

## “COMMUNITIES THAT CARE”: INCORPORATING SOCIALLY ENGAGED ARTISTIC PRACTICES INTO CLINICAL LEGAL EDUCATION

BERNARD P. PERLMUTTER & XAVIER CORTADA\*

*This Article, co-authored by a law school clinician and an artist and lawyer, explores collaborations between the artist, a child advocacy clinic, and its clients (children in state foster care) in building a community that empowers clients by giving them voice through both traditional legal advocacy and non-traditional forms of socially engaged artistic expression. The Article aims to address some of the challenges and benefits of clinics creating alliances with artists and community-based arts organizations as part of their teaching and advocacy missions. We describe and provide examples of the practice of law as a creative exercise and argue that importing creative perspectives and approaches into a clinic can enrich the students' learning experience. We also consider how incorporating socially engaged artistic practices into legal advocacy for clients and client communities served by clinics gives them their own space to participate in their cases on the margins of the lawsuit, outside of the courtroom.*

### INTRODUCTION: “I KNOW THAT I KNOW NOTHING”

It is the first day of clinic. At the start of the first class for the sixteen second- and third-year students who are taking clinic for the full academic year, the students participate in an ice-breaker to get to know one another. This activity leads to a discussion of the clinic manual describing the course requirements, and an overview of the class syllabus. The syllabus lays out a sequence of classes devoted to the doctrinal and substantive law of the clinic, the skills of interviewing,

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\* Bernard P. Perlmutter is a Professor of Law and Co-Director of the Children & Youth Law Clinic at the University of Miami School of Law. Xavier Cortada is a Professor of Practice at the University of Miami College of Arts and Sciences, Department of Art and Art History; School of Law; and Miller School of Medicine, Department of Pediatrics. The authors co-taught *Socially Engaged Art in Law* to upper-level law students and undergraduate art students in the spring 2022 semester. See *CourseLink: Law532 A, Socially Engaged Art in Law*, UNIV. MIAMI SCH. L., [https://lawapps2.law.miami.edu/clink/course.aspx?cof\\_id=5815](https://lawapps2.law.miami.edu/clink/course.aspx?cof_id=5815) (last visited Jan. 14, 2023). The authors thank the participants in the AALS Clinical Law Conference discussion session that we led in May 2022, and the Clinical Law Review Writers' Workshop that we attended at NYU Law School in October 2022, for comments and questions about earlier versions of this Article. We also thank our research assistants Chelsea Johnson and Yasmeen Gómez.

counseling, case planning, trial advocacy, ethics and professional responsibility, research and writing, negotiation, problem-solving, and case rounds.

The syllabus briefly describes a group activity toward the end of first semester, in which each of the students is encouraged to participate with one of their clients at the university's art gallery across campus or at a community-based art studio. As elaborated by the clinic professors in the first class, an invited guest artist from a community nonprofit will lead that particular session and the students will attend it with their clients together creating works that depict the clients' life experiences.

This item in the syllabus surprises a few students, one of whom says that they don't have an artistic bone in their body, and asks how can they be graded for an activity that they don't know how to perform. Others wonder how an artistic performance of this kind relates to the subject matter of the clinic and the skills described in the syllabus for the clinic's representation of children, many of whom are victims of human trafficking, in juvenile court.

This Article, co-authored by a law school clinician and an artist and lawyer, tries to answer these questions, while also addressing concerns from clinicians about the place of artistic activity in a law clinic. It examines collaborations between an artist, a child advocacy clinic, and its clients (children in state foster care) in building a community that empowers clients by giving them voice through both traditional legal advocacy and non-traditional forms of socially-engaged artistic expression.<sup>1</sup> Our aims are to address some of the challenges and benefits of clinics creating alliances with artists and community-based arts organizations as part of their teaching and advocacy missions.

We describe and provide examples of the practice of law as a creative exercise and argue that importing liberal arts and creative perspectives and approaches into the supervised practice of law in a clinic can enrich the students' learning experience. "Arts law" questions writ large, such as the artist's proprietary or moral rights in the work

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<sup>1</sup> For discussions of the importance of acknowledging youth voice in the attorney-client relationship, in lawyer ethics, and in discourse on child welfare and juvenile justice policy, see, e.g., Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Janet A. Chaplan, *Youth Perspectives on Lawyers' Ethics: A Report on Seven Interviews*, 64 FORDHAM L. REV. 1763 (1996); Kristin Henning, *Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005); Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89 (2002); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

of art,<sup>2</sup> are beyond the scope of this Article. Instead, our focus is on showing how incorporating creative processes into a law school clinic sharpens students' professional identities, performance, and values. We also consider how infusing socially engaged art practices into legal advocacy gives client communities the space to participate in their cases outside of the courtroom, on the margins of the lawsuit.

We began writing this Article after leading a virtual discussion session at the May 2022 AALS Clinical Law Conference. The conference centered on *Lawyering with Creativity and for Equity*, giving presenters and attendees three themes or prompts:

“May you live in interesting times.”

“Creativity is intelligence having fun.”

“I know that I know nothing.”

The organizers exhorted the participants to “call on our creativity and imagination to engage, to question, and to solve problems.”<sup>3</sup> We were particularly moved by the invocation to admit that we “know nothing.” Clinicians should proceed from an assumption that they, like their students, are learners and collaborations with artists may help to expand their creativity as lawyers and teachers.

This Article is centered on a detailed description of the Miami Children & Youth Law Clinic's collaborations with Xavier Cortada, and we use it to explore the broader potential for clinical legal education to be enhanced by interactions with social practitioners and arts organizations. We describe a multi-year effort by the clinic to reform the grounds for placing foster children into locked psychiatric facilities in Florida, through litigation, appellate and rulemaking advocacy before the Florida Supreme Court, in conjunction with a legislative project. We also describe how the project dovetailed with the artistic activity curated by Xavier Cortada. We use this example as a case study to broadly illustrate how encouraging law students to be creative lawyers and exposing them to socially engaged artistic practices with clients and communities encourages them to use their imaginations “to engage, to question, and to solve problems.”

The Article proceeds in four parts. Following this Introduction, the first Part canvases the forms of creativity that legal education and law school clinics are able to nurture in students to encourage them to be more imaginative problem-solvers and advocates, as well as more empathetic counselors for clients. The second Part is an account of our

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<sup>2</sup> See, e.g., JOHN H. MERRYMAN, ALBERT E. ELSER & STEPHEN K. URICE, *LAW, ETHICS, AND THE VISUAL ARTS* 419-612 (5th ed. 2007).

<sup>3</sup> 2022 CONFERENCE ON CLINICAL LEGAL EDUCATION, <https://clinical.aals.org/past/cle22/> (last visited Jan. 10, 2022) (noting conference theme on lawyering with creativity and for equity).

clinic's multi-year advocacy in state court to establish legal rights to pre-commitment hearings and counsel for dependent children in Florida locked up in residential treatment centers. This discussion describes how the clinic students were encouraged to fashion creative solutions to their client's problems, in the face of "outside authority" that limited the relief available from the court.

The third Part describes how the socially engaged arts collaboration strengthened and deepened the legal and policy advocacy for the children locked up in residential treatment programs. This activity took place entirely outside of the courtroom, within the confines of two inpatient psychiatric centers where these children were held and where they participated with the artist to create expressive canvases about their traumatic lives and experiences in state care.

The fourth Part asks whether incorporating an engaged arts component into a law clinic's advocacy and pedagogy is worth the effort, and, if it is, how might other clinics bring social engaged artistic practices into the legal and teaching agendas that they develop in the training of law students and the representation of clients in other specialized areas of practice.

The Conclusion urges clinicians to consider forms of collaboration with artists, clients, and clinics that work for them. We contend that introducing creativity into clinical education has affinities to recent curricular innovations such as narrative law and medicine in training lawyers and doctors and encourage colleagues in our community of teachers and lawyers to experiment with using art in ways that are compatible with their clinics' pedagogical and advocacy missions.

## I. CLINICS AND CREATIVITY

Bringing artistic imagination into a law school clinic's curriculum and advocacy agenda may seem counterintuitive to many legal academics, including the clinical community. Several members of the small, self-selected AALS conference audience, while impressed by our account of our partnership, seemed hesitant to embrace the creation of art by clients in collaboration with law students in a clinic's teaching and advocacy activities.

Many of the questions from AALS conference participants were about the practicalities of finding and engaging with artistic partners in the communities served by the clinics. Others questioned how they would be able use artistic creations from clients in the cases handled by their clinics; in other words, could they submit the creative works themselves as exhibits in ongoing litigation? Other clinicians recognized the interdisciplinary value of artistic collaboration but wondered if this type of activity could succeed in a clinic serving many clients in

crisis or triage mode. Another clinician asked how to use art in more remote or isolated settings such as farmworker or immigrant communities where there may not be a critical mass of potential artistic collaborators, or the clients might be reticent to engage with clinics and artists in this type of unorthodox setting.

Our clinic's experiences may very well be outliers in clinical legal education. Miami has a robust creative and social entrepreneurial scene, and the opportunities for clinic-arts partnerships abound.<sup>4</sup> Nevertheless it is surprising that the clinical community, which views the teaching of lawyering<sup>5</sup> and the practice of law<sup>6</sup> as performative art forms, has not reached out more conspicuously to artists as part of its teaching and advocacy.<sup>7</sup> There is, of course, significant scholarship about "creative lawyering" and "protean visions" of lawyering to bring about social change,<sup>8</sup> and a small body of literature infusing metaphors and perspectives from literature, music, and drama into legal education and clinical education,<sup>9</sup> but a paucity of writing on intro-

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<sup>4</sup> See, e.g., BARRY FELLMAN, *MIAMI CREATIVE: A DECADE OF TRANSFORMATION* (2022); Ted Loos, *The Miracle of Miami: Art Basel Marks 20 Years in South Florida*, N.Y. TIMES (Nov. 30, 2022) <https://www.nytimes.com/2022/11/30/arts/design/art-basel-miami-beach-20-years.html>.

<sup>5</sup> See, e.g., Stephen Wizner & Jane Aiken, *Teaching and Doing: The Role of Law School Clinics in Enhancing Access to Justice*, 73 FORDHAM L. REV. 997, 1003 (2004) ("In essence, we are walking a tightrope and constantly having to deal with the tension between teaching and doing.").

<sup>6</sup> See, e.g., Jocelyn Getgen Kestenbaum, Esteban Hoyos-Ceballos & Melissa C. del Aguila Talvadar, *Catalysts for Change: A Proposed Framework for Human Rights Clinical Teaching and Advocacy*, 18 CLIN. L. REV. 459, 461 (2012) ("[L]egal educators continue to face the challenge of developing appropriate clinical methodologies to train law students in the evolving art of practicing law. . .") (citations omitted).

<sup>7</sup> This is not to suggest that arts collaborations are absent from the social change advocacy performed by universities. See, e.g., Alex Ross, *Race, Prison, Justice: Illuminating Story Through the Arts*, Bos. Univ. Coll. of Fine Arts (Mar. 29, 2021), <https://www.bu.edu/cfa/news/articles/2021/race-prison-justice-illuminating-story-through-the-arts/>.

<sup>8</sup> See, e.g., Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. U. L. REV. 529, 530 (2019) (exploring the "nature of the creativity required of the social-change lawyer" in three campaigns for social justice led by lawyers); Anthony V. Alfieri, *Inner City Anti-Poverty Campaigns*, 64 UCLA L. REV. 1374, 1381 (2017) (describing a "protean vision of community-based law reform tied to clinical practice, empirical research, and experiential reflection about law and lawyers in action").

<sup>9</sup> See, e.g., Amnon Reichman, *Law, Literature, and Empathy: Between Withholding and Reserving Judgment*, 56 J. LEGAL EDUC. 296 (2006); Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601 (2008); Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U.L. REV. 859 (1996); Peter Margulies, *Doubling Doubtless, and All That Jazz: Establishment Critiques of Outsider Innovations in Music and Legal Thought*, 51 U. MIAMI L. REV. 1155 (1997); Taylor Simpson-Wood, *One Approach to Teaching Maritime Law: The Admiralty Classroom as a Stage*, 55 ST. LOUIS U. L.J. 601 (2011).

ducing hands-on artistic activities into the classroom or clinic space.<sup>10</sup> There is no published writing about law clinics and clients working with artists or community arts organizations, and there is no mention of incorporating socially engaged artistic practices into the work of clinics.<sup>11</sup> The inclusion of artistic activity into clinics invites broader explorations of roles performed by clients in collaborating with artists and their law clinic advocates to effect social and legal reform.<sup>12</sup>

This Article aims to fill that gap by showing how bringing artistic engagement into the communities served by clinics helps amplify client voices outside of the courtroom and encourages clients to feel that the legal injuries that they have suffered can be “healed” through a lawsuit or, just as meaningfully, on the margins of the lawsuit.<sup>13</sup>

Our discussion below attempts to answer definitional questions about socially engaged art, its place in clinical advocacy, and its potential for enhancing clinical student learning and client counseling

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<sup>10</sup> One notable exception is the use of radical theatre methods developed by Brazilian intellectual and activist Augusto Boal, in the Miami Law Health Rights Clinic’s classroom role-playing exercises led by Professors JoNel Newman and Melissa Swain, to lessen paternalism in lawyer-client relationships and to empower vulnerable clients. See JoNel Newman, Fergus Lawrie, Donald Nicolson & Melissa Swain, *Theatre and Revolution in Clinical Legal Education*, 26 CLIN. L. REV. 465 (2020).

