & Dorcy, *Assistance Program*, *supra* note 18. The additional ten law students/graduates who volunteered to participate in the fact-finding report for Dean Eustache and were granted access to the prison were: Marie Kivienné Dimanche, Denieuse Jean Charles, Garlin Hilaire, Jean Eslin Charles, Dimitry Bourdeau, Steeve Décembre, Lanoze Baptiste, Maxo Mezilas, Jean Wesley Lundy, and Bertrand A.H. Scipion.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* [Authors’ translation].

prison.<sup>86</sup> The report quantified and underscored the need for action on behalf of and relief for individuals detained in the prison.<sup>87</sup>

Although the information in the report was not unexpected, evidence is often compelling where anecdote and rumor might not be. This deeper understanding of the prison conditions and the needs of those incarcerated within it underscored the urgency and scope of the service task that would animate CRAALE.

## 2. *Temporary Home for CRAALE*

The second essential event in preparation for the launch was the securing of a temporary home for the clinic. A local non-profit health organization, where one of the CRAALE founders worked, offered rent-free use of a small working space on the top floor of a building in downtown Jérémie, close to the courthouse.<sup>88</sup> With the non-profit's restoration of the space to functionality (it had been damaged during Hurricane Matthew, a category 4 hurricane that devastated much of Jérémie in October of 2016),<sup>89</sup> the pieces were falling into place for the clinic vision to become reality.

## 3. *Developing Initial Curricular Materials*

The third building block related to the educational mission of CRAALE. With no in-country models of which we were aware, the clinic would need to decide the approach and content for its curriculum and training. In the years since Dean Eustache had called for the establishment of a clinic, various law school partners and colleagues had led criminal law simulations, similar to ones that a clinic might employ, at ESCDROJ.<sup>90</sup> Dean Eustache and other ESCDROJ colleagues

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<sup>86</sup> See *id.*

<sup>87</sup> See Chéry & Dorcy, *Assistance Program*, *supra* note 18. As a result of the report, even before CRAALE's launch, co-author Chéry filed a number of actions for release, generally *main levée* actions, on behalf of individuals confined in the prison. *Id.* CRAALE personnel also conducted more recent fact finding on the conditions in the prison, which resulted in a fact-finding report. See Jess McPeake, Blake Bengier, Elena Bertucci, Sherene Grinage Gotoy, Blaine Bookey & Peter Habib, *Deteriorating Conditions in the Jérémie, Haiti Prison: A Call to Action to Preserve Due Process and Human Life* (June 2023), [https://cgrs.uclawsf.edu/sites/default/files/Jeremie%20Prison%20Report\\_2023.06%20ENGLISH.pdf](https://cgrs.uclawsf.edu/sites/default/files/Jeremie%20Prison%20Report_2023.06%20ENGLISH.pdf). The report indicates that the CRAALE team was led by Professor Janvier and included Marie Midrenne Appolon, Miranda Hophine Jean René Dorvilier, Mario Marcelin, and Flavien Janvier. *Id.* at 11.

<sup>88</sup> For a description of that space, see Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 228-29, 231-32.

<sup>89</sup> Adam Voiland, *Hurricane Matthew Soaks Haiti*, NAT'L AERONAUTICS SPACE ADMIN.: EARTH OBSERVATORY, <https://earthobservatory.nasa.gov/images/88893/hurricane-matthew-soaks-haiti> (last visited Jan. 16, 2023); *Hurricane Matthew: Haiti Storm Disaster Kills Hundreds*, BBC NEWS (Oct. 7, 2016) <https://www.bbc.com/news/world-latin-america-37582009> (reporting that "Jeremie saw 80% of its buildings levelled").

<sup>90</sup> For a discussion of some of the materials and earlier simulations, see Bloch &

contributed in essential and valuable ways to these materials. However, they were developed primarily in conjunction with non-ESCDROJ academics who engaged students in the simulations during brief visits to the law school.<sup>91</sup> Although these materials would prove useful, no clinic manual or clinic curriculum yet existed.

To begin addressing this lacuna, supporters of the clinic gathered in California in the summer of 2017 to develop an introductory set of materials for the clinic and, in particular, a draft clinic manual.<sup>92</sup> This draft manual included a proposed mission statement, which embraced its aspirational service and educational goals as follows:<sup>93</sup>

This Clinic has four goals. First, the Clinic aims to provide exceptional legal representation to indigent clients accused of criminal offenses who are detained in the Jérémie Prison. Second, the Clinic would like to represent indigent victims of sexual violence as a *partie civile* [in criminal cases]. Third, the Clinic plans to offer mediation to indigent community members to manage disputes before they escalate into court actions. Fourth, through these legal representation and mediation opportunities, the Clinic will work to enable law students to learn fundamental theories and doctrines, as well as acquire essential skills for ethical and effective legal practice.<sup>94</sup>

Beyond an articulation of the mission, this preliminary manual contained proposed teaching materials and clinic policies.<sup>95</sup> Among other items, the draft included a confidentiality policy and related exercise, a conflicts-of-interest policy, and a no-gifts policy.<sup>96</sup> It offered guidance on fundamental tasks, like client interviewing, developing a case theory, as well as legal research.<sup>97</sup> It included proposed clinic contracts for interns and simulation materials for experiential learning opportunities.<sup>98</sup>

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Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 226; Bloch, *supra* note 21, at 444-459.

<sup>91</sup> See, e.g., Bloch, *supra* note 21, at 444-459, 467.

<sup>92</sup> Experienced colleagues, educators, and clinicians who contributed to this draft project, in-person or through other means of consultation, included ESCDROJ Dean Eustache, former UC Law SF Associate Dean for Experiential Education Nancy Stuart, former Florida International University College of Law Professor Troy Elder, CGRS Legal Director Blaine Bookey, Professor Bloch, and Roxane Edmond Dimanche. Thanks also to Professor Alina Ball of UC Law SF, whose clinic manual helped provide a model for these efforts.

<sup>93</sup> See GRAAL Clinic Manual, Oct. 5, 2017 Version in French (on-file with co-authors). Before CRAALE launched and received its official title in October of 2017, it was sometimes referred to by the acronym “GRAAL.”

<sup>94</sup> *Id.* at 4. [Authors’ translation]. Discussion of the second and third service aims, involving representation of individuals who have suffered sexual violence and providing mediation, can be found *infra* at nn.212-217 and accompanying text.

<sup>95</sup> *Id.* at 4-17.

<sup>96</sup> *Id.* at 5-11.

<sup>97</sup> *Id.* at 12-17, 25-31.

<sup>98</sup> *Id.* at 16-22.

Work on the clinic manual continued into the fall. But producing written materials for a clinic was inadequate to launch the clinic. Clinic supporters needed a shared opportunity in which these materials could be reviewed and potentially become a basis for demonstration, discussion, and revision.

#### 4. *Launch Workshop*

These needs coalesced into a launch and training workshop that was held in October 2017 in Jérémie. Led by Dean Eustache, Roxane Edmond Dimanche, and international faculty visitors, the four-day intensive program, conducted in French, walked participants through ethical principles and mock interactive dilemmas, legal research, programmatic and policy considerations, and an extended experiential role-play.<sup>99</sup> The workshop was based on the preliminary clinic manual and enabled consideration and review of its contents.<sup>100</sup> These materials, which aimed to highlight and apply a range of common clinical legal education best practices, furnished an introduction for the curricular foundation and educational arm of the clinic. They continue to inform training for new CRAALE interns.

It was also during this workshop that CRAALE gained its official name.<sup>101</sup> The workshop proved to be one important element in the development and launch of CRAALE.

#### 5. *Outreach to the Jérémie Legal Community*

Launching CRAALE would require more than these four essential components—more than information on service needs, a provisional home, an introductory curricular manual, and a launch workshop. As the first clinic at ESCDROJ, and as at least one of the first law school clinics in the country, it required buy-in and approval, both formal and informal, from the local legal community.<sup>102</sup> For example, local officials had to formally recognize CRAALE and its personnel.<sup>103</sup> The clinic was a new concept in Jérémie,

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<sup>99</sup> The international faculty visitors who helped lead the workshop were Nicole Phillips (adjunct professor at UC Law SF), Troy Elder (formerly a professor at Florida International University College of Law), and Professor Bloch.

<sup>100</sup> The curricular materials benefited from the insights of many thoughtful designers, including faculty, staff, and students from ESCDROJ and UC Law SF. More generally, CRAALE benefited from the infusion of resources, including funding, from a variety of supporters, including a number of the co-authors.

<sup>101</sup> In conversation with participants in the October 2017 launch workshop, Dean Eustache selected the name CRAALE.

<sup>102</sup> Cf. Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 241.

<sup>103</sup> See, e.g., “A Qui De Droit” [Authors’ translation: To Whom It May Concern] authorization of May 24, 2018 (on file with co-authors). This document represented the prosecutor’s office’s formal recognition of CRAALE as affiliated with ESCDROJ and granted permission

and, as such, needed explanation and justification.<sup>104</sup> It was important to address potential concerns, even if these were not voiced or envisioned by members of the local legal community. For example, was the purpose of the clinic to unearth judicial errors and embarrass those responsible? Would the clinic negatively affect the livelihoods of practicing attorneys? Meetings with leaders of the legal profession and bench to dispel concerns and introduce the concept and role of CRAALE were fundamental.

Both during the launch workshop and in a series of subsequent gatherings, Dean Eustache and key ESCDROJ personnel worked to provide information and persuade members of the local Bar and bench of CRAALE's value to the community.<sup>105</sup> CRAALE personnel also clarified that the clinic would provide free legal representation for individuals who could not otherwise afford such representation. It was not intended to threaten the livelihoods of local attorneys. Fortunately, many of the community leaders, from the prosecutor to various judges and local Bar members, were ESCDROJ alumni and familiar with the good work of the law school. It probably helped that co-author Janvier, who became the CRAALE supervisor, was also the former mayor of Jérémie and understood the local political and legal landscape and worked to nurture acceptance and support from the legal community.

As is commonly the case, recognition involved not only substantial work, but also ceremony. Gatherings of important dignitaries and speeches accompanied the various launch stages of CRAALE. These not only enhanced its official recognition but also helped generate the good will needed to support its difficult tasks.

With dialogue and collaboration, CRAALE has endeavored to overcome potential objections. As a result, CRAALE personnel perceive that the legal community has largely come to understand the clinic as a benefit, a positive force that can help combat prolonged pre-trial detention.<sup>106</sup> CRAALE personnel report that these same lawyers and judicial authorities have found that they sometimes had to call on CRAALE as part of their mission.<sup>107</sup> Ultimately, hard work by many dedicated individuals, along with these five pivotal components, came together to furnish the foundation for CRAALE's 2017-2018 official launch.<sup>108</sup>

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for eight members of CRAALE to visit the Jérémie prison until the end of CRAALE's project to support low-income individuals incarcerated in the prison.

<sup>104</sup> Cf. Bloch & Edmond-Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 241.

<sup>105</sup> The work of the earlier fact-finding reporting group, which focused on individuals detained pre-trial, had also received support from local officials, including the prosecutor. See Chéry & Dorcy, *Assistance Program*, *supra* note 18.

<sup>106</sup> See email from Kate Bloch to Yvon Janvier (Sept. 30, 2023, 6:14 PM PDT); Email from Yvon Janvier to Kate Bloch (Oct. 2, 2023, 5:40 PM PDT) (emails on file with co-authors).

<sup>107</sup> See sources *supra* note 106.

<sup>108</sup> The launch began with the October, 2017, workshop and involved a number of events that took place over several months with the goal of establishing CRAALE within the legal community.

### C. *Establishing the Clinic: Service & Access to Justice*

Once the clinic launched, the next step in the pursuit of service was for the CRAALE team to begin representing individuals detained in the prison. As the new CRAALE supervisor, Professor Janvier had to request and receive official permission for CRAALE staff to access the prison to interview potential clients.<sup>109</sup> The prosecutor officially granted that permission on May 24, 2018.<sup>110</sup> With that authorization, under the direct supervision of Assistant CRAALE Supervisor Chéry, CRAALE interns could effectively visit their clients and assume responsibility for cases.

From its inception, CRAALE has specialized in representing those who have been forgotten by the system. The abandonment of these individuals manifested both symbolically and literally. Although the ways in which the system neglected people varied, three common patterns emerged.

First, CRAALE members witnessed the excessive and unconstitutional delays from initial incarceration to a first hearing with a judge. As noted at the start of the Article, the Haitian Constitution of 1987 requires that individuals be brought before a judge within 48 hours of their arrest.<sup>111</sup> The government routinely violated that mandate.<sup>112</sup> In measuring the frequency of those delays, in his role as CRAALE supervisor, Professor Janvier reported that all of CRAALE's clients in the cases CRAALE processed from 2018 through November 2022 had waited more than the constitutional limit of 48 hours without being brought before a judge.<sup>113</sup>

For example, Professor Janvier described a CRAALE client's plight as follows: the individual, whom we refer to here as A, had been accused of stealing three small bags of cement and arrested in May of 2021.<sup>114</sup> His first appearance before a judge did not take place for seven months, and that appearance was the trial on his case.<sup>115</sup>

The second pattern involved lost court files. Continuing his narrative on the case described immediately above, Professor Janvier explained that, during the trial in December of 2021, the prosecutor moved to dismiss the charges, and A was ordered released.<sup>116</sup> However, for a release to be effectuated, the court file with the order needs to be transmitted to the prison.<sup>117</sup> Months later, in February of 2022, CRAALE learned of

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<sup>109</sup> See A Qui De Droit, *supra* note 103.

<sup>110</sup> *Id.*

<sup>111</sup> See *supra* text accompanying and source cited in note 3.

<sup>112</sup> See *supra* text accompanying and sources cited in notes 3 & 5.

<sup>113</sup> Email from Yvon Janvier to co-authors (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors). These are the cases described *infra* in Tables 1 & 2.

<sup>114</sup> Email from Yvon Janvier to Kate Bloch (Oct. 16, 2023, 11:23 AM PDT) (on file with co-authors).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*



the individual's continued incarceration and undertook representation.<sup>118</sup> Their efforts revealed that the client's court file had been lost and that the release order had therefore not been received at the prison.<sup>119</sup> Professor Janvier estimates that in 15% to 20% of CRAALE's cases, the court clerk's office could not find the client's file.<sup>120</sup> In many ways, lost court files epitomize the system's literal and figurative amnesia.

Lack of adequate organizational systems and technology contributes to the lost file problem. For instance, the clerk's office does not have a digital filing system.<sup>121</sup> It relies on paper files.<sup>122</sup> The photograph below was taken of a court's file archives during a visit to a courthouse in Jérémie in 2018.<sup>123</sup>



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<sup>118</sup> *Id.*

<sup>119</sup> Email from Yvon Janvier to Kate Bloch (Oct. 16, 2023, 11:23 AM PDT) (on file with co-authors).

<sup>120</sup> Email from Yvon Janvier to co-authors (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors).

<sup>121</sup> *Haiti: Events of 2022, supra* note 51, (“Haitian courts do not have digital copies of files.”).

<sup>122</sup> *Id.*

<sup>123</sup> These are the archives in the Palace of Justice courthouse in downtown Jérémie. The photograph was taken with permission during a March 2018 visit to the courthouse. It has been cropped and formatted for this Article.



Third, in addition to these unconstitutional delays before the initial judicial hearing and lost file issues, individuals generally endure prolonged detention in prison awaiting trial.<sup>124</sup> For example, a case involving the client, whom we refer to here as B, illustrates all three of these problematic realities.<sup>125</sup> The CRAALE team undertook representation of B shortly after the clinic's launch in 2018.<sup>126</sup> The team learned that B had been imprisoned since August of 2014.<sup>127</sup> B had not been brought before a judge within the constitutionally required 48 hours.<sup>128</sup> When team members tried to examine B's criminal case file, they discovered that the authorities could not locate it.<sup>129</sup> It had apparently been lost for four years, during which time B languished in prison ostensibly awaiting trial.<sup>130</sup> Consistent with the circumstances in B's case, Professor Janvier reports that the overall length of pre-trial incarceration endured by clients, whom CRAALE represented during the same 2018-November 2022 period, commonly ranged from two to seven years.<sup>131</sup>

In response to these patterns, the interns and their supervisors employed several strategies to encourage the court and the prison to remember the forgotten. The first two formal strategies involved the special habeas corpus procedure and "*main levée*."<sup>132</sup> Both are designed to achieve the client's release. The first, habeas corpus, challenges the legality of the arrest or detention itself.<sup>133</sup> The CRAALE team deployed

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<sup>124</sup> See e.g., Email from Yvon Janvier with attachments to Kate Bloch et al., (June 29, 2018, 11:19 AM PDT) (on file with co-authors).

<sup>125</sup> Information about this case, like that for all of CRAALE's cases described in this Article, has been provided by CRAALE team members. See e.g., Rapport de synthèse- Juillet 2018 attachment to email from Yvon Janvier to Kate Bloch et al., (Aug. 1, 2018, 11:40 AM PDT); Email from Yvon Janvier with attachments to Kate Bloch et al., (June 29, 2018, 11:19 AM PDT); Email from Yvon Janvier to Kate Bloch (Nov. 2, 2023, 6:00 PM PDT); Email from Kate Bloch to Yvon Janvier (Nov. 2, 2023, 3:39 PM PDT) (emails on file with co-authors).

<sup>126</sup> See *supra* sources cited in note 125.

<sup>127</sup> Rapport de synthèse- Juillet 2018 attachment to email from Yvon Janvier to Kate Bloch et al., (Aug. 1, 2018, 11:40 AM PDT); Email with attachments from Yvon Janvier to co-authors et al., (June 29, 2018, 11:19 AM PDT) (emails on file with co-authors). B was accused of rape. *Id.*

<sup>128</sup> Email from Yvon Janvier to Kate Bloch (Nov. 2, 2023, 6:00 PM PDT); Email from Kate Bloch to Yvon Janvier (Nov. 2, 2023, 3:39 PM PDT) (emails on file with co-authors).

<sup>129</sup> Rapport de synthèse- Juillet 2018 attachment to email from Yvon Janvier to Kate Bloch et al., (Aug. 1, 2018, 11:40 AM PDT) (on file with co-authors).

<sup>130</sup> Rapport de synthèse- Juillet 2018 attachment to email from Yvon Janvier to Kate Bloch et al., (Aug. 1, 2018, 11:40 AM PDT); Email with attachments from Yvon Janvier to co-authors et al., (June 29, 2018, 11:19 AM PDT); Email from Yvon Janvier to Kate Bloch (Nov. 2, 2023, 6:00 PM PDT); Email from Kate Bloch to Yvon Janvier (Nov. 2, 2023, 3:39 PM PDT) (emails on file with co-authors).

<sup>131</sup> See email with attachments from Yvon Janvier to co-authors et al., (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors).

<sup>132</sup> *Main levée* (literally, "lifted hand") means a provisional lifting of the investigating judge's order that keeps someone in custody during the post-arrest investigation of a case.

<sup>133</sup> For a discussion of habeas corpus challenges to prolonged pre-trial detention in Haiti, see, e.g., *Release of 17 persons in habeas corpus: a great moment for the protection of the rights*

this habeas approach in B's case, and, after years waiting for a trial that never took place, the court granted B's petition for release.<sup>134</sup> In addition to release from custody, according to Professor Janvier, although habeas corpus success, in the abstract, would not necessarily mean an end to the case, in Jérémie, for CRAALE clients during the 2018-November 2022 period, it did effectively result in an end to the prosecutorial pursuit of charges in their case.<sup>135</sup> *Main levée*, however, means being released while the case is pending.<sup>136</sup> In the U.S. context, it resembles release on one's own recognizance while awaiting further court proceedings.

Beyond applying for court intervention with habeas corpus or *main levée*, a third avenue of relief involved addressing a formal request to the government commissioner (prosecutor) to look into the cases. This approach did not require a court to make a decision to obtain the client's release. Instead, the decision to drop the charges or effectuate release rested with the prosecutor. This was the approach in the case of A as described above, against whom the prosecutor had moved to dismiss charges and whom the court had ordered released, but whose file with the release order had been lost.<sup>137</sup> After learning that A was still in the prison, the CRAALE team intervened and petitioned the prosecutor directly for the client's release, a petition that met with success and the client's freedom.<sup>138</sup>

Professor Janvier explained that, in some cases in this third category involving a request to the prosecutor, the offenses were minor, and the individuals might already have been detained for as long as their sentences would have required even if they had been convicted of the charged offense.<sup>139</sup> He explained that, in other cases in this category, the

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*of detainees in Haiti*, LAWYERS WITHOUT BORDERS CAN. (Sept. 17, 2019), <https://ascanada.ca/en/medias/release-of-17-persons-in-habeas-corpus-a-great-moment-for-the-protection-of-the-rights-of-detainees-in-haiti/>.

<sup>134</sup> Email from Yvon Janvier to Kate Bloch (Nov. 2, 2023, 6:00 PM PDT); Email from Kate Bloch to Yvon Janvier (Nov. 2, 2023, 3:39 PM PDT) (on file with co-authors).

<sup>135</sup> Email from Yvon Janvier to Kate Bloch (Oct. 4, 2023, 5:04 PM PDT) (on file with co-authors); Email from Yvon Janvier to Kate Bloch (Nov. 2, 2023, 6:00 PM PDT); Email with attachment from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST) (Professor Janvier explains the reality of habeas corpus success in Jérémie as follows: "in practice, and in the majority of cases, if the judicial actors (judge, prosecutor) consider that the individual released by [h]abeas corpus has spent . . . time in prison far exceeding the sentence required by the offense if he had been found guilty during a trial, at this time, after his release by habeas corpus, he has no fear of being prosecuted again by the courts. Only then can we assume that the system has dropped all charges against this individual.") (emails on file with co-authors) [Authors' translation].

<sup>136</sup> See *supra* note 132.

<sup>137</sup> Email from Yvon Janvier to Kate Bloch (Oct. 16, 2023, 11:23 AM PDT) (on file with co-authors).

<sup>138</sup> Email from Yvon Janvier to Kate Bloch (Oct. 16, 2023, 11:23 AM PDT); Email with attachment from Yvon Janvier to Kate Bloch (Oct. 15, 2023, 7:07 PM PDT) (on file with co-authors).

<sup>139</sup> Email from Yvon Janvier to co-authors (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors).

complaints might have been withdrawn or the individuals were in prison for a minor offense, and the system had forgotten they were there.<sup>140</sup> By accompanying the CRAALE representative to the prison and viewing the files, the government commissioner was in a position to recognize that there was no longer a need to pursue prosecution, and so he had those clients released without any other form of trial.<sup>141</sup> CRAALE personnel used all three approaches, habeas corpus, *main levée*, and prosecutorial discretionary review, to effectively provide relief for clients.

Separate from these three approaches to address specific patterns of concern, in their service work to support the rule of law and reduce prolonged pre-trial detention and human rights violations, CRAALE also represented clients in numerous trials, especially in the pre-pandemic period.

#### *D. Establishing the Clinic: Educational Objectives & Expanding the Curricular Foundations*

After service commitments to clients had been forged in the early stages following the 2017-2018 launch, and approaches to addressing problematic detention became part of the CRAALE repertoire, attention returned to developing the curriculum. This section explores the process and substantive choices involved in that effort.

##### *1. Assessing and Engaging with Best Practice Options*

In order to prepare interns to actually conduct the work of representing clients, law school clinics generally aim to provide foundational training. In a law school clinic environment with real-world clients, a significant temptation, especially when service needs are as vivid and urgent as those for clients confined in the Jérémie prison, is for the supervisors to take over the representation themselves, rather than rely on the less practiced interns. Succumbing to that temptation can preempt the training that would prepare the intern for such a task in the future. Consequently, among common best practices, training that prepares students to assume case responsibilities is usually central to the work of law school clinics.<sup>142</sup>

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See e.g., Adrian Evans, Anna Cody, Anna Copeland, Jeff Giddings, Mary Anne Noone & Simon Rice, BEST PRACTICES: AUSTRALIAN CLINICAL LEGAL EDUCATION 18 (2012) available at [https://cald.asn.au/wp-content/uploads/2012/11/Item\\_12.3\\_Best\\_Practices\\_Australian\\_Clinical\\_Legal\\_Education\\_Sept\\_2012.pdf](https://cald.asn.au/wp-content/uploads/2012/11/Item_12.3_Best_Practices_Australian_Clinical_Legal_Education_Sept_2012.pdf) (last visited Aug. 3, 2023) (“Students are thoroughly prepared/ trained to conduct interviews with clients, when necessary.”) Cf. Frank S. Bloch, *New Directions in Clinical Legal Education: Access to Justice and the Global Clinical Movement*, 28 WASH. U. J.L. & POL’Y 111, 121 (2008) (describing “professional skills training,

Beyond the introductory clinic manual and curriculum, for CRAALE to reach this goal of training interns for their professional roles, educators in Jérémie sought to enhance their understanding of clinical curricular pedagogy.

In August of 2018, the CRAALE and UC Law SF teams learned from U.S. Embassy in Haiti personnel that there might be a possible funding opportunity from the Embassy, which, at that time, through its publicly posted notice of funding opportunity, was soliciting applications for its Public Affairs Section Grants Program.<sup>143</sup> As a result, ESCDROJ and UC Law SF personnel subsequently applied for, and the Embassy awarded, paired grants to advance clinical legal education by supporting CRAALE and funding two academic exchanges for curricular development and implementation.<sup>144</sup>

Access to significant funding for academic exchanges to develop curriculum opened new vistas. We had previously operated on very limited budgets. For the first exchange under the grant, one held in San Francisco, instead of the usual practice of inviting one Haitian colleague to visit at a time, the UC Law SF team could invite and host eight Haitian colleagues simultaneously. In addition, a sizeable team of local SF clinical educators could readily participate, and all of the gathered participants could collaborate and present live and in real time.

Having already launched the clinic, and having taught, supervised, and learned within it, the CRAALE team would be able to draw on those on-the-ground experiences for material to revise and enrich the curriculum. With additional participants, the UC Law SF team would

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experiential learning, and instilling professional values of public responsibility and social justice” as common components of clinical legal education globally). How much responsibility should devolve to students for cases is subject to debate. Frank S. Bloch, *The Andragogical Basis of Clinical Legal Education*, 35 VANDERBILT L. REV. 321, 339 n.66 (1982) (“Clinicians differ on the extent to which students should assume responsibility.”).

<sup>143</sup> For a copy of the Embassy website posting from the Web Archive from August 7, 2018, see Call for Proposals: U.S. Embassy Public Affairs Section Grants Program, U.S. Embassy Haiti PAS Annual Program Statement, <https://web.archive.org/web/20180807040835/https://ht.usembassy.gov/education-culture/call-for-proposals-grants-program/>. In the summer of 2018, after Professor Janvier, a Hubert Humphrey Fellow, learned about the possibility of funding, he introduced then U.S. Embassy in Haiti Public Affairs Officer Jeanne Clark to Professor Bloch. A meeting was convened with Public Affairs Officer Clark, Roxane Edmond Dimanche, and Professor Bloch, all of whom happened to be in Port-au-Prince in August of 2018.

<sup>144</sup> U.S. Embassy in Haiti grant documents (on file with co-authors). Professors Kate Bloch and Jessica Vapnek spearheaded the grant application for UC Law SF. Professor Janvier and Roxane Edmond Dimanche did the same for ESCDROJ. In terms of the application and review process, former U.S. Embassy in Haiti Public Affairs Officer Jeanne Clark notes that the grant “opportunity was public, competed, . . . [and] a grant committee review[ed] all proposals . . . [before] selection was made.” See email from Jeanne Clark to Kate Bloch (Jan. 1, 2024, 5:17 AM PST). The exchanges pursuant to the grants would draw upon institutional competencies and resources, including supportive staff, students, and faculty at both institutions.

be able to draw on more than 75 years of combined clinical legal teaching experience. Experience was valuable in planning for the grant's first formal academic exchange. This process required answering critical design questions: How could the two teams, one from UC Law SF and one from CRAALE, join together to enhance understanding of clinical methodologies and best practices? How and what might be shared such that the Haitian contingent would have approaches from which they might ultimately select, adapt or reject methods and content? What should be the focus of the interactions? Clinical legal education is a rich and robust domain. But, in a five-day symposium, we could engage with only a limited subset of its riches.

In reflecting on what it meant for a legal clinic to have an educational focus, the UC Law SF team perceived one of the most difficult and important capacities of a clinical educator as the ability to help a student effectively learn to fly solo, while still providing adequate support so that the student feels confident spreading their wings. Scholar and clinician Ann Shalleck opines that “[n]owhere is the intersection of legal theory and legal practice more intense than in supervising students representing real clients on real cases.”<sup>145</sup> Since a fundamental goal of many law school clinics (including CRAALE) involves preparing aspiring attorneys to practice, success in that supervisory dynamic would be central.

In the end, in light of the challenges of scaffolding students and recent graduates in their inaugural flights in real cases, the UC Law SF team focused on common best practices for a clinic supervisor to effectively guide students and recent graduates. UC Law SF former Academic Dean and Clinical Professor Shauna Marshall offered a concise overview of three proposed core concepts for clinic supervision: 1) the “professor should be non-prescriptive in her teaching method”; 2) “the student should learn through an interactive process”; and 3) “professors should critique students as they learn new skills.”<sup>146</sup>

In addition to a focus on what the UC Law SF team understood as common supervisory best practices, while developing materials for the symposium (including adapting some prior simulations conducted at ESCDROJ), the team drew on core principles of client-centered

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<sup>145</sup> Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and in Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 110, 110 (1993).

<sup>146</sup> Shauna Marshall, Presentation at the International Clinical Legal Education Symposium & Training of Trainers Workshop, UC Law SF, San Francisco, CA (Feb. 7, 2019) (video on file with co-authors). For a discussion of providing feedback as a best practice in clinical legal education in Australia, see e.g., Evans et al., *supra* note 142, at 19 (explaining that “[t]he constructive provision of feedback is central to student supervision. . . Feedback is provided in a timely manner so as to enable the student to address and build on the feedback”). These three approaches highlighted and served as vehicles for exploring potential best practices in clinical legal education.

lawyering.<sup>147</sup> Although not unique to the U.S., this approach to lawyering, which seeks to uplift the client and their agency as central to understanding and pursuing the case, has become a foundational philosophy in clinical legal education in the U.S.<sup>148</sup> In describing the prevalence and impact of this philosophy, Professor Katherine Kruse opines that “the client-centered approach has so thoroughly permeated skills training, it is not an exaggeration to say that client-centered representation is one of the most influential doctrines in legal education today.”<sup>149</sup> Client-centered principles, in turn, manifested in various contexts during the symposium, including through client interviewing role plays and the related supervision exchanges with students about those interviews.

Beyond approaches to supervision and client-centered lawyering, the symposium also focused on the critical process of reflection that is often understood as a clinical legal education best practice<sup>150</sup> and regularly anticipates debriefing as an important tool.<sup>151</sup> Supervision approaches, including an emphasis on interactive learning, client-centered lawyering, and debriefing became common best practice options highlighted during the symposium.

## 2. *Logistical Challenges*

Concurrently with developing a basic framework and content for the first academic exchange, both the Haiti and California contingents were juggling the logistical realities of scheduling and travel. In many ways, the essentials of how and what content would be chosen represented only a fraction of the important considerations for the symposium workshop. Engaging cross-culturally and bridging the language differences (the symposium took place in French and English) as well as geographic complexities offered their own challenges. For example,

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<sup>147</sup> See, e.g., Elliot Milstein, *Experiential Education and the Rule of Law: Teaching Values Through Clinical Education in China*, 22 GLOBAL BUS. & DEV. L. J. 55, 61 (2009) (“One of the core values of most American clinical programs is client-centered lawyering. By this we mean that lawyers represent clients and must do it in a way that ensures the autonomy of the client as the primary decision-maker over the life of a case. It assumes that all important decisions involved in solving a legal problem involve value-choices and that a primary job of a lawyer is to help a client make those decisions in a way that is consistent with the client’s values.”); Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369, 370-71 (2006). Beyond discussion of this approach in the U.S. context and for the academic exchanges with the CRAALE clinic team, this Article does not explore whether or the extent to which the client-centered approach is a core approach in legal education or lawyering in other jurisdictions globally.

<sup>148</sup> See, e.g., Milstein, *supra* note 147.

<sup>149</sup> Kruse, *supra* note 147, at 370-71.

<sup>150</sup> See e.g., Evans, et al., *supra* note 142, at 12, 20-21 (describing reflection as among clinical legal education best practices in Australia).

<sup>151</sup> *Id.* at 20-21.







suggestions have been foundational throughout the gestation and establishment of CRAALE, although her studies of law school clinics had also been substantially focused on U.S. clinical legal education.<sup>157</sup>

In addition to the CRAALE team, the Embassy had authorized the inclusion of Jacques Letang, who directs the Bureau des Droits Humains en Haïti (Office of Human Rights in Haiti),<sup>158</sup> a well-respected human rights legal organization in the capital, in the symposium. As noted above, he has (more recently) assumed leadership as the president of the Federation of Bar Associations (FBH) in Haiti.<sup>159</sup> In addition to the presentation that President Letang gave in which he shared key approaches to human rights representation in Haiti, his engagement with the clinical approaches that were highlighted and his commentary provided important perspective on those clinical options.<sup>160</sup>

Reducing the chance of realizing the risks also meant building in space and time for the CRAALE team to share their experiences and reflections in both larger and smaller group settings and for their wisdom to govern decision making in a variety of contexts.

Perhaps the most powerful check on the potential influence of U.S. colleagues was the track record throughout the multi-year collaboration of Haitian colleagues explicitly providing guidance when U.S. colleagues made incorrect assumptions or proposed approaches that were not likely to work well in a Haitian context.<sup>161</sup>

In the 2019 symposium, Haitian participants appreciated the value of being open to new approaches while recognizing the importance of being discerning in exploring those approaches. They knew it would be necessary to evaluate new theories and practices critically and evaluate them within the Haitian legal context.<sup>162</sup> Even approaches that looked

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number of other institutions, including Seton Hall and Florida International University College of Law, and she, along with Georges Gabrielle Paul, presented the vision for CRAALE at the Global Alliance for Justice Education (GAJE) in Valencia, Spain in July of 2011.

<sup>157</sup> *Id.*

<sup>158</sup> See BDHH, <https://bdhhaiti.org/>.

<sup>159</sup> See, e.g., Jacques Letang, *Jacques Letang (FBH & BINUH) on the UN Integrated Office in Haiti (BINUH) - Security Council Open VTC*, UNITED NATIONS: UN WEB TV (June 19, 2020), <https://media.un.org/en/asset/k1w/k1wypz7hq9>.

<sup>160</sup> FBH President Letang subsequently participated in all four of the additional U.S. Embassy in Haiti grant-sponsored symposia and trainings that UC Law SF and/or ESCDROJ have hosted. Notably, he presented at the symposium in San Francisco in the spring of 2023, and he was a principal in the planning and presenting for the training conducted by BDHH and ESCDROJ in Jérémie in August of 2023.

<sup>161</sup> See e.g., Kate E. Bloch and Roxane Edmond Dimanche, *The Rule of Law and Ethical Integrity: Does Haiti Need a Code of Legal Ethics?*, 37 U. HAW. L. REV. 1, 3 (2016). For a discussion of developing and modifying experiential simulation materials for use in a Haitian context, see, e.g., Bloch, *supra* note 21, at 453.

<sup>162</sup> Email with attachment from Roxane Edmond Dimanche to Kate Bloch, Building a Legal Aid Clinic from Scratch, (Feb. 3, 2023, 10:45 AM PST) (on file with co-authors).

promising would likely need to be adapted, in light of Haitian cultural customs, law, and principles.<sup>163</sup>

The California hosts hoped that the presentations by U.S. colleagues would offer options that could be accepted, rejected, or adapted. The dialogue, respect, and reflection at the heart of the exchange also enabled revising approaches in real time during the symposium. Still, concerns about imposing methodologies and practices and infusing the selection and rejection process of Haitian colleagues with U.S. colleagues' limited understandings and clinical legal education preferences remained.

#### 4. *First Academic Exchange Under the Grant*

Finally, and with various caveats in mind, the symposium was underway. The initial two days offered a whirlwind of presentations, experiential role-plays, and opportunities to discuss clinical supervision, with guests and hosts deeply immersed in clinical approaches (and we hope best practices).<sup>164</sup>

On the third day of the visit, we joined colleagues at the regional Northern California Clinicians' Conference.<sup>165</sup> This brief interlude enabled the group to engage with clinicians from throughout Northern California and beyond. The expectation was that this engagement would provide broader and more diverse contacts and perspectives on clinical legal education than could be offered within the confines of the symposium. In some perhaps unexpected ways, this regional gathering did turn out to provide a particularly important moment for international clinical collaboration.

That was because of Jean.<sup>166</sup> It appears that Jean was six years old when his parents traveled from Haiti to Chile and left him behind with a caregiver in a mountainous and remote region of Western Haiti.<sup>167</sup> When we learned about Jean, his parents had been unsuccessfully trying to contact Jean's caregiver for some time. As a consequence of their inability to locate their son, they had approached clinicians at a law school clinic in Santiago, Chile, hoping perhaps that these lawyers could reach the more than 3500 miles across the sea and through the international challenges to reunite the family. But as of early February of 2019, the clinicians had had no success.

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<sup>163</sup> *Id.*

<sup>164</sup> See e.g., Agenda from International Clinical Legal Education Symposium & Training of Trainers Workshop (Feb. 7-12, 2019) (on file with co-authors).

<sup>165</sup> The conference was hosted by Golden Gate University Law School on February 9, 2019.

<sup>166</sup> The child's name was changed to protect their privacy.

<sup>167</sup> Jean's age at the time of separation was calculated based on Jean's birth certificate (on file with co-authors) and a subsequent news article about Jean and his family, which is cited *infra* in footnote 262.

Then, as part of the growing global clinical community, like the CRAALE participants, clinicians from the Santiago law school clinic in Chile happened to also be in attendance at the same Northern California Bay Area clinicians' event in San Francisco. On that Saturday morning, after the clinicians from Chile heard the introduction of the clinicians from Haiti, a conversation began, one to which we will return later.

Following the regional conference, gathering once again at UC Law SF on the third day of our symposium, we stepped back from the role plays and immersion to focus on designing curriculum. We worked together to reverse engineer one of the supervision exercises from the initial days of the symposium. Our goal was to surface educational objectives in the materials that had guided the work thus far. With alacrity, guests identified the educational objectives embedded in the exercise.

With these concepts now explicit and available for scrutiny, the time had come for members of the Haitian team to ascertain the underlying ideas or tasks that they would want to teach the interns in CRAALE and which, if any, of the approaches discussed might be useful. In an engaging session, with their recent practice experiences informing their discussion, the Haitian team quickly generated a list. From this, given the challenges the team members had encountered in their early representation endeavors, they selected learning how to address the recurring problem of lost court files as the overarching frame for a training exercise that could be valuable for the CRAALE curriculum.

It is worth noting that CRAALE's experience in Jérémie with lost files is not unique. For instance, a description of USAID support for a legal aid office in the Haitian city of St. Marc<sup>168</sup> narrates a client's circumstances that largely mirror the challenges CRAALE personnel had identified.<sup>169</sup> The article indicated that the client had been imprisoned on a petty theft charge four years earlier, was still awaiting trial, and had already served the equivalent of multiple times the expected sentence (even if convicted).<sup>170</sup> The case description expressly noted that the client's "lengthy incarceration was due to a lost case file."<sup>171</sup>

With lost court files as the focus, on the final day together, the Haitian team began brainstorming and documenting the learning objectives for the experiential role-play they chose to develop. Here, in light of how role-play scripts are often generated in the U.S., the UC Law SF team might have anticipated the Haitian team sitting and drafting a script for an experiential exercise. But instead, the Haitian

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<sup>168</sup> See *Lost While Awaiting Trial*, *supra* note 54.

<sup>169</sup> See *id.*

<sup>170</sup> See *id.*

<sup>171</sup> *Id.* The website article reports that the legal aid office in St. Marc also has an impressive record of client releases (251 clients released). See *id.*



Protests took over the streets,<sup>177</sup> and UC Law SF and CRAALE team members sheltered in place at a hotel. Pictured below is a photograph of some of the protests from the hotel window.<sup>178</sup>



Despite the challenges, days later, both teams collaborated to plan and host a second academic exchange at another hotel nearby.<sup>179</sup> We opened this exchange to share information with approximately 30 guests on CRAALE's progress and accomplishments. Our guests included Haitian attorneys and law students, as well as individuals affiliated with Lawyers without Borders, the U.S. Embassy in Haiti, and the UN.<sup>180</sup>

It was with this audience that CRAALE shared its service accomplishments thus far and its now finished role-play on clinical pedagogy and supervision in the case of lost court files. It was here in Haiti that we engaged audience members as participants in experiential clinical legal education opportunities. It was here that we celebrated the two-year anniversary of CRAALE. It was here that audience members were moved to ask how they could create a

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<sup>177</sup> *Id.*

<sup>178</sup> The photograph was taken by Professor Bloch. It has been cropped and formatted for this Article.

<sup>179</sup> The agenda for the second exchange is on file with the co-authors.

<sup>180</sup> Sign-in sheets for the second academic exchange are on file with the co-authors, although it is not clear that they include all audience members in attendance at the event.

CRAALE in Port-au-Prince.<sup>181</sup> It was, thus, here that CRAALE had taken the next step in becoming a model for clinical legal education in Haiti.<sup>182</sup>

### III. ANALYZING CRAALE'S IMPACT

The enthusiastic reception of the CRAALE team's presentation at the exchange in the capital and the interest in replicating CRAALE outside of Jérémie were invigorating. However, considering CRAALE as a potential model warrants an analysis and evaluation of CRAALE's successes and limitations. This Part offers such an assessment.

Depending on a clinic's goals and context, criteria for such an assessment may vary. For the assessment here, we have chosen six lenses: service, ethics, teaching, logistics and managerial considerations, collaboration, and societal challenges. The first three, service, ethics, and teaching, represent essential goals announced as part of CRAALE's mission.<sup>183</sup> Consequently, evaluating CRAALE's work on those criteria furnishes an opportunity to determine to what extent CRAALE is fulfilling its animating principles. These domains also enable consideration of some of the theories, approaches, and practices the CRAALE team decided were appropriate to apply in the Haitian context. In addition, these three lenses open a window into whether CRAALE's work is furthering the rule of law and human rights. The remaining three criteria, logistics and managerial considerations, collaboration, and societal challenges seem appropriate bases for review for most organizations, especially those that aim to survive in complex and resource-scarce environments.

#### A. *Service: Clients' Lives, Human Rights, & the Rule of Law*

In evaluating CRAALE's service, this section considers first a quantitative assessment of CRAALE's work and then turns to more qualitative dimensions and implications of CRAALE's engagement with clients. Finally, it considers limits on the scope of CRAALE's service aspirations.

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<sup>181</sup> See Lamour & Janvier, *supra* note 20, at 8.

<sup>182</sup> The exchanges did not end with the 2019 presentation in Port-au-Prince. The pandemic struck, but we engaged in a mediation workshop virtually in May of 2021. We also held a fourth academic exchange in the spring of 2023, the International Human Rights, Mediation & Restorative Justice symposium, which was a four and one-half day hybrid event with most participants engaged in person on the UC Law SF campus in San Francisco. Following that fourth exchange, the CRAALE contingent hosted a training in August of 2023 focused on topics from the recent symposium, including mediation and alternative dispute resolution.

<sup>183</sup> For CRAALE's mission statement, see *supra* text accompanying notes 93-94.



## 1. *Data and Scale*

In March of 2018, when the CRAALE and UC Law SF Haiti Justice Partnership<sup>184</sup> teams visited the Jérémie prison, CRAALE was poised to begin representing clients. On that day, the prison held 323 individuals of whom 268 were detained pre-trial.<sup>185</sup> In CRAALE's first 18 plus months of service, from May, 2018, through 2019, the CRAALE team processed 49 cases. "Processed" here means that CRAALE represented these clients and handled these cases.<sup>186</sup> During this period, these 49 individuals constituted CRAALE's full client caseload.<sup>187</sup>

The initial team succeeded in garnering the formal release of individuals from the prison in 29 of those 49 cases.<sup>188</sup> Even as a new clinic, overall, CRAALE's representation persuaded courts, juries, or the prosecutor to release clients in more than half of the cases processed by the team during that initial period. These were not temporary releases awaiting trial; these 29 cases reached resolution. Resolution of a case here means that the client was either convicted or released without further prosecution on the charges in the case. Resolving a case could occur in a number of ways. These include: 1) a case could resolve at trial, in which the client was acquitted or convicted or the charges were dismissed; 2) a case could resolve through a court process that resulted in release, such as a successful habeas corpus petition, which could apply to both individuals detained pre-trial or those who were in custody post-trial; 3) a case could also resolve through administrative or executive action either pre-trial or post-trial, such as prosecutorial dismissal of charges, or prosecutorial release without further prosecution, or presidential clemency.

Of the remaining 20 cases that did not result in release, individuals in 18 of them were convicted, and client petitions for habeas corpus release in two cases were rejected. For the 18 clients who were convicted, their cases also reached resolution. Only the cases for the two clients whose habeas petitions were unsuccessful did not reach resolution in this period.

Thus, of the total 49 cases processed in 2018 and 2019, CRAALE was able to resolve 47 of them. Of these 47 resolved cases during this

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<sup>184</sup> Formerly the Hastings to Haiti Partnership (HHP).

<sup>185</sup> Jérémie prison population statistics were supplied by the prison during the visit on March 7, 2018.

<sup>186</sup> See email with attachment from Yvon Janvier to co-authors (Aug. 24, 2023, 4:52 PM PDT) (on file with co-authors).

<sup>187</sup> *Id.*

<sup>188</sup> Information on CRAALE's cases was compiled and provided by CRAALE team co-authors.



initial window, a period in which both jury and non-jury trials were still being conducted, there were 43 cases brought to trial, and clients were released in 25 of those 43 cases, for a trial release success rate of over 58%. In other words, in cases that were brought to trial, more than half of the clients were not convicted and were, instead, released.

The table below provides a snapshot of CRAALE's service during that initial period.

Table 1: 2018-2019 CRAALE Service Results

Nature of Cases	Released	Convicted	Rejected	Number of cases processed	Number of cases resolved
Habeas Corpus	4		2	6	4
Correctional Court (less serious offenses)	11	4		15	15
Criminal Jury Hearings	6	9		15	15
Criminal Hearings without Juries	8	5		13	13
<b>Total</b>	<b>29</b>	<b>18</b>	<b>2</b>	<b>49</b>	<b>47</b>

Although CRAALE's representation of clients has continued after 2019, in this more recent period, substantial additional hurdles have further complicated its efforts. For this Article, the recordkeeping of CRAALE's statistical data was divided into two periods, reflecting, *inter alia*, the advent of these new impediments. For example, in 2020, the COVID-19 pandemic struck worldwide.<sup>189</sup> More generally, socio- and geo-political instability has substantially stymied the CRAALE team's ability to advocate on behalf of its clients.<sup>190</sup> As noted earlier, on July 7<sup>th</sup> of 2021, assassins murdered President Jovenel Moïse, Haiti's leader.<sup>191</sup> The assassination, coupled with the lack of elections and the lack of a functioning parliament, has largely paralyzed Haiti's government.<sup>192</sup> These problems multiplied when, in August 2021, a 7.2 magnitude

<sup>189</sup> See, e.g., Harrison Bardwell, *Crisis in Haiti Intensifies [ETR 2020 Report]*, VISION OF HUMAN., <https://www.visionofhumanity.org/etr-2020-the-pandemics-toll-on-food-insecurity-and-undernourishment-in-haiti/> (last visited Apr. 14, 2023). However, the death toll directly attributed to COVID has not necessarily been as high in Haiti as in a number of other countries. See, e.g., Jason Beaubien, *One of the World's Poorest Countries has one of the Lowest COVID Death Rates*, NPR (May 4, 2021), <https://www.npr.org/sections/goatsandsoda/2021/05/04/992544022/one-of-the-worlds-poorest-countries-has-one-of-the-worlds-lowest-covid-death-rat>. Commentators suggest that, among other factors, the on-average younger age of the Haitian population may play a role. *Id.*

<sup>190</sup> For discussion of the social and geopolitical instability, see, e.g., RIBANDO SEELKE & RIOS, *supra* note 14, at 1-11.

<sup>191</sup> See *id.* at 4.

<sup>192</sup> See, e.g., *supra* text accompanying notes 47-51.

earthquake struck Haiti.<sup>193</sup> It devastated much of the Western portion of the country, where Jérémie and CRAALE are located.<sup>194</sup> These events negatively impacted the functioning of the judicial system, sometimes paralyzing it for substantial periods.<sup>195</sup> For example, although there were intermittent judicial proceedings, no trials in criminal cases, which are defined in Haiti as involving more serious offenses, were conducted in Jérémie in 2020 or 2021.<sup>196</sup>

Despite these impediments, the team processed 31 client cases overall and 30 client cases to resolution in the 2020-November, 2022 period.<sup>197</sup> In those cases, CRAALE secured the release of 23 individuals from the local prison. Although no trials involving more serious offenses were conducted, in other court proceedings handled by CRAALE, there were seven convictions and six releases of clients in cases that went to trial, and one case was dismissed because the offense was misclassified. There was also one client whom CRAALE represented, but where their hearing did not go forward. In addition, two clients were released through an appeal to the prosecutor to use his discretionary power to release.<sup>198</sup>

Concern about COVID-19's contagious nature also offered an opportunity for the CRAALE team to petition the prosecutor to exercise discretion, through a pandemic-related presidential clemency policy, for release of a number of individuals held in the Jérémie prison.<sup>199</sup> Because the CRAALE team was present in the prison with some frequency, team members were often familiar not only with their clients but also with individuals who were not their clients but might qualify for this presidential clemency. Thus, although a significant number of the individuals involved were not CRAALE's clients (and not part of CRAALE's regular caseload), the CRAALE team was in a position to recommend

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<sup>193</sup> See, e.g., Daniel Politi, *Hundreds Killed in Massive Magnitude 7.2 Earthquake in Haiti*, SLATE (Aug. 14, 2021), <https://slate.com/news-and-politics/2021/08/massive-earthquake-haiti-death-toll.html>.

