

SEARCHING FOR JUSTICE: INCORPORATING CRITICAL LEGAL RESEARCH INTO CLINIC SEMINAR

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

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

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INTRODUCTION

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

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

have shed light on the bias inherent in classification systems¹ and on-line databases.² Critical Legal Research “seek[s] to expose how external power structures shape the organization of legal information and embed biases in the tools of legal information retrieval.”³ Critical Legal Research (CLR) is a critical intervention, oriented toward social justice, which reconstructs traditional legal research. It provides a theoretical framework and a means of practical application, both of which center social justice. It reorients our conceptualization of the research process to advocate for more equitable outcomes using imperfect legal resources designed to reify hegemonic norms. CLR provides lawyers with tools to deconstruct and reconstruct legal research to reach more just, client-focused outcomes that fall outside dominant legal narratives.⁴

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹² Grose, *supra* note 10.

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

I. CLR: A LITERATURE REVIEW

CLR¹³ is a theoretical framework, pedagogy, and praxis that exposes and challenges the reification of hegemonic norms through dominant legal research processes and resources.¹⁴ CLR draws upon critical legal theory and applies critical methods to conducting legal research.¹⁵ CLR scholars engage in important pedagogical practices that expose students to selective informational warehousing in both print and digital resources, and counter the false narrative that research results are normatively neutral and therefore accurate.¹⁶ As a discipline, it intentionally incorporates critical thinking into legal research, challenging students to rethink their research questions and strategies, and to develop more expansive and thoughtful research plans in order to account for systemic bias.¹⁷

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

¹³ See generally Stump, *supra* note 11.

¹⁴ *Id.*

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

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

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

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

and disability theory.¹⁹ Scholars use these various discourses to challenge notions of neutrality,²⁰ fairness,²¹ and order²² within legal regimes. Because these critical perspectives engage in deeper, more comprehensive, and nuanced forms of investigation and analysis, they are able to unveil not only systemic bias, but also the creation of interlocking

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

¹⁹ Stump, *supra* note 4.

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

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

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

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

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

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

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

Scholars immersed in CLR and critical legal information literacy²⁴ concretize the impacts of the faulty foundation of beliefs about legal information and legal research. Steven Barkan’s foundational 1987 article in this tradition, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, applies the Critical Legal Studies framework to the legal research process for practicing attorneys, illustrating the dangers of creating a “bibliographic determinism.”²⁵ Barkan cautions that researchers “establish rules without admitting their own value judgments” by “attributing meaning to courts or legislators” while obscuring that “judicial opinions, statutes, legislative history materials, regulations and other sources are indeterminate.”²⁶ This position, according to Barkan, is particularly problematic, as it assiduously ignores the human element of legal regimes. As Barkan points out, judges have “subjective preferences” and they make choices in each case about “how precedence and statutes are interpreted, which ones are followed,

²³ Stump, *supra* note 11, at 603.

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

²⁵ Barkan, *supra* note 22, at 632.

²⁶ *Id.* at 628.

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

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

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

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

²⁷ *Id.* at 630.

²⁸ *Id.* at 630–31.

²⁹ *Id.* at 632.

³⁰ *Id.* at 632.

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

³² *Id.* at 217.

³³ *Id.*

³⁴ *Id.*

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

³⁶ Sokkar Harker, *supra* note 2, at 21.

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

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

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

³⁷ *Id.*; see *infra*, section IV.D.

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

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

⁴⁰ *Id.*

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

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

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

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

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

⁴² See Wheeler, *supra* note 2, at 364-65.

⁴³ Wheeler, *supra* note 2, at 366.

⁴⁴ *Id.* at 368-69.

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

⁴⁶ Lamdan, *supra* note 45, at 257-58.

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

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

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

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

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

⁴⁷ *Id.* at 258.

⁴⁸ *Id.* at 283.

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

⁵⁰ Lamdan, *supra* note 45 at 258-59.

⁵¹ Nevelow Mart, *supra* note 39, at 420.

⁵² See Lamdan, *supra* note 45, at 261.

⁵³ Mignanelli, *supra* note 3, at 341.

⁵⁴ Stump, *supra* note 11.

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

⁵⁶ *Id.*

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

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

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

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

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

⁵⁸ Stump, *supra* note 55.

⁵⁹ Stump, *supra* note 11.

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

⁶¹ Mignanelli, *supra* note 3, at 341.

⁶² *Id.* at 342.

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

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

⁶⁵ *See* Sokkar Harker, *supra* note 2.