<sup>11</sup> The literature on socially engaged art practices gives many examples of collaborations between artists, communities, political activists and, indirectly at least, social justice advocates and lawyers. See, e.g., PABLO HELGUERA, EDUCATION FOR SOCIALLY ENGAGED ART: A MATERIALS AND TECHNIQUES HANDBOOK 7 (2011) (“Certainly many SEA projects are in tune with the goals of deliberative democracy and discourse ethics, and most believe that art of any kind can’t avoid taking a position in current affairs.”).

<sup>12</sup> In *The Theory of Communicative Action*, Jürgen Habermas suggests future opportunities to explore questions such as whether the creation of collective artworks by clients in law school clinics affects the public sphere in a deep and meaningful way. The inquiry begins from the premise that politically or socially motivated artworks are not just “representations” of ideas or issues but serve as “feeling complexes, whose truthfulness involves a distinct sort of non-cognitive—but certainly not irrational—claim.” Geoff Boucher, *The Politics of Aesthetic Affect—A Reconstruction of Habermas’ Art Theory*, 13 PARRHESIA 62, 63 (2011). Beyond this premise is a consideration of whether the fabrication of art by clinics in collaboration with social practitioners constitutes a “symbolic” or “actual” conceptual gesture. In the former context, artist and clients are “relying on literary and public relations mechanisms to attain verisimilitude and credibility,” and in the latter, the artistic gesture is “geared to communication and understanding between individuals that can have a lasting effect on the spheres of politics and culture as a true emancipatory force.” HELGUERA, *supra* note 11, at 8, 7.

<sup>13</sup> Professor Lucie White’s seminal article, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 546 (1987/1988), shows how impoverished clients can “feel moments of power by participating in group activities . . . in the shadow of welfare litigation.” Our Article attempts to underscore and build on the insights and examples in her descriptive accounts of giving clients “parallel spaces” such as “speak-out” events spontaneously formed by disabled clients outside of the courthouse, and “people’s theatre” performances enacted by homeless individuals in Los Angeles, promoting new forms of collective speech as a vehicle for mobilizing the homeless. *Id.* at 547-563. See discussion at Part III *infra*.

experiences.

### A. *What is Socially Engaged Art?*

Socially engaged art (“SEA”), or social practice, is an established form or medium of artistic creation, involving intensive collaborations with communities on artistic projects to activate social change.<sup>14</sup> SEA is not confined to a particular artistic medium or form. Our collaborative project used oil, acrylic painting, pastels and other mixed media to capture images and words from our clients about their experiences in locked psychiatric facilities. However, in facilitating the engaged process and activating the participants, we could have used other forms of artistic expression.<sup>15</sup>

Although it has many features deriving from historical forms of “participatory art,”<sup>16</sup> one unique aspect of this practice is that it moves outside of the boundaries of galleries and museums, and is grounded in dialogues with communities as active participants in the creative process.<sup>17</sup> It is built on principles of trust and respect between the artist and community collaborators.<sup>18</sup> SEA is, at its essence, “directly engaged with the public realm—with the street, the open social space, the non-art community—a task that presents so many variables that only few artists can undertake it successfully.”<sup>19</sup> At its most successful, it is a “hybrid, multi-disciplinary activity that exists somewhere between art and non-art, and its state may be permanently unresolved. SEA depends on actual—not hypothetical—social action.”<sup>20</sup>

<sup>14</sup> See generally HELGUERA, *supra* note 11, at 11 (“... SEA is often characterized by the activation of members of the public in roles beyond that of passive receptor.”) R

<sup>15</sup> See, e.g., ALEXIS FRASZ & HOLLY SIDFORD, HELICON COLLABORATIVE, MAPPING THE LANDSCAPE OF SOCIALLY ENGAGED ARTISTIC PRACTICE 11 (2017) (“The socially engaged artists’ toolkit includes dialogue, community organizing, placemaking, facilitation, public awareness campaigns or policy development, as well as theater games, art installations, music, participatory media-making, spoken word and other media.”).

<sup>16</sup> See, e.g., *Participatory Art*, TATE, <https://www.tate.org.uk/art/art-terms/p/participatory-art> (describing its “origins in the futurist and dada performances of the early twentieth century, which were designed to provoke, scandalise and agitate the public”) (citations omitted) (last visited Jan. 15, 2023).

<sup>17</sup> HELGUERA, *supra* note 11, at 12. R

<sup>18</sup> See, e.g., Trinidad Ruiz, *Collaboration is Where Social Practice Begins*, ARTJOB (May 17, 2012), <https://web.archive.org/web/20141006132603/https://www.artjob.org/content/collaboration-where-art-social-practice-begins> (“If you’re thinking about starting a non-profit that works within or with a community, consider the personal relationships as part of the work. The artwork really begins there. Build trust, truly listen, have patience, communication, transparency, under promise, over deliver - these are key attributes for an arts organization working in a neighborhood.”)

<sup>19</sup> HELGUERA, *supra* note 11, at 12. R

<sup>20</sup> *Id.* at 8; see also Frasz & Sidford, *supra* note 15, at 6 (“‘Socially engaged’ artists work in all artistic media . . . , but for them, the ‘work’ is the sum of the aesthetic product and an R

B. *What Is the “Place” of SEA in Clinical Advocacy?*

Clinicians may recognize potential intersections and affinities with the literature on clinics engaged in collective mobilization.<sup>21</sup> For the clinic that serves as “a center of activity in the community, a place where organizers and collective members interact with each other, build alliances, or mediate disputes (that seem inevitably to arise in progressive work),”<sup>22</sup> inviting a social practitioner or non-profit artistic collaborator into this hub offers opportunities for heightened and enriched community interactions in preparing clinic students to pursue social justice through collective mobilization. The various immigrant and labor organizing initiatives described by Professor Sameer Ashar in his alternative typology of clinical legal education<sup>23</sup> could potentially be strengthened by forging alliances with social practitioners who could facilitate connections to established and emerging community organizations. This linkage could also fulfill the “cross-modal advocacy and strategy” opportunities that collective mobilization invites.<sup>24</sup>

These opportunities to forge connections between clinical education and social practitioners depart from the conventional wisdom in legal education that learning the law and becoming a lawyer skilled in the craft of law only occurs through traditional forms of case analysis, trial presentation, appellate argument, and other forms of dispute resolution within the parameters of the legal process.<sup>25</sup> Indeed, as our clinic has framed its agenda, we view our classes and advocacy modalities as giving law students opportunities to learn side-by-side with stu-

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intentional social impact, and the process of developing the work – often in concert with community members – may even be the ‘product.’”).

<sup>21</sup> See Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 24 CLIN. L. REV. 355 (2008).

<sup>22</sup> *Id.* at 357.

<sup>23</sup> *Id.* at 389-97.

<sup>24</sup> *Id.* at 399 (“Most public interest lawyers no longer operate in a single forum or use a single mode of advocacy. These lawyers develop campaigns on parallel track, including litigation, policy and legislative advocacy, community and public education, media advocacy, and international or transnational advocacy.”)

<sup>25</sup> Critics of the Langdellian foundations of traditional legal education frequently call for incorporating artistic knowledge into the curriculum as a means to reframe and broaden the training of lawyers throughout the three years of school, and not just in the clinical setting. See, e.g., Kara Abramson, “*Art for a Better Life: A New Image of American Legal Education*,” 2006 BYU EDUC. & L.J. 227, 228 (2006) (“At the core of this challenge to Langdell’s heritage is a vision of legal education that looks outward to the larger world of knowledge that gives life to law. It is a vision of law in three forms: a liberal art, an American enterprise, and a practical profession.”); Gary D. Finley, Note, *Langdell and the Leviathan: Improving the First-Year Law School Curriculum by Incorporating Moby Dick*, 97 CORNELL L. REV. 159 (2011) (using the example of *Moby-Dick* to demonstrate how a novel can complement the case method in a typical first-year law school property course).



dents from other fields and disciplines, in which we encourage creative approaches to problem solving through the representation of individual clients and groups, while also teaching fundamentals of legal doctrine, practice skills, and professional responsibility.<sup>26</sup>

Our clinic-artistic collaboration, as we describe it in Parts III and IV, was initially somewhat improvised, but we wanted it to evolve into a more intentional, multi-faceted project that sought to “add the voices of youth to public discourse” through art and legal advocacy to reform harmful public policies affecting their legal and civil rights, such as the unconscionable practice of shackling of children in Florida juvenile courtrooms indiscriminately.<sup>27</sup> Although this long-term collaboration did not come to fruition, the two canvases that we discuss below have endured. The contributions to the effort made by children outside of the legal arena have meaning decades after they participated in these projects, and the clinic has continued to work and teach with Professor Cortada.

Moreover, through the clinic’s proposed “Voice Project,” which incorporated insights from scholarship in the field of therapeutic jurisprudence developed by our late Miami colleague Bruce Winick, we aspired to use this multi-disciplinary approach to redress other systemic harms affecting our clients.<sup>28</sup> Professor Winick and his frequent collaborator David Wexler presciently envisioned ways of improving legal advocacy for clients who have suffered trauma and injury by encouraging more humanistic and empathetic ways of teaching and practicing law, which they viewed as a “healing profession.”<sup>29</sup> They and

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<sup>26</sup> See generally Carrie Menkel-Meadow, *AHA? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOTIATION L. REV. 97, 124 (2001) (“Is it possible to speak of legal creativity or is the phrase itself an oxymoron? Law is based on precedent, rule of law and gradual evolution of legal principles. Even this conservative discipline, however, has had its revolutionary moments.”); Stefan H. Krieger, *Domain Knowledge and the Teaching of Creative Problem Solving*, 11 CLIN. L. REV. 149 (2004) (synthesizing literatures in creativity training, problem solving, learning theory, and cognitive development to show how the teaching of legal domain knowledge can be enhanced through problem solving in clinical education); Richard K. Neumann, Jr., *On Strategy*, 59 FORDHAM L. REV. 299, 306-308, n.19 (1990) (“Effective strategizing tracks the creative process . . .”).

<sup>27</sup> See Bernard P. Perlmutter, “*Unchain the Children*”: Gault, *Therapeutic Jurisprudence, and Shackling*, 9 BARRY. L. REV. 1, 1 n.2 (2007) [hereinafter “Perlmutter, ‘Unchain the Children’”].

<sup>28</sup> See, e.g., Bernard P. Perlmutter, *George’s Story: Voice and Transformation Through the Teaching and Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 563 n.9 (2005) [hereinafter “Perlmutter, George’s Story”]; Carolyn S. Salisbury, *From Violence and Victimization to Voice and Validation: Incorporating Therapeutic Jurisprudence in a Children’s Law Clinic*, 17 ST. THOMAS L. REV. 623, 625 (2005), in addition to the activity described in Part III *infra*, for further discussion of the genesis of this collaboration.

<sup>29</sup> See generally David B. Wexler & Bruce J. Winick, *Putting Therapeutic Jurisprudence*

other scholars also urged clinicians to incorporate these insights into clinical legal education pedagogy and practice.<sup>30</sup>

Artistic activity curated by artists with law school clinic clients has a natural affinity with perspectives advanced by therapeutic jurisprudence in that artistic creativity and legal advocacy can be seen as catalysts for healing.<sup>31</sup> Law and art serve as healing agents through client storytelling.<sup>32</sup> More broadly, encouraging students to value the expressive forms of client narrative in clinic advocacy also gives them critical insight into the many systemic imbalances that impair lawyer-poverty client relationships and the legal systems that adjudicate the clients' interests and rights.<sup>33</sup>

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*to Work*, 89 A.B.A. J. 54 (2003) (“[W]e believe TJ provides a framework to support practicing law as a healing profession in an explicit and systematic way . . . .”); Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence*, 3 PSYCHOL. PUB. POL’Y & L. 184, 187 (1997) (“Therapeutic jurisprudence seeks to apply social science to examine law’s impact on the mental and physical health of the people it affects.”); see also Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLIN. L. REV. 201, 226 (2018) (showing affinities between trauma-informed lawyering and therapeutic jurisprudence).