<sup>194</sup> See, e.g., *id.*

<sup>195</sup> See, e.g., National Human Rights Defense Network (RNDDH), *Dysfunction of the judicial and penal systems: RNDDH calls for respect for rights for a judicial guarantee*, 1, 36 (2022), <https://web.rnndh.org/wp-content/uploads/2022/11/12-Rap-Justice-Prisons-11Nov2022-ENG.pdf> (last visited Feb. 2, 2023) [hereinafter *Dysfunction of the judicial and penal systems*] (“The courts of the first instance of Cap Haïtien, Coteaux, Grande Rivière du Nord, Hinche, Jacmel, Jérémie, Mirebalais, Port-au-Prince, and Port-de-Paix did not hold any criminal hearings.”).

<sup>196</sup> For a discussion, dated November 11, 2022, about the lack of criminal trials in Haiti in 2021 and 2022, see *id.*

<sup>197</sup> See *infra* Table #2.

<sup>198</sup> For a discussion more generally of appealing to the prosecutor in Jérémie, see *Dysfunction of the judicial and penal systems*, *supra* note 195, at 15-17.

<sup>199</sup> For information regarding the presidential pardon and related releases in 2020, see, e.g., U.S. DEP'T OF STATE, HAITI: HUMAN RIGHTS REPORT 2020, 7 (2021).

approximately 70 individuals for release.<sup>200</sup> As explained by Professor Janvier, these were primarily individuals in pre-trial detention who were accused of minor crimes as well as individuals whose situations merited urgent attention.<sup>201</sup> Professor Janvier reported that, ultimately, 15 individuals of the approximately 70 recommended were approved for release under the presidential clemency policy.<sup>202</sup> Fourteen of the fifteen were CRAALE clients,<sup>203</sup> for a total number of 23 clients released during the 2020–November 2022 representation period.

The table below summarizes CRAALE's results in cases processed over the near two-year period from 2020 through November of 2022.

Table 2: 2020 - November 2022 CRAALE Service Results:

Nature of case	Released	Convicted	Number of cases processed	Number of cases resolved
Habeas corpus	-	-	-	
Request directed to the prosecutor's office for release	2	-	2	2
Clients granted clemency pursuant to COVID-19 Presidential Clemency policy	14		14	14
Cases brought to Correctional Court (jurisdiction over less serious offenses)	6	7	13	13
Criminal hearings, with Jury Assistance	1 (misclassified offense) <sup>204</sup>		1	1
Criminal record, potentially without Assistance from Jury	-	-	1	
<b>TOTAL</b>	<b>23</b>	<b>7</b>	<b>31</b>	<b>30</b>

<sup>200</sup> The seventy individuals included here reflect the cases in which the CRAALE team recommended release. It does not necessarily reflect every case considered by the team. In short, CRAALE can sometimes take steps that help individuals other than those for whom they have accepted representation, as in the non-client cases where CRAALE recommended presidential clemency.

<sup>201</sup> Email from Yvon Janvier with attachment to co-authors (Aug. 18, 2023, 8:01 AM PDT) (on-file with co-authors).

<sup>202</sup> Email from Yvon Janvier to Kate Bloch (Sept. 5, 2023, 2:35 PM PDT) (on file with co-authors).

<sup>203</sup> *Id.*

<sup>204</sup> Due to the misclassification of the offense, the charges were dismissed. *See* email with attachments from Yvon Janvier to co-authors (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors).

Unfortunately, CRAALE lacks the staff to represent all indigent incarcerated individuals who need representation. So, the CRAALE team must choose which clients to assist and in which order.<sup>205</sup> Over the years, factors that have informed prioritization include: pre-trial detention in excess of two years, failure to bring the client before a magistrate within six months of their arrest, and cases involving women and minors who are victims<sup>206</sup> of violence.<sup>207</sup>

While CRAALE's service impact can be measured in multiple dimensions, both immediate and far-reaching, there is, first, the scale of its work in sheer numbers. From the spring of 2018 through November of 2022, CRAALE generally functioned with one or two members of the Bar as supervisors, a *stagiaire* or apprentice attorney working on his apprenticeship, a coordinator for part of this period, and a small cadre of pre-apprenticeship interns (usually limited to no more than five at a given time). With this staff, the CRAALE team processed 80 client cases and wrestled 77 of those 80 cases to resolution through the tangled and under-resourced judicial processes in Jérémie. Three cases did not reach resolution. These were the two cases involving a denial of habeas corpus in Table 1 and the one case where the hearing was postponed, as listed under Criminal record in Table 2. Whether CRAALE would be able to bring those cases to resolution at a later point, through a release of the client or a conviction by trial, remained to be determined. Of the 77 cases that reached resolution, the team obtained the release of clients in 52 of those cases.<sup>208</sup>

Even with release of clients in 52 of the 77 cases brought to resolution over the 2018–November 2022 period, the legal proceedings for the

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<sup>205</sup> For the 2022 calendar year, Professor Janvier reported that CRAALE collaborated with a government unit, the Office de Protection du Citoyen (Office of Citizen Protection) and two NGOs, Justice et Paix (Justice and Peace) and Lawyers without Borders Canada (LWBC). He explained that cases were selected by mutual agreement based on the following criteria, criteria that were retained and shared by LWBC: 1) the most problematic detention cases: detention without trial for more than two years, detention of women and minors; 2) individuals detained under warrant from the Government Commissioner (prosecutor) without being informed of the charges against them; 3) individuals detained under the arrest warrant of the investigating judge exceeding the 90-day period for investigating the case; 4) individuals who were convicted or released during a trial but who had not received the required notice of the judgment; 5) detained individuals without a file at the registry office (usually people taken to prison by authorities not competent to do so); 6) detained individuals who have never appeared before a detainee magistrate for 6 months, counted from the day of their arrest until the day when the CRAALE team identified their file; 7) individuals detained under the warrant of committal of a dismissed judge or Commissioner; 8) cases of women and minors who are victims of violence; 9) any other case where the vulnerability of the person is proven. See CRAALE-ESCROJ-Report Brief – 2018-2022; Email with attachment from Yvon Janvier to co-authors (Aug. 24, 2023, 4:52 PM PDT) (both sources on file with co-authors).

<sup>206</sup> Terminology varies regarding individuals who have suffered sexual assault crimes. In Haiti, the term is generally “victim,” whereas in some places it might be “survivor.”

<sup>207</sup> See *supra* note 205.

<sup>208</sup> See *supra* Tables 1 & 2.

remaining 25 clients resulted in a conviction. Nonetheless, whether it produced the result of release or conviction, prioritizing clients in older, often forgotten cases served to bring clients out of the legal limbo in which they had been trapped.

Stepping back to provide perspective on CRAALE's service work in terms of the numbers, just for illustrative purposes, let us compare the number of cases CRAALE handled from the spring of 2018 through 2019 (Table 1) to the overall prison population on March 7, 2018. CRAALE's work representing clients in 47 cases brought to resolution would mean representation for 14.5% of the 323 persons held in the prison on that date.<sup>209</sup> If we include the two clients whose cases did not reach resolution, the proportion becomes just over 15%. The above ratios do not, of course, capture the realities of the situation because, *inter alia*, the prison population was not static during this time. Still, they can provide a useful approximation to understand the scope of CRAALE's service. While such figures might be a testament to the need for and potency of that service, they would still mean that, during that initial period, almost 85% of the individuals in the total prison population who were incarcerated on March 7, 2018, would not have been represented by CRAALE. Few of those individuals were likely to have had other access to representation.

## 2. *Qualitative and Holistic Outcomes*

Statistics can offer insight, but they furnish only one portal into CRAALE's work. They don't capture the visceral and cognitive benefits for clients. For those who are released, the benefits of freedom are myriad and apparent. But even for clients whose cases result in conviction, they finally know their sentence, and they likely have already served part or all of that sentence during their pre-trial incarceration. As a general rule under Haitian law, detention in custody in excess of two months is to be credited as time served and deducted from an individual's sentence if they are convicted of the charged offense(s).<sup>210</sup>

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<sup>209</sup> Although CRAALE's primary focus is on representing individuals detained pre-trial, occasionally, CRAALE also represented individuals who had been convicted of crimes. In these cases, for example, clients had not necessarily received appropriate communication of their judgments, such as not having been informed of how much time remained to be served on their sentences. CRAALE-ESCDROJ-Report Brief – 2018-2022; Email with attachment from Yvon Janvier to co-authors (Aug. 24, 2023, 4:52 PM PDT) (both sources on file with co-authors).

<sup>210</sup> For a discussion of the Haitian approach to credit for time served for time spent in custody generally and the separate calculation for hard labor, see Vanessa Dalzon, *Détention préventive prolongée, habeas corpus, Loi Lespinasse, que disent les législations?*, [Authors' translation: *Prolonged Pretrial Detention, Habeas Corpus, Lespinasse Law: What Do the Statutes Say?*] (May 3, 2020), <https://balistrad.com/detention-preventive-prolongee-habeas-corpus-loi-lespinasse-legislations/#:~:text=I'appel%20p%C3%A9nal.-,La%20Loi%20Lespinasse,lespinasse%2C%20intervient%20en%20sa%20faveur.>

One of the most profound results of CRAALE's work is relieving client suffering through release from prison. Even working in a challenging system with minimal resources, this team of clinic attorneys and interns had a dramatic impact on the liberty of many incarcerated people.

Beyond relieving the physical torments of prison life, the CRAALE team perceived that representation and release often produced powerful change in clients' beliefs about their future. In initial meetings with clients, CRAALE staff encountered individuals enmeshed in an oppressive and archaic judicial system, which frequently did not treat them as human beings and had often forgotten them for years in foul-smelling cells. Any traces of belief in their country's justice had often long ago evaporated. Developing rapport between a client trapped in the prison and their attorney could start a cycle of trust, with release potentially initiating first steps of a renewal of faith in humanity and rule of law. The impact here on human beings and on the human spirit is critical. It furnishes another dimension of what CRAALE's work means.

In reflecting on the process and outcomes of CRAALE's practice, at least four additional takeaways emerge. First, the successful pursuit of legal process advanced clients' human rights. Article 5 of the Universal Declaration of Human Rights states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>211</sup> CRAALE's work has become a key that can open prison doors to usher individuals back into the light of freedom and stem human rights violations.

Second, the hesitancy of a legal community to embrace a new law school legal aid clinic could be overcome. The CRAALE team achieved this by meeting with members of the legal community to explain and discuss the value of the clinic as part of its launch process as well as by subsequently providing high-quality legal services that benefited the justice system.

Third, CRAALE's success is also a portrait of the system's propensity to forget those caught within it. That amnesia illustrates the precarious nature of rule of law without continued vigilance on the part of client and human rights advocates. Whether the result in a particular case was a release from custody or a conviction, CRAALE's work upholds the rule of law as both releases and convictions were effectuated through judicial and prosecutorial process.

Fourth, CRAALE's important impact is significantly constrained by limited resources. Despite the many successes, an inability to represent most of the individuals incarcerated suggests that there remains much work to do in this service domain.

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<sup>211</sup> Article 5, *Universal Declaration of Human Rights*, *supra* note 11.

### 3. *Limits on Range of Service Domains*

A final consideration about CRAALE's service goals merits acknowledgement. The initial vision for CRAALE imagined its service encompassing not only representation for individuals detained in the prison, but also two additional service domains: community mediation services and representation for those who have suffered sexual assaults.<sup>212</sup>

As we reflect more generally on the scope of CRAALE's clinical aims, we realize that, in light of resource constraints, it was pragmatic and arguably necessary to circumscribe the service domains for the initial launch. That has been a limitation in the piloting of CRAALE. We are optimistic, however, that CRAALE's services can someday expand to include mediation and representation of victims/survivors, the two additional domains originally contemplated.

With respect to mediation services, trainings and exchanges about such services have been a focus under the U.S. Embassy in Haiti grants. The initial symposium in San Francisco included a presentation on mediation, and a subsequent May 2021 virtual workshop offered a series of presentations and interactive simulations on mediation. More recently in late spring of 2023, the grant funding supported a multi-day symposium in San Francisco with a substantial focus on mediation. This symposium resulted in the Dean of ESCROJ authorizing doubling the number of CRAALE interns from five to ten and authorizing Professor Janvier to incorporate mediation as a topic in his course for first-year law students in Jérémie.<sup>213</sup>

Haitian Bar Federation President Jacques Letang, BDHH attorney Nathan Laguerre, Dean Eustache, and Professor Janvier, all participants in the spring 2023 symposium from BDHH and ESCDROJ, also conducted a final training under the grants in Haiti in August 2023, with an emphasis on providing a foundation for CRAALE interns on mediation principles and skills.<sup>214</sup> Consequently, the envisioned mediation component of CRAALE now has some of the seminal groundwork to move toward fruition. What additional resources might be needed to make this service dimension a reality of CRAALE's work remains to be assessed.

With respect to representing individuals who have been victims/survivors of sexual assault, that goal for CRAALE could also reach fruition soon. In Haiti, the law allows those who have been harmed

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<sup>212</sup> Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 227-28.

<sup>213</sup> As of November 12, 2023, Professor Janvier reported that CRAALE had 14 members. See email with attachment from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST).

<sup>214</sup> Among other speakers, Pauline Lecarpentier, the secretary general of BDHH, also presented at this training event.



by criminal conduct to participate directly in the criminal trial (partie civile process), with representation by their own attorney.<sup>215</sup> In entering into this service domain, CRAALE may need to implement additional procedures to avoid conflicts of interest between representation of individuals accused of sexual assault who are detained in the prison and its representation of victims/survivors of sexual assaults.<sup>216</sup> With this caveat in mind, through collaborations with other human rights organizations, and training that it has already implemented, the CRAALE team anticipates expanding the scope of its efforts to encompass such representation.<sup>217</sup>

### B. Ethical Practice

CRAALE's success extends beyond the benefits to clients and their human rights and the rule of law described above. With concerns about corruption a persistent refrain in assessments of the judicial system in Haiti,<sup>218</sup> CRAALE has been developing an alternate narrative, one based on adherence to ethical practice. CRAALE supervisors school their interns in handling client cases and files with professionalism and respect for confidentiality.<sup>219</sup> CRAALE, as the legal clinic arm of ESCDROJ, concentrates on meeting the ethical values advocated both by the law school and by the national decree regulating the legal profession.<sup>220</sup>

Like other participants in the judicial system, CRAALE personnel report being exposed to ethical challenges. For example, one CRAALE co-author lamented that some people thought CRAALE had resources available that CRAALE should "share" to obtain the desired service. The co-author noted that this type of expectation is one of the major issues within the Haitian judicial system. However, because, from its

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<sup>215</sup> For a discussion of the partie civile process, see Mario Joseph & Nicole Phillips, *Judicial Corruption in Haiti: The Need for Discipline and Civil Society Participation*, 39 HASTINGS INT'L & COMP. L. REV. 183, 205-06 (2016).

<sup>216</sup> When representation for victims/survivors of sexual assaults was contemplated as a concurrent part of the original representation mission, CRAALE had anticipated a policy that would limit representation of individuals detained in the prison to those persons not accused of sexual assault. See Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 227.

<sup>217</sup> See Section E. *infra*.

<sup>218</sup> See, e.g., HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 2, 7, 10-11.

<sup>219</sup> See, e.g., Yvon Janvier, CRAALE-ESCDROJ Training Agenda, Feb. 17-18, 2023 (on file with co-authors) (describing training for new CRAALE interns, including a focus on general ethical obligations and competencies and specific attention to confidentiality and conflicts of interest and independence).

<sup>220</sup> Jean-Claude Duvalier, *Décret du 29 mars 1979 règlementant la profession d'Avocat*, <https://metienne.wordpress.com/2016/10/11/decret-du-29-mars-1979-reglementant-la-profession-davocat/> (last visited July 23, 2023) [Authors' translation: Decree of March 29, 1979 Regulating the Legal Profession].

conception, CRAALE began with and adheres to a no-gifts policy,<sup>221</sup> the answer to an intimation that such resources should be made available is always “no.”

CRAALE’s steadfast dedication to ethical practice means that CRAALE is not plagued by rumors of suspicion of corruption and embezzlement, which shadow much of the judicial system in Haiti.<sup>222</sup> CRAALE’s supervisors train aspiring lawyers in key values involving justice and integrity. Developing a culture of practice with these values at the forefront can nurture generational adherence to and advocacy for the rule of law.

In looking prospectively to the possibility of versions of the CRAALE model elsewhere, it is important to recognize that taking the proverbial high road may risk bad outcomes for clients if corruption governs legal practice and there is inadequate support for refusing to bow to its nefarious reach; thus, beyond adopting and implementing a non-corruption, no-gifts policy, it may be important to advise clients about the potential consequences to the client’s case of the clinic’s refusal to engage in corrupt practices.<sup>223</sup>

### C. *Teaching and Mentoring*

In addition to evaluating service and ethical practice, the third domain of assessment involves teaching and mentoring. Four aspects of the educational mission of CRAALE receive explicit treatment here. They are: 1) *mémoire* writing, 2) implementing client-centered approaches to lawyering and supporting student autonomy, 3) navigating the potential tension between service and educational goals, and 4) inspiring each other.

#### 1. *Mémoire Mentoring & Apprenticeship Supervision*

Law students finish their coursework with the challenging tasks of writing their *mémoire* and completing an apprenticeship still before them.<sup>224</sup> Although at the time that Roxane Edmond Dimanche imagined a

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<sup>221</sup> See Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 241, 243-44. The policy from the Oct. 5, 2017 version of the CRAALE clinic manual follows: “[CRAALE] NON-CORRUPTION, NO GIFTS POLICIES: [CRAALE] pursues a non-corruption, no gifts policy. You must therefore not offer money or other gifts to justice system officials or employees in connection with a case handled by the Clinic.” CRAALE Clinic Manual, Oct. 5, 2017 Version in French, at 9 (on-file with co-authors) [Authors’ translation].

<sup>222</sup> See, e.g., HAITI 2022 HUMAN RIGHTS REP., *supra* note 5, at 10-11.

<sup>223</sup> See Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 241, 243-44. For the language of the CRAALE “no-gifts” policy and the recommendation that clients be advised about the policy and its potential consequences for their case, see *supra* note 221 and the CRAALE Clinic Manual, Oct. 5, 2017 Version in French, at 9 (on-file with co-authors).

<sup>224</sup> See Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 224.

clinic at ESCDROJ, law students were permitted to handle even relatively serious cases in court under the supervision of a practicing lawyer, a subsequent rule change by the Bar has limited the scope of practice opportunities for students in Jérémie.<sup>225</sup> As a result, until June of 2023, CRAALE interns were generally individuals who had completed their coursework and were trying to prepare their *mémoires* or fulfill their apprenticeships, rather than current students taking classes.<sup>226</sup> Mentorship by CRAALE supervisors, who are practicing members of the Haitian Bar, can be instrumental in helping the *finissants*, who are writing their *mémoires*, and *stagiaires*, who have completed and defended their *mémoires* and need to complete their practice apprenticeships, build their new professional careers. Once engaged as interns at CRAALE, they have support in these essential stages needed to become attorneys. For example, CRAALE has offered training on research methodologies for the *mémoire*. Later, CRAALE supervisors provided feedback to interns who had submitted written work and met with them to provide additional support.

Nonetheless, even with the supervision and mentoring offered by CRAALE attorneys to these engaged interns, completing one's *mémoire* and defending it remain significant obstacles to entering practice, especially in the face of sweeping social and political upheaval. Of the initial four CRAALE interns who proposed *mémoire* subjects to their CRAALE mentors, two made only limited progress, one wrote a first draft, and one successfully completed and defended his *mémoire*.<sup>227</sup> That last intern also has engaged in his apprenticeship through CRAALE and has been admitted to the Jérémie Bar.<sup>228</sup>

Two important takeaways surface here. First, the situation of instability in the country can be so draining it breaks interns' momentum and makes them lose sight of their resolutions and dreams. Second, undermining resolve may also be a function of exhaustion and other work demands, as interns cannot rely on a stipend for interning at CRAALE. Thus, they commonly must find independent employment to support themselves, while they intern at CRAALE doing research

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<sup>225</sup> See email with attachments from Yvon Janvier to co-authors (Aug. 18, 2023, 8:01 AM PDT) (on file with co-authors).

<sup>226</sup> Since the second symposium under the U.S. Embassy in Haiti grant at UC Law SF, which concluded in June of 2023, Dean Eustache has authorized CRAALE to accept interns who were still taking their coursework at ESCDROJ. See email with attachments from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST) (on file with co-authors).

<sup>227</sup> Email with attachments from Yvon Janvier to co-authors (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors).

<sup>228</sup> Professor Janvier reports that this intern has been sworn into the Bar, but that, due to the dysfunction of the judicial system during the recent two-plus-year period, the Bar will not consider his internship complete until the spring of 2024, when this intern is expected to receive his final certificate. Email with attachment from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST) (on file with co-authors).

and representing clients. These realities can erode the best intentions of both the interns and their CRAALE mentors.

## 2. *Implementing Client-Centered Approaches and Supporting Student Autonomy*

A client-centered philosophy has served as a lodestar of best practice options in the exchanges between UC Law SF and Haitian colleagues in the gestation and launch of CRAALE. Starting at least with the early simulations at ESCDROJ in 2009, this focus on various values embedded in client-centeredness featured in simulations and training.<sup>229</sup> For example, ascertaining client goals, establishing rapport, and giving deference to client narratives were central to curricular demonstrations and shared opportunities in which the U.S. and Haitian partners engaged.<sup>230</sup> CRAALE intern trainings have emphasized being attentive to and developing rapport with the client, as well as how to engage effectively with their cases and the judicial system.<sup>231</sup>

By choosing to present and implement key client-centered norms in their teaching and practice, CRAALE staff perceive that this has helped spark and maintain client trust in legal representation by CRAALE personnel. As one co-author explains: “In their haggard eyes, emptied of any hope of seeing the sun of freedom again, we read distrust quite often. [It seems as] if, at first glance, their question [is], ‘What can motivate these lawyers who come to offer me their service for free?’ However, their attitude changes once we gain their trust after a few visits and exchanges. They begin to cling to life again. Moreover, in the process, we manage to help them regain their freedom[, which] was lost for too long. [For many of CRAALE’s clients, it is as if a new person] returns to society . . . determined to rebuild [a] life.”<sup>232</sup>

The CRAALE team reports that client-centered approaches for those accused of crimes were not the norm in Haitian legal practice in Jérémie. Often in Jérémie, for example, lists of cases to be adjudicated at trial would be posted a day or so prior to the semi-annual trial court sessions (assizes). At that time, attorneys would be assigned to handle a case of someone who was incarcerated and whose trial was to be held.<sup>233</sup>

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<sup>229</sup> Bloch, *supra* note 21, at 444-59.

<sup>230</sup> See, e.g., *id.*

<sup>231</sup> See e.g., Ariel Chéry, email from Yvon Janvier, with attachments, to co-authors (Jan. 10, 2023, 10:41 AM PST) (on file with co-authors) (on being attentive and handling cases).

<sup>232</sup> Email with attachments from Yvon Janvier to co-authors (Dec., 11, 2022, 10:27 AM PST) (on file with co-authors).

<sup>233</sup> Cf. *Assessment of Legal Aid in Haiti*, *supra* note 36, at 5 (describing the approach in a July, 2017, report and opining that, “In practice, the Bar Association designates trainee lawyers to defend the accused in criminal cases warranting trial by jury, but there is little to no legal assistance system organized beyond that.”).

It was then, often just a day or so prior to trial or even at the trial itself, that an attorney would often meet their incarcerated client for the first time. Thus, they had little time or opportunity to develop trust or rapport or to engage with the client and their narrative. The teaching, training, mentoring, and earlier intervention in cases by CRAALE staff may be ushering in a modified conception of client-attorney relationships, at least in some legal practice contexts.

This modified approach appears to support confidence and sharing between clients and their CRAALE representatives and to help establish the trust that is often vital to effective representation. One co-author intern explained: “With clients or detainees, collaborating was easy as they considered me as a person whom they could trust. This is a skill that CRAALE has developed in me, especially thanks to the training sessions prepared by the UC [Law SF] team.”<sup>234</sup>

Moreover, client narratives and their trust in their legal representatives commonly, in turn, invigorate those representatives. This mutually reinforcing experience can benefit clients and inspire CRAALE interns to continue pursuing their public service ideals.

The dynamic among interns and supervisors also deserves mention. Because CRAALE selects interns who make the voluntary commitment to the clinic with a focus on service, their participation renews the spirit of the CRAALE team as a whole. Thus, not only do relationships with clients invigorate CRAALE personnel, the energy and engagement of interns and their supervisors offers a reinforcing circle of dedication to common justice values, learning, and clients.

With respect to student autonomy, support for such independence, as reflected in supervision approaches, served as a centerpiece of proposed best practices of the first academic exchange under the U.S. Embassy in Haiti grant. Although respect for intern autonomy might, in practice, pre-date the academic exchanges under the grant, the CRAALE team also incorporates this approach as a principle for the clinic. Autonomy comes in the form, for example, of interns conducting client interviews without a supervisor present and communicating directly with the court clerk. This autonomy appears to foster intern confidence in their responsibilities and effectiveness.

While client-centered approaches and supporting student autonomy might not work in every culture and legal system, at least some elements of those approaches seem valuable for CRAALE personnel to engage in their effective representation.

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<sup>234</sup> Email with attachment from Maxo Mezilas to Kate Bloch, (Jan. 11, 2023, 5:01 AM PST) (on file with co-authors). [Authors’ translation].

### 3. *Tension Between Service and Education Goals*

In light of the pressing service needs of clients in the Jérémie prison, CRAALE is not immune from the common tension in clinical legal education between service and education goals.<sup>235</sup> A law school clinic is not synonymous with a community legal aid clinic. The former usually has a substantial, if not predominantly, educational focus and the latter usually a predominantly service focus.<sup>236</sup> In the 2017 USAID and UN report, the authors acknowledge that service, rather than education, is often the priority of the legal aid offices that have been funded in Haiti, noting, that “[i]n existing projects . . . the objective of building the capacity of trainee lawyers is regarded as secondary or supplementary to other aims and is rather a consequence of the operational decision to rely on trainees as the main service providers.”<sup>237</sup>

Helping interns make their solo flights and supporting them in handling a variety of important responsibilities takes a serious investment of time and training. It would be far more efficient in the short run for supervisors to undertake many of the difficult tasks. Staying focused on the longer-term commitment to training interns can be challenging in the face of the dire circumstances of clients. Consequently, emphasis on and support for the teaching and mentoring process can be critical to clinic success.

#### *D. Logistics and Managerial Considerations*

The first three criteria above for assessing CRAALE’s work focused on measuring progress on goals that CRAALE defined as essential to its mission (service, ethics, and teaching). We now turn to an exploration of three additional evaluation rubrics that undergird the health and efficiency of the organization and its survival. Three facets of the first, logistics and managerial considerations, are explored briefly here.

First, there is the question of language. It was valuable that some of the Haitian partners spoke English while some of the U.S. partners spoke French and/or Kreyòl. This language fluency can be especially important if funders have a preference or requirement for grant applications and reports to be prepared in a particular language.

Second, for a clinic to endure, planned training and knowledge transfer for personnel transitions is crucial. A number of the original

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<sup>235</sup> See, e.g., Douglas A. Blaze, *Deja Vu All over Again: Reflections on Fifty Years of Clinical Education*, 64 TENN. L. REV. 939, 949 (1997); Cf. Jane H. Aiken & Stephen Wizner, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 999 (2004).

<sup>236</sup> Cf. Aiken & Wizner, *supra* note 235, at 999.

<sup>237</sup> *Assessment of Legal Aid in Haiti*, *supra* note 36, at 19.



CRAALE participants have moved on to other stages of their careers or had life events preclude their continued participation. CRAALE needs effective and efficient methods for passing knowledge from one generation of participants to the next as well as for recruiting for various roles within the organization. For example, one vital administrative role is that of the clinic coordinator. Ideally, this individual will have grant writing and budgeting experience, along with fluency in more than one language. If funding permitted, this role might be designated as at least a regular weekly part-time commitment to provide stability and consistency in managing the work load in the clinic.

Third, as the clinic evolves, it may be valuable to further clarify the scope of the various roles, decision making accountability, and authority of each stakeholder, e.g., faculty, law school dean, clinic director, lawyer-supervisors, partners, interns, and donors.

#### *E. Collaboration with Other Human Rights Advocates*

CRAALE is certainly not alone in the Jérémie landscape in fighting human rights violations and advocating for positive change in the justice domain.<sup>238</sup> CRAALE, however, has the advantage of having practicing Haitian lawyers as well as legal interns among its personnel such that the CRAALE team can bring cases before the court and litigate through the criminal trial stage. In contrast, the interventions of entities that do not employ Haitian lawyers are commonly limited to other avenues of advocacy work or requesting change on behalf of the accused. Because of its access and capabilities, CRAALE has been finding itself in a position to play a critical role in joint projects to further progress with key human rights actors and organizations. Professor Janvier reports that, in 2022, for example, CRAALE collaborated with the Office of Citizen Protection (a government organization) and two NGOs, Justice and Peace, and Lawyers Without Borders Canada.<sup>239</sup> The CRAALE team also anticipates that these collaborations will allow CRAALE staff to undertake representation of victims/survivors of sexual assault in the future.

#### *F. Societal and Financial Constraints*

Law school clinics do not operate in a vacuum. They are generally subject to the constraints and demands of the society in which they find themselves. This section uses several of these as the sixth criterion

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<sup>238</sup> For example, among other advocates for the rights of incarcerated persons, the Office of Citizen Protection has had a representative in Jérémie.

<sup>239</sup> Email from Yvon Janvier, with CRAALE Update 2022 attachment, to co-authors (Dec. 2, 2022, 10:59 AM PST) (on file with co-authors).



for evaluation of CRAALE's work. It interrogates their impact and whether or how they impair CRAALE's utility.

### 1. *Growth in Prison Population*

Although CRAALE's endeavors have engendered substantial positive change, CRAALE's work has also had limitations. One important such limitation involves the prison population in recent years. In the period between the March 7, 2018 visit and November 30, 2022, the end of the reporting period in Table 2, the Jérémie prison population grew substantially.<sup>240</sup> Whereas in March of 2018, shortly after CRAALE was launched, there were 323 incarcerated individuals, by November 30, 2022, the number had increased by more than a third, to 444 individuals.<sup>241</sup>

In particular with the advent of the pandemic and the increasing dysfunctionality of the Haitian court system, the number of people held in the prison surged, while the number and size of the cells remained unchanged.<sup>242</sup> Consequently, the population growth exacerbated the already dire overcrowding and related tribulations described at the start of this Article.

At least as alarming as the growth in overall numbers of individuals incarcerated is the increasing ratio of persons detained pre-trial to those who have been convicted. Whereas, in 2018, the percentage of pre-trial detainees in the Jérémie prison hovered just under 83%, as of the end of November 2022, the percentage was approaching 97% (430 individuals detained pre-trial out of 444 individuals in the total Jérémie prison population).<sup>243</sup>

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<sup>240</sup> For prison population figures from November 30, 2022, see email from Yvon Janvier, with CRAALE Update 2022 attachment, to co-authors (Dec. 2, 2022, 10:59 AM PST) (on file with co-authors).

<sup>241</sup> *Id.* For information on the more recent reduction in the prison population, although not to March 7, 2018 levels, see Janvier, *Enhancing Legal Assistance*, *supra* note 75, at 1 (on file with co-authors) and *infra* note 243.

<sup>242</sup> The Jérémie prison contains nine cells for detained individuals. One is reserved for adult women and female minors. Six are for adult men. One is for male minors, and one cell serves as an isolation unit for those who have contagious illnesses. Currently, Professor Janvier reports that, for individuals showing symptoms of certain illnesses, including cholera and tuberculosis, transportation to the hospital can be arranged.

<sup>243</sup> See *supra* note 240. Although this Article focuses on CRAALE's launch and its work in the 2018 through November 2022 period, CRAALE's work continues. See Janvier, *Enhancing Legal Assistance*, *supra* note 75, at 1-4. Professor Janvier's November 2023 CRAALE update, covering the December 2022-November 2023 period, reports that 360 individuals were incarcerated in the Jérémie Prison on November 16, 2023, with approximately 95.5% of those individuals (344 of 360) detained pre-trial. See *id.* at 1. The November 2023 update also discusses, *inter alia*, CRAALE's work on behalf of clients in habeas corpus and in correctional court trials during the December 2022-November 2023 period. See *id.* at 2-3. The update notes that "[s]ince January 2023, no criminal trial . . . with or without a jury has been held in the jurisdiction of Jérémie." *Id.* at 3.

This growth underscores the larger context in which CRAALE and law-school clinics around the world function. Global maladies like COVID-19 and governmental upheaval, which impede or prevent courts from functioning, can capsize the ability of clinics to provide effective representation. Similarly, outbreaks of diseases, like cholera, which re-emerged in Haiti in the fall of 2022,<sup>244</sup> can also negatively impact conditions for incarcerated clients. In addition, in the capital, gang violence and control of neighborhoods impedes the judicial system.<sup>245</sup>

In Jérémie specifically, other factors also raise obstacles to or complicate representation. For instance, there are three positions for investigating judges, who, in the Haitian judicial system, conduct post-arrest case investigations. However, as of August 2023, the mandates of two had not been renewed.<sup>246</sup> Without investigating judges, cases are not prepared for judges to conduct the trials. In addition, as of August 2023, neither the prosecutor's office nor the prison owned the necessary vehicle (a car or minivan) to regularly transport detained individuals to court.<sup>247</sup>

Moreover, strikes and other work stoppages by the judiciary have compounded the difficulty of getting cases heard.<sup>248</sup> Together, factors like these, in addition to the larger socio-political turmoil, have largely paralyzed the judicial system in recent years.<sup>249</sup> This paralysis is so profound that, as noted above, in Jérémie, no criminal trials, which involve more serious offenses, were conducted in 2020 or 2021, with or without a jury.<sup>250</sup>

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<sup>244</sup> The RNDDH report notes that, "One hundred and seventy-two (172) detainees died from January to October 2022, including twenty-four (24) from Cholera." *Dysfunction in the judicial and penal systems*, *supra* note 195, at 5.

<sup>245</sup> See UNDP website, *supra* note 45 ("In 2021, the activity of criminal gangs slowed down all of the judicial proceedings in Port-au-Prince, the capital.") For a recent report by the UN on gang violence and intimidation in Cité Soleil in Port-au-Prince, see *The Population of Cité Soleil in the Grip of Gang Violence: Investigative report on human rights abuses committed by gangs in the zone of Brooklyn from July to December 2022*, UN HUM. RTS OFF. OF THE HIGH COMM'R. & BINUH (Feb. 2023).

<sup>246</sup> See email with attachments from Yvon Janvier to co-authors (Aug. 18, 2023, 8:01 AM PDT) (on file with co-authors).

<sup>247</sup> See email with attachment from Yvon Janvier to co-authors (Aug. 24, 2023, 4:52 PM PDT) (on file with co-authors). Professor Janvier reports that the authorities use other substitute vehicles when available, including one of the judges contributing the use of a private car (a pickup truck), or the prosecutor using a car from the national police, when it is available, or, sometimes the Government Commissioner borrows the private car of one of his contacts in the city. *See id.*

<sup>248</sup> The RNDDH report notes such stoppages during the 2021-2022 judicial year. *See Dysfunction of the judicial and penal systems*, *supra* note 195, at 4. ("at least four (4) work stoppages were recorded").

<sup>249</sup> *See, e.g., id.*; *see also supra* note 47.

<sup>250</sup> See email with attachments from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST) (on file with co-authors); *See also Dysfunction of the judicial and penal systems*, *supra* note 195, at 36, dated November 11, 2022, for discussion of the lack of criminal trials in

While the factors in this subsection may fairly be described as outside of CRAALE's purview or control, they compromise CRAALE's ability to effectively represent clients. They speak to the reality that law school clinics live within the constraints of the society around them, subject to much the same buffeting winds of societal upheaval and challenge.

## 2. *Lack of Re-entry Resources/Programs*

Another important recognition that has emerged from CRAALE's work lies in Jérémie's lack of re-entry resources and programs. One important direction for CRAALE moving forward would be for the clinic to explore creating a follow-up and resource system for its clients released from prison to ensure their access to rehabilitation services and reintegration opportunities into society. Without such resources, released clients may be vulnerable to a cycle of exclusion that can undermine their progress and encourage them to engage in behavior that could result in harm and in reincarceration.<sup>251</sup>

An important refrain in our reflections on CRAALE's work is that CRAALE's success involves a continuing journey. The need for and lack of re-entry services furnishes another example of structural work that remains to be done.

## 3. *Financial Challenges*

For CRAALE, financial challenges take many forms. These include a dearth of funding for supervisor, coordinator, and intern stipends, the inability to fund space dedicated to the clinic, as well as limited or lack of money for transportation, projects, and additional service domains.

Fundraising efforts have accompanied CRAALE throughout much of its gestation and establishment. Often, they involved donated time, funds, and intellectual capital of the founders and true believers in the CRAALE enterprise. Notable contributions have also derived from fundraising efforts at partner law schools in the U.S., where students, staff, and faculty contribute to or engage in fundraising activities and then make the funds available to ESCDROJ.<sup>252</sup> Over the years, other organizations and individuals have also contributed their time, funds, and talent. At one stage, the UN donated shipping containers as

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various places in Haiti, including in Jérémie, during the 2021-2022 judicial year.

<sup>251</sup> The CRAALE co-authors note the particular importance of developing a re-entry program in light of an individual released and returned to prison in 2023, where both imprisonments involved accusations of theft. *See* email with attachment from Yvon Janvier to co-authors (Nov. 12, 2023, 12:33 PM PST) (on file with co-authors).

<sup>252</sup> Fundraising has taken a variety of forms, including group events and direct appeals to interested individuals.

potential convertible space for offices.<sup>253</sup> More recently, as noted earlier, the U.S. Embassy in Haiti provided critical support through generous grants for academic exchanges to advance clinical legal education under CRAALE's auspices.<sup>254</sup>

An important takeaway from these fundraising endeavors lies in the value of searching for funding in sometimes unexpected places. For example, we had not explored the possibility of U.S. Embassy funding before a fortuitous discussion about clinical legal education transpired between Professor Janvier and Public Affairs Officer Jeanne Clark at the U.S. Embassy in Haiti.

The grant to ESCDROJ had the particular benefit of including stipends for members of the CRAALE team.<sup>255</sup> That meant that there was some monetary compensation for the extensive investment of time in learning and support for interns. Nonetheless, the stipends were relatively modest sums not designed to last an extended period of time,<sup>256</sup> and the grant to CRAALE has now concluded. If stipends could be a regular feature of CRAALE for faculty, supervisors, a coordinator, and interns, that would be a positive development.

Funding constraints have also impacted space for the clinic. Over time, the space that had been made available free-of-charge by a local non-profit became unavailable. The law school itself shares space with a nursing program, which occupies the building during typical business hours.<sup>257</sup> On weekdays, the law school has classes and general use of the building only in the evenings.<sup>258</sup> Although CRAALE personnel visit their clients at the prison, they still need space to research and work where they can make progress on their *mémoires* and cases. Taking the next step to represent individuals who have suffered sexual assault and to conduct mediations also suggests the need for dedicated clinic space. Finding such space and preserving it for the clinic represents both an unmet need and a critical takeaway.

An overarching consideration, then, from CRAALE's early years is the importance of funding and of ensuring a renewable or adequate stream of funding.<sup>259</sup> In a law school context where almost all faculty

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<sup>253</sup> For a description of the donation process and the items delivered from the UN, see Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 229.

<sup>254</sup> *See supra* text accompanying note 144.

<sup>255</sup> *See supra* note 144.

<sup>256</sup> *See id.*

<sup>257</sup> *See* Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 228. There is a new space upstairs in the building, which includes a large open room used for a law library and instructional purposes. However, it is a communal space, so even if it were/is reserved for law school purposes, it is not dedicated to the clinic.

<sup>258</sup> *See id.*

<sup>259</sup> This challenge is certainly not unique to CRAALE. Clinics in many countries lack adequate funding. *See, e.g.*, Bloch & Edmond Dimanche, *Human Rights from the Ground Up*,

have only part-time appointments, funding can make it possible for supervisors to devote significant time to the clinic endeavor. Funding can also enable interns to focus on their research, writing, and service to clients, without needing full-time employment elsewhere. Funding can preserve clinic space for case work, writing, and research.

Funding can further other critical clinic aims, including supporting structural change. One such change might involve working toward a re-entry program. The clinic might also undertake other structural change projects to improve implementation of the rule of law. For example, one idea that had been floated previously would involve scanning the public record court files and generating a digital database for the court to improve its tracking and processing of cases.<sup>260</sup>

If we now imagine that the new National Legal Representation Assistance Law were ultimately funded in Jérémie,<sup>261</sup> financial support for CRAALE might fall within its purview. One could also imagine CRAALE interns, who had completed their *mémoires*, moving onto a similarly-funded local legal aid office, where they could continue their service, complete any remaining apprenticeship, and start their legal careers as attorneys.

Although adequate clinic funding may not solve all the challenges that CRAALE faces, it remains a fundamental limitation on the power of CRAALE to effectively engage in its day-to-day service and educational functions and to make long-term holistic and structural change.

## CONCLUSION

This work of launching and establishing the CRAALE clinic has highlighted innovation, legal intervention, collaboration, and leadership that is motivated by compassion, humility, respect, and a deep belief in the fundamental importance of justice. It has reminded us of the value of persistence and rewarded us with a sense of positive change. CRAALE's journey also reflects the importance of recognizing context. Context here embodies respect for the decision making of colleagues on the ground and knowledgeable about the circumstances of the local legal and cultural environment. What works in Jérémie, Haiti, a place where many, if not most, legal and judicial actors are graduates of ESCDROJ, might be different than what works elsewhere. However,

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*supra* note 15, at 233 (providing examples, including funding challenges at the University of Namibia as described in the scholarship of Professor Yvonne Dausab, *Access to Justice: The Use of International Law Clinics to Advance the Case for Vulnerable Members of Society*, 26 MD. J. INT'L L. 8 (2011)).

<sup>260</sup> For a discussion of this potential project, see Bloch & Edmond Dimanche, *Human Rights from the Ground Up*, *supra* note 15, at 243.

<sup>261</sup> See *supra* text accompanying note 44.

the underlying premise that context should inform theory and implementation promises broader applicability.

You may be asking what became of the search for Jean and why it is important in this narrative and evaluation of CRAALE's work. After the serendipitous encounter with clinicians from Chile at the San Francisco conference, the search for Jean by members of CRAALE began. Shortly after the conference, CRAALE clinicians located Jean and his caregiver. The two of them traveled to the CRAALE clinic in Jérémie. Then, in coordination with CRAALE representatives and the Chilean clinicians, Jean and his caregiver journeyed to the Chilean Embassy in Haiti's capital to arrange the necessary documentation for travel overseas. Within four months of the day the CRAALE team learned of Jean's plight, Jean arrived in Chile and reunited with his family.<sup>262</sup> CRAALE's joining the global clinical community was a sine qua non and a proximate cause of the happy reunion for Jean and his family.

In various places in the world, one hears that it takes a village, a community, to successfully raise a child.<sup>263</sup> Here, it took a village, a clinical community, to bring this young child back to his family. We would argue that it can take a village, a legal community, both local and international, to successfully nurture clinical legal education and its potential to advance the rule of law and human rights.

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<sup>262</sup> The Northern California Clinicians' conference was held on February 9, 2019, and an article from the Chilean law school on the reunification (that explicitly notes the assistance of the ESCDROJ clinic team) reports that the family reunion occurred on May 25, 2019. See *Familia haitiana representada por la Clínica Jurídica Derecho UC consiguió visa humanitaria de reunificación familiar*, PONTIFICIA UNIVERSIDAD CATÓLICA DE CHILE (June 13, 2019), <https://www.uc.cl/noticias/familia-haitiana-representada-por-la-clinica-juridica-derecho-uc-consiguio-visa-humanitaria-de-reunificacion-familiar/>. The article also noted that the family separation had lasted two years. *Id.*

<sup>263</sup> For discussion of the origins of this adage, see e.g., Joel Goldberg, *It Takes A Village To Determine The Origins Of An African Proverb*, NAT'L. PUB. RADIO (July 30, 2016).





# INTEGRATING HUMAN RIGHTS IN DOMESTIC CLINICAL PRACTICE

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*Given that the human rights framework contains a rich and evolving body of norms and standards, integrating human rights law into clinical teaching provides new avenues to approach problem-solving. A human rights framework offers additional sources to ground moral and legal claims, as well as new strategies and advocacy targets. These alternatives work to foster creativity and lawyering skills, particularly in areas where domestic law is limited or constraining. Moreover, U.S. advocates have much to learn from global human rights struggles and advocacy efforts and can benefit from engaging in human rights discourse and practice. This article introduces readers to human rights norms and strategies as potential teaching and advocacy tools, providing practical case studies and exploring both opportunities and challenges.*

## INTRODUCTION

In recent years, advocates in the United States (U.S.) have turned to courts to vindicate rights in the face of increasing partisanship and legislative gridlock. The Trump administration's rejection of established rights in a wide range of areas, from voting rights to asylum to reproductive rights, prompted a wave of legal challenges as advocates turned to the courts.<sup>1</sup> Many law school clinics participated in these legal challenges, and many continue to do so to address restrictions on rights under the Biden administration.<sup>2</sup>

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<sup>1</sup> David Cray, "See You in Court": *ACLU Files Nearly 400 Cases Versus Trump*, ASSOC. PRESS (Aug. 6, 2020), <https://apnews.com/article/ap-top-news-religion-lawsuits-immigration-elections-81f61e7d5c381b707bd21efc9a704e93>.

<sup>2</sup> See, e.g., Emmy M. Cho, *Harvard Law School Clinic Sues Trump Administration Over Proposed Asylum Rule Changes*, THE CRIMSON (Jan. 2, 2021); Conor Skelding,

Litigation is indispensable, both as a substantive intervention to address rights violations and as a pedagogical vehicle to teach clinical students practical lawyering skills. At the same time, litigation on behalf of particular clients or in response to urgent policy changes may offer limited opportunities to examine and address the larger structural conditions that give rise to widespread rights violations.<sup>3</sup> The legal systems in which students operate can themselves limit the range of arguments that are considered viable, constraining students from thinking as expansively as possible about the rights that are violated in a given situation and what meaningful justice might entail. As U.S. courts have increasingly upheld procedural barriers to judicial access and rolled back substantive rights, they have further limited the possibilities for domestic litigation to realize rights and achieve justice.<sup>4</sup>

Despite the limitations of domestic litigation, U.S. advocates, legal practitioners, and clinicians often view international human rights advocacy with considerable skepticism.<sup>5</sup> They may see human rights law, language, and strategies as unhelpful, aspirational, or simply not worth their limited time and capacity. They may not know or think much about international human rights at all, seeing it to be a niche field that is the domain of human rights advocates and teachers. They generally refrain from raising human rights arguments in litigation because

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*NYU Law Clinic to Advise International Students After Trump Order*, POLITICO (Feb. 2, 2017), <https://www.politico.com/states/new-york/city-hall/story/2017/02/nyu-law-clinic-expands-brief-to-students-after-trump-order-10916>.

<sup>3</sup> See Muneer I. Ahmad & Michael J. Wishnie, *Call Air Traffic Control! Confronting Crisis as Lawyers and Teachers*, in *CRISIS LAWYERING* 311, 317 (Ray Brescia & Eric K. Stern eds., 2021) (“One challenge of crisis lawyering, then, is to determine how to both work within and push against institutional constraints when exigent circumstances require, so as to seize the potential for student learning amidst an emergency.”); Deborah N. Archer, *Political Lawyering for the 21<sup>st</sup> Century*, 96 *DENV. L. REV.* 399, 428-434 (2019) (describing how and why clinicians might productively embrace political lawyering in clinical practice); Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 *CLINICAL L. REV.* 355 (2008) (critiquing dominant models of clinical practice and identifying and imagining more transformative alternatives focused on collective mobilization).

<sup>4</sup> Caroline Bettinger-López, Davida Finger, Meetal Jain, JoNel Newman, Sarah Paoletti, & Deborah M. Weissman, *Redefining Human Rights Lawyering through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 *GEO. J. POVERTY L. & POL’Y* 337, 345-46 (2011) (noting that “U.S. courts are systematically closing the door on civil rights litigants, both through procedural rulings making it more difficult for plaintiffs to access the courts, as well as through a substantive narrowing of the scope of constitutional rights”); Zachary Clopton, *Judges Will Not Save Us: Pushing for Truly Democratic Solutions Will*, *CHICAGO TRIBUNE* (Aug. 24, 2022) (observing in the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* revoking the constitutional right to abortion that “the idea that courts can be leaders of progressive change . . . is not true today, and it will not be true any time soon.”).

<sup>5</sup> David Cole, *The Idea of Humanity: Human Rights and Immigrants’ Rights*, 37 *COLUM. HUMAN RIGHTS L. REV.* 627, 632 (2006) (referring to “the skeptical reception such [human rights] claims have long been given in the United States”).

of an assumption that courts will not view such arguments favorably. More broadly, human rights are traditionally seen as only relevant in countries abroad that lack the “good fortune” of the U.S. legal system. This is despite the pivotal role played by the U.S. in the founding of the international human rights system, as well as its continued active involvement in its development.<sup>6</sup>

U.S. advocates, however, have much to learn from global human rights struggles and can benefit from engaging in human rights discourse and practice. Given that the human rights framework contains a rich and evolving body of norms and standards, incorporating human rights law and strategies into clinical teaching can provide students and lawyers with new avenues to approach individual and structural problems and potentially advance successful advocacy. A human rights framework can offer additional sources of law to ground moral and legal claims, as well as new strategies to pursue and new advocacy targets to engage. These alternatives can foster creativity and lawyering skills and – perhaps particularly in areas where domestic law is limited or constrained – enable students to meaningfully grapple with difficult issues.