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

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

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

⁶⁶ See Sokkar Harker, *supra* note 2.

⁶⁷ Mignanelli, *supra* note 16, at 102.

⁶⁸ *Id.* at 102.

⁶⁹ See generally Stump, *supra* note 11.

⁷⁰ Wheeler, *supra* note 2, at 366.

A. Traditional Legal Research — Goals & Methodology

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

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

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

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

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

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

⁷³ *Id.*

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

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

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

⁷⁷ Valentine, *supra* note 74, at 218.

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

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

1. *Bibliographic Methodology*

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

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

⁷⁸ Valentine, *supra* note 74, at 219.

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

⁸⁰ *Id.*

⁸¹ *Id.* at 519.

⁸² Valentine, *supra* note 74, at 226.

⁸³ *Id.*

⁸⁴ Drake, *supra* note 79, at 529.

⁸⁵ Valentine, *supra* note 74, at 201.

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

2. *Process Methodology*

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

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

3. *Alternative Methodologies*

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

⁸⁶ *Id.*

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

⁸⁸ Valentine, *supra* note 74, at 201.

⁸⁹ Drake, *supra* note 79, at 519.

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

⁹¹ Drake, *supra* note 79, at 519.

⁹² *Id.* at 529-30.

⁹³ *See id.* at 519; 529-30.

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

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

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

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

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

⁹⁴ Valentine, *supra* note 74, at 177.

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

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

⁹⁷ *See* Valentine, *supra* note 74, at 201-203.

⁹⁸ Valentine, *supra* note 74, at 208.

⁹⁹ *Id.* at 199.

¹⁰⁰ *Id.* at 210.

¹⁰¹ *Id.* at 226.

¹⁰² *See id.* at 226.

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

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

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

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

¹⁰⁴ Drake, *supra* note 79, at 529.

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

¹⁰⁶ Drake, *supra* note 79, at 530.

¹⁰⁷ *Id.* at 521.

¹⁰⁸ *Id.* at 521, 530-31.

¹⁰⁹ *Id.*

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

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

B. CLR and Pedagogical Application

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

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

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

¹¹¹ See Sokkar Harker, *supra* note 6, at 43.

¹¹² Rosario-Lebrón, *supra* note 7, at 314.

¹¹³ See, e.g., Valdes, *supra* note 8, at 72; Klare, *supra* note 8.

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

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

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

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

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

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

¹¹⁷ Sokkar Harker, *supra* note 6, at 43.

¹¹⁸ Grose, *supra* note 10, at 495.

¹¹⁹ As Stump explains,

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

Stump, *supra* note 11, at 657.

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

II. SYNERGIES BETWEEN CLR AND CLINICAL PEDAGOGY

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

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

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

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

¹²¹ Grose, *supra* note 10, at 512.

¹²² *Id.* at 494.

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

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

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

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

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

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

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

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

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

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Stump, *supra* note 11, at 621-22.

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

¹³⁰ Mignanelli, *supra* note 3, at 343.

¹³¹ Stump, *supra* note 11, at 621-22.

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

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

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

¹³² See *id.*

¹³³ See *infra* Section V.D.

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

¹³⁵ As Mignanelli points out,

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

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

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

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

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

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

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

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

B. Skills Training and Legal Research

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

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

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

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

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

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

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

¹⁴¹ Mignanelli, *supra* note 3, at 337.

¹⁴² Valentine, *supra* note 74, at 216.

¹⁴³ See Schlinck, *supra* note 63, at 302-04.

¹⁴⁴ See Osborne, *supra* note 17, at 182-83.

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

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

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

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

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

¹⁴⁶ See Mignanelli, *supra* note 3, at 343.

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

¹⁴⁸ See Mignanelli, *supra* note 3, at 341-43.

¹⁴⁹ See *id.* at 335-340.

¹⁵⁰ See *id.*

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

¹⁵² See *id.*

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

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

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

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

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

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

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

¹⁵⁵ Mignanelli, *supra* note 3, at 338.

¹⁵⁶ *Id.* at 340.

¹⁵⁷ *Id.*

¹⁵⁸ See generally Osborne, *supra* note 17.

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

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

C. Learning for Transfer

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

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

¹⁵⁹ Bowman & Brodoff, *supra* note 120, at 275.