<sup>30</sup> See, e.g., Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLIN. L. REV. 605, 607, 609-11 (2006) (“[Lawyers] explicitly value their clients’ psychological wellbeing, and in their problem analysis, problem-solving, and counseling efforts on behalf of their clients, seek not only to protect and promote their clients’ rights and economic interests, but also to improve their emotional lives.”); see also Keri K. Gould & Michael L. Perlin, “Johnny’s in the Basement/Mixing up his Medicine:” *Therapeutic Jurisprudence & Clinical Teaching, Introduction to Therapeutic Jurisprudence: Issues, Analysis, and Applications*, 24 SEATTLE U. L. REV. 339, 353-54 (2000) (“[U]sing [therapeutic jurisprudence] in clinical teaching creates in students an affinity for engaging in multidisciplinary investigation and evaluating the therapeutic effects of the lawyering process or the case disposition.”).

<sup>31</sup> See, e.g., A.J. Stephani, *The Art of Healing/A Law of Healing: A Juxtaposition of the Therapeutic Action of Art and Law*, 68 U. CIN. L. REV. 403, 404 (2000):

The unique triangulation of law, art, and recovery from mental illness invites one to conceive of legal rules and procedures in a manner distinct from that which relies upon the common precepts of social policy, predictability, and fairness to inform the substantive law. Instead, one realizes that the law and legal procedure, much like art and the artistic process, can, and does, function as an instrument for personal, interpersonal, and social remediation and healing. Any attempt to triangulate these three seemingly disparate concepts . . . must proceed [sic] a basic understanding of the law/healing and art/healing comparative relationships.

<sup>32</sup> See, e.g., Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999):

Participation, dignity, and trust, as well as the opportunity to “tell their story,” are themes often voiced in the mental health consumer (or survivor) literature. The consumer’s desire for an opportunity to tell his or her side of the story suggests the applicability in the civil commitment context of the “voice” effect described in the procedural justice literature. Allowing patients at the commitment hearing an opportunity to tell their story therefore might be an important mechanism for increasing patient perceptions of fairness, respect, and dignity in the process.

*Id.* at 47 (citations omitted).

<sup>33</sup> See, e.g., Jane Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995); Marie Ashe, *Theoretics of Practice: The Integration of Progressive Thought and Action: The “Bad Mother” in Law and Literature: A Problem of Representation*, 43

We therefore contend that there are many opportunities for clinics to be intentional and deliberate in their uses of art to promote their clients' interests and rights, complementing many of the more traditional orthodoxies of experiential teaching and learning.

### C. *What are the Benefits of this Collaboration for Students?*

Incorporating this kind of collaboration into the clinic is akin to other forms of interdisciplinary collaboration such as medical-legal partnerships or teaming law clinic interns with social work students, in a sense blurring boundaries between the different disciplines and professions.<sup>34</sup> Socially engaged arts-law clinic collaborations have the potential to produce moving, expressive works that convey feelings and ideas from clients that evoke greater empathy from law students, while also promoting equity and access to justice for clients.<sup>35</sup>

SEA offers clinics new ways to tell clients' stories using not just the words that appear in the legal pleadings, but through artistic imagery and expressive statements devised by clients under the curatorial engagement of an artist working with law students. By bringing art into the teaching of law in a legal clinic, students are thus encouraged to conceive of and envision new, creative approaches to fashioning legal solutions for client problems.<sup>36</sup> Incorporating artistic expression from clients and artists into the clinical legal education space also enhances the learning experiences and sensibilities of law students, helping them to process the injustices frequently suffered by their clients.<sup>37</sup>

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HASTINGS L.J. 1017 (1992); Peter Margulies, *The Mother with Poor Judgment and Other Tales of the Unexpected: A Civic Republican View of Difference and Clinical Legal Education*, 88 N.W. U. L. REV. 695 (1994); Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991).

<sup>34</sup> See Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL'Y 63 (2003); Yael Cannon, *A Mental Health Checkup for Children at the Doctor's Office, Lessons from the Medical-Legal Partnership Movement to Fulfill Medicaid's Promise*, 17 YALE J. HEALTH POL'Y L. & ETHICS 253 (2017).

<sup>35</sup> We titled our AALS Clinical Conference discussion session, *Clinics Telling Client Stories (With Pictures)*. See *Program: 2022 Conference on Clinical Legal Education*, AALS, [https://memberaccess.aals.org/eweb/DynamicPage.aspx?WebKey=9DB18C7C-22B4-4DA7-86C3-1B7CB0318DD0&RegPath=EventRegFees&REg\\_evt\\_key=87934db8-eb82-44c3-a5a6-0b8abe64c68c&Site=AALS](https://memberaccess.aals.org/eweb/DynamicPage.aspx?WebKey=9DB18C7C-22B4-4DA7-86C3-1B7CB0318DD0&RegPath=EventRegFees&REg_evt_key=87934db8-eb82-44c3-a5a6-0b8abe64c68c&Site=AALS) (find under events listed for May 11, 2012, 3:55-5:10) (last visited Jan. 15, 2023).

<sup>36</sup> See generally Menkel-Meadow, *supra* note 26, at 133 ("Legal creativity is necessarily limited by its need to work within the law, or at least within the foreseeable boundaries of legal change, but for optimal problem solving it would seem we should try to push the boundaries of little "c" creativity as much as we can to produce at least a greater number of choices about how best to accomplish legal results.").

<sup>37</sup> See, e.g., Sarah Buhler, *Painful Injustices: Encountering Social Suffering in Clinical Legal Education*, 19 CLIN. L. REV. 405, 411 (2013) (arguing that a "critical 'pedagogy of suffering'—one that seeks to understand suffering in its historical and social context and to critically examine problematic responses to social suffering—can be an important aspect of

The process of making art signifies more than the optics or beauty of the art object.<sup>38</sup> Social engagement between clinics and artists is also a process designed to invite a different type of intelligence into the lawyer-client relationship, reflecting human connections between students and clients. As Professor Mark Aaronson has described in his writing on the four overlapping domains of good lawyering, it nourishes “the development of various intelligences, not the least of which is emotional intelligence regarding human interactions.”<sup>39</sup>

For law students, clinical legal education encourages them to understand, empathize, and to engage in advocacy on behalf of marginalized communities to change laws on a systemic level.<sup>40</sup> For socially engaged artists, collaborating with law school clinics gives them opportunities to understand legal concepts and to use that understanding to shape artistic work designed to achieve social reforms with communities.<sup>41</sup> Encouraging clinicians to import these synergies into their legal advocacy, enables lawyers and artists to work elastically across disciplines to engage clients and their communities to problem-solve, plan, and organize for legal and policy reform.

## II. THE CASE STUDY: EXPERIMENTS IN LEGAL CREATIVITY

### A. *M.W. v. Davis*

This law reform effort involved two appearances in an intermedi-

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clinical law teaching and practice”).

<sup>38</sup> One common critique of SEA is that it elevates social activism over aesthetics. Critics point out that in doing so, it devalues conventional expectations, nurtured by artists, museum patrons and collectors, that visual, literary or performing artists should focus primarily on developing the formal or aesthetic qualities of their work. See, e.g., Randy Kennedy, *Outside the Citadel, Social Practice Art Is Intended to Nurture*, N.Y. TIMES, Mar. 20, 2013 (“[I]ts practitioners freely blur the lines among object making, performance, political activism, community organizing, environmentalism and investigative journalism, creating a deeply participatory art that flourishes outside the gallery and museum system. And in so doing, they push an old question—‘Why is it art?’—as close to the breaking point as contemporary art ever has.”).

<sup>39</sup> Mark Neal Aaronson, *Thinking Like a Fox: Four Overlapping Domains of Good Lawyering*, 9 CLIN. L. REV. 1, 7 (2002).

<sup>40</sup> See, e.g., Susan L. Brooks, *Using Therapeutic Jurisprudence to Build Effective Relationships with Students, Clients and Communities*, 13 CLIN. L. REV. 213, 215 (2006) (integrating therapeutic jurisprudence practices with family systems and cultural competence perspectives to “inspire clinical teachers and students to contemplate expanding their services beyond individual representation toward other forms of community lawyering”).

<sup>41</sup> See, e.g., Carolina A. Miranda, *How the Art of Social Practice is Changing the World, One Row House at a Time*, ARTNEWS (Apr. 7, 2014, 5:00 AM), <https://www.artnews.com/art-news/news/art-of-social-practice-is-changing-the-world-one-row-house-at-a-time-2415/> (observing that social practice artists need training not just in studio practice and art history but in “social theory, theories of politics, and theories of public space” and urging practitioners to “let[ ] the community help share the direction of the work”).

ate state appellate court and three appearances in the Florida Supreme Court in an appeal and subsequent rule proceeding through which we sought greater due process protections for foster children facing involuntary commitment in locked psychiatric facilities. In our clinic's three appearances before the Florida Supreme Court, we relied on statutory, constitutional, and therapeutic jurisprudence-grounded arguments, bolstered by social science research, to argue that affording foster children a pre-commitment hearing at which they could be represented by counsel would further not just their constitutional and legal rights but also their therapeutic interests. These themes resurfaced in the clinic-client-art collaborations described in Parts III and IV *infra*.

The effort began with a petition filed on behalf of a foster child represented by the clinic.<sup>42</sup> "Michael" was a teenager committed by the Florida Department of Children & Families ("DCF") to a psychiatric institution after a five-minute hearing in juvenile court at which he was not present, in which he had no opportunity to participate, and at which no evidence was presented by the state or the child.<sup>43</sup>

The commitment order signed by the juvenile court judge required an armed police escort to transport Michael to the institution. While at this institution, Michael was forced to take psychotropic drugs, placed in four-point leather restraints, punished by confinement in seclusion, and prohibited from speaking to other patients, or

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<sup>42</sup> Although we identify the child by a pseudonym rather than the two initials that served as his identity in this protracted litigation, our students were continuously in touch with the real client in this story, and they never forgot the many vital lessons that they learned from their client during the law reform effort that his anonymous name came to represent. See generally April Land, "Lawyering Beyond" without Leaving Individual Clients Behind, 18 CLIN. L. REV. 47, 48 (2011) (observing that "the lessons of decades of clinical teaching suggest that the connection with individual client experiences must guide our actions when we reach for student lawyering experiences beyond the representation of individual clients in the communities we serve").

<sup>43</sup> For more in-depth analysis of *M.W. v. Davis*, 756 So. 2d 90 (Fla. 2000) ("M.W. I"), and the two juvenile court rulemaking decisions issued by the Florida Supreme Court, *In re Fla. R. Juv. P. 8.350*, 804 So. 2d 1206 (Fla. 2001) and *In re Fla. R. Juv. P. 8.350*, 842 So. 2d 763 (Fla. 2003), see Bruce J. Winick & Ginger Lerner-Wren, *Do Juveniles Facing Civil Commitment Have a Right to Counsel?: A Therapeutic Jurisprudence Brief*, 71 U. CIN. L. REV. 115 (2002-2003); Bernard P. Perlmutter & Carolyn S. Salisbury, "Please Let Me Be Heard." *The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution*, 25 NOVA L. REV. 725 (2001); Bernard P. Perlmutter, *Mental Health Commitment of Dependent Children: Due Process Rights*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT AND DEPENDENCY CASES 575-605 (Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran, eds., 2016); Salisbury, *supra* note 28, at 672-80; and Bernard P. Perlmutter, "Letting Kids Be Kids": Youth Voice and Activism to Reform Foster Care and Promote "Normalcy," in STUDIES IN LAW, POLITICS AND SOCIETY (VOLUME 72) 121, 143-45 (Austin Sarat, ed., 2017) [hereinafter "Perlmutter, 'Letting Kids Be Kids'"].

telephoning his family.<sup>44</sup> Michael and his court-appointed attorney ad litem from the clinic<sup>45</sup> appeared at the hearing, but were denied the opportunity to present evidence that he did not meet the criteria under the Florida Mental Health Act (known as the “Baker Act”) to be involuntarily placed in such a restrictive setting.<sup>46</sup> The trial court set an evidentiary hearing more than six weeks after his placement.<sup>47</sup>

Shortly after he was placed in the program (known as Lock Towns), the clinic filed a petition for habeas corpus in the Fourth District Court of Appeal. The core of the petition argued that the commitment was illegal because the trial court failed to provide a pre-placement adversarial hearing with findings by clear and convincing evidence that involuntary commitment was required and that no less restrictive treatment alternative was available.<sup>48</sup> The district court initially agreed, and granted the writ, holding that Michael’s commitment by DCF violated his rights to an adversarial hearing under the Florida dependency law statute, section 39.407(4), and the Florida Mental Health Act, section 394.467 of the Florida Statutes.<sup>49</sup>

On DCF’s motion for rehearing, rehearing *en banc*, and certification, the district court withdrew its earlier opinion and denied the child’s petition for habeas corpus relief, holding that no further hearing on Michael’s commitment was required.<sup>50</sup> The court of appeal denied further rehearing requested by Michael, but certified to the Supreme Court of Florida as a matter of great public importance the following question:

IS A HEARING WHICH COMPLIES WITH THE REQUIRE-

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<sup>44</sup> While in the locked program, Michael was interviewed by a newspaper reporter. The reporter’s profile described him in the following manner:

Michael has been confined to Lock Towns for more than a year. He turned 16 inside the pink walls and behind locked metal doors. He is not allowed out, except to go to court or see a doctor. When he does leave, Lock Towns’ staff puts his legs in shackles to prevent him from running away . . . He is on several powerful drugs, and he says he has been mistreated and harshly punished. “It feels like I’m in jail,” Michael said. To an untrained eye, Michael does not appear to be disturbed. He answers questions thoughtfully though with few words. He likes the Dallas Cowboys and Denver Broncos and has a teenager’s awkward shyness. As he sits in his case-worker’s office, he fidgets with her computer. He downs two orange sodas and a large bag of potato chips.