This paper introduces a pedagogical framework that employs human rights norms and strategies as potential teaching and advocacy tools. Section I provides a brief overview of the human rights system and its historical development. Section II presents three case studies of innovative projects applying human rights in the domestic context, drawing on the work of human rights clinics at Cornell Law School,<sup>7</sup> Duke University School of Law, University of Miami School of Law, and Yale Law School with local advocates. These case studies focus on challenging the criminalization of homelessness, advancing the right to be free from domestic violence, and addressing the role of guns in domestic violence. Strategies employed include advocating through the United Nations (U.N.) and regional human rights systems, documenting and publicizing human rights violations, enacting local human rights resolutions and bills of rights to implement international standards in domestic law, filing amicus briefs providing an international human rights perspective, and building human rights literacy and legal empowerment at the community level. Section III then draws lessons from the case studies and provides overarching reflections on how clinical faculty can integrate human rights in their teaching and advocacy, examining both opportunities and challenges. It explores how using the language of human rights to frame demands and engaging effectively with

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<sup>6</sup> COLUMBIA L. SCH. HUM. RTS. INST., BRINGING HUMAN RIGHTS HOME: HOW STATE AND LOCAL GOVERNMENTS CAN USE HUMAN RIGHTS TO ADVANCE LOCAL POLICY 2 (Dec. 2012).

<sup>7</sup> While the Gender Justice Clinic at Cornell Law School is not a human rights clinic, it regularly uses human rights law and strategies in its advocacy.

human rights mechanisms works to broaden students' perspectives and strengthen their lawyering skills.

## I. INTERNATIONAL HUMAN RIGHTS: AN OVERVIEW

To ground the case studies and analysis, this section provides a brief overview of the origins and key normative instruments within the international human rights system. Next, this section outlines particular challenges with human rights implementation in the U.S. context, as well as opportunities and resources available to practitioners to facilitate human rights engagement.

The birth of the U.N. in 1945 following World War II marked the start of the international human rights system. The U.N. Charter recognized the link between peace and stability and respect for human rights, highlighting human rights as an international concern. Article 55 set out an aim of the U.N. as promoting “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.”<sup>8</sup> In Article 56, member states pledged “to take joint and separate action” to promote human rights.<sup>9</sup>

The Universal Declaration of Human Rights (UDHR), the foundational document of international human rights, followed in 1948,<sup>10</sup> with Eleanor Roosevelt chairing the Human Rights Commission that drafted it. For the first time, the UDHR defined and enumerated key rights. After the horrors of World War II and the Holocaust, it set out what was then a revolutionary idea that it is possible to override state sovereignty and give other states a legal interest in a state's treatment of its own citizens.<sup>11</sup> While the UDHR is a declaration and not a binding treaty, it has important normative status, and some parts of it are customary law.<sup>12</sup>

Decades later, the rights outlined in the UDHR became protected in legally binding treaties with the International Covenant on Civil and

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<sup>8</sup> U.N. Charter art. 55; *see also id.* at Preamble (setting out an aim of the U.N. “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”).

<sup>9</sup> *Id.* art. 56.

<sup>10</sup> Universal Declaration of Human Rights, art. 7, G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

<sup>11</sup> United Nations, *History of the Declaration*, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>; Office of High Commissioner of Human Rights (OHCHR), *International Human Rights Law*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>; MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

<sup>12</sup> Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 289 (1996). Customary law refers to international law that is not codified, but rather based in “a general and consistent practice” followed by states out of “a sense of legal obligation.” *STATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES*, § 102 (Am. L. Inst. 2017).

Political Rights (ICCPR)<sup>13</sup> and the International Covenant on Social, Economic and Cultural Rights (ICESCR) in 1976.<sup>14</sup> The UDHR, ICCPR, and ICESCR together constitute the International Bill of Human Rights.<sup>15</sup> Other treaties focus on particular areas of human rights law, including torture, racial discrimination, women's rights, children's rights, migrants' rights, enforced disappearance, and the rights of persons with disabilities.<sup>16</sup>

Challenges have long existed for implementing human rights in the U.S. legal system. While human rights standards play a part in U.S. foreign policy,<sup>17</sup> the U.S. has been very reluctant to apply them domestically.<sup>18</sup> Louis Henkin famously referred to the U.S. as a “flying buttress,” supporting human rights from the outside and unwilling to subject itself to scrutiny.<sup>19</sup> Despite its role in developing the international human rights system,<sup>20</sup> from the outset, the U.S. sought to prevent international scrutiny of domestic practices rooted in racism.<sup>21</sup> Thus, the NAACP (National Association for the Advancement of Colored People), which pushed for the creation of the U.N. Human Rights Commission and appealed to the international human rights system early on, encountered severe pressure to limit its advocacy to domestic claims in U.S. courts.<sup>22</sup> As Caroline Bettinger-López and colleagues write, “[C]oncerned with how the U.S. campaign for racial equality would play on the world stage, Eleanor Roosevelt herself urged the leaders of the movement to keep their struggle internal to the United States, marking the beginning of the practiced conception that human rights was something that happened outside of the United States, and civil rights is what happened inside the United States.”<sup>23</sup>

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<sup>13</sup> International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>14</sup> International Covenant on Economic, Social, and Cultural Rights, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>15</sup> *Fact Sheet No. 2 (Rev. 1): The International Bill of Human Rights*, <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

<sup>16</sup> OHCHR, *The Core International Human Rights Instruments and their Monitoring Bodies*, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>.

<sup>17</sup> *E.g.*, Anthony J. Blinken, Secretary of State, *Remarks to the 46<sup>th</sup> Session of the Human Rights Council* (Feb. 22, 2021), <https://www.state.gov/remarks-to-the-46th-session-of-the-human-rights-council/> (“The United States is placing democracy and human rights at the center of our foreign policy, because they are essential for peace and stability.”).

<sup>18</sup> According to Tara Melish, the U.S. “has appeared to flinch and even recoil, when it comes to direct domestic application of human rights norms.” Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 *YALE J. INT’L L.* 389, 391 (2009).

<sup>19</sup> LOUIS HENKIN, *THE AGE OF RIGHTS* 76 (1990).

<sup>20</sup> COLUMBIA L. SCH. HUM. RTS. INST., *supra* note 6, at 2.

<sup>21</sup> CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS 1944-54* (2003).

<sup>22</sup> Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 *FORDHAM L. REV.* 459, 465 (2008).

<sup>23</sup> Bettinger-López, et al., *supra* note 4, at 343.

Nonetheless, the U.S. has taken some critical steps towards domestic implementation of human rights standards. It has ratified some of the core U.N. human rights treaties, including the ICCPR, the Genocide Convention, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention against Torture (CAT), and two Optional Protocols to the Convention on the Rights of the Child (CRC).<sup>24</sup> It has further signed the ICESCR, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), CRC, and Convention on the Rights of Persons with Disabilities (CRPD).<sup>25</sup> While signing is only a first step signaling intention to ratify a treaty, and a country need not take steps to comply with the treaty's provisions, it must refrain from acts that would defeat "its object and purpose."<sup>26</sup>

Pointedly, when ratifying human rights treaties, the U.S. has issued a declaration that they are not self-executing,<sup>27</sup> meaning that they cannot by themselves serve as a cause of action in courts.<sup>28</sup> However, treaties to which the U.S. is a state party are legally binding<sup>29</sup> and can be used in

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<sup>24</sup> OHCHR, *Ratification Status for the United States of America*, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN).

<sup>25</sup> *Id.*

<sup>26</sup> Vienna Convention on the Law of Treaties, art. 18(a), Apr. 24, 1970, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. See also RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 304 cmt. d (AM. L. INST. 2017) (requiring the government to "avoid actions which could render impossible the entry into force and implementation [of a treaty], or defeat its basic purpose and value"). The criminalization of homelessness discussed in the case study below arguably violates the "object and purpose" of the ICESCR, which enshrines a right to housing. See University of Miami School of Law Human Rights Clinic et al., *Housing and Homelessness in Miami-Dade County, Florida*, Submission to the United Nations Universal Periodic Review of the United States of America, ¶ 12 (Oct. 2019), <https://miami.app.box.com/s/g0vzmxzmtmkrd1kxrfcf9nclty59tvlq> [hereinafter "Miami Human Rights Clinic, *Housing and Homelessness in Miami-Dade County*"].

<sup>27</sup> Catherine Powell, *Dialogic Federalism, Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 258-259 (2001). *E.g.*, U.S. Reservations, Declarations, and Understandings, ICCPR, 138 Cong. Rec. S4781-84 (1992).

<sup>28</sup> In reporting to the Human Rights Committee monitoring compliance with the ICCPR, the U.S. government explained that this declaration "did not limit the international obligations of the United States under the Covenant. Rather, it means that, as a matter of domestic law, the Covenant does not, by itself, create private rights directly enforceable in U.S. courts." United States of America Initial Report to the Human Rights Committee, ¶ 8, CCPR/C/81/Add.4 (Aug. 24, 1994), [http://www.bayefsky.com/reports/usa\\_ccpr\\_c\\_81\\_add.4\\_1994.php](http://www.bayefsky.com/reports/usa_ccpr_c_81_add.4_1994.php).

<sup>29</sup> U.S. CONST. art. VI ("[A]ll Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). See also Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). The United States signed the Vienna Convention on April 24, 1970, but has not yet ratified it. Vienna Convention, *supra* note 26, at art. 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."), U.S. DEP'T OF STATE, <http://www.state.gov/sll/treaty/faqs/70139.htm>. Nevertheless, it considers many of its provisions "to constitute customary international law on the law of treaties," indicating its intention to abide by them. *Id.*



court as an aid in interpretation<sup>30</sup> or in advocacy with other branches of government, which some advocates have done quite effectively. Courts in the U.S. reference the UDHR, although a non-binding declaration, as persuasive authority more frequently than those in any other country.<sup>31</sup> Human rights treaties also require states parties to undergo regular review of their compliance, as discussed in more detail below, giving advocates an opportunity to highlight shortcomings and press for new commitments.<sup>32</sup>

Despite limitations on human rights espoused by the U.S. and enforcement challenges, there are important opportunities to integrate human rights in advocacy, enriching both teaching and practice. As an initial matter, the human rights framework provides a robust set of norms, which encompass both civil and political rights enshrined in the U.S. Constitution, such as the rights to due process, freedom of expression and religion, and political participation,<sup>33</sup> as well as additional economic, social, and cultural rights, such as rights to housing, health, and education.<sup>34</sup> Additionally, unlike the generally negative conception of rights in the U.S.<sup>35</sup> focused on freedom from government interference,<sup>36</sup> the international human rights framework recognizes three levels of state obligations: (1) *respect*, or the obligation not to violate a right itself; (2) *protect*, or the obligation to ensure other parties do not violate a right; and (3) *fulfill*, or the obligation to create the conditions necessary for exercising a right.<sup>37</sup> Thus, realizing rights requires a proactive approach and preventive action that extends beyond addressing violations. Significantly, ensuring the foundational

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<sup>30</sup> *E.g.*, *Roper v. Simmons*, 543 U.S. 551, 576 (2005); *Sterling v. Cupp*, 625 P.2d 123, 131 n.21 (Or. 1981); *Graham v. Florida*, 560 U.S. 48, 81-82 (2010).

<sup>31</sup> *Hannum*, *supra* note 12, at 304; *e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 789, 794 (9th Cir. 1996); *Perkovic v. I.N.S.*, 33 F.3d 615, 622 (6th Cir. 1994); *Wong v. Ilchert*, 998 F.2d 661, 663 (9th Cir. 1993); *Cerrillo-Perez v. I.N.S.*, 809 F.2d 1419, 1423 (9th Cir. 1987); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

<sup>32</sup> *E.g.*, ICCPR, art. 40.

<sup>33</sup> UDHR, arts. 9-11, 18-21.

<sup>34</sup> *Id.* arts. 25-26.

<sup>35</sup> Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984), [https://scholarship.law.upenn.edu/penn\\_law\\_review/vol132/iss6/7/](https://scholarship.law.upenn.edu/penn_law_review/vol132/iss6/7/).

<sup>36</sup> Tamar Ezer, *A Positive Right to Protection for Children*, 7 YALE HUM. RTS. & DEV. L.J. 1, 4 (2004), <https://digitalcommons.law.yale.edu/yhrdlj/vol7/iss1/1/> (“Negative, or non-interference rights, prevent the state from violating individual autonomy, while positive, or integrative rights, impose a duty on the state to provide certain goods and services... This differentiation also reflects two conceptions of liberty: negative liberty, or liberty from, and positive liberty, or liberty to.”).

<sup>37</sup> U.N. Hum. Rts. Council, *Role of Local Government in the Promotion and Protection of Human Rights – Final Report of the Human Rights Council Advisory Committee*, ¶ 27, U.N. Doc. A/HRC/30/49 (Aug. 7, 2015); Columbia Law School Human Rights Institute, *Gender Equity Through Human Rights: Local Efforts to Advance the Status of Women and Girls in the United States* 4 (Jan. 2017).



and cross-cutting right to equality requires addressing disparate impact, not just intentional discrimination.<sup>38</sup>

Indeed, an important dimension of human rights engagement in the U.S. is the incorporation of human rights norms at a local level. This entails close to a dozen self-declared human rights cities that articulate a commitment to international human rights standards in some form, including Boston, MA; Carrboro and Chapel Hill, NC; Dallas, TX; Edina, MN; Eugene, OR; Jackson, MS; Mountain View and Richmond, CA; Pittsburgh, PA; Seattle, WA; and Washington, DC. Additionally, Dallas County, Texas designated itself a human rights county in 2017, and Pottage, Michigan affirmed its human rights commitment to residents in 2019.<sup>39</sup> The U.S. further has a vibrant Cities for CEDAW movement, focused on addressing discrimination against women. There are currently nine U.S. cities or counties with binding CEDAW ordinances,<sup>40</sup> used as a basis for gender assessments of city policies, programs, and budgets.<sup>41</sup> Furthermore, over 30 cities have passed resolutions in support of CEDAW,<sup>42</sup> which, while not legally binding, signal endorsement of women's human rights and may be useful in advocacy.

Additionally, the international human rights system provides a set of practical tools to exert political pressure and facilitate coalition-building and mobilization, as discussed in the case studies below. While the U.S. has taken only meager steps to apply human rights norms domestically,<sup>43</sup> it

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<sup>38</sup> HUMAN RIGHTS COMMITTEE, General Comment No. 18: Non-Discrimination, ¶ 6, U.N. Doc. HRI/GEN1/Rev. 1 (1994); Risa E. Kaufman, *Book Review, Human Rights in the United States: Reclaiming the History and Ensuring the Future*, 40 COLUM. HUM. RTS. L. REV. 149, 156 (2008) (noting that international instruments, unlike the U.S. Constitution, “define discrimination broadly, so as to include any act with discriminatory effects or impact, and require the government to provide a remedy, including measures to rectify past discrimination”). Scholars, such as Olatunde Johnson, point to constraints in the current U.S. framework, which include “[s]trains on the private attorney-general regime and the limited efficacy of ex post enforcement regimes in addressing structural exclusion.” Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 141 (2016).

<sup>39</sup> Tamar Ezer, *Localizing Human Rights in Cities*, 31 S. CAL. REV. L. & SOC. JUST. 68, 72-73 (2022).

<sup>40</sup> *Cities for CEDAW: Status of Local Activities*, Women's Intercultural Network, <http://citiesforcedaw.org/wp-content/uploads/2020/03/Landscape-Cities-for-CEDAW-Branded-for-Website-June-27-2019.pdf> [<https://perma.cc/7GCP-LVAP>].

<sup>41</sup> Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1655 (2006); Anu Menon, San Francisco Department on the Status of Women, *Human Rights in Action: San Francisco's Local Implementation of The United Nations' Women's Treaty (CEDAW)* 3 (2010).

<sup>42</sup> *Cities for CEDAW: Status of Local Activities*, *supra* note 40.

<sup>43</sup> Melish, *supra* note 18, at 391 (noting that the U.S. “has appeared to flinch and even recoil, when it comes to direct domestic application of human rights norms”); Kaufman, *supra* note 38, 150-151 (highlighting the U.S.'s “deep ambivalence toward upholding the norms that it helped to establish”). The U.S. is the only country not to have ratified the CRC and the only developed country not to have ratified CEDAW. See *Ratification Status for*

usually actively participates in human rights assessments in the international sphere, although this was not the case under the Trump administration.<sup>44</sup> For its periodic reports, the U.S. generally prepares detailed submissions to the relevant international bodies and attends dialogues with these bodies with robust participation by high-level, interagency delegations.<sup>45</sup> In this way, the U.S. seeks to set an example of constructive engagement for other countries as part of its foreign policy.<sup>46</sup> Consequently, engagement with the international human rights system presents domestic advocacy opportunities.

Resources are available to practitioners to facilitate human rights engagement with the U.N. system, including both written materials and networks. Good, user-friendly resources on the international human rights system have been developed by the U.N. Office of the High Commissioner for Human Rights (OHCHR)<sup>47</sup> and non-governmental organizations, such as the International Justice Resource Center.<sup>48</sup> Additionally, the Bringing Human Rights Home Lawyers Network provides materials to build the capacity of lawyers and advocates to use human rights standards and strategies, hosts periodic meetings to exchange ideas, and organizes an annual continuing legal education session on a timely human rights topic.<sup>49</sup>

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*United States of America*, U.N. Treaty Body Database, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN).

<sup>44</sup> Ed Pilkington, *US Halts Cooperation with UN on Potential Human Rights Violations*, THE GUARDIAN (Jan. 4, 2019), <https://www.theguardian.com/law/2019/jan/04/trump-administration-un-human-rights-violations> (“The silent treatment being meted out to key players in the UN’s system for advancing human rights marks a stark break with US practice going back decades. Though some areas of American public life have consistently been ruled out of bounds to UN investigators . . . Washington has in general welcomed monitors into the US as part of a wider commitment to upholding international norms.”); Julian Borger, *US Quits UN Human Rights Council - A “Cesspool of Political Bias”*, THE GUARDIAN (June 19, 2018), <https://www.theguardian.com/world/2018/jun/19/us-quits-un-human-rights-council-cesspool-political-bias>. However, under the Biden Administration, the U.S. subsequently decided to rejoin the Human Rights Council. John Hudson, *US Rejoins UN Human Rights Council Reversing Trump-Era Policy*, WASH. POST (Feb. 8, 2021), [https://www.washingtonpost.com/national-security/us-rejoins-un-human-rights-council-reversing-trump-era-policy/2021/02/08/91694b3e-6a1a-11eb-9ed1-73d434b5147f\\_story.html](https://www.washingtonpost.com/national-security/us-rejoins-un-human-rights-council-reversing-trump-era-policy/2021/02/08/91694b3e-6a1a-11eb-9ed1-73d434b5147f_story.html).

<sup>45</sup> Melish, *supra* note 18, at 419.

<sup>46</sup> *Id.* at 419, 461.

<sup>47</sup> OHCHR, *What Are Human Rights*, <https://www.ohchr.org/EN/pages/home.aspx>.

<sup>48</sup> International Justice Resource Center, *United Nations*, <http://www.ijrcenter.org/universal-tribunals-treaty-bodies-and-rapporteurs/>. Please also see THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (5th ed. 2017) for a good introduction to the international human rights system.

<sup>49</sup> Columbia Law School, *The Bringing Human Rights Home Lawyers’ Network*, <https://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network>. The U.S. Human Rights Network is another network that promoted a human rights movement in the U.S. by facilitating the sharing of information and creating access at international human rights bodies for grassroots groups and communities affected by human rights violations. In October 2021, however, the Network’s Board of Directors indefinitely paused the network’s operations. U.S. Human Rights Network, <https://www.ushrnetwork.org/>.

In parallel with the international human rights system at the U.N., there are also regional human rights systems in Africa, the Americas, and Europe. This includes the Inter-American human rights system in which the U.S. participates, discussed in the case study below on recognizing freedom from domestic violence as a human right. The International Justice Resource Center and the website of the Organization of American States (OAS) offer resources on engaging with the Inter-American system.<sup>50</sup>

All these avenues provide new opportunities for students to address human rights violations in the U.S. This is perhaps particularly valuable when opportunities under state and federal law seem to be contracting, or where more expansive frameworks are helpful in diagnosing and addressing violations. In the following Section, we consider three areas where human rights frameworks have proven fruitful for domestic advocacy, specifically examining clinic projects on the criminalization of homelessness, domestic violence, and gun violence as instructive case studies.

## II. CASE STUDIES OF HUMAN RIGHTS IN DOMESTIC ADVOCACY

This section presents three case studies of the application of human rights in the U.S. context, drawing on the work of four human rights clinics. The case studies focus on the criminalization of homelessness, recognizing a right to freedom from domestic violence, and addressing the role of guns in domestic violence—topics where international norms and pressure can help advance domestic work. Strategies used include taking advantage of international fora presented by human rights mechanisms for advocacy, compiling human rights documentation to develop a record and publicize violations, integrating human rights norms in domestic policymaking and litigation, and building human rights literacy and legal empowerment at a community level. These various strategies are intersecting and complementary, connecting advocacy in international and regional spaces with domestic work and legal advocacy with community engagement.

### A. *Challenging the Criminalization of Homelessness*

Across the U.S., people experiencing homelessness are exposed to a range of laws and ordinances criminalizing their behavior. These restrictions often prohibit loitering or panhandling, as well as resting,

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<sup>50</sup> International Justice Resource Center, *Regional Human Rights Systems*, <http://www.ijrcenter.org/regional/>; Organization of American States, *Our Structure*, [http://www.oas.org/en/about/our\\_structure.asp](http://www.oas.org/en/about/our_structure.asp). See also Caroline Bettinger-López, *The Inter-American Human Rights System: A Primer*, 42 CLEARINGHOUSE REV.: J. POVERTY L. & POL'Y 581 (2009).

sleeping, urinating, and other behaviors that many people experiencing homelessness must necessarily do in public. Violating these prohibitions opens people to police harassment, arrest, and penalties, which in turn makes it more difficult to secure stable housing and employment.<sup>51</sup>

The criminalization of homelessness has prompted notable domestic litigation, including cases successfully challenging the criminalization of necessary behaviors in public as a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>52</sup> While domestic law provides some opportunities to challenge violations against people experiencing homelessness, no states and cities recognize an enforceable right to housing,<sup>53</sup> the right to an adequate standard of living, and other international human rights that all people, including people experiencing homelessness, enjoy. The human rights framework offers a more expansive way to think about the full range of rights at stake in the criminalization of homelessness, and to develop creative interventions that are responsive to the lived experiences of people experiencing homelessness.

The Lowenstein International Human Rights Clinic at Yale Law School ("Lowenstein Clinic") and the Human Rights Clinic at the University of Miami School of Law ("Miami Human Rights Clinic") have worked with advocates on multiple projects affirming the human rights of people experiencing homelessness in the U.S. Strategies used include U.N. advocacy, documentation of violations, integrating human rights standards in litigation and policymaking, and building human rights literacy and legal empowerment to address homelessness. These various projects illustrate some of the possibilities of using human rights language and strategies to center conversations about human dignity and the lived experiences of marginalized populations.

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<sup>51</sup> NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2018), <https://homelesslaw.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf>; Nicole Weissman & Marina Duane, *Five Problems with Criminal Background Checks*, URBAN INST. (Mar. 13, 2007), <https://www.urban.org/urban-wire/five-problems-criminal-background-checks>; *Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America*, ¶ 45, U.N. Doc. A/HRC/38/33/Add.1 (2018).

<sup>52</sup> *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

<sup>53</sup> Madison, San Diego, and Washington, DC, have passed non-binding right to housing resolutions. City of Madison Resolution 11-00984, <https://madison.legistar.com/LegislationDetail.aspx?ID=1075403&GUID=F3511F44-503F-46EC-8ED5-45BF4297F345&FullText=1>; Phillip Molnar, *San Diego Declares "Housing as a Human Right," But Does It Mean Anything Legally?*, SAN DIEGO UNION TRIB. (Jan. 24, 2023), <https://www.sandiegouniontribune.com/business/story/2023-01-24/san-diego-declares-housing-as-a-human-right>; Meetal Jain, *Bringing Human Rights Home: The DC Right to Housing Campaign*, 17 HUM. RTS. BRIEF 10 (2010), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1127&context=hrbrief>. Puerto Rico also recognizes a right to an adequate standard of living that includes a right to housing. P.R. Const. art. II §20.

### 1. *Engaging with International Human Rights Mechanisms*

As an initial matter, international human rights advocacy opens additional fora for making claims and the opportunity for exerting international pressure, strengthening domestic advocacy. Engaging with international human rights mechanisms, as discussed in Section III below, further facilitates coalition-building and dialogue with government officials. Both the Lowenstein Clinic and the Miami Human Rights Clinic have engaged with U.N. mechanisms to draw attention to the criminalization of homelessness in the U.S. in collaboration with the National Homelessness Law Center (NHLC). The Lowenstein Clinic and NHLC analyzed how approaches to homelessness in the U.S. violate rights enshrined in the ICCPR<sup>54</sup> and submitted key findings to the U.N. Human Rights Committee, which periodically assesses how states might improve compliance with their obligations under the ICCPR.<sup>55</sup> Submitting these “shadow reports” when states are under review is one way that civil society actors, including law school clinics, can encourage a treaty body to inquire into human rights conditions in a country and publicize violations to an international audience.<sup>56</sup> In concluding its review, the Committee urged the U.S. to end the criminalization of homelessness and develop rights-respecting solutions for people experiencing homelessness, providing support for advocates in the U.S. and elsewhere challenging criminalization.<sup>57</sup>

The Miami Human Rights Clinic has likewise collaborated with NHLC on U.N. advocacy. Students engaged in research, conducted interviews, and coordinated with advocates to develop a report on racial

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<sup>54</sup> Students in the Clinic produced a report detailing how the criminalization of homelessness can amount to cruel, inhuman, and degrading treatment; interferes with the freedom of assembly; undermines the right to liberty and security of the person and puts people at risk of arbitrary arrest and detention; and threatens the right to privacy. The report also noted that constraints on people experiencing homelessness put their right to family, right to vote, and freedom from discrimination at risk. NAT'L L. CTR. ON HOMELESSNESS & POVERTY (currently NAT'L HOMELESSNESS L. CTR.) & ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, *CRUEL, INHUMAN, AND DEGRADING: HOMELESSNESS IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (2013), [https://nlchp.org/wp-content/uploads/2018/10/Cruel\\_Inhuman\\_and\\_Degrading-1.pdf](https://nlchp.org/wp-content/uploads/2018/10/Cruel_Inhuman_and_Degrading-1.pdf). For the 2023 U.S. review by the Human Rights Committee, NHLC and the Miami Human Rights Clinic collaborated on a shadow report on *The Criminalization of Homelessness and Mental Health in the United States*, available at <https://miami.app.box.com/s/ts2gz8qy14gqh674619avty2jdu4z3w7>.

<sup>55</sup> OHCHR, Human Rights Committee, <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>.

<sup>56</sup> See, e.g., Joel R. Pruce, *The Ferguson Uprising, Shadow Reporting, and Human Rights Experimentalism*, 45 HUM. RTS. Q. 88 (2023).

<sup>57</sup> Hum. Rts. Comm., *Concluding Observations on the Fourth Periodic Report of the United States of America*, United States of America, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (2014). See also Hum. Rts. Comm., *Concluding Observations on the Fifth Periodic Report of the United States of America*, ¶ 41, U.N. Doc. CCPR/C/USA/CO/5 (2023).

injustice in housing and homelessness.<sup>58</sup> They then submitted this report to the U.N. Committee on the Elimination of Racial Discrimination, which assesses state compliance with ICERD.<sup>59</sup> In addition to the written submission, students traveled to Geneva and engaged in on-the-ground advocacy with the Committee for strong recommendations to the U.S. government. Students made oral statements during a public meeting between civil society and the Committee, bringing key issues to the Committee's attention. They further developed a succinct factsheet with key points and recommendations,<sup>60</sup> translated it into French and Spanish,<sup>61</sup> and engaged in individual discussions with Committee members and the U.S. delegation.<sup>62</sup> Students thus had the opportunity to develop critical lawyering skills in relationship-building, research, interviewing, legal analysis, writing, collaboration, and oral advocacy. These efforts paid off, and in concluding its review, the Committee called upon the U.S. government to "abolish laws and policies that criminalize homelessness," "redirect funding from criminal justice responses to adequate housing and shelter programs, in particular for persons belonging to racial and ethnic minorities most affected by homelessness,"<sup>63</sup> and "affirmatively further[] fair housing and protection against discriminatory effects."<sup>64</sup>

Additionally, the Miami Human Rights Clinic collaborated with NHLC on a submission on housing and homelessness as part of the Universal Periodic Review (UPR) of the U.S. by the U.N. Human Rights Council.<sup>65</sup> The U.N. Human Rights Council is an

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<sup>58</sup> University of Miami School of Law, Human Rights Clinic et al., *Racial Injustice in Housing and Homelessness in the United States*, Shadow Report to the U.N. Committee on the Elimination of Racial Discrimination (2022), <https://miami.app.box.com/s/x2obqbt-gy84o5qkfipyxct03nzd4g0l>. See also an advocacy factsheet developed from the longer submission at University of Miami School of Law, Human Rights Clinic et al., *Racial Injustice in Housing and Homelessness in the United States*, <https://miami.app.box.com/s/xfgsbuq6nnn03rcn5tg1lyhgfinuk1id>.

<sup>59</sup> OHCHR, Committee on the Elimination of Racial Discrimination, <https://www.ohchr.org/en/treaty-bodies/cerd>.

<sup>60</sup> Human Rights Clinic et al., *Racial Injustice in Housing and Homelessness in the United States*, <https://miami.app.box.com/s/xfgsbuq6nnn03rcn5tg1lyhgfinuk1id>.

<sup>61</sup> The French and Spanish versions of the factsheet are available at <https://miami.app.box.com/s/b2q9lqmetnvdadm06sxh2p0fbmlyli52f> and <https://miami.app.box.com/s/1v6hr6bbx-z5vu5w2al8rk7ffji70glx>.

<sup>62</sup> Please see a description of the students' advocacy at *Human Right Clinic Advocates for the Right to Food, Health, and Housing at the U.N.*, University of Miami School of Law (Sept. 21, 2022), <https://news.miami.edu/law/stories/2022/09/human-rights-clinic-advocates-for-rights-to-food.html>.

<sup>63</sup> Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America, ¶ 40, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022).

<sup>64</sup> *Id.* ¶ 38.

<sup>65</sup> UNIVERSITY OF MIAMI SCHOOL OF LAW HUMAN RIGHTS CLINIC ET AL., HOUSING AND HOMELESSNESS IN MIAMI-DADE COUNTY, FLORIDA (Oct. 2019), <https://miami.app.box.com/s/g0vzmxzmtmkrd1kxrfcf9nclty59tv1q>; NAT'L L. CTR. ON HOMELESSNESS & POVERTY



intergovernmental body of 47 states, which reviews the human rights records of all U.N. member states approximately every four years. The review provides a forum for states to peer review each other's records and provide recommendations for improvement.<sup>66</sup> Malta recommended that the U.S. refrain from using "policing as a response to societal problems largely related to poverty" and instead focus on solutions "that do not involve criminalization."<sup>67</sup> Similarly, Cuba recommended that the U.S. "[e]nd the criminalization of poverty."<sup>68</sup> For both of these recommendations, the U.S. affirmed that it "supports investing in direct solutions to alleviate the personal and social problems surrounding the issues of poverty."<sup>69</sup> Additionally, Ethiopia called for "reducing homelessness faced by vulnerable groups across the country,"<sup>70</sup> and Azerbaijan urged "strategies for addressing the housing and sanitary problems of marginalized communities."<sup>71</sup> The U.S. likewise indicated its support for these recommendations.<sup>72</sup>

Because enforcement of recommendations by U.N. bodies is a persistent challenge, it is important to connect those recommendations

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(currently NAT'L HOMELESSNESS L. CTR.) ET AL., *HOUSING AND HOMELESSNESS in the United States of America*, Submission to the United Nations Universal Periodic Review of the United States of America (Oct. 2019), <http://nlchp.org/wp-content/uploads/2019/10/Housing-Homelessness-US-UPR-2019.pdf>. See also an advocacy factsheet developed from the longer submission at University of Miami School of Law, Human Rights Clinic et al., *Housing and Homelessness in Miami-Dade County, Florida*, <https://miami.app.box.com/s/bmh4tbrex1h4j1o5xpkezqjhe1yfn6l>.

<sup>66</sup> U.N. Hum. Rts. Council, *Universal Periodic Review*, <https://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>.

<sup>67</sup> U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review*, United States of America, 26.255 U.N. Doc. A/HRC/46/15 (Dec. 15, 2020).

<sup>68</sup> *Id.* at 26.284.

<sup>69</sup> U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review*, United States of America, ¶ 12, U.N. Doc. A/HRC/46/15/Add.1 (2021). In the 2015 review, Egypt recommended that the U.S. "[a]mend laws that criminalize homelessness and which are not in conformity with international human rights instruments." HRC Recommendations to U.S.A. (Egypt) U.N. Doc. A/HRC/30/12/Add.1 – 176.310; *Police Violence Against Homeless, Poor Persons, Housing & Homelessness Addressed at Global Review of U.S. Human Rights Record*, HOMELESSNESS LAW (May 14, 2015), <http://homelessnesslaw.org/2015/05/police-violence-against-homeless-poor-persons-housing-homelessness-addressed-at-global-review-of-u-s-human-rights-record/>. While the U.S. did not concede that current laws violate international standards, it declared that it is "committed to helping communities pursue alternatives to criminalizing homelessness." U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review*, United States of America, *Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, ¶ 12, U.N. Doc. A/HRC/30/12/Add.1 (Sept. 14, 2015), [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_12\\_Add\\_1\\_ENG.DOCX](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_12_Add_1_ENG.DOCX).

<sup>70</sup> U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review*, United States of America, 26.286, U.N. Doc. A/HRC/46/15 (Dec. 15, 2020).

<sup>71</sup> *Id.* at 26.287.

<sup>72</sup> U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review*, United States of America, ¶ 12, U.N. Doc. A/HRC/46/15/Add.1 (2021).



to domestic advocacy.<sup>73</sup> NHLC has developed a sophisticated strategy for engaging with the international human rights system, which focuses on both the development of human rights norms and their implementation, and the Clinics' participation was part of this larger strategy. NHLC first advocated with the U.N. Special Rapporteurs, or U.N.-appointed subject matter experts, which tend to be the most flexible and creative human rights entities at the U.N., to lay the groundwork for addressing the criminalization of homelessness as a human rights issue. Next, NHLC, in conjunction with the Lowenstein Clinic and the Miami Human Rights Clinic, engaged with the more legalistic treaty bodies, such as the Human Rights Committee, charged with monitoring compliance with particular U.N. treaties, to further develop these standards. Finally, NHLC, collaborating with the Miami Human Rights Clinic, turned to the Human Rights Council, a more political entity, to affirm these standards. In parallel, advocates used these various processes to trigger meetings with federal officials to advance human rights implementation domestically.<sup>74</sup> Thus, at the same time that advocates focused on developing international human rights norms, they also used international processes to obtain meetings with government officials to implement them.

NHLC's strategy has borne fruit, leading the Federal Strategic Plan to End Homelessness, endorsed by nineteen agencies, to recognize that "[c]riminally punishing people for living in public when they have no alternative violates human rights norms, wastes precious resources, and ultimately does not work."<sup>75</sup> It further resulted in a Statement of Interest Brief by the Department of Justice (DOJ) in the seminal case of *Martin v. Boise*, recognizing that criminalizing sleeping outside for those with no alternative violates the Eighth Amendment prohibition on cruel and unusual punishment, the domestic analogue of the international right to freedom from cruel, inhuman, and degrading treatment.<sup>76</sup>

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<sup>73</sup> See NAT'L CTR. ON HOMELESSNESS & POVERTY, HUMAN RIGHTS TO HUMAN REALITY: A 10 STEP GUIDE TO STRATEGIC HUMAN RIGHTS ADVOCACY (2014), [https://homelesslaw.org/wp-content/uploads/2018/10/Human\\_Rights\\_to\\_Human\\_Reality-1.pdf](https://homelesslaw.org/wp-content/uploads/2018/10/Human_Rights_to_Human_Reality-1.pdf).

<sup>74</sup> University of Miami School of Law, Human Rights Clinic et al., *Strategy Meeting: Realizing the Rights to Food, Health and Housing in the U.S.* 4 (Nov. 2020), <https://miami.app.box.com/s/xv0eid3835pnllhmt1oapcwtnrdv2dy17>. See also Eric Tars, Tamar Ezer, Melanie Ng, David Stuzin & Conor Arevalo, *Challenging Domestic Injustice through International Human Rights Advocacy: Addressing Homelessness in the United States*, 42 CARDOZO L. REV. 913, 936-963 (2021) (providing a detailed discussion of Law Center's strategy for engagement with the international human rights system).

<sup>75</sup> U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, OPENING DOORS: FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS 53 (2015).

<sup>76</sup> Statement of Interest of the United States, *Bell v. City of Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014) (No. 1:09-cv-00540-REB) ("It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment."); *Justice Department Files Brief to Address the Criminalization of Homelessness*, U.S. DEPT. JUST. OFF. PUB. AFF. (Aug. 6, 2015), <http://www.justice.gov/opa/pr/>

Even prior to the Ninth Circuit's holding in *Martin v. Boise*,<sup>77</sup> national news coverage of the DOJ brief led some cities to preemptively repeal ordinances criminalizing homelessness or modify their enforcement,<sup>78</sup> as well as courts to adopt the DOJ's position.<sup>79</sup> Additionally, following international human rights advocacy, the Department of Housing and Urban Development (HUD) now provides funding incentives for communities taking steps to end the criminalization of homelessness.<sup>80</sup>

## 2. Documenting Human Rights Violations

Human rights documentation, often referred to as “naming and shaming,” is a classic human rights approach, premised on the belief that producing clear evidence of rights violations will persuade or put pressure on responsible parties to address and resolve them.<sup>81</sup> The process of documentation offers pedagogically valuable opportunities to students, who are tasked with listening to partners and those affected by injustice, gathering persuasive evidence of the problems that individuals and communities are facing, and articulating how violations run afoul of state obligations under international law. It not only draws on interviewing and witness testimony, but typically also involves desk research, investigative work, and analysis of structural issues and shortcomings in state practice that put certain populations or communities at particular risk of harm. In addition to engaging in U.N. advocacy, both Clinics have documented and publicized human rights violations domestically.

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justice-department-files-brief-address-criminalization-homelessness. While the brief did not directly cite international human rights law, the DOJ later affirmed that its position in the case was an “acknowledgement of the human rights of people experiencing homelessness.” Letter from Lisa Foster, Dir., Off. for Access to Just., U.S. Dept. of Just., to Seattle City Council Members 3 (Oct. 13, 2016), <https://assets.documentcloud.org/documents/3141894/DOJ-ATJ-Letter-to-Seattle-City-Council-10-13-2016.pdf>.

<sup>77</sup> *Martin v. City of Boise*, 902 F.3d 1031, 1049 (9th Cir. 2018); *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), *cert. denied* 2019 U.S. LEXIS 7571 (Dec. 16, 2019).

<sup>78</sup> *E.g.*, *Homelessness Toolkit*, CITY OF PORTLAND, OR., <https://www.portlandoregon.gov/toolkit/article/562206> [<https://perma.cc/3QTW-N9JS>] (stating “Why won’t the police arrest people experiencing homelessness? Being homeless is not against the law. The Department of Justice has recently made it clear that not allowing people to sleep on the street may be illegal.”).

<sup>79</sup> *E.g.*, *Smith v. City of Corvallis*, No. 6:14-cv-01382-MC, 2016 WL 3193190, at \*1–2 (D. Or. June 6, 2016); *Cobine v. City of Eureka*, No. C 16-02239 JSW, 2016 WL 1730084 (N.D. Cal. May 2, 2016); *City of North Bend v. Bradshaw*, No. Y123426A (Issaquah Mun. Ct. Jan. 13, 2016).

<sup>80</sup> NAT’L L. CTR. ON HOMELESSNESS & POVERTY, SCORING POINTS: HOW ENDING THE CRIMINALIZATION OF HOMELESSNESS CAN INCREASE HUD FUNDING TO YOUR COMMUNITY 1, 6 (2018), <https://nlchp.org/wp-content/uploads/2018/10/NOFAtoolkit2018.pdf>.

<sup>81</sup> *See* Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 64 INT’L ORG. 689 (2008). Documentation need not be used in this way, though, and can also be used to establish the existence of a problem or provide an evidentiary basis for coordination and advocacy.

Yale's Lowenstein Clinic produced two research reports illustrating the human cost of criminalization. The first report, *Welcome Home: The Rise of Tent Cities in the United States*, was produced in partnership with NHLHC as part of a broader effort to document the harmful consequences of criminalization and identify a range of policy responses. It drew on firsthand interviews with residents and former residents of tent cities to examine the factors that give rise to homeless encampments in the U.S. and made recommendations for governments to address abuses and help people obtain stable housing.<sup>82</sup> The second, "*Forced Into Breaking the Law*": *The Criminalization of Homelessness in Connecticut*, was undertaken in partnership with local organizers working on housing and homelessness. It examined punitive laws and policies in Connecticut that trap people in a cycle of homelessness and punishment that is difficult to escape, and called on state lawmakers, municipal governments, police departments, and other entities to end practices that contribute to this cycle.<sup>83</sup> In both reports, documentation helped define the nature of the violations that people experienced and identify the most rights-respecting options available to policymakers. By examining the lived experiences of people experiencing homelessness, for example, the reports explained why rigid housing options that police people's behaviors and relationships might be unattractive or unacceptable to those in need of shelter, and underscored the importance of providing options that respect people's dignity, privacy, and autonomy.

The Miami Human Rights Clinic has collaborated with NHLHC on a Right to Housing Report Card, documenting and grading the U.S. response to housing and homelessness along the seven dimensions of the human right to housing.<sup>84</sup> The Report Card thus uses international human rights as an accountability framework and to push for housing policies that enable people to live in a safe, stable place with dignity. In working on the Report Card, students coordinated with advocates, conducted research and interviews, and engaged in analysis connecting human rights standards with domestic laws and policies, developing critical lawyering skills.

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<sup>82</sup> NAT'L L. CTR. ON HOMELESSNESS & POVERTY & ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, *WELCOME HOME: THE RISE OF TENT CITIES IN THE UNITED STATES* (2014), [https://law.yale.edu/sites/default/files/documents/pdf/WelcomeHome\\_TentCities\\_final\\_report.pdf](https://law.yale.edu/sites/default/files/documents/pdf/WelcomeHome_TentCities_final_report.pdf).

<sup>83</sup> ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCHOOL, "*FORCED INTO BREAKING THE LAW*": *THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT* (2016), [https://law.yale.edu/sites/default/files/documents/pdf/news/criminalization\\_of\\_homelessness\\_report\\_for\\_web\\_full\\_report.pdf](https://law.yale.edu/sites/default/files/documents/pdf/news/criminalization_of_homelessness_report_for_web_full_report.pdf).

<sup>84</sup> University of Miami School of Law, Human Rights Clinic, *Human Right to Housing Report Card 2023: Grading the United States Response to Housing and Homelessness* (Oct. 2023), <https://homelesslaw.org/wp-content/uploads/2023/09/ReportCard2023.pdf>.

### 3. *Integrating Human Rights Standards in Policymaking and Litigation*

Human rights documentation develops a record of violations and provides critical support for change, including the integration of human rights norms in policymaking and litigation. The Miami Human Rights Clinic has brought human rights standards to domestic advocacy and litigation to address the criminalization of homelessness. In June 2020, the Clinic submitted a comment providing a human rights analysis of the problems with an ordinance in Miami that criminalizes food sharing, or the feeding of people experiencing homelessness in large groups in public places without a permit and at non-designated feeding locations, with only five inconvenient locations designated.<sup>85</sup> While the City Commission sought “to balance the rights of those well-intentioned individuals and groups who distribute food to the homeless with the property rights of residents and businesses in the City,”<sup>86</sup> the human rights analysis centered the rights of people experiencing homelessness who rely on that food to stay alive. It highlighted how criminalizing food sharing impedes the fundamental rights to life and to an adequate standard of living and tied the Commission’s desire to control the activities of people experiencing homelessness to an underlying violation of the right to housing.<sup>87</sup> The Clinic is currently providing support to a coalition of advocates working to challenge this ordinance.

Additionally, in June 2021, in collaboration with NHLC and Leilani Farha, the former U.N. Special Rapporteur on the right to adequate housing and Global Director of The Shift,<sup>88</sup> the Miami Human Rights Clinic filed an amicus brief in the Ninth Circuit, highlighting human rights violations in the impositions of fines and fees for life-sustaining activities.<sup>89</sup> In the case, the plaintiffs, who were all people experiencing street homelessness, collectively received 615 tickets for either sleeping or camping in public, despite Grants Pass not having any homeless

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<sup>85</sup> University of Miami School of Law, Human Rights Clinic, Comment on Ordinance 7440, amending Chapter 25 of the Code of the City of Miami to create regulations for the use of city of Miami streets and public spaces for large group feedings, <https://miami.app.box.com/s/8njkvqz14rf7ht3g1b5nev7cx5mddglh>.

<sup>86</sup> Proposed Ord. No. 7440.

<sup>87</sup> University of Miami School of Law, Human Rights Clinic, Comment on Ordinance 7440, amending Chapter 25 of the Code of the City of Miami to create regulations for the use of city of Miami streets and public spaces for large group feedings, <https://miami.app.box.com/s/8njkvqz14rf7ht3g1b5nev7cx5mddglh>.

<sup>88</sup> See The Shift, *The Global Movement to Secure the Human Right to Housing*, <https://www.make-the-shift.org/>.

<sup>89</sup> Brief for Univ. of Miami Sch. of Law, Human Rights Clinic, Nat’l Homelessness Law Center & The Shift as Amici Curiae, *Blake v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) (Nos. 20-35752 & 20-35881).

shelters or emergency beds.<sup>90</sup> The brief specifically focused on violations of the right to be free from cruel, inhuman, and degrading treatment and argued that a human rights analysis should inform interpretation of the Eighth Amendment's prohibition of cruel and unusual punishment, which hinges on "evolving standards of decency."<sup>91</sup> The brief concludes by noting that the U.S.'s failure to recognize the right to adequate housing is at the root of punishment for homelessness and that it is within the Court's authority to order measures enabling access to housing, addressing the underlying cause of a violation that has persisted for years.<sup>92</sup>

The Lowenstein Clinic has similarly sought to bring international human rights standards to bear on domestic policymaking in New Haven, Connecticut. Nationally, one way that advocates have affirmed the rights of people experiencing homelessness is the passage of state and municipal Homeless Bills of Rights.<sup>93</sup> The Clinic worked with the city's Homeless Advisory Commission (HAC), advocates, and community members to draft and refine a Homeless Bill of Rights as a city ordinance.<sup>94</sup> The final version approved by HAC and submitted to the city contained provisions affirming the rights to enjoy public space, to meet basic needs, to vote, to own personal property and have privacy, to safety, to rest, to social exchange, and to emergency housing.<sup>95</sup> It also contained nondiscrimination provisions, prohibiting discrimination in employment, housing, and medical care on the basis of housing status.<sup>96</sup> Although it has not passed at the time of writing, it set a baseline for advocacy with the city around the rights of people experiencing homelessness. Through these different projects, the students gained

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<sup>90</sup> *Blake v. Grants Pass*, No. 1:18-cv-01823-CL, at 10-11 (D. Or. July 22, 2020).

<sup>91</sup> Debra Blake Amicus Brief, *supra* note 89, at 1-10; *see also* *Roper v. Simmons*, 543 U.S. 551, 551 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)).

<sup>92</sup> Debra Blake Amicus Brief, *supra* note 89, at 10-17. For additional information on this brief, please see Miami Law Staff Report, *Human Rights Law Clinic Advocates for the Decriminalization of Homelessness Before the Ninth Circuit* (June 10, 2021), <https://www.law.miami.edu/news/2021/june/human-rights-law-clinic-advocates-decriminalization-homelessness-ninth-circuit>; Tamar Ezer & Lily Fontenot, *Housing, Not Fines to Address Homelessness*, HUMAN RIGHTS AT HOME BLOG (June 8, 2021), [https://lawprofessors.typepad.com/human\\_rights/2021/06/housing-not-fines-to-address-homelessness.html?utm\\_source=feedburner&utm\\_medium=email&utm\\_campaign=Feed%3A+HumanRightsAtHome+%28Human+Rights+at+Home+Blog%29#](https://lawprofessors.typepad.com/human_rights/2021/06/housing-not-fines-to-address-homelessness.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+HumanRightsAtHome+%28Human+Rights+at+Home+Blog%29#).

<sup>93</sup> These bills of rights have been enacted in Connecticut, Illinois, and Rhode Island, in addition to various municipalities. *See* Nat'l Coalition for the Homeless, *Homeless Bill of Rights*, <http://nationalhomeless.org/campaigns/bill-of-right> (last visited July 17, 2021).

<sup>94</sup> Thomas Breen, *Homeless Bill of Rights Sparks Debate*, NEW HAVEN INDEP. (Feb. 6, 2019), [https://www.newhavenindependent.org/index.php/archives/entry/homeless\\_hearing](https://www.newhavenindependent.org/index.php/archives/entry/homeless_hearing).

<sup>95</sup> Bill of Rights for New Haven Residents Experiencing Homelessness, sec. 3, on file with author.

<sup>96</sup> *Id.*

facility with advocacy in various fora, including navigating city politics and contributing to litigation.