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

¹⁶¹ Tiffany D. Atkins, #fortheculture: *Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 164-65 (2020); Orin S. Kerr, *The Decline of the Socratic Method at Harvard*, 78 NEB. L. REV. 113, 120 (1999); Tracy A. Thomas, *Teaching Remedies As Problem-Solving: Keeping It Real*, 57 ST. LOUIS U. L.J. 673 (2013); Cheryl B. Preston, Penée Wood Stewart & Louise R. Moulding, *Teaching “Thinking Like A Lawyer”: Metacognition and Law Students*, 2014 B.Y.U. L. REV. 1053, 1076-1080 (2014); April Land & Aliza Organick, *Moving Law Schools Forward by Design: Designing Law School Curricula to Transfer Learning from Classroom Theory to Clinical Practice and Beyond*, 71 J. LEGAL EDUC. 503, 515 (2022).

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

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

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

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

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

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

¹⁶³ Bowman & Brodoff, *supra* note 120, at 279.

¹⁶⁴ *Id.* at 278.

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

¹⁶⁶ *Id.* at 319.

¹⁶⁷ *Id.*

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

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

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

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

¹⁶⁸ *Id.* at 319.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 319-20.

¹⁷¹ *Id.* at 320.

¹⁷² See generally Bowman & Brodoff, *supra* note 120.

¹⁷³ *Id.* at 296.

¹⁷⁴ *Id.* at 278.

¹⁷⁵ *Id.* at 280-81.

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

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

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

D. *Furthering Social Justice*

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

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

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

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

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

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

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

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

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

¹⁸¹ Krishnaswami, *supra* note 180.

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

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

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

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

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

¹⁸⁵ *Id.* at 323.

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

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

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

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

by the Black Panther Party¹⁹⁰ and Young Lords,¹⁹¹ and numerous other efforts led by and anchored in local communities.¹⁹²

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

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

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

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

¹⁹² Haber, *COVID-19*, supra note 187, at 72-77.

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰¹ Haber, *Legal Issues in Mutual Aid Operations*, *supra* note 187.

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

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

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

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

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

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

²⁰³ Haber, *Transactional Movement Lawyering*, *supra* note 187, at 226.

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

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

A. Learning Goals

1. Transactional Research Skills — Building a Baseline

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

Although transactional clinics represent a variety of enterprise clients, this particular module uses tax law to introduce students to transactional research. Tax is a useful pedagogical device for three reasons. First, it introduces students to an expanded world of legal authorities beyond case law and statutes. Tax law encapsulates the spectrum of legal authorities, including familiar sources like statutes, case law, and regulations. Tax law also introduces students to administrative law, including various types of administrative rulings and other important agency materials.²⁰⁷ Second, conducting tax law research expands students’ knowledge of search tools to include transactional resources and databases, such as Bloomberg Law²⁰⁸ and Practical Law,²⁰⁹ in addition to frequently requiring the students to navigate specialized databases, like Thomson Reuters Checkpoint (formerly RIA Checkpoint).²¹⁰ The instructor can also revisit how different databases work in tandem, including when

²⁰⁶ Valentine, *supra* note 74, at 184-85.

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

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

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

²¹⁰ *Id.*

and how to Shepardize²¹¹ and check for “good law.” Third, tax research forces students to engage with a highly specialized and detailed area of law, challenging them to become comfortable with uncertainty and develop expertise during the research process itself.

2. *Critical Thinking and Legal Research*

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

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

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

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

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

3. *Embracing Uncertainty in Transactional Law*

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

4. *Exploring Justice Gaps*

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

B. *In-Class Module Description*

1. *Seminar Format and Goals*

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

2. *Conceptual Framework*

The assigned reading divides tax authorities into three categories:²¹⁵

- Legislative
- Administrative
- Judicial

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

²¹⁴ See *supra* notes 2-4 and accompanying text.

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

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

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

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

²¹⁶ *Id.* at 982-998.

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

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

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

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

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

²²² LEDERMAN & MAZZA, *supra* note 215, at 989-991.

²²³ See *supra* note 4 and accompanying text.

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

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

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

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

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

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

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

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

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

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

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

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

3. *Generating a Research Plan and Search Terms*

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

This list often includes the following items:

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

a. Issue Spotting and Critical Thinking

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

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

b. Drafting Research Questions

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

Questions listed below may emerge as our group research questions:

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

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

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

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

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

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

c. Research Strategy Creation

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

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

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

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

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

d. Secondary Sources

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

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

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

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

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

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

e. Creating Search Terms

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

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

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

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

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

²²⁹ See *supra* notes 128-131 and accompanying text.