Sally Kestin, *At 16, He’s Behind Locked Doors, State as Parent Denies Rights to Foster Kids*, S. FLA. SUN-SENTINEL, Nov. 7, 1999, at A25. See also Perlmutter & Salisbury, *supra* note 43, at 727-28.

<sup>45</sup> M.W. I, 756 So. 2d at 92 n.3.

<sup>46</sup> *Id.* at 95.

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

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

<sup>49</sup> M.W. v. Davis, 23 Fla. L. Weekly D2419 (Fla. Dist. Ct. App. 1998), *withdrawn on reh’g*, 722 So. 2d 966 (Fla. Dist. Ct. App. 1999) (“M.W. II”).

<sup>50</sup> M.W. II, 722 So. 2d at 969.

MENTS OF SECTIONS 39.407(4) AND 394.467(1), FLORIDA STATUTES, NECESSARY WHEN A COURT ORDERS THAT A CHILD BE PLACED IN A RESIDENTIAL FACILITY FOR MENTAL HEALTH TREATMENT, WHERE THE CHILD HAS BEEN COMMITTED TO THE LEGAL CUSTODY OF THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES AND THE DEPARTMENT IS SEEKING RESIDENTIAL TREATMENT?<sup>51</sup>

The Supreme Court of Florida held that neither the statutory framework in chapter 39, nor the U.S. Constitution, requires an evidentiary hearing that complies with the Baker Act (section 394.467(1)) before the juvenile court orders a child in the legal custody of DCF to be placed in a residential facility for mental health treatment.<sup>52</sup> However, the Court made it clear that “[a]n order approving the placement of a fifteen-year-old dependent child in a locked residential facility against the wishes of that child deprives that child of liberty and requires clear-cut procedures to be followed by the dependency court judge.”<sup>53</sup>

The Court directed the Florida Juvenile Court Rules Committee to develop a rule that above all affords the child “a meaningful opportunity to be heard” before the court orders the child’s placement against his will in a psychiatric institution.<sup>54</sup> In its instructions to the rules committee, the Court asked it to prepare a rule that “give[s] due regard to both the rights of the child and the child’s best interests.”<sup>55</sup>

### *B. Parham v. J.R.*

The *M.W.* Court’s holding that the U.S. Constitution does not afford the child a substantive right to such a hearing followed long-standing Fourteenth Amendment precedent. In 1979, the Supreme Court of the United States decided *Parham v. J.R.*, a widely criticized opinion in which it held that the Fourteenth Amendment to the U.S. Constitution does not require a court hearing prior to parents or the state committing a child to a psychiatric hospital.<sup>56</sup> The ruling set forth the minimum due process that is required under the federal Constitution when a child is committed to a psychiatric facility.

In *Parham*, the Court established that “[i]t is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state’s involvement in the commitment decision constitutes state ac-

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<sup>51</sup> *M.W. v. Davis*, 729 So. 2d 481 (Fla. Dist. Ct. App. 1999).

<sup>52</sup> *M.W. I*, 756 So. 2d at 92.

<sup>53</sup> *Id.* at 107.

<sup>54</sup> *Id.* at 109.

<sup>55</sup> *Id.*

<sup>56</sup> *Parham v. J.R.*, 442 U.S. 584 (1979).

tion under the Fourteenth Amendment.”<sup>57</sup> Accordingly, the Court “assume[d] that a child has a protectable interest not only in being free of unnecessary bodily restraints but also in not being labeled erroneously by some persons because of an improper decision by the state hospital superintendent.”<sup>58</sup>

Although *Parham* recognized the child’s interest in not being deprived of liberty and in not being erroneously diagnosed with a mental illness as part of a hospital admission process, the Court declined to mandate a judicial process for oversight of erroneous commitments.<sup>59</sup> It set forth three minimum due process requirements that must be provided when a child is committed: (1) an inquiry by a neutral factfinder, which is not required to be in the form of a judicial inquiry; (2) the inquiry must probe the child’s background using all available resources; and (3) there must be periodic review by a neutral factfinder.<sup>60</sup> These minimum standards apply whether the child has been admitted by the state as the guardian of its ward or by a natural parent.<sup>61</sup>

*Parham* spurred a spate of critical commentary.<sup>62</sup> Much of the criticism focused on its *post-hoc* justification for the use of residential treatment centers to institutionalize “troublesome youth” diagnosed with relatively mild adolescent behavioral disorders such as “conduct disorder,” “oppositional defiant disorder,” and “adolescent adjustment reaction.”<sup>63</sup> Other criticism emerged from the governing policy bodies of the psychiatric and psychology professions in favor of more judicial protection for children facing civil commitment to inpatient hospitals for mental health disorders, reversing their positions in *Parham*.

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<sup>57</sup> *Id.* at 600.

<sup>58</sup> *Id.* at 601.

<sup>59</sup> *See id.* at 607 (“Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer.”).

<sup>60</sup> *Id.* at 606.

<sup>61</sup> *See id.* at 618-19.

<sup>62</sup> *See, e.g.,* MICHAEL L. PERLIN, *MENTAL DISABILITY LAW: CIVIL AND CRIMINAL* § 3.72 (1989) (“No modern U.S. Supreme Court civil case dealing with the rights of the mentally handicapped has been criticized as consistently or as thoroughly as [has] been *Parham*.”); Ira C. Lupu, *Mediating Institutions: Beyond the Public/Private Distinction: The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994) (discussing *Parham* and the mechanism for distributing decision-making authority over children).

<sup>63</sup> *See, e.g.,* Lois A. Weithorn, Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 788-92 (1988) (noting that more than half of children in psychiatric facilities were “troublemakers” suffering from relatively mild psychological disorders, and children undergoing normal adolescent developmental phases, rather than children diagnosed with severe mental illness or psychotic disorders).



*Parham* conspicuously relied on an *amicus curiae* brief submitted by the American Psychiatric Association arguing against the requirement of providing judicial hearings prior to the minor's commitment.<sup>64</sup> Two years after *Parham*, the association approved a set of guidelines for the psychiatric hospitalization of minors that reversed its prior arguments.<sup>65</sup> The guidelines, prepared by the Association's Task Force on the Commitment of Minors, would guarantee children over 16 the right to contest an involuntary admission to a psychiatric facility, the right to an involuntary commitment hearing, and the right to counsel at the involuntary commitment hearing. At the involuntary commitment hearing, the child through appointed counsel would have the right to cross-examine witnesses favoring commitment and the right to present testimony and evidence in opposition to commitment and/or in favor of less structured alternatives.<sup>66</sup>

The American Psychological Association's Division of Child, Youth, and Family Services endorsed guidelines that likewise sought to guarantee heightened judicial due process to youth facing psychiatric commitment.<sup>67</sup> Both the guidelines by the American Psychological Association and the American Psychiatric Association would apply even where a parent was seeking the youth's commitment.

Despite the *Parham* decision's unpopularity among legal scholars and policy advocates, the Florida Supreme Court was bound to follow this precedent, and the Court held that it could not grant relief for our client Michael under the Fourteenth Amendment, notwithstanding his lack of a natural parent to look out for his best interests when admitting the child to a facility.<sup>68</sup>

The only additional protection available to Michael, as a ward of the state, was the possibility "that the procedures required in reviewing a ward's need for continuing care should be different from those used to review the need of a child with natural parents."<sup>69</sup> This small

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<sup>64</sup> See Perlmutter & Salisbury, *supra* note 43, at 763.

<sup>65</sup> *Id.* at 764.

<sup>66</sup> See § 4(C) of the *Am. Psychiatric Ass'n Official Action, Guidelines for the Psychiatric Hospitalization of Minors*, 139 AM. J. PSYCHIATRY 971, 974 (1982).

<sup>67</sup> See GARY B. MELTON, PHILLIP M. LYONS JR. & WILLIS J. SPAULDING, NO PLACE TO GO: THE CIVIL COMMITMENT OF MINORS 4-5, 163-70 (App. A) (1998) (reproducing the AM. PSYCHOL. ASS'N, A MODEL ACT FOR THE MENTAL HEALTH TREATMENT OF MINORS § 108).

<sup>68</sup> See *Parham*, 442 U.S. at 619 (observing that "[t]he absence of an adult who cares deeply for a child has little effect on the reliability of the initial admission decision, but it may have some effect on how long a child will remain in the hospital").

<sup>69</sup> *Id.* The dissenting opinion in *Parham* offered a sharp critique of the relatively benign view espoused by the majority that the authority of a state social worker was tantamount to that exercised by a parent in admitting a child to a psychiatric facility. See *id.* at 637 ("To my mind, there is no justification for denying children committed by their social workers the prior hearings that the Constitution typically requires. In the first place, such children

allowance for heightened due process post-commitment was due to the Court's acknowledgement that as a child in state custody under the care of state social workers rather than natural parents, he could be "lost in the shuffle."<sup>70</sup>

### C. *Legal Creativity Through the Florida Constitution*

Lacking a basis to challenge the Florida law that confined our client in Lock Towns without a hearing under the federal Constitution, the clinic students attempted to fashion alternative legal theories under the Florida Constitution.<sup>71</sup> The necessity for legal "creativity" is a common practical experience for students in law school clinics, where, as Professor Jane Aiken points out, "[r]eliance on authority may work unfair results for the client."<sup>72</sup> In clinic, students frequently work on cases that challenge them to "face the fact that they cannot rely on 'the way things are' and meet the needs of their clients."<sup>73</sup>

Clinical legal education is a space where a student gains critical thinking and ultimately "justice readiness" skills, which "may force the student to draw from her own knowledge base and to draw connections based on context."<sup>74</sup> In civil rights litigation especially, the challenge is to "transform[ ] a factual situations into something that can be redressed under the law."<sup>75</sup> To use another analogy, not from art but from science, clinic serves as a laboratory in which the students can experiment and "create causes of action or legal remedies" when there is an absence of "'outside authority' from which to draw a remedy."<sup>76</sup>

There were two "creative" arguments available under the state constitution. The first derived from a line of precedent from the Florida Supreme Court recognizing that "[s]ubstantive due process under

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cannot be said to have waived their rights to a prior hearing simply because their social workers wished them to be confined. The rule that parents speak for their children, even if it were applicable in the commitment context, cannot be transmuted into a rule that state social workers speak for their minor clients.") (Brennan, J., dissenting).

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *See id.* at 607 (states are free to provide additional due process safeguards for minors in mental health commitment proceedings). *See also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977) (decisions of the Supreme Court of the U.S. "are not and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law").

<sup>72</sup> Jane H. Aiken, *Provocateurs for Justice*, 7 CLIN. L. REV. 287, 294 (2001).

<sup>73</sup> *Id.* at 294.

<sup>74</sup> *Id.* Aiken's choice of the verb "to draw" suggests a creative—perhaps artistic—act by the student under the supervision of teacher who serves as a "role model by demonstrating a lawyer taking a stand grounded in values despite uncertainty and complexity." *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government.”<sup>77</sup>

Unfortunately, the Supreme Court declined to recognize the child’s due process claim, holding that the “nature and extent of a child’s constitutional rights in a dependency proceeding” did not mandate a “constitutional right to counsel” for the child.<sup>78</sup> This led the Court to conclude, without any further elaboration, that it did not have a basis to recognize a more expansive panoply of due process rights, such as a pre-commitment hearing with appointed counsel in this case, which represented a serious encroachment by the government on the child’s individual rights, as opposed to a generic dependency case.<sup>79</sup>

The second theory was a privacy argument. In 1980, Florida’s citizens chose to include an explicit right to privacy in the state constitution, guaranteeing that “every natural person has the right to be let alone and free from government intrusion into his private life.”<sup>80</sup> The Supreme Court of Florida stated, less than a decade after the adoption of the privacy right in the Florida Constitution, that minors are “persons” in the eyes of the law, and “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, . . . possess constitutional rights.”<sup>81</sup>

In *T.W.*, the Florida Supreme Court established that minors have the right to privacy under the Florida Constitution and that this privacy right extends to medical procedures.<sup>82</sup> Additionally, the court extended the right to choose or reject medical treatment, under the guarantee of a right to privacy, to incompetent or incapacitated persons, because “the right of privacy would be an empty right were it not to extend to competent and incompetent persons alike.”<sup>83</sup>

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<sup>77</sup> M.W. I, 756 So. 2d at 97 (quoting *Dep’t of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (1988)).