#### 4. *Building Human Rights Literacy and Legal Empowerment*

A fourth important human rights strategy is the building of human rights literacy and legal empowerment, translating human rights law for and with communities.<sup>97</sup> As discussed in Section III below, human rights advocacy emphasizes engagement with communities, complementing engagement with the law and legal bodies. This does not only involve the mutual sharing of knowledge about issues that people are facing and human rights obligations under regional and international law, but also encouraging and facilitating the use of legal tools to seek justice.<sup>98</sup> The Miami Human Rights Clinic has worked to build human rights literacy on homelessness and strategize with national and local partners on advocacy tools. Following up on the UPR submission, the Clinic partnered with NHLC and local Miami advocates on a series of factsheets on the human right to adequate housing<sup>99</sup> and on the intersection of homelessness with race<sup>100</sup> and gender, including the experiences of women<sup>101</sup> and lesbian, gay, bisexual, transgender, and queer (LGBTQ) communities,<sup>102</sup> and the impact of COVID-19.<sup>103</sup> The Clinic further developed a series of factsheets focused on various components of the international human

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<sup>97</sup> E.g., Kathleen Kelly Janus & Dee Smythe, *Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic*, 56 NYS L. REV. 445, 476 (2012) (referring to convenings with community leaders and the drafting of factsheets as “us[ing] legal knowledge to empower minor revolutions”).

<sup>98</sup> The concept of “legal empowerment” has been defined as “[t]he transfer of power from the usual gatekeepers of the law—lawyers, judges, police, and state officials—to ordinary people who make the law meaningful on a local level and enhance the agency of disadvantaged populations.” EMMA DAY & RYAN QUINN, OPEN SOC’Y FOUND., BRINGING JUSTICE TO HEALTH: THE IMPACT OF LEGAL EMPOWERMENT PROJECTS ON PUBLIC HEALTH 1 (2013). For examples of legal empowerment projects, see *id.*; Tamar Ezer, *Medical-Legal Partnerships with Communities: Legal Empowerment to Transform Care*, 17 YALE J. HEALTH POL’Y, LAW & ETHICS 309 (2017).

<sup>99</sup> University of Miami School of Law Human Rights Clinic et al., *What Is the Right to Housing*, <https://miami.app.box.com/s/7i1w7myiz27qc1yuiwobrscaopl1rbq2>.

<sup>100</sup> University of Miami School of Law Human Rights Clinic et al., *A Racial Justice Response to Homelessness*, <https://miami.app.box.com/s/p3b5g6xoaw05lbcxnfou6fx557c5krw>.

<sup>101</sup> University of Miami School of Law Human Rights Clinic et al., *Women’s Homelessness in the United States*, <https://miami.app.box.com/s/h7csvo69hy8rbhd94j31v019f1j5l3pg>.

<sup>102</sup> University of Miami School of Law Human Rights Clinic et al., *Homelessness in the LGBTQ Community in the United States*, <https://miami.app.box.com/s/6ajyu7b7mt7g59ckoe0onho02jzokf8l>.

<sup>103</sup> University of Miami School of Law Human Rights Clinic et al., *Addressing the Impact of COVID-19 on People Experiencing Homelessness*, <https://miami.app.box.com/s/neb02gohomjczdmya3ivvuxl7dj4edf>.



right to housing, including equality,<sup>104</sup> affordability,<sup>105</sup> tenant rights,<sup>106</sup> and informal settlements,<sup>107</sup> providing guidance and highlighting good practices from countries around the world. Additionally, the Clinic published an op-ed in the *Miami Herald* with human rights framing on the need for homes to protect people experiencing homelessness from COVID-19.<sup>108</sup> Most recently, the Clinic has partnered with artists, including those with lived experience with homelessness, to illustrate the seven dimensions of the human right to housing in powerful and concrete ways connected to community experiences.<sup>109</sup> Through these efforts, students learn to break down the law to its essential components, connect the law to real experiences, and engage effectively with a variety of audiences.

The Miami Human Rights Clinic has further collaborated with Matters at Play design lab at DePaul University, NHLC, and the Fines & Fees Justice Center to develop a series of virtual, interactive simulations highlighting how fines and fees in the U.S. justice system perpetuate poverty.<sup>110</sup> The simulations require participants to role play with the goal of generating empathy around the impossible binds in which current laws and policies place people experiencing homelessness and poverty. They are further embedded in a website introducing participants to the relevant human rights standards.<sup>111</sup> Clinic students have piloted these simulations and led a session on the criminalization of poverty with local high school students in Miami to an enthusiastic response. According to the Director of Legal Studies at the high school, the session “challenged our group to think deeper about problems and implications that were entirely new concepts for them” and was “a highlight” of a seminar on social and

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<sup>104</sup> University of Miami School of Law Human Rights Clinic et al., *Non-discrimination and Equality: At the Core of the Right to Housing*, <https://miami.app.box.com/s/j1kkp7lpp99uoigdy5i3rix3vvlwtwv>.

<sup>105</sup> University of Miami School of Law Human Rights Clinic et al., “*At a Reasonable Cost*”: *The Human Right to Affordable Housing*, <https://miami.app.box.com/s/ywd7r5kdiiizpgk5boy89if5tq8szvs96>.

<sup>106</sup> University of Miami School of Law Human Rights Clinic et al., *The Human Right to Housing: Protecting Tenants from Forced Eviction*, <https://miami.app.box.com/s/90hsh18p0b9hxxd2ayv1zzwuifrlgjk>.

<sup>107</sup> University of Miami School of Law Human Rights Clinic et al., *Informal Settlements and the Human Right to Adequate Housing*, <https://miami.app.box.com/s/3s2fv53ss7wz7py3xgyp5xqx8xwb8w1m>.

<sup>108</sup> Tamar Ezer & David Stuzin, *Homes for the Homeless is One of the Best Way to Protect them from COVID-19*, MIAAMI HERALD (May 26, 2020), [https://www.miamiherald.com/opinion/op-ed/article242995686.html?fbclid=IwAR3jKZJFc\\_Tnfq\\_ZraPemHY2znBqKCdnZMkjV\\_uf7gVDbey3Yiecyrh7C5I](https://www.miamiherald.com/opinion/op-ed/article242995686.html?fbclid=IwAR3jKZJFc_Tnfq_ZraPemHY2znBqKCdnZMkjV_uf7gVDbey3Yiecyrh7C5I).

<sup>109</sup> Please see the Miami Human Rights Clinic’s Art and the Right to Housing Project at <https://www.law.miami.edu/academics/programs/human-rights/initiatives/arts-rights/housing/>.

<sup>110</sup> National Homelessness Law Center et al., *Poor Not Guilty (P.N.G.) Challenge* (2022), <https://poornotguilty.org/challenge.html>.

<sup>111</sup> *Id.*



racial justice, drawing in students who had not previously participated.<sup>112</sup> Building on this session, the Clinic subsequently developed a Street Law lesson plan<sup>113</sup> centered around the challenges that others could use to teach high school students about the criminalization of poverty.<sup>114</sup>

### B. *Recognizing Freedom from Domestic Violence as a Human Right*

Domestic violence, the leading cause of homelessness for women,<sup>115</sup> is another area ripe for human rights advocacy. Domestic violence is pervasive across the U.S. About 41% of women and 26.3% of men have experienced sexual or physical violence and/or stalking by an intimate partner in their lifetimes.<sup>116</sup> More than half of the transgender individuals who responded to the 2015 U.S. Transgender Survey reported experiencing some form of intimate partner violence.<sup>117</sup> Domestic violence can have devastating consequences for the health, well-being, and financial security of survivors and their families.<sup>118</sup> In 2021, more than one third of female homicide victims were killed by a former or current intimate partner.<sup>119</sup>

Domestic violence is an underreported offense,<sup>120</sup> and responses of the criminal legal system, as well as other measures to prevent and respond to such violence, have historically been deeply inadequate.

<sup>112</sup> Email from Leah Storie, Cushman High School Director of Legal Studies, to Tamar Ezer, Acting Director, Human Rights Clinic and Faculty Director, Human Rights Program, University of Miami School of Law (Apr. 28, 2021) (on file with authors).

<sup>113</sup> For more about Street Law programs and their underlying philosophy, please see <https://streetlaw.org/>.

<sup>114</sup> Please see the lesson plan at <https://miami.app.box.com/s/p42utppo0z0grfqyg5q-qsyet0l6uza8re> and a PowerPoint teachers can adapt at <https://miami.app.box.com/s/rr54afwg9z7krt67fydib5fug2qs3zh>.

<sup>115</sup> University of Miami School of Law Human Rights Clinic et al., *Women's Homelessness in the United States*, <https://miami.app.box.com/s/h7csvo69hy8rbhd94j31v0l9f1j5l3pg>; *New Federal Policy Proposals Will Hurt Survivors of Domestic Violence*, NAT'L ALLIANCE TO END HOMELESSNESS (Oct. 23, 2019), <https://endhomelessness.org/new-federal-policy-proposals-will-hurt-survivors-of-domestic-violence/> (noting that 57% of all women experiencing homelessness report domestic violence as the immediate cause of their homelessness).

<sup>116</sup> NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION, CTRS. FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 4 (Oct. 2022), [https://www.cdc.gov/violenceprevention/pdf/nisvs/NISVSReportonIPV\\_2022.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs/NISVSReportonIPV_2022.pdf)

<sup>117</sup> NATIONAL CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 68 (2016) (surveying 27,715 transgender adults), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>118</sup> See Ctrs. For Disease Control and Prevention, Violence Prevention, *Fast Facts: Preventing Intimate Partner Violence 2* (2021), <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html>.

<sup>119</sup> Erica L. Smith, U.S. Dept. of Justice, Bureau of Justice Statistics, *Just the Stats: Female Murder Victims and Victim-Offender Relationship, 2021* (Dec. 2022), <https://bjs.ojp.gov/female-murder-victims-and-victim-offender-relationship-2021>.

<sup>120</sup> 2018 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets, [https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info\\_flyers/fact\\_sheets/2018NCVRW\\_IPV\\_508\\_QC.pdf](https://ovc.ojp.gov/sites/g/files/xyckuh226/files/ncvrw2018/info_flyers/fact_sheets/2018NCVRW_IPV_508_QC.pdf).

So too are domestic legal frameworks; for example, the U.S. Supreme Court's decision in *Castle Rock v. Gonzales* found that a victim of domestic violence who has a restraining order against her abuser has no constitutional due process right to have the police enforce that order.<sup>121</sup> A human rights framework, on the other hand, highlights the responsibility of government actors to provide a more robust and protective response to domestic violence, including a focus on prevention, protection, and support for survivors.

The Gender Justice Clinic at Cornell Law School has worked with local advocates on several initiatives that seek to affirm and implement the human right to be free from domestic violence. This has included domestic advocacy for the local implementation of a landmark decision by the Inter-American Commission on Human Rights against the U.S. Additionally, like the human rights clinics at Yale and the University of Miami, Cornell's Gender Justice Clinic engaged in documenting violations, integrating human rights standards in policymaking, and building human rights literacy and legal empowerment, in this case around the issue of domestic violence. This work enabled the Clinic and its partners to explore new models of addressing domestic violence that engaged diverse stakeholders, emphasized prevention, and provided robust support for survivors and their families. The human rights framework also helped situate this local work within broader national and transnational movements to end gender-based violence, affording valuable opportunities for multi-directional learning and collaboration.

### *1. Implementing the Decision of a Regional Human Rights Mechanism*

The Gender Justice Clinic's local initiatives to realize the right to be free from domestic violence began in 2014 as a collaboration between the newly founded Clinic<sup>122</sup> and the Advocacy Center of Tompkins County, an agency that provides services to survivors of domestic violence. This partnership began with a focus on local advocacy to help implement the decision of an international human rights mechanism, the IACHR. By inviting the local community to engage with a human rights body at the implementation stage, the Clinic and its partners fostered dialogue about the regional human rights decision and a sense of purpose among local actors who came to view themselves as being part of an international and national project as well. As discussed in Section III below, this advocacy also helped expand understandings of the problem

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<sup>121</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

<sup>122</sup> The Clinic was founded as the Global Gender Justice Clinic but changed its name to the Gender Justice Clinic in 2017.

of domestic violence and of the remedies needed to address it, and it facilitated coalition-building among local and national advocates.

The IACHR had issued its landmark decision on the issue of domestic violence a few years earlier in the case of *Lenahan v. United States*.<sup>123</sup> The decision was the result of tireless and creative advocacy by colleague Caroline Bettinger-López of the Miami Human Rights Clinic, generations of clinic students from Miami and Columbia Law Schools, and the late Lenora Lapidus and other lawyers at the ACLU's Women's Rights Project, on behalf of their courageous client Jessica Lenahan.

The facts of the case are chilling. In 1999, Ms. Lenahan's estranged husband, Simon Gonzales, had abducted their three daughters, Rebecca, Katheryn, and Leslie, in violation of a domestic violence restraining order. Ms. Lenahan, then Jessica Gonzales, repeatedly contacted the Castle Rock, Colorado police department, seeking their help, but the police told her that there was nothing they could do. In the early hours of the next morning, Simon Gonzales drove to the police station and started shooting. The police fired back, killing Mr. Gonzales. In the cab of his truck, they found the bodies of the three girls, who had been shot and killed.<sup>124</sup>

Jessica Lenahan sued the Castle Rock police. Her case eventually reached the Supreme Court, which found that she had no constitutional due process right to the enforcement of her restraining order.<sup>125</sup> Refusing to concede defeat, Ms. Lenahan took her case to the Inter-American Commission on Human Rights. In its landmark decision, the Commission held that the U.S. had violated the rights of Jessica Lenahan and her daughters under the American Declaration of Human Rights when it failed to act with due diligence to protect them from domestic violence or to afford Ms. Lenahan and her family meaningful redress.<sup>126</sup> The Commission called for an investigation into the failures related to the enforcement of the restraining order, reparations for Ms. Lenahan, and systemic remedies including legislative reform that would mandate the enforcement of restraining orders, policies for domestic violence education, and protocols relating to the investigation of missing children in the context of restraining order situations.<sup>127</sup>

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<sup>123</sup> *Jessica Lenahan (Gonzales) v. United States*, Case 12.626, Merits, Inter-Am. Comm'n. H.R., Report No. 80/11, OEA/Ser.L/V/II, doc. 69, ¶¶ 201, 215 (July 21, 2011).

<sup>124</sup> *Id.* ¶¶ 18-22.

<sup>125</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

<sup>126</sup> *Jessica Lenahan (Gonzales) et al. United States*, Case 12.626, Merits, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II, doc. 69, ¶¶ 5, 199 (2011) (finding that the United States failed to act with due diligence to protect Jessica and her daughters from domestic violence, which violated their rights to nondiscrimination and equal protection before the law, the children's right to life, in conjunction with their right to special protection as girl children, and Jessica and her family's right to judicial protection).

<sup>127</sup> *Id.* ¶¶ 201, 215.

The decisions of international human rights bodies are not enforceable in the way that domestic court decisions, backed by executive police power, are enforceable. Moreover, the Inter-American Commission's remedies are framed as recommendations rather than orders. Implementation thus required sustained efforts by Jessica Lenahan's legal team and other advocates across the country.<sup>128</sup> The Gender Justice Clinic's initiative sought to bring this decision home to the local actors, who are on the front lines of preventing and responding to domestic violence, and to help prevent the recurrence of situations like the one that Ms. Lenahan and her family endured.<sup>129</sup>

As the first step in this project, clinic students and their partners drafted and advocated for the adoption of local government resolutions recognizing that freedom from domestic violence is a fundamental human right.<sup>130</sup> Students conducted extensive outreach and presented to the local government bodies a petition and photos from an online campaign that documented broad community support.<sup>131</sup> They developed a white paper that presented Ms. Lenahan's story and the decision of the IACHR, explained why freedom from domestic violence is a human right, and discussed the symbolic and practical value of the proposed resolution.<sup>132</sup>

As a result of this advocacy, six local governments in rural Tompkins County, New York – from the Tompkins County Legislature to the Board of Trustees of the small Village of Cayuga Heights to the Tompkins County Council of Governments, an association of all of the local governments in the county – adopted versions of the proposed resolution,<sup>133</sup> while the executive branch of the City of Ithaca adopted a

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<sup>128</sup> See generally Caroline Bettinger-López, *Introduction: Jessica Lenahan (Gonzales) v. United States of America: Implementation, Litigation, and Mobilization Strategies*, 21(2) *Am. U. J. GENDER, SOC. POL'Y & L.* 207 (2012); Lenora M. Lapidus, *Jessica Lenahan Lived Through a Domestic Violence Nightmare and Emerged as a Heroic Advocate for Police Reform*, *ACLU BLOG* (June 9, 2017), <https://www.aclu.org/blog/womens-rights/violence-against-women/jessica-lenahan-lived-through-domestic-violence-nightmare>.

<sup>129</sup> See Advocacy Center of Tompkins County, Avon Global Center for Women and Justice at Cornell Law School, and Cornell Law School Global Gender Justice Clinic, *Recognizing Freedom from Domestic Violence as a Human Right: Background Note 6* (Oct. 2014), <https://www.lawschool.cornell.edu/wp-content/uploads/2020/11/Memo-Domestic-Violence-fr-Avon-Ctr-Advocacy-Ctr-Oct-2014-Cornell-White-Paper.pdf>.

<sup>130</sup> See, e.g., Advocacy Center of Tompkins County, Avon Global Center for Women and Justice at Cornell Law School, and Cornell Law School Global Gender Justice Clinic, *Draft Resolution of the Tompkins County Legislature Declaring Freedom from Domestic Violence as a Human Right* (n.d.) (on file with authors).

<sup>131</sup> See Tompkins County Legislature, Regular Meeting Minutes, Nov. 18, 2014 (approved 12-2-14), <http://tompkinscountyny.iqm2.com/Citizens/FileOpen.aspx?Type=12&ID=2068&Inline=True>; Tompkins County Council of Governments, Regular Meeting Minutes, Jan. 22, 2015, <http://tompkinscountyny.iqm2.com/Citizens/FileOpen.aspx?Type=12&ID=2095&Inline=True>.

<sup>132</sup> Advocacy Center of Tompkins County et al., *supra* note 129.

<sup>133</sup> Tompkins County Legislature, *Declaring Freedom from Domestic Violence as a Human Right*, RES2014-214, Nov. 18, 2014; Ithaca Town Board, *Declaring Freedom from Domestic Violence as a Human Right*, TB Res 2014-197, Dec. 8, 2014; Lansing Town Board, *Declaring*

related proclamation.<sup>134</sup> The Clinic's human rights arguments resonated with legislators across the political spectrum, including those from more rural and conservative areas. Several localities that the Clinic did not approach directly heard about the resolutions under consideration in nearby communities and were inspired to adopt their own versions.<sup>135</sup>

Although there were variations across the seven resolutions and proclamations, most addressed the local prevalence and impact of domestic violence, cited applicable international human rights law, and explained the need for the resolution.<sup>136</sup> Several discussed the Inter-American Commission's decision in *Lenahan*<sup>137</sup> and its call for the U.S. "to enact law and policy reforms at all levels to protect survivors of domestic violence and their children."<sup>138</sup> Significantly, the resolutions acknowledged state responsibility for addressing domestic violence and undertook to improve local domestic violence prevention and response.<sup>139</sup> In adopting these resolutions, Tompkins County and its

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Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014; Village of Cayuga Heights Board of Trustees, Declaring Freedom from Domestic Violence as a Human Right, Res 7552, Jan. 12, 2015; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Resolution, Mar. 6, 2015. These resolutions are available at Columbia Law School's Human Rights Institute, University of Miami School of Law's Human Rights Clinic, and Cornell Law School's Gender Justice Clinic, *Freedom from Domestic Violence as a Fundamental Human Right Resolutions, Presidential Proclamations, and Statements of Principle*, CORNELL LAW SCHOOL (last updated Feb. 2018), <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/gender-justice-clinic/freedom-from-domestic-violence-as-a-fundamental-human-right-resolutions-presidential-proclamations-and-other-statements-of-principle>.

<sup>134</sup> Svante T Myrick, Mayor of the City of Ithaca, City of Ithaca Proclamation, Apr. 24, 2015, <https://www.lawschool.cornell.edu/wp-content/uploads/2020/11/24b-Ithaca-City-Executive.pdf>.

<sup>135</sup> See Lansing Town Board, Declaring Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014; Village of Cayuga Heights Board of Trustees, Declaring Freedom from Domestic Violence as a Human Right, Res 7552, Jan. 12, 2015.

<sup>136</sup> Tompkins County Legislature, Declaring Freedom from Domestic Violence as a Human Right, RES2014-214, Nov. 18, 2014; Ithaca Town Board, Declaring Freedom from Domestic Violence as a Human Right, TB Res 2014-197, Dec. 8, 2014; Lansing Town Board, Declaring Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Resolution, Mar. 6, 2015.

<sup>137</sup> Tompkins County Legislature, Declaring Freedom from Domestic Violence as a Human Right, RES2014-214, Nov. 18, 2014; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Resolution, Mar. 6, 2015.

<sup>138</sup> Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Resolution, Mar. 6, 2015.

<sup>139</sup> See Tompkins County Legislature, Declaring Freedom from Domestic Violence as a Human Right, RES2014-214, Nov. 18, 2014; Ithaca Town Board, Declaring Freedom from Domestic Violence as a Human Right, TB Res 2014-197, Dec. 8, 2014; Lansing Town Board, Declaring Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014;

localities joined a growing national momentum; today, more than thirty-five local governments have adopted similar resolutions.<sup>140</sup> Through this work, Clinic students had the opportunity to hone their research and writing skills, gain important policy advocacy experience, and think deeply about the possibilities afforded by local engagement in the implementation of an international human rights decision.

## 2. *Documenting Human Rights Violations*

Documenting human rights violations is a strategy that human rights advocates frequently use to uncover the nature and scope of the problem and identify actions needed to remedy the violations. Following the adoption of the domestic violence-human rights resolutions, Clinic students and their partners, which expanded to include the Tompkins County Office of Human Rights, a government agency, and the Tompkins County Human Rights Commission, an independent body appointed by the County legislature, carried out several initiatives aimed at implementing the right recognized in the local resolutions. The first initiative involved collecting perspectives from community members about the gaps and challenges that exist in realizing the right to be free from domestic violence and the changes needed to address those gaps and challenges. It also engaged local actors in dialogue about the meaning of the human right that their community had recognized.

The Clinic and its partners approached their advocacy by assuming good intentions on the part of community stakeholders and seeking out opportunities for collaboration between government and civil society organizations. In this local context, the classic human rights methodology of “naming and shaming”<sup>141</sup> evolved into something rather different. Instead of a potentially adversarial investigation, it became a “gathering voices” campaign that entailed conducting story circles, interviews, and other conversations with diverse stakeholders including, among others, government officials, criminal legal system actors, human resource staff members, advocates for racial or gender justice, immigrants’ rights attorneys and organizers, religious leaders, community organization staff members, educators, students, and survivors.

Community members shared their views on what it would mean to realize the human right to be free from domestic violence, and what

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Village of Cayuga Heights Board of Trustees, Declaring Freedom from Domestic Violence as a Human Right, Res 7552, Jan. 12, 2015; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Mar. 6, 2015. See Columbia Law School’s Human Rights Institute et al., *supra* note 133.

<sup>140</sup> See Columbia Law School’s Human Rights Institute et al., *supra* note 133.

<sup>141</sup> See *supra* note 81 and accompanying text.



gaps and challenges exist locally to implementation of that right. As one service provider put it, the idea that freedom from domestic violence is a fundamental human right is “profound and sort of like a basic truth, yet we know that it is not true on some levels, that people are not free from domestic violence. So then the question is, how do we as a community make it true?”<sup>142</sup> In addressing this question, multiple stakeholders, from a former prosecutor to survivors, noted that the criminal legal system, while important, could be burdensome, ineffective, intimidating and retraumatizing for survivors. Heather Campbell, then the Director of the Tompkins County Advocacy Center, explained, “We as a society and culture expect survivors to go through so much in order to get a tiny piece of justice. And even when survivors jump through all of the hoops, the system can still fail.”<sup>143</sup> The criminal legal system could be particularly unhelpful for survivors whose communities regularly experienced discrimination and violence from that system. One community member explained, “I think as women of color, we are afraid of calling the police for anything. That is definitely not one of the first places we would go. . . . Women of color don’t trust many systems that have been designed to hurt them. So having places that are more accessible and cultural, and for us [would be] more helpful.”<sup>144</sup>

Community members also highlighted how domestic violence affected survivors’ access to other human rights. For example, several survivors shared how domestic violence impeded their ability to work, where stress related to the abuse made it difficult to function effectively at work or where an abuser would not let them leave the home, called their office to intimidate their employer, or worked for the same employer.<sup>145</sup> Other community members talked about how survivors struggled with multiple barriers to accessing safe housing, including abusers’ knowledge of the location of the community’s only safe house, high-barrier tenant screening processes that revealed past visits from law enforcement or credit ruined by abusers, and landlords’ refusal to rent to recipients of government housing assistance.<sup>146</sup>

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<sup>142</sup> Interview with Richard Bennett, Director, Rescue Mission - Ithaca (Apr. 12, 2016) (on file with authors).

<sup>143</sup> Heather Campbell, Panelist Remarks, Home Truth: A Film Screening and Discussion on Domestic Violence and Human Rights from Cornell Law School’s Berger International Speaker Series, Dorothea S. Clarke Program in Feminist Jurisprudence, and Gender Justice Clinic, the Advocacy Center of Tompkins County, Cornell Women’s Law Coalition, and the Finger Lakes Women’s Bar Association, Ithaca, NY, March 14, 2018 (on file with authors).

<sup>144</sup> Story Circle with Tompkins County Survivors of Domestic Violence (April 19, 2016) (on file with authors).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; Story Circle with Tompkins County Survivors of Domestic Violence, May 25, 2017; Interview with Kim Fezza and Richard Cowan, Staff at the Ithaca Neighborhood Housing

Considered together, the feedback from this “gathering voices” campaign suggested that a human rights approach required a more holistic response to gender-based violence. Such a response would engage diverse community members, particularly survivors; explore new ways to hold perpetrators accountable; and emphasize prevention and support for survivors and their families. From these conversations, ideas emerged for strengthening the local community’s ability to prevent domestic violence and respond effectively when it occurs. These included, for example, an initiative to provide training and guidance to employers in addressing the effects of domestic violence at the workplace and advocacy in opposition to a local village nuisance law that could lead to the eviction of survivors who call the police for help. For their part, the Clinic students involved in the campaign gained new perspectives on what meaningful implementation of the human right to be free from domestic violence requires and an appreciation of the importance of listening to and working with affected communities in identifying problems and crafting meaningful solutions.

### 3. *Integrating Human Rights Standards in Policymaking*

The Clinic sought to use the human rights standards recognized in Tompkins County’s local government resolutions to influence local policy. In recognizing that freedom from domestic violence is a human right affecting the realization of other human rights, the local resolutions implicitly affirmed the relevance of both treaties binding on the U.S. that protect this right, as well as nonbinding international agreements, principles and declarations that have interpreted its content.<sup>147</sup> In line with these international instruments, the resolutions expressly recognized that freedom from domestic violence is a human right affecting the realization of many other rights and that governments have an obligation to prevent and respond to such violence.<sup>148</sup> Through their “whereas” clauses, the

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Services (Apr. 18, 2016) (on file with authors); Interview with Vicki McDonald, Director of Housing Operations, Ithaca Housing Authority (Apr. 18, 2016) (on file with authors).

<sup>147</sup> See, e.g., ICCPR, *supra* note 13, at arts. 2, 3, 6, 9, 14, 26; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 1, 2, adopted Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 16, 1987); Org. of American States [OAS] Charter, Preamble, arts. 3, 46, 49; Declaration on the Elimination of Violence Against Women, arts. 1, 2, 3, 4, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993); American Declaration on the Rights and Duties of Man, arts. 1, 2, 5, 7, 18, O.A.S. Res. XXX, Int’l Conf. of Am. States, 9th Conf. (May 2, 1948); Committee Against Torture, General Comment No. 2 on the implementation of article 2 by States parties, ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008); Human Rights Comm., General Comment No. 35 on Article 9, Liberty and security of person, ¶ 9, U.N. Doc. CCPR/C/GC/35 (2014); Human Rights Comm., General Comment No. 36 on article 6: right to life ¶¶ 23, 26, U.N. Doc. CCPR/C/GC/36 (2019).

<sup>148</sup> See Tompkins County Legislature, Declaring Freedom from Domestic Violence as a Human Right, RES2014-214, Nov. 18, 2014; Ithaca Town Board, Declaring Freedom from

resolutions also suggested that government responsibility extended to assisting survivors of domestic violence in addressing the effects of that violence including “physical injuries, long-term psychological damage, financial and career instability, and trouble finding safe housing,” as well as the “deeply negative impact on children who are exposed to it.”<sup>149</sup>

Several of the domestic violence-human rights resolutions also explicitly charged government departments and offices with incorporating the declaration’s principles into their policies and practices and with ensuring that those policies and practices are informed by domestic violence survivors’ voices and needs.<sup>150</sup> A City of Ithaca report, prepared by the Tompkins County Office of Human Rights, that analyzed impediments to fair housing choice subsequently cited the resolutions and encouraged the City to consider amending its local anti-discrimination law to include protections based on “domestic violence victim status.”<sup>151</sup> Two years later, the City amended its local law to prohibit discrimination or harassment in housing, employment, education or public accommodations based on an individual’s status as a victim of domestic violence.<sup>152</sup>

The Tompkins County Office of Human Rights also asked the Clinic and other partners to use the domestic violence-human rights resolution and the principles it affirmed to oppose a local village nuisance law that had the effect of penalizing survivors who call the police for

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Domestic Violence as a Human Right, TB Res 2014-197, Dec. 8, 2014; Lansing Town Board, Declaring Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014; Village of Cayuga Heights Board of Trustees, Declaring Freedom from Domestic Violence as a Human Right, Res 7552, Jan. 12, 2015; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Mar. 6, 2015. See Columbia Law School’s Human Rights Institute et al., *supra* note 133.

<sup>149</sup> *Id.* In addition, the resolutions recognized that the obligation was not limited to addressing forms of violence covered by criminal law but instead extended to addressing all forms of domestic violence including “physical, sexual, psychological, or economic abuse, intimidation, isolation, and coercive control by intimate partners or family members.” *Id.*

<sup>150</sup> See Tompkins County Legislature, Declaring Freedom from Domestic Violence as a Human Right, RES2014-214, Nov. 18, 2014; Ithaca Town Board, Declaring Freedom from Domestic Violence as a Human Right, TB Res 2014-197, Dec. 8, 2014; Lansing Town Board, Declaring Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014; Village of Cayuga Heights Board of Trustees, Declaring Freedom from Domestic Violence as a Human Right, Res 7552, Jan. 12, 2015; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Mar. 6, 2015. See Columbia Law School’s Human Rights Institute, et al., *supra* note 133.

<sup>151</sup> City of Ithaca, *Analysis of Impediments to Fair Housing Choice*, 66, 103 (May 2015), available at <https://www.cityofithaca.org/DocumentCenter/View/2992/Analysis-of-Impediments-to-Fair-Housing-Choice-2015?bidId=>.

<sup>152</sup> City of Ithaca Municipal Code, § 215, as amended 1 January 2017 by Ord. No. 2017-02, <https://ecode360.com/8390435>.

help.<sup>153</sup> Clinic students drafted a letter to village leaders from the Clinic and its government and NGO partners that called for repeal of the discriminatory law. While this action did not independently move the village to amend its law – which ultimately was declared unconstitutional by the New York Supreme Court’s Appellate Division<sup>154</sup> – it helped to educate village leaders about the ways in which this local legislation was inconsistent with the human rights commitments they had undertaken when joining the Tompkins County Council of Governments’ domestic violence-human rights resolution.<sup>155</sup>

In addition, the Clinic drew upon the human rights standards codified in the local government resolutions to advocate for policies addressing the effects of domestic violence in the workplace and helping employers to better support employees who are experiencing violence at home.<sup>156</sup> A suggestion from a government official led the Clinic and its partners to develop a model domestic violence and the workplace policy and toolkit,<sup>157</sup> which they launched at an event for local employers. These resources were informed by human rights principles, domestic laws, national and local good practices, and policies and guidance published by others, including New York’s Office for the Prevention of Domestic Violence.<sup>158</sup>

The City of Ithaca and Town of Ithaca adopted their own versions of the policy or toolkit, as a step towards implementing their obligations under the domestic violence-human rights resolutions.<sup>159</sup> Private employers embraced this initiative too.<sup>160</sup> Cornell University’s Human Resources led a review of the University’s support systems and policies, adopted a domestic violence at the workplace guide for managers and Human Resource (HR) professionals that expanded upon the Clinic’s

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<sup>153</sup> See Letter from Freedom from Domestic Violence Workgroup to Christopher J. Neville, Mayor of the Village of Groton (Apr. 10, 2017) (on file with authors).

<sup>154</sup> Board of Trustees v. Pirro, 152 A.D.3d 148 (NY App. Div. 3d Dept. 2017).

<sup>155</sup> Letter from Freedom from Domestic Violence Workgroup to Christopher J. Neville, Mayor of the Village of Groton (Apr. 10, 2017) (on file with authors).

<sup>156</sup> See Avon Global Center for Women and Justice at Cornell Law School, *Advocacy Center of Tompkins County and Cornell Law School Global Gender Justice Clinic, Short- and Long-Term Strategies for Implementation of Freedom from Domestic Violence Resolution in Tompkins County 2* (April 20, 2015) (on file with authors).

<sup>157</sup> Domestic Violence and the Workplace Model Policy and Toolkit, available at <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/gender-justice-clinic/domestic-violence-and-the-workplace-model-policy-and-toolkit>.

<sup>158</sup> For an updated version of New York State’s model policy, see N.Y. State Office for the Prevention of Domestic Violence, *State of New York Model Gender-Based Violence and the Workplace Model Policy* (2022 update), <https://opdv.ny.gov/system/files/documents/2022/10/opdv-gender-based-violence-and-the-workplace-model-policy.pdf>.

<sup>159</sup> See, e.g., City of Ithaca, Domestic Violence and the Workplace Policy (on file with authors); Email from Kristi Taylor, Education Director, Advocacy Center of Tompkins County to Elizabeth Brundige, January 24, 2018 (on file with authors).

<sup>160</sup> Email from Kristi Taylor, Education Director, Advocacy Center of Tompkins County to Elizabeth Brundige, January 24, 2018 (on file with authors).

model toolkit, provided related training for hundreds of staff members, and engaged in a long-term program of campus-wide education and fundraising to support the emergency funds that are available for employees seeking help.<sup>161</sup> Through these initiatives, Clinic students developed skills in policy research and advocacy, gained experience in navigating government-community partnerships, and learned how context-sensitive implementation of human rights standards can serve as a valuable catalyst and guide for reform.

#### 4. *Building Human Rights Literacy and Legal Empowerment*

Building human rights literacy and legal empowerment is a common strategy in human rights advocacy and can be done through a variety of methods. In the Gender Justice Clinic's domestic violence project, initiatives have focused on developing human rights literacy around the issue of domestic violence, including through film screenings, talks and panels, tabling events, media advocacy, and workshops for local high school students on dating and domestic violence.

For many participants in these initiatives, the development of human rights literacy led to a shift in perspectives and sparked new ideas. For example, by adopting a human rights lens, local high school students came to identify long-accepted problems as impediments to realizing rights that could and should be addressed.<sup>162</sup> At one school, a conversation about human rights led the students to share how living in a rural location made it impossible for students who experienced dating violence to access community resources due to a lack of access to transportation. Many students were afraid to seek help from parents who expected them not to date in high school or from a teacher who would be required to make a report. Some students of color felt further isolated and unsure of where to turn for help because of the lack of diversity among faculty and students at their school. The workshop participants decided to undertake their own project on implementing the right to be free from dating violence that would address some of the barriers to support and assistance that they had identified.<sup>163</sup>

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<sup>161</sup> See Cornell University, *Domestic Violence at the Workplace, Guide for Managers and Human Resource Professionals*, [https://hr.cornell.edu/sites/default/files/domestic\\_violence\\_at\\_the\\_workplace\\_guide\\_v3.pdf](https://hr.cornell.edu/sites/default/files/domestic_violence_at_the_workplace_guide_v3.pdf); U.S. Dept. of Defense Counter-Insider Threat Program, *Cornell University Takes a Stand Against Domestic Violence*, THE INSIDER: THE THREAT LAB NEWSLETTER 2(4) (2021); Nancy Doolittle, *HR's Artibee, Joseph Receive Community Awards*, CORNELL CHRON. (Apr. 24, 2018), <https://news.cornell.edu/stories/2018/04/hrs-artibee-joseph-receive-community-awards>; Nancy Doolittle, *Gathering Highlights Resources for Domestic Violence Survivors*, CORNELL CHRON. (Nov. 2, 2017), <https://news.cornell.edu/stories/2017/11/gathering-highlights-resources-domestic-violence-survivors>.

<sup>162</sup> Interview with five Trumansburg High School students (Mar. 23, 2017) (on file with authors); Cornell Gender Justice Clinic, Summary of Key Points from Workshop with Lansing High School Students (Mar. 21, 2017) (on file with authors).

<sup>163</sup> Cornell Gender Justice Clinic, *supra* note 162.

Human rights literacy and legal empowerment can also be fostered through collaboration and movement building. The Gender Justice Clinic and its partners also worked to educate community members about the connections between their local domestic violence-human rights initiatives and the Inter-American Commission's decision in the *Lenahan* case, as well as broader national and transnational human rights movements to advance the human right to be free from domestic violence. With the Miami Human Rights Clinic and Columbia Law School's Human Rights Institute, the Clinic helped develop a webpage that tracks the adoption of local domestic violence-human rights resolutions and makes them available as public resources.<sup>164</sup> It additionally contributed to an advocates' roundtable and other collaborations.<sup>165</sup> IACHR petitioner Jessica Lenahan and two of her lawyers came to Tompkins County to speak at community film screenings of *Home Truth*, a documentary about Ms. Lenahan's pursuit of justice,<sup>166</sup> and Ms. Lenahan later returned to Cornell as a visiting fellow.<sup>167</sup> At the same time, the Clinic collaborated with a partner organization in Zambia on the Tompkins County gathering voices campaign as well as a related project in Lusaka, Zambia.<sup>168</sup>

These initiatives expanded knowledge in multiple directions. Community members gained new insights from their engagement with human rights standards and collaboration with local, national, and transnational partners. At the same time, Clinic students learned that the meaningful realization of human rights draws strength from movement-building and collaboration and from context-specific approaches that center the participation of affected individuals and communities.

### C. Addressing the Role of Guns in Domestic Violence

Addressing firearm use in relation to domestic violence is critical; in the U.S., on average, intimate partners shoot and kill seventy women every month and almost one million women report surviving after being

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<sup>164</sup> Columbia Law School's Human Rights Institute, et al., *supra* note 133.

<sup>165</sup> See Cornell Law School Global Gender Justice Clinic and Columbia Law School Human Rights Institute, *Freedom from Domestic Violence: Lessons Learned in Passing and Implementing Local Resolutions* (n.d.) (discussing takeaways and recommendations from May 2015 convening) (on file with authors).

<sup>166</sup> See *Home Truth: A Film Screening and Discussion on Domestic Violence and Human Rights* (2018), ITHACA.COM, [https://www.ithaca.com/calendar/films/home-truth-a-film-screening-and-discussion-on-domestic-violence-and-human-rights/event\\_631699be-d177-11e8-b6f3-308d99b24d4f.html](https://www.ithaca.com/calendar/films/home-truth-a-film-screening-and-discussion-on-domestic-violence-and-human-rights/event_631699be-d177-11e8-b6f3-308d99b24d4f.html); Shelby Garland, *Law School Hosts Colloquium on Domestic Violence and Human Rights*, Cornell Law School Spotlight (Apr. 10, 2018) (on file with authors).

<sup>167</sup> Garland, *supra* note 166.

<sup>168</sup> See Tinenenji Banda & Elizabeth Brundige, *When Criminal Law is Not Enough: Towards a Holistic Approach to Gender-Based Violence Prevention and Response in Zambia and Beyond*, in HANDBOOK ON AFRICAN LAW (Muna Ndulo ed., 2021).



“shot or shot at” by intimate partners<sup>169</sup> With respect to the use of firearms in intimate partner homicides, “female intimate partners are more likely to be murdered with a firearm than all other means combined”<sup>170</sup> and “females living with a gun in the home” are almost “three times more likely to be murdered than females with no gun in the home.”<sup>171</sup> In 2020, “[f]irearms were the weapon most commonly used by males to murder females,”<sup>172</sup> and of those “females killed with a firearm, sixty-three percent were murdered by male intimates.”<sup>173</sup> In comparison with other similarly situated countries, “[w]omen in the US are 28 times more likely to be killed with a gun than women in other high-income countries.”<sup>174</sup>

Advocacy addressing firearm use in domestic violence situations has tended to focus on calls for legislative and policy change directed at domestic policymakers<sup>175</sup> at the federal,<sup>176</sup> state,<sup>177</sup> and local levels,<sup>178</sup> as well as domestic litigation,<sup>179</sup> endorsements of “candidates [who] are championing lifesaving gun safety laws,”<sup>180</sup> local and community engagement,<sup>181</sup> and grassroots and survivor based activism.<sup>182</sup> Such efforts

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<sup>169</sup> *Domestic Violence*, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/guns-domestic-violence>.

<sup>170</sup> VIOLENCE POLICY CENTER, *WHEN MEN MURDER WOMEN: AN ANALYSIS OF 2020 HOMICIDE DATA 1* (2022), <https://www.vpc.org/studies/wmmw2022.pdf>.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 7.

<sup>173</sup> *Id.*

<sup>174</sup> *Domestic Violence*, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/guns-domestic-violence>.

<sup>175</sup> *See, e.g.*, Everytown for Gun Safety, *Work*, <https://www.everytown.org/work>; *see also* Sandy Hook Promise, *Why Advocacy*, <https://actionfund.sandyhookpromise.org> (“Legislation can save lives and prevent gun violence, and we need your help to get these bills passed into law.”).

<sup>176</sup> *See, e.g.*, Center for American Progress, *Gun Violence Prevention Priorities for a New Congress and a New Administration* (Jan. 26, 2021), <https://www.americanprogress.org/article/gun-violence-prevention-priorities-new-congress-new-administration/> (Listing “top priorities for legislative, executive, and budgetary action to begin to implement a comprehensive federal strategy to reduce all forms of gun violence.”). *See also* CSGV, *Federal Actions*, [https://www.csgv.org/federal\\_actions](https://www.csgv.org/federal_actions); Everytown for Gun Safety, *Work*, <https://www.everytown.org/work>.

<sup>177</sup> *See, e.g.*, CSGV, *State Actions*, [https://www.csgv.org/state\\_actions](https://www.csgv.org/state_actions); Everytown for Gun Safety, *Work*, <https://www.everytown.org/work>.

<sup>178</sup> *See, e.g.*, Everytown for Gun Safety, *Work*, <https://www.everytown.org/work>.

<sup>179</sup> *See, e.g., id.*

<sup>180</sup> Giffords, *Gun Safety Champions*, <https://giffords.org/elections/endorsements>; *see also* Everytown for Gun Safety, *Work*, <https://www.everytown.org/work/>.

<sup>181</sup> *See, e.g.*, Violence Policy Center, *5 Things You Can Do Now to Stop Gun Violence*, <https://vpc.org/5-things-you-can-do-now-to-help-stop-gun-violence> (“Here are five things you can do right now to help stop gun violence. . . Join a local gun violence prevention organization . . . Write a letter to the editor in your local paper in support of gun violence prevention . . . Host your very own evening of information and action to educate your friends and community about gun violence while helping support the Violence Policy Center.”).

<sup>182</sup> Everytown for Gun Safety, *Work*, <https://www.everytown.org/work> (“We are a movement of moms, dads, students, survivors, educators, gun owners, and concerned citizens working together to fight for public safety measures that can protect people from gun violence.” “Everytown Support Fund provides support to a diverse community of survivors that are

have often framed gun violence, particularly in relation to domestic violence, as public health<sup>183</sup> and/or Second Amendment issues.<sup>184</sup>

The Duke International Human Rights Clinic (Duke IHRC) has promoted a human-rights-based approach to the issue of firearm possession and use—particularly in situations of domestic violence—in the U.S. From engagement with inter-governmental human rights bodies, including the U.N. Human Rights Committee, to the integration of human rights standards and norms in U.S. based advocacy, to building and cultivating human rights literacy and legal empowerment among various stakeholders, this work has relied on fact-finding, legal analysis, reporting, and coalition-building to demonstrate the human rights implications of gun use in domestic violence contexts in the U.S. and to advocate for a human rights-based approach to address these violations.

### 1. *Engaging with International Human Rights Mechanisms*

The IHRC engaged with the U.N. treaty monitoring body system, including through its March 2019 submission on “The United States’ Human Rights Obligations on Guns and Domestic Violence” to the

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putting a human face on the gun violence crisis by sharing their stories.”). *See also* Change the Ref, *About*, <https://changetheref.org/about>.

<sup>183</sup> Giffords, *Domestic Violence*, <https://giffords.org/issues/domestic-violence> (“Domestic violence is a preventable public health crisis that impacts people of all backgrounds.”); Everytown for Gun Safety, *Guns and Violence against Women*, <https://everytownresearch.org/report/guns-and-violence-against-women-americas-uniquely-lethal-intimate-partner-violence-problem> (“Intimate partner violence (IPV) is a serious public health problem that affects millions of American women, with far-reaching impacts not only for individual victims, but also for their families, their communities, and our economy.”); Center for American Progress, *supra* note 176 (“After four years of a presidential administration that was hostile toward efforts to address gun violence, the start of a new Congress and a new presidential administration presents an opportunity for serious action to address the many gaps and weaknesses in our nation’s approach to this public health crisis.”); GVPedia, *Denver Accord A Comprehensive Plan to Reduce Gun Violence, The Four Principles* (May 7, 2019), <https://denveraccord.org/the-four-principles-of-the-denver-accord> (“Gun violence in America is a pervasive public health crisis that demands substantial policy solutions and well-funded programs that effectively reduce gun violence.”); JOHNS HOPKINS CENTER FOR GUN VIOLENCE PREVENTION AND POLICY, <https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-violence-prevention-and-policy> (“Our goal is to bring public health expertise and perspectives to the complex policy issues related to gun violence prevention.”).

<sup>184</sup> *Second Amendment*, EVERYTOWN FOR GUN SAFETY, <https://everytownlaw.org/our-work/second-amendment> (“Everytown Law regularly files amicus briefs defending state and federal gun safety laws against Second Amendment challenges. Our briefs focus on the historical, social science, and doctrinal reasons that common sense gun laws do not violate the Second Amendment.”); *The Second Amendment*, GIFFORDS, <https://giffords.org/lawcenter/gun-laws-second-amendment>, *Supreme Court and the Second Amendment*, CSGV, <https://www.csqv.org/issues-archive/supreme-court-and-the-second-amendment>, *What are So-Called Second Amendment Sanctuaries*, BRADY, <https://www.bradyunited.org/act/second-amendment-sanctuaries>.

U.N. Human Rights Committee.<sup>185</sup> This submission provided the Human Rights Committee with an analysis of “the issue of guns and domestic abuse in the United States using a human rights-based approach.”<sup>186</sup>

A core element of this strategy was to use the human rights framework to identify the full range of rights violations experienced by victims of gun violence in domestic violence situations, including the rights to non-discrimination (“[t]he use of guns in intimate partner violence disproportionately affects women”),<sup>187</sup> life,<sup>188</sup> physical and mental health (“[g]uns are . . . often used in non-fatal intimate partner violence against women, with significant adverse effects”),<sup>189</sup> and work (“[g]uns are

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<sup>185</sup> Duke Law International Human Rights Clinic, Submission to the U.N. Human Rights Committee 125<sup>th</sup> session, Mar. 4-29, 2019 in relation to the U.S. List of Issues Prior to Reporting (LoIPR), *The United States’ Human Rights Obligations on Guns and Domestic Violence* (2019), [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FICD%2FUSA%2F34117&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FICD%2FUSA%2F34117&Lang=en). (The submission contains sections on: “Prevalence and Types of Gun-Related Domestic Violence Incidents,” “U.S. Laws on Guns and Domestic Violence,” “International Human Rights Obligations on Guns and Domestic Violence,” and “Suggested Questions for the U.S. LoIPR.” The suggested questions address the following rights contained in the ICCPR: non-discrimination and equal rights of men and women; violence against women; right to life; and right to liberty and security of person, and treatment of persons deprived of their liberty and fair trial.). U.N. Office of the High Commissioner, *Reporting Procedure*, <https://www.ohchr.org/en/treaty-bodies/ccpr/reporting-procedure> (The “list of issues prior to reporting” is one of “three principal documents . . . exchanged between States parties and the [Human Rights] Committee before the interactive dialogue takes place” between the two.).

<sup>186</sup> Duke Law International Human Rights Clinic, *supra* note 185, at “Introduction” (The submission did so by “[lay]ing out the prevalence and types of gun-related incidents in domestic violence situations/instances in the United States, highlighting that the use of guns in intimate partner fatal and non-fatal violence disproportionately affects women and that domestic gun violence is intersectional,” “analyz[ing] relevant U.S. laws on guns and domestic abuse, highlighting five key loopholes that particularly implicate the U.S. government’s obligations under international human rights law,” “analyzing the international human rights framework governing the issue of guns and domestic violence, highlighting the due diligence obligations of the United States that derive from treaties ratified by the U.S. government,” and providing a “suggested list of questions for inclusion in the List of Issues Prior to Reporting to the United States.”).