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

f. Live Search: Application of Research Plan and Strategies

After generating the search terms, we introduce students to transactional legal research resources generally²³¹ and Thomson Reuters Checkpoint (“Checkpoint”). Checkpoint is a specialized and comprehensive tax database used by many transactional and tax attorneys.

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

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

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

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

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

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

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

²³³ A sample research log is available on the website resource listed in Appendix A.

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

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

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

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

4. Room for Growth

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

²³⁵ See *supra* notes 172-176 and accompanying text.

²³⁶ See *supra* notes 128-131 and accompanying text.

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

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

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

IV. CHALLENGES

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

A. Seminar

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

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

²³⁹ See *supra* notes 54-62 accompanying text.

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

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

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

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

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

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

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

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

²⁴⁴ Drake, *supra* note 79, at 21.

Ultimately, legal research is a core lawyering skill and clinic students must learn and master such skills while furthering social justice. When we recognize that lawyering skills are important, we pursue and embed nuanced and adaptive pedagogies. Topics like critical interviewing²⁴⁵ or trauma informed lawyering²⁴⁶ are designed to help students become better attorneys and advocates by using specialized methods and pedagogies to tailor their practice according to the needs of their clients, the nuances of the case, the structural and societal factors at play, and any critical perspectives and tools that can lead to a more holistic and comprehensive approach to client representation. Implicit in the use of critical pedagogies is the understanding that vulnerable individuals, particularly those in disenfranchised communities, require more thoughtful and intentional interactions, and that the dominant client representation methods fail to serve these clients.²⁴⁷ Legal research can fall into a similar trap, with the prevailing approaches failing to account for the “invisible hands” that shape information and restrict access.²⁴⁸ In contrast, “awareness of the political, social, and cultural ramifications of information flow can arm a law student with the ability to use these materials ethically and in the service of vulnerable populations.”²⁴⁹ Clinical instruction that incorporates, if not centers, these skills allow law students to practice “construct[ing] paradigm-shifting arguments based on new sources of primary and secondary authority.”²⁵⁰

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

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

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

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

²⁴⁸ See Sokkar Harker, *supra* note 2.

²⁴⁹ Krishnaswami, *supra* note 180, at 177.

²⁵⁰ *Id.* at 177.

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

B. Varying Methods of Teaching Research

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

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

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

²⁵³ See Mavrova Heinrich & Pettinato Oltz, *supra* note 251, at 489.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *The Growth of AI in Legal Research*

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

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

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

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

²⁶⁰ Baker, *supra* note 259, at 110.

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

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

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

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

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

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

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

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

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

²⁶⁷ See Mignanelli, *supra* note 134, at 44-46.

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

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

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

²⁶⁸ See LEXISNEXIS, *supra* note 263; THOMSON REUTERS, *supra* note 263.

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

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

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

²⁷² See Sokkar Harker, *supra* note 2.

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

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

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

justice.²⁷⁶ GAI systems are not neutral by design²⁷⁷ as “technology reflects the values of its creators.”²⁷⁸ Legal AI is also created for a commercial purpose, thus “bias occurs when developers select data to benefit consumers like themselves.”²⁷⁹ GAI design is also incredibly opaque.²⁸⁰ IP law often protects design and other information – including training datasets that inform machine learning – from any form of scrutiny.²⁸¹ This results in a truly troubling outcome, whereby “algorithms provide a veneer of impartiality” while simultaneously “obscure[ing] how they reach their conclusions, thereby camouflaging bias.”²⁸² As Daryl Lim has noted, the worst case scenario “may manifest in a two-tiered justice system – with human judges hearing cases from businesses and wealthy individuals” leaving “AI judges decide lower-value claims.”²⁸³

E. CLR as a Pedagogical Counterweight to GAI

In the wake of Legal generative AI, CLR can serve as an incredibly important pedagogical tool. Asking law students to refrain from using GAI may be a lost cause; particularly when law firms²⁸⁴ and commercial databases²⁸⁵ are actively launching, promoting, and inundating them with these tools. Additionally, GAI is not the source of injustice within

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

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

²⁷⁸ Lim, *supra* note 266, at 826.

²⁷⁹ Lim, *supra* note 266, at 829.

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

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

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

²⁸³ Lim, *supra* note 266, at 831.

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

²⁸⁵ See LEXISNEXIS, *supra* note 263; THOMSON REUTERS, *supra* note 263.

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

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

CONCLUSION

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

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

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

²⁸⁸ *Id.*

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

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

APPENDIX A

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

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

CRITICAL RESEARCH LIBRARY GUIDE: https://wcl.american.libguides.com/critical_research_for_clinics

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