<sup>78</sup> *Id.* at 97 (quoting *In re D.B.*, 385 So. 2d 83, 89 (Fla. 1980)).

<sup>79</sup> *Id.*

<sup>80</sup> FLA. CONST. art. I, § 23. “‘Privacy’ has been used interchangeably with the common understanding of the notion of ‘liberty,’ and both imply a fundamental right of self-determination subject only to the state’s compelling and overriding interest.” *In re Guardianship of Browning*, 568 So. 2d 4, 9-10 (Fla. 1990).

<sup>81</sup> *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

<sup>82</sup> *Id.* (holding that the right to privacy under the Florida Constitution encompasses a minor’s right to consent to an abortion without first obtaining parental consent or court authorization); *see also Jones v. State*, 640 So. 2d 1084 (Fla. 1994) (indicating that a minor’s privacy right extends to other medical and surgical procedures besides abortion, and to the “conduct of others,” including the state).

<sup>83</sup> *In re Guardianship of Browning*, 568 So. 2d at 12 n.9 (defining “incompetent” and “incapacitated” persons, to whom the right of privacy extends, as “those individuals unable

In *T.W.*, the Court ruled that the child's right to privacy included her own decision as to whether to terminate her pregnancy.<sup>84</sup> Thus, the minor obtained the right to make the decision about whether to have a medical procedure that affects her body.<sup>85</sup> Michael's privacy claim did not seek the same degree of personal or bodily decision-making autonomy that the Court accorded to T.W. under the privacy clause. Rather, his privacy claim sought a meaningful right to be heard before being subject to institutionalization at locked psychiatric facilities where his body would be forcibly and involuntarily subjected to four-point restraints, seclusion, and psychotropic medications.<sup>86</sup>

Even if the state were to assert that it had a compelling interest that outweighed his privacy right, Michael argued that DCF could not commit a minor in its custody to a long-term, locked psychiatric institution without providing him due process. This was because the state must accomplish its objective through use of the least intrusive means, which is the second prong of the Court's *Winfield* test.<sup>87</sup> In reviewing the state's intrusion on a minor's right to privacy, and the means of furthering the state's interest, the Supreme Court of Florida had held that "[a]ny inquiry under this prong must consider *procedural safeguards relative to the intrusion*."<sup>88</sup> This, the argument went, mandated a court hearing as the procedural safeguard relative to the intrusive restrictions on privacy and liberty in his placement at Lock Towns.

Lamentably, the Florida Supreme Court declined to reach the merits of Michael's claim under the privacy clause. It brushed aside this legal theory on the procedural ground that "this argument was not raised in the petition for writ of habeas corpus filed in the Fourth District and therefore is not preserved for our review."<sup>89</sup> This disap-

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to make medical decisions on their own behalf" and holding that the constitutional right to refuse medical treatment is not lost or diminished by virtue of mental incapacity or incompetence).

<sup>84</sup> In re *T.W.*, 551 So. 2d at 1189.

<sup>85</sup> *Id.*

<sup>86</sup> See *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 533 (Fla. 1985), which established the appropriate test to be applied when the right to privacy is implicated:

The right to privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

*Id.* at 547 (citations omitted).

<sup>87</sup> *Id.* at 544.

<sup>88</sup> In re *T.W.*, 551 So. 2d at 1195-96 (emphasis added); see also *Singletary v. Costello*, 665 So. 2d 1099, 1105 (Fla. Dist. Ct. App. 1996) (stating that when the right of privacy is involved, "the means to carry out such a compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual").

<sup>89</sup> *M.W. I*, 756 So. 2d at 87 n.17.

pointing result dealt the students a bitter lesson and opportunity for reflections not on just the fine points of Florida appellate review but also the delicate pitfalls presented in social justice litigation.<sup>90</sup>

#### D. Legal Creativity Across Disciplines

Although the Florida justices declined to recognize Michael's right to a pre-commitment hearing through the Florida Constitution,<sup>91</sup> they were commendably able to see Michael's perspective and understand how he *felt* when he was committed to a psychiatric institution without the opportunity to have his views heard by the juvenile court judge.

The ultimate linchpin of its decision in *M.W.* was the Court's observation that:

While the child's best interests may in fact be paramount in the eyes, minds and hearts of every participant in the dependency proceeding, it is important that our procedures in dependency cases ensure that each child is treated with the dignity to which every participant in a dependency proceeding should be entitled. It is true that the dependency court, a citizen review panel, the Department and multiple psychiatrists and psychologists were involved in *M.W.*'s case and all were concerned with his best interests. However, of paramount concern is the question of whether *M.W.* perceived that anyone had his best interests at heart when he was placed against his wishes in a locked psychiatric facility without the opportunity to be heard.

Indeed the issue presented by this case extends beyond the legal question of what process is due; rather, this case also presents the question of whether the child believes that he or she is being listened to and that his or her opinion is respected and counts. *See generally* Gary B. Melton, et al., *No Place to Go: The Civil Commitment of Minors* 146-47 (1998) (stating that children obtain psycho-

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<sup>90</sup> *See* Aiken, *supra* note 72, at 299 ("Provocateurs for justice encourage students to engage in this kind of 'critical reflection.' Critical reflection has at its root an attempt to tease out or hunt down assumptions. Perhaps the most powerful tool for lawyers dedicated to social justice is the ability to identify assumptions and expose them.") (citations omitted).

<sup>91</sup> The court in *M.W.* I stated:

Whether or not an evidentiary hearing is constitutionally mandated, our legal system at the very least should afford the child, through his or her attorney and/or guardian ad litem, a meaningful opportunity to be heard. The ultimate goal of any procedure should be to balance the flexibility and informality characteristic of dependency proceedings with the need for procedural safeguards prior to placing a dependent child in a residential psychiatric treatment facility, which may constitute a temporary or prolonged loss of liberty. In striking this balance, the judicial system must recognize the individuality and dignity of the children who find themselves inside the courtroom solely as a result of their parents' abuse or neglect.

756 So. 2d at 108.

logical benefit from procedural protections prior to being placed in psychiatric treatment facilities).<sup>92</sup>

This extended observation by the Court cited to a study by three researchers unsparingly critical of the *Parham* decision, its flawed assumptions about children's competence to make decisions about their health care,<sup>93</sup> its reasoning on the roles of parents and state actors in committing children to treatment facilities,<sup>94</sup> and the limited benefits of pre-commitment judicial hearings.<sup>95</sup> The clinic had cited to this study in its briefs and urged the Court to consider it. The study's authors were a professor of neuropsychiatry and behavioral science (Dr. Gary B. Melton), a forensic psychologist (Philip M. Lyons, Jr.), and a mental health law scholar (Willis Spaulding). The study introduced a different perspective, elaborating on Dr. Melton's earlier writing and bringing insights from social science research, into the Court's opinion.<sup>96</sup>

The interdisciplinary perspective in this study enabled us to re-frame the problem presented in *M.W.* in a new light, not bound by the singular focus on arguments to overcome adverse legal authority, which constrained the grounds for judicial relief. Melton and his co-authors surveyed the residential treatment system for children and adolescents, and analyzed the prevailing legal framework for the commitment of children to these deep-end institutions. Their carefully-researched policy recommendations proposed greater recognition of children's privacy and autonomy interests over the countervailing interests of the state.<sup>97</sup>

This iteration of legal "creativity" may have been the most effective strategy in our multi-year advocacy before the Florida Supreme

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<sup>92</sup> *Id.* at 107-08.

<sup>93</sup> See *Parham*, 442 U.S. at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.").

<sup>94</sup> See MELTON ET AL., *supra* note 67, at 102-03, 105-07, 129-30, 130-31.

<sup>95</sup> See *id.* at 94-95.

<sup>96</sup> See, e.g., Gail S. Perry & Gary B. Melton, *Precedential Value of Judicial Notice of Social Facts: Parham as an Example*, 22 J. FAM. L. 633, 644-45 (1983-84) (correcting erroneous factual assumptions and empirical conjecture in *Parham*); Gary B. Melton, *The Significance of Law in the Everyday Lives of Children and Families*, 22 GA. L. REV. 851, 872 n.76 (1988) (noting faulty assumptions about social fact in *Parham*'s discussion of the distribution of authority among parents, child, and state, and also ignoring "the fact that many of the youth were already wards of the state and that the practical policy questions was finding them a place to live while preserving some measure of liberty").

<sup>97</sup> See, e.g., Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOL. 99 (1983) (noting that psychologists should actively involve minors in decision making about treatment and research, and policy-makers should begin their analyses of issues involving adolescents with respect for their autonomy and privacy).

Court in *M.W.* and in the rulemaking proceedings that it put into motion, which ultimately achieved a significant reform of the long-standing legal regime and courtroom practices that had confined Michael without any meaningful judicial oversight.

Social justice lawyers, of necessity, frequently confront injustices that do not lend themselves to traditional legal tools or arguments. While all lawyers are problem solvers, the social justice advocate operates in a different sphere of problem solving, as one commentator observes, “seeking to change the legal infrastructure that affects the lives of her clients rather than simply operating within it.”<sup>98</sup> This forces the social change lawyer to devise different strategies “to overcome and offset some of the risks inherent in social-change lawyering.”<sup>99</sup> Creativity for the social justice lawyer can mean pursuing incremental change, reframing the legal issues that inhibit the pursuit of legal change, incorporating interdisciplinary perspectives into the work, or building coalitions across diverse interests.<sup>100</sup>

As Professor Raymond Brescia observes, incorporating an interdisciplinary perspective is an especially helpful technique for achieving structural legal reform when legal authority or established doctrine stands in the way of change:

In many ways, the social-change lawyer’s use of interdisciplinary strategies . . . helps to reframe arguments and tests other theories against perceived wisdom and common understandings of the law and society that may need to change to bring about wider social change . . . . By incorporating disciplines other than law, social-change advocates widen their own lenses when they view a problem and begin to see legal issues in a different light, which then helps them frame their arguments and present new theories and new ways of looking at the world to judges, juries, policymakers, legislators, and the general public. In turn, these theories, informed by interdisciplinary views, might find an audience more receptive to these arguments because they help that audience see the law in different ways, undermining traditional understandings and interpretations of the law and social relations.<sup>101</sup>

### *E. Creativity Through Therapeutic Jurisprudence*

These interdisciplinary perspectives also exemplified the role of

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<sup>98</sup> Brescia, *supra* note 8, at 603. *See also* Menkel–Meadow, *supra* note 26, at 115 (“The law represents a hybrid domain in which the field is that of fellow experts (judges, legal scholars, lawyers) but in fact the lasting creativity of legal work will be measured by a much broader field—that of clients, citizens of legal regimes and all those regulated by law.”).

<sup>99</sup> Brescia, *supra* note 8, at 602.

<sup>100</sup> *Id.* at 582–583.

<sup>101</sup> *Id.* at 583 (citations omitted).

therapeutic jurisprudence in the litigation described in this case study as well as the resulting socially engaged artistic collaborations. As a law reform project focusing on “the therapeutic and antitherapeutic consequences of law with the tools of the behavioral sciences,”<sup>102</sup> therapeutic jurisprudence looks at how “rules of substantive law, legal procedures, and the roles of various actors in the legal system such as judges and lawyers have either positive or negative effects on the health and mental health of the people they affect.”<sup>103</sup>

How a teenage child is treated by the judge, the state’s or child’s attorney, the social worker for the state, the guardian *ad litem*, and other legal actors or agents in a proceeding involving the child’s commitment to an inpatient health facility, affects the child’s mental health and the child’s feelings about the legal process.<sup>104</sup> The research demonstrates that “[j]uveniles involved in civil commitment hearings are likely to be particularly sensitive to issues of participation, dignity, and trust.”<sup>105</sup>

Procedural justice similarly recognizes that children are more satisfied with and comply more with the outcome of legal proceedings when they perceive those proceedings to be fair and have an opportunity to participate in them.<sup>106</sup> Social scientist Tom Tyler’s research of the factors creating satisfaction in litigants involved in the legal process has direct application to children in this context.<sup>107</sup>

Allowing children the opportunity to participate in adversarial court proceedings increases their perception of the fairness of the process.<sup>108</sup> Additionally, “having some control over the process (a form of control inherent in a truly adversarial system) is likely to enhance a child’s sense of perceived justice . . . and perhaps decrease resistance

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<sup>102</sup> See Winick & Lerner-Wren, *supra* note 43, at 120.