<sup>187</sup> *Id.* at 1, citing to *Domestic Shooting Homicides*, ASSOC. PRESS (2016), <http://data.ap.org/projects/2016/domestic-gun-homicides> (“Between 2006 and 2014, “[a]n average of 760 Americans were killed with guns annually by their spouses, ex-spouses or dating partners,” of which “[c]urrent wives and girlfriends comprised nearly 75 percent of all victims in fatal domestic shootings. Overall, women were the victims in more than four out of every five of these types of incidents.”).

<sup>188</sup> *Guns and Domestic Violence*, EVERYTOWN FOR GUN SAFETY, <https://everytownresearch.org/guns-domestic-violence> (“Every month, an average of 57 women are shot and killed by an intimate partner.”). See also VIOLENCE POLICY CENTER, WHEN MEN MURDER WOMEN, *supra* note 170, at 5 (In 2019, of “homicides in which the weapon could be identified, 58 percent of female victims . . . were killed with a gun. Of the females killed with a firearm, 59 percent were murdered by male intimates. The number of females shot and killed by their husband or intimate acquaintance . . . was more than three and a half times higher than the total number murdered by male strangers using all weapons combined . . . in single victim/single offender incidents . . .”).

<sup>189</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 2, citing to NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, GUN VIOLENCE: A THREAT TO WOMEN AND FAMILIES 1

prevalent in workplace homicides among U.S. women perpetrated by intimate partners”).<sup>190</sup> Based on this demonstration of impact, the clinic’s submission argues that the U.S. government is failing to fulfill its obligations under international human rights law,<sup>191</sup> including with respect to economic, social, and cultural rights, an argument that would have less traction in the absence of an international human rights framing given the insufficient recognition and protection given to economic, social, and cultural rights under U.S. domestic law.<sup>192</sup> As the submission explains:<sup>193</sup>

States’ obligations under international human rights law on the use of guns by domestic abusers implicate a number of human rights guarantees, including particularly the right to non-discrimination and equality on the basis of sex and gender,<sup>194</sup> as well as other intersecting prohibited grounds of discrimination, such as race;<sup>195</sup> the

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(2018), <http://www.nationalpartnership.org/our-work/resources/health-care/gun-violence-a-threat-to-women-and-families.pdf> (The “trauma associated with gun violence takes a lasting physical and emotional toll on victims and their families.”). See also *Guns and Domestic Violence, EVERYTOWN FOR GUN SAFETY*, *supra* note 188 (“[N]early 1 million women alive today have reported being shot or shot at by intimate partners.”).

<sup>190</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 2, citing to Hope M. Tiesman, Kelly K. Gurka, & Srinivas Konda et al., *Workplace Homicides Among U.S. Women: The Role of Intimate Partner Violence*, 22(4) ANN. EPIDEMIOLOG. 277-84 (2012) (In workplace homicides among U.S. women between 2003 and 2008, nearly 80 percent of the “personal relations” homicides (which constitute 33% of the workplace homicides among U.S. women) were perpetrated by an intimate partner and while firearms were used in 67% of workplace homicides overall, a “significantly larger percentage” of “personal relations” homicides (i.e. 80%) were caused by firearms).

<sup>191</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 5-6.

<sup>192</sup> Larry Cox, *A Movement for Human Rights in the United States: Reasons for Hope*, 40 COLUM. HUM. RTS. L. REV. 135, 140 (2008) (“The advancement of human rights domestically also allows us to break out of the current limits of a U.S. legal framework that denies the existence of economic and social rights-rights as essential to the full development of a human personality as any of the rights in the U.S. Constitution.”).

<sup>193</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 5-6.

<sup>194</sup> *Id.* at 5. See, e.g., ICCPR, *supra* note 13, at arts. 2(1), 3, 26; ICESCR, *supra* note 14, at arts. 2(2), 3; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), arts. 1-4, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), art. 1(1), *adopted* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (see also Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25 on gender-related dimensions of racial discrimination*, U.N. Doc. A/55/18 (2000)); Convention on the Rights of the Child (CRC), art. 2, *adopted* Nov. 20, 1989, 15 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>195</sup> *Id.*, citing to Human Rights Comm., General Comment No. 28, *Article 3 (The Equality of Rights Between Men and Women)*, U.N. Doc. CCPR/C/21/Rev.1/Add.10, ¶ 30 (2000); CERD Comm., *General Rec. No. 32, The meaning and scope of special measures in the International Convention on the Elimination of All Forms [of] Racial Discrimination*, ¶ 7, U.N. Doc. CERD/C/GC/32, (2009); Comm. on the Elimination of Discrimination against Women (CEDAW), *General Rec. No. 25: Temporary Special Measures*, ¶ 12 (2004).

rights to life and security;<sup>196</sup> the rights of the child;<sup>197</sup> and a series of economic, social, and cultural rights, including the rights to physical and mental health (for individuals shot or threatened, as well as those affected by secondary victimization),<sup>198</sup> and work.<sup>199</sup>

A second integral element of this strategy of engagement was to utilize underlying principles of international human rights law, including intersectional discrimination. The submission contains information regarding the intersectional nature of domestic violence, including that “[c]omprehensive data analyzing rates of domestic gun homicides and other gun-incidents among racial minorities, sexual minorities, and immigrant communities is lacking.”<sup>200</sup> With respect to race, available data shows that [i]n 2020, Black females were murdered by males at a rate nearly three times as high as white females: 2.96 per 100,000 versus 1.07 per 100,000. In 2020, Black females accounted for fourteen percent of the female population in the United States, while 31 percent of the females killed by males in single victim/single offender incidents where the race of the victim was known were Black.<sup>201</sup> And while “[d]omestic violence also occurs within the LGBTI community,”<sup>202</sup> the submission notes that limited data regarding LGBTI persons “prevents a clear

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<sup>196</sup> *Id.*, citing to Human Rights Comm., Concluding Observations: United States of America, U.N. Doc. CCPR/C/79/Add.50 ¶ 17 (1995).

<sup>197</sup> *Id.*, citing to See Human Rights Comm., *General Comment No. 17: Article 24 (Rights of the child)* ¶ ¶ 3,4 (1999). See also Comm. on the Rights of the Child, *General Comment No. 13, The right of the child to freedom from all forms of violence*, U.N. Doc. CRC/C/GC/13 (2011) (*CRC General Comment No. 13*); Comm. on the Rights of the Child, *General Comment 14, The right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, U.N. Doc. CRC/C/GC/14 (2013).

<sup>198</sup> *Id.* at 6 (citing to Comm. on the Rights of the Child, *General Comment No. 15, The right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, U.N. Doc. CRC/C/GC/15 (2013); Comm. on Economic, Social and Cultural Rights, *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* U.N. Doc. E/C.12/2000/4 (2000)). For a more detailed overview of the health and human rights of gun violence survivors, see Cate Buchanan, *The Health and Human Rights of Gun Violence Survivors: Charting a Research and Policy Agenda*, 13(2) HEALTH AND HUMAN RIGHTS 50 (2011).

<sup>199</sup> *Id.* (citing to *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, Addendum Mission to the United States of America*, ¶¶ 19-20, U.N. Doc. A/HRC/17/26/Add.5 and Corr.1 (June 6, 2011). See generally Comm. on Economic, Social and Cultural Rights, *General Comment No. 23 on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/23 (2016)).

<sup>200</sup> *Id.* at 2.

<sup>201</sup> VIOLENCE POLICY CENTER, *WHEN MEN MURDER WOMEN*, *supra* note 170, at 7 (2022), <https://www.vpc.org/studies/wmmw2022.pdf>. In addition, “[o]f Black victims who knew their offenders, 56 percent (259 out of 464) were wives, common-law wives, ex-wives, or girlfriends of the offenders.” *Id.* at 8.

<sup>202</sup> AMNESTY INTERNATIONAL, *IN THE LINE OF FIRE 90* (2018), [https://www.amnestyusa.org/wp-content/uploads/2018/09/Gun-Report-Full\\_16.pdf](https://www.amnestyusa.org/wp-content/uploads/2018/09/Gun-Report-Full_16.pdf).

understanding of the ways in which various laws on guns and domestic violence impact persons in LGBTI relationships.”<sup>203</sup> With respect to state obligations in this regard, the submission explains as follows<sup>204</sup>:

A State’s due diligence obligation . . . requires States to address the intersectional nature of gun violence in domestic violence. The U.N. Human Rights Committee has recently emphasized that “[l]egal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination.”<sup>205</sup> In relation to the United States, the U.N. Special Rapporteur on violence against women, its causes, and consequences, has specifically called on the government to “[r]eview and more effectively address the disproportionate impact that violence has on poor, minority, and immigrant women.”<sup>206</sup>

The Human Rights Committee has demonstrated a continued commitment to addressing gun violence, including in the domestic violence context, as evidenced by the inclusion of a question directly addressing many of the topics raised in the IHRC submission in its “list of issues prior to submission” of the U.S. periodic report.<sup>207</sup> This question built on the Human Rights Committee’s previous engagement with the issue, both in the form of Concluding Observations to the

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<sup>203</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 3.

<sup>204</sup> *Id.* at 7.

<sup>205</sup> *Id.*, citing to HRC General Comment No. 36, at ¶ 61.

<sup>206</sup> *Id.* at 7-8.

<sup>207</sup> See Human Rights Committee, “List of issues prior to submission of the fifth periodic report of the United States of America,” ¶ 14, U.N. Doc. CCPR/C/USA/QPR/5 (Apr. 18, 2019) (“With respect to the Committee’s previous concluding observations (para. 10) and the follow-up information received from the State party, please provide information on the number of victims of gun violence, including in the context of domestic violence. Please describe the efforts made by the State party to restrict access to firearms for those most at risk of abusing them, and the steps taken to counter patterns of abuse.”). Following this, the United States, in its periodic report, responded by expressing the view that this question “appear[s] to request information regarding the U.S. legal framework with respect to the private actions of non-state actors” and “to primarily relate to the conduct of persons or groups acting in a private rather than an official capacity” and that the view of the United States is that “Article 2 of the Covenant contains no language stating that its obligations extend to private, non-governmental acts, and no such obligations can be inferred from Article 2” and that “neither the text nor the negotiating history of the Covenant support any obligation on the part of States Parties to take ‘reasonable positive measures’ and to exercise ‘due diligence’ to respond to foreseeable threats by private persons and entities.” Fifth periodic report submitted by the United States of America under article 40 of the Covenant pursuant to the optional reporting procedure, due in 2020, U.N. Doc. CCPR/C/USA/5 para 4 (Jan. 19, 2021). The Human Rights Committee’s Concluding Observations following the Fifth Reporting Cycle in 2019 are not yet available. OHCHR U.N. Treaty Body Database, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=USA&Lang=EN).



U.S.<sup>208</sup> and its General Comment on the right to life.<sup>209</sup> Thus, the Human Rights Committee remains a valuable target, including for U.S.-based advocates who, through their active engagement with the Human Rights Committee as well as other mechanisms,<sup>210</sup> can work to further magnify their impact. Such engagement “has the potential to play a significant role in influencing U.S. policy to end violence against women”<sup>211</sup> and, by extension, violence against women related to gun violence, given the inextricable link between the two.<sup>212</sup> As this interplay continues between advocates’ engagement and “observations, recommendations, and reports on U.S. abuses and violations of international law . . . with regard to the problem of domestic violence and police lack of accountability” from international bodies, “it will become more and more difficult for the United States to continue to keep its head in the sand and disavow any governmental responsibility for protecting women from intimate violence.”<sup>213</sup> This is particularly impactful in a context in which “United

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<sup>208</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 13 (The IHRC submission includes the Human Rights Committee’s most recent Concluding Observations to the United States—Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 ¶ 10 (2014) —which serve as a basis for its list of “Suggested Questions for the U.S. LoIPR” Submission.).

<sup>209</sup> The Human Rights Committee’s General Comment on the right to life is also referenced throughout the submission. Human Rights Comm., General Comment No. 36, *General Comment No. 36, on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36 (2019). The General Comment contains relevant language with respect to domestic violence victims (*id.* at ¶ 23); intersectional discrimination (*id.* at ¶ 61); firearms (*id.* at ¶ 20); and gun violence (*id.* at ¶ 26). This paragraph directly cites to the Human Rights Committee’s Concluding observations on the fourth periodic report of the United States of America. *Id.* at note 91.

<sup>210</sup> Lenora M. Lapidus, *The Role of International Bodies in Influencing U.S. Policy to End Violence Against Women*, 77 *FORDHAM L. REV.* 529, 554 (2008) (encouraging advocates to “use the international human rights mechanisms and the resulting observations and recommendations to push the United States to alter its policies” and suggesting various avenues through which to do so including to “publicize those proceedings, observations, and recommendations to make the public aware of the mechanisms and their operation as well as the substantive abuses that are at issue in the proceedings before these bodies,” to “cite as persuasive (though not controlling) authority the concluding observations in other legal proceedings—both in domestic courts and before international bodies,” and “use the recommendations as support for policy changes at the state and federal legislative and executive levels”).

<sup>211</sup> *Id.*

<sup>212</sup> *Domestic Shooting Homicides*, ASSOC. PRESS (2016), <http://data.ap.org/projects/2016/domestic-gun-homicides> (Based on data collected between 2006 and 2014, “[c]urrent wives and girlfriends comprised nearly 75 percent of all victims in fatal domestic shootings. Overall, women were the victims in more than four out of every five of these types of incidents.”)

<sup>213</sup> Lapidus, *supra* note 210, at 553. (noting that while international human rights mechanisms cannot “force a country to do anything . . . reports on a country’s compliance-or lack thereof with human rights norms shine a spotlight on human rights abuses and can shame a country into altering its practices”). *Id.* at 538.

Nations' human rights bodies are engaging in an increasingly robust discussion about the human rights risks of firearm violence."<sup>214</sup>

## 2. *Integrating Human Rights Standards in Domestic Advocacy*

The IHRC's work also involved integrating human rights standards and framing into advocacy around gun violence. For example, the Clinic contributed to Amnesty International's report "Fragmented and Unequal: A Justice System that Fails Survivors of Intimate Partner Violence in Louisiana, USA"<sup>215</sup> by researching federal and state laws regarding firearms (including laws on firearm purchase, possession and transfer, licensing requirements, sanctions and enforcement of firearms restrictions, background check requirements, and data collection restrictions), domestic violence (for example, the role of domestic violence courts and state-level domestic violence benchbooks directed at judges), and the intersection between the two.<sup>216</sup> This work cultivated crucial legal research, writing, and analytical skills, including the substantive and strategic dexterity to seamlessly navigate both U.S. federal and state legislation and case law,<sup>217</sup> as well as international human rights law.<sup>218</sup> The work enabled development of this proficiency in strategically significant ways including by expanding existing advocacy efforts, which, as noted in the introduction to this case study, have typically focused on domestic advocacy targets and concentrated on advocacy grounded in public health and/or the Second Amendment.

## 3. *Building Human Rights Literacy and Legal Empowerment*

Finally, the IHRC held or participated in a number of events domestically that sought to support grassroots actors, including by furthering their understanding of how a human rights framing might contribute to their advocacy efforts. For example, the IHRC's contribution to the "Gun

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<sup>214</sup> Barbara A. Frey, *Due Diligence to Prevent Foreseeable Harm: The International Human Rights Agenda on Civilian Gun Violence*, 60 WASH. U. J. L. & POL'Y 91, 109 (2019).

<sup>215</sup> AMNESTY INTERNATIONAL, FRAGMENTED AND UNEQUAL A JUSTICE SYSTEM THAT FAILS SURVIVORS OF INTIMATE PARTNER VIOLENCE IN LOUISIANA, USA (2019), <https://www.amnesty.org/en/documents/amr51/1160/2019/en/>

<sup>216</sup> *Id.* at 48 n.223, 232 (citing to the IHRC's research on state-level "legal provisions that require training for judges and other court officials involved in cases of intimate partner violence" as well as state benchbooks that "include provisions to guide how judges should assess a defendant's access to or possession of firearms as a lethality factor throughout the protection order process.").

<sup>217</sup> *See id.*

<sup>218</sup> Students researched a range of issues which included close examination of, among other sources, those produced by the U.N. and other intergovernmental bodies (including treaties, treaty monitoring bodies, and Special Procedures), regional human rights bodies, and NGOs.

Violence Prevention Conference 2019: Twenty Years from Columbine to Parkland”<sup>219</sup> convening about utilizing an international human rights framing as an additional advocacy tool to address gun violence was met with strong interest. It resulted in follow-up that sought to break down the silos between addressing the issue solely through advocacy targeted at domestic policymakers and through U.S.-based mechanisms to also advocate for change through international human rights venues.<sup>220</sup> Pedagogically, student participation in this conference, as well as other engagements including participation in expert discussions,<sup>221</sup> provided the opportunity to develop critical advocacy and lawyering skills including oral advocacy and engaged and deep listening.<sup>222</sup> Given the conference’s centering of gun violence survivors and families speaking to both the personal impact of gun violence and their activism and movement building, lessons from “a movement-centered model” of lawyering were especially relevant, including that “training in self-reflection and prudence” must include “cultivating skills . . . such as close listening, consultation, collaboration, mindfulness, fair-mindedness, and sensitivity to context and nuance,” all of which “are part of the ethical apparatus that movement lawyers should bring to bear on their work.”<sup>223</sup>

IHRC further sought to develop human rights literacy in its efforts to increase an understanding of gun violence as a human rights issue

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<sup>219</sup> GVPedia, Survivors Empowered, and Newtown Action Alliance, *Gun Violence Prevention Conference 2019: Twenty Years from Columbine to Parkland*, <https://www.survivorslead.com/events/2019/3/23/20-years-from-columbine-to-parkland> (Apr. 2019). The goal of the conference was to “connect [ ] gun violence prevention advocates to academic researchers.”

<sup>220</sup> The domestic violence advocacy context provides a useful model for the ways in which advocates might integrate a human rights framing into their work, including by working in collaboration with human rights advocates. See Caroline Bettinger-López, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19, 76-77 (2008) (explaining that the U.S. and United Nations based advocacy and engagement with the Inter-American Commission on Human Rights in the case of Jessica Lenahan (formerly Gonzales) contributed to the following: “Domestic violence and human rights advocates who have previously occupied separate spheres are increasingly interacting and engaging in constructive and meaningful dialogue, both in the United States and abroad”).

<sup>221</sup> Washington University’s Institute for Public Health, WashU Law Public Interest Law and Policy Speakers Series and the *Journal of Law and Policy*, American Branch of the International Law Association (International Human Rights Committee), *Interdisciplinary and Human Rights Approaches to the Gun Violence Crisis in the United States*, (Nov 2, 2018) [https://law.wustl.edu/wp-content/uploads/2019/05/The-U.S.-Gun-Violence-Crisis\\_-Conference\\_Public-Agenda.pdf](https://law.wustl.edu/wp-content/uploads/2019/05/The-U.S.-Gun-Violence-Crisis_-Conference_Public-Agenda.pdf).

<sup>222</sup> James H. Fierberg, *A CIVILITY-BASED MODEL FOR NEW LAWYERS* 28 (2021) (“Active listening, as its name suggests, is a conscious undertaking to actually and fully comprehend what is being said; that is, to grasp the message that the speaker is trying to convey, to make the speaker aware that you are, in fact, attempting to understand what is being said and focus on the message in a manner that will allow for a productive and appropriate exchange of information.”).

<sup>223</sup> Susan Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 464 (2018).

within academic institutions, including by organizing an event at Duke University School of Law, entitled “Guns and Domestic Violence: U.S. and International Human Rights Law Perspectives,”<sup>224</sup> which helped establish a foundation for relationship-building with local advocates at the city-level.

### III. OPPORTUNITIES AND CHALLENGES IN USING HUMAN RIGHTS FRAMEWORKS IN CLINICAL PROJECTS

The above case studies highlight some of the possibilities of integrating human rights into domestic clinical practice. Human rights norms and strategies can serve as useful advocacy and teaching tools. Specifically, clinics can create opportunities by widening the range of rights and sources of law that students might consider, advancing new understandings of state responsibility, providing new venues for advocacy, expanding the universe of potential remedies, focusing attention on human dignity, and broadening advocates’ and students’ perspectives. Clinicians should also be mindful of potential challenges of using human rights frameworks to orient domestic advocacy, including limitations on the application and enforceability of human rights, skepticism among partners or advocacy targets towards an unfamiliar framework, inconsistencies between domestic and international law, the non-legal work often required to address complex structural problems, and co-optation of human rights frameworks for regressive ends.

#### A. Opportunities

##### 1. Widening the Range of Rights

The human rights framework offers advocates and students an opportunity to think broadly about the nature of violations people are experiencing and the rights at stake, which are understood to be interdependent and interrelated in human rights law even when they may be separated or dealt with in a piecemeal fashion domestically. In fact, U.S. civil rights leaders, like Martin Luther King Jr. Malcolm X, and Walter White, the former executive secretary of the NAACP, called for

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<sup>224</sup> Duke University School of Law, *Guns and Domestic Violence: U.S. and International Human Rights Law Perspectives*, Oct. 14, 2019, <https://web.law.duke.edu/news/guns-and-domestic-violence-us-and-international-human-rights-law-perspectives>. Panel speakers were Sherry Honeycutt Everett, North Carolina Coalition Against Domestic Violence, Aya Fujimura-Fanselow, Clinical Professor of Law (Teaching) and Supervising Attorney, Duke University School of Law, and Verna Williams, Dean and Nippert Professor of Law, University of Cincinnati College of Law. The panel was introduced by Jake Charles, Executive Director, Center for Firearms Law, Duke University School of Law and moderated by Darrell A.H. Miller, Faculty Co-Director, Center for Firearms Law and Melvin G. Shimm Professor of Law, Duke University School of Law.

broadening the civil rights movement to a struggle for human rights.<sup>225</sup> As Carol Anderson explains, human rights could “address not only the political and legal inequality that African Americans endured, but also the education, health care, housing, and employment needs that haunted the black community.”<sup>226</sup> In 1951, Paul Robeson and William Patterson submitted a petition documenting widespread racist brutality and lynching and arguing that the U.S. government was guilty of genocide against Black Americans under international law.<sup>227</sup> While Cold War politics and pervasive racism stymied initial attempts to hold the U.S. government accountable for white supremacy and racist violence at the U.N., the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) in 1965 offered a new tool for advocates to look beyond civil rights guarantees at the domestic level and seek accountability for racial discrimination as a violation of international law.

Work on addressing the criminalization of homelessness through the lens of civil and political rights, more familiar to a U.S. audience, has provided an opening for a more robust understanding of rights that includes the right to housing and social and economic rights. While the amicus brief addressing fines for life-sustaining activities by the Miami Human Rights Clinic and partners focuses on the right to be free from cruel, inhuman, and degrading treatment, it concludes by linking punishment for homelessness to the U.S.’s failure to recognize the right to

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<sup>225</sup> ANDERSON, *supra* note 21, at 276; Barbara M. Oomen, *Introduction: The Promise and Challenges of Human Rights Cities*, in *GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES* 1, 239 (Barbara M. Oomen et al. eds., 2016) (quoting Martin Luther King Jr.: “We have moved from the era of civil rights to an era of human rights”); Dorothy Q. Thomas, *Against American Supremacy: Rebuilding Human Rights Culture in the United States*, in *BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 5 (Cynthia Soohoo et al. eds., 2009) (quoting Malcolm X: “How is a black man going to get ‘civil rights’ before he first wins his human rights?”); Carol Anderson, *A “Hollow Mockery”: African Americans, White Supremacy, and the Development of Human Rights in the United States*, in *BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES* 75 (Cynthia Soohoo et al. eds., 2009) (quoting Walter White, the NAACP’s executive secretary in 1950: “Democracy doesn’t mean much to man with an empty belly.”).

<sup>226</sup> ANDERSON, *supra* note 21, at 2. In 1947, shortly after the UN was created, W.E.B. DuBois authored an appeal on behalf of the National Association for the Advancement of Colored People (NAACP), documenting racial discrimination and other rights violations faced by Black individuals and communities in the United States. W.E.B. DuBois, *NAT’L ASS’N. FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), AN APPEAL TO THE WORLD: A STATEMENT ON THE DENIAL OF HUMAN RIGHTS TO MINORITIES IN THE CASE OF CITIZENS OF NEGRO DESCENT IN THE UNITED STATES OF AMERICA AND AN APPEAL TO THE UNITED NATIONS FOR REDRESS* (1947). The United States strongly objected to considering the petition, and while the Soviet Union pressed for it to be considered, the United Nations Commission on Human Rights ultimately rejected it. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 45 (2000).

<sup>227</sup> PAUL ROBESON & WILLIAM PATTERSON, *CIVIL RIGHTS CONGRESS, WE CHARGE GENOCIDE: THE CRIME OF GOVERNMENT AGAINST THE NEGRO PEOPLE* (1951).

adequate housing.<sup>228</sup> Advocates have further stressed the principle of “progressive realization” as a way to balance ultimate goals with current reality, recognizing that governments should commit to guaranteeing social and economic rights over time to the maximum of their available resources.<sup>229</sup> Nationally, advocacy to address the criminalization of homelessness has helped shift political discourse towards greater recognition of a right to housing.<sup>230</sup> President Biden ran on a platform endorsing a right to housing,<sup>231</sup> and the U.S. Interagency Council on Homelessness (USICH) strategic plan opens with a letter noting that “USICH believes that housing should be treated as a human right.”<sup>232</sup> Additionally, movements at the federal level and in California, Connecticut, and Vermont seek to establish a right to housing.<sup>233</sup>

The Cornell Gender Justice Clinic’s work to realize the right to be free from domestic violence has expanded community members’ understanding of the issues and rights at stake when domestic violence occurs. In advocating for the adoption of domestic violence-human rights resolutions, the Clinic drew upon their work the previous year in contributing research to a report by the U.N. Special Rapporteur on violence against women and girls, its causes and consequences (U.N. Special Rapporteur on violence against women) that analyzed how gender-based violence impedes the realization of all human rights.<sup>234</sup> While arguments around the United States’ binding civil and political rights obligations under the ICCPR were most persuasive to some local legislators in Tompkins County, NY, most of the domestic violence-human rights resolutions emphasized the impacts of domestic violence on survivors’ health, financial stability, and access to safe housing<sup>235</sup> – all traditionally understood as economic and social

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<sup>228</sup> Debra Blake Amicus Brief, *supra* note 89, at 10-17.

<sup>229</sup> See, e.g., ICESCR, *supra* note 14, at arts. 2(1).

<sup>230</sup> Tars et al., *supra* note 74, at 975-80.

<sup>231</sup> *The Biden Plan for Investing in Our Communities Through Housing*, JOEBIDEN.COM, <https://joebiden.com/housing>.

<sup>232</sup> USICH, All In: The Federal Strategic Plan to Prevent and End Homelessness, Message from the Executive Director (Dec. 2021), <https://www.usich.gov/fsp/message-from-executive-director>.

<sup>233</sup> See e.g., Fundamental human right to housing, ACA-10, Reg. Sess. (Cal. 2023); Jeremy B. White, *California Will Consider ‘Right to Housing’ Legislation This Year*, POLITICO (Jan. 6, 2020, 8:48 PM), <https://www.politico.com/states/california/story/2020/01/06/california-will-consider-right-to-shelter-legislation-this-year-9420607>; An Act Establishing a Right to Housing, Raised Bill No. 168, Conn. Gen. Assemb., LCO No. 1614 (2022).

<sup>234</sup> See Report to the U.N. General Assembly of the Special Rapporteur on Violence Against Women, Its Causes, and Consequences, Violence Against Women as a Barrier to the Effective Realization of All Human Rights, n. 1, U.N. Doc. A/69/238, (Sept. 1, 2014), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/523/34/PDF/N1452334.pdf?OpenElement>.

<sup>235</sup> Tompkins County Legislature, Declaring Freedom from Domestic Violence as a Human Right, RES2014-214, Nov. 18, 2014; Ithaca Town Board, Declaring Freedom from



rights issues. Resolutions also acknowledged that “the United Nations has recognized that freedom from domestic violence is a human right affecting the realization of many other rights and freedoms.”<sup>236</sup> This holistic human rights framing enabled community members to think more broadly about domestic violence interventions, to include, for example, a focus on support from employers, counseling support for survivors and their children, childcare assistance, and expanded access to and protection against discrimination in housing. Similarly, as noted above, the Duke IHRC submission to the Human Rights Committee demonstrates the full range of rights violations—both civil and political rights as well as economic, social, and cultural rights—experienced by victims of gun violence in domestic violence situations.<sup>237</sup>

The human rights framework not only illuminates a wider range of violations, but also sheds light on the ways different groups might bear the brunt of these violations differently. A human rights approach provides a robust understanding of equality that requires addressing disparate impacts and intersecting forms of discrimination. Human rights embrace the intersectionality framework, originally defined in the landmark work of Kimberlé Crenshaw to call attention to multiple forms of discrimination experienced in unique and specific ways by Black women and girls.<sup>238</sup> Intersectionality recognizes identity as inseparable from a person’s life experiences and the accumulation of vulnerabilities from several levels of societal marginalization.<sup>239</sup> As the CEDAW Committee has recognized, intersectional discrimination both “increases the risk of violence and heightens the adverse consequences of violence when it occurs.”<sup>240</sup> As noted above, the U.N. Special Rapporteur on violence against women has specifically called on the U.S. government to

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Domestic Violence as a Human Right, TB Res 2014-197, Dec. 8, 2014; Lansing Town Board, Declaring Freedom from Domestic Violence as a Human Right, Res 14-158, Dec. 17, 2014; Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Mar. 6, 2015.

<sup>236</sup> Tompkins County Council of Governments, Declaring Freedom from Domestic Violence as Human Rights, Res 002-2015, Jan. 22, 2015; City of Ithaca Common Council, Declaration of Freedom from Domestic Violence as a Human Right, Mar. 6, 2015.

<sup>237</sup> See Section II(C)(1) *supra*.

<sup>238</sup> Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STANFORD L. REV. 1241, 1242, 1252-53 (1991) (explaining intersectionality in the context of violence against women as “an experience...often shaped by other dimensions of their identities, such as race and class. Moreover, ignoring difference within groups contributes to tensions among groups, another problem that bears on efforts to politicize violence against women.”).

<sup>239</sup> *Id.*

<sup>240</sup> Comm. on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, ¶ 200, U.N. Doc. CEDAW/C/OP.8/CAN/1 (Mar. 30, 2015).

“[r]eview and more effectively address the disproportionate impact that violence has on poor, minority, and immigrant women.”<sup>241</sup> The U.N. Human Rights Committee has likewise emphasized, “Legal protections for the right to life must apply equally to all individuals and provide them with effective guarantees against all forms of discrimination, including multiple and intersectional forms of discrimination.”<sup>242</sup>

In accordance with this framing, the various Clinic initiatives emphasize intersectionality. Intersectional discrimination is a critical factor in homelessness, leading the Miami Human Rights Clinic to delve into intersections of homelessness with race and gender.<sup>243</sup> Cornell’s Gender Justice Clinic’s work implementing local domestic violence-human rights resolutions was guided by the experiences of survivors, including the particular experiences of survivors of color and others who experience multiple and intersecting forms of discrimination. This approach helped illuminate an insight shared by many community members that domestic violence responses should look beyond criminal legal system responses, which can afford critical protection and support but do not meet the needs of all survivors.<sup>244</sup> As explained above, the Duke IHRC submission underscores the intersectional nature of domestic violence, citing statistics on the impact of gun violence with regards to race.<sup>245</sup>

In addition, an intersectional lens requires the collection of disaggregated data to enable improvements and accountability. The Duke IHRC thus noted in its submission to the Human Rights Committee that such “[c]omprehensive data analyzing rates of domestic gun homicides and other gun-incidents among racial minorities, sexual minorities, and immigrant communities is lacking,”<sup>246</sup> for example highlighting that limited data regarding LGBTQ persons “prevents a clear understanding of the ways in which various laws on guns and domestic

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<sup>241</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 7-8, citing to *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Rashida Manjoo, Addendum Mission to the United States of America*, ¶115(A)(b), U.N. Doc. A/HRC/17/26/Add.5 and Corr.1 (June 6, 2011).

<sup>242</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 7, citing to Human Rights Comm., General Comment No.36, *General Comment No.36, on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, ¶ 61 CCPR/C/GC/36 (2018).

<sup>243</sup> University of Miami School of Law Human Rights Clinic et al., *A Racial Justice Response to Homelessness*, <https://miami.app.box.com/s/p3b5g6xoaw05lbcxnfou6fx-557c5krw>; University of Miami, Human Rights Clinic et al., *Women’s Homelessness in the United States*, <https://miami.app.box.com/s/h7csvo69hy8rbhd94j31v0l9f1j5l3pg>; University of Miami, Human Rights Clinic et al., *Homelessness in the LGBTQ Community in the United States*, <https://miami.app.box.com/s/6ajyu7b7mt7g59ckoe0onho02jzokf8l>.

<sup>244</sup> See, e.g., Campbell, *supra* note 143.

<sup>245</sup> See Section C(1), *Addressing the Role of Guns in Domestic Violence, Engaging with International Human Rights Mechanisms*.

<sup>246</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 2.

violence impact persons in LGBTI relationships.”<sup>247</sup> On this basis, the Clinic’s submission emphasizes that “[a] State’s due diligence obligation . . . requires States to address the intersectional nature of gun violence in domestic violence.”<sup>248</sup> The Miami Human Rights Clinic factsheet on “Homelessness in the LGBTQ Community in the United States” likewise calls for the collection of disaggregated data by sexual orientation and gender identity to understand and address LGBTQ struggles in accessing adequate housing.<sup>249</sup>

## 2. *Expanding State Responsibility*

In addition to a wider range of rights, using the human rights framework offers new understandings of state responsibility. These include the state’s responsibility to protect people from violence by private actors, to address structural issues, and to be proactive in addressing potential violations. First, human rights frameworks emphasize state responsibility to protect against violations by private actors. As the Cornell Gender Justice Clinic and its partners emphasized in their policy advocacy, a human rights lens provides a critical reframing of domestic violence as not just a private tragedy, but a violation of fundamental rights that governments at all levels have an obligation to address.<sup>250</sup> Both international and regional human rights bodies have recognized state responsibility to respond to domestic violence with “due diligence” whether the perpetrator is a state or non-state actor, and whether an act is committed in an official or private capacity.<sup>251</sup> This concept of due diligence is relevant in the context of guns and domestic violence which involves the use of guns by private actors,<sup>252</sup> as highlighted in the Duke IHRC submission to the Human Rights Committee.<sup>253</sup> Arguing for the full scope of

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<sup>247</sup> *Id.* at 3.

<sup>248</sup> *Id.* at 7.

<sup>249</sup> University of Miami School of Law Human Rights Clinic et al., *Homelessness in the LGBTQ Community in the United States*, <https://miami.app.box.com/s/6ajyu7b7mt7g59ckoe0onho02jzokf8l>.

<sup>250</sup> See Advocacy Center of Tompkins County et al., *supra* note 129, at 4; Tompkins County Council of Governments, Regular Meeting Minutes, Jan. 22, 2015, <http://tompkinscountyny.iqm2.com/Citizens/FileOpen.aspx?Type=12&ID=2095&Inline=True>.

<sup>251</sup> *E.g.*, M.W. v. Denmark, Communication No. 46/2012, ¶ 5.4, U.N. Doc. CEDAW/C/63/D/46/2012 (Mar. 12, 2016); Opuz v. Turkey, App. No. 33401/02, ¶ 176 (June 9, 2009), <http://hudoc.echr.coe.int/eng?i=001-92945>; Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 199 (July 21, 2011).

<sup>252</sup> Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U.J.L. & POL’Y 1, 48 (2019) (While the vast majority of shootings in the United States “are carried out by private actors, the U.S. government may be held responsible for human rights violations resulting from their actions”).

<sup>253</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 6, citing to Special Rapporteur on violence against women, its causes and consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women: The Due*

a state's obligation on the basis of the due diligence principle as required by international human rights law is an opportunity that would otherwise be unavailable under domestic law.<sup>254</sup>

Second, a human rights approach reframes structural issues, including homelessness, from a private tragedy to a violation the state is responsible for addressing, linking social factors and structural causes to the rights and dignity of human beings. For example, the U.N. Special Rapporteur on the right to adequate housing has noted that the very existence of homelessness is “a profound assault on dignity, social inclusion and the right to life. It is a prima facie violation of the right to... freedom from cruel, degrading and inhuman treatment.”<sup>255</sup> Moreover “a State party to [ICESCR] in which any significant number of individuals are deprived of basic shelter and housing is, prima facie, failing to discharge its obligations under the Covenant.”<sup>256</sup>

Third, the human rights framework provides a proactive orientation and focus on prevention. As the ACLU Women's Rights Project, Miami Human Rights Clinic, and Columbia Law School Human Rights Institute explain:

International human rights law provides a framework to evaluate existing problems and identify solutions aimed at preventing gender-based violence. Human rights principles focus on governmental responsibility to proactively take steps to prevent acts of gender-based violence committed by both private and governmental actors. This includes addressing the underlying conditions that

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*Diligence Standard as a Tool for the Elimination of Violence against Women*, ¶ 27, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (noting that the U.S. government must “exercise due diligence to prevent gun violence in domestic situations, to investigate and prosecute perpetrators, to assist and protect victims, and to ensure remedies”).

<sup>254</sup> Lapidus, *supra* note 210, at 549 (noting that one “of the most significant differences between . . . international human rights law, and the U.S. Constitution” is “that the state party must act with due diligence to protect individuals from harm caused by third parties, not simply ensure that no harm is committed by the government itself”). See also Caroline Bettinger-López, *Jessica Gonzales v. United States: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States*, 21 HARV. HUM. RTS. J. 183, 188 (2008) (contrasting the “different approach” between the United States legal system and the human rights framework, including that “[b]ecause the government has an affirmative obligation under international law to exercise due diligence and protect individuals known to be at risk, human rights can be a powerful mechanism for highlighting the state's role in perpetuating violence against women when it fails to respond appropriately to victims.”).

<sup>255</sup> U.N. Hum. Rts. Council, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, *Guidelines for the Implementation of the Right to Adequate Housing*, ¶ 30, U.N. Doc. A/HRC/43/43 (Dec. 26, 2019).

<sup>256</sup> U.N. Hum. Rts. Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, ¶ 48, U.N. Doc. A/HRC/31/54 (2015) (citing CESCR, General Comment No. 3 (1990), ¶ 10).

perpetuate violations of rights (such as discrimination, social biases and a lack of adequate institutional responses).<sup>257</sup>

Using this human rights framework, Cornell's Gender Justice Clinic thus helped develop initiatives that emphasized prevention through public education, outreach that invited stakeholders to identify community-based solutions to underlying problems, and a focus on strengthening institutional responses.

### 3. *Providing Additional Venues for Advocacy*

The case studies further illustrate how engaging with international and regional human rights mechanisms can strengthen domestic advocacy by providing new venues for students and partners to make their claims. U.N. or regional human rights advocacy can provide opportunities for dialogue with governments, trigger meetings with officials, and exert political pressure for change. As discussed above, housing advocates used the various international review processes to obtain meetings with government officials to advance advocacy and push for the implementation of human rights standards domestically. These meetings influenced the Federal Strategic Plan to End Homelessness, as well as led to HUD funding incentives to stop the criminalization of homelessness and a supportive DOJ brief in the seminal *Martin v. Boise* case.<sup>258</sup> Moreover, advocates can use engagement in international fora to elicit government commitments. Thus, in the 2015 UPR, the U.S. declared that it is "committed to helping communities pursue alternatives to criminalizing homelessness,"<sup>259</sup> and in the 2021 UPR, the U.S. affirmed that it "supports investing in direct solutions to alleviate the personal and social problems surrounding the issues of poverty."<sup>260</sup>

The key to this approach is connecting advocacy at the international level to a strategy in the domestic sphere. NHLC developed a particularly savvy approach to U.N. advocacy, focused on both developing human rights norms and working to implement them domestically. Additionally, critical groundwork for international advocacy comes from

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<sup>257</sup> UNIVERSITY OF MIAMI SCHOOL OF LAW HUMAN RIGHTS CLINIC, COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE & ACLU WOMEN'S RIGHTS PROJECT, DOMESTIC VIOLENCE & SEXUAL ASSAULT IN THE UNITED STATES: A HUMAN RIGHTS BASED APPROACH & PRACTICE GUIDE 1 (Aug. 2014), [https://hri.law.columbia.edu/sites/default/files/publications/dv\\_sa\\_hr\\_guide\\_reduce.pdf](https://hri.law.columbia.edu/sites/default/files/publications/dv_sa_hr_guide_reduce.pdf).

<sup>258</sup> See Section II(C)(1) *supra*.

<sup>259</sup> U.N. Hum. Rts. Council, Report of the Working Group on the Universal Periodic Review, United States of America, *Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, ¶ 12, U.N. Doc. A/HRC/30/12/Add.1 (Sept. 14, 2015), [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_12\\_Add\\_1\\_ENG.DOCX](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_12_Add_1_ENG.DOCX).

<sup>260</sup> U.N. Hum. Rts. Council, *Report of the Working Group on the Universal Periodic Review*, United States of America, ¶ 12, U.N. Doc. A/HRC/46/15/Add.1 (2021).

community work, including human rights trainings, partnership-building, and joint convenings. Sally Engle Merry describes a process of “vernacularization,” where global human rights language and norms are adapted to local institutions and meanings.<sup>261</sup> This was a central tenet behind the Duke IHRC’s hosting of and participation in convenings in the U.S. which sought, among other goals, to support local and grass-roots advocates, including through contributing to an increased understanding of engagement with international human rights mechanisms.

Participation in international processes can further facilitate coalition-building among local advocates. Participation in the review of the U.S. by the U.N. Committee on the Elimination of Racial Discrimination provides an example of this. Advocates from across the U.S. engaging in the review on different issues formed a listserv and WhatsApp chat, which continue to be active months later with people sharing upcoming events, news, contacts, and resources. A sub-group is further collaborating on engagement with the new U.N. Permanent Forum of People of African Descent. Likewise, the Cornell Gender Justice Clinic joined a growing movement of advocates around the U.S. committed to helping implement the Inter-American Commission’s decision in *Lenahan v. United States*. The Clinic gained new opportunities for collaboration with local, national, and even transnational partners that would not have been possible without the unifying goal of “bringing home” a landmark regional human rights decision.<sup>262</sup> These opportunities enabled local governments and community members to see themselves as participants in a broader movement and learn from others in their efforts to grapple with similar problems using human rights tools. This, in turn, affirmed and galvanized local efforts to strengthen domestic violence prevention and response.

One factor contributing to coalition-building is that, as noted above, the human rights framework provides an inclusive and universal language that can serve to bring advocates together. As Caroline Bettinger-López points out in the context of domestic violence, “the language of human rights appeals to a broader constituency and . . . has the ability to cut across the thematic . . . and identity-based . . . silos that have traditionally separated different advocacy groups doing social justice work” and “[o]ne of the strengths of the human rights framework is its

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<sup>261</sup> Sally Engle Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, 108 *AMERICAN ANTHROPOLOGIST* 38, 39 (2006).

<sup>262</sup> At one of the two film screenings that the Clinic and its partners hosted with Jessica Lenahan and her lawyers, attorney Caroline Bettinger-López encouraged the local audience by noting, “It is incumbent upon communities to take ownership and think about how to implement these decisions [of human rights bodies like the Inter-American Commission] on a local level. And this community, more than any other community in the U.S., has shown that this is possible.” Garland, *supra* note 166.



ability to place different stakeholders together under one umbrella.”<sup>263</sup> This takes place not just in the context of international human rights advocacy, but also in local human rights work. For instance, the human rights framework embodied in local domestic human rights resolutions has helped foster collaboration among diverse local stakeholders.

Additionally, as Bettinger-López and colleagues highlight, international advocacy serves to “amplify[] within an international context human rights concerns that may be seen as isolated domestic or local concerns.”<sup>264</sup> Elevating domestic violence, too often dismissed as a private, family matter, to an international concern is particularly powerful. Bringing an international dimension is further “compelling in our increasingly-globalized world, in which specific violations or transgressions are so often not solely attributable (if they ever were) to one particular state actor, but rather may be attributable to one or more state and non-state actors, including international financial or political institutions.”<sup>265</sup> In the context of homelessness, the U.N. Special Rapporteur on the right to adequate housing has highlighted “the financialization of housing,” in which housing is treated as a commodity and a means for wealth accumulation, as displacing communities and undermining the right to housing globally.<sup>266</sup> This is a concept the Miami Human Rights Clinic and partners have incorporated in our advocacy, calling for public hearings in neighborhoods with new developments and environmental and community impact assessments and mitigation plans for displacing vulnerable populations.<sup>267</sup>

#### 4. *Expanding the Universe of Potential Remedies*

Moreover, the human rights framework offers broad remedies that are systemic and survivor-centered to address violations. For example, a human rights approach to addressing domestic violence illuminates the need for solutions that center victims/survivors and recognize the complexity and systemic nature of the problem and its impact on many

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<sup>263</sup> Bettinger-López, *supra* note 220, at 71.

<sup>264</sup> Bettinger-López, et al., *supra* note 4, at 388.

<sup>265</sup> *Id.*

<sup>266</sup> U.N. Hum. Rts. Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context*, ¶ 6, U.N. Doc. A/HRC/34/51 (2017). The Special Rapporteur points out that residents are increasingly displaced in favor of new luxury buildings that turn quick profits, but because the units are so unaffordable, they are left empty at no consequence to the developers because to them “housing is as valuable whether it is vacant or occupied, lived in or devoid of life.” *Id.* at ¶ 30, 31.

<sup>267</sup> *E.g.*, University of Miami School of Law Human Rights Clinic et al., *RACIAL INJUSTICE IN HOUSING AND HOMELESSNESS IN THE UNITED STATES* (2022), <https://miami.app.box.com/s/x2obqtgy84o5qkfiyxct303nzd4g0l>.

other human rights.<sup>268</sup> As domestic violence is a deeply complex problem that violates many human rights, solutions must similarly be holistic, multifaceted, and sensitive to the experiences of survivors. This requires improving upon but not privileging criminal legal system responses, which often afford critical protection, but can also be traumatizing and abusive, particularly for marginalized communities. This may call for exploration of alternate approaches to victim safety and perpetrator accountability, such as by considering whether community-based restorative approaches might offer a valuable tool for some survivors in some circumstances,<sup>269</sup> and by ensuring robust support for survivors and their families, including in such diverse areas as employment, housing, social services, education, childcare, and mental and physical health. Efforts in Tompkins County, NY to implement local domestic violence-human rights resolutions resulted in to a student-led human rights program on dating violence in schools and the creation of impactful initiatives to address domestic violence at the workplace. Michelle Arbitte, Director of Cornell University's Workforce Well-Being, reported that the implementation of this initiative at Cornell helped reduce stigma and create a workplace environment that is safe and supportive, with employees coming forward at higher rates to ask for help in areas ranging from safety planning to mental health, to financial support or childcare.<sup>270</sup>

Similarly, an international human rights framing in the context of firearms in domestic violence widens the scope of government accountability, as well as corresponding remedies responsive to rights violations.<sup>271</sup> By

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<sup>268</sup> See, e.g., Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 35, ¶¶ 28 ff, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017) (setting out multifaceted measures that States parties should take “in the areas of prevention, protection, prosecution, punishment, and redress, data collection and monitoring, and international cooperation” and emphasizing that all of these measures “should be implemented with a victim/survivor-centered approach, acknowledging women as subjects of rights and promoting their agency and autonomy”); U.N. Hum. Rts. Council, Report of the U.N. Special Rapporteur on violence against women, its causes and consequences Rashida Manjoo, ¶ 65, U.N. Doc. A/HRC/26/28 (May 28, 2014) (“Transformative remedies require that the problem of violence against women is acknowledged as systemic and not individual; and that this requires specific measures to address it as a gender-specific human rights violation.”).

<sup>269</sup> See, e.g., LEAH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICE APPROACH TO INTIMATE PARTNER VIOLENCE* 87-99, 136-41 (2018).

<sup>270</sup> U.S. Dept. of Defense Counter-Insider Threat Program, *Cornell University Takes a Stand Against Domestic Violence*, THE INSIDER: THE THREAT LAB NEWSLETTER 2(4) (2021).

<sup>271</sup> See Bettinger-López, *supra* note 220, at 21 (“By framing domestic violence as a human rights violation, the case [*Jessica Gonzales v. United States* brought before the Inter-American Commission] challenges advocates and policymakers to re-think our country’s current approach to domestic violence” including with respect to “whether fundamental rights—to life, security, family, due process, equality, truth, and freedom from torture and cruel, inhuman, and degrading treatment—are being respected and fulfilled.”). See also *supra* note 252, 89 (2019) (“Human rights remedies are not the only response to America’s gun violence problem, of course, but they are an important part of the solution.”).

contrast, reliance on U.S. law alone narrows the possibility of this fuller articulation.<sup>272</sup> These framings are possible because the U.S. government is required, under legally binding international human rights obligations, “to address gun violence against women in domestic violence contexts.”<sup>273</sup>

### 5. *Attention to Human Dignity*

At the core of the human rights approach is a focus on human dignity. As Larry Cox explains, an international human rights framing “open[s] up possibilities that working within a strict constitutional or civil rights framework does not” including “because it takes us immediately to the most unassailable and universal basis for rights claims—human dignity and freedom.”<sup>274</sup>

Such a framing prioritizes the dignity and empowerment of domestic violence survivors.<sup>275</sup> The Inter-American Commission’s decision in *Lenahan v. United States* resonated with legislators and other community members in Tompkins County, NY because its focus on the United States’ systematic failure to protect Ms. Lenahan and her children spoke to their fundamental rights to live in safety and dignity as human beings and stood in sharp contrast to the much narrower constitutional framing of the U.S. Supreme Court.<sup>276</sup> The human rights framing also captures the impact of firearms in domestic violence contexts in ways that are intrinsically valuable because they align with and reflect lived experiences. With regards to homelessness, as the Special Rapporteur on the right to adequate housing noted, the very existence of homelessness itself is “a profound assault on dignity, social inclusion and the right to life.”<sup>277</sup> Much of the advocacy around homelessness therefore focuses on the fundamental right to live in dignity and security. In the evolution of their campaign for a Homeless Bill of Rights, the Lowenstein Clinic and community partners sought to concretely translate this guarantee

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<sup>272</sup> Cox, *supra* note 192, at 140.