<sup>103</sup> Winick, *supra* note 29, at 188.

<sup>104</sup> See Winick & Lerner-Wren, *supra* note 43, at 122 (“When legal authorities treat juveniles with dignity[,] . . . their status as competent, equal citizens and human beings is confirmed.”).

<sup>105</sup> *Id.*; see also Jan C. Costello, *Why Have Hearings for Kids if You’re not Going to Listen?: A Therapeutic Jurisprudence Approach to Mental Disability Proceedings for Minors*, 71 U. CIN. L. REV. 19 (2002).

<sup>106</sup> See Winick & Lerner-Wren, *supra* note 43, at 115.

<sup>107</sup> See Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, in *LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 3* (David B. Wexler & Bruce J. Winick, eds., 1996).

<sup>108</sup> See generally Victoria Weisz, Twila Wingrove & April Faith-Slaker, *Children and Procedural Justice*, 44 CT. REV. 36 (2008) (citing studies applying procedural justice theories to demonstrate that children value fairness in court procedures); Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447 (2009) (examining empirical studies in procedural justice theory exploring how children and adolescents develop ties to the law and legal actors and demonstrating a causal relationship between juveniles’ perceptions of fairness and their likelihood of reoffending).



to treatment if it ultimately is ordered.”<sup>109</sup> Significant clinical evidence shows a greater likelihood of the treatment succeeding when adolescents participate in the decision to begin treatment.<sup>110</sup>

One early research study found considerable benefits resulting from allowing adolescents to have judicial hearings prior to their commitment if they objected to hospitalization.<sup>111</sup> The researchers reported that hospital staff believed that giving adolescents a hearing if they objected to hospitalization was “helpful to children” by giving the child the opportunity to tell how he felt and to express his objections to hospitalization.<sup>112</sup>

The procedure also crystallized the issue of the need for treatment. It made the child (and the family) confront the issue of whether or not the child really needed or wanted to be hospitalized. It made the child feel that he had been treated fairly; if he objected, he would have an impartial hearing. The court could release the child if he did not meet criteria for hospitalization. The procedure also afforded the child some measure of control over his own destiny and was a step in the patient’s involvement in planning for his own care.<sup>113</sup>

These findings both explicitly and implicitly informed the Court’s ruling in *M.W.*, and they set into motion the judicial rulemaking proceeding presided over by the same Court that had found no merit to Michael’s constitutional or statutory arguments, but ultimately recognized the benefit of more independent court review of the state’s procedures for committing children to inpatient hospitals.<sup>114</sup>

#### F. Creativity Through Court Rulemaking

I think it’s very important for a foster child to have a hearing before DCF sends them to a facility so they can talk to the judge. After I got my attorney, she made sure that I got a hearing and that I went to court. I was able to speak to the judge, and my lawyer told the judge why I shouldn’t be placed in a facility. The judge said that I

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<sup>109</sup> MELTON ET AL., *supra* note 67, at 139-141; see also Richard C. Boldt, *Adolescent Decision Making: Legal Issues with Respect to Treatment for Substance Misuse and Mental Illness*, 15 J. HEALTH CARE L. & POL’Y 75, 76-77 (2012) (“When the law does not permit adolescents to exercise independent and final authority . . . parents and clinicians should still seek to structure opportunities for adolescents to participate in the decision-making process, while openly acknowledging the limits of that participation.”).

<sup>110</sup> *Id.*; Rochelle T. Bastien & Howard S. Adelman, *Noncompulsory Versus Legally Mandated Placement, Perceived Choice, and Response to Treatment Among Adolescents*, 52 J. CONSULTING & CLINICAL PSYCHOL. 171, 177 (1984).

<sup>111</sup> Alan Meisel & L.H. Roth, *The Child’s Right to Object to Hospitalization: Some Empirical Data*, 4 J. PSYCHIATRY & L. 377-92 (1976).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 384-85.

<sup>114</sup> These insights also surfaced in the social engagement artistic practices outside of the formalities of the legal and rulemaking processes, described in Parts III-IV *infra*.

didn't need to be put in another facility. . . . Also, I think it's very important for every foster child in a facility to have a lawyer. If a child doesn't have a lawyer, then there's no one to stand up for what the child wants. This makes a child lose hope, which is how I felt for a long time.<sup>115</sup>

Although the Court in *M.W.* did not reach the constitutional questions presented in our appellate advocacy, it did hold that there must be procedural safeguards that give the child a meaningful opportunity to be heard. It urged the Juvenile Court Rules Committee to consider a proposed rule submitted by the Guardian ad Litem program, to look at rules in other jurisdictions, and in particular procedural rules from New Jersey addressing this issue.<sup>116</sup> In essence, then, as an indirect allusion to earlier privacy arguments raised in *M.W.*, the Court asked the Committee to formulate an appropriate court rule that considered the "procedural safeguards relative to the intrusion."<sup>117</sup>

There were four procedural safeguards at issue in the extended proceeding on the proposed rule: the child's right to notice and to be heard; the right to an attorney; the right to a pre-placement court hearing; and the right to present evidence and to have a burden of proof met.

The Juvenile Court Rules Committee drafted proposed Rule 8.350, Placement of Child Into Residential Treatment Center After Adjudication of Dependency, attempting to give consideration both to the court's directives in *M.W. v. Davis* and recently enacted amendments to section 39.407 of the Florida Statutes in which the Children & Youth Law Clinic had participated.<sup>118</sup> The proposed rule failed to mandate counsel, require a pre-placement hearing, define the standard of proof, or spell out what evidence, if any, the child could present at the hearing.<sup>119</sup>

Under the proposed rule, any party could present evidence concerning "suitability of placement" at this hearing. The court would

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<sup>115</sup> See Karina's Comments in the Appendix to University of Miami School of Law Children & Youth Law Clinic, Comments in *In Re Fla. R. Juv. P. 8.350* (Feb. 15, 2002) (on file with authors). See *In re Fla. R. Juv. P. 8.350*, 804 So. 2d at 1209; *In re Fla. R. Juv. P. 8.350*, 842 So. 2d at 763.

<sup>116</sup> While New Jersey was the one state identified by the court, several other states' supreme courts had already considered the constitutional rights of minors facing psychiatric commitment and adopted due process protections exceeding the limited rights accorded under the Fourteenth Amendment, consistent with their state constitutions. See, e.g., *Washington ex rel. T.B. v. CPC Fairfax Hosp.*, 918 P.2d 497 (Wash. 1996); *In re N.N.*, 679 A.2d 1174 (N.J. 1996); *In re P.F. v. Walsh*, 648 P.2d 1067 (Colo. 1982); *In re Roger S.*, 569 P.2d 1286 (Cal. 1977).

<sup>117</sup> *In re T.W.*, 551 So. 2d at 1195-96

<sup>118</sup> See *In re Fla. R. Juv. P. 8.350*, 804 So. 2d at 1207-08.

<sup>119</sup> *Id.*

then be obligated to order DCF to place the child in a less restrictive setting best suited to the child's needs if the court determined that the child was not suitable for continued placement.<sup>120</sup>

Finally, the proposed rule, tracking the recently enacted amendment to chapter 39, section 39.407(5) of the Florida Statutes, designed to provide greater legal protection for children inappropriately admitted to or held in psychiatric facilities.<sup>121</sup> The new legislation and proposed rule required an initial review hearing within three months of admission, and a continuing review hearing every three months thereafter, until the child could be deemed suitable for placement in a less restrictive setting. The child was required to be present at all hearings except the initial five-day status hearing.<sup>122</sup>

The two issues that generated the most discussion were whether a pre-placement court hearing was required and whether to mandate the appointment of counsel for every dependent child recommended for placement in a residential facility.<sup>123</sup> The disagreement over the appointment of counsel in turn prompted a sharply worded Minority Report, which resulted from close and conflicting votes on a draft of the proposed rule requiring the court to appoint counsel for the child only *after* the child's placement in a residential treatment center.<sup>124</sup>

The Court invited interested members of the public to provide testimony and comments on the proposed rule, including the views of the Majority and Minority of the Committee. Several members of the Bar, judges, organizations, clinical psychologists, and legal academics participated in the rule comment proceeding.<sup>125</sup> Professor Winick and Broward County Mental Health Court Judge Ginger Lerner-Wren jointly filed a Therapeutic Jurisprudence brief with their comments

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<sup>120</sup> *Id.*

<sup>121</sup> S.B. 682, 2000 Leg. Sess. (Fla. 2000); H.B. 2347, 2000 Leg. Sess. (Fla. 2000).

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

<sup>123</sup> *Id.*

<sup>124</sup> See *In re Fla. R. Juv. P. 8.100(a)*, 796 So. 2d 470 (Fla. 2001). The Minority argued that a "meaningful opportunity to be heard is the hallmark of procedural due process," which required a pre-commitment proceeding at which the child was represented by court-appointed counsel. The report also noted the irony and inconsistency of mandating the appointment of counsel for the lay guardian ad litem, while depriving the child himself of legal representation in this proceeding. *Id.* See also *Dep't of Children & Family Servs. v. I.C.*, 742 So. 2d 401, 406 (Fla. 1999) (stating that "the child, the alleged object of everyone's concern, has no voice and no capacity to reach the court in many cases").

<sup>125</sup> More than 57 individuals and over fifteen advocacy organizations submitted comments to the Court. At least nine judges weighed in on both sides of the issue, as did bar representatives, law professors, state agencies, and advocates from the Advocacy Center for Persons With Disabilities, Bazelon Center for Mental Health Law, Juvenile Law Center, Florida Legal Services, Children First Project at Nova Southeastern University Shepard Broad Law Center, and the Florida Public Defender Association. *In re Fla. R. Juv. P. 8.350*, 842 So. 2d at 763-64.

about the proposed rule,<sup>126</sup> as did the Children & Youth Law Clinic.<sup>127</sup>

Our clinic's brief appended the statement of our client "Karina." Karina's full statement begins with a preamble that she wrote in her own hand, guided by the assistance of two of our students:

I was placed in several treatment facilities over the years I was in foster care. . . I wish I would have had a lawyer during all the years I was kept in locked facilities. I think it would have made a big difference. I don't think that I would have been abused like I was if I would have had a lawyer. I don't think I would have even been in locked facilities as long as I was if I would have had a lawyer. If I hadn't finally gotten a lawyer, DCF would have kept me in a locked facility until I turned 18, and I never would have learned to live outside of a facility. . . .

The Court scheduled oral arguments for the commentators and others interested in the rule. Karina's position was presented by a lawyer. Karina's lawyer was our artistic collaborator, and this Article's co-author, Xavier Cortada, who at this stage of his professional career was both a practicing lawyer and a socially engaged artist. Xavier spoke for the first few minutes of the hour-long oral argument before the Court through the Children & Youth Law Clinic's "Voice Project."<sup>128</sup> Karina's statement was the only voice of a child that the Court heard in this entire proceeding.

In retelling her story to the Court, answering questions about Karina from the justices, the artist *qua* lawyer performed as the "translator" of Karina's life experiences to the Court, interpreting the story that his client shared with him.<sup>129</sup> This translation or reconstruction of the client's story as told by the lawyer is a creative role that lawyers often perform in the courtroom.<sup>130</sup>

Xavier's other role as a socially engaged artist organizing and encouraging the activities of children locked up in the two psychiatric hospitals leads us to the question of how the artistic activity influenced

<sup>126</sup> Winick & Lerner-Wren, *supra* note 43, at 119-26.

<sup>127</sup> *Id.* See also Salisbury, *supra* note 28, at 676.

<sup>128</sup> In re Fla. R. Juv. P. 8.350, 843 So. 2d at 763. For descriptions of the Voice Project, see Perlmutter, "Unchain the Children," *supra* note 27, at 1 n.2; Perlmutter, *George's Story*, *supra* note 28, at 563 n.9; Perlmutter, "Letting Kids Be Kids," *supra* note 43, at 143-46; Salisbury, *supra* note 28, at 625-27.

<sup>129</sup> See Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1, 44-45 (2000) ("An act of storytelling is by definition an act of interpretation or translation. . . . The best that we can hope for as lawyers is that we recognize the ways in which we shape case stories, and know that the story that we tell is different from the story that the client might tell.") (citations omitted).

<sup>130</sup> See, e.g., Clark D. Cunningham, *Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298 (1992).