<sup>273</sup> Duke Law International Human Rights Clinic, *supra* note 185, at 7.

<sup>274</sup> Cox, *supra* note 192, at 140.

<sup>275</sup> University of Miami School of Law Human Rights Clinic et al., *Domestic Violence & Sexual Assault in the United States: A Human Rights Based Approach & Practice Guide 1* (Aug. 2014).

<sup>276</sup> The Tompkins County Legislature’s domestic violence-human rights resolution included a paragraph that the legislators added to the draft resolution that the Gender Justice Clinic and its partners had proposed, which emphasized the differences between the Inter-American Commission’s decision in *Lenahan* and that of the Supreme Court in *Castle Rock*. Tompkins County Legislature, *Declaring Freedom from Domestic Violence as a Human Right*, RES2014-214, Nov. 18, 2014.

<sup>277</sup> U.N. Hum. Rts. Council, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context, *Guidelines for the Implementation of the Right to Adequate Housing*, ¶ 30, U.N. Doc. A/HRC/43/43 (Dec. 26, 2019).

into access to clean, safe, and convenient restroom facilities that enable people to meet their basic needs with dignity, above and beyond any domestic legal obligation for the city to provide those facilities.

#### 6. *Broadening Advocates' and Students' Perspectives and Furthering Pedagogical Goals*

Adopting a human rights perspective further enables global connection and provides opportunities for broader alliances and learning. Human rights lawyering connects local struggles with universal norms and transnational movements, integrating advocates into global dialogues. Advocates can thus situate deeply local work in a broader context. This opens the door for cross-learning from the experiences of advocates around the world, and advocates can draw on international norms and best practices. As Bettinger-López and colleagues explain, “the shared language of human rights allows advocates to converse with each other and expand possibilities.”<sup>278</sup>

In all the Clinic projects, transnational connections were important sources of learning and inspiration for local advocates. For instance, in the context of gun violence, “an emerging global consensus and common practice regarding the minimum regulations needed to prevent civilian firearms-related violence”<sup>279</sup> served as a useful tool for domestic advocates. Moreover, advocates addressing homelessness and housing issues in the U.S. benefited from the international human rights analysis of the right to adequate housing, including identification of its various components and steps governments can take to realize it.<sup>280</sup> Advocates have asked the Miami Human Rights Clinic to delve into different country practices for operationalizing the right to housing so that they can draw on these experiences in their local work.<sup>281</sup> At the same time, advocates have helped contribute to the development of universal human rights norms through international level advocacy, as well as local work to give rights meaning.<sup>282</sup> For instance, the U.N. Committee on the Elimination

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<sup>278</sup> Bettinger-López, et al., *supra* note 4, at 388. See also Omar Madhloom & Irene Antonopoulos, *Clinical Legal Education and Human Rights Values: A Universal Pro Forma for Law Clinics*, 9 *ASIAN J. LEGAL EDU.* 23, 27 (2022) (2021) (“Influenced by human rights values, derived from the UDHR, a universal pro forma can facilitate the creation of a global law clinic community. Students are able, through this pro forma, to communicate effectively through a shared ‘language’ and objectives, and thereby overcome obstacles such as pluralism and different legal systems.”).

<sup>279</sup> Frey, *supra* note 214, at 110.

<sup>280</sup> See University of Miami School of Law Human Rights Clinic et al., *What Is the Right to Housing*, <https://miami.app.box.com/s/7i1w7myiz27qc1yuiwobrscaopl1rbq2>.

<sup>281</sup> Please see comparative factsheets discussed above on equality, affordability, tenant rights, and informal settlements.

<sup>282</sup> Peggy Levitt and Sally Merry posit that through vernacularization, local movements not only adapt global human rights norms, but can, in turn, “transform the global

of Racial Discrimination cited the DOJ brief in the *Martin v. Boise* case in its review of Norway.<sup>283</sup> The local work by Cornell's Gender Justice Clinic sparked a collaboration on a related project in Lusaka, Zambia with learning in both directions. In particular, Clinic students found their local human rights-domestic violence work informed by the focus in Zambian law on preventing violence, protecting and assisting victims, and engaging diverse government and civil society stakeholders in domestic violence response.<sup>284</sup>

Moreover, engaging in human rights advocacy provides a valuable teaching tool in preparing students to be thoughtful and effective lawyers, broadening the students' perspectives with regards to both norms and practice.<sup>285</sup> Exposure to human rights concepts and strategies challenges students to recognize gaps in domestic law, policy, and practice and opens their vision to different possibilities. Clinics have strong pedagogical goals and often more time and flexibility than other domestic legal organizations do, and clinical teachers can guide students in exploring these gaps and possibilities. Engagement around the proposed Homeless Bill of Rights in New Haven gave students in the Lowenstein Clinic a different appreciation of the range of advocacy targets whose decisions affected the rights of people experiencing homelessness. While students engaged with the city and local police, they also considered how local merchants, university security forces, community groups, and others effectively excluded people experiencing homelessness from public spaces, as well as how government offices concerned with budgeting and building design restricted what options were possible for providing new facilities. Taking the rights and dignity of people experiencing homelessness as a starting point led to creative, reflective discussions of what kinds of interventions might be helpful.

Students in Cornell's Gender Justice Clinic were surprised and moved by the differences between the decisions of the U.S. Supreme Court and Inter-American Commission in Jessica Lenahan's case. Although most students had joined the Clinic with little previous experience with international human rights, they quickly became eloquent advocates for the value of using human rights frameworks to guide local policy and practice. Their engagement with local stakeholders around

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understanding and practice of human rights. As social movements seize these ideas and wrestle with them, they make them something new." Peggy Levitt & Sally Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, 9 GLOBAL NETWORKS: A J. OF INT'L AFF. 441, 460 (2009).

<sup>283</sup> Eric Tars & Liz Osborn, *Leading by Example on Human Rights of People Experiencing Homelessness*, USICH NEWS (Oct. 13, 2015).

<sup>284</sup> See Banda & Brundige, *supra* note 168.

<sup>285</sup> See Janus & Smythe, *supra* note 97, at 478 (noting that human rights advocacy can "help students understand the breadth of opportunities to make an impact using legal advocacy and research tools").

the implementation of these frameworks led to further valuable insights – related, for example, to the importance of adopting holistic and multifaceted approaches to domestic violence prevention and response and ensuring that such approaches are responsive to the multiple and intersectional forms of discrimination and marginalization many survivors experience. This work challenged them to recognize gaps in domestic law, policy, and practice, and to consider how international frameworks, as well as insights gained through transnational collaboration, might help to address these gaps and to identify new possibilities. Overall, the project expanded students’ perspectives, helping prepare them to be thoughtful and effective lawyers in a deeply interconnected world.

In addition, human rights approaches can give students the opportunity to practice important lawyering skills, including collaboration and teamwork, organization and management, research, legal analysis and writing, interviewing, deep listening, oral advocacy, and relationship-building with community partners, both locally and cross-nationally. They learn to bridge community lawyering with global insights, which is particularly valuable in today’s deeply interconnected world. For example, in contributing to Amnesty International’s report “Fragmented and Unequal: A Justice System that Fails Survivors of Intimate Partner Violence in Louisiana, USA,” Duke IHRC students developed important legal writing and analytical skills, as well as legal research skills with respect to both U.S. federal and state legislation and case law, as well as international human rights law. The Duke IHRC’s participation in, among others, the “Gun Violence Prevention Conference 2019: Twenty Years from Columbine to Parkland” and the “Interdisciplinary and Human Rights Approaches to the Gun Violence Crisis in the United States” expert discussion created opportunities to develop a range of vital advocacy and lawyering skills, including oral advocacy and deep listening. Three Cornell Gender Justice Clinic students who helped advocate for recognition of the right to be free from domestic violence wrote that “[i]t was important for us to work on local human rights issues since there are still many human rights violations in the United States, though they often are not discussed in human rights terms.”<sup>286</sup> They explained that their local human rights advocacy work caused them to be “pushed out of our comfort zone” by participating in creative engagement with the media, strengthened their public speaking and advocacy skills through their work with legislative and community stakeholders, and enabled them to improve their writing and teamwork

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<sup>286</sup> Josh Baldwin, Joanne Joseph, & Carolyn Matos, *A Student Perspective on Human Rights Advocacy*, BRINGING HUMAN RIGHTS HOME BLOG, Dec. 5, 2014, [https://lawprofessors.typepad.com/human\\_rights/2014/12/a-student-perspective-on-human-rights-advocacy.html](https://lawprofessors.typepad.com/human_rights/2014/12/a-student-perspective-on-human-rights-advocacy.html).



skills – overall an experience they described as “one of the most rewarding experiences of our law school careers.”<sup>287</sup>

Moreover, human rights advocacy provides the opportunity for students to balance engagement with the law with engagement with communities. Kathleen Kelly Janus and Dee Smythe recount how the Stanford Law School International Human Rights Clinic has helped expand students’ conception of lawyering beyond “the paradigm of the ‘Perry Mason’ image that many students may imagine as the quintessential lawyer.”<sup>288</sup> The importance of translating law for communities particularly struck one of their students, who characterized convenings with community leaders and the drafting of factsheets as “us[ing] legal knowledge to empower minor revolutions.”<sup>289</sup> The various case studies in this article include a deliberate focus on building human rights literacy and legal empowerment at the community level. A student who worked on homelessness advocacy as part of the Miami Human Rights Clinic described the Clinic as an opportunity for “a lot of different types of writing, a lot of different types of advocacy,” from an op-ed to a law review article to social media and an online interactive role play to legal submissions and engagement with different levels of government, from the local to the national to the international.<sup>290</sup> He remarked on how the various projects encouraged students “to be as creative as you can think,” leading to “a huge impact on my life and thinking.”<sup>291</sup>

### B. Challenges

Using human rights frameworks in clinical work also comes with challenges for supervisors and students. Some of the main challenges include limitations on the domestic applicability and enforcement of international human rights law, skepticism among partners and advocacy targets about the utility of human rights, inconsistencies between international and domestic law, veering into non-legal policy interventions where a clinic does not necessarily have expertise, and co-optation of rights frameworks. These challenges may counsel in favor of eschewing a human rights approach in particular situations, but as a general matter, they need not deter clinicians and practitioners from incorporating human rights strategies into their teaching and practice. As suggested below, many of these challenges can be considered and addressed in project design and over the course of advocacy. Moreover, helping

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<sup>287</sup> *Id.*

<sup>288</sup> Janus & Smythe, *supra* note 97, at 478.

<sup>289</sup> *Id.* at 476.

<sup>290</sup> Miami Law, *David Stuzin’s Experience with the Human Rights Clinic*, YouTube (Apr. 21, 2021), <https://www.youtube.com/watch?v=aJx9H5SepRY&t=1s>.

<sup>291</sup> *Id.*

students identify and grapple with these challenges can itself further important pedagogical goals.

### 1. *Limitations on the Applicability and Enforcement of Human Rights*

The use of human rights frameworks in clinical work may be impeded by the limitations on the application and enforcement of international human rights law in the U.S. These limitations relate in part to the nature of human rights law and institutions, which are not supported at the international level by a police force or other enforceability tools available to governments at the domestic level. Many international and regional human rights mechanisms have been hampered by funding shortages, which limit their ability to conduct investigations or follow up on recommendations.<sup>292</sup> In the U.S, the limitations also relate to the effects of American exceptionalism, which include the non-ratification of important human rights treaties, the scarcity of domestic laws incorporating human rights obligations, and barriers to litigating human rights claims in domestic courts discussed above. These challenges constrain clinicians' choices about advocacy strategies and may lead partners, communities, governments, or other relevant actors to resist human rights-based claims.

For example, a member of the Tompkins County Legislature opposed the reference in the draft resolution to CEDAW, given that the U.S. has signed but not ratified this human rights treaty. The legislature ultimately removed the CEDAW reference from its resolution, relying instead on treaties that the U.S. has ratified, like the ICCPR and CAT, as well as the Inter-American Commission's *Lenahan* decision.<sup>293</sup> The lengthy debate around this issue led the Clinic and its partners to remove the CEDAW reference from the draft resolution that they presented to other local governments as well. Grappling with these concerns was both difficult and valuable for the student team; they recalled that "one of the most rewarding experiences this semester was working with a local legislator to improve the language of our draft in response to questions that she and her colleagues had raised."<sup>294</sup>

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<sup>292</sup> See, e.g., Press Release, OHCHR, Human Rights Experts Warn of Damaging Impact on Special Procedures from UN Funding Crisis (Sept. 28, 2020), <https://www.ohchr.org/en/press-releases/2020/09/human-rights-experts-warn-damaging-impact-special-procedures-un-funding>; Press Release, Inter-American Commission on Human Rights, Severe Financial Crisis of the IACHR Leads to Suspension of Hearings and Imminent Layoff of Nearly Half its Staff (May 23, 2016), [https://www.oas.org/en/iachr/media\\_center/preleases/2016/069.asp](https://www.oas.org/en/iachr/media_center/preleases/2016/069.asp).

<sup>293</sup> The partners subsequently revised the draft resolutions they submitted to other local governments to more generally note that the United Nations had recognized that freedom from domestic violence was a fundamental human right.

<sup>294</sup> Baldwin et al., *supra* note 286.

Additionally, courts and government actors may hesitate to include explicit references to international human rights in litigation. While human rights advocacy led to the DOJ Statement of Interest Brief in the seminal case of *Martin v. Boise*, the brief focused on the Eighth Amendment and did not directly cite human rights law.<sup>295</sup> However, the DOJ later affirmed that its position in the case was an “acknowledgement of the human rights of people experiencing homelessness.”<sup>296</sup> Similarly, the Ninth Circuit Court of Appeals in *Johnson v. City of Grants Pass*<sup>297</sup> issued a positive decision, holding that “the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go,” but did not reference international human rights.<sup>298</sup>

If advocates do not raise human rights arguments, however, then courts and government actors will never have an opportunity to consider them. Adjudicators will only gain comfort with international law arguments over time as they are regularly and thoughtfully raised in litigation. Already, some courts have considered and used international law as persuasive authority when interpreting domestic law.<sup>299</sup> During the Cornell Gender Justice Clinic’s gathering voices campaign, several county judges suggested that courts could consider the local domestic violence-human rights resolutions as an overarching principle

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<sup>295</sup> Statement of Interest of the United States, *Bell v. City of Boise*, 993 F. Supp. 2d 1237 (D. Idaho 2014) (No. 1:09-cv-00540-REB) (“It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment.”); *Justice Department Files Brief to Address the Criminalization of Homelessness*, U.S. DEPT. JUST. OFF. PUB. AFF. (Aug. 6, 2015), <http://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness>.

<sup>296</sup> Letter from Lisa Foster, Dir., Off. for Access to Just., U.S. Dept. of Just., to Seattle City Council Members 3 (Oct. 13, 2016), <https://assets.documentcloud.org/documents/3141894/DOJ-ATJ-Letter-to-Seattle-City-Council-10-13-2016.pdf>.

<sup>297</sup> Formerly *Blake v. City of Grants Pass*.

<sup>298</sup> *Johnson v. City of Grants Pass*, 50 F.4th 787, 813 (9th Cir. Sept. 28, 2022).

<sup>299</sup> In their study of state courts drawing on international human rights law, the Opportunity Agenda and Program on Human Rights and the Global Economy of Northeastern University School of Law conclude, “[T]he range of cases in which international law arguments are offered seems to have increased, now encompassing environmental claims, tort cases, and guardianship matters. Many of these arguments have been cursorily dismissed, with a few courts and individual judges staking out their opposition to the application of international human rights law. However, some state courts have considered and affirmatively used international law as persuasive authority for the interpretation of state constitutions, statutes, and common law. Further, individual judges regularly draw on human rights norms in concurring or dissenting opinions.” Martha F. Davis, Diego Iniguez-Lopez & Juhu Thukral, *Human Rights in State Courts 2014* (Northeastern Univ. Sch. of Law Research Paper No. 177-2014, Feb. 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2394019](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2394019).

when interpreting and applying binding domestic law.<sup>300</sup> We hope that continuing to raise these arguments will help educate courts and government entities and lead to further decisions and policies in line with human rights. Clinics can play an important role in this historical process, as they teach students about how to advocate for systemic change.

## 2. *Skepticism about Human Rights*

Another significant challenge in using human rights frameworks, often related to the first, is that partners and advocacy targets may not share the clinic's conviction that human rights are relevant or effective tools for social change. Partners may lack familiarity with the human rights framework or harbor skepticism about the utility or enforceability of human rights. This skepticism is often understandable and can be productive in encouraging students to think critically about whether and how human rights arguments will be useful in working with partners to achieve shared goals. For advocacy targets, human rights may seem too aspirational, raise concerns about external scrutiny, or evoke skepticism about the nature of the legal obligations that human rights commitments might entail.

Lawmakers may have reservations about embracing a human rights framework. In initial efforts to enact a Homeless Bill of Rights in New Haven, for example, sweeping language about social and economic rights was gradually limited in the political process. An unqualified right to housing, which drew concern about feasibility and cost to the city, became a right to emergency housing that would commit the City of New Haven to work with community partners and area governments to guarantee emergency shelter. The right to dignity in meeting basic needs evolved to include a requirement to "clean, safe, highly accessible public locations and facilities" for performing basic bodily needs and committed the city to create such facilities where they are lacking.<sup>301</sup> While these changes helped secure passage of the Homeless Bill of Rights before the HAC, lingering concerns about legal liability have left the ordinance in limbo and prevented passage before the city's Board of Alders.

In addition, advocacy targets sometimes perceive human rights arguments as an effort to impose external norms upon a government or community. The Gender Justice Clinic's partners, for example, cautioned that human rights arguments might be seen as impositions and

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<sup>300</sup> Garland, *supra* note 166. Hon. Joseph Cassidy, County Court Judge, and Maura Kennedy-Smith, Law Clerk to Hon. Joseph Cassidy, Tompkins County Court and Integrated Domestic Violence Court, Oct. 4, 2016, on file with authors; Interview with Hon. John Rowley, County Court Judge, Tompkins County Court and Integrated Domestic Violence Court, July 6, 2016, on file with authors.

<sup>301</sup> Bill of Rights for New Haven Residents Experiencing Homelessness, sec. 3, on file with authors.

fail to resonate in some spaces, among some parts of law enforcement for example. This consideration was also noted in a more recent presentation by Chair Peyi Soyinka-Airewele on behalf of the Tompkins County Human Rights Commission, one of the Clinic's former community partners. Quoting Makau Mutua, she explained that while "we need global solutions to shared problems," including among other goals, to protect domestic violence victims, "these norms and structures must be grown at home and must utilize the cultural tools familiar to the people at the grassroots. . . . What the human rights movement must not do is to close all doors, turn away other cultures, and impose itself in its current form and structure on the world."<sup>302</sup>

Drawing lessons from domestic clinics that engage in community or movement lawyering, human rights-focused clinics and advocates can navigate these concerns by being mindful of power dynamics and deliberate about not imposing their leadership or goals, and by striving to collaborate with, learn from, and build the power of directly impacted communities.<sup>303</sup> This approach requires humility and an openness to reevaluating or even abandoning a human rights strategy or objective in favor of other legal or non-legal approaches that affected community members may identify as more valuable, effective, or prudent. For example, the Gender Justice Clinic built into its initiative multiple opportunities to listen to and learn from the priorities, strategies, and understandings of human rights identified by community stakeholders. This led to a decision to set aside the Clinic's initial goal of using local human rights resolutions to advocate for improvements to law enforcement responses to gender-based violence. Instead, the Clinic's students and instructors sought out opportunities to support other community members in realizing their visions for implementing the right to be free from domestic violence, leading to projects that focused on dating violence and workplace responses to domestic violence. Clinic partner and then-Tompkins County Advocacy Center Executive Director Heather Campbell described this implementation work as "one of the most

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<sup>302</sup> Peyi Soyinka-Airewele, Protecting Human Rights, Equity, and Dignity in Tompkins County and the Global Community, Presentation to the Community Foundation of Tompkins County (April 2022), slide 13 (quoting MAKAU MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE 5 (2013)), available at [https://www.cftompkins.org/wp-content/uploads/2022/04/Lets-Talk\\_Human-Rights\\_-Community-Foundation-Presentation.pdf](https://www.cftompkins.org/wp-content/uploads/2022/04/Lets-Talk_Human-Rights_-Community-Foundation-Presentation.pdf).

<sup>303</sup> See William Quigley, *Ten Ways of Looking at Movement Lawyering*, 5 HOW. HUM. & C.L.R. REV. 23, 33-35 (2020) (advocating for an approach to movement lawyering that involves learning from and working in solidarity with organizations and directly impacted people "to challenge and dismantle unjust situations and structures, and to shift power to the people of the movement so they can continue to bring about social change"); Bettinger-López, et al., *supra* note 4, at 385-87 (advocating for a model of collaborative human rights lawyering in which lawyers are "cautious not to usurp or diminish community power in any community process").

collaborative campus-community projects” she had worked on to date, and one that spawned many deeply valuable projects.<sup>304</sup>

### 3. *Inconsistencies Between International and Domestic Law*

A third challenge arises when international law is out of step with domestic law or norms. The Gender Justice Clinic found that international human rights law’s emphasis on expanded state responsibility was valuable in many ways but also carried the potential to place too much focus on interventions by state actors. Governments are the primary duty-bearers under international law, and the international principle of due diligence highlights the responsibility of states to prevent domestic violence, prosecute and punish perpetrators, and afford protection and redress to victims and survivors. However, as Julie Goldshied and Debra Liebowitz have pointed out, “[a] reflexive focus on State response can encourage an undue emphasis on criminal justice responses, with adverse consequences such as arrests of survivors and other unwanted interventions” that can have particularly harmful impacts on racial, ethnic, religious, or sexual minorities and other members of marginalized communities.<sup>305</sup> This focus also “risks situating the State as the entity charged with program delivery when other entities would be more effective.”<sup>306</sup>

Clinic students discovered echoes of these critiques in Tompkins County community members’ insistence that domestic violence responses must be holistic, community centered, and inclusive of strategies found outside the arena of state action and specifically criminal legal system responses. As noted earlier, Clinic students also learned from their cross-national collaboration about Zambia’s legal approach to gender-based violence,<sup>307</sup> which extends to all Zambians the responsibility of advising and assisting victims of such violence.<sup>308</sup> In their advocacy, Clinic students and their partners came to emphasize that domestic violence affects everyone and to suggest that a human rights framework requires a societal response, with governments supporting and working in collaboration with their community partners.<sup>309</sup> This

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<sup>304</sup> Garland, *supra* note 166.

<sup>305</sup> Julie Goldshied & Debra Liebowitz, *Due Diligence and Gender Violence: Parsing its Power and its Perils*, 48 CORNELL INT’L L. J. 301, 301 (2015).

<sup>306</sup> *Id.*

<sup>307</sup> See Section III(A)(6).

<sup>308</sup> Anti-Gender-Based Violence Act 2011 (Zambia), § 5.

<sup>309</sup> See Alex Gutierrez & Carolina Morales, *The Right to Be Free from Domestic Violence*, Barely Legal Column, CORNELL DAILY SUN (Feb. 4, 2016); Bill Chaisson, *Domestic Violence Resolution Presented at City Administration*, ITHACA TIMES (Jan. 28, 2015); Jeff Stein, *With 100s of Domestic Violence Cases a Year, Tompkins Gov. Takes a Step Forward*, ITHACA VOICE (Jan. 13, 2015), <https://ithacavoices.com/2015/01/100s-domestic-violence-cases-year-tompkins-gov-takes-step-forward>; Svante T Myrick, Mayor of the City of Ithaca, City of Ithaca Proclamation, Apr. 24, 2015, <https://www.lawschool.cornell.edu/wp-content/uploads/2020/11/24b-Ithaca-City-Executive.pdf>.



approach involved an interpretation of the human rights framework that was not the only one possible. Importantly, it was an understanding that came out of Clinic's local community and transnational partnerships, pointing to the important role that local and transnational human rights engagement can play in further developing international norms.

#### 4. *Tackling Non-Legal Policy Interventions*

While the human rights framework offers opportunities to recognize and work to address the structural factors that give rise to human rights violations, addressing these conditions may also require interventions that are less legal and unfamiliar to students and supervising clinicians. In the campaign for a Homeless Bill of Rights in New Haven, for example, advocates identified the absence of accessible public restroom facilities as a threat to health and dignity and a contributing factor to criminalization, and city officials expressed interest in addressing this problem. As part of their work, students looked to other models of public restrooms being adopted in similarly sized cities, met with architects and local stakeholders, and compiled cost estimates and different models for a public bathroom in downtown New Haven. While this piece of the project attracted community interest even as the bill of rights itself stalled, it also drew on a different skill set that was not primarily legal. This may be exciting for some clinicians and students eager to tackle problems that arise, but may also be frustrating where clinicians and students lack relevant expertise or worry that these creative interventions come at the expense of developing more traditional legal skills.

Similarly, in its efforts to help implement the local resolutions recognizing freedom from domestic violence as a human right, the Gender Justice Clinic and its partners responded to an identified need to help employers address domestic violence at the workplace. In support of this initiative, students reviewed policies from around the country, held a roundtable for public and private employers in the community, worked with partners to turn the policy into a user-friendly toolkit, consulted widely with human resource professionals and other stakeholders within institutions, participated in awareness raising events for employees, and helped raise funds for an employee emergency care fund. As in the New Haven example, this initiative was challenging and rewarding for many of the students involved, but it also for the most part was not particularly legal in nature. As noted above,<sup>310</sup> the initiative also required the Clinic to step back and support others with deeper expertise (here local human resource leaders and experienced educators at our partner NGO) in reimagining and carrying forward the human rights initiative. This led to a lessening of the initiative's

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<sup>310</sup> See Section III(B)(2) *supra*.

explicit focus on human rights and on law-related strategies. At the same time, it fostered a sense of humility among our students and taught them to see their own work and knowledge as a significant but small part of a much broader effort through which the process of bringing human rights home became more meaningful, sustainable, and community-owned.

### 5. *Co-option of Rights Framing and Language*

As familiarity with human rights framings and language grows, adversaries may co-opt the language of human rights in ways that create new obstacles to rights realization. In the context of the right to housing, a dangerous attempt to co-opt human rights framing is Mayor Steinberg of Sacramento's introduction of a bill that redefines the right to housing. The bill defines "adequate" housing to include an offer of an encampment and a "requirement to take what is offered" under penalty of criminalization.<sup>311</sup> Another example relates to advocacy for the recognition and establishment of new rights directly in opposition to efforts to address firearm possession and use. This has taken the form of the argument that "[t]he right to possess arms is a fundamental *human* right"<sup>312</sup> and that "[a]n international human right to keep and bear arms should take form in a treaty."<sup>313</sup> This argument is also built on the premise that "[t]he Second Amendment serves to secure this fundamental human right" and thus "[i]t is time for international human rights law to secure this fundamental right."<sup>314</sup> Relatedly, while not going so far as arguing for "the existence of a universal international human right to possess and carry firearms in all circumstances," an argument is made "that the evidence of an international human right to self-defense is clear" and that this "undoubtedly must imply some right . . . to the possession of some type of defensive arms."<sup>315</sup> This argument is then extended as follows: "[I]t would be a violation of human rights law for a government to . . . forbid the possession of reasonably necessary defensive arms."<sup>316</sup> Similarly, arguments are made about competing rights, which can then extend into broader criticisms of international law.<sup>317</sup> While these

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<sup>311</sup> Benjamin Oreskes, *A Plan to Give Homeless People a Right to Housing Roils Sacramento*, LA TIMES (Nov. 19, 2021), <https://www.latimes.com/homeless-housing/story/2021-11-19/sacramentos-mayor-wants-a-right-to-housing-some-in-his-city-are-skeptical>.

<sup>312</sup> Christopher J. Schmidt, *An International Human Right to Keep and Bear Arms*, 15 WM. & MARY BILL RTS. J. 983, 1020 (2007).

<sup>313</sup> *Id.* at 1016.

<sup>314</sup> *Id.* at 1020.

<sup>315</sup> David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 178 (2007).

<sup>316</sup> *Id.*

<sup>317</sup> Following its criticism of a report by the Human Rights Council, Sub-Commission on the Promotion and Protection of Human Rights on "Prevention of Human Rights Violations Committed with Small Arms and Light Weapons," the authors argue that "[o]ne of the

arguments have not achieved broad consensus, human rights framings are being used in ways that contain fundamental misunderstandings of human rights law. This attempt to co-opt human rights is concerning, and as human rights arguments gain traction, we may see increased use of this strategy in other contexts.<sup>318</sup>

### CONCLUSION

Clinical teaching and advocacy can benefit from the incorporation of human rights norms and strategies, particularly in areas where domestic law is inadequate. A human rights framework provides a more robust understanding of rights, benefiting from global struggles and developments. It further expands notions of state responsibility and potential remedies and provides new avenues for advocacy. Clinicians should be mindful of potential challenges, including limits on the application and enforceability of international human rights law, skepticism by partners and advocacy targets, non-legal work required to address complex structural problems, and the potential for co-optation, but they need not be deterred by these challenges from incorporating human rights into their advocacy toolkits. Clinics are well-placed to integrate human rights into their practice given the heightened flexibility they often have in building their dockets and the pedagogical considerations that inform their work. Through their engagement with human rights law and strategies, students learn to bridge community lawyering with global insights, as they practice key lawyering skills including collaboration, organization and management, research, legal analysis and writing, interviewing, deep listening, oral advocacy, and relationship-building with community partners. In particular, human rights advocacy can broaden students' perspective and encourage them to use their legal knowledge and skills creatively to imagine and help develop a more just world.

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reasons that international law is viewed with intense suspicion in some circles is the tendency of some activists to twist international law so that it evades people's right to self-government and self-determination, imposing an elitist, far left social policy agenda on a population against its will." *Id.* at 170.

<sup>318</sup> In relation to the now-disbanded Commission on Unalienable Rights, established by Secretary of State Michael R. Pompeo, the Duke Law International Human Rights Clinic authored a submission co-signed by more than thirty individuals "linked to law school human rights clinics in the United States." The submission "identifies ten core concerning propositions relied upon by the Commission" and "focuses on addressing the most concerning misconceptions about human rights law in how the Commission understands and/or seeks to resolve questions about existing challenges with human rights and institutions." See, e.g., Duke Law International Human Rights Clinic, *Submission to the Commission on Unalienable Rights* 1 (May 2020), [https://web.law.duke.edu/sites/default/files/centers/cicl/cur\\_submission\\_final.pdf](https://web.law.duke.edu/sites/default/files/centers/cicl/cur_submission_final.pdf).

# WHY NOT A 1L CLINIC?

JACLYN KELLEY-WIDMER\*

*This article explores the benefits and challenges of offering a clinical course for first-year law students. Currently, only five percent of law schools permit 1Ls to take clinical courses, and only two law schools offer clinics specifically designed for 1Ls. Drawing from the author's experience teaching a 1L clinic and contextualizing this project within experiential education pedagogy and the broader law-school curriculum, the article explores reasons a law school might opt to develop a clinical course for 1Ls. The article provides a snapshot of the student perspective through data analysis of students' self-reported reasons for enrolling in the clinic and experiences gained in the course. Further, the article discusses specific pedagogical innovations and benefits of a 1L clinic, and it frankly assesses and strategizes around the inherent challenges in such a project. Finally, the article presents concrete ideas for how schools might build on this knowledge to design new clinical programs and other credited experiential work for first-year law students.*

## INTRODUCTION

First-year law students have very limited opportunities to engage in live-client clinics<sup>1</sup> for credit. The first year of law school remains focused on traditional doctrinal classes such as property, civil procedure, contracts, and tort law, along with legal writing.<sup>2</sup> True, many law schools now

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\* Clinical Professor of Law, Cornell Law School. In working on this project and later this piece, I had invaluable support from far too many Cornell Law colleagues to name here, and to whom I am so grateful. Thanks to Beth Lyon for her support; to my incredible co-teacher, Alisa Whitfield; and to fantastic research assistants Sarahi Rivas and Allayne Thomas. Finally, enormous thanks to the students and clients who trusted me with this project, especially my very first class of 1L Clinic students.

<sup>1</sup> I use the term “clinic” in this article to refer to curricular courses taught by law-school faculty in which students engage in lawyering for academic credit on behalf of clients and communities and which include a seminar component. See Lindsay M. Harris, *Learning in “Baby Jail”: Lessons from Law School Engagement in Family Detention Centers*, 25 CLIN. L. REV. 155, 168 (2018); Elliot S. Milstein, *Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations*, 51 J. LEGAL EDUC. 375, 376 (2001) (describing “in-house, live-client clinics.”); Margaret Martin Barry, Rachel Camp, Margaret E. Johnson, Catherine Klein & Lisa Martin, *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 404 (2012) (discussing how “community legal education can be a powerful means to pursue the clinical legal education mission.”).

<sup>2</sup> See, e.g., Michael A. Milleman & Eduardo R.C. Capulong, *Introduction*, in THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS 3, 7 (Eduardo R.C. Capulong, Michael A. Milleman, Sara Rankin & Nantiya Ruan eds., 2015) (describing the typical first-year doctrinal courses taught at law schools since the 1870s that remain largely the same today); Harris, *supra* note 1, at 168 (noting that “traditional legal education, which has involved studying appellate cases,

permit electives in the second semester,<sup>3</sup> and some have moved certain core classes into elective options that can be taken beyond the first year.<sup>4</sup> Nevertheless, the overall curricular structure remains traditional,<sup>5</sup> despite calls to more concretely prepare students for practice<sup>6</sup> and an ongoing movement to integrate more experiential education<sup>7</sup> into the curriculum.<sup>8</sup>

Many incoming law students are motivated by a passion for justice and have an idealistic desire to use their law degree to help others,<sup>9</sup> as is possible in experiential settings. Today's law students, mostly of

through engaging in the Socratic method of questioning, by a 'podium' professor, typically with a high student to faculty ratio"—the "opposite" of clinical pedagogical models).

<sup>3</sup> Schools permitting an elective in second semester of law school include, for example, the University of Chicago Law <https://www.law.uchicago.edu/prospective/1Lcourses>; Duke Law School, <https://law.duke.edu/study/firstyear/>.

<sup>4</sup> For example, New York University Law permits students to take constitutional law and property as upper-level electives (but they remain graduation requirements), <https://www.law.nyu.edu/academics/courses/requiredfirstyearcourses>; Michigan Law School no longer requires property in the first year, <https://michigan.law.umich.edu/academics/programs-study/jd-program>.

<sup>5</sup> See, e.g., Milleman & Capulong, *supra* note 2, at 7; Margaret Martin Barry, *Practice Ready: Are We There Yet?*, 32 B.C.J.L. & Soc. JUST. 247, 250 (2012) ("Despite almost a century of critique that [the traditional] approach does not provide enough preparation for the profession, law schools have been reluctant to substantially modify it.").

<sup>6</sup> See Cynthia Batt, *A Practice Continuum: Integrating Experiential Education into the Curriculum*, 7 ELON L. REV. 119, 120 (2015) (arguing that "[l]egal education continues to struggle with the basic question of how best to educate law students for the professional lives they will face post-graduation" and explaining several catalysts for reexamination of the curriculum); see also Barry, *supra* note 5, at 251-52 ("[l]aw schools are beginning to process a new reality that calls for relevance and effective professional preparation.").

<sup>7</sup> The exact parameters of the term "experiential education" is a subject of debate beyond the scope of this article, but it most commonly includes clinics, externships, and simulations, and sometimes includes legal research and writing courses and other pro bono projects that are a formal part of the curriculum—which is how I use the term here. See also Batt, *supra* note 6, at 124 (noting that schools define the concept differently, but a unifying principle is that "[e]xperiential education in law schools often is considered the vehicle by which students are transformed into practitioners through the acquisition of lawyering skills."); Deborah A. Maranville, Mary A. Lynch, Susan L. Kay, Phyllis Goldfarb & Russell Engler, *Re-Vision Quest: A Law School Guide to Designing Experiential Courses Involving Real Lawyering*, 56 N.Y.L. SCH. L. REV. 517, 519 (2012) (experiential education includes a "wide array of options for structuring an educational experience in which law students are performing as professionals by serving people involved in legal matters.").

<sup>8</sup> See Erwin Chemerinsky, *Why Not Clinical Education?*, 16 CLIN. L. REV. 35, 37 (2009) (describing the history of law-school curricular critiques and the current effort for reform in which "experiential training is increasingly being emphasized"); Rebecca Sandefur & Jeffrey Selbin, *The Clinic Effect*, 16 CLIN. L. REV. 57, 59 (2009).

<sup>9</sup> A 2018 study by the Association of American Law Schools found that at least a third of aspiring law students are motivated by public-interest aspirations when they apply to law school. Ass'n. of Am. L. Schs., *Highlights from Before the J.D.: Undergraduate Views on Law School* 3, <https://www.aals.org/research/bjd/> (35% applying to law school out of a desire to help others; 32% interested in being an advocate for social change). This motivation has been true for some time, of course, as observed by Prof. William Quigley: "Many come to law school because they want in some way to help the elderly, children, people with disabilities, undernourished people around the world, victims of genocide, or victims of racism, economic injustice, religious persecution or gender discrimination." William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 9 (2007).

Generation Z,<sup>10</sup> aspire to “change the world,” and are “willing to mobilize to achieve justice and equality.”<sup>11</sup> The current generation’s diversity and engagement with activism<sup>12</sup> means that today’s students are more eager than ever before to engage in social-justice-oriented work on behalf of others.<sup>13</sup> But law schools’ traditional curricular focus and competitive culture, paired with the dominant postgraduate career opportunities in corporate law, can cause law students to become disillusioned early in their law school careers,<sup>14</sup> as their goals may not match their educational experience. However, early involvement in live-client public-service work can provide balance and inspiration for students.

Further, experiential work, especially early on, makes students better learners and sets them up for their legal careers. Whether they go directly into public service after law school, into corporate law, or into fields like academia or government, law-school opportunities to engage in practical projects “for the greater good” are formative, often profound experiences that may establish a student’s career path or pro bono practice area.<sup>15</sup> At the very least, public-interest work in law school can color students’ understanding of systemic injustices and broader societal challenges, providing a formative experience that can contextualize and inform their future work in any field, legal or otherwise.

Innovative legal educators have been moving law school—especially the second and third years—towards more practical, skills- and

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<sup>10</sup> Gen Z includes persons born between 1995 and 2010. Laura P. Graham, *Generation Z Goes to Law School: Teaching and Reaching Law Students in the Post-Millennial Generation*, 41 U. ARK. LITTLE ROCK L. REV. 29, 37 (2018).

<sup>11</sup> Tiffany D. Atkins, #fortheculture: *Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 129 (2020); Nathan Peart & Jacqueline Bokser LeFebvre, *Gen-Z: Now Influencing Today’s Law Firm Culture*, Major, Lindsey & Africa 7 (May 10, 2023) <https://www.mlglobal.com/en/insights/research/genz-now-influencing-todays-law-firm-culture> (Report by a legal search firm found that Gen Z is “a generation whose members are motivated deeply by their intrinsic values and seek work that aligns with these values.”).

<sup>12</sup> See Atkins, *supra* note 11, at 127-30 (describing the typical traits of “Gen Zers”).

<sup>13</sup> *Id.* at 133; see also Corey Seemiller & Meghan Grace, *GENERATION Z: A CENTURY IN THE MAKING* 278-80 (2019) (Gen Z desires to change the world and has a high level of civil engagement and motivation towards activism on behalf of social causes).

<sup>14</sup> See Quiqley, *supra* note 9, at 9-10 (“The repeated emphasis in law school on the subtleties of substantive law and many layers of procedure . . . can grind down the idealism with which students first arrived.”); see also Harris, *supra* note 1, at 192 (explaining that experiential learning is “particularly important for first-year law students, who can become disillusioned, confused, and overwhelmed by the traditional first year curriculum”).

<sup>15</sup> See Sandefur & Selbin, *supra* note 8, at 57 (study showing a strong correlation between clinic participation and public service work, and showing that clinical training may be a strong factor in graduates’ longer-term engagement with civic work); see also Matt Reynolds, *BigLaw is Losing its Appeal, New Survey of Gen Z Lawyers and Law Students Says*, ABA JOURNAL (May 10, 2023, 8:35 AM), <https://www.abajournal.com/web/article/a-survey-of-gen-z-lawyers-and-law-students-suggests-biglaw-is-losing-its-appeal> (“[i]n the long term, a majority of Generation Z attorneys and law students plan on eschewing a traditional BigLaw career path for in-house, government or nonprofit work” according to a 2023 study).



service-focused work for decades.<sup>16</sup> The American Bar Association (ABA) has issued various requirements in areas such as experiential learning and assessments in the last 15 years<sup>17</sup> that have built more skills-based pedagogy into the curriculum. Most recently, in 2022, the ABA affirmed the value of experiential education in standard 303(b), which requires law schools to offer “substantial opportunities” for work in law clinics, field placements, and other public service activities.<sup>18</sup> Historically, most of this practical work has been available to students in their second and third years of law school.<sup>19</sup> However, in recent years, law schools have been creative in expanding and diversifying ways for first-year students to engage in practical, experiential work.<sup>20</sup> And some law schools—Cornell and Michigan—have created clinical courses specifically for first-year law students.<sup>21</sup>

In spring 2020,<sup>22</sup> I launched the first clinic for first-year students at Cornell Law School: the 1L Immigration Law & Advocacy Clinic (the 1L Clinic).<sup>23</sup> The 1L Clinic at Cornell was begun as a pilot and later made a permanent part of the curriculum, where I run it as a spring-semester elective.

Over the last four years of the 1L Clinic (including during the height of the pandemic), the Clinic has experienced numerous successes and

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<sup>16</sup> See Kimberly E. O’Leary, *Weaving Threads of Clinical Legal Scholarship into the First-Year Curriculum: How the Clinical Law Movement is Strengthening the Fabric of Legal Education*, 26 CLINICAL L. REV. 357, 358 (2019); see also Gerald Lopez, *Transform—Don’t Just Tinker With—Legal Education*, 23 CLINICAL L. REV. 471 (2017); Gerald Lopez, *Transform—Don’t Just Tinker With—Legal Education (Part II)*, 24 CLINICAL L. REV. 247 (2018).

<sup>17</sup> O’Leary, *supra* note 16, at 359.

<sup>18</sup> ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, at 17-27 (2023).

<sup>19</sup> See discussion *infra* Part I.

<sup>20</sup> See generally THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS (Eduardo R.C. Capulong et al. eds., 2015).

<sup>21</sup> According to the Center for the Study of Applied Legal Education (CSALE), only five percent of law schools permit first-year students to enroll in clinics. See Robert R. Kuehn, David A. Santacroce, Margaret Reuter, June T. Tai & G.S. Hans, 2022-23 *Survey of Applied Legal Education* at 9, <https://www.csale.org/#results> (last visited Sept. 13, 2023). The only law schools I am aware of that permit first years to take credited clinical courses are Michigan Law School and Cornell Law School. See *infra* Part I.A. While Yale Law School has permitted first-year students to participate in clinics for about fifty years, Yale and others integrate 1Ls into existing clinics rather than running a 1L-specific clinic. See Michael J. Wishnie, *The First-Year Clinic: Forty Years of First-Year Students Representing Clients*, in THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS 93, 93 (Eduardo R.C. Capulong et al. eds., 2015). Antioch Law School, which was the predecessor to the University of the District of Columbia David A. Clarke School of Law, involved all law students in clinics in the 1970s and 1980s. See *Antioch University: History*, Antioch University, <https://www.antioch.edu/about/history/> (last visited Dec. 18, 2023). Other law schools do currently permit 1Ls to engage in various client projects, discussed *infra* Part I.B., but not in credited clinical courses.

<sup>22</sup> Louis Chuang, *Legal Clinics Offer Real World Practice for Cornell Law Students*, THE CORNELL DAILY SUN (Dec. 1, 2019), <https://cornellsun.com/2019/12/01/legal-clinics-offer-real-world-practice-for-cornell-law-students/>.

<sup>23</sup> *1L Immigration Law and Advocacy Clinic*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/1l-immigration-law-and-advocacy-clinic/> (last visited Sept. 13, 2023).

managed numerous challenges. Like most clinicians, with each iteration of the course, I have revised my approaches and adjusted my docket and course content. But for a 1L Clinic, these adaptations are particularly essential because of the uniquely challenging nature of the first year of law school and the critical importance of the first-year outcomes as students seek summer jobs that may lead to long-term job placements.

In this article, I draw from my experience teaching Cornell's 1L Clinic and the rich scholarly literature on clinical education to demonstrate the importance of a first-year clinical experience and advocate for the expansion of such programming at Cornell and beyond. Part I briefly explains the existing opportunities for 1Ls to participate in live-client experiential learning, including an overview of experiential programs and clinics that include 1Ls. Part II articulates reasons to include 1Ls in clinics, drawing on both faculty and administration motivations for (and reservations about) creating the clinic and students' reasons for taking the clinic, as expressed in their clinic applications and post-clinic course evaluations and surveys. Part III draws from the experience of the Cornell 1L Clinic to discuss different course models and their pros and cons, highlight successes possible in a 1L clinic, and offer insight into the challenges. Finally, Part IV offers a vision for 1L clinical programs going forward.

## I. EXPERIENTIAL LEARNING FOR FIRST-YEAR LAW STUDENTS

The term “experiential education” covers a broad variety of programs, with live-client clinical programs and externships as the two most common options.<sup>24</sup> Various programs for experiential education, primarily for upper-class students, have been a fixture in virtually all law schools since the 1990s,<sup>25</sup> though the first law school clinics were developed in the 1960s.<sup>26</sup> Clinics are defined as credited courses that serve as part of the curriculum, provide work experience and professional identity formation for students, and deliver client services under the supervision of a licensed attorney and/or under a relevant student practice rule.<sup>27</sup> While not all clinics have clear

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<sup>24</sup> “Live-client clinics” in which students work on cases under professor supervision, and “externships,” programs in which students are placed in a law office outside the academy, are currently the two primary modes of experiential education. See Maranville et al., *supra* note 7, at 518.

<sup>25</sup> See Martina E. Cartwright & Thelma Harmon, *Fifty Plus Years and Counting: A History of Experiential Learning and Clinical Opportunities at Thurgood Marshall School of Law*, 39 T. MARSHALL L. REV. 187, 192–93 (2014).

<sup>26</sup> There were earlier law-school clinics, but the modern movement that resulted in clinics in all law schools across the country emerged in the late 1960s. See Wallace J. Mlyniec, *Where to Begin? Training New Teachers in the Art of Clinical Pedagogy*, 18 CLIN. L. REV. 505, 506 (2012); see also Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 917 (1933) (articulating perhaps the earliest argument for integrating clinics into the law-school curriculum).

<sup>27</sup> Professional responsibility rules permit non-lawyers to engage in legal work when adequately supervised by an attorney. MODEL RULES OF PRO. CONDUCT R. 5.3 (AM. BAR ASS'N 2023).

public-service goals, most are serving the public interest in some way.<sup>28</sup> Today, clinics exist in nearly every law school.<sup>29</sup> However, the vast majority of law-school clinics and experiential programs do not admit 1Ls.<sup>30</sup>

### A. *Clinical Programs for 1Ls*

Because of their careful pedagogy and professor supervision, public-interest focus, and prevalence across law schools, clinics are an ideal site for today's students interested in "making the world a better place."<sup>31</sup> Though clinics are typically not available to 1Ls, several law schools have developed clinical programming for first-year law students. Yale Law School, a trailblazer in this area, has integrated 1Ls into its clinics since the early 1970s.<sup>32</sup> This programming is made possible in part by Connecticut's more liberal student practice rule, which allows a law-school dean to certify first-year law students to practice before Connecticut courts.<sup>33</sup> In 2021, two clinics at Berkeley Law began accepting first-year students.<sup>34</sup>

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<sup>28</sup> Maranville et al., *supra* note 7, at 523 (discussing law-school clinics' "social justice roots"); Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1473-75 (1998) (discussing the "paramount social justice goals" of some clinics and general public-interest motivations of clinical legal education); Colleen F. Shanahan, Jeffrey Selbin, Alyx Mark, & Anna E. Carpenter, *Measuring Law School Clinics*, 92 TUL. L. REV. 547, 550 (2018) (describing the dual teaching-service mission of law schools).

<sup>29</sup> Cartwright & Harmon, *supra* note 25, at 193.

<sup>30</sup> See Maranville et al., *supra* note 7, at 531 ("Throughout U.S. law schools, real experiential education has most often been available to upper-level J.D. students."); Sara K. Rankin, Lisa Brodoff, & Mary Nicol Bowman, *We Have a Dream: Integrating Skills Courses and Public Interest Work in the First Year of Law School (and Beyond)*, 17 CHAPMAN L. REV. 89, 89 (2013) ("first-year students rarely receive clinical learning opportunities.").

<sup>31</sup> See Catherine Fisk, Carrie Hempel & Erwin Chemerinsky, *Building An Experiential Law School*, in *THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS* 147 (Eduardo R.C. Capulong et al. eds., 2015).

<sup>32</sup> See Wishnie, *supra* note 21, at 98. Yale has used various formats to include 1Ls in clinics, and today offers about 20 clinics to first-year, second-semester law students. *Id.* at 100; see additional discussion of this programming *infra* Part III.