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the law reform process. In the next Part, we examine the role that the creation of the art played in this effort. While his advocacy for Karina's legal position clearly moved the Florida Supreme Court and Xavier's direct artistic engagement with children outside of the courtroom was "therapeutic" for these clients, did the art serve any larger purposes in the resolution of the policy and textual disagreements in the Court's consideration of the rules?

### III. THE CANVASES: CHILDREN CREATING ART ON THE MARGINS OF THE LAWSUIT

My lifes been pretty bumpy<sup>131</sup>

You feel powerless, like youre being raped all over again<sup>132</sup>

do you know what it is like to get raped over and over again. To finally wake up and not know if your going to like to get locked up. Pregnant and lose the baby, or always wonder If you have some kind of STD. it doesn't sound like that much right now but it gets overwhelming after a while sometimes. I even put myself in self denile its ok cuz I know that one day im going to make it and that's all that matters to me<sup>133</sup>

In October 2001, the Court rendered an opinion on proposed Rule of Juvenile Procedure 8.350.<sup>134</sup> In its opinion, the Court mandated the appointment of counsel for children who objected to commitment.<sup>135</sup> It also required that the courts conduct pre-commitment hearings except in emergencies. The ruling acknowledged the therapeutic benefits of providing a hearing, with counsel, *before* DCF could place the child in a facility. This mirrored the therapeutic jurisprudence arguments that our clinic and Professor Winick had advanced.<sup>136</sup>

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<sup>131</sup> Statement of a child locked up in a residential treatment facility in the painting entitled "*Trapped*." See Appendix. For a color version, see *Trapped* (2002), CORTADA, <https://www.cortada.com/art2002/trapped/> (last visited Jan. 15, 2023).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> In re Fla. R. Juv. P. 8.350, 804 So. 2d at 1206.

<sup>135</sup> *Id.* at 1213-14 ("[O]ur proposed rule makes appointment of counsel mandatory rather than discretionary when the child objects to the placement. In reaching this conclusion, we recognize the strong policy reasons raised by the comments in favor of appointment of an attorney for a dependent child in order to ensure that the child has a meaningful opportunity to be heard (e.g., the importance of an attorney-client privileged relationship between the child and counsel, and the *therapeutic benefits* that representation would provide to the child.") (citations omitted) (emphasis added).

<sup>136</sup> *Id.* at 1213-14. ("This Court has recognized that 'children obtain psychological benefit from procedural protections prior to being placed in psychiatric treatment facilities' and that there is a 'need for procedural safeguards prior to placing a dependent child in a residential psychiatric treatment facility.' We believe that the incorporation of such a hearing . . . also would enhance the child's perception that he or she has a voice and that his or

### A. *The Art Project*

While the clinic's many students throughout the years of this law reform project had engaged in traditional forms of lawyering—interviewing and counseling clients, researching and drafting appellate briefs and *amicus* briefs, and preparing Karina's statement to the Court—several of them also had opportunities to witness some of the artistic activities curated by Xavier Cortada. As our artistic partner in this collaboration, Xavier brought an unusually diverse array of legal, social activist, community organizing, and artistic talents.<sup>137</sup>

Xavier was invited to collaborate with the University of Miami Children & Youth Law Clinic after being introduced to him and his artistic work by our colleague and mutual friend Professor Bruce Winick. Professor Winick had proposed that we collaborate. Prior to the proceedings before the Florida Supreme Court, he suggested that Xavier visit children in the facilities who were the subjects of the litigation and rulemaking proceedings. Xavier and the law school applied for a grant from the Miami-Dade Cultural Affairs Council's Community Grant Program, and this helped to support the creation of art with the children in the facilities.

Although he had already produced a significant body of socially engaged art pieces in collaboration with children across the globe, nation and local community, including a glass mosaic mural placed on the façade of Miami-Dade's Juvenile Courthouse, commemorating the 100th Anniversary of the Juvenile Court,<sup>138</sup> and a collaborative painting with teenagers held in pre-trial detention at a county jail, direct-filed as adults,<sup>139</sup> Xavier had not spent much time with foster children locked up in residential treatment hospitals.

However, by this stage of his career, he had already dedicated a decade to collaborating with children creating art in many different

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her stated interests are being considered in determining whether placement is in the child's best interests and whether the placement is the least restrictive alternative available.") (citations omitted).

<sup>137</sup> See, e.g., Renée D. Ater, *Xavier Cortada, Socially Engaged Artist*, in *PAINTING CONSTITUTIONAL LAW: XAVIER CORTADA'S IMAGES OF CONSTITUTIONAL RIGHTS* 28 (M.C. Mirow & Howard M. Wasserman, eds., 2021) (noting that after passing the Bar, Cortada served as a Research Assistant Professor and Director of the Juvenile Justice and Delinquency Prevention Programs). His extensive curriculum vitae references his service as an elected student representative to ABA House of Delegates while in law school at the University of Miami, and many other community and professional service experiences, including directing a non-profit drug treatment program, and chairing the City of Miami Youth Gang Task Force, before and after law school. See *Artist: Biography*, CORTADA, <https://cortada.com/artist/> (last visited Jan. 15, 2023).

<sup>138</sup> See *Juvenile Courthouse: Commemorating 100 Years of Juvenile Justice* (1999), CORTADA, <https://cortada.com/art1999/juvenile-courthouse/> (last visited Jan. 15, 2023).

<sup>139</sup> See *Convictim* (2001), CORTADA, <https://cortada.com/art2001/convictim/> (last visited Jan. 15, 2023).

settings, from hospitals, addiction rehabilitation centers, foster homes, juvenile delinquency programs, public housing sites, and community centers, and with many different communities from South Africa to Bolivia, and throughout the U.S.<sup>140</sup> His art with children in these settings was “[d]one in a figurative style that would become his signature, the artist us[ing] the human figure in exaggerated proportions, bold geometric designs, and vibrant colors to convey the power of mural painting to act as a source for community engagement and as a consciousness-raising tool.”<sup>141</sup>

Xavier was able to draw from these diverse experiences to help the children in the hospitals feel comfortable sharing their deeply personal stories with him and each other. This process, in turn, made it easier for clinic students to develop deeper professional relationships with their clients. Through this iterative process, the children conveyed their traumatic life experiences giving testimonials that reified many of the arguments presented on their behalf in the Florida Supreme Court. While creating the art, the children shared accounts of abuse by family members and their re-victimization by staff in locked psychiatric facilities. According to our former clinic colleague, Carolyn Salisbury, therapists in the programs told our students about the psychological insights gained by some of the girls who shared their experiences in this creative process.<sup>142</sup>

The first painting, “Trapped” (2002),<sup>143</sup> was the result of sessions held with children at the same hospital where Michael had previously been confined. At the center of the painting are the crouched figures of two girls wrapped together, their eyes closed, a large finger pointing at them from the upper left-hand corner of the canvas, four spears or needles closing in on them from the top.<sup>144</sup> The canvas reflects Xavier’s distinctive visual language, which art historian Renée Ater has observed in her introductory essay to an examination of his paintings depicting constitutional cases “borrows from Cuban modernism, including the tropical palette and strong blacklines of Amelia Peláez and the syncretic Surrealist aesthetic of Wifredo Lam.”<sup>145</sup>

Some children produced hand-written poems, others wrote letters, and a few issued short manifestos, all of which the artist “col-laged” into the canvas. Many of the children’s poetic, epistolary and

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<sup>140</sup> Ater, *supra* note 137, at 29-31 (“Mural Painting as Consciousness Raising”); *id.* at 30 (describing Cortada’s 2005 painting, *Protecting America’s Children: A National Message Mural*, commissioned by the Child Welfare League of America).

<sup>141</sup> *Id.* at 29.

<sup>142</sup> See Salisbury, *supra* note 28, at 626-28, 634-39.

<sup>143</sup> See *Trapped* (2002), *supra* note 131.

<sup>144</sup> See *id.*

<sup>145</sup> Ater, *supra* note 137, at 28.

artistic expressions, especially those contributed by the female participants, convey the trauma of being sexually abused, the re-traumatization of being locked up through forced psychiatric treatment, and the further re-traumatization of being silenced in the legal system that controlled their psychiatric commitment and every aspect of their lives.

Cortada installed “Trapped” during the annual meeting of the Florida Bar in 2002.<sup>146</sup> Our clinic also attached photocopies of “Trapped” as an exhibit to our *amicus curiae* brief filed with the Florida Supreme Court in the rulemaking phase of the law reform project.<sup>147</sup>

The second art piece, “Voice Project 2003 Mural,” created after the Florida Supreme Court in 2003 adopted its new procedural rule mandating pre-commitment hearings and counsel for these children, presents a different tone and message.<sup>148</sup> In bright and cheerful colors, with a group of children embracing each other underneath a light bulb hanging from the center of the canvas, the painting depicts the children’s sanguine visual expressions and written testimony. The celebratory images and words may reflect the children’s gratitude for the Court’s recognition of their due process rights, giving them a “meaningful right to be heard” in a pre-commitment hearing where they would be represented by a lawyer. The canvas also features several Yin-Yang images, one of which appears near the word PAIN, in large red letters, perhaps hinting that the successful legal case that they were celebrating in the center of the canvas had a darker underside.

Many of the statements or images depicted their brutalization before entering the hospital and inside the hospital in raw and graphic ways. In the 2003 canvas, our client “María” created a montage of cartoon-like images about her experiences in the psychiatric facility where she encountered Xavier and our students. María’s cartoon features a caged tiger, a young girl tightly-bound in four-point mechanical restraints on a bed or gurney, a needle used to inject anti-psychotic medications, and a bearded crimson Satanic figure with horns and a pitchfork, perhaps symbolizing or representing the male staff in her facility who restrained her and then administered psychotropic drugs if she acted out.<sup>149</sup>

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<sup>146</sup> The painting was displayed at the Florida Bar Public Interest Law Section Luncheon. See *Trapped: About*, CORTADA, <https://cortada.com/art2002/trapped/trapped-about/> (last visited Jan. 15, 2023).

<sup>147</sup> Salisbury, *supra* note 28, at 678 n.173.

<sup>148</sup> See Appendix. For a color version, see *Voice Project 2003 Mural*, CORTADA, <https://www.cortada.com/art2003/voice-project-2003-mural/> (last visited Jan. 15, 2023).

<sup>149</sup> The visual images—pictures without words—that María made illustrates how some



Both of the paintings were part of a 2004 exhibit titled, “May It Please the Court” mounted in the Florida Supreme Court’s neoclassical rotunda.<sup>150</sup> Xavier later donated both paintings to our law school and they are on permanent display in our clinical program’s office. The public showings of the canvases, which incorporated the children’s words and art, were designed to give children a chance to express to lawmakers, the judiciary, and a larger public audience their experiences of being confined by the state in psychiatric hospitals.

### *B. Art on the Margins*

These activities in the two treatment facilities in many key aspects mirror Lucie White’s descriptions of client “mobilization on the margins of the lawsuit.”<sup>151</sup> She describes how “litigation can be an occasion of participatory, educative experiences for clients and their advocates”<sup>152</sup> but acknowledges the reality that social justice litigation no longer “consistently produces systemic reform.”<sup>153</sup> She thus exhorts lawyers for poor people to “be creative and flexible in responding to their clients’ needs. They cannot simply ‘file a lawsuit’ to solve every problem.”<sup>154</sup> Lawyers for subordinated communities of clients “must understand the systemic obstacles to client participation, appreciate the cultural norms and practices in their clients’ own communities, and respond flexibly in each political and institutional context.”<sup>155</sup>

White offers two case studies illustrating how a lawsuit “might be an occasion for poor people to join together, outside of the formal boundaries of the litigation, in *spaces that are parallel* to it, to engage among themselves in reflective conversation and strategic action.”<sup>156</sup>

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participants chose to tell their stories, particularly those who might not have been adept at putting into words what they experienced in their young lives. See ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE 4 (1994) (not all adolescents are “necessarily good at narrative skills” and many “do not understand time as both a historical concept (one that goes on and one without them) and a day-to-day concept that affects their lives”). Moreover, adolescents who are “undereducated, underparented, [or] unattached,” are like younger school-age children in that they “[a]re still not mature at organizing the details of narratives.” *Id.* As our teenage client María’s images attested, participants contributed personal statements about their lives with drawings as compelling as the words from other children.

<sup>150</sup> Several of these exhibited art pieces are the subjects of essays by legal scholars in PAINTING CONSTITUTIONAL LAW: XAVIER CORTADA’S IMAGES OF CONSTITUTIONAL RIGHTS, *supra* note 137 (analyzing painted depictions by Cortada of ten landmark U.S. Supreme Court constitutional decisions originating in Florida).

<sup>151</sup> White, *supra* note 13, at 547-62.

<sup>152</sup> *Id.* at 538.