<sup>33</sup> Connecticut permits 1Ls to practice before its courts. See Conn. Prac. Book § 3-16(a)(2) (permitting law students to practice before a court under attorney supervision after completing at least two semesters of credit, or students with less than two semesters if certified by the dean of the law school). The Executive Office for Immigration Review (EOIR) also permits any properly supervised law student to appear. 8 C.F.R. § 1292.1(a)(2)(ii); EOIR Practice Manual, Rule 2.5(a) (permitting law students to practice before the court when they are in a clinic, with no reference to number of semesters of study completed). In contrast, states like Michigan require students to have completed two semesters of law school before they can appear in court. Michigan Court Rules Ch. 8.120(A)-(D) (permitting law students to staff legal aid clinics within law schools under the supervision of an attorney; but requiring law students to have completed the first year of law school with passing grades). See also Wallace J. Mlyniec & Haley D. Etchison, *Conceptualizing Student Practice for the 21st Century: Educational and Ethical Considerations in Modernizing the District of Columbia Student Practice Rules*, 28 GEO. J. LEGAL ETHICS 207, 227 (2015) ("In formulating their student practice rules, several states have recognized that the foundational skill of legal analysis is essentially mastered by the end of the first year of law school.").

<sup>34</sup> *Apply to the Clinics*, BERKELEY L., <https://www.law.berkeley.edu/experiential/clinics/apply-to-the-clinics/> (last visited September 12, 2023); e-mail from Jeffrey Selbin, Chancellor's

However, only two law schools, to my knowledge, currently have clinical courses designed specifically for 1Ls: the University of Michigan Law School and Cornell Law School.<sup>35</sup> Michigan Law developed a first-year Workers' Rights Clinic for students in their second semester of law school, which began around 2015 and ran for approximately seven years<sup>36</sup> before it was replaced by Michigan's current 1L Advocacy Clinic.<sup>37</sup> Both Michigan and Cornell offer three-credit clinics through which 1Ls represent real clients under faculty supervision and receive a letter grade.<sup>38</sup>

### B. Other Experiential Projects and Programs

Many creative professors and advocates have developed a catalog of first-year experiential offerings that contain the breadth and depth of live-client work but take place outside of clinics and without the legal licensure student practice rules can grant to student attorneys. In *The New 1L: First-Year Lawyering with Clients*, these professors describe the different models they use to integrate live-client work into legal research and writing (LRW) and doctrinal courses and into stand-alone projects.<sup>39</sup>

Several law schools have developed experiential modules embedded in first-year legal writing and research courses, such as Michigan Law School and the University of California Irvine Law.<sup>40</sup> Seattle

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Clinical Prof. of L., Berkeley L., to author (May 20, 2020, 4:23 PM EST) (on file with author); e-mail from Laura Riley, Clinical Program Dir., Berkeley L., to author (Jul. 25, 2023, 5:29 PM EST) (on file with author); see additional discussion of this programming *infra* Part IV.

<sup>35</sup> This is my impression after much research and discussion with other clinicians. For example, in 2020, an email thread from the much-used LawClinic listserv identified only Michigan and Cornell. See e-mail from Jeffrey Selbin, Chancellor's Clinical Prof. of L., Berkeley L., to author (May 20, 2020, 4:23 PM EST) (on file with author) and additional replies. However, I'd be happy to be wrong, and glad to know of others which may have been started since 2020 or located at law schools that are less involved with the LawClinic listserv.

<sup>36</sup> *Workers' Rights Clinic I*, UNIV. OF MICH., <https://michigan.law.umich.edu/courses/workers-rights-clinic-i> (last visited Sept. 12, 2023); interview with Rachael Kohl, Assistant Prof. of L., Wayne State Univ., March 25, 2021 (notes on file with author); e-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (June 28, 2023, 1:48 PM EST) (on file with author).

<sup>37</sup> *1L Advocacy Clinic*, UNIV. OF MICH. <https://michigan.law.umich.edu/academics/experiential-learning/clinics/1l-advocacy-clinic> (last visited Sept. 12, 2023); Professor Joshua Kay explained that Michigan discontinued the Workers' Rights Clinic due to a changing legal landscape in conflict with pedagogical goals, choosing instead to design a new iteration of a 1L-specific clinic that would allow for "meaningful, real-world practice experiences that help [students] build core lawyering skills in four areas: interviewing, investigation, legal writing, and oral presentation to the court." See e-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (June 28, 2023, 1:48 PM EST) (on file with author).

<sup>38</sup> See e-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (Jun. 28, 2023, 1:48 PM EST) (on file with author) (discussing Michigan's grading scheme and credits); see *1L Immigration Law and Advocacy Clinic*, *supra* note 23 (indicating that the course is three credits and graded on a curve).

<sup>39</sup> See generally *THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS*, *supra* note 20.

<sup>40</sup> See, e.g., Mary Bowman, Lisa Brodoff, Sara Rankin & Nantiya Ruan, *Adding Practice Experiences to Legal Research and Writing Courses*, in *THE NEW 1L: FIRST YEAR LAWYERING*

University School of Law has braided legal-writing courses together with clinical experiences.<sup>41</sup> Case Western Reserve Law School's 1L First Client Contact Experience includes all 1Ls in at least one live-client legal intake or related project with a community partner, similar to an abbreviated externship.<sup>42</sup> These opportunities are like clinics in that they are part of credited courses and formally embedded in the curriculum, but different in that they usually do not involve an on-going seminar related to the clinic or have students manage cases over the course of the entire semester as clinics do, and they may not involve student representation before a tribunal.

Several scholars have argued for greater inclusion of skills learning in traditional 1L doctrinal courses such as torts and civil procedure.<sup>43</sup> Some clinicians have actively woven typical clinical-teaching methods, like the use of simulations and self-assessments, into doctrinal classes like property and contracts.<sup>44</sup>

Other law schools offer optional, non-credited first-year projects, such as the Access to Justice Service Learning Program at Indiana Maurer School of Law<sup>45</sup> and Columbia Law's 1L Advocates Program at its Human Rights Institute.<sup>46</sup> Still others make pro bono projects

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WITH CLIENTS 51, 51-63, 153 (Eduardo R.C. Capulong, et al. eds., 2015) (describing the integration of live-client work into first-year legal writing courses, including at UC Irvine); *Lawyering Skills Curriculum*, UNIV. CAL. IRVINE L., <https://www.law.uci.edu/academics/lawyering-skills/curriculum.html> (last visited June 1, 2023) (stating that all first-year students will "conduct intake interviews of actual clients for organizations" in their second semester of law school); *Legal Practice Program*, UNIV. OF MICH., <https://michigan.law.umich.edu/academics/experiential-learning/legal-practice-program> (last visited June 1, 2023) (noting that "[i]n numerous Legal Practice sections, students may have the opportunity to put their newly developed skills into play by performing legal work for real clients in the Ann Arbor area."); see also Nancy Vettorello & Beth Hirschfelder Wilensky, *Reimagining Legal Education: Incorporating Live-Client Work into the First-Year Curriculum*, 96 MICH. BAR. J. 56, 56-57 (Aug. 2017).

<sup>41</sup> Rankin et al., *supra* note 30, at 89-90.

<sup>42</sup> *1L First Client Contact Experience*, CASE W. RSRV. UNIV. SCH. OF L., <https://case.edu/law/practical-training/1l-first-client-contact-experience> (last visited Sept. 12, 2023).

<sup>43</sup> See generally Michael A. Millemann & Steven D. Schwinn, *Mainstreaming Experiential Education*, in THE NEW 1L: FIRST-YEAR LAWYERING WITH CLIENTS 65, 65-77 (Eduardo R.C. Capulong, et al. eds., 2015); Raleigh Hannah Levine, *Of Learning Civil Procedure, Practicing Civil Practice, and Studying A Civil Action: A Low-Cost Proposal to Introduce First-Year Law Students to the Neglected MacCrate Skills*, 31 SETON HALL L. REV. 479, 480 (2000).

<sup>44</sup> O'Leary, *supra* note 16, at 361-63.

<sup>45</sup> Victor D. Quintanilla, Joan K. Middendorf, Francesca L. Hoffmann, Emily Kile-Maxwell, Danielle M. Sweet & Kaelyne Yumul Wietelman, *Experiential Education and Access-to-Justice within U.S. Law Schools: Designing and Evaluating an Access-to-Justice Service Learning Program within the First-Year Curriculum*, 7 IND. J.L. & SOC. EQUAL. 88, 88 (2019); see also Zoe Niesel, *Putting Poverty Law into Context: Using the First Year Experience to Educate New Lawyers for Social Change*, 76 N.Y.U. ANN. SURV. AM. L. 97, 99 (2020) (describing how "first year law students engage in a year-long 'soft' simulation exercise addressing poverty in the local community" at St. Mary's University School of Law in San Antonio, Texas).

<sup>46</sup> *HRI 1L Advocates Program*, COLUMBIA L. SCH.: HUM. RTS. INST., <https://hri.law.columbia.edu/students/hri-1l-advocates-program> (last visited Sept. 12, 2023).



available to 1Ls as well as upper-class students, such as at Duke Law,<sup>47</sup> Harvard Law School,<sup>48</sup> and the University of Texas at Austin.<sup>49</sup>

Nevertheless, though more law schools have developed first-year opportunities to engage in live-client experiential work,<sup>50</sup> most still do not include 1Ls in experiential work, especially credited coursework.<sup>51</sup>

## II. WHY HAVE A CLINIC FOR 1LS?

Law students should learn about how the law impacts real people every day<sup>52</sup> and how to work with the law on behalf of their clients. Just as medical students spend time in clinical settings working with actual patients,<sup>53</sup> law students too can prepare to represent clients by actually practicing, working through how the law might be used to solve a problem, and identifying where the law might be unfair or cumbersome (and what to do about that).<sup>54</sup> Various scholars have commented that, while simulations can be effective teaching tools,<sup>55</sup> only work with actual clients can convey the high stakes of a real case, the complexity of decision-making required, and the interpersonal dynamics that are part of the practice of law.<sup>56</sup> Clinical work can also remind students why they went to law school<sup>57</sup> and keep them engaged. Thus, live-client work is the cornerstone of preparing students for the actual and sustained practice of law.

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<sup>47</sup> *Public Interest & Pro-Bono*, DUKE L., <https://law.duke.edu/publicinterest/> (last visited Sept. 12, 2023).

<sup>48</sup> *Pro Bono Program*, HARV. L. SCH., <https://hls.harvard.edu/pro-bono/> (last visited Sept. 12, 2023).

<sup>49</sup> UT Austin has brought 1Ls and 2Ls to volunteer in immigration detention centers. See Harris, *supra* note 1, at 182.

<sup>50</sup> See, e.g., Eduardo R.C. Capulong, ‘Clinicalizing’ the First Year: Working With Actual Clients at the University of Montana, in *THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS* 121, 121-27 (Eduardo R.C. Capulong, et al. eds., 2015) (describing the efforts of the University of Montana to integrate live-client projects into doctrinal courses such as civil procedure, criminal law, and torts); Mary Nicol Bowman, *Engaging First-Year Law Students Through Pro Bono Collaborations in Legal Writing*, 62 J. LEGAL EDUC. 586, 586 (2013).

<sup>51</sup> See, e.g., Milleman & Capulong, *supra* note 2, at 4 (“the substantial majority of law schools” do not offer any course engaging with live clients in the first year).

<sup>52</sup> See O’Leary, *supra* note 16, at 366.

<sup>53</sup> Chemerinsky, *supra* note 8, at 36 (noting that a “core aspect of medical education is clinical education,” but while medical students engage with patients under supervision over several years of schooling, most law students do not engage in the actual practice of law unless they take a clinical course).

<sup>54</sup> See O’Leary, *supra* note 16, at 367.

<sup>55</sup> Simulations may be most effective when offering nuanced client needs such as would arise in practice. See *id.* at 366.

<sup>56</sup> See Cheryl Bratt, *Livening up 1L Year: Moving Beyond Simulations to Engage 1L Students in Live-Client Work*, 33 SECOND DRAFT 21, 22 (2020); Fisk et al., *supra* note 31, at 149.

<sup>57</sup> Harris, *supra* note 1, at 187 (noting that, because law-school clinics are usually not offered to 1Ls, first-year law students unfortunately miss out on the “power” of live-client work to connect them to the reasons they enrolled in law school).



### A. *Why the 1L Clinic Started at Cornell*

In 2019, I proposed that the law school offer a new clinical course designed for first-year students that would provide direct legal services to underserved immigrants on campus and engage in advocacy in the community. This project would have distinct benefits for Cornell and its students while taking advantage of my particular pedagogical and practice background. The 1L Clinic would be integrated as a spring-semester elective, easily slotting into the curricular space created when Cornell began to require all 1Ls to take a spring-semester elective.

The 1L Clinic proposal was met with mixed reviews. A substantial contingent of the faculty resisted the idea of a 1L clinic, opining that the 1L curriculum was established to give students necessary background in legal theory and doctrine, and this structure should not be disrupted by a clinic. Some argued that the spring-semester elective was established to allow students to choose from “core” classes, like evidence and administrative law, and this should not be widened to include clinics. Further, the small size of a 1L clinic run by a single professor with other simultaneous courses (the proposal limited the clinic to six students) meant that the average 1L would not have a meaningful chance at getting into the clinic, potentially creating student discontent and other administrative challenges.

However, I and others on the faculty supported the 1L clinic for several primary reasons: attracting and retaining students; supporting public-interest work for 1Ls; and innovating pedagogically, as few clinics nationwide<sup>58</sup> were open to 1Ls. Once launched, the presence of a 1L Clinic would contribute to a stronger public-service ethos and tone, both for students with public-interest career aspirations and those planning to go into corporate law and engage in pro bono work. Early clinical experience could also enhance students' resumes, making them more competitive for summer jobs, both in the sometimes-insular public interest field and in law-firm positions, where few 1L summer associates would already have live-client experience.<sup>59</sup> And for students with limited or no prior work experience before law school, an early clinical experience could also help prepare them for the practical realities of a work environment. Additionally, students who may find the first-year doctrinal classes to be discouraging or divorced from the reasons they came to law school might be retained if they could engage in practical work in their first year.

Further, I developed the 1L Clinic to build on my own work and interests and add depth to Cornell's public-service focused offerings.

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<sup>58</sup> See *supra* Part I.A.

<sup>59</sup> Indeed, studies show a strong correlation between clinic participation and public-service employment. See Sandefur & Selbin, *supra* note 8, at 59, 98, 101.

I also teach Lawyering<sup>60</sup> at Cornell, a full-year, required 1L legal research and writing course. Lawyering professors also teach an additional, one-semester skills course—which can be a clinic or a course such as client counseling and depositions.<sup>61</sup> As a Lawyering professor, I have particular insight into the legal skills (and limitations) of first-year students, and thus could tailor a clinical opportunity for 1Ls with dual goals of providing a meaningful learning experience to 1Ls and quality representation to underserved populations. And as a recent practitioner who had entered academia directly from practice during the height of the Trump administration, I had been quickly tapped to work on urgent immigration issues on campus and thus already had some live-client work in progress under the auspices of existing clinics.<sup>62</sup>

Still, although there were strong reasons to establish the 1L Clinic, some faculty resistance meant that this project was hotly debated during several lengthy faculty meetings and discussed in many more informal conversations. Ultimately, the faculty cautiously approved the 1L Clinic as a one-year pilot in spring 2020. The pilot period was extended for another year due to the pandemic.

By late spring 2021, when the 1L Clinic was most of the way through the second iteration, support for the 1L Clinic had significantly increased. I presented an update to the faculty which was received with great enthusiasm. Those who were excited about the original idea were thrilled by the successes of the 1L Clinic, and those who had been hesitant were largely won over by the innovative pedagogy and inspiring nature of the work. Several faculty opined that the law school should expand the 1L Clinic, or offer additional 1L Clinics in different subject areas, or perhaps rotate the subject matter of the 1L Clinic (though none of these ideas have yet come to fruition). Ultimately, Cornell renewed the 1L Clinic on a permanent basis.

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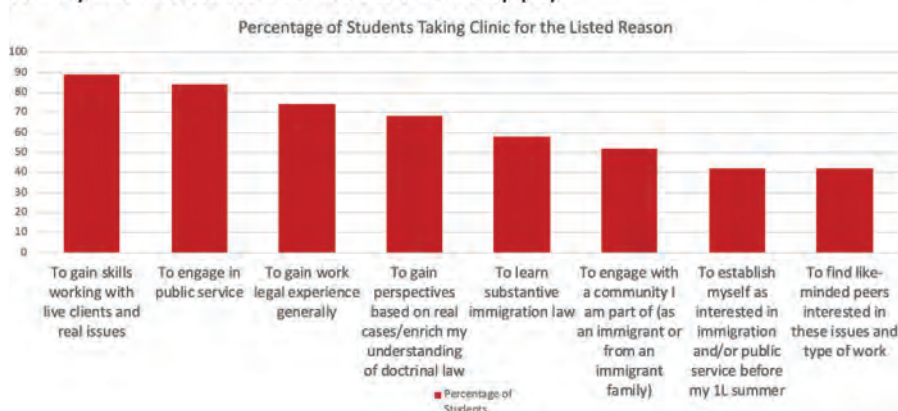
<sup>60</sup> *Lawyering Program*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/academics/experiential-learning/lawyering-program/> (last visited July 18, 2023).

<sup>61</sup> *2023-2024 Course Offerings*, CORNELL L. SCH., <https://support.law.cornell.edu/CourseCatalog/> (last visited July 18, 2023).

<sup>62</sup> In my first semester, I started representing undocumented Cornell students and those with Deferred Action for Childhood Arrivals (DACA) in their immigration cases, eventually incorporating students into the work through existing clinics. Ian McGullam, *The Law Professors Helping Cornell Immigrants*, 44 FORUM 12, 16 (2018), [https://www.lawschool.cornell.edu/wp-content/uploads/2022/11/2018\\_fall.pdf](https://www.lawschool.cornell.edu/wp-content/uploads/2022/11/2018_fall.pdf) (discussing my arrival at Cornell in 2017, immediate work with DACA students, and initial incorporation of law students in the work in 2018). I also led a service trip to the border for a week-long immigration representation project in 2019. Winny Sun, *At the Border, Cornell Law Students and Professor Help Detained Mothers and Children Seek Asylum*, CORNELL DAILY SUN (Jan. 22, 2019), <https://cornellsun.com/2019/01/22/at-the-border-cornell-law-students-and-professor-help-detained-mothers-and-children-seek-asylum/>; *Cornell Law Students Go to Border to Help Mothers, Children Seeking Asylum*, WSKG (Jan. 11, 2019, 10:43 AM), <https://wskg.org/cornell-law-students-go-to-border-to-help-mothers-children-seeking-asylum/>.

### B. Why Students Want to Take the Clinic

What were some reasons you wanted to take the 1L Clinic as a first-year student? Check all that apply.



In spring 2023, Cornell conducted a study of prior 1L Clinic applications to evaluate student motivations to take the Clinic.<sup>63</sup> We wanted to see what students' self-reported reasons for interest might be during the application period and determine whether the Clinic is meeting those expectations. Simultaneously, we conducted a survey of all 1L Clinic alumni about their experiences in the 1L Clinic.<sup>64</sup>

For applicants, we analyzed their anonymized personal statements and resumes (when available)<sup>65</sup> and coded them for their expressions of interest for reasons such as desire for skills training; desire to offer their existing skills, such as prior work with marginalized communities or language abilities; desire to engage in public service; interest in immigration work specifically; or other motivations. We also coded the data for whether applicants mentioned their long-term career plans (public interest or corporate work) and various personal experiences, such as their relevant work or life experience (such as personal interaction

<sup>63</sup> Special thanks to Sarahi Rivas, Cornell University Class of 2023, for her work on this project.

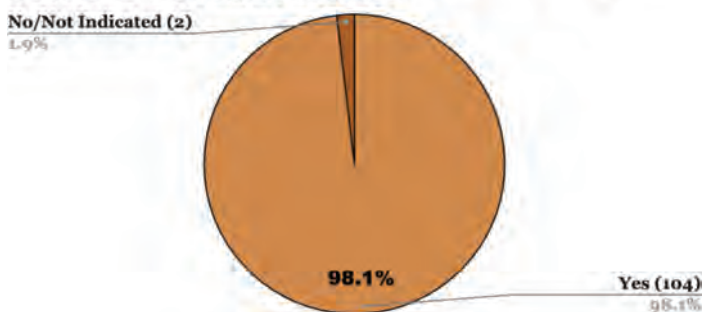
<sup>64</sup> In May 2023, I invited all students who were either alumni of the 1L Clinic (twenty-six total students across four semesters) or had worked with the 1L Clinic as an advanced student after taking a different clinic at the law school (two students) to take a survey titled "2023 1L/Advanced Immigration Clinic Survey." Nineteen 1L Clinic alumni replied, as did the two advanced-only students. The charts in this piece indicate their responses, with the two advanced-only students omitted when the question was irrelevant to them.

<sup>65</sup> We had resumes only from the class of 2022 (1L Clinic year 2020); for the classes of 2023, 2024, and 2025, (clinic years 2021, 2022, and 2023, respectively) we had both personal statements and resumes.

with the immigration system). Finally, we examined personal traits of the applicants, such as their race, ethnicity, gender identity, nationality, and other characteristics that could be gleaned from the anonymized applications.

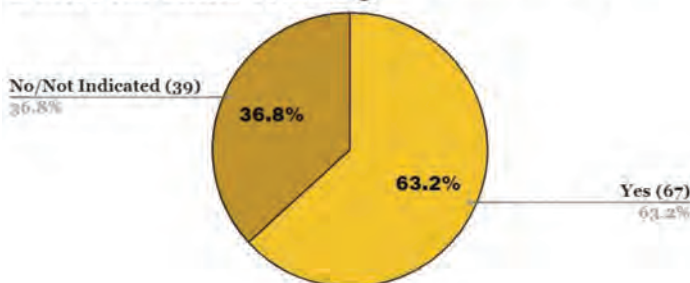
Across the applications for clinic semesters 2020, 2021, 2022, and 2023, we had 105 total applications. Unsurprisingly, the overwhelming majority of students were interested in taking the clinic because of a desire to engage in public service—98 percent—and a desire for skills training—63 percent.

### Percentage of Total Applicants Indicating a Desire to do Public Service



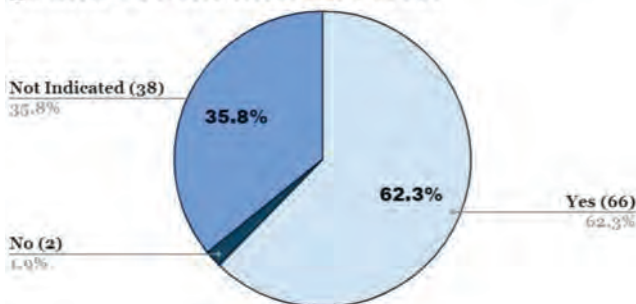
These reasons for taking the clinic would be likely applicable for any public-interest focused clinic, regardless of legal practice area.<sup>66</sup> About 62 percent stated that they planned to go into a public-interest career after law school and named this as a reason to take the clinic.

### Percentage of Total Applicants Indicating a Desire for Skills Training



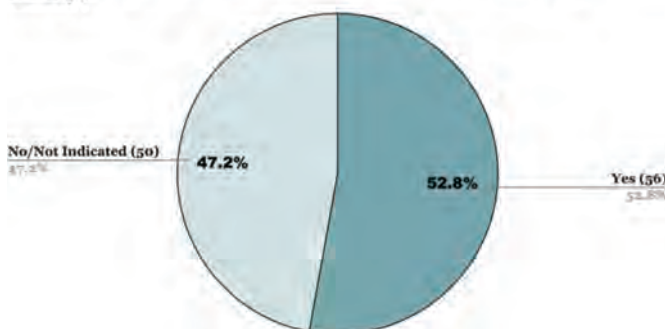
<sup>66</sup> Indeed, many law students are interested in clinics because they believe clinics build skills and improve employment opportunities. See Robert R. Kuehn, David A. Santacroce, Margaret Reuter, June T. Tai, and G.S. Hans, *2022-23 Survey of Applied Legal Education*, Center for the Study of Applied Legal Education 15-16, <https://www.csale.org/#results> (last visited Sept. 13, 2023).

### Percentage of Total Applicants Planning to go into a Public Interest Career

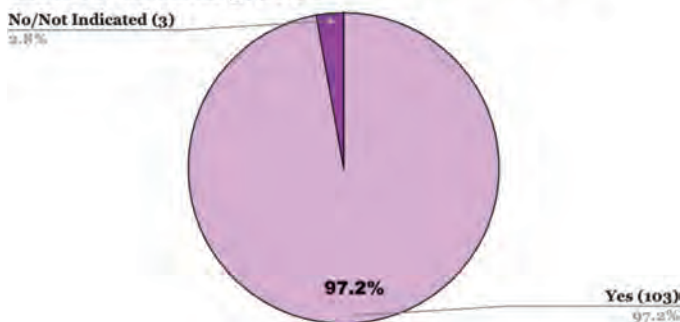


Further, we analyzed the role that the practice area of immigration may have played in student interest. More than half of applicants indicated a personal connection to the topic as a member of an immigrant family or as an immigrant themselves, contributing to their interest in an immigration-focused clinic. Virtually all students, regardless of immigration history, indicated an interest in immigration law specifically.

### Percentage of Total Applicants with Relevant Life Experience (as an immigrant or from an immigrant family)



### Percentage of Total Applicants Indicating an Interest in Immigration



In our survey of 1L Clinic alumni, we asked respondents to consider their past motivations for applying to the 1L Clinic. Their responses also show that students wish to gain skills, engage in public service, and set themselves on public-service paths in their first year of law school. Further, in looking back on their experiences, students also indicate that they wished to enrich their understanding of doctrinal courses—not something most applicants indicated in their application materials.

We also examined the demographics of all applicants as best we could given the information provided, since applications often indicated certain identity affiliations, but this information was not explicitly requested. We found that nearly sixty percent of applicants were students of color (whether African American, Asian, Latine, native/indigenous, or other). Fifteen percent of applicants indicated an LGBTQI+ identity.

A clinic for 1Ls (and/or for immigration) seems to have a special appeal for students of color, as such students were somewhat overrepresented in the applicant pool as compared to the entire law school student population. When comparing our applicant demographics with the demographic data for the incoming Cornell Law classes for the same years as these applicant pools, we found that, for example, Cornell's incoming classes between fall 2019 and fall 2022 were on average 6.75 percent African American, compared with 15.1 percent of clinic applicants, and 12.5 percent Hispanic/Latino, compared with 19 percent of clinic applicants over the same period.<sup>67</sup>

### III. SUCCESSES AND CHALLENGES OF THE 1L CLINIC

This Part first explains what types of cases and projects are generally best for 1Ls and which are less manageable, drawing from Cornell's experience. Second, this Part discusses some of the major successes of the 1L Clinic, building on the reasons hypothesized above about why 1Ls should get to take clinics. Third, this Part reviews significant challenges inherent in 1L Clinics and suggests ways to ameliorate those concerns.

#### A. *1L Clinic Cases and Projects*

The 1L Clinic has structured its docket around a mix of several components: casework, service trips, and advocacy projects. Each semester, the balance of components has been adapted to adjust for issues such as the pandemic and to incorporate student feedback and professor experiences. This section describes the best practices I have developed for casework, service-learning trips, and advocacy projects—all components that future 1L Clinics may wish to incorporate.

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<sup>67</sup> See e-mail from Michael Cummings, Interim Assistant Dean of Admissions, to author (Jul. 14, 2023, 9:24 AM EST) (on file with author) (containing this data and study results).



### 1. Course Structure and Casework

Cornell's 1L Clinic is three credits, with a weekly two-hour seminar requiring about two hours of reading per week. The third teaching hour is a weekly one-hour supervision meeting between the professor and each student team. However, some weeks, we style supervision as a "big meeting" with all the clinic students together, instead of with each team separately (discussed further below). Students are expected to spend about 50 hours on their casework and advocacy projects over the course of the semester.

In creating the 1L Clinic docket and timing of casework and project assignments, I have found that the 1L Clinic runs most smoothly when all student teams are assigned cases of the same type in the same (or similar) procedural posture. First-year students are best prepared to succeed on their cases when the in-class seminar topics closely match the cases and tasks they are assigned, rather than, for example, generalized instruction in an area of law and then a wide variety of cases within that area, as in some upper-level clinics. I start students with an overview of the immigration legal scheme, introductory lectures that home in on the type of cases on our docket, and exercises to develop skills, such as client interviewing, before they meet their first clients.

Then, student teams set up their first client meeting, always with a client who has already been screened and whose likely form of relief has been identified. Early client assignments are very structured, with a specific goal pre-assigned to the students. Due dates are crafted around Lawyering deadlines to allow students the ability to focus on those critical assignments; later clinic assignments build on the persuasive argument skills and more complex writing they have recently completed in Lawyering.<sup>68</sup>

Because 1Ls require more rigid case planning and predictable structure,<sup>69</sup> aligning the case types as much as possible allows the instructor to cover much of the needed content in class. Supervision meetings can then focus on the case-specific questions that arise. In designing a case docket, a mix of simpler cases and more complex matters allows students to scaffold their skills, staying challenged and engaged.

In managing these cases, as stated above, students attend one hour of supervision per week. The 1L Clinic has also used a combination for team and group supervisions, periodically holding full-class or large-group supervision "big meetings" or "workshops" instead of individual team supervision meetings. When cases are generally aligned, these workshop supervisions are very useful because 1Ls often have the same questions, and they enjoy the collaborative atmosphere. Further,

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<sup>68</sup> See Part III.C.3. *infra* for a discussion of the challenges of working around Lawyering assignments—and teaching Lawyering at the same time as the 1L Clinic; see also Part III.C.5. *infra*.

<sup>69</sup> See Part III.C.4., *infra*.

the predictability of the 1L schedule, while a drawback in some ways,<sup>70</sup> means that professors can easily choose an additional non-class time during the week when the entire class is available. Additionally, the teaching assistant for the Clinic (a 2L or 3L who has taken the Clinic) holds weekly office hours for student questions, which they can then raise to the supervisor as well. This overlapping structure of supervision spaces and other opportunities for guidance helps ensure that 1Ls are adequately supervised as required by rules of professional conduct.

Below, I describe the two types of cases I assign in the 1L Clinic.

a. Less-Complex, Agency-Level Immigration Matters

Cases that involve straightforward application procedures and minimal, relatively simple legal analysis are a good fit for 1Ls. In the immigration space, this includes cases like Deferred Action for Childhood Arrivals (DACA) renewals, advance parole for DACA recipients, and naturalization. These applications are advantageous for first-year students new to clinical work because they are the most legally straightforward cases, where the primary tasks are brief interviewing of clients, screening for relief, preparing filings, and occasional predictive memos. Further, professors can train students on the nuts and bolts of these applications over relatively few sessions, preparing students to answer most client questions and to competently complete forms prior to supervisor review. Additionally, these simpler, administrative cases are a great introduction to clinic work for 1Ls because of their lower-stakes nature (in comparison to, for example, asylum cases) and the ease of client communication (clients typically speak English and are used to conventions such as email).

b. More Complex Litigation Matters: Asylum

As the semester progresses, students are ready for more legally complex work—in my clinic, this is usually asylum cases. The 1L Clinic has engaged in asylum work ranging from limited-scope services to affirmative asylum filings before the administrative agency to full defensive representation,<sup>71</sup> finding that limited-scope and affirmative cases work best for 1Ls.

Asylum cases typically involve extensive fact development and evidence gathering, such as creating the client's declaration (their written

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<sup>70</sup> See *infra* Part III.C.3.

<sup>71</sup> Affirmative asylum cases are for individuals who are not in removal proceedings before an immigration judge, while defensive immigration cases are for clients in the United States, who may be detained or non-detained, and who have a case pending before an immigration court. For more on the structure of the United States asylum system, see American Immigration Council, *Fact Sheet: Asylum in the United States* (August 16, 2022), <https://www.americanimmigrationcouncil.org/research/asylum-united-states>.

personal statement);<sup>72</sup> interviewing other witnesses, such as family members, and creating declarations; gathering and organizing personal documents such as identity documents, medical and education records, and news articles relevant to the case; and researching country conditions to create an index of sources demonstrating the potential persecution and government stance.<sup>73</sup> Evidence-related tasks necessary to asylum cases are well-suited to first-year students, who often excel at building connections with their clients to develop their stories and who think creatively about what additional evidence might be useful. As the semester progresses, 1Ls can spot more issues and refine their interviewing and client communication techniques.

While such complex cases are of great interest to 1Ls, they require more careful balancing and collaboration than the simpler cases. In addition to fact development, asylum cases require robust legal analysis, including persuasive briefing, on a wide variety of substantive elements and procedural issues—tasks that can push the boundaries of 1L skills. First-year students in their spring semester have typically not yet written a persuasive brief in their legal writing class until partway through the semester, and their capacity to get up to speed on legal analysis is limited by their otherwise heavy course load and relative newness to the law. While some 1L students are ready for the robust research and analysis required for asylum claims and are excited to create persuasive arguments, 1Ls generally are not fully prepared for this work. Even when I have assigned single-issue predictive memos or small components of a legal brief to 1Ls, they often express feeling overwhelmed, and their work product needs significant oversight.

Therefore, I have found that any case involving extensive written legal analysis essentially requires collaboration with advanced students. I usually take on advanced students, partner with another Cornell clinic that admits upper-class students,<sup>74</sup> and/or partner with a community agency. The strongest legal analysis has resulted when upper-class clinic students work together with 1L students to provide representation across law student experience levels and across clinical areas of expertise, while community partner attorneys provide additional insights and supervision. Specifically, an advanced student is typically tasked with writing the briefing, while the first-year student team conducts fact gathering. Through team meetings, the advanced student will ask for information that prods the 1L team to ask the client certain questions,

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<sup>72</sup> An asylum declaration is a distinct genre of legal writing as a first-person narrative and a common project for students in immigration clinics. See Stacy Caplow, *Putting the "I" in Writing: Drafting an A/Effective Personal Statement to Tell a Winning Refugee Story*, 14 J. LEGAL WRITING INST. 249, 249 (2008).

<sup>73</sup> See Jaelyn Kelley-Widmer & Estelle McKee, *Essentializing Cultures in U.S. Asylum Law*, BROOKLYN L. REV. (forthcoming 2024).

<sup>74</sup> The 1L Clinic has partnered with Cornell's Farmworker Legal Assistance Clinic, Asylum and Convention Against Torture Appellate Clinic, Afghan Assistance Clinic, and Gender Justice Clinic on various cases and projects over the years.

while the 1L team raises facts from client interviews that, in turn, prompt the advanced student to conduct further legal research. Later in the semester, the 1L team will be asked to write an application section of the brief, or the Statement of Facts—on which they are the experts.

Further, the 1L Clinic has taken on only one case involving court hearings: a full-representation defensive asylum case. I found this level of complexity and stakes to be beyond what 1Ls could handle alone—they could not be fully brought up to speed on both the fundamentals of asylum law and of trial practice in only one semester with the limited time they have. Even with additional faculty involvement and immediate integration of upper-class students on the team, this case was very difficult. I recommend that faculty considering a 1L Clinic limit 1L participation in cases with active court appearances, instead focusing on cases before administrative agencies. Cases before administrative agencies often have more manageable timelines and simpler evidentiary requirements, in part because there is no opposing counsel.

## 2. *Service Trips*

Service-learning trips<sup>75</sup> are a format of clinical casework that can fit well with the 1L schedule if they are timed advantageously. Such trips permit an encapsulated, intensive casework experience that is pedagogically meaningful and minimally interferes with their other courses. In Spring 2020, I planned for a clinic service trip over spring break to work in the South Texas Family Residential Center, an immigration detention center in Dilley, Texas<sup>76</sup>—a trip that was ultimately cancelled.

Spring 2023 was the first post-pandemic opportunity to plan a trip for 1L Clinic students. Together with an adjunct instructor brought on to increase student volume and help supervise and innovate projects, I developed a partnership with the Southeast Immigrant Freedom Initiative (SIFI),<sup>77</sup> a project of the Southern Poverty Law Center operating in Louisiana and other Southern states. We spent spring break of April 2023 in Louisiana, providing legal orientation programming and individual consults to people detained in two remote, rural detention

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<sup>75</sup> See Harris, *supra* note 1, at 175-77 (describing service-learning models and arguing that intensive trips as casework is different from regular clinical courses); Laurie Morin & Susan Waysdorf, *The Service-Learning Model in the Law School Curriculum*, 56 N.Y.L. SCH. L. REV. 561, 565 (2011/12) (referring to service-learning as a “capstone educational experience” that bring together doctrinal and practical law.)

<sup>76</sup> Many law-school clinics visited this detention center to provide short-term legal services to detained mothers and their children. See Harris, *supra* note 1, at 170. I had previously taken students on a week-long trip to this facility in January 2019.

<sup>77</sup> *Southeast Immigrant Freedom Initiative (SIFI)*, S. POVERTY L. CTR., <https://www.spl-center.org/our-issues/immigrant-justice/sifi> (last visited Jun. 12, 2023).

centers.<sup>78</sup> Earlier in the semester, clinic faculty provided students training on the substantive law of detention and habeas relief, as well as skills training students had been putting into practice already with local asylum clients in upstate New York. SIFI staff also provided a remote orientation prior to the trip. Students worked in two teams, alternating a day spent in the detention centers with a day spent in the hotel completing follow-up tasks for the cases encountered in the centers and for on-going affirmative cases they were already handling for the clients in New York.

The Louisiana trip proved to be an excellent vehicle for the students to bring together the skills they had developed over the semester, including client communication, substantive asylum knowledge, and team collaboration. They had to bring those skills to bear in a more demanding environment, with detained clients in significant distress; higher-stakes, quicker interviewing either through an interpreter or in another language; and implementation of more challenging issue spotting a wider variety of potential legal (and non-legal) problems.<sup>79</sup> Overall, this project was incredibly impactful for students and provided essential services to immigrants detained in a remote area of the country.

Faculty considering designing a 1L clinic to include service-learning should carefully consider structural concerns, such as the timing of spring break within the semester. At Cornell, spring break is during the first week of April. I found this timing to be both too close to finals—causing additional 1L stress—and too late in the semester to permit adequate case follow-up. With no other break in the spring semester, Cornell likely cannot take future 1L Clinic students on an extended service trip; however, schools with spring breaks in March may find this to be an excellent option for 1Ls. Alternatively, weekend trips or one-day trips could provide similar benefits with reduced logistical and economic costs. In Spring 2024, Cornell's 1L Clinic will visit a nearby detention center as a day trip.

### 3. *Advocacy Projects*

Advocacy projects are an excellent way to involve students in legal issues and the community without the pressure and logistics of casework. At Cornell, 1L students engage in community advocacy<sup>80</sup> through presentations such as Know Your Rights, immigration law updates, and Immigrant

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<sup>78</sup> Eileen Korey, *1L Students Counsel Hundreds in Detention Centers During Spring Break "Reality" Experience*, CORNELL L. SCH. (Jun. 7, 2023), <https://www.lawschool.cornell.edu/news/1l-students-counsel-detained-immigrants/>.

<sup>79</sup> *Id.*

<sup>80</sup> These projects could also be considered "community education," a "form of systemic advocacy that aims to educate a segment of the community about its rights in a particular legal context to advance the empowerment of that community." Barry et. al., *supra* note 1 at 404.

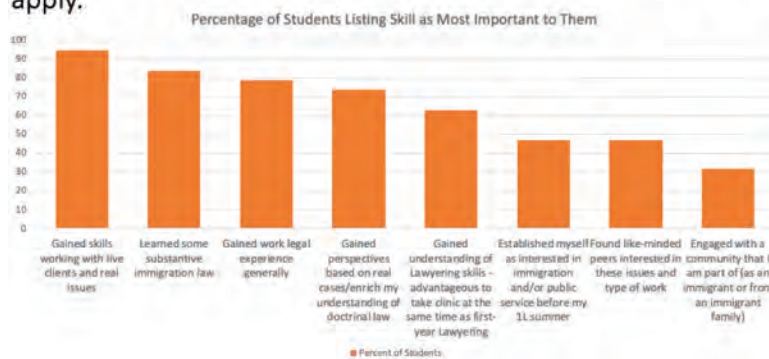
Allyship on campus and in the community. Students keep abreast of developments in immigration law and create fact-sheet documents, guides, and/or presentations for affected communities. Audiences for students' public-facing work have included impacted immigrants; immigration attorneys; lawmakers; Cornell students, faculty, and staff; and members of the general public.<sup>81</sup> Students have also participated in events with notable immigration-related speakers, such as author Karla Cornejo Villavicencio<sup>82</sup> and speaker and undocumented attorney Lizbeth Mateo. Each semester provides distinct opportunities for such advocacy projects and outreach tailored to the needs of the community and the interests of the students.

Faculty considering starting a 1L clinic should strongly consider incorporating legal advocacy projects into their dockets to give students another perspective on the relevant legal issues, integrate more flexible work deadlines, and engage them with the communities they serve. While these projects may not directly engage individual clients, they can often be structured to allow students to support organizational clients, as many clinics do.

### B. Successes and Benefits

Inclusion of 1Ls in live-client experiential work has an expansive catalog of potential benefits.<sup>83</sup> Below, I identify some of the key benefits from the 1L Clinic.

Which of the below skills did you both gain through the clinic as a 1L and have been most important to you? Check all that apply.



<sup>81</sup> For example, law students presented to a nationwide audience of practitioners on the new public charge immigration rule in 2020. Cornell Law School Staff, *Cornell Law Immigration Clinic Presents "Immigrants, Public Benefits, and COVID-19" via Webinar Attended by Over 1,000*, CORNELL L. SCH. (Apr. 24, 2020), <https://www.lawschool.cornell.edu/news/cornell-law-immigration-clinic-presents-immigrants-public-benefits-and-covid-19-via-webinar-attended-by-over-1000/>.

<sup>82</sup> Karla Cornejo Villavicencio, *The Undocumented Americans: In Conversation with Author Karla Cornejo Villavicencio* at Cornell Law School (Apr. 1, 2021), <https://ecornell.cornell.edu/keynotes/overview/K040121a>.

<sup>83</sup> See, e.g., Rankin et al., *supra* note 30, at 94-96 (discussing benefits of a first-year live-client project for students, faculty, and the educational institution).



### 1. *Pedagogical Innovation and Student Learning*

Developing a clinic for first-year students has been an opportunity to join the movement to integrate experiential education as a critical component of the early law school experience.<sup>84</sup> It also has provided a chance to be creative with the curriculum, envisioning a course that meets needs of first-year students as yet unaddressed.

In building the progression of legal theory, practical skills, and integration of casework, I have drawn on my experiences teaching first-year Lawyering.<sup>85</sup> I work closely with my section of first-year law students each year over the course of the entire year, giving me insights into the particular skills and training 1Ls have at any given point in the semester, as well as the distinctive stressors, other assignments (such as for Lawyering), and special 1L challenges that they are experiencing.

However, because of the limitations of first-year students, 1Ls do not work on legal arguments alone. Instead, I pair 1L teams with an advanced clinic student, who will typically take on the more complex legal research tasks and write the majority of the brief.<sup>86</sup> 1L students contribute to the brief as well, focusing on components such as the statement of facts and writing selected pieces of the legal argument. The unique opportunity to take a clinic as a 1L positions students for an especially robust mentoring-mentorship relationship among students across all three class years in the J.D. program and fosters opportunities for leadership.<sup>87</sup>

Overall, the scaffolding of work and cross-student collaboration on cases is an effective structure to provide first-year students with the means to learn practical client skills, apply and enrich their research and writing knowledge, and engage with substantive law.

Further, 1Ls report several other takeaways that are only possible because the clinic occurs during their first year. During a year focused on doctrinal courses, seventy-four percent of clinic alumni surveyed in 2023 valued that the clinic allowed them to gain perspectives on legal concepts as applied to real cases—not just cases from the casebook—and enriched their understanding of doctrinal law. For example, an administrative law course, held in the first year at some law schools, could

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<sup>84</sup> See, e.g., Milleman & Capulong, *supra* note 2, at 4 (describing the various ways law schools and law professors have been innovating to integrate real client work into the first year).

<sup>85</sup> I have taught Cornell's LRW course, Lawyering, every year since 2017. Previously, I taught legal writing at Berkeley Law.

<sup>86</sup> See *supra* Part III.A.1.b.

<sup>87</sup> See Paul Radvany, *Experiential Leadership: Teaching Collaboration Through a Shared Leadership Model*, 27 CLIN. L. REV. 309, 313-14 (2021) (discussing shared leadership model of collaboration, where different team members take the lead in different components of a case or project but ultimately need all parts to move forward to succeed).

be illuminated by administrative practice experience. Sixty-one percent of alumni appreciated taking the 1L Clinic at the same time as first-year Lawyering, finding it advantageous to have two skills courses simultaneously. Indeed, students who take a clinic in their first year may be more successful in their law school learning generally after the grounding, eye-opening experience of applying real law to real cases.

## 2. Professional Identity Formation

Clinical courses have long been a site for professional identity formation,<sup>88</sup> a competency recently formalized into required legal education. The 2022 American Bar Association Standards require law schools to “provide substantial opportunities to students” for “the development of a professional identity,”<sup>89</sup> including an “intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice.”<sup>90</sup> Law schools may meet this standard through existing courses and have developed a variety of other applicable programs, such as leadership programs specifically designed to address professional identity formation<sup>91</sup> and teaching assistantships.<sup>92</sup> Clinical courses, while not specifically designed for leadership training, are often the site of leadership development and professional identity formation<sup>93</sup> as students navigate the meaning and methods to being a principled lawyer. Further, students often receive close mentorship from clinical professors in particular, helping them gain direction on their path.<sup>94</sup>

Most first-year doctrinal courses do not engage directly with professional identity formulation. Doctrinal courses help students begin to “think like lawyers” with regard to legal reasoning and core analytical moves, but they do not require students to engage in legal decision-making.<sup>95</sup> Legal

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<sup>88</sup> See Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 395 (2012); Susan L. Brooks, *Fostering Wholehearted Lawyers: Practical Guidance for Supporting Law Students’ Professional Identity Formation*, 14 U. ST. THOMAS L.J. 412, 412-14 (2018).

<sup>89</sup> ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, Std. 303(b)(3).

<sup>90</sup> ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, Interp. 303-5.

<sup>91</sup> See Leah Teague, *Growing Number of Leadership Programs and Courses Supports Professional Identity Formation*, 62 SANTA CLARA L. REV. 149, 162 (2022) (leadership programs exist at almost half of American law schools).

<sup>92</sup> See generally Lara G. Freed & Rachel T. Goldberg, *Cultivating Teaching Assistants’ Professional Identities*, 18 CHARLESTON L. REV. (forthcoming 2024).

<sup>93</sup> See Teague, *supra* note 91, at 163 (2022) (“clinical experiences . . . provide fertile ground for leadership training”).

<sup>94</sup> See O’Leary, *supra* note 16 at 370.

<sup>95</sup> See, e.g., Milleman & Capulong, *supra* note 2, at 9.

writing courses are often the primary site of professional identity formation in the first year, as these courses often incorporate discussion of professionalism and the role of the lawyer.<sup>96</sup> Some engage with well-being in the practice of law.<sup>97</sup> However, these courses are usually focused on core writing and analytical skills through engagement with hypothetical cases,<sup>98</sup> so they provide only limited engagement with professional decision-making and legal ethics. Interpretation 303-5 notes that “developing a professional identity requires reflection and growth over time,” so law students “should have frequent opportunities for such development during each year of law school and in a variety of courses...”<sup>99</sup>

Having a clinical course in the first year of law school is an exceptional opportunity for 1Ls to develop professional identity and competency. They get to see lawyers in action dealing with real legal problems and see how the law can be a tool to help others.<sup>100</sup> Working with a professor in the role of advocate, or with lawyers from community partners, can provide students with role models of how to be both an effective advocate and how to confront the real challenges of lawyering.<sup>101</sup> Students have the opportunities to see their mentors work through ethical dilemmas, client counseling, and how to handle emerging and novel issues—all on cases that the students are intimately familiar with and invested in. Further, clinical courses typically build in reflective practices, so students and their mentors engage in discussion of whether they made the best possible decision and consider professional competency and the personal impact of the cases on the advocate.<sup>102</sup> This engagement with experienced, expert advocates on real case work thus provides students essential models of how to be a lawyer and foments the development of their own professional identities. Providing this opportunity in a first-year experiential setting allows students to envision their lives as lawyers in a concrete way that no other 1L curricular course affords.

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<sup>96</sup> See Bratt, *supra* note 58, at 22-24.

<sup>97</sup> Rankin et al., *supra* note 30, at 94.

<sup>98</sup> *Id.* at 89 (“[L]egal writing courses tend to focus students on carefully constructed legal problems rather than ‘real time, real life’ legal problems.”).

<sup>99</sup> ABA SECTION ON LEGAL EDUCATION AND ADMISSIONS TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2023-2024, Interp. 303-5.

<sup>100</sup> Michigan Law has seen similar benefits with their 1L Advocacy Clinic. See e-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (Jun. 28, 2023, 1:48 PM EST) (on file with author).

<sup>101</sup> See, e.g., Milleman & Capulong, *supra* note 2, at 9.

<sup>102</sup> Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLIN. L. REV. 317, 319-20 (2014) (describing reflection as a professional skill and introducing a model for teaching it in law-school clinics); Monika Batra Kashyap, *Rebellious Reflection: Supporting Community Lawyering Practice*, 43 N.Y.U. REV. L. & SOC. CHANGE 403, 406 (2019) (describing a “regular practice of self-scrutiny and self-reflection” as essential to the work of community lawyers).

### 3. Career Building and Practice Readiness

Engaging in clinical work in the first year significantly helps students in their career trajectories. First, the 1L Clinic supports public-interest students, as the mere presence of the Clinic provides a sort of implicit support for public interest in the law school, and studies show “significant positive correlation. . . between clinic participation and subsequent public service employment.”<sup>103</sup> Because many elite law schools, Cornell included, send most of their students into corporate law and provide extensive programming aimed at this goal, students focused on public interest may not feel as supported. While law schools also offer various resources for public interest students, such as career services counseling, social events, and student affinity groups, public interest can still seem under-resourced to many students.<sup>104</sup> Clear signposts of support for public-service work can thus be very impactful for students. While most clinics telegraph a public-service ethos,<sup>105</sup> having the unique presence of a clinic dedicated to marginalized communities available in the first year sends a particularly strong signal of support for this work. Thus, the 1L Clinic can support public-interest students more broadly, even if they are not admitted into the Clinic as a 1L.

For those students who are admitted to the 1L Clinic, the community created within the course, both with 1Ls and advanced students, has helped public-interest students find that common ground with others.<sup>106</sup> Indeed, most clinic applicants and alumni indicate that public interest was a strong reason to take the clinic.<sup>107</sup> For example, one student commented in an anonymous course evaluation, “[t]his course has solidified my commitment in public interest, now that I see the internal workings and some of the things that can be accomplished.”<sup>108</sup>

In general, students find that an early clinic experience helps them find their personal direction for their career, whether or not their focus

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<sup>103</sup> Sandefur & Selbin, *supra* note 8 at 59, 98.

<sup>104</sup> I have served on Cornell Law School’s Public Interest Committee for five years, including several years as chair, and thus engaged deeply with these issues, hearing both the administrative and general student perspective.

<sup>105</sup> See *supra* Part I.

<sup>106</sup> One student commented that a major positive takeaway from the course was that they “gained a mentor and belonging in a larger public interest community.” 2023 1L/Advanced Immigration Clinic Survey results discussed *supra* Part II.B. (on file with author).

<sup>107</sup> See *supra* Part II.B.

<sup>108</sup> 2021 course evaluations for Law 7841, 1L Immigration Law & Advocacy Clinic (on file with author); see also statement from 2020 Clinic student Siunik Moradian on the 1L Clinic website: “Working in the clinic was an invaluable opportunity to have so early in my legal career. Having hands on experience with clients on a variety of immigration related issues and the hurdles they face helped me solidify the type of legal work I wanted to do.” *1L Immigration Law and Advocacy Clinic*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/academics/experiential-learning/clinical-program/1l-immigration-law-and-advocacy-clinic/> (last visited Sept. 13, 2023).

is public interest. One exemplary comment from an anonymous course evaluation stated, “[t]he clinic is one of the things that got me ‘off the fence’ in terms of my orientation toward my future career. This has been one of the most valuable learning experiences of my life and I look forward to continuing to take clinical courses in the future.”<sup>109</sup> Another student wrote that they took the Clinic “[f]or meaning and purpose—an opportunity to recenter my law school education around some of the reasons I came to law school and to remind myself of those reason[s]. Further, for application—to find a forum to apply the substantive lawyering skills I was learning into practical problems in the real world.”

Second, 1L Clinic alumni draw on their early experience in their job interviews, whether for public interest or for law firm positions—especially for their 2L summers, for which interviews are held prior to the start of the 1L year, and having already done a clinic in 1L greatly sets them apart. For example, a Clinic alum commented on an anonymous survey, “[c]linic enabled me to distinguish myself from my peers, and this was significant in my job interviews, as my doctrinal grades were often median at best, but I excelled in clinic work.”<sup>110</sup> Students also draw on the clinic work in pro bono opportunities that arise in corporate law firms. One student told me that, in their first-year summer firm job, they were one of the most experienced people in the room when it came time to discuss a pro-bono asylum case.<sup>111</sup>

Third, regardless of career direction, all clinical students build specific skills that help make them especially “practice ready.”<sup>112</sup> Most law-school courses, especially the traditional first-year courses other than legal writing, focus on skills such as legal analysis and synthesis of texts, but do not teach students the practical skills they will need to employ as soon as their first summer job.<sup>113</sup> In contrast, experiential education courses such as legal writing and clinics teach students skills like problem-solving, fact investigation, drafting, and professional collaboration.<sup>114</sup> Further, like all clinical experiences, their value appreciates with time. For example, a 2019 law-school graduate who worked on clinical cases with me prior to the 1L Clinic has since

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<sup>109</sup> 2023 course evaluations for Law 7841, 1L Immigration Law & Advocacy Clinic (on file with author).

<sup>110</sup> 2023 1L/Advanced Immigration Survey results discussed *supra* Part II.B., on file with author.

<sup>111</sup> Conversation with Donaldson Izekor, Cornell Alumnus ‘23 (August 2021).

<sup>112</sup> *See, e.g.*, Milleman & Capulong, *supra* note 2, at 5 (explaining that clients and potential employers “seek practical problem-solvers” ready for practice); Batt, *supra* note 6, at 119 (“[L]aw schools continue to grapple with the most fundamental question: how to educate law students so that they can enter the legal market as competent, ethical lawyers” who are practice-ready); Barry, *supra* note 5, at 248 (describing critiques of legal education that note students spend more time deconstructing cases than learning how to represent actual clients); Sandefur & Selbin, *supra* note 8, (explaining that clinics “play an important bridge function between law school and law practice”).

<sup>113</sup> *See, e.g.*, Milleman & Capulong, *supra* note 2.

<sup>114</sup> *Id.* at 7.

transitioned from big law into administrative litigation. She recently reported that she continues to draw on her clinical experience in immigration court every time she has an administrative hearing at her small boutique firm.<sup>115</sup>

#### 4. *Student Recruitment and Retention*

As noted in the Introduction, students are intrigued by clinical work and motivated to engage in public-facing advocacy. Indeed, since I began the Clinic, I have received regular communication from prospective and admitted students wishing to learn more,<sup>116</sup> and from current 1Ls hoping to take the clinic in their first year.<sup>117</sup> Further, Cornell Law School has enjoyed positive publicity around the work, similar to any successful clinic but enhanced by the unique nature of the incorporation of 1Ls in the work.<sup>118</sup>

Finally, hands-on work helps students maintain full engagement in their legal education.<sup>119</sup> The early connection to real cases and clients is essential for some students, who find this engagement to be so grounding and meaningful that it keeps them in law school when they might otherwise have departed.<sup>120</sup> Many law students who start working with the 1L Clinic in their first year go on to additional clinics at Cornell, and/or stay on as advanced students in Immigration Law & Advocacy Clinic II and III.

#### 5. *Casework Successes*

First-year students can meaningfully assist clients, leading to both their personal satisfaction and positive outcomes for clients. Students complete this work within the boundaries of professional ethics, as they may engage in legal tasks as long as they are adequately supervised by

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<sup>115</sup> E-mail from Amanda Wong, Cornell Alumnus (June 15, 2023) (on file with author).

<sup>116</sup> See, e.g., e-mail from IP, Prospective Student (Sept. 14, 2021) (on file with author) (“I’m applying to Cornell Law this fall and I’m really interested in the Immigration Law and Advocacy Clinic that you run” and related questions); e-mail from HZ, Cornell Law Admitted Student (Oct. 4, 2021) (on file with author) (similar); e-mail from MF, Cornell Law Student (May 31, 2023) (an admitted student interested in learning about the 1L Clinic). I have used only the initials of students in this section to protect their privacy.

<sup>117</sup> See, e.g., e-mail from LM, Cornell Law Student (Aug. 19, 2021) (on file with author) (new 1L student expressing interest in taking the clinic during her first year); e-mail from CP, Cornell Law Admitted Student (November 30, 2020) (on file with author) (similar).

<sup>118</sup> Since the beginning of the clinic, Cornell Law publications have highlighted the uniqueness of this 1L clinic and its work as a positive element of the curriculum. See, e.g., Sherrie Negrea, *New Clinical Courses Mean More Hands-On Experiences for Students*, Cornell Law Forum (Fall 2021) (on file with author).

<sup>119</sup> See e-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (Jun. 28, 2023, 1:48 PM EST) (on file with author).

<sup>120</sup> I have learned this in multiple confidential conversations with students, and this has been noted by others in the field. *Id.*



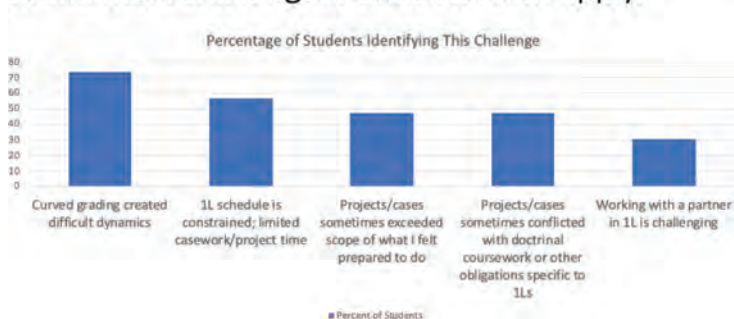
a lawyer.<sup>121</sup> Across the first four years of the 1L Clinic so far, students represented and/or advised over fifty total clients on an individual basis. Most clients were Cornell students, faculty, or staff who needed assistance in DACA cases, citizenship applications, asylum, and related matters. We also represented and/or advised non-Cornell clients also based in upstate New York on their cases for asylum, Special Immigrant Juvenile Status, and more. Further, on our 2023 spring break trip, we advised about 800 detainees in collaboration with our community partner in Louisiana.<sup>122</sup>

Many of these cases presented unique issues, such as substantive red flags requiring research or unique client situations requiring delicate interviewing skills. Some cases required detailed document preparation, while others involved more complex legal research and writing. Students enjoyed working with a wide variety of clients from different campus departments, from undergraduates in philosophy and faculty in computer science to recently arrived asylum seekers from around the world. We have worked with clients from approximately twenty-five different countries in the last four years. Further, the advocacy projects have reached a wide variety of audiences who otherwise would not be served.<sup>123</sup>

Casework and projects must be constantly adapted as the immigration landscape fluctuates and needs of the local community change (discussed above), along with substantive constraints of the 1L schedule (discussed below), but each semester, the Clinic adds substantial value to the legal services offerings in upstate New York and beyond.

### C. Challenges

When you took this class as a 1L, what were some of the main challenges? Check all that apply.



<sup>121</sup> See *supra* notes 27 and 33, discussing various practice rules including ABA Model Rule 5.3 requiring adequate supervision of non-lawyers, and the Executive Office for Immigration Review rule permitting law students in clinics to represent clients before the court.

<sup>122</sup> Eileen Korey, *1L Students Counsel Hundreds in Detention Centers During Spring Break 'Reality' Experience*, CORNELL L. SCH. NEWS (June 7, 2023), <https://www.lawschool.cornell.edu/news/1l-students-counsel-hundreds-immigrants/>.

<sup>123</sup> See discussion *supra* Part III.A.3.

Clinic alumni surveyed in 2023 identified the main challenges of clinic from their perspective, illustrated in the graph above. This section discusses an array of challenges 1L clinics face and suggests strategies for ameliorating them.

### 1. *Limited Enrollment*

Many students are interested in first-year clinical work, but the class size at Cornell is small. In light of the constraints described below, I have limited the 1L Clinic enrollment to six-to-eight 1Ls,<sup>124</sup> about three percent of the 1L class,<sup>125</sup> while about fifteen percent of the class apply. The 1L Advocacy Clinic at Michigan has employed a similar student-professor ratio (about 1:6), but with four professors and 26 students in Winter 2023.<sup>126</sup>

While eight students is perhaps an ideal number for intimate seminar discussion and for two professors with significant other obligations, it means that the 1L Clinic is practically very difficult for students to get into. Administratively, the ability to enroll a larger number of students into 1L Clinics would be preferred so that there is a more realistic opportunity for students to get in. Enrolling more students would also improve some of the issues created by curved grading, described below.

Further, student selection can be challenging. With extremely limited enrollment, students are concerned that they will not be admitted to the clinic, and they may be on alert for perceived unfairness in the selection process. Therefore, to select students, I use a partially random selection process agreed upon by the entire faculty. Students apply to the Clinic by submitting their resume and a statement of interest. I do not have information about the students' grades when they apply, as they have not yet taken final exams for their first semester. I review the applications and remove the weakest candidates from the pool—generally, students whose materials suggest that they are not prepared for the clinic, such as those with especially weak writing skills. I then use an online random-selection tool to select students, in part to relieve the perception by students that I am more likely to choose students I already know well from my other 1L course.

Faculty considering how to admit 1Ls may wish to examine applicants' materials for interest and relevant work experience, as many

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<sup>124</sup> I have admitted eight students only when joined by an adjunct for the semester. The adjunct instructor has an additional, full-time job in immigration law.

<sup>125</sup> Cornell typically enrolls around 200 1L students. In Fall 2022, Cornell enrolled a slightly bigger class than usual with 211 students. *Facts and Statistics*, CORNELL L. SCH., <https://www.lawschool.cornell.edu/about-cornell-law-school/facts-and-statistics/> (last visited Jun. 22, 2023).

<sup>126</sup> E-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (Jun. 28, 2023, 1:48 PM EST) (on file with author).

clinicians do.<sup>127</sup> However, for 1Ls, its especially important that they be particularly ready to work with a partner and handle the professional obligations of live-client work, such as meeting deadlines. These traits are important for all lawyers, but 1L Clinic students are under higher grade pressure than upper-class students and thus are even more sensitive to partner work challenges.

## 2. *First-Year Knowledge Base*

First-year law students have extraordinary energy and enthusiasm for live-client work. The students I have been privileged to teach have been uniformly dedicated to their clients and striven for excellence in their work. Nevertheless, there are specific curricular experiences they do not yet have when they start the clinic, which sets them behind upper-class students in some ways. Indeed, Professor Joshua Kay of Michigan's 1L Clinic noted that, while Michigan professors have been very impressed by their 1L Clinic students, 1Ls are naturally a bit "green."<sup>128</sup> Without a second semester of legal writing under their belts (which usually involves their first persuasive writing assignment), only half as many doctrinal courses, and no summer legal internship experience, they are significantly less trained than the average 2L taking a clinic for the first time the following fall. The 1L Clinic caseload must take into account these substantive limitations and seek projects that can be scaled for 1L knowledge and skill levels.

Further, first-year students may also be less aware of their own limitations, given their reduced level of experience in the legal world. Students will not yet have taken professional responsibility or worked in a legal environment. Instructors designing and managing 1Ls in live-client work must therefore be especially aware of ethical challenges the potential pitfalls around unauthorized practice of law and ensure adequate supervision, just as they would for any non-lawyer member of a legal team.<sup>129</sup> And in the case of a "K to JD" student who came directly to law school from undergrad, students may not have any professional work experience at all—even a 1L summer internship. Students thus may also need training in basic office etiquette and in skills such as using a photocopier.

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<sup>127</sup> Clinical faculty in general "often select . . . students because of interest or talent." See Mlyniec, *supra* note 26, at 566.

<sup>128</sup> E-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (Jun. 28, 2023, 1:48 PM EST) (on file with author).

<sup>129</sup> Nantiya Ruan, Jason Cohen & Victoria Chase, *Ethical Considerations in 1L Collaborative Classrooms*, in *THE NEW 1L: FIRST YEAR LAWYERING WITH CLIENTS* 173, 175 (Eduardo R.C. Capulong et al. eds. 2015); *see also* MODEL RULES OF PRO. CONDUCT R. 5.3 (AM. BAR ASS'N 2023).

To adjust for these substantive limitations of 1Ls, I have developed a system of strategic inclusion of advanced students in the casework, as described above.<sup>130</sup> Advanced students have even worked cases in early stages over winter break, conducting the initial client interviews so that we could hand 1Ls a pre-vetted case package ready for their skill levels, aligned procedurally<sup>131</sup> for substantive ease and fairness of workload.

To handle the 1Ls' higher need for supervision and support, I have also brought on a teaching assistant for several semesters and, most recently, an adjunct professor.<sup>132</sup> Still, scaling the clinical projects to the 1L skill level and time capacity remains an ongoing challenge given the mismatch between the 1L structure and the nature of real legal work.

### 3. *First-Year Curricular Structure*

As noted above, the curricular structure of the first year of law school has changed little since the initial set of doctrinal courses was established, save the universal requirement of a legal research and writing course.<sup>133</sup> Most law schools place students into "sections," or fixed groups of fifteen to forty students, which have all their classes together for the first year. The one exception from the standardized schedule is the spring-semester elective course, which some law schools permit or require (though others do not allow an elective). Further, dates of major exams, job application cycles, and moot court competitions are typically coordinated, placing the entire 1L class on the same broad timeline. In particular, legal-writing assignments for classes like the Lawyering course I teach define the rhythm of the first-year schedule and, if synced across sections, create periodic stressful deadlines for the entire class. Thus, first-year law students have almost no control over their schedule, and they move in lockstep with their entire class.

Law schools that permit or require electives are likely the ideal site for 1L clinics because they provide a natural opening in which 1Ls can fit a clinic into their schedule. Law schools that do not have an elective option would need to do more reconfiguring of the curriculum to create such an opportunity.

Still, even with an elective, the typical 1L schedule is very constrained. This limitation in flexibility is at odds with clinical work, which is inherently unpredictable—the exact trajectory of litigation, or availability, temperament, or story of a client cannot be determined in

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<sup>130</sup> *Supra* Part III.A.1.b.

<sup>131</sup> See more detailed discussion of case selection *infra* Part III.C.4.

<sup>132</sup> Alisa Whitfield, CORNELL L. SCH.: FACULTY DIRECTORY, <https://www.lawschool.cornell.edu/faculty-research/faculty-directory/alisa-whitfield/> (last visited July 18, 2023).

<sup>133</sup> See *supra* Part I.

advance of the semester.<sup>134</sup> Clinic work also varies by semester or year; while other 1L courses can cover the same content annually, with only minor changes for a new case or legal-writing assignment topic, live-client cases cannot be predicted in this way. Indeed, the very strength that clinics provide—the “urgency to deal[] with a real client’s problems that no simulation can approximate”<sup>135</sup> and the attendant skills and professional identity formulation that come with this task—is also at odds with the rest of the obligations of 1L. Professors teaching 1Ls in clinics note that they seem “more overwhelmed” than students in upper-class clinical students, who are better able to balance clinic work with their other obligations.<sup>136</sup>

Some schools, committed to prioritizing first-year experiential learning, have modified the classic first-year structure to accommodate it. At UC Irvine, a law school launched in 2009,<sup>137</sup> this was possible because the founding faculty started with a “blank slate” and intentionally designed a first-year curriculum with the flexibility needed for experiential education.<sup>138</sup> Other schools have adjusted certain first-year courses to allow for live-client work within the existing paradigm of doctrinal and legal research classes.<sup>139</sup> Yale, which admits about fifty percent of its 1Ls into clinics, does not have any required 1L courses in 1L spring, permitting students to create schedules that are designed to accommodate clinic work if they so choose.<sup>140</sup>

However, some faculty may oppose a redesign of the curriculum to permit clinics, which could distract 1Ls from their doctrinal studies. Indeed, live-client work often becomes a top priority for students, who take their duties seriously and wish to provide high-quality

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<sup>134</sup> In reflecting on integrated live-client work into the Lawyering Program at the University of Montana, Prof. Eduardo R.C. Capulong noted, “the relative unpredictability of our work affected other deadlines, the reading and exam periods, and students’ and colleagues’ nerves.” Capulong, *supra* note 50, at 140.

<sup>135</sup> Fisk et al., *supra* note 31, at 149.

<sup>136</sup> See interview with Julianna Lee, Clinical Assistant Professor of Law, Michigan L. Sch. (July 19, 2023) (notes on file with author).

<sup>137</sup> *Our History*, UNIV. CAL. IRVINE L., <https://www.law.uci.edu/about/our-history/>.

<sup>138</sup> Fisk et al., *supra* note 31, at 149, 152-54 (describing the meetings held by ten founding faculty members during which they determined the key competencies they wanted their law students to learn and planning the curriculum around these goals. One hallmark of the curricular structure is that all first-year students have one entire morning free per week, at a time that works for legal aid offices, so that they can assist with live-client work in the office during that time).

<sup>139</sup> For example, University of Maryland Law and John Marshall Law integrate real legal work into courses such as torts, property, and civil procedure through a “Legal Theory and Practice” course model. Millemann & Schwinn, *supra* note 43, at 65-67. Further, Seattle University and the University of Denver incorporate client work into the second semester of the LRW course. Bowman et al., *supra* note 40, at 58-59.

<sup>140</sup> Yale Law Women, *The 2020 Guide to Academics*, at 4, <https://ylw.yale.edu/wp-content/uploads/2020/08/411-from-YLW-Academics-2020.pdf> (last accessed Aug. 26, 2023).

representation for their clients—sometimes at the expense of tasks like studying for their other classes. Further, students who are already struggling in doctrinal courses might be hindered by the different pressures of clinical work. Those who may be at risk for challenges with bar passage should perhaps focus on doctrinal work; on the other hand, sometimes struggling students gain confidence through clinical work that raises their performance in other courses and could thus help them on the bar. Schools concerned about the academic impact of a 1L clinic could consider a GPA minimum for enrollment, and potentially lift or adjust that requirement over time.

#### 4. *Case Planning and Docket Design*

While all clinicians must intentionally and methodically design their docket of cases and projects with student time and knowledge in mind, these issues are heightened when running a 1L clinic. Because of the curricular constraints in most law schools, professors directing a 1L clinic should design a 1L clinic docket that is planned around the other major deadlines and projects 1Ls have, such as Lawyering assignments. If a 1L clinic professor is not already teaching in the first-year curriculum and thus aware of these deadlines and the unique stressors their 1L students face, a mentor from the legal writing faculty could be beneficial as the clinic professor plans for and navigates these issues.

Further, 1Ls benefit from greater structure than upper-class students, with pre-planned deadlines throughout the semester rather than assigning the students to create their own case plan and deadlines. For example, I review the 1L spring schedule closely each year and plan deadlines for work product drafts (e.g., “declaration draft #1” in week three, then “declaration draft #2” in week five) around these deadlines and on the same timeline for all clinic students. Although this sacrifices some of the self-direction that clinic students often have in upper-class clinics, it creates a more predictable and manageable schedule for 1Ls and reduces their anxiety. Of course, I advise them that the schedule is subject to change, but having a plan in place staves off the more frantic questions and keeps their workload even across teams.

In choosing cases and projects for 1Ls, instructors should aim for a casework difficulty level that balance stakes, complexity, and intensity so that students find the work challenging but manageable.<sup>141</sup> For my immigration-focused clinic, this has meant a mix of simpler administrative cases, affirmative asylum cases with work mostly limited to fact

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<sup>141</sup> For example, across various semesters, I have tried strategies including focusing on affirmative asylum instead of defensive; partnering with additional community organizations; and keeping most of the work to spring break. *See supra* Part III.A.



investigation, and advocacy projects, like a relatively low-stakes, low-intensity memo for a community partner on a recurring issue.<sup>142</sup> I have tried incorporating trial-level court cases and tried limiting most of the casework to spring break, but have found these options overly difficult. Court work is too high-stakes for 1Ls to handle alone, while pushing most work to spring break—week ten in Cornell’s semester—means that there is not enough other work to engage students for three quarters of the semester or time to complete follow-up casework after the trip.

Further, to keep the workload fair to students in a curved, letter-graded class, I strive to assign an evenly balanced caseload, with approximately the same types of cases and level of complexity for each team. Still, the casework and advocacy projects will necessarily vary. Instructors must be prepared to grapple with the student concern that arises over any perceived unfairness, especially in the curved grading universe that is 1L.

Like any non-lawyer member of a legal team, 1L students can assist with numerous non-court aspects of cases, such as research, client interviewing, and providing advice to a client under attorney supervision. Some states’ practice rules also permit 1Ls to appear in court. For example, Connecticut allows law students who have completed one semester of law school to practice in that state,<sup>143</sup> enabling Yale’s 1Ls to fully participate in all clinical projects, including court appearances. However, most states require two semesters of courses.<sup>144</sup> Administrative agencies often do not have a limitation for student practice,<sup>145</sup> enabling 1L students in clinics that deal with agencies, like my immigration clinic, to fully participate. Schools interested in integrating 1Ls into clinics, or creating a 1L-specific clinic, should examine their states’ practice rules and consider advocating for a one-semester student practice rule, particularly if they are interested in incorporating 1Ls into court work.

## 5. Faculty Time

Faculty members are also constrained by the limits of the 1L curriculum, either by dint of teaching another course in it or by the limits it places on their students’ time and capacity to meet unpredictable casework demands

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<sup>142</sup> Bowman et al., *supra* note 40, at 55 (providing a visual model for thinking about intensity level, scope of projects, and management/supervision demands). I have assigned lower-stakes work like this to clinic students in the form of advocacy projects. *See supra* Part III.A.3.

<sup>143</sup> *See* Conn. Prac. Book § 3-16(a)(2); *see also* Wishnie, *supra* note 21, at 100 (describing advocacy by Yale professors in the late 1960s to establish this “liberal student practice rule”).

<sup>144</sup> *See Student Practice Rules – Clinical Research Guide*, GEO. L. LIBR., <https://guides.ll.georgetown.edu/c.php?g=271042&p=1808947> (last accessed Aug. 26, 2023) (research guide listing the applicable student practice rules for every state).

<sup>145</sup> For example, a law student participating in a legal aid program or clinic conducted by a law school or non-profit organization may appear in immigration court proceedings under the direct supervision of a registered attorney or accredited representative. 8 C.F.R. § 1292.1(a)(2)(ii).

(or both, as in my case). In particular, faculty with other immovable obligations, such as my own simultaneous teaching of first-year Lawyering, may grapple with the volume of student supervision.<sup>146</sup> As other clinicians have noted, “[t]he intensive nature of [clinical] work . . . means that supervising faculty are always on call,” as “the key to a successful clinical experience is effective, timely supervision.”<sup>147</sup> This is even more essential for 1L supervision in light of their comparatively less experience.

Therefore, in determining which faculty teach a 1L clinic, law schools should consider lightening the teaching load of that faculty member in other regards to make the work manageable. For example, as a professor in Lawyering, my teaching load is already very student-focused, involving numerous in-person student conferences and extensive, high-volume feedback delivered on fast-paced timelines—similar to what the 1L clinic students require in supervision. Because of this high teaching load, after four years of teaching a full Lawyering course (about 35 students per semester) together with the 1L Clinic in the spring, I have proposed either teaching the 1L clinic only in alternating years, or teaching only the 1L clinic without Lawyering, to create a more sustainable long-term workload.

Additionally, 1Ls in any experiential setting typically engage in live-client work only in the second semester of law school.<sup>148</sup> 1L Clinics thus experience all the challenges of any single-semester clinic: student projects must fit within about three months of the year, have meaningful work timed to occur during that specific window, and minimize the workload for the other nine months of the year when students are not available to staff cases (or the clinic structure must include a staff attorney, legal fellow, or faculty member with primarily clinic commitments who can carry the case load). When faculty teach a clinic only in the spring, they often bear the ongoing casework in the months outside their clinic semester, which can come at heavy personal cost as they juggle additional casework beyond their teaching load. Faculty may also take on summer interns or term-time advanced students—though this work still requires supervision time and may be uncompensated.<sup>149</sup>

## 6. Grading

Though grading is part of the 1L curricular structure, I address it separately here because of its impact on the course. The 1L Clinic at

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<sup>146</sup> See Capulong, *supra* note 50, at 142.

<sup>147</sup> *Id.*

<sup>148</sup> See Bowman et al., *supra* note 40, at 58 (students in LRW programs work with real clients in the spring); *see also* Capulong, *supra* note 50, at 124 (students work with live clients during a six-week period in the spring).

<sup>149</sup> Because I routinely face casework that stretches far beyond the semester, with no way to slot that into my teaching load, I have worked to take more limited projects and collaborate with community partners to whom I can return the cases at semesters' end.

Cornell is graded on a curve, which aligns it with other 1L electives but distinguishes it from all other law school courses of its size.<sup>150</sup> The curved grading scheme undergirds the clinical experience for 1Ls in a way that many upper-course clinics avoid by keeping their enrollment under the limit for curved grading—an option not available to the 1L Clinic at Cornell because the faculty policy is to keep all 1Ls in all curved classes.<sup>151</sup>

Grading on a curve for such a small class size in a course that involves such detailed, personal work, including teamwork, is a challenge for numerous reasons:<sup>152</sup> 1. this scheme carries the strong possibility that students will perform well and yet receive a lower grade, and 2. curved grading can create more difficult, competitive team dynamics that work against the interests of the client.

First, the clinic website notes that the course is curved,<sup>153</sup> and students are reminded at the start of the curve restraints. Still, this limitation is particularly problematic for the public-interest-focused students that the Clinic is designed to lift, as public-interest employers will be most interested in a student's clinic grade because it reflects ability to engage in practical work. Thus, an artificially lowered grade in the Clinic can harm strong public-interest focused students who otherwise would be given a significant leg up via participation in the Clinic. Further, for high-performing students who wish to engage in practical work, the grading scheme has chilled participation. Several students have declined admission to the Clinic or decided not to apply to avoid the risk to their GPAs.

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<sup>150</sup> Cornell Law School policy is to curve all classes enrolling ten or more students.

<sup>151</sup> In contrast, other schools that allow 1Ls in clinics do not use curved grading systems for the reasons described above. Yale Law School permits 1Ls to take any clinic, and about half do so. They are graded on a standard grading system (Honors, Pass, Low Pass, and Fail) with no mandatory curve. See e-mail from Muneer Ahmad, Sol Goldman Clinical Prof. of L., to author (April 14, 2021, 2:51 PM EST) (on file with author). Michigan Law School's 1L Workers' Rights Clinic graded clinic students on an S/U system. Interview with Rachael Kohl, Assistant Prof. of L., Wayne State Univ. (March 25, 2021) (notes on file with author). Now, Michigan's 1L Advocacy Clinic uses letter grades but is not mandated to adhere to a curve. E-mail from Joshua Kay, Clinical Prof. of L., Univ. of Mich. L. Sch., to author (Jun. 30, 2023, 9:40 AM EST) (on file with author). Berkeley Law admits some 1Ls into clinics, and they are graded credit/no credit, like all students in clinics. E-mail from Laura Riley, Clinical Program Dir., Berkeley L., to author (Jul. 25, 2023, 5:29 PM EST) (on file with author). Further, many law schools use alternative grading structures for all clinics, such as pass/fail, or, for a full-year clinic, pass/fail for the first semester and letter grades for the second semester. Richard H. Frankel, Nicole Godfrey, Michael Harris, Kevin Lynch, Laurie Mikva, Wallace J. Mlyniec, Adam Stevenson, Brian Wilson & Sarah H. Wolking, Presentation at American Association of Law Schools Clinical Conference, San Francisco, California, Grading & The Curve: Rebuilding Hope and Confidence in Students Fighting to Abolish Systems of Oppression (Apr. 29, 2023).

<sup>152</sup> Mlyniec, *supra* note 26, at 566 (describing eight reasons curved grading is inappropriate in a clinical course, including both of these).

<sup>153</sup> *1L Immigration Law and Advocacy Clinic*, *supra* note 23.

Second, grading on a curve inherently pits students against one another, which can create a difficult dynamic in a small class and due to the nature of the Clinic structure. Indeed, seventy-four percent of 2023 survey respondents listed curved grading as a main challenge to the 1L Clinic,<sup>154</sup> making it the most-frequently selected challenge. In Clinic, students work in pairs or groups of three on their docket of cases—a structure used by many clinics and which ensures more robust representation by new lawyers while teaching collaborative skills. However, most clinics do not grade on a curve, avoiding perverse incentives to “out-do” one’s clinic partner to gain favor with the professor, or to avoid raising difficulties with one’s partner to avoid impacting that person’s potential grade. First-year grades matter more than any other year of law school because of the pattern of hiring practices, with most students applying to firms or other grade-conscious 2L summer placements like non-profit organizations and judges for summer clerkships after only one year of grades. The pressure to perform well is extreme and cuts against the goals of the Clinic, both pedagogically and in the spirit of service to clients.<sup>155</sup>

#### IV. THE FUTURE OF 1LS IN CLINIC

Since the launch of Cornell’s 1L Clinic in spring 2020, followed by a report-back and significant excitement for and approval of the Clinic in spring 2021, the 1L Clinic has become an established part of Cornell’s 1L curriculum. However, the project of both the 1L Clinic in particular and the integration of 1Ls into experiential work is ongoing. First, the 1L Clinic is a heavy course to teach, necessitating some adjustments in frequency of the course or in professor teaching load.<sup>156</sup> Second, the Clinic does not currently provide a widely available opportunity for 1Ls, as only eight students are admitted; therefore, Cornell’s faculty Experiential Committee is currently considering other methods for making live-client work available to 1Ls, elaborating on the successes of the Clinic and scaling up the opportunities. Below are clinical models to try with first-year law students.

##### A. *Multi-Practice 1L-Specific Clinic*

Michigan Law School runs the only other 1L-specific clinic currently operating. Previously, Michigan ran its Workers’ Rights Clinic

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<sup>154</sup> Challenges Graph, *supra* Part III.C.

<sup>155</sup> See Mlyniec, *supra* note 26, at 566 (“legal work in the modern world is collegial and collaborative, not competitive,” making individual grades anathema to actual practice; and “the practice of law deserves a high and consistent level of work” on behalf of clients.).

<sup>156</sup> See *supra* Part III.C.5.

for 1Ls, focusing on quick turnaround unemployment insurance cases 1Ls handled in teams during their spring semester, together with mentorship from upper-class students who had taken the clinic.<sup>157</sup> In 2023, Michigan launched a new iteration of a 1L-specific clinic called the 1L Advocacy Clinic. This clinic is co-taught by four professors, allowing greater enrollment than Cornell's 1L Clinic (twenty-six students compared to eight), and incorporating a wider variety of legal expertise. In its first semester, the 1L Advocacy Clinic handled mostly guardian ad litem cases, with a few immigration cases handled by a smaller group of students enrolled in the clinic and given separate instruction.<sup>158</sup> Because of the time required to handle the cases and the disparate substantive topics, the 1L Advocacy Clinic held a limited series of seminar sessions in the early weeks of the semester and then transitioned to providing most of the teaching in supervision, with optional group case rounds offered later in the term.<sup>159</sup>

Future 1L clinics could build on Michigan's approach to create a multi-practice clinic with several distinct practice areas taught by various professors. This way, some of the broadly applicable skills (e.g., intercultural communication, client interviewing) could be taught together, and then later group case rounds could allow more student interaction. In between, students in each practice area could receive specific training and supervision from the relevant professor(s).

Such an approach could allow clinicians who teach a typical upper-level clinic to create a 1L-specific module of their clinic to be taught in this semi-collaborative way in the spring, bringing more professors and subject areas into the 1L experience and permitting admission of higher numbers of 1Ls. More variety in 1L clinic offerings would lead to both greater student interest and increased adaptability, as different practice areas could be offered if and when suitable projects arise. Further, this approach better integrates a larger proportion of the clinical teaching faculty, which bodes well for long-term sustainability, as professors may not be able to (or wish to) take on the challenging task of supervising 1Ls every year.

Another way to create a multi-practice 1L clinic that takes less coordination among faculty and avoids the risk of too little substantive overlap to be useful would be to rotate the topic of the 1L clinic. Clinical professors could opt to teach a 1L-version of their clinic in the spring every two to four years, for example. This model would allow more variety in student experience over time and contribute to sustainability by

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<sup>157</sup> The Workers' Rights Clinic was discontinued around 2022; see discussion *supra* Part I.

<sup>158</sup> Interview with Julianna Lee, Clinical Assistant Professor of Law, Michigan L. Sch. (Jul. 19, 2023).

<sup>159</sup> *Id.*

not placing the challenge of teaching the 1L clinic on the same professor every year. It would also allow clinic faculty to experiment with working with 1Ls, perhaps opening slots for 1Ls in upper-class clinics the future.

### B. Limited-Scope Representation in 1L-Specific Clinic

Limited-scope representation could be a viable model on which to base a 1L-specific clinic, avoiding some of the challenges inherent in more complex casework while still providing a meaningful learning experience for students<sup>160</sup> and provide vital access to justice for clients.<sup>161</sup> Limited-scope work typically means that the advocate does not perform all necessary assistance for the case, such as appearing in court for the client, but does assist the client in preparing for one or more components of the case.<sup>162</sup> Limited-scope work has long been permitted

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<sup>160</sup> Some law schools have clinical programs and projects that revolve around limited-scope representation. *See, e.g.*, the completed “Unger Project” at Maryland Francis Carey School of Law, described in Michael Millemann, Rebecca Bowman-Rivas & Elizabeth Smith, *Digging Them Out Alive*, 25 CLIN. L. REV. 365, 387 (2019) (explaining why the clinic provided only limited-scope legal representation to their particular cohort of clients); *Community Law Project*, CAL. W. SCH. OF L., [https://www.cwsl.edu/experiential\\_learning/clinics/community\\_law\\_project.html](https://www.cwsl.edu/experiential_learning/clinics/community_law_project.html) (last accessed July 18, 2023); *About Pro Se Legal Assistance Program*, HOFSTRA UNIV. MAURICE A. DEAN. SCH. OF L., <https://proseprogram.law.hofstra.edu/about/> (last accessed July 18, 2023). Many ideas in this section came from, or were supplemented by, the following talk: Ted Janowsky & Dana Sisitsky, *Practice Makes Perfect – How a High-Volume Legal Advice and Referral Clinic Helps Students Develop Practical Lawyering Skills*, Presentation at the American Association of Law Schools Clinical Conference, San Francisco, California (Apr. 28, 2023). *See also* Kristy D’Angelo-Corker, *When Less Is More: The Limitless Potential of Limited Scope Representation to Increase Access to Justice for Low-to Moderate-Income Individuals*, 103 MARQ. L. REV. 111, 116, 148-49 (2019) (arguing that law schools should integrate limited-scope work into pro bono projects and clinics).

<sup>161</sup> Many people cannot afford or do not need attorneys for full representation of their cases. *See* Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 661 (2013) (“If more attorneys would consider providing these types of limited services, additional clients (i.e., people considered ‘nobody’s clients’ now) could be served in the way that matters most to them.”). Further, public-interest organizations often operate at capacity and cannot take enough cases at full scope to provide sufficient access to justice. *See* Norah Rexer, *A Professional Responsibility: The Role of Lawyers in Closing the Justice Gap*, 22 GEO. J. ON POVERTY L. & POL’Y 585, 585 (2015) (“In the United States, there is one attorney for every 429 people living above the poverty line, but only one legal aid attorney for every 6415 individuals living in poverty.”).

<sup>162</sup> Lianne S. Pinchuk, *Limited Scope Lottery: Playing the Odds on Your Ability to Withdraw*, 85 BROOK. L. REV. 699, 703 (2020) (defining both limited-scope and full-scope representation); *see also* *Limited Scope Representation*, AM. BAR ASS’N., [https://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defense/resource\\_center\\_for\\_access\\_to\\_justice/resources--information-on-key-atj-issues/limited\\_scope\\_unbundling/#:~:text=%20Limited%20Scope%20Representation%22%20refers%20to,this%20method%20of%20client%20service](https://www.americanbar.org/groups/legal_aid_indigent_defense/resource_center_for_access_to_justice/resources--information-on-key-atj-issues/limited_scope_unbundling/#:~:text=%20Limited%20Scope%20Representation%22%20refers%20to,this%20method%20of%20client%20service) (last accessed July 18, 2023) (“‘Limited Scope Representation’ refers to the concept of a lawyer agreeing with a client to handle only some part(s) of the client’s legal matter. The term ‘unbundling’ is sometimes used to refer to this method of client service.”).



by the American Bar Association,<sup>163</sup> and a wide variety of limited-scope projects in various legal disciplines have developed nationwide<sup>164</sup> as the demand for legal services far outstrips the existing capacity to handle cases at full-scope and as access-to-justice projects for civil litigants who cannot afford counsel.<sup>165</sup>

Limited-scope projects may be ideal for 1L clinics because these projects can be less-complex and more contained. First-year students can conduct these projects without advanced students,<sup>166</sup> reducing logistical complexity and allowing more 1L ownership over the work. The projects can operate on shorter timelines, allowing students to complete projects within a semester.

Although many, perhaps most, law-school clinics focus on full-scope representation,<sup>167</sup> limited-scope work can be a formative learning experience for students.<sup>168</sup> Students get to engage in substantive work of a wider variety (rather than extensive depth on a single case). Meeting with more clients means students practice adopting different approaches based on client needs and modify their interviewing techniques accordingly. Students may learn issue spotting across a wider range of issues and settings,<sup>169</sup> developing both substantive and professional skills.

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<sup>163</sup> Blankley, *supra* note 163, at 662; Rexer, *supra* note 163, at 599 (2015) (limited-scope work has been common since at least the 1970s).

<sup>164</sup> For example, the American Bar Association developed a limited-scope project to assist the thousands of Afghans who were evacuated after the fall of Kabul in 2021. *Assist Afghan Families Filing Asylum Applications*, <https://drive.google.com/file/d/1hyZx4M4oHWeiuyhmQaQCOsNDG-F0JnQ50/view>, (last accessed Sept. 13, 2023); the New York Legal Assistance Group runs a pro se project providing limited-scope assistance to pro se litigants in federal civil cases. *Legal Clinic for Pro Se Litigants in the SDNY*, N.Y. LEGAL ASSISTANCE GRP., <https://nylag.org/pro-se-clinic/> (last accessed Jun. 28, 2023). Various legal aid organizations run brief advice “hotlines” as a form of limited service. Jessica K. Steinberg, *In Pursuit of Justice? Case Outcomes and the Delivery of Unbundled Legal Services*, 18 GEO. J. ON POVERTY L. & POL’Y 453, 463 (2011). Numerous projects of this nature exist nationwide. See *Articles*, AM. BAR ASS’N., [https://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/articles/](https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/articles/) (last accessed Jun. 28, 2023) (compiling dozens of articles on unbundled legal services from around the country).

<sup>165</sup> Steinberg, *supra* note 166, at 453 (describing the “‘justice gap’ between rich and poor litigants”).

<sup>166</sup> See e.g. *supra* Part III.A.1.b.; III.B.3.; and III.C.2. discussing collaboration between advanced students and 1L clinic students.

<sup>167</sup> See, e.g., Shanahan et. al., *supra* note 28, at 567 (in a study involving four law-school clinics, only one clinic reported giving limited advice to clients, while the rest presumably provided full representation); Steinberg, *supra* note 166, at 478-79 (describing the full-representation model of the Stanford Community Law Clinic in detail).

<sup>168</sup> See Millemann, Bowman-Rivas, & Smith, *supra* note 162, at 406-07 (discussing lessons learned by students in limited-scope client interviewing work); James G. Mandilk, Book Note, *Attorney for the Day: Measuring the Efficacy of In-Court Limited-Scope Representation*, 127 YALE L. J. 1828, 1854-55 (describing a typical day for clinical law students working in a limited-scope housing clinic at Yale Law, who would interview clients, consult with supervisors, and sometimes draft and file motions).

<sup>169</sup> See Harris, *supra* note 1, at 189 (describing the learning that comes from a limited-scope project in immigration detention centers: “students must learn how to exercise independent

Further, limited-scope work allows the clinic to reach a higher volume of clients and make a difference for clients who might otherwise go unrepresented.

Partnership between clinical programs and community agencies<sup>170</sup> on limited-scope cases is usually necessary so that the clinic students can either handle a part of the case for the attorney.<sup>171</sup> This close work with community partners may allow students to be mentored by both faculty and lawyers in practice, increasing their exposure to lawyering styles. Students can also situate their clients within a broader universe of cases or within a community, fostering a community lawyering ethos as well.<sup>172</sup>

However, drawbacks to limited-scope representation from a pedagogical perspective include the inability to follow up with the client and to provide holistic services. Clinic participants may not learn the outcomes of the cases, and students can feel frustrated by their incapacity to do more for each individual client, as they handle a higher volume of cases.<sup>173</sup> From a client perspective, limited-scope service may be insufficient to meet their needs or less likely to result in optimal outcomes.<sup>174</sup> Limited-scope cases can also come with complex ethical dilemmas and challenges in maintaining the boundaries of representation.<sup>175</sup> Limited-scope representation can also be discouraged by courts, who prefer clients who are fully represented so that they are fully prepared and not confused by the scope of representation, which may be ambiguous.<sup>176</sup>

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judgment in a fastpaced environment, juggling multiple clients, with high stakes and incredibly limited resources, in a hostile environment where the rules are arbitrary and in constant flux.”).

<sup>170</sup> Law clinics commonly partner with community agencies, especially in immigration detention projects. *See id.* at 196-97, 201 (describing many specific partnerships between law schools and community agencies and why this partnership is essential to the work).

<sup>171</sup> Cornell’s 1L Clinic has conducted limited-scope work with organizations such as Journey’s End Refugee Services and the Southeast Immigrant Freedom Initiative, discussed *supra* Part III.

<sup>172</sup> *See* Alina Ball, *Transactional Community Lawyering*, 94 *TEMP. L. REV.* 397, 418-19 (2022) (describing how clinical legal education incorporates community lawyering).

<sup>173</sup> *See, e.g.,* Millemann, Bowman-Rivas & Smith, *supra* note 162, at 394 (discussing potential drawbacks to high-volume clinics).

<sup>174</sup> Steinberg, *supra* note 166, at 500-01 (“Only a lawyer who has accepted a case for full representation can provide the tailored assistance necessary to bring the legal problem to a successful resolution, particularly as the nature of the problem shifts and develops over the course of time.”).

<sup>175</sup> *See, e.g.,* D’Angelo-Corker, *supra* note 162, at 115 (discussing challenging issues such as how to manage the attorney’s duty of candor and honesty to the court in a limited-scope context); Pinchuk, *supra* note 164, at 716 (noting that “[a]ttorneys attempting to appear for some, but not all, hearings, or draft some, but not all, submissions, may find themselves mired in the rules of withdrawal.”); Peter C. Angelica, *Limited Scope Representation When an Appearance Is Made and the Ethics of Lawyering*, 49 *FORDHAM URB. L.J.* 1203, 1242 (2022) (discussing limits on unbundling services under a “reasonableness” standard that has been applied differently across jurisdictions).

<sup>176</sup> *See Villar v. City of New York*, 540 F. Supp. 3d 437, 440 (S.D.N.Y. 2021) (“The traditional model of full-scope representation sets clear expectations for all involved . . . limited-scope

### C. *Integrate 1Ls into Existing Clinics*

Perhaps one of the most accessible ways to involve 1Ls in clinical work without overhauling the curriculum and designing a new course could be to integrate 1Ls into existing clinics. This strategy is advantageous in that professors teaching established clinics already have a strong base from which to build in 1Ls. These professors can identify projects and matters that would be well-suited to 1Ls. They can assign 1Ls to work with upper-class students, providing built-in mentors and involving students with more curricular flexibility to handle unanticipated, time-consuming case issues. 1Ls who are interested in the clinics can review the clinic website and speak with current clinic students and recent alumni to gain a robust understanding of the clinic experience, which is more difficult with an entirely new clinic.

However, challenges to this approach include the high demand for clinics in general, which are often oversubscribed. To deal with this interest, some professors favor upper-class students who have fewer future opportunities to take clinics, meaning 2Ls—and potentially 1Ls—are unlikely to gain admittance. For example, although Berkeley Law decided to open two of its fourteen clinics to 1Ls in 2021, 1L enrollment has been extremely rare. High demand from 2Ls and 3Ls has resulted in each of these two clinics only ever enrolling a maximum of one 1L per semester.<sup>177</sup> And unlike Yale, where the 1L second-semester curriculum is as flexible as upper-class course schedules, most law schools considering integrating second-semester 1Ls will need to consider how to ensure that 1Ls who are mixed in with upper-class students do not fall behind because of their lesser legal experience mixed with their more rigid course load. Professors will have to contend with the 1L-specific challenges detailed above.<sup>178</sup> However, these challenges could be lessened by pairing 1Ls with upper-class students as described above, and by having fewer 1Ls enrolled overall.

Further, many schools offer year-long clinics, where new enrollments are only possible in the fall.<sup>179</sup> Only semester-long clinics already use a structure in which 1Ls could be admitted for spring, so the advantages inherent in integrating 1Ls into existing clinics are diminished by the need to adapt the format of some clinics. Finally, professors who are

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representation does not . . . it is imperative that the scope of the attorney-client relationship be described with the utmost clarity.”).

<sup>177</sup> E-mail from Laura Riley, Clinical Program Dir., Berkeley L., to author (Jul. 25, 2023, 5:29 PM EST) (on file with author).

<sup>178</sup> See *supra* Part III.C.

<sup>179</sup> See e-mail from Jeffrey Selbin, Chancellor’s Clinical Prof. of L., Berkeley L., to author (Jul. 21, 2023, 5:13 PM EST) (describing lack of semester-long clinic option as a barrier to admitting 1Ls) (on file with author).

accustomed to working with more experienced students may not want to admit 1Ls, for whom they may need to adapt their seminar content or other pedagogical choices.

*D. Non-Clinic Experiential Options for 1Ls Interested in Live Client, Public-Service-Focused Work*

As law schools continue to progress in the field of clinical legal education, the next wave may be inclusion of 1Ls in clinics, or at least in live-client projects. Many law schools have already developed non-clinical experiential programs that involve live-client, public-service work.<sup>180</sup>

Going forward, law schools may consider whether a live-client clinical course, another experiential model, or a combination may be best to serve their students. While an extensive discussion of these models is beyond the scope of this article, ideally, schools would offer a credited clinical or experiential course for 1Ls. This way, first-year students could engage in an extended practical experience under close supervision, with an accompanying seminar, and for course credit. However, not all students will want the potential complication or distraction from their doctrinal courses, so offering a lower-stakes or more limited-commitment experiential option would allow more students to participate. This could look like an intensive live-client project over a break or a weekend, perhaps in conjunction with an existing clinic and for a single credit, or a one-credit research project connected to a clinic.

## CONCLUSION

First-year law students would greatly benefit from expanded opportunities to engage in clinics early in their law-school careers. Such students are inspired, grounded learners who revel in using their new legal skills in the service of others. Law schools considering 1L clinical options should examine their pedagogical goals, 1L curricular constraints, and client service goals. With 1L clinics only just beginning in a few law schools, but with student interest and pedagogical value high, now is the time for law schools to innovate around including 1Ls in clinics.

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<sup>180</sup> See *supra* Part I.B.