<sup>153</sup> *Id.* at 537.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 538.

<sup>156</sup> *Id.* at 545-46 (emphasis added).

One example involved clients in a disability lawsuit who were intimidated by the “discourse and culture of formal litigation.”<sup>157</sup> Their lawyers “looked for spaces where clients could speak together with fluency and confidence, describing their injuries and needs in their own terms.”<sup>158</sup>

The clients organized “speak-out” events at which the participants enacted “a sequence of monologues by disabled people with grievances against the Social Security Administration. Each speaker would rise spontaneously from the audience and come forward to recite his or experience. . . . The details of each speech were different, but basic narrative and oratorical style repeated itself in every presentation.”<sup>159</sup> As White describes the speaking out: “The speakers seemed to generate collective energy at these events; they produced a moment of mobilization.”<sup>160</sup>

The activity outside of the courtroom complemented the litigation, creating synergies with the arguments and evidence presented inside the courtroom: “The sense of power happened as the participants came together to speak publicly about a shared experience of injury in a language that they considered their own.”<sup>161</sup> In many respects, it is similar to the artistic activities curated by Xavier in the two canvas projects, which complemented the advocacy for children in residential treatment centers that were unfolding in the legal arena.

An even more direct comparison was a “people’s theatre” project in Los Angeles, using Augusto Boal’s “theatre of the oppressed” as a vehicle for mobilizing the homeless in that city.<sup>162</sup> Although theatrical performance and litigation are very different cultural activities, this collaboration showed how they can work together to effect social reform and legal change.<sup>163</sup>

#### IV. COMMUNITIES THAT CARE—ARTIST, CLINIC, CLIENTS

In using arts and culture to build community, we often forget that the greatest resources isn’t necessarily the program that we design, or the object that we create, or the idea that we generate. It is the people themselves. We somehow forget that art is theirs; that for a

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<sup>157</sup> *Id.* at 546.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 551.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 552.

<sup>162</sup> *Id.* at 557.

<sup>163</sup> *See id.* at 563 (“[T]his theatre may not enable homeless clients to assist their lawyers with specific tasks in the litigation, . . . [However,] it can challenge the assumptions that their lawyers relied on to design the litigation in the first instance . . . [and], as an activity among the homeless, the theatre can help change their often harsh images of themselves, empowering them to see their own capacities and identify their needs.”).

very long time now people have intuitively used it to better connect with one another.<sup>164</sup>

Law reform advocacy, such as the efforts described in this Article, has been an integral part of the clinic experience for students. This socially engaged artistic collaboration was a unique and *sui generis* feature of this activity. Over the past 25+ years, our clinic has developed a model of holistic, client-centered representation of children in the foster care system, in which our students are encouraged “to see their client as a whole person, rather than simply a legal issue.”<sup>165</sup> As our colleague, Professor Kele Stewart, has written, we ask our students to try to “understand the full context of our clients’ experiences . . . to understand and address all of the client’s legal, as well as non-legal needs.”<sup>166</sup> With the benefit of a few years’ hindsight, it is worth asking a few rhetorical and actual questions about the boundary crossing entailed in this creative, cross-disciplinary collaboration:

- Is an arts-law collaboration a worthwhile endeavor?
- How does it benefit law students training to be lawyers and learning the craft of law?
- How does it benefit clients served by student lawyers?
- What other kinds of creativity and collaboration with practicing artists would work in clinics?

Our experiences working together suggest that incorporating socially engaged artistic expression into the clinic’s mission (and syllabus) adds immeasurable value to the students’ experience in representing their clients. The collaboration of artist, clients, and clinic working on a project connected to but on the margin of a legal issue can create “communities that care” for the client and each other. The work is not easy, but it offers the students a chance to see their clients, and the legal system in which the clients are frequently “trapped,” in a different light than might occur in a more traditional live-client clinic focused on teaching doctrine, lawyering skills, and professional identity.

As an artist who has done community engaged and social activist artistic work for decades, Xavier Cortada brings unique insight into the power of art in community.<sup>167</sup> He posits that as attorneys, we have the ability to connect with the feelings of our clients in ways that show them empathy, connection, and humanity. By allowing our clients to

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<sup>164</sup> Ater, *supra* note 137, at 28 (quoting Xavier Cortada).

<sup>165</sup> Kele Stewart, *How Much Clinic for How Many Students?: Examining the Decision to Offer Clinics for One Semester or an Academic Year*, 5 J. MARSHALL L. J 1, 39 (2011).

<sup>166</sup> *Id.* at 40.

<sup>167</sup> See, e.g., Jenny Hudak, *Professor Previews TED Talk at the Cosford Cinema*, UNNEWS@THEU, (Nov. 29, 2022), <https://news.miami.edu/stories/2022/11/professor-previews-ted-talk-at-the-cosford-cinema.html>.

say things creatively, they may be more comfortable sharing difficult feelings and thoughts than they would in an ordinary attorney-client interview or professional relationship, without the universal language of art.<sup>168</sup>

The two canvases that Xavier created two decades ago in the treatment facilities were the result of children who came together and generated ideas with one another and contributed words and drawings that Xavier wove into the two canvases. He encouraged them to speak out, like the participants in the activity described by Lucie White.<sup>169</sup>

What distinguished this activity is that their words did not evaporate, but had a purpose with meaning and value by virtue of being part of an art object presented directly to the Court during the lawsuit, which endures in a public arena, more than two decades after its creation. The adults who participated with these children in the hospitals where they were confined were there because they believed that the voices of the children and the words they shared were important. The words and images from these children have endured and convey their meaning to this day.

During our discussion with clinicians at the AALS Conference, Xavier assured the audience that even if they “cannot draw a straight line,” socially engaged arts activity is still possible in a clinic. At its essence, it is a way of engaging with communities, and particularly with populations marginalized or victimized by people who are close to them, or by the legal regimes that regulate their lives, and their wariness to trust others often makes it difficult for students to connect with these clients.

Clinicians teach their students to overcome these barriers with their clients every day in supervision meetings, in case rounds, and in other signature components of clinical legal education.<sup>170</sup> Artistic en-

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<sup>168</sup> See Winick & Lerner-Wren, *supra* note 43, at 122 (observing that “[j]uveniles involved in civil commitment hearings are likely to be particularly sensitive to issues of participation, dignity, and trust”).

<sup>169</sup> This Article’s title, “Communities That Care,” refers to and acknowledges the significant public health research project of J. DAVID HAWKINS & RICHARD CATALANO, JR., *COMMUNITIES THAT CARE: ACTION FOR DRUG ABUSE PREVENTION* (1992), at the University of Washington Social Development Research Group. This research influenced Xavier Cortada early in his career as a public health advocate and later as a socially engaged artist. Its aim is to “help the diverse segments of any community to join together in the common mission of making their community a protective environment for the healthy development of its young people.” *Id.* at xv. This goal mirrors how we view the incorporation of socially engaged artistic practices into clinical legal education. Extending the research on pro-social factors that could help build stronger communities, we have found the value and power of art in engaging communities, lifting and amplifying voices, and importantly, giving those who are creating or co-creating the art entry points to connect using this universal language that helps heal.

<sup>170</sup> See, e.g., Susan Bryant & Elliott S. Millstein, *Rounds: A “Signature Pedagogy” for*

agement can enrich this learning process by bringing students closer to their hard-to-reach clients. In addition, as this Article elaborates, the art created by clients adds value to the advocacy performed by clinic students. An art piece produced by clients can thus influence the outcome of a legal case, even if it exists and appears outside of the courtroom.

### CONCLUSION

We encourage other clinics to explore forms of artistic engagement with compatible artistic partners in their communities, based on their shared values and concerns about legal inequities and unsound public policy, to further common goals for reform.<sup>171</sup> This activity can occur in clinics that teach and practice social justice lawyering in a range of subject areas handled by students, from human rights, environmental justice, farmworker rights, immigrants' rights, to children's advocacy.<sup>172</sup>

Adding a socially engaged artistic component thus brings a dimension not typically found in clinical legal education. As explained by Pablo Helguera, a leading SEA theoretician and practitioner, "all art invites social interaction," but the fabrication of art in a socially engaged artist-community collaboration "often expands the depth of the social relationship, at times promoting ideas such as empowerment, criticality, and sustainability among participants."<sup>173</sup>

A central premise of socially engaged artistic practice is that it is "a collaborative process with a community [that] requires a reflection on the terms under which the artist and the group will interact."<sup>174</sup> Sometimes the collaboration will result in a "performance" by clients, and other times it will be a canvas with embedded messages or statements rendered by the clients.<sup>175</sup> As in other forms of collective action that clinical legal education encourages students to pursue, "[w]hat must be recognized, first, is the value that individuals bring to a col-

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*Clinical Education?*, 14 CLIN. L. REV. 195, 200-15 (2007) (describing the function of the clinical case round, and how it broadens the learning experience for students).

<sup>171</sup> See generally Anthony V. Alfieri, *Educating Lawyers for Community*, 2012 WIS. L. REV. 115, 118 (2012) ("Both community building and community recovery demand creative strategies of legal rights education, organization, and mobilization common to liberal legalism and interest-group pluralism.") (citations omitted).

<sup>172</sup> Cortada's own biography suggests many possible iterations of a socially engaged artistic collaboration applicable to other areas of social justice teaching and practice in clinical legal education. See *supra* note 137.

<sup>173</sup> HELGUERA, *supra* note 11, at 12-13.

<sup>174</sup> *Id.* at 55.

<sup>175</sup> *Id.* at 68 ("Performance is embedded in SEA, not only because SEA is performative but because it borrows from several conceptual mechanisms and strategies that are derived from the history of performance.").

laboration. Each individual has his or her own expertise and interests, and when these are put to service in the collaboration, the collective motivation can be contagious.”<sup>176</sup>

Legal education recognizes the value of client expertise in the lawyer-client relationship by helping students “build narratives on behalf of their clients to seek remedies, and/or to challenge laws and the legal system’s failures to accept outsider narratives.”<sup>177</sup> The legal case study, and its convergence with the socially engaged art project that our Article describes, show how outsider narrative can influence the outcome of a lawsuit. The children whose stories are captured in the two canvases, confined in a psychiatric institution and literally outside of the courtroom, help their advocates achieve a resolution of the litigation. Their narratives authenticate the legal arguments, help the advocates overcome legal obstacles, and through the Florida Supreme Court’s ultimate recognition of their “meaningful right to be heard,” give them a public forum to mobilize and be heard in the courtroom and beyond the courtroom.

Their stories also serve as catalysts for healing. The artistic collaboration gives the children voice, increases their ability to participate in the process, strengthens their perceptions of legal processes, and instills greater confidence in the fairness and dignity of the process. In preparing law students to see the practice of law as a “healing profession,” clinical legal educators can no doubt learn from medical school training by integrating creative processes and storytelling into our teaching and learning. By bringing social practice into the clinic, collaborating with an artist who encouraged children to express feelings that they might not feel comfortable sharing with their student interns, we helped our students gain greater self-awareness, heightened empathy, and stronger connections to the clients that they served.<sup>178</sup>

The incorporation of socially engaged artistic practices into clinical legal education that this Article describes, through its detailed study of exercises in legal creativity in our law reform project, and its illustrative account of our artistic collaboration, builds on these theoretical and practical insights. It seeks to add a new component to clinical legal education, a new form of interdisciplinary collaboration

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<sup>176</sup> *Id.* at 55.

<sup>177</sup> Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER SOC. POL’Y & L. 161, 162 (2005).

<sup>178</sup> See e.g., Rita Charon, *Narrative Medicine: A Model for Empathy, Reflection, Profession, and Trust*, 286 J. AM. MED. ASS’N 1897, 1898 (2002) (“From the humanities, and especially literary studies, . . . narrative medicine can give physicians and surgeons the skills, methods, and texts to learn how to imbue the facts and objects of health and illness with their consequences and meanings for individual patients and physicians.”) (citations omitted).

Spring 2023]

*Socially Engaged Art in Law*

345

that has the potential to amplify the voices and interests of our clients. We encourage law school clinics to give social artistic practice a try.

## APPENDIX



Xavier Cortada (with youth from the Citrus residential program), "Trapped," 48" x 60", acrylic and mixed media on canvas, 2002.

This mural project was commissioned by the University of Miami School of Law Children and Youth Law Clinic and funded through a community grant from the Miami-Dade Department of Cultural Affairs.





Xavier Cortada (with youth from the Jackson Memorial Hospital SIPP program), “(University of Miami School of Law Children and Youth Law Clinic) Voice Project Mural,” 48" x 60", acrylic and mixed media on canvas, 2003.

This mural project was commissioned by the University of Miami School of Law Children and Youth Law Clinic and funded through a community grant from the Miami-Dade Department of Cultural Affairs.

